

# A.C.T.A. AND THE EFFECTS OF THE AGREEMENT ON THE ON-LINE MARKETING STRATEGIES

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**Abstract:** *This article presents the most controversial and discussed treaty over the last period and its consequences on the marketing strategies of different companies in fields such as the movie industry, the music industry and the publishing domain. The A.C.T.A. treaty was signed by over 27 countries, and brings up positive effects upon the strategies of those companies which suffer losses from piracy and counterfeiting of intellectual property rights. The paper reflects the changes that the treaty can bring especially to the online marketing strategies of the biggest movie studios and music production labels.*

**Key words:** *copyright, A.C.T.A., on-line marketing, piracy.*

## 1. Introduction

Over the last decade, the copyright scholarship has suggested the existence of a new right in copyright law: the right of access - that is, the right to control access to copyright works for the right holder, and the right to access copyright works for the user. According to some authors, this new right was affected through the implementation and the legal protection of technological protection measures. [2]

The European *Union* Copyright Directive 2001 is the first legislative instrument meant to address the copyright regulation (and infringement) in the digital environment. Ever since the presentation of its bill, it has raised heated debates. [3]

Access control has always been part of the rights granted by copyright protection. The exclusive rights of reproduction and distribution were initially the privileges of governments, aiming at controlling the public access to knowledge. Subsequently,

they became privileges of book publishers, who wanted to avoid unauthorized access to copyright works, in order to recoup their investment. More recently, issues of access to copyright works have been raised on the side of the user. With the increasing implementation of copyright limits, users gained access entitlements to copyright works that compete with the access-controlling privilege of the right owner. The advent of the Digital Era raised the tension between owner and user in the matter of access. [2]

It is obvious that the developing countries' interest in the intellectual property rights actually equals the need of these countries to regulate intellectual property on the basis of their own national standards. Additionally, developing countries strongly emphasized the need to admit that it is a matter of sovereign rights (of all countries) to regulate, use, and

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apply the scope and level of the protection of intellectual property rights. [4]

The special need to transfer technology and pursue development has also been raised by developing countries in the regulation of intellectual property. These countries have demanded special treatment for not applying the same standard of protection to intellectual protection. This, they argued, might be helpful for the sake of its national development and they put more weight on the need to discourage restrictive business practices and to prohibit licensing agreements that place limitations on trade and development. [5]

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), strengthened enforcement of intellectual property rights have become a central issue in most international, regional and bilateral negotiations. At the regional level, the United States, Japan and the European Union (EU) announced in October 2007 their plan to negotiate an Anti-Counterfeiting Trade Agreement (A.C.T.A.) that also found its way to numerous Free Trade Agreements. [6]

## 2. The A.C.T.A. treaty

The Anti-Counterfeiting Trade Agreement between the European Union and its member states, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederacy and the United States of America was signed on the 26th of January 2012 at Tokyo by the members of the European Union. This treaty is due to be presented within the sessions of the European Parliament and, if elected, will become an enforced law across the territories of all the European Union members, including Romania. This treaty is an extension of the aforementioned TRIPS treaty and represents one of the most controversial acts signed by the EU

and other significant states across the world.

Synthesizing the content of this treaty, the most significant issues may be pointed as:

- General obligations regarding the procedures for enforcing this law;
- Action taken against the violation of property rights, blocking all unauthorized intellectual products from entering commercial circuits;
- Temporary measures against the violation of intellectual property rights, in order to retain evidence against all attempts of breaking these rights;
- Applying all penal sanctions, crimes and penalties;
- Praxis of law enforcement.

The treaty includes the following domains:

### A. The field of border enforcement

The act implies taking action regarding suspect merchandise, the infringement of suspect goods traffic, the provision of suitable evidence regarding the violation of intellectual property rights and the demolition of suspect merchandise. Competent authorities may take the following actions in order to ensure the effective enforcement of intellectual property rights at borders:

- To take counsel with the relevant interested parties and the competent authorities of other parties responsible for the enforcement of intellectual property rights with a view to identifying and taking significant risks and to encouraging actions to reduce those risks;
- To exchange data with the competent authorities of other parties responsible for the frontier enforcement of intellectual property rights, including relevant data for identifying and inspecting shipping suspect of containing merchandise that may violate any right.

