

**Intellectual Property enforcement in cyberspace: a comparative study between the United
States and the European Union**

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ABSTRACT

This research is aimed at comparing legislation available in the United States and the European Union on enforcement of the intellectual property rights in the cyberspace. The comparison shows two possible solutions: the international and national level of regulating the issue. The efforts to internationally regulating this issue are studied through the Anti-Counterfeiting Trade Agreement, pointing the weaknesses and benefits of this legislation in both jurisdictions. Furthermore, the mentioned legislation is compared to the laws and regulations offered currently in each jurisdiction. The specific attention is given in this research paper to the French solution of the ‘three strike rule’ as possible future model for regulating the enforcement of the intellectual property rights in the cyberspace.

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ABBREVIATIONS

ACTA - Anti-Counterfeiting Trade Agreement

CETA - Canada - EU Trade Agreement

DMCA - Digital Millennium Copyright Act

DRM - Digital Rights Management

INTA - Committee on International Trade

IPS - Internet Service Provider

ISDIA - an Internet site dedicated to infringing activities

MEP - Member of the European Parliament

NDN - non-domestic domain name

PIPA - Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011

SOPA - Stop Online Piracy Act

TEC - Treaty establishing the European Community

TFEU - Treaty of Functioning of European Union

TRIPS - Trade-Related Aspects of Intellectual Property Rights

USTR - Office of United States Trade Representative

WIPO - World Intellectual Property Organization

WIPO Treaty - World Intellectual Property Organization Copyright Treaty

WTO - World Trade Organization

INTRODUCTION

What is the cyberspace/Internet?

Nowadays there are multiple ways to define what the Internet is. Some scholars refer to the same term as the cyberspace. Actually these terms are used interchangeably as shown in the following definition:

...“cyberspace” can be characterized as a multitude of individual, but interconnected, electronic communications networks. The cyberspace/Internet is not a physical object with a tangible existence; rather, it is a set of network protocols that has been adopted by a large number of individual networks allowing the transfer of information among them. Moreover, the Internet is a medium through which a user in real space in one jurisdiction communicates with a user in real space in another jurisdiction.¹

This definition is very extensive explanation what constitutes the Internet. The main points of this definition are the fact that the Internet is not a material object. It can be stated that the Internet is a parallel world to the real world, but dependant on the real world. The Internet does not exist by itself beyond the support of the technology and human intelligence in the real world. Another important fact and characteristic that can be attributed to the Internet is ‘globalized spiders web’. This is reflected by the fact that the Internet is used Worldwide by multiple users who in a certain point of time do come into direct or indirect communication with each other. This definition also stresses one important issue when it comes to the intellectual property law and the development of the Internet. The fact that one person can communicate freely and relatively low cost with another person trough the Internet. The freedom to communicate is a two edged sword. On one side the Internet is stimulating the communication, trade and overall development of individuals. But on the other side there are the costs to this freedom. Because the

¹ G. I. Zekos, *State Cyberspace Jurisdiction and Personal Cyberspace Jurisdiction*, 15 INT. J. LAW INF. TECHNOL. 1–37, 1 (2006).

regulation of the Internet is still an issue, it is hard to tackle infringing behavior of its users. Next subchapter explains in more details how the development influenced the change in the intellectual property law.

Influence of the cyberspace/Internet on intellectual property

Before the development of the Internet the general perception of the intellectual property law was that it is dependent on the state sovereignty to ensure the protection to the owners of the intellectual property rights. This means that this protection is granted on the national level or within the borders of a state. The structure of the state law was so designed that when the Internet brought the globalized and “de-territorialized”² aspect to the intellectual property rights, many statutes were not ready for the change and had to be adapted. The Internet basically turned upside down the entire concept of the intellectual property rights.

Today the intellectual property law can be described as de-materialized, de-territorialized, de-personalized and de-“statualized”.³ The importance of the reaction by the legislator to this changes is stressed in the following statement: “[t]he world of cyberspace has no physical existence beyond the computers on which it resides, but this fact does not keep it from being real because it is a world of information that has real consequences and a real existence.”⁴ These consequences are created on the owners of the intellectual property, which the legislation is aiming to protect. This protection is constituted in enforcement of the rights of intellectual property owners in the new environment. Now the states could not anymore act as isolated island on the prevention and the sanction of the infringements. The international level of enforcement

² CaterinaSganga_ECOMM2013_Session1.pptx, available at: http://e-learning.ceu.hu/file.php/2098/CS_ECOMM2013_Session1.pptx (Mar 13, 2014).

³2 *Id.* at 2.

⁴ Zekos, *supra* note 1.

and the enforcement in the new environment called the Internet became interdependent. Since the Internet is characterized as borderless the international level of enforcement of the intellectual property law steps in to cure the consequences that the borderlessness of the Internet has created. Even though on the national level the legislation had been adapted to the new environment, a new framework needed to be created but on the international level. The reason for this is the fact that some acts in one jurisdiction may not have effect in that specific jurisdiction but in another one. For this reason the states need a legal framework that would also sanction the behavior that was in a *gray area or legislative gap*⁵. The reason why not only infringements but also prevention of the unwanted behavior is an aim of the legislation is in the fact that new technologies have enabled a low cost and globalized access and distribution of the material through the Internet.

The need to regulate this issue is mostly perceived by "...major exporters of intellectual property ... increasingly put[ing] the global protection of [intellectual property] at the forefront of their trade negotiation agendas."⁶ Such an effort is made when in 2011 the Anti-Counterfeiting Trade Agreement (ACTA) was negotiated. Even with the best efforts the agreement did not reach a ratification and implementation on the national level of the countries participants to the negotiations.

Reasons for this are different in the jurisdictions of the negotiating countries, but the focus of this research paper will be the United States and the European Union. The issue of the enforcement will be discussed in a comparative approach. First part of the research will give an overview of the ACTA in the section of international cooperation and enforcement in the cyberspace,

⁵ Area of law referred to the gray area is the one that is not regulated or it is regulated by the other fields in way not defined enough so that it is a weakness and creates excuse for not complying with it.

⁶ Aaron X. Fellmeth, *Anti-Counterfeiting Trade Agreement, Introductory Note by Aaron X. Fellmeth*, 50 INT. LEG. MATER. 239–257 (2011).

followed by the detailed explanation of the each jurisdiction explained separately issues of the ratification and the implementation. The research will show whether there is need for the international level legislation for the enforcement of the intellectual property or is the national level option better solution. Because of this the research paper will also discuss what national level options are currently available and which model could possibly serve best towards the effective enforcement of the intellectual property.

1. INTERNATIONAL LAW LEVEL OF ENFORCEMENT OF INTELLECTUAL PROPERTY IN THE CYBERSPACE

1.1 *Before the Anti-Counterfeit Trade Agreement*

Before the idea of ACTA came to the legal scene the unity of different intellectual property rights and their enforcement in one treaty did exist. This first step in the legal framework of the intellectual property rights that covered multiple intellectual property rights in one treaty was Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁷ Before the TRIPS the multiple treaties were used to regulate different intellectual property rights, such as the Paris and the Bern Conventions. Two years after the TRIPS the World Intellectual Property Organization Copyright Treaty (WIPO Treaty) was created.⁸ The main objective of the WIPO Treaty was to “fills some of the holes in the [TRIPS] concerning computers and the internet. Specifically, the WIPO Treaty introduces provisions obligating member states to create legal remedies for DRM [Digital Rights Management] circumvention and defining actionable circumstances of circumvention.”⁹

But the importance of the TRIPS and the WIPO Treaty is also in the fact that these treaties and all their successors now contain the enforcement section of the intellectual property rights.¹⁰ But again it is argued that both texts of the treaties “offer little in the way of enforcement guidelines or limitations on the new rights it creates”.¹¹ The ACTA is one of these successors. “Many of the

⁷Lulin Gao, *Intellectual Property Rights in the Internet Era: The New Frontier*, 5 JOHN MARSHALL REV. INTELLECT. PROP. LAW [i], 589-590 (2005).

⁸ Alex Shepard, *ACTA On Life Support: Why The Anti-Counterfeiting Trade Agreement Is Failing And How Future Intellectual Property Treaties Might Avoid A Similar Fate*, 12 Wash U Glob. Stud Rev 673–694, 677 (2013).

⁹ *Id.*

¹⁰ Gao, *supra* note 7 .

¹¹ Shepard, *supra* note 8.

