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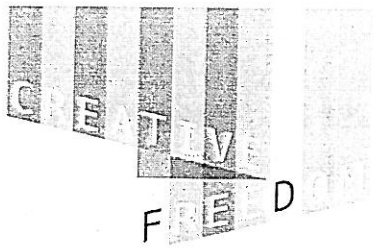

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CREATIVE FREEDOM FOUNDATION

SUBMISSION TO THE MINISTRY OF ECONOMIC DEVELOPMENT

ON THE ANTI-COUNTERFEITING TRADE AGREEMENT ("ACTA")

7April 2010

1. INTRODUCTION

1.1 The Creative Freedom Foundation ("**CFF**") is a charitable organisation that was founded in 2008 by NZ artists and technologists Bronwyn Holloway-Smith and Matthew Holloway in response to changes in New Zealand that threatened to undermine artists and public rights in the name of protecting creativity.

1.2 We represent thousands of New Zealand artists including musicians, film makers, visual artists, designers, writers, & performers. The CFF currently has approximately 20,000 members, of whom more than 10,000 are artists.

1.3 Our primary goals are:

(a) the education of New Zealand artists about emerging issues within New Zealand that have the potential to influence their collective creativity

(b) advocacy to ensure that their views are taken into consideration, and

(c) the promotion and encouragement of activities that support and build the New Zealand arts community, positive relationships within that community and/or the positive wellbeing of that community.

1.4 We are submitting on the proposed ACTA treaty generally, and on ACTA's digital provisions in particular, as we believe that the proposed treaty does not adequately account for the interests of artists who create and build upon copyrighted material, especially using digital media.

1.5 Today, a large proportion of interactions with copyrighted material involves personal use through personal computers and devices with internet connections. It is fair to say that, in turn, a proportion of these interactions involve infringement of copyright. Understandably, there is much debate as to how to interact with the new paradigm of creation and distribution that the internet represents.

1.6 Some have responded to this new digital era by seeking to extend the scope of copyright, and the methods of its enforcement, so that existing ways of creation and distribution are protected, if not privileged. We do not share this view.

1.7 We support promoting creativity by limiting regulation rather than the reverse.

1.8 Where the public views copyright as an unfair or inequitable regime that does not represent their interests, they will likely refuse to recognise its boundaries. Therefore, to ensure the future prosperity of New Zealand artists it is essential to win the hearts and minds of New Zealanders with a publicly acceptable copyright regime, and treaty process, that is transparent and fair for both artists and the wider public.

1.9 Since the ACTA treaty process has not been as transparent as other similar treaties, we encourage the New Zealand delegation and other ACTA participants to be more forthcoming about the proposals in play.

2. EXECUTIVE SUMMARY

2.1 The CFF is concerned that ACTA may harm artists rather than protect them. By reducing the rights that New Zealanders enjoy in respect of copyright material, there is a real risk ACTA will actually undermine public support for artist's copyright in their work.

2.2 Irrespective of whether New Zealand becomes a signatory to ACTA, we recommend that the New Zealand delegation to ACTA negotiations should advocate for a realistic and practical approach to enforcement of copyright and trade marks.

2.3 We note the complex nature of the matters addressed by ACTA, especially regarding the digital provisions, and the fact that work has been ongoing - by the Ministry of Economic Development and the Ministry of Foreign Affairs and Trade - to develop and advance a principled New Zealand approach to ACTA.

2.4 In summary, we believe ACTA and its digital provisions:

(a) will adversely affect creativity in New Zealand;

(b) will create uncertainty for artists;

(c) will limit opportunities for artistic expression;

(d) will result in unjust or absurd outcomes;

(e) will penalise what is otherwise unobjectionable behaviour;

(f) will remove the protections of due process and natural justice from artists who use copyright works in their own work;

(g) will make creative institutions liable for the acts of unidentifiable users of their facilities;

(h) will transfer the costs of enforcing copyright from rights holders to internet service providers ("**ISPs**") and those who use copyright works;

(i) will significantly expand the rights that subsist in copyright works despite being a treaty that is ostensibly focussed only on the "enforcement" of existing rights; and

(j) will require the amendment of the Copyright Act 1994, despite recent amendments to that Act specifically aimed at protecting copyright in the digital domain.

