

Lausunto talousvaliokunnalle valtioneuvoston  
kirjelmästä U 69/2008  
useammankeskisestä väärentämisenvastaisesta  
kauppasopimuksesta (ACTA)

19.3.2010

Electronic Frontier Finland ry

[www.EFFI.org](http://www.EFFI.org)

## **1. Yleistä**

Electronic Frontier Finland ry:n (Effi) näkökulmasta nyt käsittelyssä olevaan asiaan on vaikea ottaa täsmällistä kantaa, koska julkista informaatiota aiheesta erityisesti koskien ns. Internet-osion täsmällistä sisältöä ei ole tarpeeksi. Kannanottomme perustuu asiasta lähinnä ulkomaisista lähteistä saamaamme tietoon.

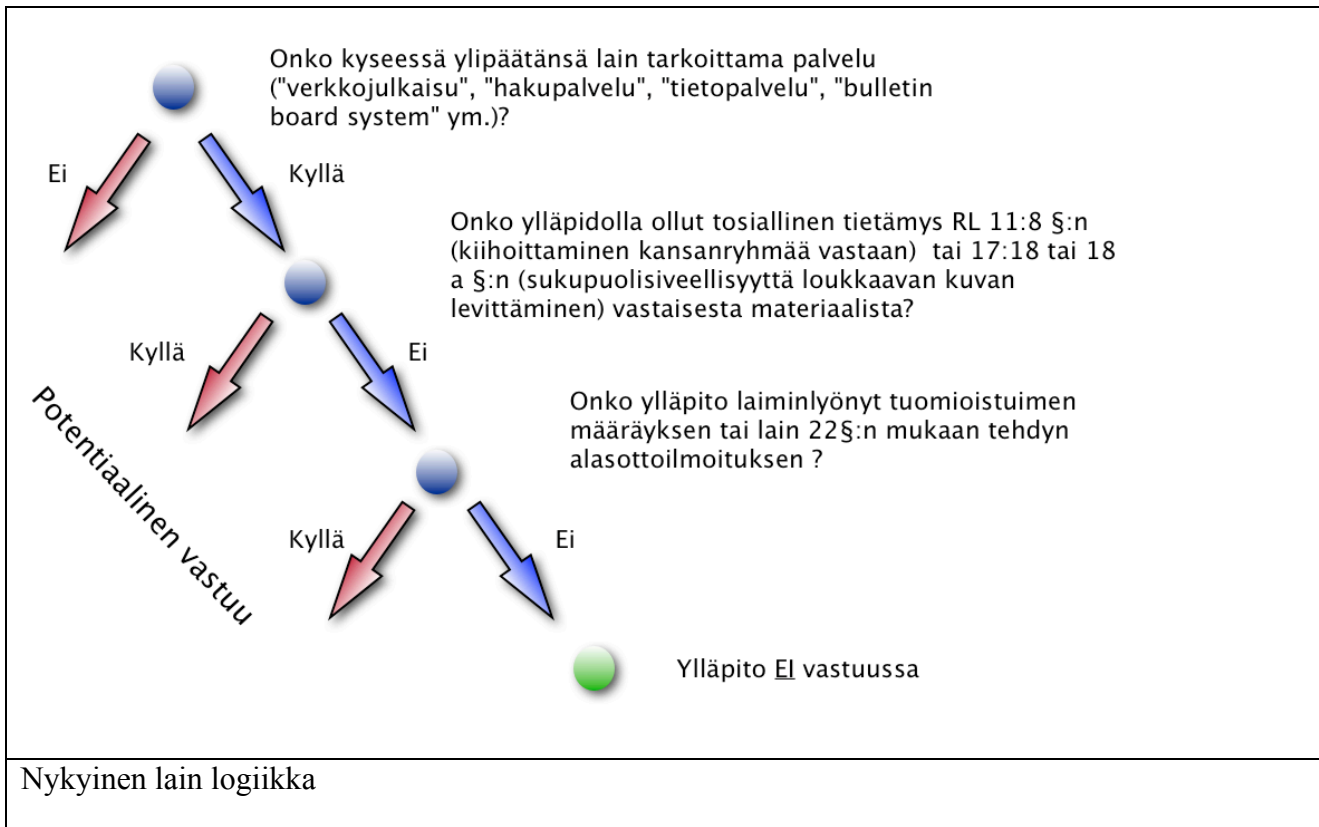
## **2. Yleinen instrumentin järkevyy**

EFFI ry pitää erittäin negatiivisena kehityksenä, että immateriaalioikeuksia koskeva päätöksenteko ollaan siirtämässä monenvälisiin kauppasopimuksiin sen sijaan, että asioista sovittaisiin YK:n alaisissa asioihin erikoistuneissa organisaatioissa, erityisesti WIPO:ssa tai WTO:ssa. Kyseessä on järjestön mielestä puhdasverisestä ”forum shopping” -toiminnasta, jonka tarkoituksena on ajaa läpi ratkaisuja, jotka eivät kestäisi kehitysmaiden ja kansalaisyhteiskunnan kritiikkiä. Toiseksi tuoteväärennösten ja muun aidon ”piratimin” vastaisen regulaation sekoittaminen normaaliin immateriaalioikeuksien sääntelyyn (esimerkiksi yritysten väliset patentti- tai tavaramerkkikiistat) johtavat erittäin haitalliseen riskitason nousuun – immateriaalioikeuksissa ”one size does not fit all”!