ACTA provisions parallel those of the TRIPS Agreement, sometimes with minor variations.”¹² It can be said that the negotiating countries used the TRIPS as guideline for drafting ACTA, but adding or expanding some aspects already developed in the TRIPS Agreement.¹³ For example when it comes to the definition of the *counterfeit trademark goods* TRIPS defines the goods as counterfeiting in relation to the law at the place of the importation, where as the ACTA expands the applicable law to the law in which country the goods are in transit.¹⁴ Main and most significant change from the TRIPS Agreement is in the expansion of the enforcement of the intellectual property rights to the cyberspace. Except adding this new environment, the ACTA aims “to enhance enforcement obligations and to foster international cooperation”¹⁵.

1.2 General overview of the Anti-Counterfeiting Trade Agreement

The need to resolve the issue of the enforcement of the intellectual property on international level, making the cyberspace one aspect of it, began with the realization that there is need to address gaps in protection of the intellectual property rights.¹⁶ So “like-minded IP-exporting states began informal discussions regarding an IP enforcement treaty in 2006, and formally began negotiations in Geneva in the summer of 2008. On November 15, 2010, the negotiating parties announced that they had finalized the text of the Anti-Counterfeiting Trade Agreement (“ACTA”).”¹⁷

“There are four aspects of ACTA that are relevant to the enforcement of intellectual property rights in the digital environment: digital copyright infringement, DRM [Digital Rights

¹² Fellmeth, *supra* note 6.

¹³ B. Mercurio, *Beyond the Text: The Significance of the Anti-Counterfeiting Trade Agreement*, 15 J. INT. ECON. LAW 361–390, 369 (2012).

¹⁴ *Id* at 369.

¹⁵ Fellmeth, *supra* note 6

¹⁶ *Id.*

¹⁷ *Id.*

Management] circumvention, minimum standards for liability, and disclosure of personal information. It is interesting, then, that TRIPS spends very little time on these issues. “¹⁸

A closer look to the introductory word and the text of the ACTA need to be taken looked at in order to see how does the ACTA solve the issue of the enforcement of the intellectual property rights in cyberspace. As stated in the introductory word of the ACTA the goal of this act is to protect and encourage the economic growth of the negotiating countries.¹⁹ Who actually are these negotiating countries? Well as it can be implied from the previous chapter *negotiating countries*²⁰ are the major intellectual properties exporting countries. So the states that have the most interests in creating an international legal framework for the issue of enforcement of the intellectual property rights are the countries which have *biggest influence on the economic market*²¹. This is why the negotiating countries wanted to ensure the international enforcement of intellectual property but not to the extent that these become obstacles or barriers to trade.²²

When comparing the countries parties to the TRIPS Agreement and the countries that negotiated the ACTA the majority of the states that negotiated the ACTA are the developed countries. This is one important shift in addition to the fact that the ACTA was not negotiated under the auspice neither the WIPO (World Intellectual Property Organization) nor the WTO (World Trade Organization).²³ “Attempts to even discuss increased enforcement standards [of intellectual property rights] at the WTO (TRIPS Council) and WIPO (Advisory Committee on Enforcement)

¹⁸ Shepard, *supra* note 8.

¹⁹ Anti-Counterfeiting Trade Agreement , preamble, Oct. 1, [hereinafter ACTA] 2011, available at: http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf (Mar 13, 2014).

²⁰ Negotiating countries listed on the web site of the Office of the United States Trade Representative are: Australia, Canada, the European Union (EU), represented by the European Commission and the EU Presidency and the EU Member States, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States of America.

²¹ David Barboza, *China Passes Japan to Become No. 2 Economy*, THE NEW YORK TIMES, August 15, 2010, available at: <http://www.nytimes.com/2010/08/16/business/global/16yuan.html> (Mar 13, 2014).

²² Anti-Counterfeiting Trade Agreement , preamble, *supra* note 19.

²³ Mercurio, *supra* note 13.

are always rejected out of hand by a large contingent of developing countries as not appropriate for discussion in that particular forum.”²⁴ “The United States, Australia, Canada, Korea, Japan, New Zealand, Morocco, and Singapore”²⁵ are the countries that signed the final text of the ACTA. Additionally to these countries the 22 EU Member States signed the ACTA as well. As required by the Article 40 of the ACTA the Agreement will enter into the force when “sixth instrument of ratification, acceptance, or approval as between those Signatories that have deposited their respective instruments of ratification, acceptance, or approval”²⁶. So far only Japan has ratified the final text of the ACTA.

The main aim of this research paper and the reason why I choose ACTA to explain is for the reason that in the final text of the agreement the negotiating countries specifically expended the enforcement issue to the cyberspace. This new environment is addressed as *digital environment*²⁷. The final text of the ACTA states the ACTA is:

... [d]esiring to address the problem of infringement of intellectual property rights, including infringement taking place in the digital environment, in particular with respect to copyright or related rights, in a manner that balances the rights and interests of the relevant right holders, service providers, and users; ... to promote cooperation between service providers and right holders to address relevant infringements in the digital environment...²⁸

So the above section of the ACTA is explaining how the principles employed in the material world will be transferred to the application in the digital environment. But the ACTA also calls on the development of the international cooperation between the negotiating counties in order to facilitate the enforcement in the digital environment. The employed procedures to protect the intellectual property rights are not balanced against the standard of *obstacle to trade* any more. In

²⁴ *Id* at 381.

²⁵ Anti-Counterfeiting Trade Agreement (ACTA) | Office of the United States Trade Representative, available at: <http://www.ustr.gov/acta> (Mar 14, 2014).

²⁶ ACTA, art. 40, *supra* note 19.

²⁷ ACTA, preamble, *supra* note 19.

²⁸ ACTA, preamble, *supra* note 19.

case of the digital environment the balance is determined differently. The proportionality of the employed measure to protect the intellectual property owner's right is balanced between the infringement and the "legitimate activities, including the electronic commerce, and ... fundamental principles, such as freedom of expression, fair process and privacy"²⁹. This is one of the main reasons that influenced the decision of the Member States of the European Union to reject ACTA. On the other side of the ocean, in the United States, this is a reason why the ACTA raised concerns of many people. In order to explain these reasons and concerns I will explain the two jurisdictions separately. Another reason for this is also the fact that the current status of the ACTA is different in these two jurisdictions.

²⁹ ACTA, art. 27 §2, *supra* note 19.

2. ANTI-COUNTERFEITING TRADE AGREEMENT IN THE UNITED STATES

2.1. Issue of the classification of the international agreements and process of implementation

In order to explore the reasons why ACTA was not implemented into the legal system of the United States I have to start from the basic facts, such as the organization of the legal system in the United States to the process by which the international treaties, such as ACTA, become the part of the domestic legislation. The United States is a common law country. This means that “[t]he body of law derived from judicial decisions, rather than from statutes or constitutions”³⁰. For this reason some fundamental changes in the United States legal system were made through the case law. The judges interpret the statutes and regulations by which they bring a new interpretation to the legislation at issue. The positive side of the case law is the fact that time is changing and with time the society is changing as well. In order for the legal system to be synchronized with these changes the judges may give a more suitable interpretation of the legislation that at the time of drafting did not predict the developments in the society. Usually judges name this interpretation the intended interpretation to achieve the aimed goal by the legislator. This is how the system is working when the legislation is domestic. But when it comes to the international legislation which was negotiated there is a pre-requirement in order for the judges to interpret and apply the legislation in the cases.

In the case of international legislation the starting point is in the executive branch; the President. Most commonly used type of international agreements is treaty.³¹ Treaty is “an international agreement concluded between two or more states in written form and governed by international

³⁰ *Black's Law Dictionary* (9th ed. 2009), available at *Westlaw BLACKS*

³¹ Peter Malanczuk, *Akehurst's Modern Introduction to International Law* 36 (7th ed. 1997).

law”.³² Treaty can be bilateral (between the two parties) and multilateral (between more than two parties). “[T]he legal terminology used by the United States to describe international agreements is markedly different from that employed elsewhere. Under the U.S. Constitution, the term ‘treaty’ has a particular meaning — an agreement made by the President with the advice and consent of the Senate.”³³

The United States President has a Constitutional power to “by and with the Advice and Consent of the Senate ... make Treaties”³⁴. So the United States Constitution explicitly grants this power to the President, meaning that the President is in charge for the drafting and negotiating step in the process. Then the proposed treaty is submitted to the Senate to be approved or disapproved, but the Senate can approve the treaty additionally stating some comments in form of conditions and reservations³⁵. “Once a treaty is approved by a two-thirds vote in the Senate, the President may still decline to make the treaty because of the understandings, conditions or reservations proposed or attached by the Senate to its consent. After a treaty's ratification and proclamation ... it becomes a binding international agreement.”³⁶ This multi-step approach may seem complicated but it is a vehicle of protection. What does that mean? Well when the multiple states sit to negotiate a treaty that usually means there is a need to regulate because it was never regulated before or there are regulations but those need to be harmonized. In either case the treaties can have major influence on the legal system. These changes can be innovations in the legal system which are so far unknown or adaptations in the legal system to comply with the requirements of the treaty.

