

Network power in the negotiations and resistance to the Anti-Counterfeiting Trade

Agreement (ACTA)

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Abstract

The Anti-Counterfeiting Trade agreement (ACTA) is a 'plurilateral' intellectual property treaty currently in negotiation by a small group of developed countries. As officially portrayed, ACTA covers enforcement provisions for large-scale commercial violations of copyright and the production of counterfeit goods. However, several leaked versions, which preceded the official release of a draft document, confirmed concerns about ACTA's broad remit and 'IP-maximalist' agenda - with a particular focus on digital content and enforcement of IP provisions online. The likelihood of a finalized ACTA being included as a condition of bilateral trade agreements has given rise to fresh concerns about the ability of a small group of negotiating countries to impose a global IP regime in the digital space (EFF 2010). This research used Castells' theory of power in the network society to analyse ACTA and related issues as a manifestation of "sociospatial networks of power (local, national, global) that, in their intersection, configure societies" (Castells 2009:18).

This framing is attractive for several reasons. First, the substance of the agreement results from changes in communication technologies – fundamentally, networked communications. Second, given the potentially far-reaching consequences, opposition to ACTA has crystallized around the issue of exclusion and global justice. The configuration of groups opposing ACTA, their tactics, and their arguments mobilize through existing networks concerned with digital rights and social justice. Finally, the mediated nature of communications between proponents and resistance – through leaks and "mass self-communication" (Castells 2009:414) demonstrates adaptations unique to an age of networked media.

Network power in the negotiations and resistance to the Anti-Counterfeiting Trade Agreement (ACTA)

The Anti-Counterfeiting Trade agreement (ACTA) is a 'plurilateral' intellectual property treaty currently in the final stages of negotiation by a small group of developed countries (Japan, the United States, Canada, Switzerland, Australia, Mexico, Morocco, New Zealand, the Republic of Korea, Singapore) as well as the European Union (EU). As officially portrayed, ACTA covers enforcement provisions for large-scale commercial violations of copyright and production of counterfeit goods.

ACTA has attracted attention from various quarters, most prominently for the the veil of secrecy surrounding negotiations – revealed when several leaked versions preceded the official release of a draft document in April 2010. For detractors, the draft confirmed concerns about ACTA's broad remit and “IP-maximalist” agenda, with a particular focus not just on counterfeit goods but on digital content and enforcement of IP provisions online (Hinze, 2010).

By the time an official final draft was released in October 2010, many (but not all) of the offending provisions had been removed. In particular, patents seem likely to be excluded. However, the likelihood of a finalized ACTA being included as a condition of bilateral trade agreements has given rise to fresh concerns about the ability of a small group of negotiating countries to impose a global IP regime in the digital space (Electronic Frontier Foundation, 2010).

This paper uses Castells' theory of power in the network society to analyse ACTA and related issues as a manifestation of “sociospatial networks of power (local, national, global) that, in their intersection, configure societies” (Castells, 2009, locations 476-84). Castells identifies four types of power in networks:

- **networking power**, which “refers to the power of actors and organizations included in the networks that constitute the core of the global network society over human collectives or individuals who are not included in these networks” and “operates by inclusion/exclusion” (Castells, 2009, locations 931-45)
- **network power**, the power of “protocols of communication [which] determine the rules to be accepted once in the network”, exercised “not by exclusion from the networks, but by the imposition of the rules of inclusion” (Castells, 2009, locations 945-57)
- **networked power**, the differential state of “power-holding in the networks of the network society” and exemplified by the power of the global financial market and its institutions in global capitalism (Castells, 2009, locations 969-81); and
- **network-making power**, comprised of “programming” - “the ability to constitute network(s), and to program /reprogram the network(s) in terms of the goals assigned to the network”, and “switching” - “the ability to connect and ensure the cooperation of different networks by sharing common goals and combining resources, while fending off competition from other networks by setting up strategic cooperation.” (Castells, 2009, locations 981-93)

The events surrounding ACTA suggest these four dimensions as a useful analytical tool.

