



The Consumer Voice in Europe

Anti-Counterfeiting Trade Agreement (ACTA)

BEUC position

Contact: **Konstantinos Rossoglou – digital@beuc.eu**

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Summary

The European Consumer Organisation calls upon the members of the European Parliament to reject the Anti-Counterfeiting Trade Agreement (ACTA). ACTA fails to provide a balance between the enforcement of Intellectual Property Rights and the fundamental rights of consumers. MEPs should reject ACTA for the following reasons:

- ❖ **Lack of transparency:** full access to the Treaty was officially granted in April of 2010 and only after the conclusion of agreement, while access to the accompanying documents remains restricted.
- ❖ **Lack of accountability:** ACTA has been negotiated outside existing international organisations and multilateral fora.
- ❖ **Lack of public support:** The failure to distinguish between organised criminal entities and individuals engaged in file-sharing for personal use creates not only a problem of proportionality, but also raises issues of ethics and risks eroding public support for IPR in general.
- ❖ **Lack of balance:** ACTA shifts the balance between the need for effective enforcement and the fundamental rights of users in favour of rights holders.
- ❖ **Lack of compliance with the EU acquis:** there are a number of provisions which raise doubts as to their compatibility with EU law:
 - **Provisional measures:** ACTA does not adhere to the procedural safeguards introduced in Directive 2004/48 on Enforcement of Intellectual Property Rights, namely: the right of the defendant to request a review of the decision; the possibility for the provisional measures to be revoked and the right of the defendant to be heard.
 - **Damages:** The criteria established by ACTA for the quantification of compensatory damages do not match the criterion of “appropriateness of the damages to the actual prejudice suffered” as introduced in Directive 2004/48.
 - **Criminal sanctions:** Criminal sanctions for IPR infringements have not been harmonised at EU level.
 - **Scope of criminal sanctions:** The definition of commercial scale is very broad and includes at least those acts carried out as commercial activities for direct or indirect economic advantage and also acts which aid or abet copyright infringements. There is no definition of indirect economic advantage or what to aid and abet means.
 - **Fundamental rights:** ACTA fails to guarantee the fundamental right to due process and the right to the presumption of innocence.
 - **Disclosure of subscribers’ personal data:** ACTA requires the disclosure of personal data of alleged subscribers, thus going beyond the scope of Article 8 of Directive 2004/48 on Enforcement of Intellectual Property Rights.
- ❖ **Lack of compliance with 2003 inter-institutional agreement:** According to the 2003 Inter-Institutional Agreement on better law-making, the European Commission is precluded from supporting self and co-regulatory mechanisms where fundamental rights are at stake. However, Article 27 of ACTA requires the signatory parties to promote cooperation within the business community to effectively address IPR infringements.

The European Consumer Organisation (BEUC) strongly believes that the Anti-Counterfeiting Trade Agreement (ACTA) has failed to strike an appropriate balance between IPR holders and the rights of consumers and the public in general. The objective of ACTA is to further strengthen enforcement of Intellectual Property Rights without any assessment of the impact on consumers' fundamental rights and freedoms, on innovation and access to knowledge.

BEUC calls upon the European Parliament to take a strong stance and reject ACTA on the grounds that it fails to meet European standards of transparency, good governance and does not comply with the EU *acquis* in the field of Intellectual Property Rights. Furthermore, the adoption of ACTA risks eroding public support for IPR in general.

Lack of transparency

Despite ACTA negotiations being launched in 2006, full access to the Treaty was only officially granted in April 2010 and only after the agreement was concluded. Under pressure from civil society and Members of the European Parliament, the European Commission organised roundtable sessions with stakeholders during which no information on the detailed provisions was given; European Commission officials only provided general comments as to the objectives and general thrust of negotiations. Nevertheless, as with every legal text, thorough analysis and examination of the specific provisions is needed before a safe conclusion as to the impact of ACTA can be made. In addition, the European Commission has not provided access to the accompanying documents which are normally used as the basis for interpretation of provisions.