³² Black's, *supra* note 26.

³³ David J. Bederman, *International Law Frameworks* 158 (2001) found at *Id.*

³⁴ U.S. Const. art. II., § 2, cl. 2.

³⁵ Ved P. Nanda, *Conclusion and Implementation of Treaties and Other International Agreements in the United States*, 38 AM. J. COMP. LAW 369–387, 370 (1990).

³⁶ *Id.* at 370.

The above described process of the implementation of the international agreement would be the obvious process that would be used when we talk about the ACTA. The reason for this is because according to the scholars the ACTA is a treaty. But one of the issues around the ACTA is the determination actually that the ACTA is not a treaty but the Sole Executive Agreement. For this reason it is important to know that besides treaty there are three more categories of the international agreements in the United States. “International agreements other than treaties fall in three broad categories: (1) congressional-executive agreements; (2) executive agreements pursuant to treaty provisions; and (3) sole executive agreements.”³⁷

Most commonly used form of making international agreement, except by treaties, is congressional-executive agreements.³⁸ The main reason for use of this type of the agreements is because they cover a wide range of subjects, but they have a requirement that the subject matter of the agreement fall within the constitutional authority of the President and the legislative authority of Congress.”³⁹ The executive agreements pursuant to treaty provisions are “made to implement a treaty, especially if it is contemplated that implementation by such an agreement would be needed.”⁴⁰ The concern which the sole executive agreement raise is concerning the conflict it is creating with the separation of powers.⁴¹ Historically the sole executive agreements were used for the settlement of the foreign disputes where the President has a unilateral power.⁴²

Although the Supreme Courts supports the Presidents power to make such agreements the Supreme Court has also held that “these agreements, being analogous to treaties, are fit to preempt conflicting state law. Thus, sole executive agreements are a means by which the

³⁷ *Id.* at 372.

³⁸ *Id.* at 372.

³⁹ *Id.* at 373.

⁴⁰ *Id.* at 373.

⁴¹ Anne E. Nelson, *From Muddled to Medellin: A Legal History of Sole Executive Agreements*, 51 ARIZ REV 1035, 1035-1068 (2009).

⁴² *Id.*

President can sideline the legislature and unilaterally create federal law”.⁴³ In the past these agreements were used aggressively by the Presidents in matters concerning the foreign policy and most scholars have questioned the constitutionality of this form of agreements.⁴⁴ Continuing concern stays the issue how these forms of agreement preempt the federal law and how these effects could be limited in order to be harmonized with the principle of the separation of powers.⁴⁵ Knowing how actually the sole executive agreements are used and what is their purpose combined with the possible sideline it is more easily to understand why was the ACTA designed as such and what issues do emerge as consequence.

2.1.1 The Anti-Counterfeiting Trade Agreement as the Sole Executive Agreement

It was stated by the Office of the United States Trade Representative (USTR) that the ACTA is not a treaty but the Sole Executive Agreement.⁴⁶ This means that the procedure applied to the treaty explained above does not apply to this category of the agreement. The United States president has the power to make the agreements which fall in the so called executive powers.⁴⁷ These powers are granted by the United States Constitution. The scope of the executive powers is limited to the issues related to the President’s “exercising ... independent statutory or constitutional powers, such as the power to receive ambassadors, to issue pardons, or to command military forces”.⁴⁸ As seen with the attempt by the USTR in case of ACTA the scope of the sole executive agreements was attempted to be extended. But what is mostly important to

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Anti-Counterfeiting Trade Agreement, ELECTRONIC FRONTIER FOUNDATION, available at: <https://www EFF.ORG/issues/acta> (Mar 13, 2014).

⁴⁷ Bradford R. Clark, *Domesticating Sole Executive Agreements*, VA. LAW REV. 1573–1661, 1581-1582 (2007).

⁴⁸ *Id.*

this type of agreement is that it circumvents the Congressional review and approval.⁴⁹ This is one of the crucial concern that was best explained in an interview by the Member of the U.S. House of Representatives from California's 49th district Darrell Issa: "as a member of Congress, [ACTA is] more dangerous than SOPA [Stop Online Piracy Act]. It's not coming to me for a vote. It purports that it does not change existing laws. But once implemented, it creates a whole new enforcement system and will virtually tie the hands of Congress to undo it."⁵⁰

So defining the ACTA as the Sole Executive Agreement gave the USTR the opportunity to circumvent the steps of review and approval. This does shorten the time needed for the completion of the process, but it poses a danger as well. The multi-step approach is created as a legal safety guard. By getting the final draft to the hands of the Congress to comment and vote on it, the draft is being represented broader audience that can bring to the discussion different perspectives and opinions. This further brings to the discussion possibly the facts or consequences that could be created in future but not easily foreseen. The importance of the ACTA is not only in the obligations stated in the final text, but in the future developments that it is creating.⁵¹ Those developments are in the change of the forum for creation of the new rules that would impact on the signatory countries and in the system of governance of the international aspect of the intellectual property.⁵²

That system of governance is the ACTA Committee. This Committee has specific tasks listed in the final text of the ACTA.⁵³ These tasks are obligations to "review the implementation and operation of...[the a]greement...consider matters concerning the development of ... [the

⁴⁹Anti-Counterfeiting Trade Agreement, *supra* note 46.

⁵⁰Lance Ulanoff, ACTA "IS MORE DANGEROUS THAN SOPA" MASHABLE (2012), available at: <http://mashable.com/2012/01/26/acta-more-dangerous-than-sopa/> (Mar 13, 2014).

⁵¹Mercurio, *supra* note 19.

⁵²*Id.* at 362.

⁵³ACTA, art. 36, *supra* note 19.

a]greement...consider any proposed amendments to [the a]greement...”⁵⁴ Beside these obligations there are also rights which were established by the Article 36. These rights are: “establish ad hoc committees or working groups... seek the advice of non-governmental persons or groups... make recommendations... share information and best practices with third parties on reducing intellectual property rights infringements, including techniques for identifying and monitoring piracy and counterfeiting... take other actions in the exercise of its functions”⁵⁵. The broadness of the section other actions needed to exercise the function is a possible danger that any type of the action taken by the Committee can be categorized as such. All of these discussed sections are pointing to the fact that the signature states are giving up their right of controlling the enforcement of the intellectual property rights to the new body created by the ACTA. Because of this section of the ACTA that is changing the governance of the intellectual property rights and the categorization of the ACTA as the Sole Executive Agreement that caused circumvention of review and approval, makes the concerns about future consequences justifiable.

2.2 Issue of the secrecy of the negotiation

Next issue that is related to the classification is the secrecy at the time of ongoing negotiations and the possible maneuvers taken to maintain the negotiations off from the public light. When the ACTA was negotiated, lack of information in the public of the negotiating countries arose as an major issue. Upon the discovery of the negotiating treaty many protests arose as a consequence of the non-transparency, both in the United States and the European Union.⁵⁶ Some of those protests were held online in form of petition to stop the implementation of ACTA. One of such web petition is held on www.stopp-acta.info. Another form of protesting took form in

⁵⁴ ACTA, art. 36, § 2, *supra* note 19.

⁵⁵ ACTA, art. 36, § 3, *supra* note 19.

⁵⁶ Hilary H. Lane, *Realities of the Anti-Counterfeiting Trade Agreement, The*, 21 TULANE J. INT. COMP. LAW 183-204, 184 (2012).

providing information to the public of the consequences that ACTA can create on the so called *legitimate activities*⁵⁷. So there were *video materials*⁵⁸ and online forums that wanted to increase the awareness of the public in United States. The “ACTA was signed by the United States quietly, and the American public was not informed of the process of negotiations.”⁵⁹ The issue and possibly the way to keep the negotiation in the secrecy is the fact that agreements name is misleading, since obligations stated in the final text do not in all sections relate to the export and import of the goods and services.⁶⁰ Some scholars refer to the attempt of keeping the negotiations secret as efforts by the USTR to “keep the ACTA negotiations in the proverbial black box; the public knows that a box exists and that USTR (and others) are working therein, but they cannot open it to discover and examine what’s inside”.⁶¹

But the secrecy of the negotiation was broken by an “internal Dutch government documents describing the positions of many ACTA participants on treaty transparency”.⁶² After this leak and the released draft from April 2010 the representatives of the European Union, Switzerland, Canada, Australia and New Zealand strongly supported continuation of the transparency which they advocated for in the beginning of the negotiation.⁶³ This position did not prevail due to the standing of the United State to resume the negotiation secretly.⁶⁴ So the next draft was not publicly released but it did reached the public by new leak as it will be explained below in the text.

