



Is the Anti-Counterfeiting Trade Agreement Compatible with Freedom of Expression online?

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SOA- 3902

A dissertation submitted in partial fulfilment for the degree:

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Spring 2012

Declaration

The work I have submitted is my own effort. I certify that all the material in the Dissertation which is not my own work has been identified and acknowledged. No materials are included for which a degree has been previously conferred upon me.

Signed Holly Black **Date** 22/05/2012

Acknowledgements

I would like to thank my fellow students on the MA Human Rights Practice
(Cohort 2010-2012)
for inspiring me consistently and without fail
over the duration of this programme.

Abstract

This research paper explores the Anti-Counterfeiting Trade Agreement, (ACTA) in relation to the human right of freedom of expression, as expressed online. The purpose of ACTA as a legally binding international document to enforce protection of Intellectual Property and copyright online is recognised and challenged by introducing a human rights discourse. The research situates the creation of ACTA by firstly discussing the various themes that impact on both the creation of; and the enforcement of; ACTA. The themes used to contextualise ACTA are; the internet, internet governance, the human rights system and freedom of expression, Intellectual Property and copyright enforcement, neoliberalism and globalisation. Using a methodology of textual orientated discourse analysis and critical discourse analysis, the research focuses on ACTA within the discourses of neoliberalism and human rights, as manifest both explicitly and implicitly in the text. The result is a discussion around the compatibility of ACTA with a human rights discourse and a suggestion for further research situating internet use as a layer of social practice and a potential cultural right.

Key words

Freedom of expression, human rights, the internet, ACTA, Intellectual Property, copyright, censorship, power, the state, neoliberalism, democracy, globalisation, culture.

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List of Abbreviations and Acronyms

ACTA – Anti-Counterfeiting Trade Agreement

CDA – Critical Discourse Analysis

DMA – Digital Millennium Copyright Act

EC – European Commission

EDRi - European Digital Rights Organisation

EFF - Electronic Frontier Foundation

EU – European Union

GDP - Gross Domestic Product

ICCAN - Internet Corporation for Assigned Names and Numbers

ICCPR – International Covenant of Civil and Political Rights

ICESCR – International Covenant of Economic, Social and Cultural Rights

IIPA - International Intellectual Property Alliance

IMF – International Monetary Fund

IP – Intellectual Property

IP Address – Internet Protocol Address

ISPs – Internet Service Providers

MEP – Member of European Parliament

NATO – North Atlantic Treaty Organization

OHCHR – Office of the High Commissioner of Human Rights

ORG – Open Rights Group

OSPs – Online Service Providers

PIPA - Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (Also known as the Protect IP Act)

SAPs – Structural Adjustment Programmes

SOPA – Stop Online Piracy Act

TRIPS - Agreement on Trade-Related Aspects of Intellectual Property Rights, contained in Annex 1C to the WTO Agreement,

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNESCO – United Nations Educational, Scientific and Cultural Organisation

US – United States of America

USTR – United States of America Trade Representative

WIPO - World Intellectual Property Organization

WTO – World Trade Agreement

1. Introduction

Is the Anti-Counterfeiting Trade Agreement compatible with Freedom of Expression online?

A discourse analysis of ACTA and the impact it may have on freedom of expression online.

“Power, before it comes from arms or wealth, emanates from ideas.”

(Cukier: 2005:12)

1.1 Research problem

The phenomenon of the internet has changed the way in which we live today. It has been described as contributing to the “discovery of the truth and progress of society as a whole,” by enabling a cross border exchange of information and ideas that was previously unseen. (UN Report: 7/III.19) Often, it is seen as tool for individuals, corporations and states to use; a method of transmitting information, of connecting people and contributing to globalisation. However, in this research the internet will be viewed as more than a simple tool; it is a medium, or a layer of modern society. (Castells: 2000:14) It has become essential to many individuals both culturally and politically.

Individuals may use the internet to give a voice to the oppressed, to disseminate information and to build online communities. In recent times the internet has become an important medium in situations of social unrest, taking a pivotal role in enabling individuals and groups to express dissent against the state. (Anderson: Time) Although there is a significant divide between those with access to the internet, and those without, the internet is becoming increasingly more obtainable as technology develops. This research adopts the position that the internet is one of the mediums protected under freedom of expression as a human right. (UN Report)

Freedom of Expression is protected by various human rights documents at an international level; most significantly the Universal Declaration of Human Rights, 1948 and the International Covenant

of Civil and Political Rights 1966 (ICCPR).¹ The Universal Declaration of Human Rights (UDHR) is the foundational document (alongside the Charter of the United Nations) that sets forth the standards by which all peoples should be treated. (UDHR: 1948: preamble) Article 19 of the UDHR states that, “this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through *any* media and regardless of frontiers.” (UDHR Article.19)² [Emphasis added]. Even though the internet was not created at the time of the UDHR, the United Nations Special Rapporteur acknowledges that the UDHR and ICCPR were created to include any future developments of media, including the internet. (UN Report: 7/III.21)

On a larger scale, freedom of expression is generally recognised as “the cornerstone of any democratic society.” (Smith:2012:291) Not only is it essential for functioning democracy, but due to the indivisible nature of human rights, freedom of expression enables the realisation of other rights, including; linguistic rights, freedom of association, press freedom, right to privacy and the right to be free from state interference in terms of property and correspondence. (Smith: 2010: 291) There is a consensus that the right to opinion and free thought is “absolute and almost impossible to control.” (Smith: 2010:292) The role of human rights law comes into effect when these thoughts and opinions are expressed in *public*, when they can affect other people.

However, Article.19 of the ICCPR includes circumstances in which the right may be “subject to restrictions,” either by law or when deemed necessary by the state.³ This is an inherent tension within freedom of expression as states are often both the protectors of human rights and also the perpetrators of human rights violations; and is those in control of limiting the rights of individuals. When freedom of expression is limited, by default the realization of other rights is also curbed.

Due to its specific nature the internet has been seen as a challenge for state control. It is a space that cannot be controlled in the same way as other facets of society. However, states are constantly developing new methods of filtering, censorship and regulation to attempt to ensure some level of control over the information that is available and accessible to individuals for a myriad of reasons; limiting freedom of expression for some individuals and groups.

¹Including the optional protocol: Optional Protocol to the International Covenant on Civil and Political Rights (adopted Dec. 16, 1966, entered into force Mar. 23, 1976)

² Article 19. of the UDHR is reflected in more depth within the legally binding International Covenant on Civil and Political Rights 1966 (Article.19)

³ Article.19 makes two allowances of limitation by the state “(a) For respect of the rights of reputations of others; (b) for the protection of national security of public order, or of public health or morals.” (ICCPR)

The internet has also become an important facet of the economy by providing a new market place. One of the most significant challenges of the online market place is the issue of copyright enforcement and protection of intellectual property. Intellectual Property (IP) refers to “intangible objects such as literary works, artistic productions, scientific discoveries, and plans for inventions and designs.” (Chapman: 2001:5) Copyright generally means 'author's rights' over how their creation is used. (Chapman: 2001:8) The issue of weak enforcement can cause significant economic loss for both private and governmental bodies. These issues have been the focus of various international agreements and discussions both inside of and outside of the World Trade Organization (WTO), and governments have reacted to copyright violators with harsh punishments.⁴

Intellectual Property is considered a human right, but not without contention. Outside of human rights, copyright and IP rights “are now protected by most countries as a result of implementing Article.8 of the World Intellectual Property Organization (WIPO) Copyright Treaty and Articles.10 and 14 of the WIPO Performances and Phonograms Treaty.” (Bonadio: 2011:3) However, there are only three national constitutions in Europe that “expressly define copyright as a fundamental right.”⁵ In recent years there has been an influx of documents both nationally⁶ and internationally aiming to enforce punishment of illegal market practices online around copyright, promoting the enforcement of copyright laws on a global scale.

The first of these documents that has taken a global scope with a legally binding implication is the Anti-Counterfeiting Trade Agreement, 2011 (ACTA). ACTA's main goals are to combat pirated goods and enforce intellectual property rights and copyrights by ensuring measures in place that do

⁴For example, in New Zealand copyright violations could result in imprisonment of up to 5 years: New Zealand Legislation, Copyright Law 1994, found at:

http://www.legislation.govt.nz/act/public/1994/0143/latest/DLM346602.html?search=ts_act_copyright_resel&p=1#DLM346602 (accessed 14/05/2012) and in Sweden, four men who founded the torrent site 'the pirate bay' were imprisoned for 1 year and paid £3million in fines, “Court Jails Pirate Bay founders”, 17/04/2009, BBC, found at: <http://news.bbc.co.uk/1/hi/8003799.stm> (accessed 14/05/2012) and in Portugal a young man was persecuted for copyright of 3 songs over 6 years resulting in a suspended sentence and fine of €880, Enigmax, “Epic 6-Year File-Sharing Case Over Just 3 Songs Comes To An End”, Torrentfreak, found at: <https://torrentfreak.com/epic-6-year-file-sharing-case-over-just-3-songs-comes-to-an-end-120430/> (accessed 21/05/2012)

⁵ Bonadio references the Swedish Constitution (art.19 (2)), Portuguese Constitution (art.42) and Spanish Constitution (art.20). Found in Bonadio: 2011:2.

⁶ Such as PIPA - Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (Also known as the Protect IP Act), SOPA – Stop Online Piracy Act, DMA – Digital Millennium copyright Act 2000 (All US based)

not deter trade, both online and offline. Negotiations began between Japan and the US, after which other states and private partners were invited to the negotiating table.

ACTA is a controversial document and has seen varied resistance due to elements of the agreement that are interpreted as curbing human rights such as freedom of expression and privacy rights. By default ACTA could influence how individuals use the internet, resulting in self-censorship. There has also been a significant backlash against ACTA due to its creation in secrecy without any presence of experts in the field, developing countries or civil rights organisations at the negotiation table. (Accesnow.org: pdf) Furthermore, negotiations have taken place outside of the WTO and other organisations that deal with IP and copyright between states and key trading partners. (EFF: website)

The research will consider the implications ACTA may have on freedom of expression online. There will be a special emphasis placed on Section 5: Enforcement of Intellectual Property Rights in the Digital Environment, Article 27: Enforcement in the Digital Environment. Central to this exploration will be the key actors influencing ACTA and the allocated responsibilities and roles. The research will address the role of the state, Internet Service providers (ISPs), private actors and the impact on the individual user. The multiple use of the internet brings with it inherent tensions, especially concerning the dichotomy of human rights and neoliberal ideology.

1.2 Aim and research questions

This research paper is an investigation into the Anti-Counterfeiting Trade Agreement, 2011 and the relationship it has with freedom of expression online.

The following research questions are used to explore the above aim:

- What is the role of freedom of expression in ACTA?
- Does ACTA operate within a human rights discourse?
- How does ACTA perpetuate certain discourses?

