

**14 July 2008**

**Ministry of Economic Development  
PO Box 1473  
Wellington**

**Emailed to: [trademarks@med.govt.nz](mailto:trademarks@med.govt.nz)**

To whom it may concern,

**Re: *Submission on Anti-Counterfeiting Trade Agreement (ACTA).***

## **1. Introduction:**

1.1 This submission is from InternetNZ (the Internet Society of New Zealand Inc), and is in response to the Ministry of Economic Development's call for submissions on the Anti-Counterfeiting Trade Agreement (ACTA) being negotiated internationally.

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 InternetNZ notes that there is a dearth of official information on the proposed ACTA treaty and on specific terms being discussed by the parties involved. Without seeing a working draft of the treaty, it is difficult to make considered comment. We comment generally on Internet-related aspects, and with reference to a recently-leaked ACTA discussion paper<sup>1</sup> that describes several example Internet and ISP provisions believed to be under consideration.

## **2. General Position:**

2.1 InternetNZ believes that in the copyright domain, the protection of the interests of rights holders needs to be balanced by robust fair-use provisions to protect freedom of speech and the innovation that the Internet in part allows. Recent amendments to copyright law in New Zealand, in our view, unduly favour rights holders' interests at the expense of the interests of citizens in their regular use of information and communications technologies.

2.2 It is very important that the New Zealand Government adopt a more balanced approach in its discussions on the ACTA Treaty, to protect the rights of citizens.

2.3 InternetNZ questions the need for New Zealand to be discussing Internet provisions as part of its role in the ACTA negotiations. New Zealand already has

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<sup>1</sup> [http://wikileaks.org/wiki/Proposed\\_US\\_ACTA\\_multi-lateral\\_intellectual\\_property\\_trade\\_agreement\\_\(2007\)](http://wikileaks.org/wiki/Proposed_US_ACTA_multi-lateral_intellectual_property_trade_agreement_(2007))

legislation - the Copyright (New Technologies) Amendment Act 2008<sup>2</sup> - which amends the Copyright Act 1994 by covering off the distribution of digital sound and video recordings via the Internet. It also deals with circumvention of technological protection measures and with repeat digital copyright infringers through the introduction of a notice-and-takedown regime for ISP. It also contains requirements for ISPs to terminate the accounts of repeat infringers of copyright.

2.4 The Act has only recently been passed, with many of its newly-amended and introduced provisions yet to take root and be fully tested. In addition, InternetNZ understands that the MED is currently investigating the effectiveness of enforcement of intellectual property-related offences and how enforcement may be improved<sup>3</sup>; potentially a very positive development for copyright protection in New Zealand.

2.5 InternetNZ believes that the Internet distribution and information technology provisions in the ACTA discussion paper, if implemented, will do little to strengthen New Zealand's existing and planned measures against digital copyright infringement, especially those contained in the amended Copyright Act. The Society is also concerned that they may coincidentally further restrict what should be the legitimate use of digital content by New Zealanders.

2.6 We understand that the G8 nations intend completing ACTA negotiations by the end of this year<sup>4</sup>. This short timeframe is a serious concern, given New Zealand's new copyright provisions will only just have come into force by the end of the year.

**2.7 InternetNZ therefore strongly urges the Government to adopt a wait-and-see approach with respect to the effectiveness of the amended Copyright Act and the MED's enforcement review before committing to sweeping digital copyright enforcement measures as part of the multilateral ACTA agreement.**

### **3. Internet Distribution & Information Technology:**

#### **3.1 ISP Liability:**

3.2 The ACTA discussion paper suggests introducing "a legal regime including safeguards for Internet service providers (ISPs) from liability to encourage ISPs to cooperate with rights holders in the removal of infringing material".

3.3 New Zealand's representatives in ACTA discussions should focus on improving the situation with respect to ISP liability by recognising that New Zealand ISPs are supportive of copyright and its role in incentivising innovation. New Zealand should also recognise that ISPs should not be expected to adopt a quasi-regulatory role in policing copyright infringement by third parties via the ACTA treaty.

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<sup>2</sup> [http://www.parliament.nz/en-NZ/PB/Legislation/Bills/b/2/a/00DBHOH\\_BILL7735\\_1-Copyright-New-Technologies-Amendment-Bill.htm](http://www.parliament.nz/en-NZ/PB/Legislation/Bills/b/2/a/00DBHOH_BILL7735_1-Copyright-New-Technologies-Amendment-Bill.htm)

<sup>3</sup> [http://www.med.govt.nz/templates/ContentTopicSummary\\_\\_\\_\\_24681.aspx](http://www.med.govt.nz/templates/ContentTopicSummary____24681.aspx)

<sup>4</sup> <http://www.g8.gc.ca/2008-G8SummitWorldEconomy-en.asp>

3.4 InternetNZ does not believe that it is a proportionate response to allow ISPs to take down material in response to a complaint by rights holders. InternetNZ instead has long advocated a more balanced approach which protects citizens' rights to free speech, by seeking the adoption of a notice and notice system to keep any copyright dispute between the alleged infringer and the alleging rights holder. Any international legal regime which New Zealand advocates for should include this, not the more restrictive model already adopted in domestic legislation and sought to be propagated by overseas interests.