⁵⁷ ACTA, art. 27 §2, *supra* note 19.

⁵⁸ STOP ACTA/SOPA/PIPA! - CLAY SHIRKY (TED TALK), (2012), available at: http://www.youtube.com/watch?v=GsxvGL5hJgE&feature=youtube_gdata_player (Mar 13, 2014). The video of Professor Clay Shirky explaining the bills that were passed before the ACTA, the SOPA and PIPA which are same goal in regulating the enforcement of the intellectual property rights. This video was used to spread the aviaries and linking in the commentary box the web links where citizens could take action.

⁵⁹ Lane, *supra* note 56.

⁶⁰ Mercurio, *supra* note 13.

⁶¹ David S. Levine, *Transparency Soup: The ACTA Negotiating Process and Black Box Lawmaking*, 26 AM U INTL REV 811-837 (2010).

⁶² Michael Geist, *The trouble with the anti-counterfeiting trade agreement (ACTA)*, 30 SAIS REV. 137–147 (2010).

⁶³ *Id.*

⁶⁴ *Id.*

2.3 Issue of the privacy and personal information

According to the Article 27 of the ACTA the enforcement procedure employed must be balanced against fundamental principles such as privacy, freedom of speech and fair process. The principle of privacy is substantially different in the United States and in the European Union. While in the European Union the legal framework for privacy rights is very strict in the United States the situation is opposite.⁶⁵

First *leaked drafts*⁶⁶ of the ACTA show that countries were not unanimous during the negotiation when it came to the privacy.⁶⁷ From the view point of the United States this can be a minor problem, because of the laxity of the legal obligations in the place when it comes to the privacy rights.⁶⁸ Some of the acts which are now in place to protect the privacy and the personal information in the United States are: “the Privacy Act of 1974 (5 U.S.C. § 552a), the Gramm-Leach-Bliley Act (15 U.S.C. §§ 6801-6809), the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.), and the Children's Online Privacy Protection Act (15 U.S.C. §§ 6501-6506)”⁶⁹ All these acts are vertically regulating the issue of privacy in one specific field of law. This is what is representing the laxity of the system in place.

⁶⁵ Alberto J. Cerda Silva, *Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement Jeopardizes the Right to Privacy*, 26 AM U INTL REV 601-643 (2010).

⁶⁶ Leak of draft dated 01 July, 2010, available at:

http://www.laquadrature.net/files/ACTA_consolidatedtext_EUrestricted130710.pdf (Mar 19, 2014) and leak of draft dated 25 August, 2010, available at https://b48958e1-a-62cb3a1a-sites.googlegroups.com/site/iipenforcement/acta/text08252010.pdf?attachauth=ANoY7crXD9hp2CY_kxho0ykFCm9eQIDyqSVvq7MiQBpzrjypMH58gfp_S3En70Ek2bLZBnrFd7-0fz21CvDKfEfT_Y0DqpRm17MO9sHkWZUvf2h5HCvSpl-Zw2h5sCJIVhP5PNbOWDqXpU7l6DD68h48qbGE8_ODN0HFOHuEB6NUpigRnZm_c7DhZDmA3Pi2W_EM7F7jXQh6pptj7rYx--USZFNEFvwQbkW3lyawRF8-D7DQ2TLtbFw%3D&attredirects=1 (Mar 19, 2014).

⁶⁷ Silva, *supra* note 65.

⁶⁸ *Id.*

⁶⁹ *Personal Information, right of privacy: access to personal information*, available at: http://www.law.cornell.edu/wex/personal_Information (Mar 19, 2014).

But how is actually the right to privacy so important to the ACTA and discussed topic? Well the Article 27 of the ACTA contains the provision that “order[s] an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement”⁷⁰ Although the section does state that the balance of the disclosure must be measured against the right to privacy there is no additional guidelines when it comes to the fact how much is enough information to indentify the user? There must be some boundaries set which are clearly from the text not set.

The issue that is most important when it comes to the United States is the compatibility between the Digital Millennium Copyright Act (DMCA) which does contain the provisions on the identification of the user but only for the legal entities, and the ACTA that does not make distinction between the legal entities and common people.⁷¹ This is creating for the United States possible pressure on the legislator to change the current framework of protection of privacy and personal information, lining more towards the model of the European Union. This would mean that the legal filters must be set in order to make the missing boundaries of the ACTA when it comes to the disclosure of the personal information.

2.4 Legislation efforts on enforcement of the intellectual property in cyberspace before the ACTA

After analyzing all the issues that were raised with the signature of the final draft of the ACTA the next questions is why the United States did insisted on the secrecy of the negotiation and why was not the ACTA classified as the treaty in the first place? These two issues are actually interdependent because “designating ACTA as an Executive Agreement... [caused] by-passing

⁷⁰ ACTA, art. 27 §4, *supra* note 19.

⁷¹ Silva, *supra* note 65.

Congress and the traditional transparent format for negotiating international agreements”⁷². The above question can be answered through the study of the recent bills that did not become the law. The influence and the efforts of the United States in creation of the international framework for the enforcement of the intellectual property rights in the cyberspace is studied through the following bills: Stop Online Piracy Act (SOPA) and Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PIPA).

2.4.1 Stop Online Piracy Act (SOPA)

Stop Online Piracy Act was introduced in the House of Representatives in 2011. The SOPA gives the authorization to the:

Attorney General ... to seek a court order against a U.S.-directed foreign Internet site committing or facilitating online piracy to require the owner, operator, or domain name registrant, or the site or domain name itself if such persons are unable to be found, to cease and desist further activities constituting specified intellectual property offenses under the federal criminal code including criminal copyright infringement, unauthorized fixation and trafficking of sound recordings or videos of live musical performances, the recording of exhibited motion pictures, or trafficking in counterfeit labels, goods, or services.⁷³

After obtaining the court order the SOPA requires from the internet service providers (IPS) upon the received court order to “withholding services from an infringing site or preventing users located in the United States from accessing the infringing site”⁷⁴. This is mostly criticized issue in the text of the bill. The consequence of so structured punishment is censorship. Meaning the amount of the information and availability to the public for the legitimate uses such as freedom of speech, would be decreased. But not only is the censorship at issue. The fact that the bill is

⁷² Levine, *supra* note 61.

⁷³ Stop Online Piracy Act (2011 H.R. 3261), GOVTRACK.US, available at: <https://www.govtrack.us/congress/bills/112/hr3261> (Mar 20, 2014).

⁷⁴ *Id.*

authorizing the IPS to withhold the access to the infringing foreign sites is giving the control over the information circulating in the international sphere. The information here is referred to the information that constitutes the infringement of the intellectual property rights. So this aim of the SOPA, to stop the infiltration of the foreign websites with infringing content into the United States, and the Article 27 of the ACTA are similar. This is a goal that countries like the United States wanted to achieve with the ACTA. As previously stated the countries found the solution to tackle the issue of the international enforcement of the intellectual property rights through the international cooperation.

The reason why the SOPA did not become the law is the fact that it had to go through the *lengthy and complicated procedure*⁷⁵ that it did not survive. “In sharp contrast to deliberations over ACTA, congressional deliberations over SOPA... were marked by a much more open flow of information between policymakers and the public. This was due in large part to the free availability of the primary documents and ... interest in their contents”.⁷⁶ This further created protests of those who will be affected mostly such as one by the “operators of Wikipedia made the unprecedented decision to “go dark” in protest for one day”.⁷⁷ “In addition to Wikipedia, more than 100,000 Internet companies, including Google, Mozilla, Reddit, and I Can Has Cheezburger ... joined the one-day protest.”⁷⁸ All these reactions of the public caused that the Congressional support for the bill quickly disappears.⁷⁹

⁷⁵ I’m Just a Bill, (2008), available at: <http://www.youtube.com/watch?v=H-eYBZFfEzf8&feature=youtu.be> gdata_player (Mar 20, 2014).

