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Treaty Negotiators Turn To "ACTA Lite" In Hopes Of Closure

By Monika Ermert on 8 September 2010 @ 4:39 am

Everyone you ask this week about the Anti-Counterfeiting Agreement (ACTA) tells you that they're just about to work their way through the new draft version to understand the implications of changes made during the recent negotiation round in Washington, DC. Massive changes to the text have been revealed by yet another leak of the draft treaty text being negotiated by 10 countries and the EU 27 member states.

This time it was Knowledge Ecology International (KEI) – which seems to be taking turns in this effort with La Quadrature du Net in this effort – which allowed the public a look into the latest draft version dated 25 August. The latest draft is [available here](#) ^[1] [pdf].

The most obvious change made headlines throughout internet publications: out of the text are liability exemptions and conditions to make internet service providers eligible for such exemptions. The respective paragraph has been cut from Chapter 2, Section Four: "special measures related to technological enforcement of intellectual property in the digital environment."

Remaining in the digital environment section that has shrunk from five to three pages is a general request to ACTA partners to provide for civil and criminal measures to allow action against IP infringers in the digital environment. Enforcement measures in the text would allow protection against infringements like "unlawful file sharing and unlawful streaming," the new draft version reads. Also still in place are measures against anti-circumvention technology and manipulation of or tampering with electronic rights management information.

As with the now-eliminated liability section, there are still differences over the provision on anti-circumvention measures (circumvention is to bypass digital rights management in place to protect content from unauthorised access). The US, Singapore and Australia are asking for measures against circumvention while New Zealand, the EU and Switzerland prefer to focus on the manufacturing, importation, distribution and public offering of the respective anti-circumvention tools. The EU even reserved their position on the whole issue.

The new version was dubbed "ACTA lite" by David Hammerstein from the Trans-Atlantic Consumer Dialogue after a closed debriefing of the European Parliament's Committee on International Trade (INTA) by EU negotiators last week. But Hammerstein and other ACTA critics do not seem completely convinced that ACTA is less scary to them now. The US Digital Millennium Copyright Act (DMCA) Section I "safe harbour" provisions – and consequently the mere threat of three-strikes regimes in ACTA countries in the future – were dropped, but the DMCA Section II issues (anti-circumvention) are still looming.

Canadian ACTA observer Michael Geist sees this as "an effort to limit the flexibility that all countries agreed to with the WIPO internet treaties in the 1990s," referring to two World Intellectual Property Organization treaties on copyright and productions. Geist's final analysis of the chapter is that "the chapter is much better than the initial US proposal, but other countries – particularly Canada – should hold out for anti-circumvention rules that mirror the WIPO internet treaties." Geist is especially critical about "the attempt to de-link circumvention from copyright infringement" which would run counter to a growing body of US jurisprudence.

On a more general note, a speaker for EuroISPA, the organisation of internet service providers in Europe, said that last minute changes to the text were always possible and therefore a concern. "Our concerns are still the same," he said, pointing to joint statement with the European Telecom and Network Operators' Association (ETNO), Cable Europe and others that asked negotiating parties to "release any future negotiating documents"

and for clarification "of their objectives with ACTA in particular with internet-related provisions."

ISPs also may still be the target of injunctions. The civil enforcement chapter contains an option favoured by Switzerland and the European Union requiring that, "The parties shall also ensure that rights holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right." The injunctions against intermediaries that are not further qualified are in brackets, but this may not be enough to put ISP concerns to rest.

Consumer organisations, on the other hand, might not be satisfied that negotiators have agreed under the criminal enforcement measures to criminalise "aiding and abetting" in "wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale," and the proposal from the EU and Australia to allow "each party to decide whether to include or exclude such acts carried out by end consumers."