2.5 We believe these outcomes are likely to occur because ACTA:

(a) does not give adequate consideration to the rights and interests of the users of copyright works, such as artists;

(b) views the question of copyright protection unduly narrowly by focussing exclusively on the role of rights holders and ISPs;

(c) relies upon standards and requirements (eg, "technically possible") that are inherently subjective and so likely to cause uncertainty among all relevant stakeholders;

(d) provides an unduly broad definition of "ISP", such that organisations not considered ISPs under New Zealand law will be faced with significant compliance costs to avoid liability for infringement;

(e) is overly prescriptive;

(f) goes beyond its stated focus on "enforcement" by including proposals that significantly expand the rights of copyright holders (eg, protection of copyright management information and all forms of technological protection measures), to the detriment of artists who would use those works as a medium for expression;

(g) has had no cost-benefit analysis completed; and

(h) does not recognise that the issues it seeks to address are already being resolved through technological and market-based mechanisms.

3. THE ACTA TREATY PROCESS

3.1 While this submission has been invited for, and directed to, the digital provisions of ACTA, we would first like to take the opportunity to state our position on the ACTA treaty process to date.

The need for the Digital Provisions, or ACTA generally

3.2 While the social harms cited as requiring intervention by ACTA are concerning, it is by no means clear that ACTA is the best means to curtail such harms.

3.3 While we acknowledge that a thorough cost-benefit analysis of ACTA cannot be concluded prior to the final text being agreed, it is nevertheless concerning that New Zealand is conducting negotiations without any independent analysis of the cost or effect these harms have on New Zealand.

3.4 In a Briefing Paper to the Cabinet External Relations and Defence Committee dated 7 May 2008 (File: P/025/PR005/002), released under the Official Information Act, New Zealand's proposed involvement in ACTA negotiations is discussed as follows:

> New Zealand has the opportunity now to participate in drafting these standards, so that they reflect, as far as possible, our interests as a net importer of goods protected by IP. In addition, New Zealand's participation would send a positive signal, domestically and internationally, about the Government's commitment to the protection of intellectual property rights.

3.5 Insofar as New Zealand's interests in ACTA can be quantified, it is recognised that we are a "net importer of goods protected by IP" such as copyright. It is therefore difficult to accept that expanding the scope of copyright enforceable against artists and others in New Zealand can be in New Zealand's interests. While enhanced copyright protection

may well be a driver for domestic creativity, no analysis has been conducted or alluded to that weighs this potential gain against the costs of curtailing the freedoms that New Zealand artists and creators currently enjoy. Accordingly, caution should be exercised when taking steps that may alter the status quo.

3.6 It has also been stated that New Zealand is not negotiating in ACTA with a view to concluding wider-ranging trade agreements with other countries. Where this is the case, there seems little "diplomatic" value in being party to ACTA that could justify the potential economic downside to becoming a signatory.

3.7 In the end, the question of whether there is indeed any need for ACTA, and particularly its digital provisions, boils down to whether there is a strong case that creativity has suffered as a result of digital technology.

3.8 Leaving aside the debate that surrounds the weight to be attributed to narrow, distributor-focussed (as opposed to creator-focussed) statistics such as those around declining CD sales (just as cassette tape sales declined with the advent of CDs, and vinyl records before that), there is an absence of compelling, independent evidence that the public welfare, or the creative community, has been diminished by the digital era of distribution.

3.9 If anything, we submit that it is now easier than ever before in human history to create and promulgate artistic work to a wide audience, and we believe this is something to be celebrated, rather than restricted.