B. The field of digital copyright enforcement

It regards the implementation and execution of effective sanctions against any act of violation of intellectual property rights which occurs in a digital environment, including efficient remedies designed to prevent any violation and measures serving as discountenance tools against any subsequent violation. The act gives aggrieved parties the right to request information from on-line service providers about subscribers that are being suspected of using their accounts to break the law regarding the counterfeiting of merchandise or violation of copyright and connected legislation. Also, the collection and analysis of statistical data or other relevant information concerning the violation of intellectual property rights is encouraged, as well as the assembling of the best procedures to prevent and control the breaking of laws regarding intellectual property rights in the digital environment.

C. The field of global cooperation

The signing parties of the A.C.T.A. agreement are aware of the importance of global cooperation, especially in the digital environment. These are their global cooperation measures:

- Data exchange; an exchange of information is being performed regarding statistical data, legislation and regulation measures, good-practice and other information.
- Reinforcement of effectives and technical assistance; each party has to provide assistance, when requested, within the mutual decided terms and conditions, regarding the reinforcement of effectives and technical assistance when inflicting intellectual property rights to other signing parties of the agreement or, if needed, to future parties.
- Consulting; each signing party can request accession with other signing parties. [12]

### **3. A.C.T.A. and online advertising**

A.C.T.A. can affect online advertising from several points of view that authors are pointing at. These effects can affect those companies that score high losses because of piracy both negatively and positively. The following positive effects may be encountered:

- Big companies, owning powerful brands or well-known trademarks are positively affected by this agreement, considering that brands, as well as their trademarks, logos and symbols cannot be used for online advertising, except for their consent;

- A.C.T.A. applies positive effects to the international musical industry, record labels, but also to producers, artists and composers, no longer affected by online piracy, whose percentage is likely to drop considerably; this can be caused by the domain of intellectual property rights digital protection incorporated in the agreement; therefore, musical industry companies can adjust their online marketing strategy, especially increasing online sales activities of musical products with owned copyright.

- The cinematographic industry will be protected from online piracy at an international level through the implementation of the A.C.T.A. treaty; this will be achieved by discouraging movie upload and download in various formats by those acting against the companies through piracy; the A.C.T.A. agreement will discourage the opening and sustaining of new movie-trafficking sites, which affect the cinematographic industry at an international level through high-losses concerning product sales with owned intellectual property rights; the movie companies could focus their activities on online shopping with DVDs, movies, CDs or other products; this type of product policy could easily have a positive influence upon the companies' budget, reducing the production costs, so that

movies or other video or audio materials could be delivered online, eventually being considered as intangible goods.

Negative effects:

- Several advertising companies will be affected, especially those working online and using viral marketing techniques; these ones will no longer be able to transmit promotional contents to online consumers and users or other distributed materials according to the viral marketing strategy, because the users will speak of big company's brands without its consent; therefore, online orientated advertising companies will be forced to negotiate deals with authors or legal owners of products, brands and so forth, due to be used in viral marketing strategies and leading to additional costs.
- Companies managing sites with video and audio content will be negatively affected by A.C.T.A. because of the users' purchasing varied products unfit to intellectual property rights ownership; thus, sites like youtube.com or trilulilu.ro will be forced to alter their marketing policies, even to leave the market if the owners of intellectual rights want them to do so; these companies can direct their activities to new price policies, that is towards a new policy of promotional prices capable of providing services and content with the authors' consent to prepaid or subscribed users, this way making sure that the budgets required for obtaining authors' consent are supported.
- Also, social networks will be affected, as well as the companies hosting these channels of communication and company promotion; these sites will have to alter their advertising policies, and also confidentiality policies due to the distribution of content without the consent of the owners.

Therefore, this treaty influences the players of the online market both

positively and negatively. The most affected are probably those from the cinema, music and entertainment industries but in a positive way. Nevertheless, the A.C.T.A. agreement has raised significant controversies and also protests on behalf of many internet consumers. In Germany, Austria, France, Poland, the Czech Republic and even Romania, countless protests had been organised by the young section of internet users. Because of this, many of the countries which signed the initial treaty at Brussels announced the adjournment of A.C.T.A. ratification, among them being: Austria, Lithuania, Bulgaria and Romania.