First, it is clear that the substance of the agreement results from changes in communication technologies – fundamentally, networked communications. Second, given the potentially far-reaching consequences of these provisions, opposition to ACTA has crystallized around the issue of exclusion and global justice. The configuration of groups opposing ACTA, their tactics, and

their arguments mobilize through existing networks concerned variously with digital rights and social justice. Finally, the mediated nature of communications between proponents and resistance – through leaks and “mass self-communication” (Castells, 2009, locations 16-74) demonstrates adaptations unique to an age of networked media.

The remainder of this paper is organized as follows. First, the structure and tactics of key actors in the ACTA negotiations – the proponents, the resistance, and the networked criminal underground that provides the rationale for the agreement – are analyzed as manifestations of the various forms of power in networks. These networked structures operate in a specific temporal and cultural context, and Castells' concept of the “cultural materials” of networks, defined as the “ideas, visions, projects and frames” through which network-making power operates (Castells, 2009, locations 1004-10) are applied to description of the cultural context from which ACTA, the proponents and the resistance emerge. Borrowing from social movement theory, I suggest opportunity structures – specifically discursive opportunities - as an analytical lens for understanding the cultural materials of networks, and demonstrate their operation in the ACTA case.

Networking proponents, networks of resistance, and a networked threat

Although the negotiating parties to ACTA are all formally identified as states (in the case of the EU, a trading bloc comprised of states), the content of the agreement reveals extensive support for, and involvement of, corporate actors. Discussions of an international treaty on counterfeiting likely originated at a 2004 meeting sponsored by the Global Business Leaders' Alliance Against Counterfeiting, with members including Coca Cola, Daimler Chrysler, Pfizer, Proctor and Gamble, American Tobacco, Phillip Morris, Swiss Watch, Nike, and Canon (Sell, 2008). Despite refusing to publicly release interim versions of the agreement, the US is known to

have made the document available to at least 40 'cleared advisors', representing corporate interests in the media, entertainment and pharmaceutical industries (McManis, 2009). This configuration is consistent with Keohane and Nye's "pluralistic and penetrated" states (Keohane and Nye 1998) and Castells' "network state" (Castells, 2000). Large corporations have immense power, but the exercise of power must at times be channeled through states – corporation cannot (yet) negotiate international treaties. Nevertheless, one of the main arguments against early drafts of ACTA was the extent to which it made public bodies – specifically border agencies and the criminal justice system – enforcers of private interests.

The creation of a new negotiating body outside of existing forums, particularly the World Intellectual Property Office (WIPO) and the World Trade Organisation (WTO), is also significant, and has opened the ACTA process to allegations of 'forum shifting'. Canadian officials suggested in 2009 that ACTA is being negotiated separately because the presence of developing countries in the WTO has led to a "development agenda" gaining traction there (Geist, 2009). The EU has also stated that "the membership and priorities of those organizations simply are not the most conducive to this kind of path breaking project" (European Commission, 2009).

In the same document, the EU responds to criticism of the non-representative negotiations by stating vaguely that no other country will be required to join ACTA, but it is hoped many will join voluntarily. Given that the negotiating countries represent about 70% of global trade (Syam, 2010), this seems unlikely. The EFF also reminds us that

"The last 10 bilateral free trade agreements entered into by the United States have required trading partners to adopt intellectual property enforcement obligations that are above those in TRIPs. Even though developing countries are not party to the ACTA

negotiations, it is likely that accession to, and implementation of, ACTA by developing countries will be a condition imposed in future free trade agreements”

(Electronic Frontier Foundation, 2010)

Negotiations take place within the networked global system of financial and trade flows, and their form and possibilities are structured by the conventions of international law. Castells explains the four forms of power in networks at this superstructural level, but they are a useful as an analytical device at the level of the negotiations themselves.

The **negotiating parties** represent states, institutions and corporate actors, - not an absence of states, instead, Keohane & Nye's “pluralistic and penetrated” states.