## **3. Internet-kohdan sisältö**

Koska talousvaliokunta on toivonut keskittymistä lähinnä ns. Internet-kappaleeseen ja koska tämä on muutenkin Effin toiminnan ydinalue, emme tässä lausunnossa kommentoi sopimuksen muuta sisältöä. Lausuntomme perustuu paremman informaation puutteessa liitteestä 1. löytyvään vuodettuun asiakirjaan sopimuksen potentiaalisesta sisällöstä.

Mikäli sopimus hyväksyttäisiin kyseisessä muodossa, se toisi todennäköisesti kahdessa kohtaa muutospainetta kotimaiseen lainsäädäntöömme. Ensinnäkin Laki tietoyhteiskunnan palvelujen tarjoamisesta pitäisi muuttaa tekijänoikeuden osalta siten, että tekijänoikeusrikokset lisättäisiin tosiasiallisen tietoisuuden piiriin (vrt. kaavio 1.)



Toiseksi sopimus näyttäisi tuovan myös mukanaan USA:sta ns. "induce"-opin, mitä ei ole aikaisemmin tunnettu suomalaisessa tekijänoikeudessa. Tämä voisi pakottaa palveluntarjoajat "vapaaehtoisesti" muuttamaan asiakassopimuksiaan siten, että epäily laittomasta jakelusta johtaa verkkoyhteyden katkaisemiseen.

#### 4. Suomen kanta

Effi esittää, että Suomen kannan tulisi olla seuraava: "ACTA-sopimuksessa tulisi ensisijaisesti keskittyä aitoihin kuluttajia uhkaaviin tuotevääreennyksiin. Tämän tavoitteen täyttämiseksi olisi keskeistä, ettei sopimukseen otettaisi mukaan Internetin tekijänoikeutta koskevia säännöksiä, koska tämä hyvin kiistanalainen aihepiiri voi muuten uhata koko sopimuksen syntyä. Jos sopimukseen tulee kuitenkin mukaan ko. aihepiiri, Suomen tulee varmistaa, että myöskin jatkossa Internet-operaattoreille riittää ns. alasottoilmoitusten tai tuomioistuinpäätösten noudattaminen eikä tosiasiallisen tietoisuuden alaa laajenneta."

