

C.7



EUROPEAN COMMISSION
Directorate-General for Trade

Brussels, 27.03.2009
Ref. 214/09

[Limited]

ACTA NEGOTIATIONS

Purpose: For information.

Attached: ACTA negotiating documents – EU Comments

Please find enclosed for information the final versions of the following documents, which, as agreed, will be distributed to our ACTA partners on 27 March 2009:

- EU comments on the non-paper on **Internet Provisions**, circulated by the US.
- EU comments on **The Draft Anti-Counterfeiting Trade Agreement - Paper for Public Release**, of 3 March 2009. As proposed by Canada and supported by other parties, the Commission will request that the final version of the "transparency paper" be agreed among all partners by **6 April 2009**, so that it can be promptly made available to the public.

These final versions take into account the latest comments provided by several MS.

As agreed among ACTA participants, the negotiating papers are not public documents and therefore should be treated with reserve.

EUROPEAN UNION'S COMMENTS

27 MARCH 2009

The Draft Anti-Counterfeiting Trade Agreement - Paper for Public Release

Swiss-Canadian proposal *draft: 3 March 2009*

Background

In recent years, the proliferation of counterfeit and pirated goods in international trade has been growing. These illegal activities cause significant financial losses for the rights owners and original producers. They also hinder sustainable economic development in both industrial and developing countries and often risk the security and health of consumers everywhere.

Expertise, innovation, quality and creativity are the main factors for success in knowledge-based economies. Adequate protection and enforcement of intellectual property rights is a key condition for nurturing those factors. However, it has become increasingly difficult to address this global problem multilaterally. ~~the issue of enforcement in the existing multilateral fora such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO).~~ In 2006, Japan and the USA launched the idea of a new plurilateral treaty to fight against counterfeiting and piracy, the so-called Anti-Counterfeiting Trade Agreement (ACTA). The aim of the initiative was to bring together those countries, both developed and developing, which are interested in fighting counterfeiting and piracy, and to negotiate an agreement that enhances international co-operation and contains effective international standards for enforcing intellectual property rights.

Preliminary talks about such an anti-counterfeiting trade agreement took place throughout 2006 and 2007 among a core group of interested parties (Canada, the European Commission, Japan, Switzerland and the United States). Negotiations started in June 2008 with the participation of a broader group of countries (Australia, Canada, the European Union and its 27 member states, Japan, [REDACTED], Mexico, Morocco, New Zealand, Singapore, South Korea, Switzerland, [REDACTED], [REDACTED] and the United States). The negotiations will continue during 2009.

Different groups have shown their interest in getting more information on what exactly is under discussion and requested that the draft text be disclosed. However, it is common practice during trade negotiations among sovereign states to not share negotiating texts with the public at large, or with specific interest groups. At this point in time, delegations are still discussing various proposals for the different elements. A comprehensive draft text of the whole draft agreement does not yet exist.

This paper is intended to clarify the objectives of the proposed treaty and to summarize contents under discussion. It gives an overview of the elements suggested under the different headings and highlights the main issues.

It is important to note that discussions are ongoing; new issues might come up and other issues may finally not be included in the agreement. This document does not prejudice of the final structure and content of the agreement, which may differ from the ones discussed at the current stage of negotiations and described below.

Objective of the ACTA

The ACTA initiative aims to define effective international standards for enforcing intellectual property rights in order to more efficiently fight the growing problem of counterfeiting and piracy. In particular, the ACTA will establish, among the negotiating countries, an agreed standard for the enforcement of intellectual property rights that addresses today's challenges, in terms of increasing international cooperation, strengthening the framework of practices that contribute to effective enforcement of intellectual property rights and relevant enforcement measures. It does not aim to unnecessarily interfere with ordinary citizens' enjoyment of creative and innovative products, but rather to tackle commercial-scale intellectual-property-rights infringement activities, including those that imply the involvement of organized criminal groups. ACTA will fully respect fundamental rights, freedoms and civil liberties, such as national rules on the treatment of personal data.

