



**NZFACT**

NEW ZEALAND FEDERATION AGAINST COPYRIGHT THEFT



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### **Submission from NZFACT on ACTA's digital provisions**

NZFACT appreciates the opportunity to respond to the Government's invitation for submissions on the digital provisions of the Anti-Counterfeiting Trade Agreement (ACTA).

As a trade association representing rights holders<sup>1</sup> in film, entertainment and television programming for different markets around the world, NZFACT is well aware of the specific issues that arise when enforcing rights in a digital environment and the losses that result if an enforcement regime is inadequate.

### **Importance of intellectual property protection for New Zealand**

Intellectual property protection is amongst a handful of issues that will determine New Zealand's economic growth and competitiveness in the 21st century. The ability to create, innovate and generate the best artistic, technological, and knowledge-based intellectual property is essential to this country's economic growth. To that end, NZFACT supports an ambitious, comprehensive, and enforceable anti-counterfeiting trade agreement.

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<sup>1</sup> The New Zealand Federation Against Copyright Theft (NZFACT) is an industry association playing both an enforcement and educational role in relation to intellectual property rights. NZFACT was established in 2005 by the Motion Picture Association (MPA) to protect the film industry in New Zealand from the adverse impact of copyright theft. NZFACT members include Walt Disney Studios Motion Pictures, New Zealand Paramount Pictures Corporation, Sony Pictures Releasing International Corporation, Twentieth Century Fox International Corporation, Universal International Films, Inc, Warner Bros Pictures, a division of Warner Bros Pictures Inc and Village Roadshow NZ Limited.

Infringement of copyright is facilitated by digital technologies which allow for the cheap reproduction of multiple copies indistinguishable from the original and rapid distribution. Internationally, illegal copyright infringement through P2P file sharing has been increasing and New Zealand is no exception. The seriousness and the scale of illegal file sharing activity are evident from numerous statistics<sup>2</sup>. The main impact is felt in the music, film and video games sector and piracy has had a massive impact on the health and competitiveness of the motion picture industry<sup>3</sup>.

Movie piracy in New Zealand is not restricted to foreign produced movies, local industry, much praised by Government, has endured significant losses. For example, in the case of the films *Sione's Wedding* pre-production material in digital form is stolen and DVDs of the films in unfinished form put on the market even before the film's public release.

A recent report commissioned by NZFACT and carried out by PricewaterhouseCoopers found that the total value added to the New Zealand economy as a consequence of film and television industry activity is approximately \$2.54 billion<sup>4</sup>.

In addition, New Zealand has profited by being the production venue for many major international films, providing great exposure and benefit to the tourism

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<sup>2</sup> See for example those set out in the Cabinet Economic Growth and Infrastructure Committee – Illegal Peer-to-Peer File Sharing Paper 2009

<sup>3</sup> NZFACT estimates that there are approximately 150,000 file shares occurring in New Zealand every month. A recent survey found that 2 in 5 young people have downloaded illegal copies of movies for free.

<sup>4</sup> The Synovate report on the Economic Impact of the Film and Television Industry in New Zealand, measures the contribution of the wider film and television industry to the New Zealand economy, and provides estimates for that contribution for the 2008 calendar year. It found that:

- \* The total value added to the New Zealand economy as a consequence of film and television industry activity is approximately \$2.54 billion.

- \* The total employment created in New Zealand as a result is estimated to be 22,000 full time equivalent positions.

- \* The total gross output in New Zealand arising as a result of the film and television industry is approximately \$6.1 billion.

- \* The total labour income in New Zealand generated as a result of film and television activity is approximately \$1.2 billion.

- \* The average salary for those directly employed in the film and television industry in 2008 was \$63,000 per annum. The production and post-production sector had an average salary of \$91,000. These are both significantly higher than the national average salary in 2008 of \$39,000.