"Mission creep"

3.10 We note that, despite ACTA being targeted at counterfeiting and piracy on a commercial level, the enforcement measures proposed would in many cases capture non-commercial users.

3.11 While a number of justifications may exist for extending the scope of liability for commercial-scale infringement (health and safety concerns regarding counterfeit medicines, the purported financing of organised crime in respect of counterfeit goods), these same concerns do not apply to users on a non-commercial level, where the economics of copying are quite different.

3.12 We understand there is no serious contention that digital copying poses a serious health or safety risk.

3.13 Nor is there any evidence to support the contention that online or digital sharing of copyright material in any way benefits organised crime. The main attraction of unauthorised digital copying by internet users is that it is costless. By happy coincidence, this characteristic also means that it cannot generate revenue for a criminal party.

3.14 More to the point, if any digital copy is subsequently reproduced and sold on a commercial scale, it is not the intangible digital copy that causes the operative loss to the rights holder. Rather, it is the multitude of physical copies that must be sold in underground markets for cold, hard currency. It is the sale of these physical copies that generates criminal proceeds, not the original digital copy which might well have been obtained legally.

3.15 Since physical copies are the true source of criminal proceeds, it is inappropriate to attempt to justify ACTA's digital provisions by recourse to arguments aimed at physical, commercial-scale infringement. The only valid question in respect of the digital provisions is whether the public welfare has been diminished, due to a decline in

creative endeavours, as a result of digital copying. Where this is not demonstrated, then there is no justification for ACTA intervention.

3.16 Failure to recognise the distinction between commercial and non-commercial infringement will lead to inappropriate regulation, whereby individuals' "fair dealing" rights are eroded in the cause of a social harm that does not apply to a given action. We strongly oppose any ACTA provision that has the effect of targeting non-commercial infringement, as that is an area explicitly outside the scope of the treaty.

Transparency

3.17 With regard to other international fora, Michael Geist has observed that the WTO, WIPO, WHO, UNCITRAL, UNIDROIT, UNCTAD, OECD, Hague Conference on Private International Law, and an assortment of other conventions have all been far more open than ACTA. For example, the WIPO Internet treaties, which offer the closest substantive parallel to the ACTA Internet provisions, were by comparison very transparent, being negotiated in a completely open meeting which the public was allowed to attend without accreditation. The draft texts for the WCT and the WPPT were public, and the US government requested comments on the draft texts, which were available, among other places, from the US Copyright Office.[1]

3.18 While we acknowledge that treaty negotiations are sometimes treated as being "in-confidence", and welcome this opportunity to comment on behalf of our members, the nature and scope of ACTA is a case that calls for wider public consultation on the proposals in play. As we have recently experienced in New Zealand, the public has a strong appetite for discussion of the issues contemplated by ACTA.

4. LIABILITY OF THIRD PARTIES FOR INFRINGEMENT

Safe harbours for ISPs

Should ACTA include provisions requiring ACTA parties to provide safe harbours for ISPs for certain infringing activities?

4.1 While the CFF does not advocate on behalf of ISPs, we recognise that they they serve as the gatekeeper to the internet for artists and the wider public alike. Accordingly, any regulation affecting ISPs will inevitably affect ISP users and their ability to create new works.

4.2 We support this approach, though we note that, where third party liability is to be imposed upon ISPs, it will be necessary to ensure that ISPs are correctly defined. Most residential and small/medium businesses have phones that cannot track individual users, and similarly most networks run consumer-grade Network Address Translation (NAT) network devices are incapable of logging the routing information necessary to corroborate and identify individuals. .

4.3 There is therefore a likelihood that considerable compliance costs (upgrading to the software and hardware necessary to take advantage of the safe harbour) may be imposed upon anyone who falls within the definition of "ISP".

