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Committee on Civil Liberties, Justice and Home Affairs

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04.06.2012

OPINION

of the Committee on Civil Liberties, Justice and Home Affairs

for the Committee on International Trade

on the compatibility of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America with the rights enshrined in the Charter of Fundamental Rights of the European Union
(12195/2011 – C7-0027/2012 – 2011/0167(NLE))

Rapporteur: Dimitrios Droutsas

PA_Leg_Consent

The Committee on Civil Liberties, Justice and Home Affairs pursuant to Rule 36(2) of European Parliament Rules of Procedure makes the following observations with respect to the compatibility of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America (ACTA) with the rights enshrined in the Charter of Fundamental Rights of the European Union (the Charter)¹.

General framework

1. Acknowledges that intellectual property rights (IPRs) are important tools for the Union in the 'knowledge economy' and that adequate enforcement of IPRs is key; recalls that infringements of IPRs harm growth, competitiveness and innovation; points out that ACTA does not create new IPRs, but is an enforcement treaty aimed at tackling effectively IPR infringements;
2. Reiterates that Europe needs an international agreement in order to step up the fight against counterfeit products as these products are causing substantial damage every year to European companies, thereby also putting European jobs at risk; notes that in addition, counterfeit products often do not fulfil European safety requirements, posing significant health hazards to consumers;
3. Recalls that the level of transparency of the negotiations as well as many provisions of ACTA itself, have been a cause of controversy that this Parliament has dealt with repeatedly during all stages of the negotiation; underlines that in line with Article 218(10) of the Treaty on the Functioning of the European Union (TFEU) Parliament must be immediately and fully informed at all stages of the procedure; takes the view that adequate transparency has not been ensured throughout the negotiations on ACTA; recognises that efforts to inform Parliament have been undertaken by the Commission¹, but regrets that the requirement of transparency has been construed very narrowly and only as a result of pressure by Parliament and civil society²; emphasises that in line with the Vienna Convention on the Law of Treaties when interpreting a treaty '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion' (Article 32); points out that not all of the preparatory work for ACTA is publicly available;
4. Underlines at the same time, that it is crucial to strike the appropriate balance between enforcement of IPRs and fundamental rights such as freedom of expression, the right to privacy and protection of personal data and confidentiality of communications, the right to due process - notably the presumption of innocence and effective judicial protection³ - and

¹ Takes note of the two opinions of the Parliament Legal Service on ACTA of 5 October 2011 and of 8 December 2011 (<http://lists.act-on-acta.eu/pipermail/hub/attachments/20111219/59f3ebe6/attachment-0010.pdf>).

² See, for example, Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations (OJ C 349 E, 22.12.2010, p. 46) and Parliament declaration of 9 September 2010 on the lack of a transparent process for the Anti-Counterfeiting Trade Agreement (ACTA) and potentially objectionable content (OJ C 308 E, 20.10.2011, p. 88).

³ See also in this sense the Opinion of the European Data Protection Supervisor (EDPS) of 24 April 2012 (<http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-04-24_ACTA_EN.pdf>).

recalls international treaties¹, European law² and the case-law of the Court of Justice of the European Union (CJEU) as regards this fair balance³;

5. In this respect stresses that IPRs are themselves among the fundamental rights protected under Article 17(2) of the Charter and under international agreements⁴;
6. Recalls that a number of internal and external limits on IPRs, such as the prevention of unilateral abuse⁵, contribute to establishing an appropriate balance between the enforcement of IPRs and the fundamental rights and interests of the public;
7. Points out that fundamental rights are, by nature, based on a number of assumptions⁶: they are universal, based on rights relating to the personality and on non-material interests; they are non-transferable and do not cease; they emanate from the person, are innate and are governed by public law; notes, in this regard, that a number of objects protected by IPRs only exhibit some of these characteristics, thus it is necessary to distinguish the use of effective tools to protect such rights, e.g. in the case of life-saving medicines on the one hand or industrial patents to protect designs on the other, from other interests deriving from other fundamental rights such as, for example, protecting human health;
8. Reiterates that the entry into force of the Treaty of Lisbon on 1 December 2009 has fundamentally changed the legal landscape of the Union, which should establish itself increasingly as a community of shared values and principles; recalls that the new, multi-level Union system of fundamental rights protection emanates from multiple sources and is enforced through a variety of mechanisms, including the legally binding Charter, the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the rights based on the Member States' constitutional traditions and their interpretation according to the jurisprudence of the European Court of Human Rights and the CJEU⁷; underlines that this enhanced human rights architecture and high level of protection that the Union is pursuing ('the European model') must be also upheld in its external dimension as the Union must be 'exemplary' in matters of fundamental rights⁸ and should not be perceived as allowing 'fundamental rights laundering';