⁷⁶ Annemarie Bridy, *Copyright policymaking as procedural democratic process: A discourse-theoretic perspective on acta, sopa, and pipa*, 30 CARDOZO ARTS ENT LJ 153-164 (2012).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

So guided by the previous experience it is understandable why the negotiations of the ACTA were facilitated in secrecy and why was the ACTA categorized and designed as the Sole Executive Agreement. All the media attention, opposition and in the end failure of the bill this time the legislator wanted to avoid.

2.4.2 Preventing Real Online Threats to Economic Creativity and Theft of Intellectual

Property Act of 2011 (PIPA)

Couple of months before the SOPA was introduced, the Senate introduced PIPA. Similar to the text of SOPA the PIPA puts the following obligations by

“[a]uthoriz[ing] the Attorney General ... to commence: ... an in personam action against a registrant of a nondomestic domain name (NDN) used by an Internet site dedicated to infringing activities (ISDIA) or an owner or operator of an ISDIA accessed through an NDN; or ... if such individuals are unable to be found by the AG or have no address within a U.S. judicial district, an in rem action (against a domain name itself, in lieu of such individuals) against the NDN used by an ISDIA.”⁸⁰

What was different in PIPA was that the target is not a foreign websites with infringing content but the “sites with no significant use other than copyright infringement”.⁸¹ The text of the PIPA specifically defines the target as “internet site dedicated to infringing activities”⁸². Further it defines the scope of the infringing activities by stating that the website will qualify as such if it “has no significant use other than engaging in, enabling, or facilitating the...reproduction, distribution, or public performance of copyrighted works, in complete or substantially complete

⁸⁰Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (2011S. 968), GOVTRACK.US, available at: <https://www.govtrack.us/congress/bills/112/s968> (Mar 20, 2014).

⁸¹Mary V. Connolly, *Sopa, Pipa, the OPEN Act: Where is This Going*, Proceedings of the 2012 ASCUE Summer Conference, 69-76, available at: <http://67.20.69.115/files/proceedings/2012-final.pdf> (Mar 20, 2014).

⁸²Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011(2011 S.968), GOVTRACK.US, available at: <https://www.govtrack.us/congress/bills/112/s968/text> (Mar 19, 2014).

form, in a manner that constitutes copyright infringement”⁸³. Again same as with the SOPA the PIPA is trying to make an extra-territorial reach when it comes to the websites containing infringing material. This is a way to enforce the intellectual property rights by monitoring the foreign web sites and cutting-off ones that have infringing content. The goal of both bills is same despite the fact that the wording is different and that the bills originated from two different sources.

In the end “neither SOPA nor PIPA will become law as they were initially drafted, although they may spawn less technically problematic, more publicly palatable alternatives.”⁸⁴ Both of the bills official status is dead. This does not mean that other similar bills will be passed in the future. Those future efforts can be seen in the ACTA. So now that we see from where the United States originates in the standing, when it comes to the secrecy of the negotiation of the ACTA and the classification and design, it is easy to understand these facts.

2.5 Current legislation which is regulating enforcement of intellectual property in the cyberspace in the United States

In the United States the regulation of intellectual property in general is done in the vertical approach. This means that for the specific type of the intellectual property right legislation is designed. This is also reflecting on the enforcement issue in the cyberspace. When regulating in the cyberspace only the copyright aspect of intellectual properties has been regulated in this new environment. The act which is regulating currently is the Digital Millennium Copyright Act (DMCA). There are other acts in the United States which are regulating other aspects of intellectual property, but the problem is those acts have not extended their application on the

⁸³ *Id.*

⁸⁴ Bridy, *supra* note 76.

cyberspace. The importance of the DMCA is in the fact, as some scholars have argued, that the ACTA is influenced by the DMCA “and [that the ACTA is] a reaction to legal battles involving new technology used to facilitate digital copyright infringement [previously experienced by the United States]”.⁸⁵

The DMCA is copyright act which was passed by the Congress in 1998, but it became effective law in 2000.⁸⁶ “This landmark legislation updated U.S. copyright law to meet the demands of the Digital Age.”⁸⁷ The law is divided into five titles that deal with different aspects of the copyright.⁸⁸ These titles are: WIPO Treaties Implementation, Online Copyright Infringement Liability Limitation, Computer Maintenance or Repair Exemption, Miscellaneous Provisions and Protection of Certain Original Designs.⁸⁹ The one which is most interesting to the issue of the enforcement of the intellectual property rights in the cyberspace is the second title: Online Copyright Infringement Liability Limitations.

The importance of this title is in the measures that it contained so called “takedown notice”. The IPS upon the knowledge or court order of the infringing material is responsible to remove the infringing material in order not to be held liable himself. The IPS is responsible also to disclose the identity information of the user. This is at same time giving the copyright holders the chance to identify the infringer and exclude the IPS from liability. This exclusion from the liability is so called “safe harbors”⁹⁰ and the DMCA specifies in which circumstances these safety harbors do apply. “Perhaps the most controversial of ACTA’s provisions, and one which appears to take a

⁸⁵ Shepard, *supra* note 8.

⁸⁶ DMCA: The Digital Millennium Copyright Act, American Library Association, available at: <http://www.ala.org/advocacy/copyright/dmca> (Mar 27, 2014).

⁸⁷ *Id.*

⁸⁸ Summary of Federal Laws - Office of General Counsel, The Catholic University of America, available at: <http://counsel.cua.edu/fedlaw/dmca.cfm> (Mar 27, 2014).

⁸⁹ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) codified at 17 U.S.C. §512

⁹⁰ *Id.*

cue directly from DMCA § 512(h), is the provision allowing parties to compel ISPs to disclose identifying information of alleged infringers.”⁹¹ But what the difference in this mechanism of enforcement in the ACTA is that the intellectual property right holder can compel the IPS to identify the infringer, but receive no safe harbor benefits in return.⁹² And as mentioned above the ACTA does not make difference between the legal entity and the common people. So the identity of both types of infringers has to be disclosed.

2.6 Current status of the ACTA in the United States

For the United States the ACTA stands as a valid agreement. But the further development and actual practical application of the ACTA is not going to happen soon. The reason for this is in the requirement of the Article 40 of the ACTA that calls on ratification, acceptance, or approval by the minimum six signing states. So far this has not happened. Only Japan satisfied this requirement which is not enough. For the United States this means no application domestically.

⁹¹ Shepard, *supra* note 8.

⁹² *Id.*

3. ANTI-COUNTERFEITING TRADE AGREEMENT IN THE EUROPEAN UNION

3.1. *How are international agreements negotiated and concluded*

In order to understand how was the ACTA negotiated on the behalf of the European Union first it is important to know the source of that power and to which body of the European Union has delegated that task.

“The European Commissioner for Trade refers to the ACTA as a treaty.”⁹³ So as previously defined, treaties are form of international agreement. The power to make the international agreements in the European Union is regulated by the Treaty on the Functioning of the European Union (TFEU). “The Treaty on the Functioning of the European Union came into force on December 1, 2009 following the ratification of the Treaty of Lisbon, which made amendments to the Treaty on European Union and the Treaty establishing the European Community (TEC).”⁹⁴ “The Treaty [of Lisbon] introduces a single legal personality for the Union that enables the EU to conclude international agreements and join international organizations. The EU is therefore able to speak and take action as a single entity.”⁹⁵

The Articles 207 and 218 of the TFEU are giving to the European Union this legal personality in order to act as a single entity in negotiating and concluding international agreements. Article 207 § 3 of the TFEU states that:

Where agreements with one or more third countries or international organizations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of

⁹³ David M. Quinn, *Critical Look at the Anti-Counterfeiting Trade Agreement*, A, 17 RICHMOND J. LAW TECHNOL. 1 (2010).

⁹⁴ Treaty on the Functioning of the European Union - TFEU, WBC-INCO.NET Coordination of Research Policies with the Western Balkans, available at: <http://wbc-inco.net/glossary/140> (Mar 26, 2014).

⁹⁵ EUROPA - Treaty of Lisbon - The EU in the world, Europa.eu, available at: http://europa.eu/lisbon_treaty/glance/external_relations/index_en.htm (Mar 26, 2014).

this Article. The Commission shall make recommendations to the Council, which shall authorize it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.⁹⁶

Although the § 3 of the Article 207 gives a reference to the Article 218 there is one important part of this Article that is the summary of the process by which the negotiations will be conducted. As stated the Commission is the body which will, in consultation with the special body appointed by the Council, lead the negotiations. On both of the bodies is a responsibility to make sure that the agreements negotiated are in compliance with the current regulatory framework of the European Union.