3.5 InternetNZ is also concerned that if, under ACTA, ISPs are forced to police copyright, they are not properly protected by a statutory indemnity under the Copyright (New Technologies) Amendment Act 2008. For instance, there is nothing in the notice-and-takedown regime New Zealand has introduced or in the repeat infringer termination provisions which protects an ISP from liability (in respect of customer impact) in the event that it takes down material or terminates an account in response to a notice from a rights holder which turns out to be incorrect.

3.6 InternetNZ is further concerned that the ACTA discussion document suggests "procedures enabling rights holders who have given effective notification of a claimed infringement to expeditiously obtain information identifying alleged infringers". InternetNZ believes absolutely in maintaining protection for privacy in respect of Internet viewing / downloading habits. Any suggestion that discovery expeditions could be engaged in without the approval of the New Zealand courts would be of serious concern.

#### **4. Technological Protection Measures (TPM):**

4.1 The ACTA discussion paper suggests the possible implementation of enforcement remedies that would apply to those circumventing TPMs used by copyright owners.

4.2 InternetNZ again notes that New Zealand's recently-amended Copyright Act already contains detailed enforcement provisions relating to people hacking or circumventing TPMs.

4.3 InternetNZ reiterates its position that TPMs do not work and are ultimately futile in combating Internet piracy and IPR infringement. We submitted at length on the ineffectiveness of TPMs in Section D of our 9 March 2007 submission to the Parliament on the Copyright (New Technologies and Performers' Rights) Amendment Bill<sup>5</sup>. A copy of this section of our Submission is attached here as **Appendix I**.

4.4 The ineffectiveness of TPMs should be examined in ACTA negotiations, and we recommend that New Zealand's ACTA representatives carefully consider the information in Appendix I as a starting point.

#### **5. Criminal Enforcement & Border Control Measures:**

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<sup>5</sup> <http://www.internetnz.net.nz/issues/submissions/archive/2007/>

5.1 The ACTA discussion paper envisages a range of possible criminal enforcement and border control measures. These include measures which give the “authority to order ex parte searches” and “to ensure the seizure and destruction of IPR infringing goods” at borders.

5.2 It has been widely reported in newswires that these provisions may see customs and border security personnel checking travellers’ personal electronic devices for IPR infringing content. We are pleased that the MED has already ruled this out and that New Zealand Customs “...will not [examine] individual travellers’ laptops or suitcases for single infringing items<sup>6</sup>”.

5.3 InternetNZ agrees that criminal enforcement and border control measures are useful tools in helping to prevent IPR infringement. Discussing such measures should be a focus for New Zealand during negotiations but only in relation to large-scale, commercial counterfeiting and piracy activities across New Zealand’s borders.

## **6. Conclusion:**

6.1 As we have noted above, there is very little concrete information available on what is proposed for this agreement.

6.2 InternetNZ would therefore appreciate the opportunity to provide further feedback should it be decided to proceed any further with ACTA. Until then the comments in this submission are of necessity generalised and may or may not represent InternetNZ’s final view once we have seen any further proposal.

Regards,

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<sup>6</sup><http://computerworld.co.nz/news.nsf/news/24AB42110257116ACC2574680080B147?Opendocument&HighLight=2,ACTA>

**Appendix I – Section D of InternetNZ’s submission on the Copyright (New Technologies and Performers’ Rights) Amendment Bill: 9 March 2007.**

**D: TECHNOLOGICAL PROTECTION MEASURES/COPYRIGHT MANAGEMENT INFORMATION**

***Technological Protection Measures - introduction***

1. In looking at what is happening overseas, InternetNZ has come to the view that New Zealand should not adopt a regime which promotes Technological Protection Measures (**TPMs**).
2. InternetNZ respects the rights of copyright owners to choose how they wish to make their works available (provided consumer’s legitimate interests are safeguarded). However, on balance, we consider that elevating that choice by granting it statutory protection is unwarranted.
3. Before we proceed with our reasons it is also useful to remember three things:
  - 3.1 Whatever position the Act takes with respect to TPMs does not affect the choice that copyright owners have as to whether or not they use them.
  - 3.2 Subject to our comments below with respect to ensuring that consumers’ legitimate uses of copyright materials are not adversely affected, copyright owners are free to include in their licences terms which prohibit TPM circumvention. Breach of those terms will give a copyright owner a contractual claim.
  - 3.3 In addition, if copyright in the underlying work is infringed, the copyright owner will have available the usual action for breach of copyright.
4. In other words, it is important to remember that an absence of TPM circumvention prohibition does not leave the copyright owner without any protection – far from it.
5. InternetNZ submits that for a regime which potentially criminalises TPM circumvention to be given statutory recognition, its proponents must be able to show that actually works whilst at the same time ensuring that legitimate use is not limited. TPMs fail on both counts.