Furthermore, ACTA will be negotiated and implemented in a manner that is consistent and respectful of the WTO Trade-Related Aspects of Intellectual Property Rights Agreement (WTO/TRIPS Agreement) rules and the Doha Declaration commitments on issues of public health.

ACTA Structure and Content

ACTA aims to build on existing international rules in the area of intellectual property, in particular, the ~~WTO Trade-Related Aspects of Intellectual Property Rights Agreement~~ (WTO/TRIPS Agreement) and will address a number of enforcement issues where the countries involved have identified that internationally agreed standards do not exist or are considered insufficient. The draft structure of the agreement as discussed at this stage is the following:

CHAPTER ONE

INITIAL PROVISIONS AND DEFINITIONS

This chapter will focus on clarifying cross-cutting issues that arise throughout the agreement, such as the need for a possible definition of "~~counterfeiting-trade-mark-goods~~" and "~~piratcyed copyright-goods~~". The chapter may also include interpretive principles.

CHAPTER TWO

LEGAL FRAMEWORK FOR ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Section 1: Civil Enforcement

Civil enforcement refers to providing courts or other competent authorities the ability to take specific actions when an intellectual property right owner complains that another party has infringed intellectual property rights, and to the rules around using those powers. The issues under discussion in this section include:

- scope of the section – which intellectual property rights will be covered by the provisions of this section (trade-marks, copyright, patents, designs, geographical indications, etc.);
- the conditions for judicial authorities to obtain certain information related to the infringement, for the purpose of collecting evidence;
- the definition of adequate damages and the question of how to determine the amount of damages, particularly when right holders encounter difficulties in calculating the exact amount of damage they have incurred;
- the destruction of goods that have been found to be infringing an intellectual property right;
- under what conditions and to what extent materials and implements that have been used in the manufacture or creation shall be destroyed or disposed of outside the channels of commerce;
- provisional measures, such as the authority for judicial authorities to order, in some circumstances, the seizure of goods, materials or documentary evidence without necessarily hearing both parties; injunctions against infringers and intermediaries; and
- the reimbursement of reasonable legal fees and costs.

Section 2: Border Measures

Border measures define the actions that customs authorities will be able to take to prevent goods that infringe intellectual property rights from crossing the borders. It also describes the procedures that must accompany these actions. Elements under discussion in this section include:

- scope of the section – which intellectual property rights will be covered, and whether border measures shall only apply to importations or shall equally apply to exports and the transit of goods.
- *de minimis* exception, excluding the personal baggage of travelers from the scope of the section;

- procedures for right holders to request customs authorities to suspend import, and possibly export and trans-shipment of goods suspected to infringe intellectual property rights at the border;
- authority for customs to initiate such suspension *ex officio* (on their own initiative, without a request from the rights holder);
- procedures to determine whether the suspended goods infringe intellectual property rights;
- measures to ensure that infringing goods are not released into free circulation without the right holder's permission; possible exceptions;
- the forfeiture and destruction of goods that have been determined to infringe intellectual property rights; possible exceptions;
- liability for storage and destruction fees;
- capacity of competent authorities to require right holders to provide a reasonable security or equivalent assurance sufficient to protect the defendant and to prevent abuse, and
- authority to disclose key information about infringing shipments to right holders.

Section 3: Criminal Enforcement

Some commercial-scale intellectual property rights infringements are serious enough to be addressed in the criminal justice system. This section determines the cases for which Parties shall provide for criminal procedures and penalties. Issues being discussed under this heading include:

- scope of the section – which intellectual property rights should be covered by the section;
- the definition of commercial scale;
- in which cases the relevant authorities shall be empowered to act and initiate legal proceedings on their own initiative (*ex officio*) with respect to infringements of intellectual property rights;
- the authority to order searches and/or seizure of goods suspected of infringing intellectual property rights, materials and implements used in the infringement, documentary evidence, and assets derived from or obtained through the infringing activity;
- the authority of judicial authorities to order the forfeiture and destruction of the infringing goods;
- the authority of judicial authorities to order the forfeiture of the assets derived from or obtained, directly or indirectly, through the infringing activity;

- the authority of judicial authorities to order forfeiture and/or destruction of materials and implements that have been used in the production of the infringing goods; and
- criminal procedures and penalties in cases of trafficking of counterfeit labels.