4.4 A separate point of concern is that safe harbour provisions must provide for resolution of infringement claims by an appropriately-qualified authority, such as a court or specialised Copyright Tribunal. Otherwise, ISPs would be required to police copyright infringement accusations against their own paying customers, all the while risking

[1] (Source: http://www.michaelgeist.ca/content/view/4549/408/)

unlimited liability to rights holders if they fail to effectively discharge the safe harbour's requirements.

4.5 A safe harbour process that bypasses appropriately-qualified authorities, and abrogates basic requirements for due process and sufficiency of evidence will lead to a proliferation of risk-averse ISPs that are more focussed on limiting their liability to rights holders than providing their paying customers with improved access to digital services.

4.6 When designing safe harbour provisions it is essential that the correct balance between the interests of the rights holder, the ISP and the ISP user is struck. The alternative is an environment where the interests of ISPs and rights holders interact to subject the general public to a *Guilt Upon Accusation* regime that can only serve to undermine public support for copyright law.

4.7 A poorly-designed regime risks alienating the public, to the detriment of artists. As illustrated by the application of the ill-planned DMCA regime in the United States, unmeritorious infringement claims under that regime have undermined, rather than strengthened public support for artists' claims of copyright in their work.

Recommendation

4.8 New Zealand support safe harbour provisions for ISPs.

4.9 New Zealand adopt the position that ISPs be defined as set out in the Copyright (Infringing File Sharing) Amendment Bill currently before Parliament.

<u>If so, what infringing activities should be covered by the safe harbours?</u>

4.10 Where a safe harbour system is adopted, it is essential that an appropriately-qualified authority is empowered to decide what is and is not an "infringing activity". It would be wholly inappropriate for an ISP to be placed in this position.

4.11 The determination of what is and is not infringement is a complex question of copyright law, one which an ISP is unqualified to make. An ISP is a commercial service provider, rather than a neutral arbiter of property disputes.

4.12 It is essential that, where an allegation of infringement is made, the target of that allegation has access to due process so that the allegation may be fully tested against the relevant law. To allow otherwise would be to allow a de facto extension of copyright and restriction of artists' fair dealing rights in respect of copyright works, as otherwise unmeritorious infringement allegations could go unchallenged by ISPs concerned that they not fall outside of the safe harbour.

4.13 By way of example, where the final ACTA text reflects a US understanding of copyright enforcement, as expressed through the DMCA, that would leave New Zealand with the worst of both worlds. We would be subject to stringent and ill-considered copyright enforcement provisions, whole having none of the benefit of the fair use doctrine which is based in their constitutionally-protected right to free speech and allows exceptions for satire and parody not presently available to New Zealanders.

4.14 One case in point is the recent parody of the anti-smacking referendum which took place on the website Should-A.com. While the Electoral Enrolment Centre ultimately took no legal action, this does not detract from the fact that this type of speech was not protected by fair dealing.

4.15 We also note that there is no provision for remedies or penalties in respect of unmeritorious claims that are rejected. Insofar as similar concerns apply to websites the subject of infringement notices

4.16 We also express concern at any attempt to codify what will constitute "infringing activities" which could take advantage of safe harbours. Infringement is ultimately a question of domestic copyright law, incorporating considerations that are indigenous to each jurisdiction and which reflects the constitutional rights and obligations which underpin each jurisdiction's approach to copyright generally. Attempting to unify the codes of all parties to the ACTA negotiations in this respect, without the benefit of Parliamentary and public discussion of the underlying policy and the actual proposals, is inappropriate and could lead to unforeseen outcomes.

4.17 ISPs should not be held liable for acting as a mere conduit for copyright infringement, just as telephone companies are not held liable for customers who sing "Happy Birthday" down telephone lines without paying the applicable royalty.

4.18 We strongly oppose any introduction of the concept of "inducement" to infringe as articulated in the US *Grokster* case. We believe such a standard would have chilling effect on technological innovation and the exchange of ideas that is essential to artistic creativity.

Recommendation

4.19 New Zealand adopt the position that an appropriately-qualified authority be tasked with determining infringement, rather than ISPs.