The measurement takes into account the direct, indirect and induced economic impacts created by the industry, and combines them to determine the industry's total economic contribution. To put the results in context, New Zealand's total GDP in 2008 was \$178 billion. The film and television sector's direct impact, therefore, was 0.7 per cent of GDP, and its total impact 1.4 per cent of GDP. PricewaterhouseCoopers found the sector to be a high value industry, with average direct value added per employee in the film and television sector to be \$133,000. The average for all New Zealand employees is \$81,000. In addition, the report finds that the film and television sector contributes additional financial benefits to the country by enhancing international awareness and equity in the New Zealand brand. This boosts tourism, heightens positive perceptions of New Zealand products and contributes to an enhanced sense of national identity.

industry and to the New Zealand economy generally, as was evident subsequent to the Lord of the Rings trilogy release.

Furthermore, New Zealand also has an interest in our creative industries being able to sell our work in offshore markets and not lose out to illegal P2P file sharing. In return our trading partners legitimately expect New Zealand to implement and enforce laws in the interest of their creative industries.

ACTA must therefore seek to establish an international framework for enforcing intellectual property rights to address more efficiently the problem of large scale trading counterfeit goods and piracy, including copyright piracy on the internet.

### **The Anti-Counterfeiting Trade Agreement**

ACTA has a real potential to improve the protection and enforcement of intellectual property rights in major markets around the world. Equally important, it has the potential to shift the international debate on intellectual property rights in favour of international cooperation and strong intellectual property enforcement standards. To meet its potential it is imperative that ACTA build on international norms and establish strong standards for the enforcement of intellectual property rights.

Current enforcement measures under the Copyright Act have not proven effective against P2P activity. For this reason, New Zealand is in the process of adopting specific measures to address this activity (the Copyright (Infringing File Sharing) Amendment Bill currently before Parliament).

NZFACT considers the implementation of the standards embodied in the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty should be the baseline for ACTA. In particular, New Zealand should seek under ACTA an obligation on member countries to adopt effective legislation to address new forms of piracy such as unauthorised P2P file sharing.

### **Specific issues**

Our comments below respond to the issues raised in the Government's "Invitation for Submissions". We will be happy to provide further input on other aspects as and when requested.

#### **1. ISP liability and safe harbours**

ISPs are uniquely placed to address the infringement occurring on their networks because they both control these networks and have a direct relationship with their subscribers. Because of this, ISPs are best placed to put an end to infringement

and to take measures to deter future infringing acts. It makes sense therefore that they should have a role in tackling online piracy.

#### *Safe harbour*

In order for the safe harbours to function as they were intended, the Government must ensure that there is clarity in liability of ISPs in the first place. Provided that this is achieved, NZFACT has no objection to ACTA containing provisions requiring parties to provide safe harbours for ISPs in certain circumstances.

These circumstances are likely to include (subject to appropriate conditions being met) use of ISP services to infringe copyright, storage of infringing materials or caching of infringing materials by an ISP and all subject to various qualifications. It is up to the Governments of each country to decide for themselves what the parameters for the safe harbours should be.

For example, in New Zealand recent amendments to the Copyright Act 1994 have acknowledged the role of ISPs in addressing online infringement. New sections 92(b) to 92(e) of the Act provide for liability of ISPs<sup>5</sup> whilst at the same time providing them with safe harbour in certain circumstances. The proposed graduated response program set out in new section 122 of the Copyright (Infringing File Sharing) Amendment Bill also provides limitations and liabilities for ISPs.

The objective of these recent amendments was to encourage ISPs to cooperate with rights holders to curb online piracy whilst at the same time providing a limit on their liability in circumstances where it was not warranted and NZFACT is supportive of these measures.

#### *Specific rules*

Secondary liability regimes for online infringement are essential to make the online marketplace less hospitable for infringers and, in appropriate circumstances, rules setting out further specific situations in which liability would apply may be effective.