- Membership in the network of ACTA negotiating parties constitutes “networking power” (Castells, 2009, locations 929-38) – the power of the included over the excluded in global networks. While developing countries may eventually become part of the agreement, they will join at a disadvantage.
- Government, industry and institutions in coerced into ratifying ACTA through future bilateral treaties will become subjects of the “network power” of the IP standards set in negotiations from which they were excluded.
- Yujuico (2010) notes that the way ACTA has been negotiated by the United States represents a strategy not just of forum shifting but forum creation. In Castells' terms (Castells, 2009, locations 982-88), this is an exercise of “network-making power” in which the United States, Japan, the EU and powerful corporate interests have “programmed” (Castells, 2009, locations 982-88) a network to achieve specific goals.

- This has potentially devastating consequences for WIPO's nascent development agenda, as powerful countries shift their negotiating efforts away from a body they can now afford to work around (Geist, 2009).

The **resistance**, too, is networked, relying on existing activist networks to mobilise against perceived threats in both the process and content of the agreement. The major utility of communications networks lies in reinforcing existing “weak ties” (Diani, 2000), both within and between movement networks. In the case of global IP, at least three types of networks were mobilised against ACTA:

- In the US, Canada and the EU, the main concern with the agreement is its incompatibility with existing national law. The resistance in these countries has been mainly (but not solely) framed in terms of individual freedoms and corporate power, particularly in the digital space. Opposition to the US Digital Millennium Copyright Act (DCMA) and similar pieces of legislation, as well as public exposure to subsequent court cases, provided a familiar frame for the ACTA debate.
- Global IP rights (IPR) activists aligned with the development agenda have concerns related to both the process and content of ACTA. The first is unsurprising given the intentional exclusion from negotiations of both developing countries and public interest groups. The latter concern frames ACTA as an extension of the TRIPS process, with proponents attempting to overturn some of the provisions of TRIPS favoured by the development agenda. For this group, ACTA is simply “the latest gimmick in a long line of IP gimmicks” (Yujuico, 2010).

- Specific issue-based movement networks, also aligned with a global IPR development agenda, have also responded. In particular, the treatment access movement has spoken out against potential restrictions on the production of generic drugs. Countries with high numbers of HIV infections, such as South Africa, India, Brazil, and Thailand, have attracted the ire of strong IP proponents by using provisions in TRIPS to provide emergency licenses for the manufacture or import of generic antiretroviral drugs.

In the resistance, the exercise of “network-making power” happens through “switching” existing networks together, to operate in a mutually reinforcing way, and “programming” the new network with a shared ideology of resistance. Apart from indirect exercise through legal enforcement, the resistance networks have no access to “coercive power”, operating nearly exclusively through “persuasive power” (Castells, 2009, location 1112) .

Finally, the **perceived threat** that provides the stated rationale for the negotiations – the danger of counterfeiting - is rooted in real or invented links between counterfeiting operations and underworld networks funding terrorism and organised crime. Along with WIPO, INTERPOL hosted the first meeting of the ACTA negotiating countries (Sell, 2008). INTERPOL operations in South America have linked the production and sale of counterfeit goods to Middle Eastern and Chinese syndicates, as well as, in one instance, directly to Hezbollah, whose leader sent a personal thank-you note (McManis, 2009).

There are two problems with this rationale. First, there is no disagreement that links that exist between networks of counterfeit manufacturing and distribution and networks of organised crime. The proposed enforcement strategy of legal process and border controls is no more likely to succeed against the counterfeiting operations of these networks than it has against their

involvement in the global drug trade, or any other activity of the global underground. As both Hagendorn (2005) and Castells (1998) recognize, organized criminal networks are flexible and decentralised, both deeply interconnected with formal institutions and institutionalized in themselves. They are also global in reach, and national borders are porous barriers, easily penetrated.

Secondly, the benefits of the proposed laws accrue not to the public in the form of reduced exposure to harm, but to private companies protecting their brand. There are unacknowledged linkages between legal and illegal distribution networks that belie the framing of such networks as illegitimate and a threat to legitimate business (Liang, 2005). Microsoft, for example, is known not to act against pirated copies of its software until market penetration in a particular country has reached high enough levels to create an irreversible dependency on Microsoft products. Piracy “produces 'network effects', which means that with every added user, whether legal or not, the popularity of a product increases” (Liang, Mazmdar & Suresh, 2005).