***TPMs do not work***

6. **TPMs will not significantly curb piracy.** As soon as a TPM is introduced it is cracked by large scale commercially driven pirating operations in countries outside New Zealand. Alternatively, low grade reproductions are made by physically recording music or movies. In fact the only people that are really inconvenienced by TPMs are those who wish to legitimately use the copyright work. Just as one recent example, the encryption system for HD-DVDs and Blu-ray discs has already been broken.
7. **Industry is now moving against TPMs.** Apple, one of the most successful implementers of a TPM regime with its iTunes system, is against TPMs and EMI is now said to be following suit.<sup>7</sup>
8. **Overseas jurisdictions are now moving against TPMs.** It is also becoming apparent that internationally the tide is turning against TPMs which unduly restrict legitimate access to, and use of, copyright works. For example, in the middle of 2006, France passed legislation effectively safeguarding format shifting and outlawing any TPMs which might prevent that.<sup>8</sup> Much was made at

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<sup>7</sup> see Steve Jobs’ recent musings at <http://www.apple.com/hotnews/thoughtsonmusic/>

<sup>8</sup> see *Dispositions Portant Transposition De La Directive 2001/29/Ce Du Parlement Européen Et Du Conseil Du 22 Mai 2001 Sur L’harmonisation De Certains Aspects Du Droit D’auteur Et Des Droits Voisins Dans La Société De L’information* at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MCCX0300082L> and the legislative history at <http://www.senat.fr/dossierleg/pj105-26.html>

the time of the fact that this would mean that the TPM measures built into iTunes would be outlawed in France.

9. **New Zealand Government is against TPMs.** The New Zealand State Services Commission has directed other government departments not to use digital rights management and is trying to build a coalition with international governments to pressure platform manufacturers into neutering such systems. It has policy online at <http://www.e.govt.nz/policy/tc-and-drm>. Government itself has rejected untrammelled DRM - why is it trying to protect DRM across the rest of New Zealand?
10. **TPMs are unnecessary.** Numerous examples exist of commercially successful operations which do not rely on TPMs. For example, emusic.com, the most successful music download site behind iTunes, does not use TPMs.
11. **TPMs are a blunt instrument.** A TPM system cannot by itself identify what is copyrightable and what is non-copyrightable; what is legitimate and what is infringing. Therefore, one can end up with the ludicrous situation where a TPM system imposes its own digital rights management lock-up on works on which copyright has expired of which have otherwise entered the public domain. A useful discussion of this can be found on the publisher Jim Baen's site starting at <http://preview.baens-universe.com/articles/matterprin>.
12. **TPMs can change at the whim of the copyright owner.** Just as an example, last year, iTunes decided that instead of allowing 10 playlists it would only allow 7. It built that change into its TPM effectively forcing a change in the terms of the agreement between it and its users.
13. **TPMs can be harmful.** The Sony rootkit example is well known but there are other similar occurrences where TPMs have interfered with user's systems.<sup>9</sup> This should be expected – TPMs by their nature are complex. As another example, many TPM systems require registration online or regular contact with a copyright owner's server for verification. What happens if the server is down or the provider goes out of business or simply decides not to support that version anymore?<sup>10</sup>
14. **Summary.** In the face of the above it is therefore difficult to see how any statutory protection for TPMs can be justified. If copyright owners wish to use them then that is their choice but sanctioning what is already being shown to be a defective and outdated business model should not be part of New Zealand law.

#### **TPMs prevent legitimate use**

15. Perhaps even worse, TPMs unduly interfere with a user's legitimate use of copyright material. They do this by making exercise of the permitted act exceptions difficult or impossible without resort to technical expertise to circumvent the TPM.
16. Again, numerous examples of how TPMs do this can be found. Many of these are highlighted by Professor Michael Geist, a leading North American academic, in his *30 days of DRM* at <http://www.michaelgeist.ca/daysofdrm>. We come back to the issue of permitted acts later.
17. InternetNZ submits therefore that not only should the proposed sections 226-226E not be enacted but that the current section 226 should be repealed.

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<sup>9</sup> For a scathing exposition of the TPM problems with Microsoft's Windows Vista see Professor Peter Gutman's paper at [http://www.cs.auckland.ac.nz/~pgut001/pubs/vista\\_cost.html](http://www.cs.auckland.ac.nz/~pgut001/pubs/vista_cost.html)

<sup>10</sup> In 2001, all DIVX DVDs became unplayable when the content provider decided to discontinue support. Microsoft recently did a similar thing with one of its portable formats.