¹ In this regard, see Article 7(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the preambles to the WIPO (World Intellectual Property Organisation) Copyright Treaty and the WIPO Performances and Phonograms Treaty.

² See recitals 3, 9 and 31 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

³ See in this sense point (d) of the Opinion of European Academics on ACTA (http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_200111_2.pdf); Case C-275/06 Promusicae [2008] ECR I-271 (para 62 to 68), Case C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) (para 44), Case C-360/10, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV (para 42-44), and Case C-461/10 Bonnier Audio AB, Earbooks AB, Norstedts Förlagsgrupp AB, Piratförlaget AB, Storyside AB v Perfect Communication Sweden AB.

⁴ See, for example, Article 27 of the Universal Declaration of Human Rights, Article 15 of the International Covenant on Economic, Social and Cultural Rights.

⁵ See Article 8(2) of the TRIPS Agreement.

⁶ GROSHEIDE, W. Intellectual Property and Human Rights: A Paradox. 1st edition, Cheltenham: Edward Elgar Publishing, 2010 (p328 ISBN 978-1848444478. p21).

⁷ Parliament resolution of 15 December 2010 on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon (P7_TA(2010)0483, para 5).

⁸ Commission Communication 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union' (COM(2010)573, p. 3).

9. Considers that ‘dignity, autonomy and self-development’¹ of human beings are deeply ingrained in this European model and recalls that privacy, data protection, together with freedom of expression have always been considered as core elements of this model as fundamental rights as well as political objectives; underlines that this must be taken into account when balancing against the right to protection of intellectual property and the right to conduct a business, rights also protected by the Charter;
10. Recalls the positions expressed by Parliament in its recommendation of 26 March 2009 to the Council on strengthening security and fundamental freedoms on the Internet² which are of relevance to the current debate, including constant attention to the absolute protection and enhanced promotion of fundamental freedoms on the Internet;
11. Reiterates that limitations on the exercise of the rights and freedoms recognised by the Charter must comply with the provisions of the ECHR and with Article 52 of the Charter which prescribe that such limitations be provided for by law, necessary and proportionate to the legitimate aims pursued;
12. Recalls that international agreements concluded by the Union must be compatible with the provisions of the Treaties, are binding upon the institutions and on its Member States' (Article 216(2) TFEU) and according to CJEU settled case-law form an integral part of the Union legal order³; underlines that in order to recognise direct effect for provisions of international agreements these 'must appear as regards their content, to be unconditional and sufficiently precise and their nature and broad logic must not preclude their being so relied on'⁴; also recalls the case-law of the CJEU⁵ according to which the requirements flowing from the protection of general principles recognised in the Union legal order, which include fundamental rights, are also binding on Member States when they implement Union rules, and according to which obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the Union Treaties, which include the principle that all Union acts must respect fundamental rights;
13. Deeply regrets that no specific impact assessment on fundamental rights has been conducted on ACTA and does not consider that ‘there is no justification for an impact assessment on ACTA since it does not go beyond the [Union] *acquis* and no implementation measures are required’⁶, especially considering the view taken by the Commission in its 2010 Communication on the 'Strategy for the effective implementation of the Charter'⁷;
14. Recalls that the Commission has decided to refer ACTA to the CJEU on the question of whether it is compatible with the Treaties, in particular the Charter⁸;

¹ A Rouvroy and Y Poulet, 'Self-determination as “the key” concept' (<http://www.cpdpconferences.org/Resources/Rouvroy-Poulet.pdf>).

² OJ C 117 E, 6.5.2010, p. 206.

³ See case C-135/10SC F v. Del Corso (para. 39) referring also to cases C-181/73 Haegeman and C-12/86 Demirel.

⁴ Ibid para. 43.