To this end, NZFACT agrees rights holders should have the full remedies of any relief available to them under national law in circumstances where ISPs do not take appropriate measures to stop or prevent an infringing activity when it is

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<sup>5</sup> When one of their users infringes copyright, or when they store infringing material or when they cache infringing material in certain circumstances.

technically possible for them to do so and where they know (or have reasonable grounds to know) that the infringement is occurring. However, any specific liability clause established along these lines needs to make it clear that liability is not restricted to those criteria alone.

In the event that the ISPs do take certain steps (as prescribed by national legislation which could include any number of specific situations) so as to come within a safe harbour then it is likely that removal of monetary relief will be reasonable.

NZFACT recommends New Zealand negotiators look to the provisions of the United States' Digital Millennium Copyright Act as setting the benchmark standards in this area.

#### *Injunctive relief essential*

In any event, no matter which path is taken under ACTA, it is imperative that the ability to obtain injunctive relief is maintained, even where safe harbours are available and ISPs do fulfil their conditions. It is particularly important in an online environment, where monetary relief is often not sufficient, to be able to obtain urgent injunctive relief to put an end to the significant ongoing infringement.

This is recognised under current New Zealand law where the Copyright Act ensures the ability of injunctive relief even where an ISP meets safe harbour conditions (see sections 92b(3), 92b(5) and 92e(3) of the Act).

#### *Conclusion*

Practical secondary liability regimes for online infringement are essential to motivate participants to cooperate in implementing the reasonable practices that will make their online marketplace less hospitable for infringers.

New Zealand should be pushing for a balance in ACTA between clearly established grounds of liability tempered with a safe harbour in certain circumstances thereby providing an incentive for an ISP to assist in controlling the online infringement.

ACTA parties should refine their secondary liability regimes to reflect current realities and adopt modern, flexible systems where they do not exist. The goal must be to educate and encourage responsible conduct on the part of all parties involved in the transmission of copyright materials.

## 2. Identifying infringing users

NZFACT would like to emphasise that it has no interest in monitoring and contacting specific ISP subscribers itself and does not require subscriber details under a graduated program. However, in circumstances where NZFACT wishes to enforce its rights against an infringer then it must be able to expeditiously obtain sufficient information from the relevant ISP so as to enable it to identify the user who is engaging in the infringing activity.

The nature of the digital environment leads to difficulties in identification of infringers because dynamic IP addresses change frequently. For example, whenever a computer is disconnected from the internet and then re-connected subscribers will generally be allotted a new IP address. Rights holders can monitor that an infringement has occurred but they cannot easily trace this back to a particular subscriber. Generally speaking, only an ISP is able to match the subscriber to the relevant ISP address(es).

If the rights holders cannot identify the infringer they are effectively prevented from enforcing their rights in relation to infringements of their intellectual property. New Zealand law addresses this difficulty by allowing a plaintiff to apply to the courts for an order that the third party involved (in this case an ISP) disclose the relevant information relating to the infringement.

The Copyright (Infringing File Sharing) Amendment Bill currently before Parliament builds on established New Zealand law by providing a mechanism whereby a copyright owner can apply for an order at the District Court under prescribed circumstances to require an ISP to disclose to a copyright owner, the name and contact details of an account holder.

Accordingly, it makes sense that New Zealand should support ACTA which provides that where information required for a court action is held by third parties, the rights holders have the ability to obtain such information by way of a court order and for such information to be obtained on an urgent and cost-effective basis. Not to have this ability to block rights holders from taking effective action against online infringement can lead to devastating losses for the movie and music industry given the speed with which copies are made and distributed in the digital environment.

More generally, New Zealand in its negotiations with ACTA must ensure that the interpretation of data privacy rules appropriately balances the fundamental rights of privacy and property, including intellectual property, to make certain that they do not create undue impediments to the enforcement of rights.

In particular, ACTA should ensure that overly strict interpretations of national data privacy rules do not impede legitimate online enforcement efforts, including the graduated response mechanism, or leave rights holders with the sole recourse of pressing criminal charges against online copyright infringers as the only avenue to enforce their rights.