1.3 Research design summary

The theoretical framework is based on the Foucauldian idea of power (1996, 2003), and Castells' notion of the network society (2000, 2007). The basis for the state and its facets is formed using Mann's concept of the state authority and its functions (1997).

1.4 Methodology summary

The research uses textual orientated discourse analysis and critical discourse analysis. These tools for analysis also allow the researcher to look more thoroughly at a phenomenon, to consider not only the texts themselves but also what may be hidden underneath the surface, including power relations that may not be explicit in the text.

1.5 Chapter break down

Chapter 1 proposes the research problem, introduces the research questions, and summarises the research design and methodology.

Chapter 2 discusses the methodology in more depth; introducing the documents involved in the research, the conceptual framework and the limitations that may arise.

Chapter 3 takes the form of a literature review, introducing the background framework to the analysis and the prominent themes that will be used.

Chapter 4 presents the findings of the analysis and a discussion around the findings within the theoretical framework of Chapter 3.

Chapter 5 concludes the findings and presents recommendations for further research.

2. Methodology

This research paper makes use of one primary research method of textual orientated discourse analysis as defined by Fairclough (2003), which takes place within critical discourse analysis. The research will take a constructivist position whereby the documents have been constructed by social actors for a purpose at a specific moment in time and, “are in a constant state of revision.” (Bryman: 2004:17) This position of a constructivist suggests that the discourse analysis will be appropriate for the present situation, with an awareness that the situation is likely to change and as social actors take different roles and society adapts.

2.1 Data

This research provides a qualitative analysis of primary and secondary data. The research uses; official documents from international bodies; official documents from private sources; mass media outputs; and “virtual outputs” or internet resources. (Bryman: 2004:380) The textual orientated discourse analysis focuses on the Anti-counterfeiting Trade Agreement 2011.

In order to choose the documents for use the following criteria was considered; that the documents are readable, have not been created for this research, and are available and relevant to the research topic. (Bryman: 2004:381) Alongside these considerations the research uses the 4 main criteria proposed by Scott (1990) to assess the following aspects of each document used; the authenticity of the document, the credibility, the representativeness of the document and the meaning of each. (Bryman: 2004: 381)

All of the documents used have been found online, giving the research an internet-based or virtual nature. The criteria expressed by Scott (1990) are still of relevance as websites are created by individuals for a reason, suggesting distortions of credibility may be an issue. As Bryman acknowledges, online research can be complicated due to 'webspeak' so a certain amount of insider knowledge must be used in order to understand complex language. (Bryman: 2004: 391) All of the websites and documents are from the public domain in English language, however it remains extremely important to be aware of bias and consider the creators or authors of websites during the analysis.

2.2 Documents used

The Anti-Counterfeiting Trade Agreement, 2011.

The main document and starting point for this research is the Anti-Counterfeiting Trade Agreement, an international document designed by one or more states that is legally binding to parties once signed and ratified. The press release accompanying the document's official release by the Office of the U.S. Trade Representative (USTR) details the state parties involved in creating the document, including: Australia, Canada, various EU member states, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States of America. (ACTA) In this sense the document may be biased towards the interests of the participants involved. The document may appear to be representative, but the “official or quasi-official” character is misleading (Bryman: 2004: 387), especially when considering the involvement of non-state actors in ACTA's creation. On the USTR website it does not disclose which non-state parties participated in negotiations, although there are announcements of support from various private institutions.⁷ (USTR: website) It is implied that non-state parties are involved as detailed in the opening remarks of a negotiation round by U.S. Trade Representative Susan C. Schwab, which includes an acknowledgement of, “Ambassadors and representatives of our trading partners who have joined us today.” (Schwab: Wikileaks) During the consultation process members of the United States of America (US) advisory committee system could request access to the (at this time) classified ACTA documents. (Love: Knowledge Ecology Int.) Members of the advisory committee system vary significantly in different areas of trade, but include large global human rights violating organisations such as Monsanto and Dow chemicals, and commercial organisations such as the International Intellectual Property Alliance (IIPA). (Less: The Ecologist) IIPA is composed of associations representing more than 1900 US based companies that distribute products globally such as video game cartridges, DVD's, books, academic journals and music.⁸ Members of the IIPA include the Motion Picture Association of America, National Music Publishers' Association, and Recording Industry Association of America, amongst others. However, these parties are not named in the official press release Press Release for the final version. Therefore, the document may appear to be official in terms of state involvement but is quasi-official

⁷Such as: the Copyright Alliance, International Intellectual Property Alliance, Motion Picture Association of America, American Association of independent music, amongst others. Found at: <http://www.ustr.gov/acta> (accessed 15/01/2012)

⁸For more information see the International Intellectual Property Alliance, found at: <http://www.iipa.com/aboutiipa.html>, (accessed 05/05/2012)

due to the inclusion of private companies with interests. Furthermore, ACTA is an international document, yet negotiation parties have not included significant representation of developing countries, experts or civil society groups. (accessnow.org: pdf)

In terms of authenticity the source of the ACTA text used for this research was the Office of the United States Trade Representative (USTR). (USTR: ACTA) This website is a resource centre for various information regarding US trade agreements. A European Commission (EC) version of ACTA is also shared on the European Commission's website for Trade. (EC: ACTA) As the documents have been sourced online the origin is questionable to the extent of any other online sourced documents. However, the two documents sourced have been compared and are both satisfactory for the research, although the version used is from the USTR website. The copy used for this research is the official final version released in November 2010 after 11 rounds of negotiations and 7 previous drafts, accessed in the public domain of the World Wide Web. (EC: ACTA)

The document is meaningful in terms of the purpose stated. Overall the document deals with international cooperation to combat counterfeited goods, to enforce copyright and Intellectual Property protection online and to enable a legal mechanism to punish piracy with international cooperation. (ACTA: Preamble)

The United Nations Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue.

This document was sourced online from the United Nations (UN) archive on the official website for the Office of the High Commissioner for Human Rights. (UN OHCHR: website) The document itself entails the United Nations heading and is available to the public via the website. As a document sourced online, it cannot be confirmed as authentic; however, due to the availability of the document on the official website of the UN the authenticity is satisfactory for this research.

In terms of being a United Nations document this attributed a certain amount of credibility to the text. The United Nations was set up following World War 2 to establish a new world order, with a focus on securing human rights internationally using legal treaties and monitoring bodies. (Freeman: 2002:33) The UN is seen as a global governing body; however, to what extent this is true is highly debated. The role of the Special Rapporteur for the United Nations is extra-conventional, often dealing with issues that have not been submitted to other areas of the UN. (Smith: 2010:153) In the case of Frank La Rue, his role is an independently mandated thematic Special Rapporteur to re-

port back to the UN on issues concerning the promotion and protection of the right to freedom of opinion and expression. (UN: OHCHR) In this report it is considered specifically in regards to the internet. The role of a Special Rapporteur is seen as having a positive effect on raising the profile of human rights and in developing international standards. (Smith: 2010:154) The document itself is representative of the United Nations and human rights discourse, dealing with protection, violations and state responsibility.

In the report the meaning is clear due to the documents stated purpose in the abstract, “This report explores key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the Internet.” (UN Report) As it is detailed to be shared at a session with the Human Rights Council, it is evident that the issues concerned will be human rights at an international level.

The Center for Democracy and Technology's Regardless of Frontiers: the International Right to Freedom of Expression in the Digital Age (Version 0.5 – Discussion Draft April 2011)

This document is created by the Center for Democracy and Technology with the purpose of exploring the relationship between freedom of expression and internet use. However, it does not address IP and copyright concerns directly. The Center is a US not for profit that works towards keeping the internet open and free. The document is representative of the organisations missions and aims and is clear in this meaning. It is privately created as opposed to a state document, is publicly accessible and found on the website for the Center for Democracy and Technology. Again, this document raises issues concerning credibility as with other documents sourced online.

2.3 Websites used

The following websites were chosen due to having been created specifically about ACTA. Websites will be deemed 'documents' and considered using Scott's 4 criteria as stated above. Issues may arise when conducting internet based data collection such as; the use of search engines to garner websites as the information returned may not be representative of the information actually available on the internet; the keywords employed and combined in order to garner the relevant information. This research used google to search “The Anti-Counterfeiting Trade Agreement” and selected the following websites due to their in depth and credible nature.

Due to the fluctuating nature of the internet it may mean that websites themselves or data entailed might be removed or created during the process of data collection. (Bryman: 2004: 469) The research will record the date each time a website is accessed. In order to ensure credibility and representative a short explanation of the background of the main sources are detailed below.

The European Commission: Trade: What ACTA is about fact sheet and website:

<http://ec.europa.eu/trade/tackling-unfair-trade/acta/transparency/>

The European Commission's trade arm deals with the development of and implementation of the EU's trade policy with other countries.

The United States Trade Representative website: ACTA: <http://www.ustr.gov/acta>

The USTR has a role centred on developing trade and investment within the US and with other countries. Part of the USTR is the advisory committee system created to ensure that, “U.S. trade [policy and trade negotiating objectives adequately reflect U.S. public and private sector interests.” (USTR: website)

Electronic Frontier Foundation: Anti-Counterfeiting Trade Agreement, What is ACTA?:

<https://www.eff.org/issues/acta/>

The Electronic Frontier Foundation (EFF) is a donor-funded non-profit that champions “the public interest in every critical battle affecting digital rights.” (EFF: About) EFF argues that “ACTA has several features that raise significant potential concerns for consumers’ privacy and civil liberties for innovation and the free flow of information on the Internet.” (EFF: What is ACTA)

Accessnow.org/ EDRI: What Makes ACTA So Controversial (and why MEPs should care):

<http://www.edri.org/files/acta-bklt-p2s.pdf>

European Digital Rights (EDRi) is an umbrella group for 32 privacy and civil rights organisations. EDRi see the need for cooperation as “increasing as more regulation regarding the internet, copyright and privacy is originating from European institutions, or from International institutions with strong impact in Europe.” (EDRi: website) EDRi suggest that “ACTA risks having serious implications as it fails to find the right balance between protecting intellectual property rights and preserving the fundamental rights of society as a whole, such as freedom of expression and access to information, culture, and privacy.” (EDRi: website)

Open Rights Group: ACTA : <http://www.openrightsgroup.org/issues/ACTA>

One of the main opposers to ACTA has been the Open Rights Group (ORG). The Open Rights Group “exists to preserve and promote your rights in the digital age”. (ORG: about) ORG is a member of European Digital Rights. They work to campaign against policy which threatens digital rights, and are founded by 1,000 digital activists. ORG states that they believe, “it is correct to say that ACTA will fundamentally alter the nature of the Internet.” (ORG: Issues: ACTA) ORG also has a STOP ACTA campaign to write to MEP's to tell them why the European Parliament should reject ACTA. (ORG: STOP ACTA)

La Quadrature: ACTA: <http://www.laquadrature.net/en/acta-updated-analysis-of-the-final-version>

La Quadrature is an, “advocacy group defending the rights and freedoms of citizens on the Internet.” It advocates for the, “founding principles of the Internet, most notably the free circulation of knowledge.” (La Quadrature: Who we are)

2.4 Media coverage

Various information included in the research is reliant on mass and independent media outputs in order to gather further information drawn from other sources. This mainly takes the form of online news or editorial articles. Issues that may arise here are the authenticity of the articles, as the authors position may be unclear therefore unreliable, alongside questionable credibility. (Bryman: 2004: 390) The credibility of the articles will be checked against other articles covering the same issue.

