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The protection of freedom of expression and information on the Internet and online media

Addendum to the report¹

Committee on Culture, Science, Education and Media

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1. Introduction

1. The new Anti-Counterfeiting Trade Agreement (ACTA)² has caused political controversy in several member States and on Internet forums. One of the major criticisms is that the ACTA could violate freedom of expression and information on the Internet. I therefore submit this addendum to my report on the protection of freedom of expression and information on the Internet and online media (Doc. 12874).

2. Work towards the ACTA was launched in October 2007 through a joint initiative of the European Union, Japan, the United States and other States. It was signed in Tokyo on 1 October 2011 by Australia, Canada, Japan, the Republic of Korea, Morocco, New Zealand, Singapore and the United States and on 26 January 2012 by 22 European Union member States.³ The European Union has replied publicly to recent criticism raised against the ACTA.⁴

3. The focus of the ACTA is on civil law remedies against (Articles 7 to 12), and on the penalising of (Articles 23 to 26), trademark counterfeiting and the violation of copyright and neighbouring rights. Its Article 27 specifically deals with the enforcement of intellectual property rights in the digital environment. It is the latter provision that has been one of the main targets of public criticism.

2. Intellectual property rights protection

4. The Council of Europe protects intellectual property rights under Article 1 ("Protection of property") of the first Protocol to the European Convention on Human Rights (ETS Nos. 5 and 9, "the Convention") and Article 10 ("Offences related to infringements of copyright and related rights") of the Convention on Cybercrime (ETS No. 185) as well as the Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health (CETS No. 211).

5. Article 17.2 of the European Union Charter of Fundamental Rights protects expressly intellectual property. Specific European Union legislation was, for instance, established through Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Directive 2004/48/EC on the enforcement of intellectual property rights and Directive 2009/24/EC on the legal protection of computer programmes.

1. Addendum approved by the committee on 6 March 2012.

2. www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/acta-crc_apr15-2011_eng.pdf.

3. All European Union member states except Cyprus, Estonia, Germany, the Netherlands and the Slovak Republic.

4. See, for example, the information provided by the Directorate General for Trade of the European Commission: http://trade.ec.europa.eu/doclib/docs/2012/january/tradoc_149002.pdf.

6. At global level, protection is primarily afforded by the revised Berne Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organisation (WTO) as well as the Copyright Treaty of the World Intellectual Property Organisation (WIPO).

7. There has also been public debate over some national legislation for the protection of copyright and neighbouring rights on the Internet. In 2009, France created the High Authority for the Distribution of Creative Works and Copyright Protection on the Internet (Haute Autorité pour la diffusion des oeuvres et la protection des droits sur internet – HADOPI), which has the power to investigate and penalise copyright violations. The President of the United States announced in January 2012 that he would veto two draft legislative acts on Internet piracy adopted by the US House of Representatives and the US Senate respectively (namely the “Stop Online Piracy Act” and the “Protect IP Act”). Currently, the US Digital Millennium Copyright Act of 1998 shields Internet companies from liability if they do not have actual knowledge of a copyright infringement. However, a company must eliminate the infringement once notified.

8. Internet piracy of copyright protected works became a widely publicised issue through the huge file-sharing among users on the You Tube network. You Tube was purchased by Google in 2006 for US\$1.76 billion and it subsequently developed a software programme called Content ID that scans and compares videos to material provided by copyright owners,⁵ for instance in order to place specific advertisements on the screens of its users who have posted those videos. This software allows You Tube to gain revenue from advertising and identify copyright violations when videos are posted by users. You Tube also introduced last year the “You Tube Copyright School” for copyright violators, who will be asked to watch on its website a four-and-a-half minute video and answer questions concerning copyright as an educational exercise.

