



ACTA – Criminal sanctions

In theory, most policy-makers agree that intellectual property legislation should focus on ensuring that dangerous products are not sold and that industrial-scale misuse of protected material should be targeted. Despite the fact that such an approach is essential for proportionality, ACTA fails to deliver on both of these priorities. It attempts to address potentially life-threatening physical products and duplication of digital material as if these two very different phenomena were of the same importance and functionally identical.

“Indirect” economic advantage

ACTA provides an extremely low threshold for imposing criminal sanctions. Article 23.1 starts by limiting (as a minimum that can be exceeded by parties) criminal procedures/penalties to wilful offences undertaken on an undefined commercial scale. It then broadens the scope to “acts” which are for direct commercial advantage but also for, also undefined, “economic advantage” or “aiding and abetting” (also undefined).

Such unclear wording is simply inappropriate in a key provision, on whose meaning the proportionality and the legality, of the Agreement rests. As the EDPS stated, “the ‘commercial scale’ criterion is decisive”.¹

What does this mean in practice?

A member of the German parliament unintentionally put multiple copyright-protected images on his website.² Large numbers of visits to the page led to a “commercial scale” reproduction of the image. He received an “indirect economic” advantage by not paying for the images and his service provider “aided and abetted” the “infringement” by not taking action against this repeat “offender”. Is he or his Internet provider a criminal? According to ACTA, they are. Unquestionably.

Conflict with existing international law – World Trade Organisation (WTO)

The European Parliament has stated (resolution of 24 April, 2008) that “the WTO plays a key role among the multilateral organisations which contribute to international economic governance.” However, the Parliament study on ACTA highlights the fact that the proposed Agreement's focus on intent (“wilful” “offences” for “direct or indirect” “economic or commercial” advantage) contradicts the recent WTO decision, which defined commercial scale in relation to the “typical or usual commercial activity with respect to a given product in a given market”. The Parliament study comes to the conclusion that “[i]t must therefore be considered that ACTA is not in line with the WTO Panel decision”.

Conflict with European Parliament's existing position

When previously seized to give a position on criminal sanctions for IPR enforcement³, the European Parliament adopted two amendments on “commercial scale” in order to ensure a degree of proportionality:

- it requested that acts “carried out by private users for personal and not-for-profit purposes” be excluded. In the absence of a *de minimis* clause, a definition of “commercial scale” and a definition of “indirect economic advantage, ACTA contradicts this amendment;
- it requested that “fair use” of works for comment, criticism, news reporting, teaching, scholarship and research be excluded from the scope. ACTA's provisions directly contradict this approach.

The fact that the Commission ignored the Parliament's demand for a *de minimis* clause in the ACTA negotiations reinforces the damage done by ACTA's lack of clarity. It will inevitably lead to restrictions on the right to communication both in the EU (at least until ruled illegal by the Court of Justice) and internationally. An explicit *de minimis* rule and an explicit public interest defence would be the minimum required to bring Article 23 into line with the European Convention on Human Rights (ECHR) and the EU Charter.

¹ Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement, paragraph 44

² <http://www.spiegel.de/netzwelt/netzpolitik/0,1518,788592,00.html>

³ Position of the European Parliament adopted at first reading on 25 April 2007 with a view to the adoption of Directive 2007/.../EC of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (EP-PE_TC1-COD(2005)0127).