#### 5. Lopuksi

ACTA-sopimusta on käsitelty myös Euroopan parlamentissa, joka hyväksyi asiasta selvin numeroin (kaikki merkittävät ryhmät tukivat sitä) päätöslauselman, jossa vaaditaan prosessin avaamista ja asetettiin tiettyjä tiukkoja reunaehtoja hyväksyttävän sisällön suhteen. ACTA:aan ei mm. tule ottaa mukaan ns. ”three strike”-yhteydenkatkaisusäännöstä ja sopimus ei saa johtaa tavallisten kansalaisten tarkistamiseen rajoilla immateriaalioikeuksia loukkaavien teosten löytämiseksi. Effi toivoo, että talousvaliokunta voisi kannanotossaan edellyttää Suomen toimivan ko. päätöslauselman mukaisesti.

Electronic Frontier Finland ry:n puolesta,

Ville Oksanen

Hallituksen jäsen, Effi

Tutkija, teknologiaoikeuden tohtori, Aalto-yliopisto

## Article 2.17: Enforcement procedures in the digital environment

1. Each Party shall ensure that enforcement procedures, to the extent set forth in the civil and criminal enforcement sections of this Agreement, are available under its law so as to permit effective action against an act of, trademark, copyright or related rights infringement which takes place by means of the Internet, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringement.
2. Without prejudice to the rights, limitations, exceptions or defenses to copyright or related rights infringement available under its law, including with respect to the issue of exhaustion of rights, each Party confirms that civil remedies, as well as limitations, exceptions, or defenses with respect to the application of such remedies, are available in its legal system in cases of third party liability<sup>1</sup> for copyright and related rights infringement.<sup>2</sup>
3. Each Party recognize that some persons<sup>3</sup> use the services of third parties, including online service providers,<sup>4</sup> for engaging in copyright or related rights infringement. Each Party also recognizes that legal uncertainty with respect to application of intellectual property rights, limitations, exceptions, and defenses in the digital environment may present barriers to the economic growth of, and opportunities in, electronic commerce. Accordingly, in order to facilitate the continued development of an industry engaged in providing information services online while also ensuring that measures take adequate and effective action against copyright or related rights infringement are available and reasonable, each Party shall:
  - (a) provide limitations<sup>5</sup> on the scope of civil remedies available against an online service provider for infringing activities that occur by:
    - (I) automatic technical processes and
    - (II) the actions of the provider's users that are not directed or initiated by that provider when the provider does not select the material, and
    - (III) the provider referring or linking users to an online locationwhen, in cases of subparagraphs (II) and (III), the provider does not have actual knowledge of the infringement and is not aware of the facts or circumstances from which infringing activity is apparent; and
  - (b) condition the application of the provisions of subparagraph (a) on meeting the following requirements:
    - (I) an online service provider adopting and reasonably implementing a

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1 For greater certainty, the Parties understand that third party liability means liability for any person who authorizes for a direct financial benefit, induces through or by conduct directed to promoting infringement, or knowingly and materially aids, any act of copyright or related rights infringement by another. Further, the parties also understand that the application of third party liability may include consideration of exceptions or limitations to exclusive rights that are confined to certain special cases that do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, including fair use, fair dealing, or their equivalents.

2 *Negotiator's Note*: This provision is intended to be moved and located in the civil enforcement section.

3 For purposes of this Article, **person** means a natural person or an enterprise.

4 For purposes of this Article, **online service provider** and **provider** mean a provider of online services or network access, or the operators of facilities therefor, and includes an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification of the content of the material as sent or received.

5 For greater certainty, the Parties understand that the failure of an online service provider's conduct to qualify for a limitation of liability under its measures implementing this provision shall not bear adversely on the consideration of a defense of the service provider that the service provider's conduct is not infringing or any other defense.

policy<sup>6</sup> to address the unauthorized storage or transmission of materials protected by copyright or related rights except that no Party may condition the limitations in subparagraph (a) on the online service provider's monitoring its services or affirmatively seeking facts indicating that infringing activity is occurring; and

(II) an online service provider expeditiously removing or disabling access to material or activity, upon receipt of legally sufficient notice of alleged infringement, and in the absence of a legally sufficient response from the relevant subscriber of the online service provider indicating that the notice was the result of a mistake or misidentification.

except that the provisions of (II) shall not be applied to the extent that the online service provider is acting solely as a conduit for transmissions through its system or network.