4.20 New Zealand adopt the position that the costs of enforcing copyright and trade marks should remain largely, though not necessarily entirely, with the rights holder.

4.21 New Zealand adopt the position that due process safeguards must be put in place to protect ISP users from unmeritorious allegations of infringement.

4.22 New Zealand oppose the introduction of *Grokster*-type "inducement" liability.

<u>Should ISPs be additionally required to meet any conditions in order to qualify for the safe harbours? If so, what should those conditions be?</u>

4.23 The provisions as set out in the Copyright (Infringing File Sharing) Amendment Bill, currently before Parliament, appears to provide an adequate balancing of rights, responsibilities and costs of enforcement between the relevant stakeholders. The Bill was drafted in response to widespread public concern at the potential abrogation of the right to due process and the costs that would be imposed by ISP responsibility for managing infringement.

4.24 Notwithstanding this, we remain strongly opposed to the inclusion of internet termination as a sanction for infringement. Due to New Zealand's geographical isolation, the internet is a vital tool for connecting to the rest of the world. It is also becoming more pervasive with vital services moving online such as parts of government, health care (records, scheduling) and social interaction tools (newspapers, phone, email, social networks). Disconnection may hinder people's ability to pay bills, operate their business or do their job, access banking, education, insurance, etc. Accordingly, the internet is already a necessary service like other utilities such as the phone and postal systems. With internet use continuing to increase, disconnection is a shortsighted and increasingly unfair penalty.

4.25 Moreover, internet termination will inevitably punish many people for the actions of one person on any shared internet connection. This means that organisations such as businesses, farms, schools, libraries, and family homes could have their internet access terminated due to the actions of a single person or even a virus infected computer (as 25% of computers are, according to OECD reports).

Recommendation

4.26 New Zealand adopt a position consistent with the policy as outlined in the Copyright (Infringing File Sharing) Amendment Bill, except as to internet termination.

4.27 New Zealand oppose any provision for, or adversion to, internet termination in the final text of ACTA.

Specifying when an ISP is liable

An alternative approach to providing greater legal certainty for ISPs might be to include a provision requiring ACTA parties to ensure that civil remedies to compensate for damage resulting from infringing activities are available against an ISP when an ISP does not take appropriate measures to stop or prevent the infringing activity when, for example:

(a) it is technically possible for ISPs to take measures for preventing the infringement; and

(b) the ISP knows or there is reasonable ground to know that the infringement is occurring.

Would this alternative approach better achieve the objective of giving greater legal certainty to ISPs, whilst also ensuring that measures are available to right holders to take adequate and effective action against infringement?

4.28 This approach does not appear to provide greater legal certainty for ISPs and by extension, ISP customers such as artists and educational institutions.

4.29 The question of whether it is "technically possible" to take measures to prevent infringement is a subjective one: what may be possible with state-of-the-art technology in a limited instance may not be feasible when applied to the whole of an ISP's network, especially where factors such as cost and protection of ISP users' privacy are concerned.

4.30 Similarly, the question of whether an ISP has reasonable grounds for knowing that an infringement is occurring may require a degree of scrutiny and monitoring on the part of ISPs that would raise concerns as to users' privacy, while transmitting the significant costs of such monitoring to the users through their ISP contracts.

4.31 We note that, as with the alternative option discussed at paragraph 4.1 above, this option does not provide for any appropriately qualified authority to determine what is and is not infringement. It appears from the structure of this proposal that the ISP would be tasked with the responsibility of identifying and addressing infringement in the first instance, which is an inappropriate allocation of what is effectively a judicial role.

Recommendation

4.32 New Zealand adopt the position set out at paragraphs 4.26and 4.27above

Should ACTA parties be given the discretion to choose between implementing one or the other of these two approaches to achieve this objective?

4.33 ACTA parties should be given as broad a discretion as possible to achieve greater legal certainties for ISPs while ensuring that infringement of copyright is limited to an economically optimal level.