In more details the Article 218 explains the procedure that has to be satisfied before conducting the negotiations. “The Council shall authorize the opening of negotiations, adopt negotiating directives, authorize the signing of agreements and conclude them. The Commission ...shall submit recommendations to the Council, which shall adopt a decision authorizing the opening of negotiations and... nominat[e] the Union negotiator or head of the Union's negotiating team.”⁹⁷

As stated before the Council appoints a special body called committee that will cooperate with the Commission during the negotiations. This is a form of a check and balance of powers delegated to the Commission. For the negotiation of the ACTA this additional body in the negotiation played a significant role since the final standing of this body influenced the voting of the European Parliament on the ACTA. The special body in the case of ACTA was the Committee on International Trade (INTA).

⁹⁶ Consolidated Version of the Treaty on the Functioning of the European Union, art. 207 § 3, 2008 O.J. (C 115) 47[hereinafter TFEU].

⁹⁷ TFEU art. 218.

Furthermore, the § 6 of the Article 218 states that in order for the Council to adopt the decision on conclusion of the agreement it is required to get a consent by the European Parliament on the given subject matter. The section specifies in details in which situations the consent is required:

[e]xcept where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement: (a) after obtaining the consent of the European Parliament in the following cases: (i) association agreements; (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; (iii) agreements establishing a specific institutional framework by organizing cooperation procedures; (iv) agreements with important budgetary implications for the Union; (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.⁹⁸

As an additional requirement through the entire procedure the Council is required to act by a qualified majority.⁹⁹ The cooperation of the Commission with the European Parliament is established by requiring that “[t]he European Parliament... be immediately and fully informed at all stages of the procedure”¹⁰⁰. The agreement can be challenged by the § 10 of the Article 218 that gives the possibility for a “Member State, the European Parliament, the Council or the Commission [to] obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties.”¹⁰¹ The importance of discussing every step of this process in the discovery of the mistakes or rather reasons why was the ACTA rejected by the European Union.

⁹⁸ TFEU art. 218 § 6.

⁹⁹ TFEU art. 218 § 8.

¹⁰⁰ TFEU art. 218 § 10.

¹⁰¹ TFEU art. 218 § 11.

3.1.1 Requirements of the Article 218 of the TFEU applied on the ACTA

The requirements set by the Article 218 of the TFEU were mainly satisfied. According to the press release by the European Commission “[t]he European Union was represented during the negotiations by European Commission officials, as well as representatives of our Member States because ACTA touches upon both exclusive competences of the European Union and competences which are shared with the Member States.”¹⁰² Same press release states very vaguely exact number of the Member States representatives. Reason why the Member States representatives were involved is because some parts of the ACTA cover the criminal sanctions for infringements and this area does fall into the competence of the Member States individually. This means that every state independently has to decide whether it will or not singe to the given treaty. This is the reason why “[i]n the European Union, twenty-two of the twenty-seven Member States have signed the ACTA, but the European Union cannot officially ratify the Agreement until all of its Member States have signed.”¹⁰³

According to the instructions of the Article 218 of the TFEU there was a committee assigned to the negotiation. As stated before this was the Committee on International Trade (INTA). The INTA took four votes on the ACTA and final vote in June 2012 revealed the consistency in standing to reject the treaty.¹⁰⁴ Final result of the voting of the Members of the Committee was 19 against, 12 in favor and no abstentions.¹⁰⁵ As it was stated before in the report by the rapporteur David Martin, who was appointed as rapporteur for the ACTA negotiations, and

¹⁰² Press release - Transparency of ACTA negotiations (Anti-Counterfeiting Trade Agreement) from Feb. 13, 2012, Europa.eu, available at: [http://europa.eu/rapid/press-release MEMO-12-99_en.htm](http://europa.eu/rapid/press-release_MEMO-12-99_en.htm) (Mar 27, 2014).

¹⁰³ Lane, *supra* note 56.

¹⁰⁴ Dave Neal, European Parliament’s INTA trade committee votes for ACTA rejection, available at: <http://www.theinquirer.net/inquirer/news/2186089/european-parliaments-inta-trade-committee-votes-acta-rejection> (Mar 28, 2014).

¹⁰⁵ Mark Brown, European Parliament’s trade committee votes to reject ACTA, WIRED UK, available at: <http://www.wired.co.uk/news/archive/2012-06/21/acta-rejected> (Mar 27, 2014).

confirmed by the results of the voting the ACTA's "[u]nintended consequences ... [are] a serious concern."¹⁰⁶ David Martin states that he doubts that the text of the ACTA is precise enough and for that reason the intended benefit are far outweighed by the threats it creates to the civil liberties.¹⁰⁷

"The Council adopted [the] ACTA unanimously in December 2011. The Commission has passed the agreement on for ratification to the Member States and for a vote to the European Parliament."¹⁰⁸ As stated in the Article 218 of the TFEU the consent is mandatory part of the process. But in the case of the ACTA, because of the criminal section of the agreement the ratification needed to be done by all Member States. This did not occur. "The remaining [five Member States] that have not ... signed [the ACTA] are: Cyprus, Estonia, Germany, the Netherlands, [and] Slovakia..."¹⁰⁹ On the other side on the July 04, 2012 the European Parliament also rejected the ACTA.¹¹⁰ Final vote was: 39 in favor, 478 against and 165 abstentions.¹¹¹

One of the reasons for the European Parliament to vote against the controversial treaty and mistake made in the required process of the negotiation is non-fulfillment of the requirement set by the § 10 of the Article 218 of the TFEU; "[t]he European Parliament shall be immediately and

¹⁰⁶ David Martin, *Draft Recommendation on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement*, available at: <http://www.martinmep.com/uploads/ea72846c-42ae-16a4-bdac-562c157f94a3.pdf> (Mar 27, 2014).

¹⁰⁷ *Id.*

¹⁰⁸ Christina Eckes, Elaine Fahey & Machiko Kanetake, *International, European, and U.S. Perspectives on the Negotiation and Adoption of the Anti-Counterfeiting Trade Agreement (ACTA)*, 20 CURR. INT. TRADE LAW J. 20 (2011).

¹⁰⁹ *Id.*

¹¹⁰ Don Melvin, EU Parliament rejects ACTA anti-piracy treaty msnbc.com, available at "http://www.nbcnews.com/id/48073670/ns/technology_and_science-security/t/eu-parliament-rejects-acta-anti-piracy-treaty/" (Mar 27, 2014).

¹¹¹ VoteWatch Europe: European Parliament vote on the ACTA of July 04, 2012, available at: <http://www.votewatch.eu/en/anti-counterfeiting-trade-agreement-between-the-eu-and-its-member-states-australia-canada-japan-the--2.html> (1Mar 27, 2014).

fully informed at all stages of the procedure”¹¹². This fact is backed by the Press release by the Commission on the Transparency of ACTA negotiations which states list of documents that were available to the European Parliament but creates doubt as to accessibility of the named documents. The report states that:

The handling of these documents by the European Parliament was governed by the rules agreed regarding the confidential handling of documents. This means that some of these documents were not accessible to ALL Members of the European Parliament ... but where accessible to the Chair of the ... INTA, the Vice-Chairs of INTA, the political coordinators of INTA and the INTA rapporteur.¹¹³

This report clearly states that documents were not accessible by all Members European Parliament (MEPs) and the requirement of § 10 of the Article 218 of the TFEU makes no classification as to what can be a substitute for the European Parliament. From the text of the named section it is obvious that the legislator intended to make no exceptions to the accessibility to the information regarding the negotiation. In connection to information requirement and the issue of the secrecy of the whole negotiation procedure, that will be discussed in following subchapter, “[i]n August of 2010, the European Parliament passed a written declaration on the lack of a transparent process for the Anti-Counterfeiting Trade Agreement”¹¹⁴.

Furthermore, the European Commission has referred the ACTA to the European Court of Justice as provided by the Article 218 § 11 of the TEFU.¹¹⁵ In the official Press statement the spokesmen for EU Trade John Clancy reveals that raised voices of the people of the European Union stressing the possible conflicts of the ACTA and fundamental rights is an issue that needs

¹¹² TFEU art. 218 § 10.

¹¹³ Europa.eu, *supra* note 102.

¹¹⁴ Quinn, *supra* note 93.

