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[Limited]

ACTA negotiations

Attached: ACTA – Internet Chapter

This is to inform MS about the state-of-play of the internet enforcement chapter that should be discussed at the next ACTA negotiating round in Seoul, Korea.

On 22-24 September, DG Trade participated in the EU-US IPR Working Group, which took place in Washington. In a side meeting with the USTR (US lead negotiators on ACTA), at their request, the US colleagues informed us about the progress in the preparation of a draft text of the future Internet Chapter of ACTA.

US reported that they have been working on a draft text since the end of the 5th round (end of July) and that this was basically finalised. However, they are still involved in internal consultations with other government agencies and a number of private stakeholders (bound to strict confidentiality clauses), therefore they were not willing to share with COM (or even to show us) the text at this stage.

USTR indicated that these internal discussions were sensitive due to different points of view regarding the internet chapter both within the Administration, with Congress and among stakeholders (content providers on one side, supporters of internet "freedom" on the other). Consequently, they have to delay the release of the initial text longer than initially expected. US expects the text to be circulated within the next 2 weeks. COM noted that if the text is received only 4 weeks before the next round, this will not be sufficient to conclude internal EU discussions and therefore to present written counterproposals (if any) in Seoul. US acknowledged the issue.

This being said, the US nevertheless provided a detailed oral description of the text. Below is a report of such description. It is stressed that this report is provided as an advance-warning and a preliminary indication of the content of US proposal, but since it results from an oral presentation it may not fully reflect the final draft and should be analysed accordingly.

The draft internet text is around 3 pages long and it was generally modelled on the respective section of the recently concluded US-Korea Free Trade Agreement (KORUS)¹ (Chapter 18), however, in a "simpler" and "shorter" manner. It consists of the following sections:

Section 1: Baseline obligations inspired by article 41 TRIPs, imposing adequate and effective legal remedies, as provided in relevant sections of ACTA (civil, penal), for internet infringements.

Section 2: ACTA members have to provide for third-party liability.

Section 3: Safe-harbours for liability regarding ISPs, based on Section 512 of the Digital Millennium Copyright Act (DMCA)², including a preamble about the balance

¹ Available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file273_12717.pdf

² The DMCA is the US domestic law implementing the WIPO internet treaties and regulating, inter alia, copyright issues on the internet. Available at: <http://thomas.loc.gov/cgi-bin/query/D?c105:6:./temp/~c105fgUiNi::>

between the interests of internet service providers (ISPs) and right-holders. See also KORUS Chapter 18.10.30. According to US, the language proposed is somewhere in the "middle" between the WIPO internet treaties, KORUS and the DMCA, which probably means that it is more detailed than the first but not as specific as the latter.

ISPs are defined as in Section 512 (k) of DMCA³

On the limitations from 3rd party liability: to benefit from safe-harbours, ISPs need to put in place policies to deter unauthorised storage and transmission of IP infringing content (ex: clauses in customers' contracts allowing, *inter alia*, a graduated response). From what we understood, the US will not propose that authorities need to create such systems. Instead they require some self-regulation by ISPs.

This Section 3 should also contain "broad" provisions regarding notice-and-takedown mechanisms.

Section 4: Will focus on technical protection measures (TPMs). Language inspired by US-Jordan Free-Trade Agreement (article 4.13)⁴, as well as by the WIPO Internet Treaties (articles 11 WCT and 18 WPPT):

- Parties to provide adequate civil and criminal remedies that are specific to TPM infringements, i.e. treat these as separate offenses form "general" copyright infringements.
- TPM infringements would be: (i) prohibition of circumvention of access controls and; (ii) prohibition of manufacture and trafficking of circumventing DRM devices.
- There will be exceptions to these prohibitions available to ACTA members.
- "Fair use" will not be circumscribed.
- There will be no obligation for hardware manufacturers to ensure interoperability of TPMs.

Section 5: Will focus on Rights' Management. Language inspired by US-Jordan Free-Trade Agreement (article 4.13)⁵, as well as by the WIPO Internet Treaties (articles 11 WCT and 18 WPPT):

- Parties to provide adequate civil and criminal remedies for rights' management infringements.
- Right' management infringements would be stripping (works?) of rights' management information

As agreed among ACTA participants, the negotiating papers are not public documents and therefore should be treated with reserve.

³ See <http://thomas.loc.gov/cgi-bin/query/F?c105:6:./temp/~c105fgUiNi:e57376>:

⁴ Available at: http://www.ustr.gov/webfm_send/1041

⁵ Available at: http://www.ustr.gov/webfm_send/1041