9. Intellectual property rights constitute a large part of property rights. According to recent WIPO statistics, 1.98 million patent applications, 3.66 million trademark applications and 724 000 industrial design applications were filed globally in 2010.⁶ A project of the Organisation for Economic Co-operation and Development (OECD) launched in 2005 concluded that international trade in counterfeit and pirated products could have been up to US\$200 billion in 2005. This estimate did not include domestically produced and consumed counterfeit and pirated products or the significant volume of pirated digital products being distributed on the Internet. If these items were added, the total magnitude of counterfeiting and piracy worldwide could well increase by several hundred billion dollars.⁷

3. Legal issues concerning the ACTA

10. Article 1 of the ACTA states clearly that “[n]othing in this Agreement shall derogate from any obligation of a Party with respect to any other Party under existing agreements, including the TRIPS Agreement”. This clause allows parties to the ACTA to implement the obligations under the latter in conformity with, for example, the European Convention on Human Rights and the Convention on Cybercrime.

11. Article 3 of the ACTA states that: (1) “This Agreement shall be without prejudice to provisions in a Party's law governing the availability, acquisition, scope and maintenance of intellectual property rights”; (2) “This Agreement does not create any obligation on a Party to apply measures where a right in intellectual property is not protected under its laws and regulations.” Therefore, limitations to intellectual property rights under domestic law might be allowed, for example for education and research purposes or in the public interest.⁸

12. Concerning the enforcement of intellectual property rights in the digital environment, Article 27.3 of the ACTA states that “[e]ach Party shall endeavour to promote cooperative efforts within the business community to effectively address trademark and copyright or related rights infringement while preserving legitimate competition and, consistent with that Party's law, preserve fundamental principles such as freedom of expression, fair process and privacy”. The latter reference will obviously prevent domestic implementation of

5. www.youtube.com/t/contentid.

6. www.wipo.int/export/sites/www/freepublications/en/intproperty/941/wipo_pub_941_2011.pdf.

7. www.iccwbo.org/uploadedFiles/BASCAP/Pages/OECD-FullReport.pdf.

8. See for example, Recommendation No. R (91) 5 of the Council of Europe Committee of Ministers on the right to short reporting on major events where exclusive rights for their television broadcast have been acquired in a transfrontier context, and Article 9 bis (“Access of the public to events of major importance”) of the revised European Convention on Transfrontier Television (ETS No. 132).

Article 27.3 of the ACTA from restricting the human rights to freedom of expression (for example under Article 10 of the European Convention on Human Rights), a fair trial (for example under Article 6 of the Convention) and private life (for example under Article 8 of the Convention).

13. Article 27.4 of the ACTA allows that “[a] Party may provide, in accordance with its laws and regulations, its competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement, where that right holder has filed a legally sufficient claim of trademark or copyright or related rights infringement, and where such information is being sought for the purpose of protecting or enforcing those rights. These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process and privacy”. This provision seems to have received most of the public criticism, because of potential obligations of online service providers and human rights concerns. However, the final sentence of this provision clearly permits, for example, Council of Europe member States which are party to the ACTA to respect their human rights obligations under Articles 10 (“Freedom of expression”), 6 (“Right to a fair trial”) and 8 (“Right to respect of private and family life”) of the European Convention on Human Rights. In addition, Article 27.4 of the ACTA appears as being an optional provision only.

4. Political criticism concerning the ACTA

14. The provisions of the ACTA are formulated in a rather vague manner, allowing exceptions under domestic law. Such exceptions might compromise the intended harmonisation of the protection of intellectual property rights at global level. However, this seems to be more of a problem for ACTA parties outside the European Union which are not Parties to the Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty and the Convention on Cybercrime, as the latter international treaties and EU legislation constitute already an advanced basis of relevant regulation. In addition, fundamental rights concerns can be met, for instance, through the express references in Articles 27.3 and 27.4 of the ACTA to the human rights to freedom of expression, a fair trial and privacy.

