



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 4 July 2012

**15044/1/09
REV 1**

**DROIPEN 146
WTO 227
PI 108**

DECLASSIFICATION

of document:	15044/09 RESTREINT UE
dated:	29 October 2009
new status:	Public
Subject:	Anti-Counterfeiting Trade Agreement (ACTA) -Chapter 2 Criminal provisions

Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

RESTREINT UE



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NOTE

from :	Presidency
to:	Delegations
prev.doc.:	Doc.14696/09 DROIPEN 130 WTO 217 PI 102 RESTREINT UE
Subject :	Anti-Counterfeiting Trade Agreement (ACTA) -Chapter 2 Criminal provisions

In view of the 6th Negotiating round on the Anti-Counterfeiting Trade Agreement (ACTA), to take place on 4-6 November 2009, in Seoul, South Korea, delegations find attached the negotiating document representing the position of the Member States of the European Union on the text of the criminal provisions to be included in the above mentioned trade Agreement.

**NEGOTIATING DOCUMENT REPRESENTING THE POSITION OF THE MEMBER
STATES OF THE EUROPEAN UNION ON
THE CRIMINAL PROVISIONS IN CHAPTER 2, IN VIEW OF THE NEXT
NEGOTIATING ROUND ON ACTA AGREEMENT**

Section 3: Criminal Enforcement

ARTICLE 1. OFFENCES/CRIMINAL INFRINGEMENTS

**1a. TRADEMARK COUNTERFEITING, COPYRIGHT AND RELATED RIGHTS
PIRACY ON A COMMERCIAL SCALE**

Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting and copyright or related rights piracy¹ on a commercial scale.

**1b. TRAFFICKING/IMPORTATION AND DOMESTIC USE IN THE COURSE OF
TRADE OF/IN COUNTERFEIT/ILLICIT LABELS**

Each Party shall provide for criminal procedures and penalties to be applied in cases of wilful importation and domestic use in the course of trade on a commercial scale of labels,

(i) to which a mark has been applied, which is identical to or cannot be distinguished from a trademark registered in its territory, and

(ii) which are intended to be used on either the goods or [services] which are identical to goods or [services] for which the trademark is registered.

¹ *Negotiator's note: The term "related rights" is defined by each Party in accordance with its international obligations.*

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1c. UNAUTHORIZED CAM-CORDING

The position of the Member States of the European Union on this provision is still under examination.

ARTICLE 2. LIABILITY, PENALTIES AND SANCTIONS

2a. LIABILITY OF LEGAL PERSONS

(i) Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for the offences referred to in Article 1.

(ii) Subject to the legal principles of the Party, the liability of legal persons may be criminal or non-criminal.

(iii) Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the criminal offences.

2b. INCITING, AIDING AND ABETTING

The provisions of this section shall apply to inciting, aiding and abetting the offences referred to in Article 1.

2c. PENALTIES AND SANCTIONS

(i) For the offences referred to in Article 1, each Party shall provide for effective proportionate and dissuasive penalties. The available penalties shall include imprisonment and monetary fines.¹

¹ *Negotiator's note: This does not imply an obligation for a Party to provide for the courts a possibility to impose both penalties in parallel.*

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(ii) For legal persons held liable under Article 2a, each Party shall provide for effective, proportionate and dissuasive sanctions, including monetary sanctions.

ARTICLE 3. SEIZURE, FORFEITURE/CONFISCATION AND DESTRUCTION

3a. SEIZURE

(i) In case of an offence referred to in Article 1, each Party shall provide that its competent authorities shall have the authority to order the seizure of suspected counterfeit trademark goods or pirated copyright goods, any related materials and implements used in the commission of the alleged offence, documentary evidence relevant to the alleged offence and any assets derived from, or obtained directly or indirectly through the infringing activity.

(ii) Each Party shall, if a prerequisite for such an order, according to its national law, is the identification of the items, ensure that the order need not determine the items that are subject to seizure in more detail than necessary to allow their identification for the purpose of the seizure.

3b. FORFEITURE/CONFISCATION and 3c. DESTRUCTION

(i) For the offences referred to in Article 1, each Party shall provide that its competent authorities shall have the authority to order confiscation/forfeiture and/or destruction of all counterfeit trademark goods or pirated copyright goods, of materials and implements [predominantly]¹ used in the creation of counterfeit trademark goods or pirated copyright goods, of the assets derived from, or obtained directly or indirectly, through the infringing activity.

¹ *The position of the Member States of the European Union on the inclusion/deletion in the text of this word is still under examination.*

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(ii) Each Party shall ensure that the counterfeit trademark goods and pirated copyright goods that have been confiscated/forfeited under this subparagraph shall, if not destroyed, be disposed of outside the channels of commerce, under the condition that the goods are not dangerous for the health and security of persons.

(iii) Each Party shall further ensure that confiscation/forfeiture and destruction under this subparagraph shall occur without compensation of any kind of the defendant.

(iv) Each Party may provide that its judicial authorities have the authority to order the confiscation/forfeiture of assets the value of which corresponds to that of such assets derived from or obtained directly or indirectly through the infringing activity.

ARTICLE 4. *EX OFFICIO* ENFORCEMENT

The position of the Member States of the European Union on this provision is still under examination.

ARTICLE 5. RIGHTS OF THE DEFENDANT AND THIRD PARTIES

Each Party shall ensure that the rights of the defendants and third parties shall be duly protected and guaranteed.