⁵ Cases C-540/03 Parliament v Council (para. 105), C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission (para. 285).

⁶ See Note 'Civil Society Meeting ACTA' (http://trade.ec.europa.eu/doclib/docs/2011/february/tradoc_147497.pdf).

⁷ Ibid no. 1.

⁸ Article 218(11) TFEU.

15. Respects the role of the CJEU as foreseen in the Treaties; emphasises, however, that the assessment of the Committee on Civil Liberties, Justice and Home Affairs in this field must take into consideration Parliament's role in the protection and promotion of fundamental rights in their letter as well as in their spirit, in the external and internal dimensions, from the perspective of the individual as well as from that of a community; moreover, considers that such an assessment should examine whether the European model described above which requires high standards of protection for fundamental rights and places dignity, autonomy and self-determination at its core has been reflected in the instrument under analysis;

The challenge of legal certainty and of appropriate balance

16. Notes that ACTA includes provisions on fundamental rights and proportionality both general (e.g. Article 4¹ and Article 6², Preamble) and specific (e.g. Articles 27(3) and (4)³); in this context, indicates, however, that Article 4 covers only disclosure of personal data by Parties and that the references included in Article 27 (3) and (4) should be considered as standard and minimal safeguards; points out that privacy and freedom of expression are not simple principles as referred to in ACTA, but are recognised as fundamental rights by *inter alia* the International Covenant on Civil and Political Rights, the ECHR, the Charter, and the Universal Declaration of Human Rights⁴;

17. Wonders whether the concepts set out in ACTA, such as the ‘basic principles’ or the concept of ‘fair process’, are compatible with the concepts set out in the Charter, such as fundamental rights or the right to a fair trial arising from Article 47;

18. Notes that concern has especially been raised on those provisions that leave room for flexibility in their implementation, on the basis that these provisions might be implemented in the Union in a manner that could be illegal or contrary to fundamental rights;

19. Considers, furthermore, that while it is understandable that an international agreement negotiated by Parties with different legal traditions will be drafted in more general terms than is the case for Union legislation⁵, taking into account the different means in which Parties deal with the balance between rights and interests and allowing for flexibility, it is also crucial that legal certainty and strong and detailed safeguards be embedded in ACTA;

20. Underlines that there is significant legal uncertainty in the manner in which some key provisions of ACTA have been drafted (e.g. Article 11 (Information related to Infringements), Article 23 (criminal offences), Article 27 (scope of the enforcement measures in the digital environment), especially Article 27(3) (cooperation mechanisms), and Article 27(4)); warns against the potential to deliver fragmented approaches within the Union with risks of inadequate compliance with fundamental rights, particularly the right

¹ Privacy and Disclosure of Information.

² General Obligations with respect to Enforcement, mores specifically, appropriate protection for the rights of all participants and the proportionality requirement.

³ “in accordance with [the] laws and regulations [of Parties]”; [...] “consistent with that Party’s law, preserv[ing] fundamental principles such as freedom of expression, fair process, and privacy”.

⁴ See also in this sense paragraph 64 of the EDPS Opinion referred to above.

⁵ Commission Services Working Paper ‘Comments on the “Opinion of the European Academies on Anti-Counterfeiting Trade Agreement”’ of 27 April 2011.

to protection of personal data, the right to due process and the right to conduct business; points out that these risks are especially present as regards Article 27 (3) and (4) in light of the lack of precision of those texts but also having in mind the practices currently taking place in some Member States (e.g. large scale monitoring of Internet by private parties) whose conformity with the Charter is questionable;