4. In implementing Article 11 of the *WIPO Copyright Treaty* and Article 18 of the *WIPO Performances and Phonograms Treaty* regarding adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers or producers of phonograms in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms, each Party shall provide civil remedies, as well as criminal penalties in appropriate cases of willful conduct that apply to:

(a) the unauthorized circumvention of an effective technological measure<sup>7</sup> that controls access to a protected work, performance, or phonogram; and

(b) the manufacture, importation, or circulation of a technology, service, device, product, component, or part thereof, that is: marketed or primarily designed or produced for the purpose of circumventing an effective technological measure; or that has only a limited commercially significant purpose or use other than circumventing an effective technological measure.

5. Each Party shall provide that a violation of a measure implementing paragraph (4) is a separate civil or criminal offense, independent of any infringement of copyright or related rights.<sup>8</sup> Further, each Party may adopt exceptions and limitations to measures implementing subparagraph (4) so long as they do not significantly impair the adequacy of legal protection of those measures or the effectiveness of legal remedies for violations of those measures.<sup>9</sup>

6. In implementing Article 12 of the *WIPO Copyright Treaty* and Article 19 of the *WIPO Performances and Phonograms Treaty* on providing adequate and effective legal remedies to protect rights management information, each Party shall provide for civil remedies, as well as criminal penalties in appropriate cases of willful conduct, that apply to any person performing any of the following acts knowing that it will induce, enable, facilitate, or conceal an infringement of any copyright or related right:

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6 An example of such a policy is providing for the termination in appropriate circumstances of subscriptions and accounts in the service provider's system or network of repeat infringers.

7 For the purposes of this Article, **effective technological measure** means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or protects any copyright or any rights related to copyright.

8 The obligations in paragraphs (4) and (5) are without prejudice to the rights, limitations, exceptions, or defenses to copyright or related rights infringement. Further, in implementing paragraph (4), no Party may require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise violate any measures implementing paragraph (4).

9 *Negotiator's Note*: This provision is subject to broader government action/sovereign immunity provision elsewhere in the Agreement.

(a) to remove or alter any rights management information<sup>10</sup> without authority; and  
(b) to distribute, import for distribution, broadcast, communicate, or make available to the public, copies of the works, performances, or phonograms, knowing that rights management information has been removed or altered without authority.

7. Each Party may adopt appropriate limitations or exceptions to the requirements of subparagraphs (a) and (b) of paragraph (6).

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<sup>10</sup> For the purposes of this Article, **rights management information** means:

- (a) information that identifies a work, performance, or phonogram; the author of the work, the performer of the performance, or the producer of the phonogram; or the owner of any right in the work, performance, or phonogram;
- (b) information about the terms and conditions of the use of the work, performance, or phonogram; or
- (c) any numbers or codes that represent such information.

When any of these items is attached to a copy of the work, performance, or phonogram or appears in connection with the communication or making available of a work, performance, or phonogram to the public.

## JOINT MOTION FOR A RESOLUTION

pursuant to Rule 115(5) of the Rules of Procedure  
replacing the motions by the following groups:

Verts/ALE (B7-0154/2010)

PPE, ECR (B7-0158/2010)

ALDE (B7-0173/2010)

S&D (B7-0179/2010)

GUE/NGL (B7-0180/2010)

on the transparency and state of play of the ACTA negotiations

Tokia Saïfi, Daniel Caspary, Cristiana Muscardini, Georgios Papastamkos

on behalf of the PPE Group

Kader Arif, Gianluca Susta, Bernd Lange, David Martin

on behalf of the S&D Group

Niccolò Rinaldi, Sophia in 't Veld, Alexander Alvaro, Metin Kazak, Marielle De Sarnez, Michael Theurer

on behalf of the ALDE Group

Carl Schlyter, Eva Lichtenberger, Christian Engström, Jan Philipp Albrecht, Franziska Keller,