Cultural materials of the struggle over global IP

According to Castells (2009, locations 1004-10), the “ideas, visions, projects and frames” of networks are the “cultural materials” that generate the programs through which network-making power operates. The public struggle between ACTA's networked proponents and global IPR resistance networks exposes the cultural materials deployed in the exercise of network-making power.

Issues of copyright, counterfeiting and patent enforcement across international borders arise because of rapid and disjunctive advances in networked communications. This has necessitated the development of new legal and trade frameworks. For the proponents of ACTA, IP rights are fundamentally continuous, and protection of those rights entails maintaining them in

advantageous terms in new digital formats, and extending their reach in globalized distribution networks. The argument for strong IP is made on incentivizing innovation and rewarding authorship of creative works. During the ACTA meetings, negotiators have repeatedly referred to estimates of the economic losses that arise from piracy and counterfeiting. Such losses, it is implied, create a duty for states to protect their industries, and ultimately their citizens, who will suffer indirectly through lost tax revenues. Both the economic loss estimates and the link between innovation and strong IP have been challenged. For economic loss estimates see Story et al (2006), and even a skeptical report from the US Government Accountability Office (GAO 2010). For innovation/IP links, see Lessig (2006), Von Hippel (2005), Boyle (2008). Nevertheless, the strong IP agenda has enjoyed immense success to date – Boyle (2008, p. 236) notes that “for the last fifty years, whenever there has been a change in the law, it has almost always been to expand intellectual property rights.”

In the frame of the global IPR resistance, the disjunctive nature of new communication technologies demands a disjunctive response. Boyle (2008) compares this to the paradigm shift achieved by the environmental movement, which forced into public consciousness the potential for irreversible environmental damage. Disjunctive does not necessarily mean radical - Benkler (2006), for example, provides an outline of a moderate 'development agenda' for global IPR, based on the concept of distributive justice. His analysis begins with the point on which the negotiators of ACTA and the resistance to it most clearly depart: what proportion of resources should be distributed so as to ensure a minimum level of well-being in a society? Taking well-being as proposed in Sen's dimensional capability approach, Benkler proposes that access to medicine and agricultural materials, access to scientific knowledge and educational resources,

and the possibility of economic growth through innovation should be the main concerns of the global IP rights movement.

There are other more radical points of view in the global IPR debate. Liang (2005) notes that the development agenda ignores agency on the part of the citizens of the developing world, and quotes Jeremy Rifkin asserting that no matter what the laws, they will fail unless the distribution networks they allow match the demands of individuals. As Yu (2010) points out, the inability of the ACTA negotiators to negotiate an agreement on unauthorized distribution of content online without the agreement itself being leaked is in itself ironic. Story et al (2006) argue against the privatization of the public domain in the south as an imposition of “Western/Northern assumptions about cultural production” that by extension do not hold. They also take up Benkler's call for open knowledge resources, particularly textbooks and scholarly journals, as a development imperative.

Discursive Opportunities

Theories of opportunity structures consider the role of the political system in mobilisation, as well as broader societal factors that affect the relationship between social movements and their environment. Mayer and Staggenborg (1996, p. 1663) describe the opportunity structures perspective as the acknowledgement that “movement development, tactics and impact are profoundly affected by a shifting constellation of factors exogenous to the movement itself”. Although the political system of a state or city is most commonly discussed, factors such as the presence and mobilisation potential of elites, sympathies of the electorate and the accessibility of global spaces of mobilisation are also important sources of movement opportunities and constraints (Ayers, 1999). Schurman (2004), for example, uses a case study of the anti-

biotechnology movement to propose a theory of industry opportunity structures that responds to the emergence of movements whose main adversary is an industry rather than a state.