21. Considers that Section 5 'Enforcement of Intellectual Property Rights in the Digital Environment' is in particular need of greater clarity and coherence, as inaccuracies and incompleteness may result in divergent national rules, and such a fragmented system would act as an obstacle to the internal market, which, in the case of the Internet environment, would preclude the wider cross-border use of the object protected by IPRs;
22. Recalls that according to Article 49 of the Charter no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed; points out in this regard that the scope of several provisions set out in Section 4 (Criminal Enforcement) is ambiguous;
23. Shares the concerns expressed by the European Data Protection Supervisor in its opinion of 24 April 2012 on ACTA, notably in relation to the unclear scope, the vague notion of "competent authority", the processing of personal data by Internet Service Providers (ISPs) through voluntary enforcement cooperation measures and the lack of appropriate safeguards in relation to fundamental rights;
24. Points out, that while several ACTA provisions (e.g. Article 27 (3) and (4)) are of a non-mandatory nature and thus do not establish any legal obligation on the Parties which would be contrary to fundamental rights, the lack of specificity of the provisions, of sufficient limitations and safeguards casts a doubt on the necessary level of legal certainty required from ACTA (e.g. safeguards against misuse of personal data or to protect the right of defence); emphasises that these deficiencies should not be acceptable in an agreement where the Union is a contracting party; recalls that other international agreements with fundamental rights implications have secured a higher level of precision and safeguards¹;
25. Takes the view that measures allowing the identification of a subscriber whose account was allegedly used for infringement would involve various forms of monitoring of individuals' use of the Internet; emphasises that the CJEU has ruled in unquestionable terms that monitoring of all electronic communications with no time limit and no precise scope such as filtering by ISPs or collection of data by rights holders does not strike a fair balance between IPRs and other fundamental rights and freedoms, in particular the right to protection of their personal data and the freedom to receive or impart information or the freedom to conduct a business (Articles 8, 11 and 16 of the Charter)²;
26. Considers that ACTA does not contain explicit guarantees concerning the protection of sensitive personal information, the right of defence (particularly the right to be heard) or the presumption of innocence;

¹ See for example Council of Europe - Convention on Cybercrime CETS No. 185, Budapest 23 November 2001

² Case C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) (para. 47-49).

27. Considers that ACTA does not provide guarantees on preserving the right to respect for private life and communications arising from Article 7 of the Charter ;

The duty to uphold fundamental rights

28. Finds it disappointing that additional and substantial efforts to further consult all the stakeholders and incorporate their views were not undertaken in the run-up to the negotiations on ACTA; deplores that the high standards of transparency and good governance the Union is striving to set have not been met as regards ACTA; believes, therefore, that ACTA comes at a very premature stage in particular with regard to areas where the Union has not yet had the chance to have thorough public deliberation;
29. Emphasises that ISPs should not police the Internet and therefore calls on the Commission and the Member States to ensure legal clarity on the role of ISPs; considers that ACTA only targets large-scale infringement of IPRs, allowing for Parties to exempt non-commercial use from its provisions on criminal enforcement procedures; notes that it is unclear where to draw the line between commercial and non-commercial use; underlines also the importance of differentiating between small scale non-commercial downloading and piracy;
30. Believes that counterfeiting and piracy committed wilfully and on a commercial scale are serious phenomena in the information society and that it is therefore necessary to prepare a comprehensive Union strategy to deal with them; such a strategy should not be focused solely on repression or the impact of counterfeiting and piracy, but also on their causes, should respect fully fundamental rights in the Union and should be simultaneously effective, acceptable and understandable for society as a whole; recalls that, following a request from Parliament¹, the Commission, in its Digital Agenda for Europe strategy, made a commitment to adopting a Code of EU online rights in 2012; therefore calls on the Commission that the Code of EU online rights should unambiguously define Union citizen users' rights and set out what they may or may not do in the digital environment, including when they use the content protected by IPRs;
31. Emphasises that the States where the greatest infringements of IPRs occur, such as China, Pakistan, Russia and Brazil, were not invited to sign ACTA, and it is unlikely that those States will sign up to ACTA in the near future, and this raises important questions about the efficacy of the measures proposed by ACTA;
32. Considers that when fundamental rights are at stake there shall be no place for any ambiguity; is of the view that ACTA has not avoided such ambiguity, but, on the contrary, entails additional and various layers of ambiguity; recalls that the jurisprudence of the European Court of Human Rights affirms that any limitation on fundamental rights and freedoms foreseen by law must be foreseeable in its effects, clear, precise and accessible, as well as necessary in a democratic society and proportionate to the aims pursued;
33. Is of the view that ACTA fails to secure adequate safeguards and an appropriate balance between IPRs and other core fundamental rights, as well as failing to secure the necessary

¹ Parliament resolution of 21 June 2007 on consumer confidence in the digital environment (OJ C 146 E, 12.6.2008, p. 370) (para. 25-28).

legal certainty for its key provisions;

34. In light of all of the above and without prejudice to the CJEU's assessment of the matter, but taking into consideration Parliament's role in the protection and promotion of fundamental rights, concludes that the proposed ACTA, for which Parliament's consent has been requested, is incompatible with the rights enshrined in the Charter and calls on the Committee on International Trade, as the committee responsible, to recommend that Parliament declines to consent to the conclusion of ACTA.