On Wednesday, The European Committee requested the evaluation of A.C.T.A., by the European Court of Justice (CEJ), to see whether the agreement is compatible with the fundamental rights and liberties of the EU, such as freedom of speech, information protection and intellectual property right. The Euro-dignitaries, who had to decide upon A.C.T.A. on the 12th of June, claim that such an effort could lead to a two-year postponement of the parliamentary election.[8]

#### **4. Possible losses and rights of the injured companies. Case study: the movie industry**

According to Article 9, lines (1) and (2), from the A.C.T.A. treaty, the injured companies are protected from possible losses as follows:

Each Party shall provide that, in civil judicial proceedings on the application of intellectual property rights, its judicial authorities have the position to order the offender (knowing or having reasonable grounds to know and being engaged in an activity rights violations) to pay the right holder damages adequate to compensate for the right holder damages suffered from the infringement. To determine the amount of damages for the infringement of

intellectual property, the judicial authorities of a certain Party have the authority to consider, among other things, any legitimate measure of the value that the owner of the intellectual rights has, which may include loss of profits, the value of goods or services which made the object of the infringement, measured at the market price or the suggested retail price.

At least as regards the violation of copyright or related rights in cases of trademark counterfeiting, each Party shall provide that in civil judicial proceedings, the judicial authorities have the authority to order the offender to pay offender proprietor profits attributable to infringement. A party may assume that these benefits correspond to the value of the damages referred to in paragraph (1).

The piracy rate in the United States and worldwide is a serious problem regarding the motion picture industry. Based on the calculations we made with the research data from the Motion Picture Association of America and Datamonitor, the piracy rate in the United States in this industry is approximately 7.8 % (data from 2005 to 2011). The following case study is a theoretical example of how A.C.T.A. and the articles above mentioned can help one of the leading motion picture studios of the world. In what follows, we present the terms of A.C.T.A. in connection with one of the most popular movies of all times, Harry Potter.

This film is a British-American film series based on the Harry Potter novels by the British author J. K. Rowling. The series is distributed by Warner Bros. and consists of eight fantasy films beginning with *Harry Potter and the Philosopher's Stone* (2001) and culminating with *Harry Potter and the Deathly Hallows – Part 2* (2011). It is the highest-grossing film series of all-time in inflation unadjusted dollars, with \$7.7 billion in worldwide receipts. Each film is in the 35 highest-grossing films of all-time in inflation unadjusted dollars. The series was produced by David Heyman and stars Daniel Radcliffe, Rupert Grint and Emma Watson as the three leading characters, Harry Potter, Ron Weasley and Hermione Granger. Four directors worked on the series: Chris Columbus, Alfonso Cuarón, Mike Newell and David Yates. *Harry Potter and the Deathly Hallows*, the seventh and final novel in the series, is split into two feature-length parts. Part 1 was released in November 2010 and Part 2 was released on 15 July 2011. [7]

For better explaining how A.C.T.A. can help Warner Bros. Studios against the piracy losses, we took as example a possible case against this issue for: *Harry Potter and the Deathly Hallows: Part I* and *Part II*.

The next table presents the revenue from the DVD sales from the United States that Warner Bros. Studio had since the release of the movies until 27th of March 2012. [11]

*US DVD sales in numbers*

Table 1

Movie	US DVD sales (units)	US DVD sales (mil \$)
Harry Potter and the Deathly Hallows: Part I	7,217,139	86,725,374
Harry Potter and the Deathly Hallows: Part II	6,378,354	87,485,502

*Source: adaptation from the-number*

Since the 15th of April 2011, Warner Bros. has recorded DVD sales of \$86,725,374 for *Harry Potter and the Deathly Hallows: Part I* and \$87,485,502

from the 11th of November 2011 for *Harry Potter and the Deathly Hallows: Part II*.

The total earnings from these DVD sales and intellectual property rights of these two movies from the Harry Potter film

series are of \$174,210,876 (only from DVD sales excepting Box Office and other Harry Potter merchandise incomes).

The A.C.T.A. treaty gives the intellectual property rights owners of these movies the right to sue the people and companies who pirated the movies, and recover the market value price for each counterfeited unit. If we take into consideration a medium market value price of \$12.32 per unit and the 7,8% piracy rate mentioned above, by means of the A.C.T.A. treaty, Warner Bros studio, J.K. Rowling and the other intellectual property rights owners can recover \$13,588,448.328 until the present moment, only on the US market, for both Harry Potter and the Deathly Hallows: Part I and II.

### 5. Conclusions

The A.C.T.A. treaty has positive effects on fields that are based on intellectual property rights and the public must be informed about the gains and losses that this agreement has on the economies of the countries signing the document. It is true that especially the on-line public and users are affected in a way that they will be obliged to give up the counterfeiting actions and spend more money on the original products.

We consider that the protests in countries like Romania, Poland, France, Germany etc. took place because of the lack of information and because of the wrong perception that the intimacy of the population will be totally trespassed. In actual fact, the treaty brings a lot of benefits for the companies, such as the ones mentioned above.

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