Just as the opportunity structure of a nation's political system determines the form and tactics of movements that arise within it, discursive opportunities provide a structure through which networks develop and reinforce the “ideas, visions, projects and frames” that comprise the network's cultural materials. In the ACTA case, the first example of this is in the name of the agreement. Described by Wikileaks founder Julian Assange as a “Trojan horse trade agreement” (Assange, 2010), ACTA did not arise primarily from concerns over counterfeiting. Instead, it is an agreement on digital IP intended to protect the interests of the media and entertainment industries. The intentional misrepresentation of ACTA as a counterfeiting treaty, justified by alleged links between counterfeiters and terrorist groups, exploits a familiar national security discourse. This is certainly more appealing to the “file-sharing-loving public” (Yu, 2010, p. 21) than an accurate description of the agreements' content, which would unavoidably suggest restrictions to their digital freedom. Even once the details emerged, a leaked EU negotiating document reveals the negotiators' careful manipulation of messages about the intent of the digital rights provisions. To account for differences in culture and values between the EU and the US, the document notes that “it is politically very important to emphasize balance and fairness, to mention culture and individual creators and not only industry”(Kravets, 2009).

In the resistance to ACTA, the moderate frame on global IP rights has predominated. Far from being incidental, this is a pragmatic response to the embeddedness of the ACTA networks within the global superstructure – the global capitalist system, including trade flows, and the international legal system. Most importantly, however, the veil of secrecy surrounding the negotiations has allowed the resistance to challenge the agreement on procedural as well as

substantial grounds (Yu, 2010). This frame exploits another discursive opportunity, namely the imperative of transparent governance. Several of the leaked early versions of the ACTA text were made available online by Wikileaks, an organisation dedicated to publishing leaked documents obtained by whistleblowers. In this example, a network formed by 'switching' distinct discourses together to form a shared base of cultural materials.

On the side of the negotiators, repeated leaks of draft negotiation documents may in fact be a strategic adaption to another discursive opportunity, in the form of the rise of "mass self-communication" (Castells 2009 16-74). As is usual with technical policy news, mainstream media reporting about the agreement has been extremely limited. Online discussion is dominated by mass self-communication from technical and legal experts in the resistance networks, alongside terse press releases from the negotiating teams. To illustrate this, Appendix A includes an "issue network" map (Issuecrawler.net, 2008) produced by iteratively crawling Internet hyperlinks in and out of sites that talk about ACTA. The network includes sites linked to the negotiating parties (US agencies, the MIAA and the RIAA) and to the resistance (the EFF, publicknowledge.org, creativecommons.org), but these are nearly eclipsed by Twitter, Youtube, Facebook, and related services, as well of the personal blogs of well-known IP reformist academics Michael Geist and Lawrence Lessig.

Could negotiating parties have leaked certain parts of the documents at particular times to mobilise the resistance in against opponents' negotiating positions? There certainly seems to have been an attempt to minimize leaks, with Geist (2009) reporting that countries other than the US were given physical, watermarked copies of drafts rather than digital versions. Yu (2010), notes that transparency could in itself have been a bargaining chip, with the US vetoing release of the agreement unless its proposals were included. At the same time, given the scale of both the

substantial misrepresentation and procedural unfairness involved, the resistance to ACTA stood to gain significantly from the leaks.

Conclusion

ACTA is the latest in a series of initiatives aiming to legislate and enforce strong IP at global scale. The states negotiating the treaty are networked with powerful industrial players, particularly in the entertainment industries, and maintain coercive power as well as the ability to 'program' the global negotiating network, and switch away from less favorable forums. The resistance to ACTA has mobilised multiple interconnected networks - 'switching' together, in Castells' terms - and relying on persuasive power and legal challenges to resist a treaty they believe is both substantively and procedurally unfair.

Neither ACTA nor the alternatives proposed by the resistance seems likely to challenge the agile networked threat of organised crime and terrorist activity. In fact, the threat of terrorist-linked counterfeiting networks is retained primarily for its discursive usefulness, as part of the cultural materials of the ACTA negotiators. Leaks, frame selection and (mis)framing, and the potential for switching together of related discourses conform to Mayer and Staggenbourg's definition of opportunity structures, existing as "a shifting constellation of factors exogenous to the movement itself" affecting the "development, tactics and impact" not only of social movement networks, but with all networks through which cultural materials are produced, reproduced and deployed.