Lack of accountability

ACTA has been negotiated outside existing international organisations and multilateral fora. As admitted by the European Commission, the EU and its negotiating partners decided to bypass the World Intellectual Property Organization and the World Trade Organization due to reluctance by developing countries to agree on the further strengthening of enforcement measures without any discussion on substantive IPR law. In addition, ACTA provides for the creation of a Committee which will be responsible for the implementation and possible amendment of ACTA without any public accountability.

Lack of public support

The approach adopted by the European Commission and its partners *vis-à-vis* IPR enforcement has resulted in an erosion of public support for Intellectual Property Rights in general. The failure to distinguish between organised criminal entities and individuals engaging in file-sharing for personal use creates not only a problem of proportionality, but also raises a question of ethics. Coordinated action against ACTA across the EU's 27 Member States

clearly demonstrates that the focus of EU policies should be on restoring balance in IPR law, to the benefit of both creators and the general public.

Lack of balance

ACTA shifts the balance between the need for effective enforcement and the fundamental rights of users in favour of right holders. The study commissioned by the International Trade Committee of the European Parliament concludes that ACTA is significantly more stringent and rightholder-friendly than existing laws.

Lack of compliance with the EU *acquis*

The European Commission has repeatedly stressed that ACTA does not go beyond the current EU *acquis* and that no change to EU laws would be required. The study commissioned by the INTA Committee of the European Parliament has concluded that ACTA in some cases provides a degree of protection which appears to go beyond the limits of EU law¹. In particular, there are a number of provisions which raise doubts as to their compatibility with EU law.

- **Provisional measures:** Article 12 of ACTA provides for an obligation of judicial authorities to apply provisional measures *inaudita altera parte*. However, ACTA does not foresee the procedural safeguards which have been introduced in Directive 2004/48 on Enforcement of Intellectual Property Rights, namely: the right of the defendant to request a review of the decision; the possibility for the provisional measures to be revoked if the applicant does not institute proceedings leading to a decision on the merits of the case within a reasonable period of time; the right for the defendant to be heard. According to the case law of the European Court of Justice, these provisions of Directive 2004/48 on Enforcement of Intellectual Property Rights are “crucial to ensure that a balance is maintained between the competing rights and obligations of the right holder and the defendant”². As regards the right to be heard, both the European Court of Justice and the European Court of Human Rights have ruled that “any restriction on the exercise of the right to be heard must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency”.³
- **Damages:** The criteria established by ACTA for the quantification of compensatory damages do not match the criterion of “appropriateness of the damages to the actual prejudice suffered” as introduced in Directive 2004/48. In particular, “the value of the infringed good or service, measured by the market price, or the suggested retail price” does not

¹ <http://www.laquadrature.net/files/INTA%20-%20ACTA%20assessment.pdf>

² ECJ case C-89/99 Schieving-Nijstad vof and Others v. Groeneveld

³ ECJ Case 341/04? (2006) ECR I-3813 para.66- Eurofood

appear in EU law and does not reflect the actual economic loss suffered by the rights holder.

Suggested retail price damage is higher than actual prejudice.

For example, software may include multiple patents from multiple rights holders. However, the first rights holder who goes to court can get damages based on the suggested retail price, despite the fact that he only has a right to one component.

As regards copyright, it is almost impossible to quantify the actual economic loss, if any, from file sharing. An increasing number of studies clearly demonstrate the long-term positive economic impact of file sharing for both the content industries and the public's access to knowledge from file-sharing:

- The study by the IvIR Institute for Information Law of the University of Amsterdam on behalf of the Dutch Ministry of the Economy concluded "file sharing has, in fact, created a net benefit to the economy and society...the direct impact on sales of file sharing is minimal"⁴.
- The study by the Canadian Government demonstrated that those who file share spend the most money on legal content⁵.
- The Advisory Committee on Enforcement of the World Intellectual Property Organization has commissioned a study, according to which estimated revenue losses by software producers are "bound to be overestimated"⁶.
- According to the report of the US Congress Government Accountability Office⁷, the estimates previously circulated regarding the economic impact of counterfeiting and piracy were erroneous.

