Internet New Zealand (Inc)

Submission to the Ministry of Economic Development

on

the Consultation Paper "Anti-Counterfeiting Trade Agreement – Invitation for Submissions about Intellectual Property Rights Enforcement in the Digital Environment"

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Public Version (there is no confidential version)

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1. Introduction

1.1 This submission is from InternetNZ (Internet New Zealand Inc).

1.2 InternetNZ is a membership-based, non-partisan, not-for-profit charitable organisation responsible for the administration of the .nz domain name system.

1.3 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.

1.4 Thank you for the opportunity to provide feedback to the Ministry in advance of the eighth round of negotiations on the Anti-Counterfeiting Trade Agreement, being held in Wellington 12-16 April 2010.

1.5 This submission responds to the Ministry's consultation paper and the specific questions it contains.

1.6 It precedes those responses with a brief background of InternetNZ's interest in ACTA, and some general statements about intellectual property and the public interest.

2. Background: InternetNZ's interest

2.1 This document is InternetNZ's third submission on the ACTA Treaty, with earlier responses being filed in response to calls for comments by the Government in July 2008 and June 2009.

2.2 InternetNZ is a strong advocate for a vision of the Internet being "open and uncapturable", and remaining an end-to-end network which maximises the prospects for innovation and development at the edge of the network.

2.3 InternetNZ has serious concerns, outlined in more depth in the following section, that the policy debate regarding intellectual "property" rights infringement on the Internet has been captured by one set of interests, and constructed in a fashion that leads to policy decisions that are not in the public interest.

2.4 ACTA appears to be an attempt to toughen the enforcement of existing legal rights held by rights holders.

2.5 InternetNZ draws the Ministry's attention to the fact that changing the enforcement of rights set out in law changes those rights substantively.

2.6 New Zealand Government officials as they engage in the Wellington round of negotiations should be wary of false distinctions between "enforcement" and "substantive rights". They are interrelated and cannot be considered independently.

3. Intellectual "Property" and the Public Interest

3.1 Law exists, among other things, to further the public interest.

3.2 The various laws of intellectual "property" exist to further the public interest by encouraging the production and distribution of a range of creative works - content, devices, products and ideas.

3.3 Typically, they do so by providing limited economic rights to the producers of creative works.

3.4 These rights are limited in many ways. They do not provide for absolute control over the distribution of the work; they are only available to protect works for a limited time; they are not able to be applied to prevent the reasonable exploitation of the work for purposes of study or public criticism. There are many more limitations but these serve to illustrate the point.

3.5 It is important to stress that these are economic rights. They are not property rights. Property rights convey a sense of permanent and substantially complete control over an object or a work that has never been provided for by copyright, patent, trademark or similar laws.

3.6 The rights set out in law seek to develop a rich tapestry of knowledge and creativity; an intellectual commons that fertilises and nourishes the ongoing development of creative production, works of science and art, and the public culture at large.

3.7 In so doing, these laws balance the rights of a producer of a work with the rights of the public to use it. The balance is intended to be struck at the point which maximises two things:

3.7.1 the narrow economic incentives to produce new works, and
3.7.2 the broader public availability of this intellectual commons to stimulate new works that are sometimes economic, sometimes not.

3.8 This is why "property" is such a poor metaphor. Copyright is not about derogating from otherwise intact "property" rights of the creators of works; it is about creating some rights for the creators and some rights for the public, and balancing these in the public interest.

3.9 That balance is expressed in the rights set out in law in New Zealand (or in any other jurisdiction) and in the manner that the rights in the law are enforced. What is permitted or not; what is allowed or not; the vigour with which permissions are fought for or disallowed users prosecuted against – all these comprise the balance that each state chooses in addressing the question of balance that copyright and other laws of intellectual "property" contain.

3.10 To justify changes to the existing balance, either at a national or an international level, a case would have to be made that the existing balance was leading to the two points of maximisation noted above not being reached.