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Appendix A: The Issue Network for ACTA

- Crawler software: IssueCrawler (<http://www.issuecrawler.net>)
- Date: 25 Oct 2010
- Settings: Crawl depth = 2, Iterations = 2, Privilege starting points = false
- Starting points: Top 50 results in a Google search for 'anti-counterfeiting trade agreement'

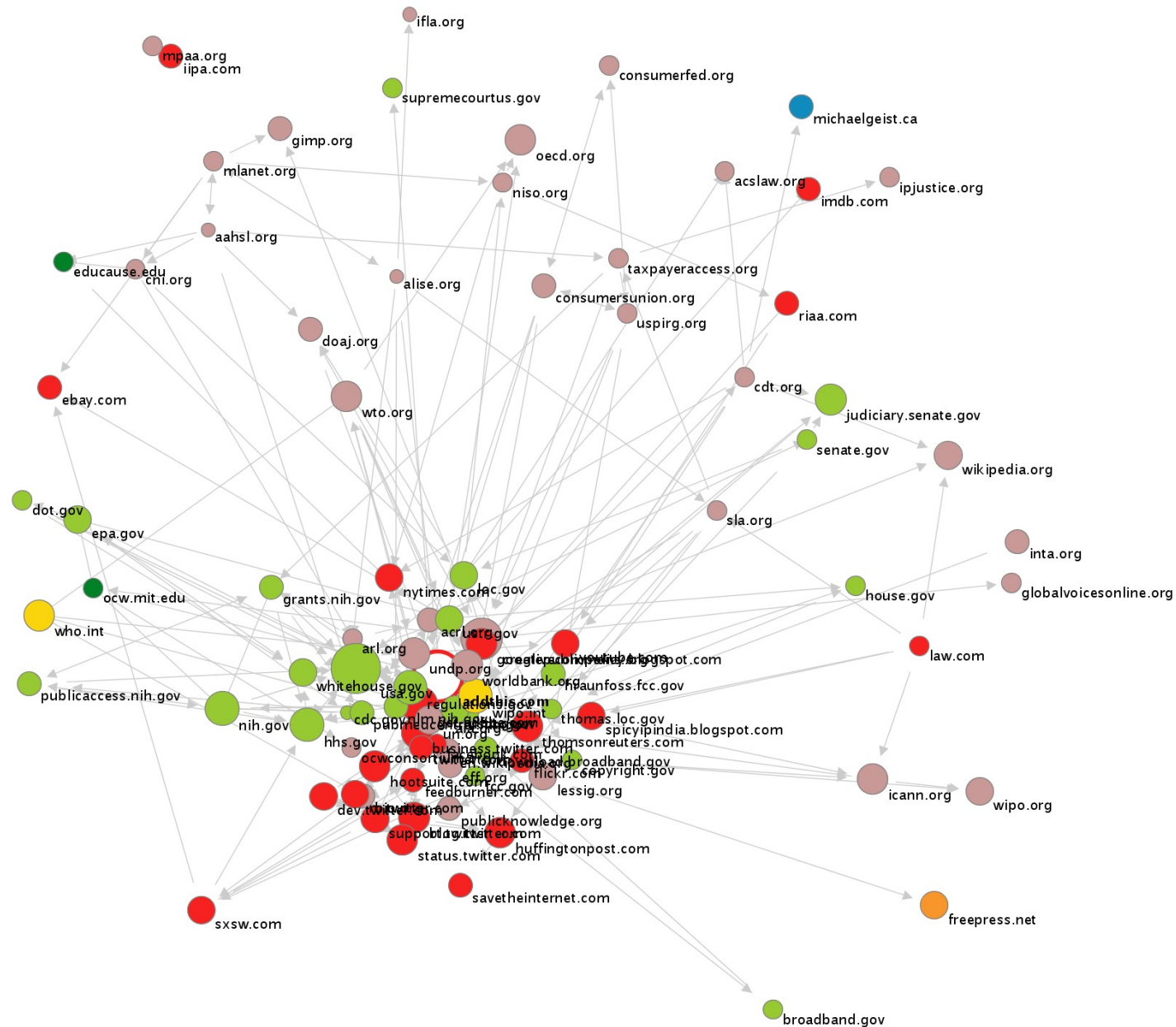
For other examples of research using issue networks, see IssueCrawler.net 2008, Gillan (2008), Ackland et al (2006), Loudon (2010).