2.5 Conceptual framework

Discourse analysis can use a wide range of theories, methodology and data. For this research, the analysis combines textual oriented discourse analysis for the specific text of ACTA, in the larger realm of critical discourse analysis. (Fairclough: 2003:2) By using these methods the research is concerned with both the central text at hand and also the more abstract levels of structure in society. (Fairclough: 2003:3) Within textual analysis the focus constantly shifts between attention on spe-

cific texts and what Fairclough coins the 'order of discourse.' (Fairclough: 2003:3) Discourse analysis is tied directly to language and assists in critically looking at social inequality and power relations as demonstrated in language. (Wodak & Meyer: 2009: 10)

2.6 Textual oriented discourse analysis

There is no escaping the subjectivity of texts. In discourse analysis the language used to describe an object is interpreted as being much more than just a method of communication, but it is something that needs to be focused on itself; it needs to be understood in order to understand the phenomenon. Language is constructive and it represents a particular view of society, or version of the world as deemed appropriate by the author. Furthermore, it is used as a tool to accomplish something within a particular context. (Gill 2000: 176 in Bryman 2004: 371) Texts have both internal and external relations. The external analysis is concerning how the text fits in social practices and structures and the basis for actions, identifications and representations within this. (Fairclough: 2003:36)

Furthermore, texts have the ability to influence change; they have causal effects. Both in terms of contributing to knowledge, values and attitudes, and also in the longer term. (Fairclough: 2003:8) However, longer term effects are influenced by the way in which meaning is made. (Fairclough: 2003:8) In this way Fairclough and Wodak's idea of 'language as social practice' (1997: 5) impacts on larger macro discourses at play; it cannot sit separately.

There is an element of judgement involved in interpreting texts; deciding if what the author saying is explicitly or implicitly true, and in judging whether the text is reflective of the institution from whence it was created. (Fairclough: 2003:11) The text itself may not have that much social impact, but the meanings may, and it is this contribution that is important and has a social affect. (Fairclough: 2003:11)

Analysis of the text will take place by applying the following concepts to assist in drawing out prominent discourse around ACTA. Each concept will be considered against the text, with more attention on some concepts than others in order to emphasize points.

Social events

The research will take into account the two most causal shapers of texts: social structures, social practices and social agents. (Archer 1995, Sayer 2000 in Fairclough 2003:22) Social agents are constrained to a certain extent by social structures (however not entirely), and these social practices “texture texts.” (Fairclough: 2003:22) A social structure can be seen as, “defining a potential, a set of possibilities,” (Fairclough: 2003:23) yet, in actuality these structures are mediated by social practices.

Genre

The use of genre is a way of maintaining the “institutional structure of contemporary society” and the “structural relations” between different facets of society. (Fairclough: 2003:32) Within genres there is a recontextualisation of social practice; a transference of one social practice into another, and in doing so a transformation of that social practice. (Bernstein 1990, Chouliaraki and Fairclough 1999 in Fairclough: 2003:32) There is a 'filtering effect'; when moving from one genre to the next certain social practices may be filtered out. This could be “so that the genre chain works as a regulative device for selecting and privileging some discourses and excluding others.” (Fairclough: 2003:34) In terms of scale, genres have the ability to link the local to the national, global and the general. (Fairclough: 2003:33)

Difference

Difference in this sense is used to represent 'other voices in the text' using representation, action and identification;

“Representation is to do with knowledge but also thereby ‘control over things’; Action is to do generally with relations with others, but also ‘action on others’, and power. Identification is to do with relations with oneself, ethics, and the ‘moral subject’.” (Fairclough: 2003:28)

There is a dialectical relationship between representation, action and identification as Foucault recognises. (Fairclough: 2003:28)

Intertextuality and Assumptions

Intertextuality depends on the 'external relations' of the text; how it lies with other texts. Invariably, texts make assumptions that can be linked to other texts. In contrast to assumptions (which are prevalent in ways of seeing something), intertextuality relates to other texts elsewhere. Assumption “broadly reduces difference by assuming common ground.” (Fairclough: 2003: 41) There are issues with how these are interpreted:

“Assertions may for instance be manipulatively passed off as assumptions; statements may mistakenly or dishonestly be attributed to others.” (Fairclough: 2003: 39-40)

Assumptions and intertextuality can be framed within hegemonic practices. By perpetuating certain things as 'universal', a form of social dominance is exerted.

Semantic relations

The semantics of a text refers to the meaning relations between both words and expression. Lexical relations refer to patterns in language, such as co-occurrence of certain words with others, or similar expressions. (Fairclough: 2003:36) The semantics of a text can tell us various explicit meanings of a text, highlight causal relationships and the discourses at play. Within this research the predominant semantic relations between sentences and clauses are considered, if there are any higher-level semantic relations over larger stretches of the text, and the grammatical relations. The genre influences the types of semantic relations used in a text.

Laclau and Mouffe (1985) identify the logic of equivalence and difference in regards to hegemony. This is the tendency to collapse difference to create equivalence, or to create or highlight difference. This is often done textually using classification, presenting certain political processes as equivalent or differentiated from one another. (Fairclough: 2003:88)

Representation of social events and social actors

Social events are included and excluded in texts according to how the event is wanting to be represented, or alternatively, elements of events can be filtered to give a certain impression. (Fairclough: 2003:139) Social actors may be excluded from texts; by suppression or back grounding. They can

be framed as participants, actors or the affected (beneficiaries); classified as groups, personalized, impersonalised or named specifically. (Fairclough: 2003:145)

Power

In textual orientated discourse analysis the role of language is integral to understanding power in society. “Power does not necessarily derive from language, but language can be used to challenge power, to subvert it, to alter distributions of power in the short and the long term.” (Wodak & Meyer: 2009: 10) By looking at how language is used by the privileged or dominant to sustain inequalities in society we can understand more about the societies in which we live.

There are multifarious concepts of what power is. This research will use the Foucauldian idea of power as a “systemic and constitutive element/ characteristic of society” (Wodak & Meyer: 2009: 9). This power is reinforced by technologies and instruments in the structure of society. When looking at social phenomena we cannot remove them from the power frameworks in which they are part of, or influenced by. Foucault emphasises that when it comes to power it is not divided between those that have power, and those that do not. Power circulates and it functions, and individuals are part of the network in which power circulates and functions, “power passes through individuals; it is not applied to them”. (Foucault: 2003: 29) Individuals are therefore part of the power network and they are also the subjects of power. Power, “only exists in action.” (Foucault: 1980: 89)

Power can be defined in terms of “control.” (van Dijk: 2003: 354) Control can be exercised hegemonically the dominant group via methods such as laws, habits, social norms. (van Dijk: 2003: 355)

Meaning making

CDA shares with textual discourse analysis the view that individuals are controlled and influenced by their minds; by meaning making, and are levy to persuasion or manipulation. (van Dijk: 2003: 355) Some cases of mind control or meaning making are contextual whereas some cases are discursive, “given a specific context, certain meanings and forms of discourse have more influence on people's minds than others.” (van Dijk: 2003: 357) The question at hand is how some manage to be more influential than others.

The meaning-making of texts takes 3 steps; producing the text, the text itself and how the text is received. (Fairclough: 2003:10) Fairclough recognises that once a text is published it is compounded, and so are the problems within the text. By this point the negotiation rounds have culminated, and the finalised text is open to various interpretations, and imbued with various different meanings. (Fairclough: 2003:11) To this end, Fairclough acknowledges that, “meaning-making depends upon not only what is explicit in a text but also what is implicit,” (Fairclough: 2003:11)

Public discourse

Dominant groups often seek to have control of public discourse in order to influence individuals and groups. This can take the form of knowledge and information, and communication. (van Dijk: 2003: 355) By passing laws concerning certain issues, the dominant authorities are expressing importance in that discourse, and so influencing individual’s opinions as the obliged recipients of the discourse. (van Dijk: 2003: 358) Furthermore there may be no contradictory discourses available to provide alternatives, or the recipients may not have the knowledge of how to resist or challenge the information they are subject to. (Wodak 1987 in van Dijk: 2003: 357) Therefore, provided with no possibility to conceptualise outside of the dominant way of thinking.

Foucault sees the relationship between power, right and truth as that of a triangle. They are all linked to one another and all needed for each other to function properly. (Foucault: 2003: 24) Inquiry has become a tool for the dominant power, to reorganise judicial practices to be more than between two individuals, but to involve the state as a third party in wrong doing. The sovereign, (or as we know it now, the state) appropriated the entire judicial system. (Foucault: 1996: 335) “The inquiry is a form of power knowledge” (Foucault: 1996: 341) and imposes a political transformation. (Foucault: 1996: 338) Those with power and knowledge are those that conduct inquiry, thus, perpetuating a discourse that is in favour of the dominant ideology that is accepted rather than coerced.

However, the dominant groups cannot be completely confident that a text will be interpreted in a specific way. There is a constant flux in formation of beliefs that complete control cannot be certain. (van Dijk: 2003: 358)

The relationship between the power holder and the power subject is affected by punishment or threat of punishment such as imprisonment, removal of freedoms and so on. (Whitmeyer: 1995:214) The threat of punishment and can be just as coercive as physical violence. (Castells: 2000:8) The

role of the state as a 'motivator' and 'punisher or discipliner' can influence citizens and their relationships with each other, (Axtmann: 2004: 267) promoting certain behaviour as legitimate or illegitimate.

Ideology

This relationship between the object/phenomena and power takes place within a framework of an overarching ideology. In order to maintain social relations of power, ideology functions as an accepted representation of the world as it is. Ideology can also contribute to changing these power relations, yet often they have a “durability and stability which transcends individual texts or bodies of texts,” (Fairclough: 2003:9) generally seen as a dominant and “coherent and relatively stable set of beliefs or values.” (Wodak & Meyer: 2009: 8)

Critical discourse analysis looks to demystify the overarching ideology through hidden elements of language and semiotics that infuse society disguised as “conceptual metaphors and analogies”. (Wodak & Meyer: 2009: 8) It can be used to shine a light on how we understand the world, and which powers are influencing this understanding by, “revealing structures of power.” (Wodak & Meyer: 2009: 8) In order for an ideology to dominate it must hegemonically incorporate resistance.