3.11 In respect of maximising the supply of new works, either the economic incentives on producers of copyright works would have to be shown to have markedly diminished (demonstrable by a reduction in their supply, perhaps creating a case for changing the balance in favour of creators) or to have markedly increased (demonstrable by an increase in their supply, and perhaps a case for changing the balance in favour of the public).

3.12 In respect of maximising the publicly available information commons as a foundation for further innovation, the general bias would be towards changing the balance in favour of the public to the point where problems of supply of new works became a problem.

3.13 It is worth noting that "new works" in these paragraphs cannot only include works created for commercial purposes. Vast amounts of content are created and disseminated without commercial intentions, but that does not imply that such content has no value. An analysis that attempted to argue changes in balance to improve the supply of new works or to maximise the information commons which only considered commercially produced works would be spurious.

3.14 It is also worth noting that in defining changes in supply, it is the works created and the revenues derived that are important data. The growth or fading of particular media for distributing creative content, and the sales revenues of those particular media, or even of particular companies within a given industry, do not tell us about the overall economic position of a given industry. The whole market and all relevant dynamics must be considered to derive an accurate picture.

Is there a problem that justifies change?

3.15 Given this background, and given the premise of ACTA being that the enforcement of intellectual "property" rights should be strengthened (thus shifting the balance towards the interests of creators and away from the interest of the public), the evidence required to justify ACTA's approach would be a reduction in the supply of new creative works, or a view (which can be dismissed) that the size of the public information commons is too great.

3.16 On the matter of a reduction in supply of new works, InternetNZ contends that nowhere – locally nor globally – have the creators of new works or their representatives (the rights holders) produced compelling evidence that there is a problem of supply.

3.17 There are many examples that illustrate this point. A lucid summary is in a filing by NetCoalition and the Computer & Communications Industry Association to the U.S. Intellectual Property Enforcement Coordinator's Request for Comments on the Joint Strategic Plan, published this month and available on the Internet[1].

[1] Available at http://www.docstoc.com/docs/31483004/IPEC-Comments-FINAL-w-Attachments. Also see as other examples the following links: http://www.musically.com/theleadingquestion/downloads/090713-filesharing.pdf, or http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/eng/h_ip01456.html, or http://www.zeropaid.com/news/86724/uk-music-economist-says-music-industry-revenue-up-4-7/. There are many more examples available.

3.18 One of the salient examples is a paper called "File Sharing and Copyright" (Oberholzer-Gee and Stumph, Harvard Business School, 2009)[2] which canvasses the evidence at a high level in respect of the music industry.

3.19 Their summary of a wide range of studies shows that in considering music sales, there is ambiguous evidence as to whether sales have been reduced. Some studies see a substitution effect but others do not.

3.20 The new revenues enabled by the Internet have obviously increased (for example, digital distribution of content with no costs for physical media), and complementary revenues for producers of music (for example, bands spending more time on tour) have also shown sharp increases.

3.21 The paper's overall conclusion is that given ambiguous data as to whether revenue from music sales has fallen due to file sharing, and clear data that revenue from complements has increased, the music industry as a whole is better off than it was before the widespread use of Internet technologies for the distribution of creative content that ACTA seeks to reduce.

3.22 InternetNZ is aware of broadly similar patterns in the other creative content industries.

3.23 The implication of this evidence is that the weakening in the control of distribution (and effectively a change in the balance that copyright and similar law represents in favour of the public) has led to positive economic outcomes for content producers, and positive effects in improving the size of the global information commons.

3.24 Certain producers and publishers of creative works argue the opposite; that their industries are under threat, and that only a change in the balance in the opposite direction can serve their interests and the public interest.

3.25 They have failed to make their case.

3.26 Furthermore, they continue to make use of technologies or approaches (often TPMs, which are discussed in section 4 of this submission, and region locking, bundling of product, temporal sequencing of movie releases and so on) that hinder the development of sales which they argue they are trying to promote.