Top sites by inlinks

<i>Rank</i>	<i>URL</i>	<i>Inlinks</i>
1	usa.gov	31
2	twitter.com	21
3	loc.gov	19
4	whitehouse.gov	18
5	addthis.com	17
6	creativecommons.org	15
7	hhs.gov	14
8	nih.gov	14
9	thomas.loc.gov	14
10	get.adobe.com	14
11	ala.org	13
12	youtube.com	13
13	nlm.nih.gov	13
14	uspto.gov	12
15	arl.org	12
16	facebook.com	11
17	status.twitter.com	11
18	business.twitter.com	11
19	blog.twitter.com	11
20	fcc.gov	11
21	copyright.gov	10
22	senate.gov	10
23	thomsonreuters.com	9
24	support.twitter.com	9
25	publicaccess.nih.gov	9
26	house.gov	9

27	supremecourtus.gov	9
28	eff.org	8
29	dev.twitter.com	8
30	pubmedcentral.nih.gov	8
31	un.org	8
32	cdc.gov	8
33	ustr.gov	8
34	regulations.gov	8
35	wto.org	8
36	dot.gov	8
37	icann.org	8
38	publicknowledge.org	7
39	lessig.org	7
40	m.twitter.com	7
41	wipo.int	7
42	huffingtonpost.com	7
43	epa.gov	7
44	who.int	7
45	educase.edu	7
46	broadband.gov	7
47	judiciary.senate.gov	7
48	freepress.net	7
49	worldbank.org	7
50	sxsw.com	7
51	sla.org	7
52	flickr.com	6
53	googlepublicpolicy.blogspot.com	6
54	savetheinternet.com	6
55	ocwconsortium.org	6
56	hootsuite.com	6
57	ftc.gov	6
58	undp.org	6
59	ifla.org	6
60	mlanet.org	6
61	taxpayeraccess.org	6
62	consumersunion.org	6
63	nytimes.com	5
64	spicyipindia.blogspot.com	5
65	download.broadband.gov	5
66	oecd.org	5
67	cdt.org	5
68	cni.org	5
69	riaa.com	5
70	consumerfed.org	5
71	wikipedia.org	5

72	aahsl.org	5
73	niso.org	5
74	wipo.org	5
75	hraunfoss.fcc.gov	4
76	en.wikipedia.org	4
77	feedburner.com	4
78	bio.org	4
79	law.com	4
80	michaelgeist.ca	4
81	uspirg.org	4
82	ocw.mit.edu	4
83	mpaa.org	4
84	inta.org	4
85	alise.org	4
86	gimp.org	4
87	doaj.org	4
88	ebay.com	4
89	grants.nih.gov	3
90	acrl.org	3
91	imdb.com	3
92	acslaw.org	3
93	globalvoicesonline.org	3
94	ipjustice.org	3
95	iipa.com	3



ACTA issue network

Co-link Map Details:

Author: Melissa Loudon
 Email: melissa.loudon@gmail.com
 Crawl start: 25 Oct 2010 - 03:34
 Crawl end: 25 Oct 2010 - 06:14
 Privilege starting points: off
 Co-link Analysis Mode: page
 Iterations: 2
 Crawl Depth: 2
 Node count: 95

Map generated from Issuecrawler.net by the Govcom.org Foundation, Amsterdam.

Legend:

● (.org)
 ● (.com)
 ● (.gov)
 ● (.edu)
 ● (.net)
 ● (.ca)
 ● (.int)

Statistics:

addthis.com

Destination URL: <http://www.addthis.com/bookmark.php?v=250&username=webislam>
 Page date stamp: 25 Oct 2010 - 05:24

Links received from crawled population: 8709

Links from network (1 - 20)

1. doaj.org
2. ocw.mit.edu
3. regulations.gov
4. sla.org
5. usa.gov
6. worldbank.org
7. ala.org
8. acrl.org

Links to network: 0