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'Final final' ACTA Text Published; More Discussion Ahead For EU

By Monika Ermert for *Intellectual Property Watch* on 6 December 2010 @ 10:05 pm

Negotiating partners today released the final text of the Anti-Counterfeiting Trade Agreement (ACTA) after another week of what they called "legal scrubbing" which in fitting form was once again was performed behind closed doors, this time in Sydney.

The host Australian Ministry for Foreign Affairs and Trade (DFAT) not answer press inquiries on the agenda or a list of discussed changes. Now the 'final final' text has been published by several negotiating partners and is open to more interpretation from experts before national governments and in some cases parliaments decide whether to accept signing. The treaty [text is available here](#) ^[1] [pdf].

Changes made this week were said to not touch on substantial issues. They include, for example, a change in the definition of "pirated copyright goods." The European Commission had pushed for this change as it was concerned the original definition would create obligations to destroy goods that were not infringing rights in the EU.

The new text now states that pirated copyright goods "means any goods which are copies made without the consent of the right holder ... in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country" in which the ACTA measures are invoked. Fair use or private copy rules in national laws therefore might disallow procedures from jurisdictions where no such limitations exist.

With regard to definitions, one hot issue – at least for the EU – remains the definition of what constitutes "commercial scale" infringements. The final text reads: "Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale. For the purposes of this Section, acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage."

There is a dispute about the nature of ACTA as an executive agreement in the US, and in some EU member states national parliaments will have to pass ACTA as proposed by their governments. In addition, the EU Council and Parliament will have to accept the agreement. The EU Parliament in late November voted for a more ACTA-friendly of two [tabled resolutions](#) ^[2] [doc] welcoming the finalisation of the much-debated text. But given the tiny margin by which a more critical resolution was rejected (322 against, 306 in favour, 26 abstentions), members of the Parliament said after the vote the last word on ACTA had not been spoken.

No Agreement on ACTA Compliance with EU Acquis

The more critical joint resolution proposed by the Green group (including the Pirate Party), the Social Democrats, the Liberals and the Left, had bashed ACTA once more for its secrecy and asked for clarification with regard to consistency with the Lisbon Treaty. It also asked for evidence that ACTA would "not restrict the harmonization of exceptions and limitations for copyright and related rights in the EU" or future expansions of exceptions and limitations.

On 16 December, Green Party members will request a formal decision by the EP's Legal Affairs Committee "to ask the legal service of the Parliament if ACTA is compatible with the Treaties of the European Union."

Axel Metzger, chair of the Institute of Legal Informatics at the University of Hannover

(Germany), told Intellectual Property Watch that the resolution taken by the EP purporting that ACTA is in line with the *acquis* (current EU law) is based on a fallacy.

"All criminal sanctions that go beyond 'may' clearly are outside of the EU *acquis*," Metzger said. Metzger pointed to the fact that the Parliament in its discussion about criminal sanctions for IP infringement in 2007 had explicitly excluded acts of private persons that were non-commercial.

Another extension of IP enforcement favouring rights owners in the text are criminal measures against parallel imports of generic drugs. "While there is agreement in the EU that this constitutes a copyright infringement, having criminal sanctions in place for it, is clearly outside the EU *acquis*," he said.

Medical assistance organisations like *Médecins sans Frontières* (Doctors without Borders) in late November started a new campaign against ACTA and other upcoming bilateral IP agreements of the EU, including the EU-India agreement that will be negotiated later this week.

Metzger's preliminary conclusion with regard to ACTA is that there is a clear shift to extend IP protection, sometimes just by limiting redress for the alleged infringer, for example by allowing seizure without a hearing. Metzger and other experts plan to publish their analysis before month's end.

In some countries, however, ACTA seems to be a done deal.

Singapore's Ministry of Law announced even before the last, legal expert round in Sydney that it had "set sights on ACTA" and explained on its website: "If Singapore chooses to sign the agreement, it is not expected that ACTA implementation will require significant changes to the law." Australian IP law expert Kimberlee Weatherall gave as an update on Australia: "Not much discussion." The general view is that ACTA would not require changes in Australian law. Experts in Australia appear to be more focussed on where the benefit was in signing, she said.

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[1] text is available here: <http://www.dfat.gov.au/trade/acta/Final-ACTA-text-following-legal-verification.pdf>

[2] tabled resolutions: <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2010-0618&language=EN>

[3] ACTA Negotiators: Maximal Protection Proposals Unlikely In Final Text: <http://www.ip-watch.org/weblog/2010/02/18/acta-negotiators-maximal-protection-proposals-unlikely-in-final-text/>

[4] Leaked ACTA Text Shows Possible Contradictions With National Laws: <http://www.ip-watch.org/weblog/2010/03/29/leaked-acta-text-shows-possible-contradictions-with-national-laws/>

[5] ACTA: No More Negotiating Rounds Planned; Latest Text To Be Released: <http://www.ip-watch.org/weblog/2010/10/04/acta-no-more-negotiating-rounds-planned-latest-text-to-be-released/>