### **3. Promoting cooperation between ISPs and rights holders**

NZFACT absolutely understands that legislation alone is not the key to solving the digital piracy problem. A collaborative approach to public education which successfully pulls resources of Government, ISPs, and rights holders is essential. A cost-effective balance needs to be struck between investment, enforcement and education involving these three parties.

In particular, cooperation between ISPs and rights holders is key to reducing online infringement. NZFACT believes that it is only when there is an understanding in the online community of the consequences and impacts of intellectual property infringement that real progress can be made in reducing infringement levels.

The development of the graduated response process in New Zealand, which was previously discussed in conjunction with the Telecommunication Carriers Forum, is an excellent example of cooperation between ISPs and rights holders.

Government could take a more active part in the process and generally assist with achieving cooperation between ISPs and rights holders by, for example, formalising processes and setting deadlines in the event such issues are not addressed directly within the context of the legislation itself.

Therefore, ACTA should contain an obligation for Governments to promote mutually supportive relationships between ISPs and rights holders to deal effectively with infringements of intellectual property rights taking place via the internet.

### **4. Technological Protection Measures**

Technological Protection Measures (TPMs) play an essential role in protecting intellectual property rights in the digital environment by protecting against unauthorised copying and distribution of digital recordings. The use of TPMs also assists in making digital recordings available at varying price points and with various usage rules providing a choice for consumers.

TPMs are necessary to manage the risk of infringement of copyrighted work in the digital environment. This has been recognised to an extent in New Zealand with amendments to the Copyright Act in 2008. New sections 226 – 226(e) of the Act relate to TPMs and copy protection measures.

However, these provisions fall short of what is required under WIPO Copyright Treaty (WCT). A significant component of full implementation of WCT is coverage of technologies that control access to copyright of materials. To outlaw circumvention only if it is linked to copyright infringement falls short of the requirements of the WCT and NZFACT seeks the strongest possible criminal and civil protection for TPMs under ACTA covering both access controls as well as copy controls.

In short, New Zealand should support an ACTA that recognises the important role of TPMs in the digital market by providing an obligation to prohibit both the act of circumvention of technological measures and any dealing in or with any device designed to enable circumvention.

## **5. Copyright Management Information**

Copyright management information (CMI) allows users to label their works and to identify their works and conditions of use.

CMI is especially important in the digital environment where infringement can occur quickly on a massive scale. Works that appear in digital form can easily be changed or reproduced and put into distribution channels without the consent of the copyright owner.

CMI benefits consumers providing them with confidence in the authenticity of the source of a work, and certainty as to the conditions for its use. The manipulation of CMI can lead consumers to draw the wrong conclusions about permitted uses and thus can have an economic effect equivalent to common fraud.

The WIPO treaties require effective legal protection of CMI and New Zealand's Copyright Act (as recently amended) provides protection for CMI (see sections 226(f) – 228 of the Act).

NZFACT considers that New Zealand should insist on at least equivalent protection being incorporated into ACTA.



## Conclusion

NZFACT views these negotiations as the unique opportunity. Moving enforcement standards from statutory law into practical and specific mechanisms to strengthen enforcement is a key step in the process of improving intellectual property protection on a global basis. We hope and expect an eventual agreement will contain a solid, legal framework and strong, practical enforcement provisions.

NZFACT trust that the above submission provides useful feedback for the review of the digital provisions of ACTA and that they will be given due consideration.

Please do not hesitate to ask us for a more detailed explanation of our concerns or material supporting our proposals. We remain ready to discuss with Government our views on the digital provisions of ACTA and on copyright protection more generally as and when required.

Thank you for the opportunity to provide this submission. If you need any further information or clarification, please do not hesitate to contact us. If further input is sought by the Government, we would again appreciate the opportunity to be involved in that process.

Yours sincerely

**New Zealand Federation Against Copyright Theft**



Tony Eaton  
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