Copyright Criminal measures in ACTA

FFII analysis

Summary

The negotiating parties published the ACTA October text. ACTA criminalises newspapers revealing a document, office workers forwarding a file and possibly downloaders; whistle blowers and weblog authors revealing documents in the public interest and remixers and others sharing a file if there is an advantage. Even if that advantage is only indirect, an element which may be fulfilled by others.

ACTA's criminal measures go beyond the European Parliament 2007 vote on the IPRED 2 proposal. They fail to meet the EU principle of proportionality.

The Presidency of the Council, representing the Member States, negotiated the criminal measures. It is uncertain whether the Presidency is competent to do that since the entry into force of the Lisbon Treaty. The EU has exclusive competence in the area of common commercial policy (TFEU art 3.1), possibly negotiations should have been conducted by the Commission. The Council and its Presidency may not be competent to initial criminal measures in trade agreements.

An opinion of the Court of Justice as to whether ACTA is compatible with the Treaties should be obtained.

ACTA's Criminal measures

ACTA 2.14.1: *"Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale.* [ACTA footnote 9]

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."

On July 12, Commissioner De Gucht said ACTA will not have a definition of commercial scale. The second sentence is a definition of commercial scale, De Gucht misinformed the European Parliament.

The definition is extremely broad, *"commercial activities for direct or indirect economic or commercial advantage"*. This is hardly a threshold at all. For example an advertisement on a web page gives a commercial advantage. When someone downloads a song from the Internet without authorization, that person could be seen as having gained a commercial advantage by not paying for it.

This definition includes newspapers revealing a document, office workers forwarding a document and possibly downloaders. Remixers and others sharing a file are included if there is an advantage. A whistle blower or weblog author revealing a document in the public interest, may easily be prosecutable, for instance if the webpage contains advertisements. ACTA does not contain exceptions. ACTA is not limited to large scale activity, as claimed earlier by the Commission. There is no de minimis exception either.

What could be indirect economic or commercial advantage? Say you have a nice cd, make a copy for a friend. He then buys a cd and gives it to you. The act of someone else fulfills the indirect advantage element. Indirect advantages should never be an element of a crime.

ACTA footnote 9: *"Each Party shall treat willful importation or exportation of counterfeit trademark goods or pirated copyright goods on a commercial scale as unlawful activities subject to criminal penalties under this Article. A Party may comply with its obligation relating to exportation and importation of pirated copyright or counterfeit trademark goods by providing for distribution, sale or offer for sale of counterfeit trademark goods or pirated copyright goods on a commercial scale as unlawful activities subject to criminal penalties."*

In this footnote the criminalisation is extended, something which should not happen in a footnote. Importation may refer to downloading or taking home a dvd after holiday or taking home a laptop containing files after holiday or business trip. There is no de minimis exception. The alternative measures include distribution, problematic for newspapers, whistle blowers, office workers, remixers, weblog authors and filesharers. Why do ACTA's border measures contain a de minimis exception, but do criminal measures regarding importation not contain a de minimis exception?

Art 2.14.4 *"With respect to the offences specified in this Section, each Party shall ensure that criminal liability for aiding and abetting is available under its law."*

The criminalisation is so broad, that aiding and abetting may easily occur as well.

The criminal measures are highly invasive, Parties limit their domestic policy space beyond proportion, foreclosing future legislative improvements in response to changes in technology or policy.

Competence

The Presidency of the Council, representing the Member States, negotiated the criminal measures. It is uncertain whether the Presidency is competent to do that. The EU has exclusive competence in the area of common commercial policy (TFEU art 3.1), possibly negotiations should have been conducted by the Commission. The Presidency of the Council may not be competent to initial criminal measures in trade agreements.

The EU power to negotiate criminal measures in trade agreements is not unlimited. The criminal measures in trade agreements are limited by the same rules that limit the power to make internal EU legislation. Art 207.6 TFEU: *"The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation."*

The Treaty of Lisbon entered into force on 1 December 2009. The EU is competent to make criminal law. Criminal IP measures have to be based on art 83.2 TFEU: *"If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76."*

Measures have to be "*essential"*. This has been discussed earlier. The competence and subsidiarity issues pointed out by the Dutch Parliament and others like the Max Planck Institute are still valid. Based on ECJ C-176/03, the European Commission proposed IPRED2, the IP criminal measures directive proposal 2005/0127/COD, in 2005. Both Chambers of Dutch Parliament unanimously deemed

these measures not essential, the Community not competent. The Dutch Parliament, the Staten-Generaal, sent a letter to Commissioner Frattini, with English and French translations.

At the end of September 2007, the Commission launched a questionnaire addressed to the Member States in order to conduct a study on the situation of the intellectual property legislation in the Member States. The answers to the questionnaire will provide insight whether the measures are essential. The Commission should publish the answers to the questionnaire and the study.

The criminal measures have to comply with the Treaties, measures have to be *"essential"* and comply with the principle of proportionality (see below).

Proportionality

We can assess the appropriateness of ACTA according to the EU principle of proportionality. As a consequence of that principle, the qualification characteristics of the elements of a crime must be defined as clearly and narrowly as possible. The Max Planck Institute concluded in its statement on the IPRED 2 proposal, that harmonisation of criminal law in the field of IP, if admissible at all, must remain confined to cases of clear piracy and counterfeiting.

Max Planck Institute:
"14. Restricting the application of the directive to infringements carried out 'on a commercial scale' fails to provide for an appropriate and sufficiently precise definition of the elements of a crime, all the more as it would practically only exclude acts undertaken in good faith by consumers. An example of a more precise definition of what constitutes counterfeiting and piracy can be found in Regulation 1383/2003.8

15. Indeed, when proper account is taken of the proportionality principle (see above, 6), harmonisation of criminal penalties can only be justified in relation to acts fulfilling the following elements cumulatively:
- Identity with the infringed object of protection (the infringing item emulates the characteristic elements of a protected product or distinctive sign in an unmodified fashion [construction, assembly, etc.]).
- Commercial activity with an intention to earn a profit.
- Intent or contingent intent (dolus eventualis) with regard to the existence of the infringed right."

When we compare the broad definition of commercial scale in ACTA with *"Commercial activity with an intention to earn a profit"*, we see that ACTA's criminal measures fail to meet the EU principle of proportionality.

An opinion of the Court of Justice as to whether ACTA is compatible with the Treaties should be obtained.

European Parliament

On 25 April 2007 the European Parliament (EP) concluded its first reading of the IPRED 2 proposal, which was later withdrawn. FFII/EFF/EBLIDA/BEUC published a coalition report on the proposal as amended in Strasbourg by the European Parliament at its first reading.

The European Parliament adopted the following definition of commercial scale: *"infringements on a commercial scale" means any infringement of an intellectual property right committed to obtain a commercial advantage; this excludes acts carried out by private users for personal and not-for-profit purposes;"*.

Note that the EP definition fails to meet the requirements formulated above by the Max Planck Institute, violates the principle of proportionality.

Including indirect economic and commercial advantages, the ACTA definition goes further than the EU Parliament definition. Compared with the EP definition, *"this excludes acts carried out by private users for personal and not-for-profit purposes"* is missing.

Furthermore, the European Parliament adopted some exceptions and safeguards, which are missing in ACTA:

Amendment 16: *"Member States shall ensure that the fair use of a protected work, including such use by reproduction in copies or audio or by any other means, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, does not constitute a criminal offence."*

Amendment 24: *"Member States shall ensure that, through criminal, civil and procedural measures, the misuse of threats of criminal sanctions is prohibited and made subject to penalties. Member States shall prohibit procedural misuse, especially where criminal measures are employed for the enforcement of the requirements of civil law."*