Patents, Other Sticking Points

One organisation quick to come out with its concerns was the Foundation for a Free Information Infrastructure (FFII). "We are disappointed the EU still wants punitive measures against patent infringements in ACTA," the organisation said in a 6 September statement. "The software field is plagued by patents and holders of huge patent portfolios could decide to eliminate competition from startups, small and medium-sized enterprises and open source projects, on their own, or by using a proxy, a patent troll," it said.

The inclusion of patents in ACTA also could cause issues with regards to access to medicine, and even more with other technology not protected by the Doha Declaration on TRIPS and Public Health, including much wanted "green technology." TRIPS is the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights.

Organisations that favour a "strong ACTA" like the US Chamber of Commerce or Business Europe have been slow to react to the toning down of liability in the new ACTA text and assurances that enforcement procedures in the digital environment "shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with each Party's law, preserves principles relating to freedom of expression, fair process, and privacy (...)."

Ilias Konteas from Business Europe, which published a joint resolution with the US Chamber of Commerce and the International Intellectual Property Protection Forum of Japan promoting a "strong ACTA" in June, told Intellectual Property Watch: "We will have to assess what is on the table and whether it meets the requirements set forward in the joint resolution you mentioned when an official document is made available again."

"We support a strong ACTA," Konteas reiterated, "which effectively combats counterfeiting and piracy while helping to facilitate legitimate commerce – and this is the framework on which we will evaluate the agreement once it is made available." The Chamber, the Recording Industry Association of America (RIAA), and the International Federation of the Phonographic Industry (IFPI) did not react to requests by *Intellectual Property Watch*.

Proposals for more change in ACTA now have to come quickly as negotiators seem to be determined to get ACTA in the bag finally. Geist wrote in his blog it became "increasingly apparent that the USTR is willing to agree to almost anything in order to bring home an agreement before the next round of elections in November." For the Tokyo round later this month negotiators have agreed to declare it a "vice-ministerial" meeting, in practice meaning that policy-level delegates should attend in order to allow the possible resolution of all outstanding substantial issues.

The one really substantial issue to be resolved is the scope of the agreement ([*IPW, Enforcement, 2 July 2010*](#)^[2]) which is still bracketed through most of the ACTA chapters. TACD's Hammerstein reported on a bilateral meeting between the US and the EU to resolve this alongside the recent DC negotiations, but the resulting DC text does not reflect much progress. The EU wants to see IP rights referred to in general terms in many of the chapters, while the US wants to focus on copyright, related rights and trademarks.

According to Hammerstein, the EU chief negotiator speaking to the INTA committee stated that there was still a long way to go to bridge the gap between the US and the EU on issues of scope of rights covered in border measures.

Opposition Stays in the Fight

While negotiators press for the wrap-up, ACTA critics continue in their efforts to bash the negotiations for continued secrecy. A written declaration by a group of EU Parliament members requesting publication of all documents related to the ongoing negotiations this week met the necessary threshold of votes necessary for adoption, according to Jérémie Zimmerman of La Quadrature du Net. The EP tomorrow will have another public debate on ACTA that might give a first impression how "ACTA lite" is received by one major legislature which has to approve ACTA.

Meanwhile there are voices like the one of Rick Shera, IP-law expert from New Zealand, recommending a shift of focus to bilateral free trade agreements that may try to make up lost ground in more extensive IP protection.

The focus should now shift to the Trans Pacific Partnership (TPP) negotiation, the third round of which is due to start in October. New Zealand may find itself hard pressed in that negotiation. Australia already has a FTA with the US and, since Europe is not a party to TPP, there is not the same ability to ally with a strong counterpoint to US calls for increased copyright protection/ISP liability.

Related Articles:

- [ACTA Negotiators: Maximal Protection Proposals Unlikely In Final Text](#) ^[3]
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URLs in this post:

[1] available here: http://keionline.org/sites/default/files/acta_aug25_dc.pdf

[2] *IPW*, Enforcement, 2 July 2010: <http://www.ip-watch.org/weblog/2010/07/02/acta-negotiators-vow-to-mesh-with-national-level-rights-withhold-new-text/>

[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/>