Discourses

Discourse can function in various ways, as Fairclough describes with globalization. From representing globalization in a truthful way, to mystifying globalization, to project a certain view of globalisation and contribute to certain ideologies that can use globalisation. (Fairclough: 2009: 321) Fairclough sees discourses as “the processes, relations and structure” of the material world, the mental world and the social world. (Fairclough: 2003:124) Different discourses represent the world in different ways, from different perspectives- depending on that particular relationship with the world. Furthermore, discourses are also “projective, imaginaries, representing possible worlds which are different from the actual world, and tied in to projects to change the world in particular directions.” (Fairclough: 2003:124) They can dominate, compete, stay separate and be constantly changing in their relationship with one another. This paper will be an interdiscursive look at ACTA - discussing the different discourses at play; a hybridization of discourses. These discourses operate on different levels of abstraction; including semantics. (Fairclough: 2003:133) Bryman describes

how the discourse “forms a version” of a phenomenon, and eventually “comes to constitute it.” (2004: 370) Here we see that the discourse is not, and cannot be “a neutral device for imparting meaning”. (Bryman: 2004: 378) It is related to; and influential on how we see social phenomena.

Furthermore, the Horkheimer and the Frankfurter school of thinking see theory as being the means to critique and change society, rather than merely an explanation in order to understand society. (Wodak & Meyer: 2009: 6) By trying to understand if, how and why domination and submission is functioning through critical analysis of the discourse, a different 'truth' could be revealed in the texts and language used and change instigated. (Fairclough and Wodak: 1997: 258 in Wodak and Meyer: 2009)

2.7 Limitations and ethical issues arising from methodology

Alongside an understanding of the concepts and theories are being applied in the discourse analysis, there must also be an understanding of the researchers position as an individual. Using an example from Gilbert and Mulkay (1984) Bryman describes the contingent repertoire, where researchers choose to disclose intellectual commitments, beliefs and social ties which may affect the framework for the research. This position allows the research to be more objective and more transparent for the audience in regards to influence and impact. (Gilbert and Mulkay in Bryman: 2004: 323) This research uses a contingent repertoire essential to conducting a genuine analysis of the framework of understanding and power influence on phenomena.

I am a human rights student, activist and advocate. I believe that freedom of expression is a fundamental right essential to a fair and democratic society. As a researcher I am aware that I may be biased towards protection of the individual over the free market and will use the methodology above to create distance. I take the ontological position of a constructionist, which implies that “social properties are outcomes of the interactions between individuals, rather than phenomena 'out there' and separate from those involved in its construction”. (Bryman: 2004: 266)

Van Dijk argues that the researcher must also recognise the power structures in which the research is taking place. As a Human Rights Student of a joint European Masters programme, I am aware that the research is taking a focus from a Human Rights influences perspective. However, rather than working against the research, this perspective could shine a light on hidden meaning of texts from a scholarly perspective; whilst attempting to remain neutral in analysis.

The formation of theory, method of research and analysis is all “socio-politically situated” as described by van Dijk. (2003: 353) This may result in research being conducted in line with dominating groups. (van Dijk: 2003: 353) One element of textual analysis that the researcher must be aware of is the selectivity, inevitably the researcher must choose certain social phenomenon and certain questions. However, the process of analysis assists in removing the researcher away from their 'usual' experience. (Fairclough: 2003:15)

3. Literature Review/ Theoretical Framework

In order to understand the implications of ACTA online, we must first contextualise the unique nature of the internet. To do so, Castells' conceptualization of the internet is used as the main theoretical reference. Firstly I will use the Center for Democracy and Technology's definitions to highlight the key features of the internet:

Global: It localizes the global; communication with someone across the world is as instantaneous as with someone next door. Information can be “processed, reproduced and disseminated in a manner and with a speed hitherto unimaginable.” (Smith:2010:291)

Decentralized: In its very design the internet allows access to information without having to go through the network core.

Open: In comparison with other mediums there is easy user access.

Inexpensive: In terms of production all you need is a computer and an internet connection, rather than a recording studio or printing press etc.

Abundant: the internet can “accommodate an essentially unlimited number of points of entry and an essentially unlimited number of speakers.”

User-controlled: Users are not mediated by a content provider, they can choose more widely. (Center for Democracy and Technology: 5/6)

These attributes suggest that as a decentralized space the power relationships of the internet are horizontal to a greater extent than other domains, with different power relations than in other layers of society.

3.1 *The Internet and social structure*

Interactions are meaningful due to layers of society and its structures. Castells places an emphasis on the role of technology in influencing the minds of individuals in meaning making. Technology is helping to organise communities and individuals in new relationships and meaningful interaction; a

new social structure. (Castells: 2000:5) It is a specific social structure that is a characteristic of what has come to be known as the “Information Age.” (Castells: 2000:5)

However, today we are in more than an 'Information age' but a society based on “network-diffused technologies”. (Castells: 2000:9-10) The internet has played a pivotal role in humans entering a “new technological paradigm.” (Castells: 2000:9) Castells points to the trend of an “emergence of horizontal networks of communication; mass self-communication.” (Castells: 2007:239) The feature of participatory interaction for the public rather than the simple role of a passive audience is a hugely significant change in communication, allowing peer to peer communication, user generated content and non-hierarchical communication. (Castells: 2007:246)

3.2 Governance of the internet

Cukier argues that the idea of an uncontrollable internet is false; networks need centralized control. (Cukier: 2005:7-8) Cukier argues that control can, and should be had over the internet as it functions in the same way as an open society where both creativity and crime thrive. (Cukier: 2005:10) The medium of the internet itself is not bad or good, it is dependent on how it is used. From child pornography to expressions of dissent against a dictator, it has multiple uses. This often leads to the suggestion of a form of governance over the internet, in order to protect individuals and ensure a safe space for users.

States already use various methods of control over the internet: by applying existing laws created before the advent of the internet, to the domain of the internet; creating internet specific laws to deal with content and user access; mandatory filtering or blocking of certain websites, domain names and IP addresses; intermediary liability imposed by governments in order for intermediaries to police users; limits of access such as disconnection; limits on anonymity and pervasive surveillance.(Center for Democracy and Technology:7/9) Power holders are constantly developing ways to enforce control and police users. (Castells: 2007:259) Yet censorship is becoming more visible due to activists and non-activists using the same platforms. When these platforms are shut down, the non-activists become aware that censorship is taking place and start asking questions. (Zuckerman: 2010:82)

Arguably, the US already has a greater level of domination over the internet than most. The Internet Corporation for Assigned Names and Numbers (ICANN), a US based not for profit, allocates

technical details such as domain names and Internet Protocol addresses (IP addresses) for the entire world.⁹ (Cukier: 2005:8) US opposition could easily argue that the tensions in the Middle East could result in the US “knocking Iran off the Internet by simply deleting its two-letter moniker, .ir.” (Cukier: 2005:12) UN efforts to address internet governance could be seen as a backlash against this idea of the internet being directly influenced by the US.¹⁰ (Cukier: 2005:11)

There has been an increase in government authorities demanding that Internet Service Providers (ISPs) and Online Service Providers (OSPs)¹¹ “block connections to selected web addresses,” as documented by the OpenNet Initiative.¹² (Zuckerman: 2010:71) There is a shift of censorship responsibility from the state to private actors that may, or may not realise the implications (in terms of freedom of expression) that such actions may have. Selzer suggests that there is a greater incentive for OSP's to take down sites that may even be only *potentially* infringing on copyright laws, due to the threat of the entertainment industries litigation style, especially in the US. In comparison, they have “significantly less incentive to protect the First Amendment rights of users.” (Selzer in Zuckerman: 2010:79) OSPs have a commitment to “interpret and follow government regulations and to turn an operating profit.” (Zuckerman: 2010:80) Internet disconnection has been used as a punishment by continual file sharers in France under the 'Hadopi' law, that when under scrutiny by the French Constitutional Court was found to be unconstitutional in terms of affecting freedom of expression on the internet. (Bonadio: 2011:6)

The internet can play a significant role in democratic processes, economic expansion and the development of humans. (Center for Democracy and Technology: 2) The UN Special Rapporteur recognises that censorship and restrictions are incompatible with the responsibility of the states as detailed in human rights law. (UN Report: 8/III.26)

⁹ ICANN is a US non-profit that is liable both to the attorney general of California and the influence of the US government. (Cukier:2005:11)

¹⁰“In November 2004 UN Secretary-General Kofi Annan appointed a 40-person working group to address questions of Internet governance, in which The UN working group report suggested transferring authority over the internet to the UN.” (Cukier:2005:12) For more information: UN Press Release PI/1560, Online Forum on Internet Governance Launched on 08/03/2004, found at: <http://www.un.org/News/Press/docs/2004/pi1560.doc.htm> (accessed 10/05/2012)

¹¹OSP's generally host blogging and social networking sites

¹²The OpenNet Initiative is a collaboration of four institutions: the Citizen Lab at the University of Toronto, the Oxford Internet Institute at Oxford University, the Berkman Center for Internet & Society at Harvard Law School, and the University of Cambridge. More information is available at <http://www.opennetinitiative.net>

Castells argues that in terms of state presence on the internet, various networks such as trade, human rights and communication, divert away from the nation state. (Castells: 2000:19) This is due the nature of a network; networks dissolve centres that previously were imbued with power. (Castells: 2000:19) The legitimacy of the state has diminished due to remaining national. (Castells: 2007:258) Shapiro describes the redistribution of power on the internet as slowly relocating power from huge global institutions to smaller civil society organisations and the general public. (Shapiro: 1999:24) Thus, suggesting that the internet has provided an entirely new dynamic of power distribution.

The state itself is not objectively powerful, it is a vessel imbued with power that is exerted in order to realise certain groups of peoples interests more so than others. (Whitmeyer: 1997:211-2) The state is usually interpreted as a “territorially consolidated, centralized, sovereign state”. (Axtmann: 2004: 259) Sovereignty suggests that within the state the government has control over all aspects within that specific territory. (Axtmann: 2004: 260) However, the internet is not defined and bounded in the same way. With reference to Mann's definition of the four main organizational powers of the state (military, economic, political and ideological) (Mann: 1997) the research addresses which aspects of the state have significant influence over the domain of the internet.

Military power

Physical protection of the state takes the form of the police (internally) and the army (externally). (Axtmann: 2004: 261) The Center for Technology and Democracy describes the internet as defying the “traditional territorial boundaries” due to its networked nature. (Center for Democracy and Technology: 3) This suggests that military power would not be effective in a shared, decentralized space. However, there is an emergency of cyber warfare online, with the military developing new tactics to hack other states networks, redefining military power on the internet. (Croft: Reuters) Cyber warfare tends to be horizontal, from state to state, as opposed to vertically exerting influence.

Political power

Political power often takes the form of governments using tools such as laws and regulations. (Whitmeyer: 1995:216) It can promote certain behaviours by legalizing them, or minimize behaviours by reducing how likely or probable that an action will achieve something. The example Whitmeyer gives is; suing as a deterrent. (Whitmeyer: 1995: 216) Political power takes a presiding role in the domain of the internet.

