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ACTA Negotiators Vow To Mesh With National-Level Rights; Withhold New Text

By [Monika Ermert](#) for *Intellectual Property Watch* @ 3:50 pm

LUCERNE, SWITZERLAND – There was progress during the ninth round of negotiations for the Anti-Counterfeiting Trade Agreement (ACTA) this week in Lucerne, negotiators said over the last day, and in their final press communiqué they made promises that “ACTA will not interfere with a signatory’s ability to respect fundamental rights and liberties,” it would be consistent with World Trade Organization agreements and certainly “not hinder the cross-border transit of legitimate generic medicine.”

But negotiators could not agree to allow the interested public or experts to check how these promises would be phrased, as no new draft ACTA text was released at the meeting’s conclusion yesterday. The final press communiqué is [available here](#).

“We are regretting this,” Jürg Herren, head of legal services, general law in the Division of Legal & International Affairs of the Swiss Federal Institute of Intellectual Property, said after the meeting, seconded by the EU delegation head Luc Devigne. “We were strongly in favour of publishing it,” said Devigne.

Yet one delegation had blocked consensus on this, the two Europeans said. As the group had agreed to proceed on consensus, the negotiators all are bound by this, they said. The next meeting of ACTA will take place in the United States, for some a signal that the US is interested in getting ACTA finished quickly.

Some negotiators said they saw a real acceleration during the last round in Wellington and this Lucerne meeting, and some optimists had expected to come close to the end of the negotiation during the Swiss round. Yamamoto Shinpei, director for intellectual property in the Multilateral Trade System Department of the Japanese Ministry of Economy, Trade and Industry, said finalising ACTA by the end of this year was realistic. While there was still a lot of bracketed text, some sections had been straightened out.

“There is a consensus that patents should not be covered in the border measures and the criminal enforcement section,” said Devigne. While some countries would be satisfied to limit ACTA to counterfeiting and copyright piracy, the EU’s position was to keep patents in there.

The scope issue will only be settled at the very end, said Herren. The inclusion of geographical indications or not is “a deal-breaker,” said Jorge Amigo, director general of the Mexican Institute of Industrial Property (IMPI). Mexico, like Switzerland and the EU, favour the inclusion of geographical indications against the Anglo-American countries. In Mexico, there was even a discussion to adapt the existing legislation on appellation of origin to the geographical indications approach, said Amigo.

Questioned for real steps forward in the still heavily bracketed text, Herren said: “We for example cleared the part on damages a lot.” The chapter now has the various systematic legal approaches covered in a much less complicated manner, he said. For a country like Switzerland, he added, pre-established instead of licence-cost

based damages were out of the question. So despite more clarity, all national versions are still in the text, according to information from the negotiators.

Critics like Knowledge Ecology International have warned especially against an upward harmonisation towards high damages. But when asked if the Swiss with the licence-oriented damage-structure were not afraid of an upward spiral once higher damages were an option in ACTA, Herren said: "Such legislative changes could happen outside of ACTA, too."

This might as well be true for three-strikes internet cut-offs for repeated copyright infringement and additional liability – they become only optional in ACTA and they already happen outside ACTA just now. Japan, independent from ACTA, has been discussing the introduction of the Digital Millennium Copyright Act analogue legislation on technological protection measures. These measures also are part of the ACTA.

ACTA could be used as a reference framework for tightening the measures, critics like Canadian law professor Michael Geist have warned for some time now. European telecommunications operators expressed the same concern recently for their business. "The draft ACTA provisions aim for a minimum set of obligations. A party may implement in its domestic law more extensive protection and enforcement of intellectual property rights," the telecom operators said in their press release. "Hence, a final ACTA-agreement will not lead to fewer demands for additional measures on national levels, but rather would act as a base for further obligations on ISPs."

Nongovernmental organisations, which had talks on Monday with the ACTA delegations, had a fight with the French delegate over the shift of responsibility from public to private actors (see the protocol of the [exchange of views here](#)). "It is companies that collect the information" (about users' behaviour on the internet), one NGO representative said in a heated exchange, according to the NGO report of the talks. "You are encouraging the companies to use that information in ways that, if done by the state, would violate fundamental privacy protections," he said, adding, "Is that promoting fundamental rights?"

EU ACTA negotiators in Lucerne told *Intellectual Property Watch* once more that they stood firmly within the EU *aquis communautaire*, the existing legal framework of the Union, changes to which are not acceptable under their negotiating mandate. Yet some bracketed proposals of the internet chapter go beyond the *aquis*, like the request for internet service providers to remove access to internet content expeditiously when they have "reasonable grounds to know that the infringement is occurring." This would involve ISPs checking for what their users do.

The NGOs focused on the access to generic drugs also are not satisfied with the commitments of ACTA negotiators to take patents out of the enforcement and criminal sanction chapters. Oxfam, the Berne Declaration and the Aids-Initiative Act Up Paris published a [highly critical statement](#) yesterday.

"The Anti-Counterfeiting Trade Agreement is the latest gift from rich countries to the multinational pharmaceutical industry to limit access to affordable, generic medicines in developing countries," Rohit Malpani from Oxfam said, according to a press release. "Despite numerous warnings, countries are persisting in their push for new intellectual property rules that will harm public health around the world."

Patrick Durisch, Berne Declaration added: "ACTA would in a very undemocratic way contribute to establish a climate of general suspicion and shift enforcement burdens

from the private to the public sector, whilst not solving the problem with dangerous fake medicines.”

Pauline Londeix from Act Up-Paris said, “2010 was supposed to be the year of the universal access to HIV/AIDS treatments. But in 2010, less than 40 percent of people among those who need it urgently have access to life-saving drugs. If concluded, ACTA will hinder access to cheap generic medicines and millions of people will be denied access to life-saving treatment.”

[Updated:] The Computer and Communications Industry Association said afterward that as the US prepares to celebrate its independence this weekend, ACTA threatens to limit the protection of and extension of our freedoms to the internet world. “Americans and Internet users around the world are facing mounting efforts by governments to expand their control, restrict new models of communication, and deploy sweeping tools to inhibit dynamic Internet activity,” CCIA said in a release. There also was [support for ACTA](#) [pdf] during the Lucerne meeting. BusinessEurope, the International Intellectual Property Protection Forum of Japan (IIPPF), and the Global Intellectual Property Center (GIPC) of the US Chamber of Commerce welcomed the ACTA negotiation as “the agreement would help ensure the like-minded trading partners to address counterfeiting.” The business organisations also applauded the release of the Wellington draft. The holding back of the new text might not be that welcome even for ACTA fans. *[end of update]*

Transparency again could become an issue of public discussion after the decision of Lucerne not to publish a new draft version. Civil society groups wrote in their joint declaration Thursday that they were “outraged” negotiators did not confirm they would release the new ACTA version. Several delegates at the Lucerne meeting said they could not comment on the progress of the negotiations to the press. A US delegate Thursday morning said she was “not allowed to speak,” and no press briefing or availability was announced, which is a departure from international trade negotiations of the past.

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