¹¹⁵ Eckes, Fahey, and Kanetake, *supra* note 108.

attention.¹¹⁶ For this reason the European Commission used the right of referral of the following question to the European Court of Justice for an independent opinion: "Is the envisaged Anti-Counterfeiting Trade Agreement (ACTA) compatible with the Treaties and in particular with the Charter of Fundamental Rights of the European Union?".¹¹⁷ According to some online news websites final status of the application of the Commission is that it was withdrawn.¹¹⁸

3.2 Objection by the Member States

One of the requirements in order for the European Union be party to the signing of the ACTA was that all Member States sign ratify the draft. Not all Member States did sign the final draft: Germany, Netherlands, Estonia, Slovakia and Cyprus.¹¹⁹ Reason for Germany to postpone the ratification was in the reaction of the public to the controversial agreement and the fact the Germany's Justice ministry has taken a position that the treaty is not necessary to Germany.¹²⁰ For this reason the official standing of the Germany was to wait the vote of the European Parliament and then decide on the issue.¹²¹

As for the countries that did signed act the most of these stalled the process of ratification. Among those countries are: joins Poland, Czech Republic, Slovenian and Latvia.¹²² "In Poland, the Prime Minister, Donald Tusk, agreed to hold off on ratifying ACTA, admitting that the

¹¹⁶ European Commission officially referred ACTA to the European Court of Justice - Trade - European Commission, Europa.eu, available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=799> (Mar 28, 2014).

¹¹⁷ *Id.*

¹¹⁸ Jennifer Baker, European Commission drops court challenge of ACTA legality, Computerworld UK, available at: <http://www.computerworlduk.com/news/security/3417648/european-commission-drops-court-challenge-of-acta-legality/> (Mar 28, 2014).

¹¹⁹ What you should know about ACTA, European Parliament, available at: <http://www.europarl.europa.eu/news/en/news-room/content/20120220STO38574> (Mar 28, 2014).

¹²⁰ Germany delays ACTA signing, BBC NEWS, available at: <http://www.bbc.co.uk/news/technology-16980451> (Mar 28, 2014).

¹²¹ *Id.*

¹²² *Id.*

negotiation process did not involve sufficient consultation.”¹²³ The Slovenian ambassador Helena Drnovsek Zorko, made a public apology for signing the ACTA admitting that she did not dedicated enough attention to the text of the treaty.¹²⁴ “[E]xplained that she did not ... connect the agreement she had been instructed to sign with the agreement that, according to her own civic conviction, limits and withholds the freedom of engagement on the largest and most significant network in human history, limit[ing] ... the future of our children.”¹²⁵ For this reason and due to the fact of the unsettled position of the European Union on the issue the ratification process was freeze in Slovenia.¹²⁶

3.3 Issue of secrecy of the negotiations

The fact that the European Parliament and the general public are concerned with non-transparent or secret, at that time, ongoing negotiations is shown by the actions taken. On March 8, 2010 the European Parliament made a written declaration on the ACTA.¹²⁷ Although this written declaration is not legally binding its importance is that it represents the view on the issue of secrecy of 377 MEPs.¹²⁸ This declaration has seven points but most important one for the issue of the secrecy is “that the Commission should immediately make all documents related to the ongoing negotiations publicly available”¹²⁹. Even though the Article 218 of the TFEU does require this from the Commission it was not followed. This declaration can be observed as an additional warning to the Commission, but also as a sign that the European Parliament will take

¹²³ Lane, *supra* note 56.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Slovenia freezes ACTA ratification, Physo.org, available at: <http://phys.org/news/2012-03-slovenia-acta-ratification.html> (Mar 28, 2014).

¹²⁷ Nate Anderson, European Parliament passes anti-ACTA declaration, ArsTechnica.com (2010), available at: <http://arstechnica.com/tech-policy/news/2010/09/european-parliament-passes-anti-acta-declaration.ars> (Mar 28, 2014).

¹²⁸ *Id.*

¹²⁹ Monica Horten, EUROPEAN PARLIAMENT ACTA DECLARATION, IPTEGRITY.COM, available at: <http://www.iptegrity.com/index.php/acta/474-european-parliament-acta-declaration> (Mar 28, 2014).

the treaty and the process of negotiation under a loop. This is a first sign of possible future disagreement on the standing towards the ACTA between these two bodies.

On the other side the Commission did try to justify the process as transparent by the Press release two years later. As stated earlier the press release may be looked at in two different ways. One is that the transparency did occur when we take in the consideration all the documents that were available.¹³⁰ On the other side this could be a proof of opposite. The statement specifically says that the documents were not accessible by all MEPs.¹³¹ As before, only one conclusion can be made that the secrecy was an issue of the negotiations.

“Since [the written declaration of the European Parliament] negotiations have begun to open to the public eye.”¹³² As a response from general public in the European Union to the non-transparency and other concerning issues protests started globally. “Protestors even include governmental officials such as Viviane Reding, the EU Commissioner for Justice, Fundamental Rights, and Citizenship, who made an official statement declaring, that for her, blocking the Internet is never an option.”¹³³

There were others as well who publicly protested against the ACTA such as David Martin and Kader Arif, who both were rapporteurs for the ACTA. “Kader Arif, who resigned from his position as the European Parliament's rapporteur over ACTA, said that many provisions in the Agreement worried him, particularly a provision that could make an IPS liable for copyright infringement by users, something that would be in conflict with existing European law.”¹³⁴ This concerns the safe harbors created by the Directive 2000/31/EC identical to those in the DMCA.

¹³⁰ EUROPA - PRESS RELEASES - Press release - Transparency of ACTA negotiations (Anti-Counterfeiting Trade Agreement), *supra* not 102.

¹³¹ *Id.*

¹³² Quinn, *supra* note 93.

¹³³ Lane, *supra* note 56.

¹³⁴ *Id.*

“Arif was further concerned that, as the Agreement stands, every state party could potentially have different standards for what they consider to be "commercial" levels of privacy, to the point where a country might choose to search a traveler's laptop computer or digital music player for illegally downloaded content.”¹³⁵

These public statements, especially of insiders, and debates created in the public contributed to questioning things such as compatibility of the ACTA text with legal framework and founding principles. General public demanded the answers to these questions and the response insufficient or not given at all. “The European Commission ... has declared that enactment and enforcement of ACTA will not require any changes to current EU intellectual property law. However, the European Commission does not give any explanation of how ACTA is similar enough to current EU law to not require changes.”¹³⁶ One of the biggest concerns in the European Union was the protection of privacy and compatibility with the requirements of the ACTA.

3.4 Issue of the privacy and personal information

The privacy of the personal data in the European Union is stricter regulated than in the United States. The protection in the European Union is set by the two Directives: Directive 95/46/EC of 24 October 1995, and Directive 2002/58/EC of 12 July 2002 amended by Directive 2009/136/EC of 25 November 2009. Each of the mentioned regulates different aspect of personal data protection. Each will be analyzed in order to see how does the requirement of the ACTA, particularly the requirement of ISP to disclose the identity of the user, fit or not into the current legal framework.

¹³⁵ *Id.*

¹³⁶ *Id.*

The Directive 95/46/EC or the Data Protection Directive regulates the processing the personal data. This directive “applies to data processed by automated means (e.g. a computer database of customers) and data contained in or intended to be part of non automated filing systems (traditional paper files)”¹³⁷. The main aim of the Directive is to determine when in the processing of the data lawful.¹³⁸ This Directive is a guideline determining issues such as that quality of the processed data has to be, obligation of obtainment of a unambiguously consent by the subject, restrictions on data that cannot be processed (such as racial, ethnic origin or political opinion), information given to subject concerning the entity doing the processing and right to object to the processing.¹³⁹ The directive explicitly states that the subject must give unambiguous consent to the processing of the data. This particular section of the Directive would at odds with the requirement set by the in the Article 27 of the ACTA regarding the disclosure of the identity of the user. The Article 4 of the ACTA does state party is not obligated to disclose the information which would constitute act contrary to the national law.¹⁴⁰ But this section is applicable only to the disclosure mandated from the states not private persons.¹⁴¹ In the Article 27 of the ACTA there are no limitations set as to this issue.¹⁴² Another point of departure between these two acts is in the transfer of data to third country. “Transfers of personal data from a Member State to a third country with an adequate level of protection are authorized. However, they may not be made to a third country which does not ensure this level of protection.”¹⁴³ So all countries negotiating the ACTA has to have the same level of protection or the sharing of the information

¹³⁷ Protection of personal data, Europa.eu , available at: http://europa.eu/legislation_summaries/information_society/data_protection/l14012_en.htm (Mar 28, 2014).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ S. Vousden, *ACTA is dead? Long live ACTA! A review of Blakeney on ACTA*, 8 J. INTELLECT. PROP. LAW PRACT. 176–181 (2013).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Protection of personal data, *supra* note 137.

such as between the intellectual property holder outside the European Union and IPS in the European Union will not be possible.