Ideological power

Ideological power is used to monopolize a claim to meaning, norms and aesthetic practices. (Mann 1986:22 in Whitmeyer: 1995:212) This relationship can take place without the knowledge of the people affected by the decisions, and is exerted more forcefully when there is no resistance. (Whitmeyer: 1995: 216-7) Ideological power operates beneath the surface of society.

Economic power

In terms of research and development, ownership, assets, corporations, banks and insurance firms are all linked to their 'home' nation state, gaining from protectionism, education and infrastructure from that nation state. (Camoy: 1993; Castells: 1993 in Mann: 1997:479) There is a dependency of private actors on state when operating in the global market. (Mann: 1997:479) Economic gain is a goal for both private entities and states; often creating a close relationship between the two on a larger scale.

As shown, the internet is a domain that is subject to a discursive struggle. Within the space there are different actors vying for power and control through various means. This functions on two operational levels. Firstly, externally of the internet by actors exerting influence on those online which can take the form of political power such as international law. On another level there are tensions directly within the domain of the internet itself, with tools such as censorship, circumvention, disconnection and surveillance at play.

3.3 Themes

In the following section the different themes within the research are discussed in order to situate the research problem. Themes considered are: The Human Rights system and Freedom of Expression; Intellectual Property and Copyright; Democracy and Neoliberalism; and Globalisation. Each area is considered in general and with application to the domain of the internet.

3.3.1 The Human Rights system and Freedom of Expression

Human rights are founded in a liberal ideology based in an international global governance system; the United Nations. The aims of the UN are threefold; to ensure peace, to regulate the global economy (via the IMF and World Bank amongst others) and to control crime. (Freeman: 2002:155) The UN is statist and supra statist as it operates as an organisation higher than the state, and can hold the state accountable. (Freeman: 2002:155) Thereby detracting power and sovereignty from the nation-state. (Bobbitt 2002) Yet, power is generally distributed from the UN bodies down to states, which are then responsible for implementation within their nation state; with the end goal of protecting individuals. The human rights system is able to make recommendations, such as the UN Special Rapporteurs report, but is unable to enforce recommendations on the ground except through presence and promotion of a liberal human-rights centric rhetoric.

Freedom of expression is special as it functions both horizontally (with protection of the individual from other individuals interference) and vertically (protection of the individual from the state). (Smith: 2010:292) One of the most consistent challenges to freedom of expression is state censorship. Article.22 of the ICCPR asserts that the state has a responsibility to place specific restrictions.”¹³ This legal protection is extremely important as any censorship has to be justified within this definition. Should the argument of national security be used in order to censor or limit freedom of expression, it becomes difficult for the international bodies to step in as it is seen as a sovereign or national issue. (Smith: 2010:298)

The view that the internet is a significant contributor to the realization of freedom of expression is shared by the UN Special Rapporteur, who recognises freedom of expression as an enabler. (UN Report: 7/III.22) It has become an important prerequisite to creativity, as Bonadio recognises. (Bonadio: 2011:2) Furthermore, Best discusses the potential of the internet being a human right, and so universal in nature. (Best: 2000) Best argues that the internet enables the “symmetrical claim of information rights” of both imparting and receiving information. (Best: 2000:23-24) Therefore, it is an essential tool for freedom of expression. The UN's call, “for universal access to basic com-

¹³“which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.” Article 22. International Covenant on Civil and Political Rights.

munication and information services” is the first step towards the realization of the internet as a human right. (Best: 2000:30)

3.3.2 *Intellectual Property and Copyright*

Intellectual Property is protected in the UDHR Article 27.2. “Everyone has the rights to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Central Human Rights instruments ¹⁴ recognise intellectual property rights in terms of intrinsic value drawn from the creativity of humans. (Chapman: 2001:5) However, it is a contentious area of human rights. (Chapman: 2001) During the creation of the UDHR there was much debate on whether IP should be included at all. (Chapman: 2001: 11) Arguably, for Intellectual Property to gain the title of a human right, they must be implemented in line with the minimum core obligations held to by states, such as; a strong ethical regime and orientation, being reflective of developing country’s needs; amongst others.¹⁵ (Chapman: 2001: 15-18)

They key issue facing IP protection and copyright online is the digital nature of how information is stored and shared, with a growth of file-sharing between users. The specific attributes of technological developments¹⁶ make this act very easy.¹⁷ Furthermore due to the unique nature of digital copying, no quality is lost in the process and only one copy is needed. (Liebowitz: 2006:21) Copyright holders see this as a threat to their economic revenue as notably the copyright industry brings in a large amount of GDP through sales. (Liebowitz: 2006:3) States have an interest in aligning with revenue makers, and so the issue may receive a disproportionate amount of attention. This relationship has resulted in rights-holding organisations requesting governmental, regional and international support in securing their rights online. IP has changed from an incentive driven right to a commer-

¹⁴In the ICESCR Article 15.1, c. It is stated that those party to the covenant must recognise the right of persons “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.” (ICESCR)

¹⁵Such as: being consistent with domestic cultural traditions; promoting scientific progress; being internationally cooperative; and being sensitive to the effect of IP and copyright on vulnerable groups.

¹⁶“Devices that can play MP3 files have become increasingly popular, CD writers have become ubiquitous, and Internet speeds have increased as broadband has become more common.” (Liebowitz:2006:5)

¹⁷This isn't the first time that the copyright industries reacted vehemently to new technological developments. Liebowitz uses the example of when videotaping became common place, the movie and television industries filed a law suit against the video recorder. (Liebowitz:2006:2)

cialized means of protecting investor's revenue and resources mirrored in the public domain becoming more privatized. (Chapman: 2001:22) This vision of IP as primarily an economic commodity is not reflective of human rights. (Chapman: 2001:14)

One of the main arguments for IP and copyright is that an incentive is needed to stimulate creativity and distribute the product. However, file sharing can be integral to freedom of speech in the sense that it is used to disseminate and exchange ideas, opinions and information as well as to discover those of other people. (Bonadio: 2011:4) The internet is a social and cultural phenomenon that has been utilized by universities and musicians; contributing to scientific, technological and cultural development. (Bonadio: 2011:4-5) Copyright results in the work being protected and access to the work limited, which could impact negatively on the formation of ideas and opinion. Copyright and IP rights can potentially have a positive or a negative effect on stimulating creativity. This ability to both stifle and enhance freedom of expression is coined the "copyright's paradox" by Netanel.¹⁸ (Bonadio: 2011:2) However, Netanel sees copyright as essential for creative expression; without it creativity may be under produced and under disseminated by "unbridled free riders". (Netanel: 1996: 293)

This dichotomy of copyright is seen by Netanel as a democratic paradigm, a dilemma as to the point where restriction ends and access for the public begins. (Netanel: 1996: 285) Netanel argues that copyright is a method of the state, using the market, to further improve democratic nature of society. (Netanel: 1996: 288) Copyright provides firstly a production value; providing an incentive for expression, contributing to society, and secondly a structural function; freeing this activity from elitist patronage and subsidy from the state. (Netanel: 1996: 288) Ultimately Netanel sees this paradigm as highlighting that although copyright functions in the market, it is not born of the market. (Netanel: 1996: 386)

Intellectual Property rights are seen as a central asset to contemporary society based on knowledge and technology. (Chapman: 2001: 5) In terms of power, Intellectual Property rights attribute the most power to the organisations that have gained the copyright or intellectual property rights; the rights holders.¹⁹ It is becoming usual for copyright holders to take legal action against those in-

¹⁸For more information see Neil Netanel's book *Copyright's Paradox* (OUP, 2008)

¹⁹However, some artists take cases into their own hand such as prominent author Paulo Coelho who has taken the opposite stance. When his book came out in Russian he put a free copy up on the internet against his publishers wishes, and it was so successful in promoting his work (and selling hard copies) he created "the Pirate Coelho" which provides free copies of his work. Found via: Smaran, "Alchemist Author Pirates His Own Books",

fringing their rights, especially in the entertainment industry. Often they take action against both the individual and “secondary infringers”; the companies and organisations that enable infringements; ISP's. (Bonadio: 2011:3) Private agreements between ISP's and holders of copyright are becoming common; cutting out the role of the state in policing and punishment. (Bonadio: 2011:1) Private agreements might entail user's information in exchange for transmission rights. Therefore, enforcement of copyright laws could result in self-censorship of artists, authors and musicians when they are aware that copyright provisions are in place; rather than being at the end of a law suit from the entertainment industry. (Bonadio: 2011:5)

The relationship between intellectual property and the internet is twofold; for dissemination of a product, and for enforcement of the rights to that product. By using power apparatus such as legal courts and suing for copyright violations the power of the right holders is being exerted. With the development of international documents enshrining rights, enforcement protocol and international cooperation, these rights holders are not just exerting power but they are framing the discourse on a global level; framed as contributing to economic security. Furthermore, Chapman issues a warning that the future of IP needs to be influenced by human rights as a counteraction to market interests. (Chapman: 2001:6)

3.3.3 Democracy and Neoliberalism

The relationship between the state and the individual takes place within the frame work of the nation state; bringing the state and the people together. (Axtmann: 2004: 260) This relationship is generally accepted due to individuals attributing the qualities of protector, economic welfare provider and cultural identifier to the state. (Axtmann: 2004: 261) This suggests the state is a benign actor that knows what is best for the citizens within the territory.

In order for the state to be representative of the people there needs to be a method of representation in place; such as democracy. Democracy suggests that the power is held by those living within a sovereign territory that have rights as citizens with influence on the government - “popular sovereignty” as Axtmann coins it. (Axtmann: 2004:261) Within democratic nation states, there is an expectation by citizens that the government acts with their interests in mind. (Axtmann: 2004: 266)

24/01/2008, Torrent Freak, <http://torrentfreak.com/alchemy-author-pirates-own-books-080124/>, (accessed 03/05/2012)

There has been an increase in developing countries relying on use of the internet to create communities, enable wealth creation and lay the transparency and dialogue essential to democracy. (Cukier: 2005:12) This role that the internet can play in democratic society is highlighted by the UN's special rapporteur for, "facilitating active citizen participation in building democratic societies." (UN Report: 4)

The concept of citizens having the power to influence the state via the government is problematic on two levels. Firstly, the government, even though a power-holder, also distributes power via state apparatus and other governmental institutions. Although these institutions are not power holders, they have implications on power subjects (individuals) that the individuals may not be aware of; diffuse power. (Whitmeyer: 1997) These may not have direct power goals like other power sources, but may exert power and influence society separately. (Whitmeyer: 1995: 213) By affecting people's behaviour through these collective social structures and institutions, and by affecting the way people think, power holders can have an influence over who has social power in the state. (Whitmeyer: 1995: 214) In perpetuating a certain social order, the social order itself becomes acceptable to society. Often social practices enforced by the government go unquestioned; such as the content of the education system, or methods of policing (such as stop and search).