3.27 Notwithstanding that, governments are negotiating a Treaty that accepts their case without it having been substantiated by evidence.

3.28 ACTA should return to its origins: a treaty to deal with physical counterfeiting of goods, for the perfectly reasonable consumer safety reasons that such issues are of interest.

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[2] http://www.hbs.edu/research/pdf/09-132.pdf

3.29 Until the reality matches the false claims of the publishers of creative works or their representatives, the digital enforcement parts of ACTA should be put on hold, and if they are included in the final Treaty, New Zealand should not sign it.

4. Responses to Specific Questions

4.1 The following sections respond to the detailed questions set out in the MED's Invitation for Submissions. They must be considered in light of the comments made in sections 2 and 3 of this submission, and are not offered independent of those comments.

4.2 One overarching issue is the definition of "ISP" – various leaked texts include a debate about this. InternetNZ favours a very narrow definition being included in the ACTA framework, to prevent catching large numbers of unintended institutions through an overly broad one.

A - Liability of third parties for infringement

4.3 InternetNZ regards Internet Service Providers as mere conduits. They provide people with connectivity to the Internet on an end-to-end basis, as does the postal service or the public switched telephone network.

4.4 While ISPs might in an imprecise technical sense be able to identify traffic of various sorts that could include infringing content (as well as including non-infringing content), it is not in the public interest for ISPs to be monitoring all traffic to try and discern what is infringing and what is not. This is consistent with the overarching view of the Internet as being an end-to-end network: the ISP is there to provide transmission of packets, not to decide what packets can and cannot be transmitted.

4.5 InternetNZ's established policy position is that ISPs should remain mere conduits and should not be held liable for the activities of their users. ISPs do not breach copyright or infringe patents, or allow their customers to do so: they provide connectivity to the Internet, and what their customers do on the Internet is the responsibility of the customers and nobody else.

4.6 In submissions on the Copyright (New Technologies) Amendment Act, InternetNZ supported the concept of safe harbour provisions for ISPs as a way to acknowledge this mere conduit approach in law. The balance discussed in the previous section gave rise to the mere conduit approach for other communications systems, and the rise of use of the new Internet system should not lead to a change in its application.

4.7 InternetNZ continues to accept that approach as preferable to specifying liability for ISPs. Clear, unambiguous, brightline exclusions of liability (our understanding of what a "safe harbour" is) should be available to Internet Service Providers.

4.8 Such safe harbours should include all those areas of intellectual "property" covered by ACTA.

4.9 The conditions that ISPs should be required to meet should amount only to notices: where an allegation of infringement is made by a copyright/trademark holder, the ISP's duty should be simply to pass that allegation on to their customer.

4.10 This applies to the mere conduit operations of ISPs. Where they are hosting material on behalf of their customers, a slightly different obligation could be reasonable. ISPs could be obliged to remove material that is proven to be infringing copyright by the appropriate judicial authorities, in return for protection from liability for infringements.

4.11 The important point is that such infringement must be proven rather than alleged. InternetNZ has not supported the notice-and-take-down provisions included in the New Zealand Copyright Act (Section 92C), and would not recommend that such a system be mandated by ACTA. The absence of a counter-notice procedure or penalty for vexatious or incorrect notifications of infringement means that ISPs' interests are aligned solely with removing material, creating a chilling effect on free speech. Such an approach is not compatible with a proper balance between the rights of the public and the rights of content creators, which as argued in previous sections of this submission needs to be struck in the public interest.

4.12 InternetNZ has no view as to whether ACTA parties should be provided with a choice between different ways of dealing with third party liability. Given the range of different legal systems across the negotiating parties, such flexibility may be commendable. InternetNZ would not support the imposition of the non-safe-harbours approach on New Zealand.