15. The major cause for public uproar might be seen in the possibility to order under Article 27.4 of the ACTA an online service provider to disclose information identifying a subscriber whose account was allegedly used for an infringement of copyright or related rights. Internet service providers have frequently opposed any attempts to oblige them to disclose their customers, because such practices could harm their business interests and might violate the right to privacy and data protection of users. While Internet service providers also refer traditionally to their inability to control their customers' conduct or the content which the latter place online, the technological progress in profiling Internet users and their identification actually permits YouTube, for example, to identify copyright protected videos posted by its customers and to place specific web advertisements for those customers. The Court of Justice of the European Union in Luxembourg decided on 16 February 2012 that the owner of an online social network cannot be obliged to install a general filtering system covering all its users in order to prevent copyright infringements by users.⁹

16. The possibility to oblige online service providers under Article 27.4 of the ACTA is expressly subject to domestic laws and the human rights to freedom of expression, a fair trial and privacy. In this context, therefore, member States of the Council of Europe should ensure that the rights under Article 6, 8 and 10 of the Convention are not violated and that relevant acts by public authorities can be reviewed by domestic courts and, as last resort, by the European Court of Human Rights.

17. Mr Peter Hustinx, the European Data Protection Supervisor of the European Union, delivered on 22 February 2010 an official Opinion on the EU negotiations of the ACTA.¹⁰ He called on the European Union to strike the right balance between demands for the protection of intellectual property rights and the privacy and data protection rights of individuals. Mr Hustinx based his Opinion on a draft text of November 2009 and declared that “in view of the little information made publicly available, the European Data Protection Supervisor notes that he is not in a position to provide an analysis of the specific provisions of ACTA”. It is not clear to what extent the final text of the ACTA took account of this Opinion. However, the relevant EU law on data protection, Article 8 of the European Convention on Human Rights and the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) should override any potentially lower data protection standards under the ACTA through the general clause in its Article 1.

9. SABAM v. Netlog (C-360/10), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-02/cp120011en.pdf>.

10. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:147:0001:0013:EN:PDF>.

18. The former rapporteur of the European Parliament on the ACTA, Mr Kader Arif (France, Progressive Alliance of Socialists and Democrats), resigned on 26 January 2012 in protest against the alleged lack of openness of the drafting process leading to the final text of the ACTA. International treaties are generally drafted by senior legal experts of ministries of justice or foreign affairs of those countries which are intended parties to such treaties. For the Council of Europe, it has become a custom to open draft treaties to a process of public consultation, especially where such treaties concern Internet regulation. After April 2000, the intergovernmental committee drafting the Convention on Cybercrime had declassified drafts in order to enable the negotiating States to consult with interested stakeholders. The current revision of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data was opened to all stakeholders through direct Internet consultation. Assembly Resolution 1744 (2010) on extra-institutional actors in the democratic system should be a reference in this context.

19. Since it was opened for signature in 2011, public consultations can no longer influence the actual content of the ACTA. However, parties to the ACTA have some margin of appreciation in applying or transposing ACTA provisions. It therefore seems useful for signatory parties to pursue public consultations now, for instance at parliamentary level where parliaments have to ratify the ACTA or pass domestic legislation in accordance with the ACTA.¹¹

5. Conclusion

20. In view of the above considerations, I suggest that the committee table the following amendment to the draft resolution contained in the report (Doc. 12874):

21. In the draft resolution, after paragraph 6, insert the following paragraph:

“Referring to the wide criticism and concerns over the restriction of fundamental rights and freedoms, most notably the freedom of expression and communication privacy, raised by Internet stakeholders and governments as regards the Anti-Counterfeiting Trade Agreement (ACTA) of 1 October 2011, the Assembly invites member States which are signatories to the ACTA to pursue public consultations about future domestic legislation resulting from the ACTA, taking into account Assembly Resolution 1744 (2010) on extra-institutional actors in the democratic system. Such domestic legislation must respect in particular Articles 6, 8 and 10 of the European Convention on Human Rights and Article 1 of its first Protocol (ETS No. 9). ACTA parties which are also Parties to the Convention on Cybercrime (ETS No. 185) or the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) should not derogate from the latter conventions, in accordance with Article 1 of the ACTA.”

11. The governments of Australia, Germany and the United Kingdom have announced that the ACTA would not require revising existing or passing new domestic legislation in their countries. See, for example, www.dfat.gov.au/trade/acta/ and www.ipo.gov.uk/pro-crime-acta.