Recommendation

4.34 New Zealand adopt the position that the broadest possible discretion be left to ACTA signatories as to how they implement the treaty.

Identifying infringing users

Under what circumstances should rights holders be able to expeditiously obtain information from an ISP about the identity of the relevant user who is engaging in the infringing activity?

4.35 We strongly oppose any provision which requires an ISP to supply information about the identity of its users.

4.36 An ISP is only able to determine the relevant IP address and relate it to the relevant account holder. This is not synonymous with "the relevant user who is engaging in the infringing activity". An IP address may have a number of users, such as a cafe or library providing Wi-Fi access, or a family home. It is therefore likely to be ineffective in identifying the individuals responsible for infringement, while making unsuspecting ISP account holders the focus of a rights holder's enforcement processes.

4.37 In any event, there is no apparent need for an ISP to reveal its users' personal details for the purposes of enforcing copyright, unless so ordered by a competent judicial authority following either a successful interlocutory application or a verdict of infringement.

4.38 Removing privacy would also allow for direct communication and actions outside of the bounds of judicial due process, which behaviour we believe should be discouraged. There are numerous overseas examples of bullying, removing whistleblower protection, legal threats and general harassment when online privacy is removed. Further, there is the potential for allegations of infringement to be used to reveal contact information about subscribers for purposes that are unrelated to copyright enforcement.

4.39 In any event, given the adequacy of damages to redress instances of infringement, we do not see how urgency should be allowed to trump the public interest in privacy and due process in this instance.

Recommendation

4.40 New Zealand to oppose provisions requiring disclosure of ISP users' personal information, save by order of a competent judicial authority following accepted standards of due process.

Promoting cooperation between ISPs and rights holders

Should parties to ACTA be required to promote domestically the development of mutually supportive relationships between ISPs and right holders to deal effectively with infringements of intellectual property rights taking place via the Internet? If so, how might a party promote such a relationship?

4.41 The CFF is supportive of ongoing consultation between all relevant stakeholders, including artists and other rights holders, ISPs, ICT and other industry groups, and users of copyright works.

4.42 In this regard, any mandatory requirement for consultation or relationship-building should include not only rights holders and ISPs, but also artists, ISP customers and copyright users, as these parties' rights and interests would be directly affected by the introduction of "self-regulation" or "industry best practice standards".

Recommendation

4.43 New Zealand adopt the position that all relevant stakeholders, including artists, and other rights holders, ISPs, ICT and other industry groups, and users of copyright works are included in any cooperative network mandated by ACTA.

4.44 Failing this, New Zealand oppose any mandated interaction between rights holders and ISPs.

5. TECHNOLOGICAL PROTECTION MEASURES ("TPM")

What enforcement measures should ACTA contain 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?

5.1 The CFF opposes the introduction of new measures in respect of TPMs. ACTA is expressly designated as a treaty addressing enforcement of copyright, rather than the creation of new rights. Criminalisation or penalisation of TPM circumvention would confer a new right on rights holders, that of preventing access to a copyright work for non-infringing uses.

5.2 Worse still, it would allow individuals to place TPMs on non-copyright works, and sue for infringement based not on the underlying work, but on the TPM which obstructs its use. Examined practically, this could have the effect of granting an unlimited extension to the term of copyright, since a CD or DVD containing a TPM would still be subject to this type of protection even though the copyright in the underlying work had long since lapsed.

5.3 At present in New Zealand, there are prohibitions on making, importing, distributing devices that circumvent TPMs, and a criminal prohibition for doing so for commercial purposes, but no prohibitions on consumers using or possessing such devices. While the CFF opposes TPM in all its forms, the New Zealand Parliament has chosen an approach which at least attempts to limit its focus to concerns of commercial-scale infringement.