Judith Sargentini

on behalf of the Verts/ALE Group

Syed Kamall

on behalf of the ECR Group

Lothar Bisky, Helmut Scholz, Rui Tavares, Cornelis de Jong, Eva-Britt Svensson, Patrick Le

Hyaric, Jacky Hénin, Marie-Christine Vergiat

on behalf of the GUE/NGL Group

European Parliament resolution on the transparency and state of play of the ACTA negotiations

The European Parliament,

- having regard to Articles 207 and 218 of the Treaty on the Functioning of the European Union (TFEU),
- having regard to its resolution of 9 February 2010 on a revised Framework Agreement between the European Parliament and the Commission for the next legislative term(1),
- having regard to its resolution of 11 March 2009 regarding public access to European Parliament, Council and Commission documents (recast), to be considered as Parliament's position at first reading(2) (COM(2008)0229 – C6-0184/2008 – 2008/0090(COD)),
- having regard to its resolution of 18 December 2008 on the impact of counterfeiting on international trade(3),
- having regard to the European Data Protection Supervisor's Opinion of 22 February 2010 on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA),
- having regard to the Charter of Fundamental Rights of the European Union, and in particular Article 8 thereof,
- having regard to Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, as last amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009,
- having regard to Directive 2000/31/EC of the European Parliament and of the Council of 8



June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on Electronic Commerce'),

– having regard to Rule 115(5) of its Rules of Procedure,

A. whereas in 2008 the European Union and other OECD countries opened negotiations on a new multilateral agreement designed to strengthen the enforcement of intellectual property rights (IPRs) and combat counterfeiting and piracy (Anti-Counterfeiting Trade Agreement – ACTA), and jointly agreed on a confidentiality clause,

B. whereas in its report of 11 March 2009 Parliament called on the Commission to 'immediately make all documents related to the ongoing international negotiations on the Anti-Counterfeiting Trade Agreement (ACTA) publicly available',

C. whereas on 27 January 2010 the Commission provided assurances as to its commitment to a reinforced association with Parliament, in line with Parliament's resolution of 9 February 2010 on a revised Framework Agreement with the Commission calling for 'immediate and full information at every stage of negotiations on international agreements (...), in particular on trade matters and other negotiations involving the consent procedure, (...) to give full effect to Article 218 of the TFEU',

D. whereas Council representatives have attended rounds of ACTA negotiations alongside Commission representatives,

E. whereas the Commission, as guardian of the Treaties, is obliged to uphold the *acquis communautaire* when negotiating international agreements affecting legislation in the EU,

F. whereas, according to documents leaked, the ACTA negotiations touch on, among other things, pending EU legislation regarding the enforcement of IPRs (COD/2005/0127 – Criminal measures aimed at assuring the enforcement of intellectual property rights (IPRED-II)) and the so-called 'Telecoms Package' and on existing EU legislation regarding e-commerce and data protection,

G. whereas the ongoing EU efforts to harmonise IPR enforcement measures should not be circumvented by trade negotiations which are outside the scope of normal EU decision-making processes,

H. whereas it is crucial to ensure that the development of IPR enforcement measures is accomplished in a manner that does not impede innovation or competition, undermine IPR limitations and personal data protection, restrict the free flow of information or unduly burden legitimate trade,

I. whereas any agreement reached by the European Union on ACTA must comply with the legal obligations imposed on the EU with respect to privacy and data protection law, notably as set out in Directive 95/46/EC, Directive 2002/58/EC and the case-law of the European Court of Human Rights and the Court of Justice of the European Union (CJEU),