Secondly; democracy only works if the government listens to its citizens via a functioning democratic system, over lobbying from private businesses or market forces. In terms of democratic or 'popular sovereignty', private actors in the state provide citizens with a huge barrier. Private actors are not liable to civilian influence in the same way as government bodies, as they are not democratic state institutions. This can cause huge problems for democracy, especially when the current global climate is dependent on the market place for both economic gain and political weighting, leaving governments trying to balance varied responsibilities, such as the global market and human rights. Chapman recognises that rather than government policy leading the future of IP, technology and privatization are shaping policy and the result is a weakened democratic process. (Chapman: 2001:23)

To this end neoliberal global markets still have certain expectations of the state. They need security guarantees such as protection from terrorist attack, property rights enforcement, education for workers, tax breaks and subsidies amongst others. (Gill: 2003: 246-55; Hirst & Thompson: 1999: 271-5 in Axtmann: 2004: 271). Fundamentally states have an interest in economic power, based on the idea of monetary or goods rewards, and revenue. (Whitmeyer: 1995:214)

Bordieu describes neoliberalism as a global capitalist political project of unrestrained markets that wants to restructure society to this end – fundamentally neoliberalism as incompatible with democracy as it requires weak states and homogenous political parties that must put the economy first. (Bordieu: 1998 in Fairclough: 2000:147) Neoliberalism constantly transforms in aid of expanding economically. This includes the commodification and marketization of various fields; including the internet. There has been a shift in relations on a wider scale; global, regional, local, national – this is an important element of the internet, globalising markets and intellectual property rights. (Fairclough: 2003:4) Neoliberal capitalism is almost entirely inescapable - affecting everyone to some extent.

Proponents of capitalism often place free-market economics alongside human rights in importance; with the view that the two come hand in hand. (Freeman: 2002:149) However, as Freeman writes, human rights are only one of many components of the government, many of which are exposed to various lobbying, often leaving human rights below trade and defence in importance. (Freeman: 2002:134) Yet, free market capitalism has demonstrated a tendency to disregard human rights in favour of economic growth.²⁰

3.3.4 Globalisation

This research deals with global phenomenon; the internet and human rights. Both are affected by globalisation, defined in this research paper as the “expanding scale, growing magnitude, speeding up and deepening impact of interregional flows and patterns of social interaction.” (Held & McGrew: 2000:4) Globalisation itself is directly linked to both democracy and neo-liberalism as discussed below.

One definition of globalisation is as a 'convenient myth' or an ideological construction in order to vindicate the political project of neoliberalism, global free markets and a western centric capitalism. (Callinicos et al: 1994, Gordon: 1988; Hirst: 1997; Hoogvelt: 1997 in Held & McGrew: 2000:5) This interpretation of globalization is essentially as an *economic* globalisation; a spreading of neo-liberal ideals that favours the free market and reduced governmental intervention in the economy.

²⁰One of the main examples of how free-market capitalism disregards some human rights around economic and social progress in developing countries can be seen in the promotion of Structural Adjustment Programs (SAP's) in developing states, which can weaken governments. (Freeman:2002: 149)

(Freeman: 2002:153) Others see a trilateral pattern of capitalist activity as opposed to global. Europe, North America and East Asia are the main areas in which 85% of global trade happens, and over 90% of production in “advanced sectors” such as electronics - not to mention a strong proportion of multinational corporations head offices. (Mann: 1997:480) This pattern seems to confirm that there is a 'geo-economic order' or nation-states. (Mann: 1997:480)

Globalization has seen a transformation of most nation-states; they are universalized. (Shaw: 1997:500) There has been an erosion of independent domestic decision making due to international policy pressures. (Held & McGrew: 2000:13) The state has become part of a national, regional, local and global network involving states, regional bodies and non-governmental organisations in complicated webs of power sharing and negotiations. (Castells: 2000:14) The development of international and regional bodies and the international law that accompanies such organisations has altered both state and society to a huge extent. (Held & McGrew: 2000:11) The growth of inter-reliance and dependency of organisations takes the form of institutions such as the United Nations, WTO, the World Bank and the EU. Freeman describes the 'myth of international law' as the view that the world is divided up into separate, sovereign states that act independently of one another. However, Shaw argues that international law provides a form of governance through treaties and agreements that regulate behaviour. (Shaw: 1997:508) Alongside states there have always been strong private economic organisations and strong communications networks. Now, we see these other actors taking shape as large private companies, global non-governmental organisations and international regimes. (Freeman: 2002:155)

Solutions to problems in policy and conduct are increasingly dependent on actors abroad with, “supranational decision making” becoming more common. (Axtmann: 2004: 269) However, the global system is not equal and different actors in different nation states may have unequal influence in the regional and international bodies. There is not a single homogenous idea of the state; therefore capitalism (or globalisation) may not have the same effect on all states. (Mann: 1997:474) By stronger states influencing other states to think similarly and enforce the same policy and protocol they can perpetuate their dominant ideology and goals.

Shaw describes the fulcrum of the emerging global system as composed around a centre state; the US. Furthermore institutions such as the UN, NATO and the WTO pass straight to the centre of the US' needs. (Shaw: 1997:507) The US has taken an aggressive lead in developing encryption technologies, flexing, “its regulatory muscle in a variety of ways, imposing trade restrictions, publishing legislation”. (Shapiro: 1999:18) In terms of censorship, many of the leading social media sites used

in other countries, that are frequently blocked are “managed and hosted” in the US, outside of national control. (Zuckerman: 2010:74) These platforms are subject to US foreign policy. In the case of Zimbabwe, rather than taking down pro-Mugabe sites, all Zimbabwean sites hosted by Bluehost were shut down in a “blanket blockage”. (Morozov in Zuckerman: 2010:76) Exactly how subject host sites are to US export policy is never very clear amongst platforms.²¹

Via globalization space and time seems to be less constrained, with less barriers to social interaction and organisation. (Held & McGrew: 2000:3) The world seems to be getting smaller and people are becoming aware that the local can affect the global and vice versa. (Held & McGrew: 2000:4) This feeling, combined with the internet suggests the horizontal communication network is effectively shrinking the globe.

There is a tension in globalisation between the need to combat problems on a higher international level, and the ability to sustain legitimacy as a democratic nation state taking part in the decision making. (Axtmann: 2004: 270) Governments and states are required to consider various pressures, emanating from regional or international bodies. This change in how decisions are made could be seen as a form of destatization. (Axtmann: 2004: 269)

In the literature review various themes prevalent in ACTA have been considered. The unique nature of the internet can have an impact on how different discourses may function. Governance of the internet is a continually contested terrain, with various powers trying to exert influence over the domain.

The Human Rights system and Freedom of Expression have an important role to play in ensuring the internet is utilized to the fullest extent. Intellectual Property and Copyright, although considered important in the human rights system have an economic foundation depending on a legal system and various laws of protection online. Both Democracy and Neoliberalism have an important relationship with the state both online and offline; and a contentious relationship with each other intensified in the domain of the internet. Globalisation also impacts on all of the areas above as an overarching theme, affecting how actors relate to one another underpinning a transformation away from states, towards global governance.

²¹“LinkedIn, MySpace, and Blogger make reference to US export laws, while Youtube, Facebook, Wikipedia, Rapidshare and Wordpress do not.” (top social media sites as suggested by alexa.com) found in (Zuckerman:2010:77)

Findings

This chapter looks at an analysis of the language used in ACTA specifically using a textual orientated discourse analysis, feeding into a larger critical discourse analysis. Using Fairclough's definitions provided in the methodology chapter there is a discussion around the different themes recognised in the Literature Review, evidenced by the textual orientated discourse analysis, with examples from ACTA.

The research focuses on Section 5: Enforcement of Intellectual Property Rights in the Digital Environment, Article 27: Enforcement in the Digital Environment, but also makes reference to other areas of ACTA.

Firstly, it is important to consider the different social actors that are identified in ACTA.

4.1 Social Actors

The social actors referred to in ACTA are generic group classifications such as; 'right's holders', 'parties', 'the public', 'the infringer' (of rights) and each party's 'judicial authorities'.

'Parties' are signatories of ACTA, although it is not stated whether the parties are exclusively states. In contrast, legal human rights document the ICCPR begin with, "The States Parties to the present Covenant." In the ICCPR we see explicitly that the responsibility to uphold the covenant lies in the hands of the state. With ACTA, the responsibility lies with the 'Parties' that are signatories, suggesting that these parties could be states or they could be other actors, such as private entities. However, in general the responsibilities that are designated to the 'parties' and their 'authorities' suggest that the 'parties' are states.

Three actors are defined in Section 2. Article 5: General Definitions. The 'competent authorities' including the appropriate judicial, administrative, or law enforcement authorities under a Party's law; The 'right holder', which includes a federation or an association having the legal standing to assert rights in intellectual property; and 'person' meaning a natural person or a legal person.²² The

²²In terms of Intellectual Property rights, the most important Human Rights based document is ANNEX 1C, the Agreement on Trade-related Aspects of Intellectual Property rights, (TRIPS). This document is for members of the World Trade Organisation (WTO), and is addressed to its members, as parties that are "persons, natural or legal,

inclusion of only these specific definitions implicitly suggests that these are the important social actors alongside 'the Parties to this agreement.' Each of the three definitions relates to each other in an economic sense: respectively as the enforcer, as the victim, and the legal terminology of 'person' to convey that persons in this document are not 'people' or 'individuals' as shared by the human rights vocabulary; but legal entities that can include companies and corporations.

The activation or passivation of the social actors is transparent in terms of their capacity to be active or passive; and for controlling others.

'Parties' are attributed with a central, active role with language such as; 'make available', 'shall provide', 'shall also establish', 'provides', 'shall include', 'may exclude', 'shall permit', 'may adopt', 'may authorize', 'shall endeavour', 'shall encourage', 'shall promote', 'may undertake'. The Parties are imbued with the main responsibility of the text; the protectors. The choice of some actions using permissive language, rather than mandatory language suggests that the actions may be interpreted by each signatory differently.

'Rights holders' are portrayed as both victims and active participants in the enforcing procedure throughout ACTA. Language of victimization such as: 'compensate', 'injury', 'suffered', 'harm caused', are used in co-occurrence with the term 'rights-holder'. There are lexical relations between the language of victimization and economic gain; 'lost profits', 'value of the infringed goods', 'market price', 'to pay the right holder the infringer's profits', and 'compensate'. Lexical relations between the rights holder and the parties suggest a close relationship, with the latter acting; 'at the right holder's request', 'upon a justified request of the right holder'. The rights holders are in a position of gain and are seen as those affected by the criminals and infringers; they need protection.

The 'public' is seen as a passive subject, rather than an active participant, with the use of language such as; 'make available to the public', 'risks to the public', 'public interest', 'offering to the public', 'enhancement of public awareness', 'available to the public', and 'open to the public'. The public does not have an active role in the text; but has been backgrounded, with a suppressed voice.