5.4 While this may be viewed as a tacit endorsement of TPM circumvention, we view this compromise as undesirable since, in practice, an individual will not be able to to bypass TPM for personal use without a community of technical experts. Making a range of software and hardware illegal limits the ability of individuals to exercise their right, as preserved by Parliament, to bypass TPMs. Accordingly, we oppose any change that increases protection of TPMs.

5.5 Where ACTA seeks to prohibit the use or possession of TPM circumvention devices, such a regime would capture personal circumvention of TPMs. This would have a number of negative consequences, not least being that artists would be unable to circumvent TPMs to use copyright works for legitimate, non-infringing purposes, ranging from research to quotation to format-shifting.

5.6 Circumventing a TPM to access a copyright work does not engage any of the social harms cited as requiring intervention in the form of ACTA. Rather, it is the unauthorised act of copying that constitutes the infringement. Where this copying is performed on a commercial scale, and is prosecuted as such, there appears little additional benefit for the rights holder in further alleging breach of its rights through TPM circumvention. Indeed, instances such as the Sony Rootkit scandal, where a secretly self-loading TPM created system vulnerabilities in users' computers, serve to show how rights holder "authorisation" does not of itself imply security.[2]

5.7 Rather, this type of provision appears aimed at actions otherwise permissible under New Zealand law such as:

(a) "format shifting", whereby a user transfers the copyright work released from the TPM from one format (eg iPod) to another (eg laptop computer);

(b) "jailbreaking", whereby a user removes the TPM so as to access and modify the underlying work, or increase its utility, such as by reprogramming an electronic toy to perform new functions; and

(c) releasing region coding, whereby a user removes the geographical limits placed on the use of a digital disc in order to access the relevant material.

5.8 The decision to use and circumvent of TPMs should be a matter between artists and those who interact with their work. To insist otherwise would lead to absurd outcomes. The widely-acclaimed, Academy Award Best Picture winner "The Hurt Locker" was released theatrically in the United States on 26 June 2009, and was released on DVD in the United States on 12 January 2010, yet has only been generally released in New Zealand as of 1 April 2010. It is unsustainable to suggest that a New Zealander who legally purchases the US-region Hurt Locker DVD, and then circumvents its region-coding, should be liable for infringement as if that person had elected to download the movie illegally without recognising any copyright whatsoever in the underlying work. Yet this is exemplary of the approach to copyright that ACTA represents.

Recommendation

5.9 New Zealand oppose the inclusion of TPM protection rights in ACTA.

6. COPYRIGHT MANAGEMENT INFORMATION ("CMI")

<u>What enforcement measures should ACTA contain for remedying and deterring the removal or modification of copyright management information attached to, or embodied in, a copyright work?</u>

6.1 The CFF opposes the introduction of new measures in respect of TPMs. ACTA is expressly designated as a treaty addressing enforcement of copyright, rather than the creation of new rights.

6.2 It is unclear what, if any, harm this proposal addresses. It is the unauthorised use of the underlying work that constitutes infringement at present. To introduce a further layer of

[2] (Source: http://www.gartner.com/DisplayDocument?doc_cd=136331)

prohibited behaviour requires a re-evaluation of copyright law that has not taken place, and which is outside the scope of ACTA in any event.

6.3 We note there may also be privacy concerns attendant to CMIs that record information around the use of a work and transmit that information to a central database.

Recommendation

6.4 New Zealand oppose the inclusion of CMI protection rights in ACTA.

7. CONCLUSION

7.1 ACTA has the potential to significantly adversely affect New Zealand artists, and New Zealanders generally. Recent New Zealand and overseas experience suggests that steps to address some of the social harms arising out of commercial-scale infringement in the digital domain will have the effect of impacting adversely upon non-commercial users of digital services.

7.2 It is therefore imperative that New Zealand adopt a principled, coherent stance in respect of ACTA, which advances the interests of all New Zealanders, including New Zealand artists.

7.3 Thank you for the opportunity to submit on this issue, and for the extension of time to file this submission.