SHORT JUSTIFICATION

Your Rapporteur believes that protecting intellectual rights in Europe is essential to maintain our continent's competitive advantage in a globalised, fast-moving and interconnected economy. Artists and innovators should be compensated for their genius. At the same time, those same artists, together with activists, political dissidents and citizens willing to engage in the public debate, should not in any way find their ability to communicate, create, protest and take action inhibited. Especially not today, when, around the world, we are experiencing, and we welcome, a vast, uncontrolled expansion of voices which are finally able to be heard. As the sole direct representative of 400 million European citizens, the European Parliament has the responsibility to safeguard that this expansion will remain unhindered.

The culture of file-sharing, enabled by the remarkable technological advance of the last decades, certainly poses direct challenges to the way we have dealt with compensation of artists and proper enforcement of intellectual rights for the past decades. Our task, as policymakers, is to overcome this challenge by striking an acceptable balance between the possibilities that technology unravels and the continuation of artistic creation, which is an emblematic token of Europe's place in the world.

We are therefore, at a defining moment of this debate, an exciting juncture of change. In this sense, your Rapporteur believes that ACTA comes at a very premature stage and a possible adoption of the Treaty would essentially freeze the possibility of having a public deliberation that is worthy of our democratic heritage. Against such a monumental challenge, what we absolutely need is that every expert we have, every affected organisation or institution we can spare, every citizen that desires to voice an opinion participates, from the beginning, in the creation of a modern social pact, a modern regime of protecting intellectual property rights. ACTA is not, and was not conceived to be, this. Instead, the Rapporteur believes that an adoption of ACTA would prematurely strangle the debate and tip the balance on one side, would allow for Member States to experiment on laws that could potentially harm fundamental freedoms and set precedents that could be undesirable for future societies. By highlighting these dangers, this opinion aims to enrich the discussion undertaken by the European Parliament and help its Members make the most informed and rounded decision on the fundamental issue of rejecting or giving our consent to ACTA.

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	31.5.2012
Result of final vote	+: 36 -: 1 0: 21
Members present for the final vote	Jan Philipp Albrecht, Mario Borghezio, Rita Borsellino, Emine Bozkurt, Arkadiusz Tomasz Bratkowski, Simon Busuttil, Philip Claeys, Carlos Coelho, Rosario Crocetta, Ioan Enciu, Cornelia Ernst, Monika Flašíková Beňová, H�el�ene Flautre, Kinga G�al, Kinga G�oncz, Nathalie Griesbeck, Anna Hedh, Salvatore Iacolino, Sophia in 't Veld, L�ivia J�ar�oka, Timothy Kirkhope, Juan Fernando L�opez Aguilar, Baroness Sarah Ludford, Svetoslav Hristov Malinov, V�eronique Mathieu, Anthea McIntyre, Jan Mulder, Georgios Papanikolaou, Jacek Protasiewicz, Carmen Romero L�opez, Birgit Sippel, Csaba S�ogor, Renate Sommer, Rui Tavares, Wim van de Camp, Axel Voss, Renate Weber, Cecilia Wikstr�om, Auke Zijlstra
Substitute(s) present for the final vote	Alexander Alvaro, Vilija Blinkevi�iut�e, Birgit Collin-Langen, Dimitrios Droutsas, Evelyne Gebhardt, Stanimir Ilchev, Iliana Malinova Iotova, Franziska Keller, �adam K�osa, Juan Andr�es Naranjo Escobar, Hubert Pirker, Zuzana Roithov�a, Carl Schlyter, Marie-Christine Vergiat
Substitute(s) under Rule 187(2) present for the final vote	Kriton Arsenis, Adam Bielan, Fran�oise Castex, Marielle Gallo, Esther Herranz Garc�ia, Se�an Kelly, Elisabeth Morin-Chartier