
Resolution on the Anti-Counterfeiting Trade Agreement

The TransAtlantic Consumer Dialogue (TACD) believes that the Anti-Counterfeiting Trade Agreement has failed to strike an appropriate balance between the enforcement of intellectual property rights and the fundamental rights of users, citizens and consumers such as the right to information, education and culture, the freedom of expression, the right to accessible health care, the right to privacy and protection of personal data, the right to due process as well as other human rights and good governance in general.

TACD reaffirms the 19th of June, 2009 TACD "Resolution on enforcement of copyright, trademarks, patents and other intellectual property rights," with special regard to the general principles and concerns: transparency and openness, human rights, privacy, competition, consumer protection, access to knowledge and the protection of culture and cultural diversity.

TACD takes note of the December 3, 2010 "Opinion of European Academics on the Anti-Counterfeiting Trade Agreement" and the submission by legal academics to the Obama Administration on "ACTA's Constitutional Problem", in response to a request for public comment.

TACD has evaluated the December 3, 2010 version of the ACTA text, the final text, and finds the desired equilibrium between intellectual property rights, innovation and citizens' rights has not been achieved. TACD deplores ACTA's sole focus on greater civil and criminal enforcement measures without seriously considering necessary copyright reform and flexibilities that would favour greater access to knowledge and the blossoming of new innovative business models.

TACD offers the following specific comments regarding the negotiating process and the status and substance of the agreement.

Negotiating process

1. TACD regrets the lack of transparency and democratic accountability that has shrouded the whole process of the ACTA negotiations that has seriously impaired public and consumer participation in the ACTA negotiating process.
2. TACD notes that ACTA has bypassed multilateral institutions such as WIPO and the WTO, and that this appears to have been a deliberate attempt to avoid broader international participation, transparency and public scrutiny.
3. TACD objects to any new international norms for IP enforcement that are introduced through the back-door of opaque, secret negotiations.
4. TACD points out that these important decisions on intellectual property enforcement have not enjoyed full parliamentary scrutiny by any of the participating parties, including the US, the EU and its member states.
5. TACD does not deem acceptable the creation of new global IP enforcement norms that could

constitute serious barriers to the access to knowledge by and the transfer of technology to developing countries, when the ACTA negotiating process was designed to exclude the participation by most countries from the global South.

Status and substance of the agreement

6. ACTA establishes new IP enforcement norms that go beyond existing EU, US and international norms and that taken together, these new rules will weaken innovation, consumer rights and threaten fundamental freedoms. TACD notes that ACTA's sole focus on greater civil and criminal enforcement measures could be counterproductive in its attempt to stop online piracy. The threat of disproportionately high damages and criminal measures in ACTA could chill innovation by making new digital and other industrial initiatives less attractive due to the fear of back-breaking financial penalties and criminal measures. Innovation could be inhibited by discouraging economic and time-consuming risk-taking in new creative ventures. This approach could be detrimental for consumer rights and interests by limiting competition and consumer choice.
7. TACD questions the possible incoherence and unfairness of a Treaty in which the two principal parties to the treaty have very differing views on the implications of ACTA. The European Union considers ACTA a binding treaty to be interpreted literally, while the United States apparently sees ACTA as an "understanding" that provides guidelines but not obligations to enforce the literal provisions.
8. There is a contradiction between ACTA and existing laws in several countries regarding criminal measures of IP enforcement, and also with regard to damages, injunctions and other remedies (Articles 8.1, 9.1 and 10).
9. TACD notes that ACTA does not make a clear distinction between the intentional and unintentional character of acts, and between the intentional or unintentional nature of possible IP infringements (art. 23. 1 and 23. 3). TACD points out the calculated ambiguity of ACTA's definition of "commercial scale" could lead to the victimization of non-commercial sharing of digital content, placing outside the law millions of people. TACD noted ACTA does not limit criminal provisions to cases with direct motivation of financial gains nor does it exclude actions carried out by those acting in good faith.
10. ACTA will create new global barriers to access to the vast cultural legacy of historic works for which the owners of works are difficult or impossible to identify or locate. ACTA would eliminate the flexibility to limit remedies for infringement in cases involving millions of orphaned copyrighted works, and requires ACTA parties to increase the penalties and criminal risks for using these works (Art. 8.1,9.1 and 10).
11. In some areas, ACTA proposes bypassing important procedural protections by courts in the application of IP enforcement. Article 12 could unreasonably limit the right of a defendant to be heard and Article 26 and Article 27.3 do not rule out the creation of extra-judicial IP enforcement bodies, and ACTA creates troubling new norms promoting ex officio judicial and IP enforcement in cooperation with right owners.
12. ACTA's provisions on trademarks are poorly drafted and could result in inappropriate seizures of products, including legal generic medicines and other products.
13. The ACTA provisions that impose obligations on third parties such as Internet Service Providers "to prevent goods that violate an intellectual property right from entering channels of commerce...where appropriate" encourage non-government actors to censor and monitor Internet content, without provisions to protect the public's rights in the area of express or uses of copyrighted materials, or the right to privacy.

14. TACD is concerned that ACTA creates a new institution out of a secret and non-transparent process, without any guarantees at all that the new institution will operate in an open, transparent and inclusive manner. TACD also notes the new institution has the power to amend the ACTA agreement.

TACD calls on:

- The US Government to clarify the possible contradictions of ACTA with US law, as well as the Constitutionality of the US ratification of ACTA as an "executive order".
- The US Government to clarify whether it expects other parties to interpret the provisions of ACTA as binding notwithstanding that the US itself does not interpret ACTA in this way.
- The European Commission and EU Council to clarify what EU member states' rules on criminal measures and other issues would need to be changed by ACTA.
- The European Parliament, without further satisfactory assurances and clarifications from the European Commission, to vote "no" on ACTA in the upcoming "consent" procedure.