As there is no definition of who an 'infringer' might be; either a natural or legal person, by implication the public have been impersonalised by being called 'infringers'. 'Infringer' is commonly found in sections detailing Damages and Remedies for violations. Alongside corporations and organisations, they are the criminals from whom the rights holders need to be protected.

who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory." It is made for and by those dealing with Intellectual Property rights, including rights holders; using similar terminology to ACTA.

Using the theoretical framework as a foundation, the following section uses the methods set out in the methodology chapter to exemplify the discourses at play in ACTA.

4.2 *The Internet*

Within ACTA there is no reference to the internet as a functioning layer to society that may have implications for public discourse as Castells suggests. (Castells: 2000:5) The language 'digital environment' is used in place of the 'internet', which does not appear. ACTA references 'online' twice; both cases of which when describing 'online service providers'. There is an acknowledgement of the importance of 'electronic rights management information' (encryption) and 'electronic commerce', to which no barriers should be created. The internet is conceptualised purely as a space in which rights-holders can operate; much like the material world. Alternative uses for the internet are not identified or represented.

As there is no definition of 'the digital environment', there is an assumption that the application of law in the digital environment is indistinguishable from the material world, with no acknowledgement of the decentralized, user-controlled attributes of the internet that make it so unique. (Center for Democracy and Technology: 5/6) Similarly, there is a suppression of the acknowledgement that the internet may be contributive towards democracy; it is simply a space to be utilized and controlled.

As referenced in the theoretical framework; states have been known to censor users. (Zuckerman: 2010:71) The issue with ACTA not conceptualizing the impact of IP and copyright enforcement online shows a refusal to contextualise the extent of other state involvement with the internet; including censorship. By framing the issue of copyright as entirely economic there is a suppression of other social practices that occur online that may be negative; yet still under the guise of protectorship.

The UN Special Rapporteur notes that “in recent years, intermediaries’ protection from liability has been eroding.” (UN Report: 11/ IV.B.38) In ACTA there is an explicit attribution to the OSP’s as participants of infringement, liable to legal implications. Article 11. Shows that there is an inclusion of 'third persons' that are 'alleged' to be involved in: “the production and distribution of such goods or services and of their channels of distribution.” This implies that intermediaries may be held liable

to infringements if they are linked to the infringer. This relationship between intermediaries and states has a direct impact on freedom of expression, “because it leads to self-protective and over-broad private censorship, often without transparency and the due process of the law.” (UN Report: 12/ IV.B.40) The UN Special Rapporteur goes on to state that this role should never be delegated away from the state. Alongside this he recognises that “no one should be held liable for content on the Internet of which they are not the author.”(UN Report: 13/ IV.B. 43) In creating a legal document dominance over public discourse is being asserted, motivating certain behaviours of ISPs and OSPs by threat of punishment.

4.3 The role of the state

Although not explicitly stated, by building a system by which rights holders can persecute infringers, political power is being exerted by the dominant powers in the legal discourse used. (Whit-meyer: 1995:216) As Foucault recognized; by using the inquiry system the dominant ideology is reinforced, as the dominant powers are the truth holders. (Foucault: 1996: 341) The dominant ideological power of neoliberalism is implied throughout ACTA. Language such as 'protection' and 'security' is used consistently, suggesting a benign dominant force.

The responsibility of the states, or 'parties', is implicit and explicit throughout ACTA, showing that corporations (rights holders) are dependent on the protection of their respective states as suggested by Mann. (Mann: 1997:479) This dependency has been manifest as a legally binding document. In terms of responsibility, there is a shift between state parties bearing all of the responsibility of policing, and the 'expeditious' means of dealing with infringers implies a fast-track of justice for rights-holders. Intermediaries such as blogging platforms, or social media websites, are coming under increased pressure from private corporations and states to disclose information concerning users, or to police their own networks. This has implications in terms of responsibility; a shift from state policing, to private organisations; affecting both the nature of ISPs and OSPs and judicial procedures.

Overall ACTA is part of a genre chain of international cooperation, reflective of organisations such as the WTO and WIPO. ACTA deals with a hybrid of genres; of global governance, state governance, and domestic and international legal enforcement. ACTA may be interpreted as a 'hortatory' report in terms of having “descriptions with a covert prescriptive intent, aimed at getting people to act in certain ways on the basis of representations of what is.” (Fairclough: 2003:96) It is an Active text; requiring action to agree with and ultimately fulfil the obligations en-

tailed; via signing, ratified and implementation. In this case there is an application of the logic of equivalence in the preamble where the purpose for the document is set up, by agreement of signatory parties.

Due to this being the final version of 7 drafts, the wording is specific as there may be legal implications. This suggests that there have been vast consideration since the first negotiations of exact execution of terminology. The text has been filtered and recontextualised from negotiations to a formal and officially released legal document. In this process of filtering, other voices have not been identified or represented in the text. By not involving civil society or experts in the negotiation process, the document has taken the shape of those involved in the discussions. ACTA is now a monological text of international agreement intended for a particular audience, who in the case of ACTA may be the same party. Furthermore, using Bakhtin's dialogical theory²³, this text is undialogized as it is both authoritative and absolute, as opposed to relativized. (Holquist 1981:427 in Fairclough:2003:42) There is an intertextual relationship between ACTA and the following Documents: TRIPS, The Doha Declaration, and the Marrakesh Agreement.²⁴ This suggests that there is a relationship between ACTA and these texts; ACTA as mutually supportive of, or an addition to these documents. This reinforces an accepted social structure dominated by hegemonic practice, such as legalising certain behaviours, and criminalizing others.

4.4 Human Rights system and Freedom of Expression

In terms of difference ACTA entails no acknowledgement of 'another way'. ACTA identifies legal enforcement as the correct way to deal with intellectual property rights and copyright violations. It is a normalization of power differences suppressing any differences of meaning that may be prevalent externally of the text.

Significantly, there is an exclusion of human rights based language and terminology, although both 'freedom of expression' and 'privacy' are present. Yet, IP is recognized as a human right by the UN,

²³Bakhtin's dialogical theory is that any dialogue is part of an on going chain of conversation. However, there can be a monological subordination of others to one singular standpoint; such as in the case of ACTA.

²⁴The Doha Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001, at the Fourth WTO Ministerial Conference, The Agreement on Trade-Related Aspects of Intellectual Property Rights, contained in Annex 1C to the WTO Agreement. (TRIPS), The Marrakesh Agreement Establishing the World Trade Organization, done on 15 April 1994. (WTO Agreement)

an organization of which many of the parties involved are members. In Section 2. Article 5: General Definitions, there is no definition of either 'freedom of expression' or 'privacy', suggesting that either, a) they are not important to the document, or b) they have been purposely left undefined. This is coupled by the correlative use of 'fundamental principles' in correlation with these terms, instead of 'rights' or 'human rights'. The semantic choice here in using the terminology of 'fundamental principles' suggests that the author did not want to use human rights terminology due to the implications that it might carry in terms of seeking remedies against injustice or de-legitimization of certain articles on a human rights basis. Yet, we see consistently the reference to the 'rights' of the rights-holder. The choice of language that is left vague or undefined is purposeful in a legally binding document, with important principles such as “freedom of expression, fair process and privacy,” being left open for interpretation. (ACTA: Article 27.2, 27.3, 27.4)

Structurally the preamble of ACTA mirrors the ICCPR, using emphasized language such as: 'Noting', 'Desiring', 'Intending' and 'Recognizing'. Yet, ACTA does not mention the word 'human' at any point. This gives a false assumption that the document would have a human rights perspective, or human rights values embedded in it. There is no acknowledgement that ACTA may be in conflict with human rights documents detailing IP and copyright, or even that these concepts may have meaning within the discourse of human rights, shown in the lack of definition. This is a hegemonic choice of using a structure and language related to human rights, without adopting the full meaning of such language.

When not utilizing the vocabulary and definitions in terms of human rights, there is a significant causal effect in the enforcement of such rights. There is no language used on which to secure or safeguard human rights abuse of individuals that may be caught up in infringements, knowingly or unknowingly. There is also an issue with digital infringements of copyright being grouped together with life-saving medicine copyright and organized border-crossing criminals.

In not recognising the importance or implication of freedom of expression various other rights are also being denied. As ACTA does not use a dominant human rights discourse, this seems unimportant to the author, although 'privacy' is mentioned occasionally, usually with 'confidentiality', rather than in human rights vocabulary.

4.5 Intellectual Property and copyright

In connection to the absence of human rights vocabulary, there is no recognition in ACTA of IP as a human right. This may be due to the missing voice of developing countries in the document. As Chapman argues, to implement human rights, there needs to be a human rights based approach to the issue; including taking into account obligations such as the impact on smaller developing countries and vulnerable groups, and a strong ethical regime. (Chapman: 2001: 15-18)

In ACTA rights holders have the opportunity to make deals with ISPs and OSPs outside of state influence in order to ensure their rights are secured online. Furthermore, the policy lobbying that is evident in both the creation of ACTA and explicitly evident within ACTA, (via the victimization of the rights-holder) demonstrates the influence of rights-holders. This shift in focus could be interpreted as a strengthening of neoliberalist ideology, which desires weak states in order to deregulate the free-market.

Neither 'culture' nor 'cultural' make an appearance in in ACTA, in line with the lack of human rights terminology. However, 'phonograms', 'performance', 'performer' (and a minimal reference to 'author') are evident throughout ACTA, suggesting that there is a cultural implication to the text, which is purposefully not identified or represented. This could be due to the authors of ACTA not recognising the internet as a part of the social structure as a layer of society; or alternatively it could be purposefully left out in order to secure the economic-based rights that are prevalent. The impact of copyright is interpreted here as only an incentive to artists, not a barrier to developing and furthering personal work by exposure. (Bonadio: 2011:2)

4.6 Democracy and Neoliberalism

Democracy is not a significant issue within the text, with the words 'democracy' and 'democratic' not appearing at all. There are various elements of ACTA that contravene democratic practice, such as the evident role of private actors in ACTA's creation, and the secret negotiation process. For citizens to trust the state as a protector there must be transparency and trust present, values that were not evident in the negotiation process.

Although there is no evidence of 'other voices' within ACTA, externally we see that individuals are using their right to protest or express their disagreement legitimately. (Axtmann: 275: Gill 2003)

There has been a rise in counter hegemonic groups opposing ACTA. ACTA's launch saw protests take place across the world; in Germany, Poland, the Netherlands and the UK. (Lee: BBC) When the Polish government announced that it was to sign ACTA on January 26th 2012 there was a significant online and offline backlash. Facebook pages were created by concerned groups and citizens, digital rights organisations sent letters to the Prime Minister of Poland and hackers blocked various websites of the Polish Parliament on January 21st. (Global Voices Online) Members of Pali-kot's Movement, a left wing parliamentary group wore Anonymous masks in parliament to “show their dissatisfaction” with Poland's agreement to sign ACTA. (Gera: Associated Press) This suggests that citizens may not be supportive of ACTA.