3.5 Current legal framework regulating enforcement of the intellectual property rights in cyberspace in the European Union

Currently the European Union has in force the Directive 2004/48/EC of April 29, 2004 which deals with the issue of the enforcement of the intellectual property in the cyberspace. This directive is a guideline which imposes on state to create legislation that will tackle the issue of the enforcement of the intellectual property rights. Specifically the preamble of the Directive recognizes the need of enforcement in the cyberspace. “Increasing use of the Internet enables pirated products to be distributed instantly around the globe. Effective enforcement of the substantive law on intellectual property should be ensured by specific action at Community level.”¹⁴⁴ The specifics on the legislation that needs to be adopted by the Member States does not create a minimum standard. But rather instructs that the employed measures should not be burdensome. “Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.”¹⁴⁵ This directive also explicitly states that the aim is not to change the substantial law on the intellectual property nor the obligations imposed under international agreements such as the TRIPS.¹⁴⁶

¹⁴⁴ Directive 2004/48/EC of the European Parliament and of the Council of April 29, 2004 on the enforcement of Intellectual property rights 2004 O.J. (L 195) 16, preamble [hereafter Parliament and Council Directive on Enforcement of Intellectual property rights]

¹⁴⁵ Parliament and Council Directive on Enforcement of Intellectual property rights, art. 3.

¹⁴⁶ Enforcement of intellectual property rights, Europa.eu available at: http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_counterfeiting/126057a_en.htm (Mar 29, 2014).

Among the Member States the different enforcement measures are in use. One of the most controversial is one in the France. This model could be a possible solution for all other Member States and will be explained in more detail.

3.6 Current status of the ACTA in the European Union

Since the ACTA was rejected by the European Parliament and not ratified by all 27 Member States, at that time, the official status of this treaty for the European Union is rejected. This does not mean that in future there will be no treaties negotiated with similar or same clauses to those in the Article 27 of the ACTA.

4. ENFORCEMENT OF INTELLECTUAL PROPERTY IN CYBERSPACE IN MEMBER STATES OF EUROPEAN UNION

4.1 French model of enforcement

On 12 May 2009 the French National Assembly adopted the HADOPI legislation, which passed the Senate on the next day.¹⁴⁷ The legislation is known by the name “three strike rule”; which literary means that the user can make violations three times until the internet service provider cuts off his connection to the Internet. The process of the application of this rule is somewhat complicated. First step prescribed in Article 5 § 3 is that: “the committee for protection of rights may send to the subscriber, under its seal and on its own, by electronic means and through the entity whose activity is to offer access to on line communication services to the public ... an injunction ... enjoining him to respect the requirement that body defines and warning of the sanctions risked if that presumed violation continues.”¹⁴⁸ If this is continued behavior in the next six months then the committee sends another warning with same wording.¹⁴⁹ But the law is criticized for the next step that will be taken if the infringement continues.

When it is held that the subscriber has failed to recognize the obligation defined ... during the year following the reception of an injunction sent by the committee ... accompanied by a receipted letter [as] proof of the date that the injunction was sent and ... the subscriber received it, the committee may, after a hearing ... [use] one of the following sanctions ... the suspension of access to service for a duration of two months to one year accompanied by making it impossible for the subscriber to subscribe during that period to another contract giving access to a public on line communication service with any operator...¹⁵⁰

¹⁴⁷ C. W. Wan, *Three strikes law: a least cost solution to rampant online piracy*, 5 J. INTELLECT. PROP. LAW PRACT. 232–244, 240 (2010).

¹⁴⁸ HADOPI translation - La Quadrature du Net, article 5 § 3, available at: http://www.laquadrature.net/wiki/HADOPI_translation (Mar 30, 2014).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

The law was reviewed by the “French Constitutional Council of France on 10 June, 2009 insofar as those related to the three strikes mechanism because, inter alia, it violates the principle of presumption of innocence because it is only a judge not the administrative body who can impose sanction.”¹⁵¹ But the new version of the same law was proposed called HADOPI 2 which now contains the involvement of the judge in the process by requiring “the Administrative body to report all the repeated infringers to a judge who might impose a fine up to 300,000 Euros or a 2-year jail sentence or disconnection of internet service to the repeated infringers.”¹⁵² But the final version adopted law has less strict penalties, 1.500 Euros, and not disconnection of the Internet access.¹⁵³

There are possible conflicts that this model of ‘three strikes rule’ could bring if the model itself would be applied on the Community level. In the Finland the access to the Internet is a right.¹⁵⁴ Current the legislator in the Finland guarantees that the 1Mbps (megabit per second) connection speed is available to all its citizens.¹⁵⁵ So it is obvious how the cutting off the Internet connection could be an issue. Even though this may be seen as two sides of extreme approach the middle point could be reached. The users who use the access to the Internet in a non-infringing way do not have to fear that their right will be diminished. But on the other side the users who violate terms of usage in a commercial scale, so not only three times (e.g., repeated violation in certain period like one year), will be sanctioned. In this way the balance could be reached.

¹⁵¹ Wan, *supra* note 147.

¹⁵² *Id.*

¹⁵³ France: ARTICLE 19 welcomes repeal of HADOPI law but concerns... · Article 19.org, available at: <http://www.article19.org/resources.php/resource/37169/en/france:-article-19-welcomes-repeal-of-hadopi-law-but-concerns-remain> (Mar 30, 2014).

¹⁵⁴ Broadband “legal right” for Finns, BBC, July 1, 2010, available at: <http://www.bbc.co.uk/news/10461048> (Mar 30, 2014).

¹⁵⁵ *Id.*

CONCLUSION

Today there is no international legal framework that focuses on the enforcement of the intellectual property rights in the cyberspace. The ACTA was an effort to resolve this issue but it did not succeed. To give a final answer to which solution of regulation is better the international one or national one, first I will summarize the main reasons why in both compared jurisdictions the ACTA was problematic.

In the United States the issues surrounding the negotiations were: classification of the agreement so that it circumvented the ratification by the Congress, conflict with the current framework on the privacy by requiring from IPS the identification of the users and the wail of secrecy of the process of the negotiation. In the European Union the situation was similar but with different outcome: the non-transparency in the negotiations is not allowed by the TFEU, the conflict with the Directives regulating the privacy of the data processing and the mandatory requirement to obtain consent of the subject by requiring IPS to disclose such data, and the objections by the Member States to ratification of this agreement. The effort to conclude this agreement is definitely a sign that in future similar agreements will be created. There is a common standing in both of these countries which is to protect the intellectual property owners but not to the cost of fundamental rights such as privacy and freedom of expression.

On the other side the comparison of the ACTA with separate jurisdictions has also shown at what level of development is the issue of enforcement of the intellectual property in the cyberspace. Each of these jurisdictions has some law in place but they are not enough. In the United States the DMCA is only regulating the copyright online, but in my opinion not extensively. The act is outdated and the gaps that have occurred have been filled with the stretching of the act so that the main goal is achieved. Although the United States is rich with the case law that regulates areas

which are not covered with statutes in my opinion the amendment of the DMCA is required. This will create more solid ground for application. In the European Union the improvement is not much better even though the Directive on Enforcement of the Intellectual property was enacted. The Directive is so structured that it is only a guideline to Member States how to avoid the collision between measure employed and other community laws. There is no minimum requirement set by this Directive. So again the Member States are left to themselves to create as they see fit the solutions for the enforcement of the intellectual property. Only good side of this Directive is that it specifically extends the enforcement on the cyberspace.

France for example employed a very strict and criticized measure, which gave the right to the IPS to block the access to the Internet to the users who infringe the intellectual property rights in three occasions. But as it turned out this law was overturned by the Constitutional Council of France, due that it is against presumption of innocence. Besides this if the model in France is to be used on community level it will collide with some rights such as those in Finland, the right to the Internet access.

In my opinion French model could best work. But it would have to be employed on the national level to bring the efficiency and speediness of application. Additionally the substitute of the three times infringement to a defined period of time would be better. This again is problematic for the fact that cyberspace is not territorially defined and infringer will find the way to circumvent this. But if with the time the level of uniformity of the law is achieved in all states then this would not be an issue. Furthermore this would bring the standpoint of the states on the issue closer so that the agreement on the international level of regulation would not face failure as with the ACTA. Alternative to this solution is the monetary punishments, as in France, but so high that would give everyone the second thought to make commercial scale infringements.

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