The Advocate General of the European Court of Justice in the *Promusicae* case⁸ stated "*it is not certain that private file sharing when it takes place without any intention to make a profit, threatens the protection of copyright sufficiently seriously.... To what extent private file sharing causes genuine damage is in fact disputed*".

⁴ http://www.ivir.nl/publications/vaneijk/Communications&Strategies_2010.pdf

⁵ The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/eng/h_ip01456.html .

⁶ <http://keionline.org/node/681>

⁷ <http://www.gao.gov/new.items/d10423.pdf>

⁸ <http://curia.europa.eu/juris/celex.jsf?celex=62006CC0275&lang1=en&type=NOT&ancre=>

- **Criminal sanctions:** Criminal sanctions for IPR infringements have not been harmonised at EU level. A legislative proposal put forward by the European Commission in 2005 was struck down. ACTA is therefore outside the remit of EU law and would require additional legislation at EU level. As regards EU competence to negotiate IP criminal sanctions in trade agreements, it must respect article 83.2 TFEU, which requires the criminal measures to be essential. However, this proof has not been provided by the European Commission.
- **Scope of criminal sanctions:** Article 23.1 limits criminal sanctions to infringements committed on a commercial scale. However, the definition of commercial scale is very broad and includes at least those acts carried out as commercial activities for direct or indirect economic or commercial advantage and also acts which aid or abet IPR infringements. There is no definition of what 'indirect economic advantage' and what aiding and abetting means. In practice this would mean that when an individual posts a copyright-protected image on their website without seeking authorisation and a significant number of people visit the website and reproduce the image, they would be considered to have had economic advantage by not paying for the image and his internet provider aided and abetted the infringement by not taking action. According to ACTA both the individual and the internet provider would be considered criminals. Furthermore, ACTA introduces a definition of 'commercial scale' which does not appear in the current EU *acquis*.
- **Fundamental rights:** Article 1.3a of Directive 2009/140 amending the electronic communication networks⁹ explicitly requires compliance of enforcement measures with users' fundamental rights, including the right to due process and the right to a presumption of innocence. However, ACTA provisions put these fundamental rights at risk.
 - **Due process:** Article 27.2 of ACTA introduces the notion of "fair process" when defining safeguards against which enforcement measures in the digital environment need to be assessed. The notion of 'fair process' has no standing at all under EU law. Fair process is not the same as 'due process', which is a fundamental right under the European Charter of Fundamental Rights and is clearly stated in the recently revised Telecom Package (Article 1.3a of Directive 2009/140). The European Court of Justice has explicitly reaffirmed the principle of effective judicial protection as a general principle of Community law¹⁰. The need to respect this principle becomes even more important in the context of IPR enforcement cases, which often involve complex legal analysis, making it

⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:0069:EN:PDF>

¹⁰ ECJ, 13 March 2007, Case C-432/05, UNIBET

impossible to ascertain *prima facie* the infringing character of copyright protected content.

- **Presumption of innocence:** Article 27.4 of ACTA requires online service providers to disclose information about the alleged infringer upon notice by the rights holder. However, there is no clear definition of what an “alleged” infringement is, thus raising the risk of rights holders abusing the notice system and failing to provide robust evidence of an actual infringement.
- **Disclosure of subscribers’ personal data:** Article 27.4 of ACTA provides for the right of information, requiring competent authorities to order disclosure of the personal data of subscribers, facilitating their identification. This provision goes beyond the scope of Article 8 of Directive 2004/48 on Enforcement of Intellectual Property Rights in covering both alleged infringers and actual infringers, whereas Article 8 only refers to infringers. Furthermore, EU law requires the claim for disclosure to be justified and proportionate. However, these safeguards do not appear in ACTA.
- **Lack of compliance with 2003 inter-institutional agreement:** According to the 2003 Inter-Institutional Agreement on better law-making¹¹, the European Commission is precluded from supporting self and co-regulatory mechanisms where fundamental rights are at stake. However, Article 27 of ACTA requires the signatory parties to promote cooperative efforts within the business community to effectively address IPR infringements.

END

¹¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:321:0001:0001:EN:PDF>