B - Other matters

Identifying infringing users

4.13 InternetNZ believes that ISPs should only ever be able to release information about the identity of alleged infringers to rights holders where there is a judicial order made for the release of that information.

4.14 In the majority of cases the obtaining of such information is not likely to be urgent, and so the pace at which the justice system moves should be adequate.

4.15 Where a significant degree of economic harm is being created which requires speedier intervention, interlocutory or interim procedures are and should remain available, where the judicial authorities can order the prompt release of such information.

Promoting cooperation between ISPs and rights holders

4.16 There is no role for the state in trying to improve relationships between different industry sectors. As such, parties to ACTA should not be required to attempt to do so.

4.17 Given the growing importance of content provision by ISPs to their customers, and the mutually advantageous relationships that gives rise to, relationships between ISPs and rights holders can and should be left in the proper, commercial domain.

C - Technological protection measures (TPMs)

4.18 Specific legal protection for technological protection measures, also known as Digital Rights Management, has long been opposed by InternetNZ. The use of TPMs should be a private matter left to the discretion of rights holders.

4.19 Legal protection of TPMs is undesirable for many reasons, with some of the key reasons being that:

- 4.19.1 they interfere with uses of copyright material that are lawful
- 4.19.2 they are unnecessary, as demonstrated by declining use among key content providers (e.g. Apple iTunes)
- 4.19.3 they can be changed at the direction of a content provider, thus retrospectively changing people's rights compared with those they were granted at time of purchase
- 4.19.4 they are ineffective – they are quickly hacked and despite any enforcement, circumvention resources are quickly ubiquitous on the Internet
- 4.19.5 They harm the profitability of those that employ them and so are economically damaging
- 4.19.6 The failure or other exit from a market of content provider who has used TPMs can deny purchasers any further access to use or move the content that they have lawfully purchased.

4.20 InternetNZ believes that extending protection to measures that can prevent people exercising their legitimate rights is effectively changing the substantive balance between the public and content creators that is the proper provenance of national legislators to define.

4.21 In other words, mandating enforcement measures would change the substantive rights available to citizens at the whim of content producers outside the jurisdiction if such ubiquitous protection was available. This is not intended to be ACTA's effect.

4.22 ACTA should not therefore provide enforcement measures for remedying and deterring the circumvention of a TPM used to control access to, or prevent unauthorised copying, playing or distribution of a copyright work.

D - Copyright management information (CMI)

4.23 InternetNZ has two objections to the inclusion of enforcement measures in ACTA that would deter the removal or modification of copyright management information attached to a copyright work.

4.24 The first is that depending on the CMI and its interaction with the user's device, it may prevent the exercise of legitimate rights in the work by the user.

4.25 The second is that, again depending on the CMI and its interaction with the user's device, there may be certain privacy implications (e.g. instructions to send use or other data to the content provider) that the user has a right to otherwise legitimately manage, but which would be prevented by strong enforcement of anti-modification provisions.

5. Conclusion

5.1 ACTA is about toughening the enforcement of a range of intellectual "property" rights.

5.2 The case for doing so has not been made, and the available evidence suggests that the balance represented by copyright and other similar economic rights has shifted in a direction that simultaneously benefits the public, and the producers of copyright and other protected works.

5.3 In the absence of evidence that current levels of digital enforcement are creating a problem for the public, ACTA should not contain provisions that seek to toughen such enforcement.

5.4 If the final treaty does contain such provisions, New Zealand should not sign it.

5.5 Notwithstanding this overall position, the comments offered in section 4 of this submission are how InternetNZ recommends New Zealand should seek to shape the provisions of ACTA that do relate to digital enforcement, in order to minimise the damage that such provisions might do to the public interest.

5.6 InternetNZ again thanks the Ministry for the opportunity to provide input to the New Zealand Government prior to the negotiations in Wellington next month.

5.7 InternetNZ is always available to expand on the arguments presented in this submission and to brief officials if required.

With many thanks for your consideration,

Yours sincerely,

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