Furthermore, this opposition has been expressed by other actors in the social structure. In June 2010 a group of international experts based at American University Washington College of Law Washington, D.C. Found that ACTA 'Threatens public Interests'. (AU Washington College of Law: website) Following this on October 28, 2010 over 75 professors coordinated by American University Washington College of Law, Washington, D.C. wrote to President Obama in opposition to ACTA, specifically the undemocratic process of its creation and development.²⁵ Here opposition is being expressed through the avenues allowed by the dominant ideology.

To a greater extent, the European Parliament's chief investigator, Rapporteur Kader Arif resigned over ACTA stating, “I will not take part in this masquerade.” (ORG: Rapporteur resigns) The following rapporteur British MEP David Martin in 2012 took a similar stance, stating "The intended benefits of this international agreement are far outweighed by the potential threats to civil liberties.” (BBC Technology) Both individuals are expected to support ACTA as they are members of the international system, the interests of whom ACTA is supposed to protect.

The role of the state as an economic provider for the citizens takes primacy in ACTA, over any other discourses. Neoliberalism itself can be interpreted as operating in tandem with democracy. Yet, neoliberalism needs weak states in order to have free reign, whereas democracy requires strong states in order to represent the citizens. (Bordieu: 1998 in Fairclough: 2000:147) Furthermore, Neoliberalism carries marketization and privatization as a fundamental element of its ideology, reflected in ACTA in the prominent roles of private organisations and rights-holders, alongside the economic

▲ ²⁵“Our conclusion is simple: Any agreement of this scope and consequence must be based on a broad and meaningful consultative process, in public, on the record and with open on-going access to proposed negotiating text and must reflect a full range of public interest concerns. For the reasons detailed above, the ACTA negotiations fail to meet these standards.” American University Washington College of Law Washington, D.C., 'Over 75 Law Profs Call for Halt of ACTA', 28/10/2010, found at: <http://www.wcl.american.edu/pijip/go/blog-post/academic-sign-on-letter-to-obama-on-acta> (accessed 07/05/2012)

discourse. (Fairclough: 2003:4) The emphasis of enforcement and protection of rights are not human rights, but the legal rights of corporations and businesses. To this extent La Quadrature argue that ACTA could be used as a “bullying tactic” for the entertainment industries, allowing them greater power than previously. (La Quadrature: website)

There is a correlation between economic growth and strong copyright enforcement. The pattern of language such as 'critical to', 'undermines', 'causes' and 'poses' in the preamble, in correlation with enforcement of IP and copyright and economic growth there is causal relationship that is highlighted. IP and copyright can be detrimental to economic growth, which ultimately will impose a risk to the public. In ACTA the assumptions made are value based, concerning both what criminal activity is, and that the said activity is negative. Neoliberalism is an ideological project that is 'in progress'; utilizing the language and vocabulary around this. (Fairclough: 2000:148)

Control is represented by the ACTA committee. This new international governing body will monitor enforcement as detailed in Chapter V. Article 36. The ACTA committee will consist of representatives from each signatory party, yet without any method of voting in that representative or a rotation of representation. Furthermore, the ACTA committee has undefined powers; Article 36.3.e. “The Committee may decide to: take other actions in the exercise of its functions.” and Article 36.6., “The Committee may amend the rules and procedures.” By having the power to both act and make changes to rules and procedures there is a suggestion of autonomy for the ACTA committee - it can do so without acknowledgement of the party’s privy. The creation of a committee mirrors the ICCPR, yet does not share the transparency and democratic nature that the ICCPR entails. (ICCPR: Part IV) This is not confluent with democratic process and implies adherence to the neoliberal discourse as driven by market interests via the committee members as potential representatives of trade partners. To this end La Quadrature argue that ACTA allows a “durable bypass of democracy”, one of the grounds for which opposition to ACTA has been strong. (La Quadrature: website)

4.7 Globalisation

Globalisation is often viewed as a tool for neoliberalism as an economic globalisation. (Freeman: 2002:153) In ACTA, globalisation is articulated as an intrinsic part of neo-liberalism; a hyponymy of neoliberal capitalism. The trilateral nature of globalisation is reflected implicitly within ACTA. By not taking in to account smaller organisations and smaller states there is conservation of the current world order; with strong states with large multinational companies in control.

Within ACTA the neoliberal discourse is expressed using the vocabulary of 'growth', 'development', 'international cooperation', 'mutually supportive', combined with economic vocabulary of 'the business community' and 'legitimate competition'. This economic neoliberal discourse is presented as inclusive of trade, economics and globalisation, assuming that economic neoliberalism is a positive occurrence. In section 5 specifically there is a focus on active vocabulary that relates to globalisation and neoliberalism. By permitting 'effective action' and 'expeditious remedies' in terms of legal enforcement there is a sense of urgency and an implication that the current situation is not enough. In using complimentary legal language such as 'infringement', 'unlawful use' and 'legitimate activity' there is an implied sense of rife criminal activity.

Furthermore, globalisation also has a shared vocabulary with human rights discourse in terms of international cooperation and development. As evidenced, globalisation is a complex term as it is used frequently within various different genres and circumstances. (Fairclough: 2009:318)

Rationally the document seems legitimate as it is signed by various state parties, including the US and the EC, rationally legitimizing the authors. By signing it is implied that the following assumed values in the digital environment are adhered to by signatories as detailed in the preamble of ACTA, such as the “effective enforcement of intellectual property”, by;

“Desiring to address the problem of infringement of intellectual property rights, including infringement taking place in the digital environment, in particular with respect to copyright or related rights, in a manner that balances the rights and interests of the relevant right holders, service providers, and users”

“Desiring to promote cooperation between service providers and right holders to address relevant infringements in the digital environment.”

ACTA is a correlation of globalisation in the sense that it looks to an international interdependent body over governance to deal with issues that are global in their impact; such as IP and copyright violations online. Ultimately ACTA could end up impacting on non-signatories as more parties sign up to the agreement.

4.8 Overarching discourse

The higher level semantic relations over the text are relating to problems in enforcement of procedures combatting copyright and IP violations online. Various solutions are proposed that fall into the three following areas; Parties ensure laws and enforcement procedures are in place; Parties cooperate internationally; Parties cooperate with the business community. The social event that ACTA contributes to is a process of legal global enforcement to protect intellectual property rights and copyright online, a network of social practice that aims to combat criminal behaviour with law.

The most evident discourse in ACTA is that of neoliberalism. Within neoliberalist discourse there is a shared vocabulary with both globalisation and legal discourse. These areas see overlaps within and amongst each other. The human rights discourse is evident on the surface level, with infrequent references to the shared terminology of freedom of expression and privacy, but without any substantial definitions or meaning imbued. Two discourses which appear in ACTA nominally, but are shrouded in the neoliberal interpretation of meaning are cultural rights and the internet, or the digital environment.

The dominant group has various interests at stake, and in a neoliberal globalised world there are certain assumptions that are carried with that world view. This is reflected in the language used and the rhetoric surrounding progression, development, expediency and economic gain.

There is also an assumption that the foremost priority of copyright and IP is for economic gain, rather than for democratic purposes as suggested by Netanel. There is a repeated theme that any measures implemented are 'in a manner that avoids the creation of barriers to legitimate activity,' prioritizing a neoliberal discourse. There is also a theme that any measures taken are 'consistent with that Party's law,' prioritizing legal discourse.

ACTA has solid legal implications that will result in enforcement and legal procedures put in place and actively used. There is a real implication for this text in terms of shaping the world; it is a causal document.

4. Conclusions and Recommendations

5.1 Conclusions

This research paper set out to explore the relationship between ACTA and freedom of expression using the following research questions:

- What is the role of freedom of expression in ACTA?
- Does ACTA operate within a human rights discourse?
- How does ACTA perpetuate certain discourses?

Firstly there was a discussion on the methodology to be used to situate the research, including details of some of the terminology to be applied in the textual orientated analysis. In the Theoretical framework and literature review certain themes were considered including; the internet as domain, the role of the state, the human rights system and freedom of expression, intellectual property and copyright, democracy and neoliberalism and globalisation. Following this, a discussion around the analysis of ACTA using textual discourse analysis.

The concluding remarks follow certain themes within this research paper.

- ACTA is located primarily within a neoliberal discourse. Neoliberal discourse prioritises economics over human rights suggesting that it is not compatible with a human rights discourse. It presents universal human rights as fundamental principles, suggesting that the relationship between IP and human rights, or freedom of expression and human rights is not of importance.
- ACTA imbues intermediaries with responsibilities that should be held by the state; thus weakening democratic processes, which are essential for the realization of human rights.

- ACTA refuses to frame the internet as a social phenomenon that individuals choose to engage with in a participatory way; unless as infringers and criminals which may have implications on cultural output if behaviours are adopted to remain 'legal'.
- The cultural impact of the internet is framed only as a money making exercise inside a neo-liberal discourse. There is no suggestion that users may create goods outside of economic reasoning; for cultural purposes as protected by human rights.
- The prevalence of legal discourse and harsh punishments may result in self-censorship of users; resulting in users not utilizing the internet to the fullest extent possible, impacting on human development.

5.2 Recommendations

This paper was conducted as a textual orientated and critical discourse analysis and so recommendations will be concerning gaps in this research and opportunities for further research.

A gap in knowledge has been uncovered concerning the use of the internet as a cultural norm. Castells details the advances of the internet in creating a new social element of society. The most important aspect of the internet is that it is a new method of communication. The internet is “a significant leap forward as an interactive medium” (UN Report: 6/III.19) Furthermore the UN Special Rapporteur describes the importance of the internet in contributing to “discovery of the truth and progress of society as a whole,” by enabling a cross border exchange of information and ideas that was previously unseen. (UN Report: 7/III.19) However, this could be taken a step further as internet usage becomes more common place and new advances in technology such as open source data and web 2.0 user-generated content sites gain traction across the world. (Center for Democracy and Technology) The active participation of individuals with the internet to different extents, from simple humorous websites as lolcatz²⁶, to political participation via various means²⁷ could be argued as

²⁶Lolcatz is a website that users can contribute to of their own free will; with no political outcome. It can be found here: <http://icanhascheezburger.com/> (accessed 01/05/2012) and is used as an example of user participation in Clay Shirky's Cognitive Surplus, (2010).

a significant cultural change. Leisure time is being transformed from passive activities such as television and radio, to internet use. There is an opportunity here to argue for internet use on cultural terms, as mentioned briefly in the UNESCO report, but framed in a slightly different way.

It is important to ensure that copyright and IP rights do not take precedence over human rights that further human development by embracing new ways of communication. Perhaps it is not the use of the internet that needs to change, but instead it is the nature of copyright and intellectual property that needs to adapt to new technological developments.

²⁷Such as online activism in the form of petitions via organisations such as 38 Degrees (<http://www.38degrees.org.uk>) or political commentary via using twitter (<http://twitter.com>).

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Word count: 16,166

Appendices: The Anti-Counterfeiting Trade Agreement, 2011 (Attached separately).