Section 4: Special Requirements Related to Rights Management Technology and the Internet

This section of the agreement will address the special challenges that new technologies pose for enforcement of intellectual property rights, including the role of internet service providers in combating copyright piracy. No draft proposal has been tabled yet as discussions still focus on gathering information on the different national legal regimes to explore a common understanding on how to deal best with these issues.

CHAPTER THREE

INTERNATIONAL COOPERATION

Cross-border trade in counterfeit and pirated goods is a growing global problem that often involves organized criminal networks. National governments need to work together to tackle this challenge. The chapter on international cooperation will address the following types of issues:

- the recognition that international enforcement cooperation is vital to realize fully effective protection of intellectual property rights;
- cooperation among the competent authorities of the Parties concerned with enforcement of intellectual property rights, consistent with existing international agreements;
- sharing of relevant information among the Parties in accordance with international rules agreements and national privacy laws;
- exchange of statistical data and information on best practices including those relating to risk analysis, and
- capacity building and technical assistance in improving enforcement, including training for developing country parties to the agreement and for third countries.

CHAPTER FOUR

ENFORCEMENT PRACTICES

Where chapter two will focus on the laws that should be in place to promote better enforcement of intellectual property rights, this chapter will focus on the methods used by

authorities to apply those laws. Areas that the enforcement practices chapter will cover may include:

- the fostering of expertise in the competent authorities in order to ensure effective enforcement of intellectual property rights;
- the collection and analysis of statistical data and other relevant information such as best practices concerning infringement of intellectual property rights;
- internal coordination among competent authorities concerned with enforcement of intellectual property rights, including formal or informal public/private advisory groups;
- measures to allow customs authorities to better identify and target shipments, which are suspected to contain counterfeit or pirated goods;
- the publishing of information on procedures regarding the enforcement of intellectual property rights, and
- promotion of public awareness of the detrimental effects of intellectual property right infringement.

The obligations or recommendations in this chapter for enforcement practices and sharing of information with the public shall take into account and be consistent with existing international agreements and the need to protect investigative techniques, confidential law enforcement information and privacy rights.

CHAPTER FIVE

INSTITUTIONAL ARRANGEMENTS

This chapter will include all the necessary provisions for the institutional set up, including questions such as monitoring the implementation of the agreement, how and when to hold meetings of the Parties, and whether and how to form the secretariat.

CHAPTER SIX

FINAL PROVISIONS

The final provisions of the agreement include details on how the agreement will function, such as how an interested country may become a party to the agreement, how to withdraw from the agreement and how to make changes to the agreement in the future.

Questions and answers:

Q1. (Update) Which parties/countries are currently involved?

A1. Australia, Canada, the European Union including its 27 Member States¹, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States participated in the last meeting.

Q2. Will the ACTA result in border agents routinely searching for downloaded music, movies or videos on the personal electronic devices of individual travellers?

A2. No. The ACTA will not require these searches. The ACTA will include a so-called *de minimis* exception, which will exempt individual travelers carrying personal-use copies from the agreement's border enforcement provisions.

Q3. Will the ACTA create an international police force or other body with the authority to enforce intellectual property rights?

A3. No. Each party to the ACTA will remain responsible for the enforcement of intellectual property rights at and within its borders.

[NOTE: These Qs&As are meant to be added to the existing set of agreed Qs&As. This section will need to be expanded depending on developments and the views of the other delegations.]

¹

Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom