

# BURSON-MARSTELLER EMEA HOT ISSUES FROM BRUSSELS



## ANTI-COUNTERFEIT TRADE AGREEMENT

### The Holy Grail of Intellectual Property Protection?

In November 2010 the EU and ten partner countries (Australia, Canada, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the US) concluded an Anti-Counterfeiting Trade Agreement (ACTA), aimed at addressing the global threat of piracy and counterfeited goods.

#### OBJECTIVES

ACTA will introduce a new international standard to improve cooperation in enforcing common rules and combating the infringement of intellectual property rights (IPRs), in particular the proliferation of counterfeiting and piracy. It includes so-called state-of-the-art provisions on:

- civil measures;
- criminal measures;
- customs measures;
- internet enforcement measures;
- robust cooperation mechanisms among ACTA parties to assist in their various enforcement efforts; and
- establishment of best practices for effective IPR enforcement.

With ACTA, companies and individuals are supposed to be able to benefit from improved access to judicial systems, customs and the police in order to enforce their IP rights against counterfeiters or infringers in court, at borders, or via the Internet.

On the Internet, in particular, ACTA will for the first time establish a minimal level of harmonisation and transparency for rules that combat infringements on millions of counterfeit goods. The agreement is not, however, intended to alter the EU acquis on IPR enforcement, but rather to increase cross border protection with other contracting states.

#### CALMING THE FEARS

Partly due to the secrecy of most of the negotiations, ACTA has come in for significant criticism and given rise to headline grabbing accusations. However, the European Commission insists:

- The proposed agreement will not change existing EU laws, as any amendment to EU legislation must be made through procedures enshrined in the EU treaties. Furthermore, the content of the agreement is already partly implemented in the EU.
- ACTA will respect EU citizens' fundamental rights, privacy and data protection.
- It will also respect the role of a free Internet and safeguard of the role of Internet service providers, as well as of the domestic systems of copyright exceptions. There will be no rumoured "three strikes and out" rule, whereby Internet service providers would be obliged to disconnect users after three illegal downloading offences.

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- There is no intention to create a permanent structure to govern ACTA – the parties to the agreement will meet annually to discuss any relevant developments. Any changes to the agreement itself would need to be introduced through the same negotiation, approval and ratification procedure as the initial text.
- Patents will be included under the civil enforcement chapter, but excluded from border measures and customs legislation due to the insistence of

a number of parties to the agreement. ACTA will not therefore impact EU citizens' – or anyone else's - access to medicines.

- ACTA deals exclusively with illegal trade and it will therefore not affect the EU's overall trade policy, nor its relationship with trading partners.

## NEXT STEPS

The agreement will be sent to the College of Commissioners for approval. Once adopted by the Council of Ministers, it must still receive the final assent of the European Parliament (expected early 2011) before it can be

ratified. Later in 2011 the Commission is to table a separate proposal to bring the EU Copyright Directive into line with ACTA.

## ANALYSIS – SOME OBSERVATIONS FROM BURSON-MARSTELLER BRUSSELS

ACTA and the European Commission have been heavily criticised by the European Parliament, in particular regarding the lack of MEP involvement and the lack of transparency in the drafting process.

As such, ACTA's ratification may in practice prove to be a lot longer and more difficult than it is expected to be in the confines of the Commission. On 24 November the European Parliament narrowly adopted a Resolution on ACTA, tabled by the EPP and ECR groups, that was approved by 331 votes to 294. This resolution backed the Commission and supported a stronger enforcement of IPRs, acknowledged that the EU acquis will not be affected, and that ACTA will benefit EU exports and rights-holders operating in a global market. But it was adopted only by a narrow margin. Other, much more critical, resolutions tabled were even more narrowly rejected. A joint motion for a resolution, for example, tabled by the S&D, ALDE, Greens/EFA and GUE/NGL groups, was rejected by just 321 votes to 306. On a different day the winning and losing resolutions could easily be reversed. The losing resolution attacked ACTA's compatibility with the acquis, its lack of respect for fundamental freedoms, private life and the data protection of citizens, the neutrality of internet service providers, and access to medicines.

Parliament's debate over ACTA demonstrated the strong competition within the institution when issues become a struggle between left and right. Clearly, the Commission will need to address MEPs' concerns if ACTA is to be ratified. The agreement will be another test case for the European Parliament's newly acquired powers in international trade matters, having gained veto rights with the entry into force of the Lisbon Treaty.

Although the actual impact of the agreement remains uncertain, as major counterfeit-manufacturing countries are not - and are unlikely to become - signatories, the aim is for ACTA to set an exemplary standard for international IP protection, which will be open to other countries as and when they become ready to join.

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