J. whereas the Lisbon Treaty has been in force since 1 December 2009,

K. whereas, as a result of the entry into force of the Lisbon Treaty, it will have to give its consent to the ACTA Treaty text prior to its entry into force in the EU,

L. whereas the Commission has committed itself to providing immediate and full information to Parliament at every stage of negotiations on international agreements,

1. Points out that since 1 December 2009 the Commission has had a legal obligation to inform

Parliament immediately and fully at all stages of international negotiations;

2. Expresses its concern over the lack of a transparent process in the conduct of the ACTA negotiations, a state of affairs at odds with the letter and spirit of the TFEU; is deeply concerned that no legal base was established before the start of the ACTA negotiations and that parliamentary approval for the negotiating mandate was not sought;

3. Calls on the Commission and the Council to grant public and parliamentary access to ACTA negotiation texts and summaries, in accordance with the Treaty and with Regulation 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents;

4. Calls on the Commission and the Council to engage proactively with ACTA negotiation partners to rule out any further negotiations which are confidential as a matter of course and to inform Parliament fully and in a timely manner about its initiatives in this regard; expects the Commission to make proposals prior to the next negotiation round in New Zealand in April 2010, to demand that the issue of transparency is put on the agenda of that meeting and to refer the outcome of the negotiation round to Parliament immediately following its conclusion;

5. Stresses that, unless Parliament is immediately and fully informed at all stages of the negotiations, it reserves its right to take suitable action, including bringing a case before the Court of Justice in order to safeguard its prerogatives;

***5a. Deplores the calculated choice of the parties not to negotiate through well-established international bodies, such as WIPO and WTO, which have established frameworks for public information and consultation;***

6. Calls on the Commission to conduct an impact assessment of the implementation of ACTA with regard to fundamental rights and data protection, ongoing EU efforts to harmonise IPR enforcement measures, and e-commerce, prior to any EU agreement on a consolidated ACTA treaty text, and to consult with Parliament in a timely manner about the results of the assessment;

7. Welcomes affirmations by the Commission that any ACTA agreement will be limited to the enforcement of existing IPRs, with no prejudice for the development of substantive IP law in the European Union;

***8. Calls on the Commission to continue the negotiations on ACTA and limit them to the existing European IPR enforcement system against counterfeiting; considers that further ACTA negotiations should include a larger number of developing and emerging countries, with a view to reaching a possible multilateral level of negotiation;***

9. Urges the Commission to ensure that the enforcement of ACTA provisions – especially those on copyright enforcement procedures in the digital environment – are fully in line with the *acquis communautaire*; demands that no personal searches will be conducted at EU borders and requests full clarification of any clauses that would allow for warrantless searches and confiscation of information storage devices such as laptops, cell phones and MP3 players by border and customs authorities;

10. Considers that in order to respect fundamental rights, such as the right to freedom of expression and the right to privacy, while fully observing the principle of subsidiarity, the proposed agreement should not make it possible for any so-called ‘three-strikes’ procedures to be imposed, in full accordance with Parliament’s decision on Article 1.1b in the (amending) Directive 2009/140/EC calling for the insertion of a new paragraph 3(a) in Article 1 of Directive 2002/21/EC on the matter of the ‘three strikes’ policy; ***Considers that any agreement must include the stipulation***

***that the closing-off of an individual's Internet access shall be subject to prior examination by a court;***

11. Emphasises that privacy and data protection are core values of the European Union, recognised in Article 8 ECHR and Articles 7 and 8 of the EU Charter of Fundamental Rights, which must be respected in all the policies and rules adopted by the EU pursuant to Article 16 of the TFEU;

***11a. Points out that ACTA provisions, notably measures aimed at strengthening powers for cross-border inspection and seizure of goods, should not affect global access to legitimate, affordable and safe medicinal products – including innovative and generic products – on the pretext of combating counterfeiting;***

12. Instructs its President to forward this resolution to the Council, the Commission and the governments and parliaments of the states party to the ACTA negotiations.