

29 June 2009

Ministry of Economic Development
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To whom it may concern,

Re: Invitation for Further Submissions on the Anti-Counterfeiting Trade Agreement (ACTA).

1. Introduction:

1.1 This submission is from InternetNZ (Internet New Zealand Inc), and is in response to the Ministry of Economic Development's call for further submissions on the ACTA treaty.

1.2 InternetNZ is a membership-based not-for-profit organisation responsible for the administration of the .nz domain name system. Our mission is to protect and promote the Internet for New Zealand; we advocate the ongoing development of an open and uncaptureable Internet, available to all New Zealanders.

1.3 The impact of new digital models on IP protection is a subject that is being openly and vigorously debated around the world, yet a veil has been drawn over ACTA. We are concerned that vested industry interests are having a far greater influence on the shape of the treaty than other, equally interested, parties.

1.4 ACTA has generated immense public interest both here and abroad. But there is little evidence of the 'transparency' and 'public information sharing' agreed to by the parties in Round Four of the negotiations¹.

1.5 InternetNZ notes therefore that it is extremely difficult for us and other interested parties to provide constructive input without seeing a draft text of the proposed treaty. We comment generally on aspects relating to digital IPR infringement.

2. General Position:

2.1 InternetNZ remains concerned that digital and Internet-related provisions are being discussed as part of ACTA. The scope of ACTA should be confined to

¹ "Participants agreed on the importance of transparency and on holding further discussions on sharing additional information with the public" -

www.med.govt.nz/templates/MultipageDocumentTOC_39924.aspx

counterfeit physical goods only. Translating border control into the online world is an impossible task; any attempt to do so will only erode citizen's online rights and privacy freedoms.

3. Criminal Enforcement:

3.1 The goal of ACTA, according to the MED, is to establish a common standard for IPR enforcement to combat global infringements of IPR on a commercial scale².

3.2 We are concerned therefore that the following statement has found its way to the negotiating table:

“Criminal measures being applied to copyright infringement and in particular substantial copying and/or large scale distribution of infringing works that has no direct or indirect motivation for financial gain.”

3.3 There is no justification for criminalising non-commercial digital infringement. Criminal sanctions are appropriate only for serious offences that cause significant harm to individuals or to the community. Nobody has satisfactorily established that alleged harms being caused by non-commercial infringement are of a sufficiently serious nature to be dealt with by criminal sanctions. It is a response out of all proportion to the action, and should not be considered seriously in forthcoming negotiating rounds.

3.4 In relation to the second bullet point in the Criminal Enforcement section of the document (seizing the proceeds of crime from IPR offences), InternetNZ wishes to suggest clarification that this could not apply to any non-commercial infringement, if such behaviour was to be criminalised (which as noted above we strongly oppose). There would after all, by definition, be no proceeds to seize.

3.5 We further note that New Zealand already has legislation giving Courts the authority to order and confiscate the proceeds of criminal offending – the Proceeds of Crimes Act 1991³. The Act only applies to serious criminal offences – those punishable by imprisonment for a term of 5 years or more.

3.6 Infringement of copyright and other IPR is a serious issue. However, New Zealand must take an approach which is consistent with other areas of activity in New Zealand in terms of the appropriateness or otherwise of criminal sanctions. We are not aware of any other activity of this nature, where the level of loss in a particular instance is likely to be low or non-existent and affects only the economic rights of a third party (rather than affecting property, Government interests or personal safety/welfare), and yet which is subject to criminal sanction in New Zealand. We doubt therefore whether criminal sanction will ever be appropriate in this circumstance.

² A Presentation on the development of ACTA - www.med.govt.nz/templates/ContentTopicSummary_34357.aspx

³ www.legislation.govt.nz/act/public/1991/0120/latest/whole.html#DLM251052

4. Civil Enforcement:

4.1 To InternetNZ's knowledge, New Zealand does not have a statutory damages system, and implementation of one would be a radical approach.

4.2 If a statutory damages system is incorporated as part of ACTA then any formula for calculation of damages must relate to the value of the IPR infringed and be subject to usual qualifications and counter claims.

4.3 However, InternetNZ again doubts whether any such system would be appropriate in New Zealand. If the recent US\$1.9 million award for infringement with respect to 24 songs is a result of such a regime, then InternetNZ regards that as out of all proportion and not something that any New Zealander would consider appropriate.

Thank you for the opportunity to make this submission.

Regards,

A handwritten signature in black ink, appearing to read 'Jordan Carter', with a stylized flourish at the end.

Jordan Carter
Deputy Executive Director
InternetNZ

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