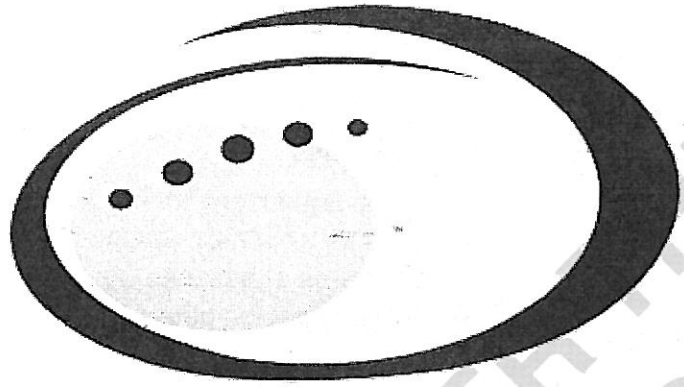
No 12



New Zealand Open Source Society

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Submission on the Anti-Counterfeiting Trade Agreement (ACTA)

by Peter Harrison
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S. 9(2)(a)

The NZOSS

The New Zealand Open Source Society is an incorporated society set up to educate, advocate and advance the use of Free and Open Source Software (FOSS) in New Zealand. It also represents the interests of Open Source software developers and users in New Zealand.

The Interest of the NZOSS in ACTA

The NZOSS represents software developers and users in New Zealand. As such we represent both the creators of copyrighted works and the consumers of those copyrighted works. This submission is addressing the concerns of our membership. We believe that for innovation to flourish requires building on the work of others, in exactly the same way modern technological society is built on a scientific method with publication and sharing as one of it's core values. This submission is talking in defence of the principles of scientific sharing required to maintain an innovative society.

Scope of the Submission

The scope of submissions as requested by the Ministry of Economic Development is limited to specific questions about Internet Service Providers. The NZOSS feels there are far broader concerns about the ACTA process itself and the impact of the entirety of ACTA, not just the provisions around Internet Service Providers. As a consequence this submission is far broader that that requested.

Secrecy and Open Society

> *The very word "secrecy" is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it. Even today, there is little value in opposing the threat of a closed society by imitating its arbitrary restrictions. Even today, there is little value in insuring the survival of our nation if our traditions do not survive with it. And there is very grave danger that an announced need for increased security will be seized upon by those anxious to expand its meaning to the very limits of official censorship and concealment. That I do not intend to permit to the extent that it is in my control. And no official of my Administration, whether his rank is high or low, civilian or military, should interpret my words here tonight as an excuse to censor the news, to stifle dissent, to cover up our mistakes or to withhold from the press and the public the facts they deserve to know.*
>
> *- John F. Kennedy (Waldorf-Astoria Hotel, New York City, April 27, 1961)*

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These words are a ringing condemnation of the process under which intellectual property laws have been drafted, developed and implemented. Strong language perhaps, but justified by the facts. Facts which will show that multinational companies have driven adoption of stronger intellectual property laws through a process that is secret and excludes any interests that oppose them, such as organisations like ours.

In this submission we will not only examine the public statements made about ACTA, but also the historical background of ACTA. We will show that there has been a hidden agenda to pass intellectual property legislation, and that the only balance introduced was achieved through a public campaign to protect our rights. In every other way the intellectual property agenda has been set not by our Sovereign Government, but by multinational companies.

ACTA; Son of DMCA

> *The Digital Millennium Copyright Act (DMCA) is a United States copyright law that implements two 1996 treaties of the World Intellectual Property Organization (WIPO). It criminalizes production and dissemination of technology, devices, or services intended to circumvent measures (commonly known as digital rights management or DRM) that control access to copyrighted works. It also criminalizes the act of circumventing an access control, whether or not there is actual infringement of copyright itself. In addition, the DMCA heightens the penalties for copyright infringement on the Internet. Passed on October 12, 1998 by a unanimous vote in the United States Senate and signed into law by President Bill Clinton on October 28, 1998, the DMCA amended Title 17 of the United States Code to extend the reach of copyright, while limiting the liability of the providers of on-line services for copyright infringement by their users.*
>
> - Wikipedia

It is interesting to compare the aspects of the DMCA with the Digital Provisions of ACTA and the Copyright Amendment Act 2008. It is clear that the provisions in ACTA are directly related to the DMCA. All the above provisions, including prohibitions of DRM circumvention devices, increased provisions for copyright infringement and rules around limiting the liability of ISP's is addressed in ACTA. Clearly ACTA is an attempt by the United States to export it's DMCA intellectual property regime to other jurisdictions.

DMCA Abuse

So what can we expect from DMCA style laws if implemented in New Zealand? A good example is the case of VenomfangX, a fundamentalist Christian who filed hundreds of false DMCA notices against content that opposed his own views. As a consequence of this action the victims had to file DMCA counter notices which forced them to identify personal information such as their address and phone numbers. VenomfangX in at least one case then distributed those personal details while making false statements that accused his victim of paedophilia and encouraged his viewers to forward the information to the authorities. He was able to use the DMCA to impact the free speech and invade the privacy of hundreds of people and try and destroy the lives of those he disagreed with. Anecdotes are not data however, so what does the evidence say about DMCA Abuse?

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In 2005 Jennifer Urban of the Intellectual Property Clinic at the University of Southern California published a study of Takedown Notices under section 512 of the Digital Millennium Copyright Act.

- *Thirty percent of notices demanded takedown for claims that presented an obvious question for a court (a clear fair use argument, complaints about uncopyrightable material, and the like);*
- *Notices to traditional ISP's included a substantial number of demands to remove files from peer-to-peer networks (which are not actually covered under the takedown statute, and which an OSP can only honor by terminating the target's Internet access entirely); and*
- *One out of 11 included significant statutory flaws that render the notice unusable (for example, failing to adequately identify infringing material).*

Copyright Amendment Act 2008

The Copyright Amendment Act of 2008 was the result of six years of consideration. The scope of the entire act would be difficult to review here, so we have chosen one issue in order to highlight how our Sovereign decision making process is undermined. In December 2002 a position paper was released by the Ministry of Economic Development called "Digital Technology and the Copyright Act".

> *The Ministry's recommendation is that any definition of ERMI [Electronic rights management information] included in the Act not encompass the tracking functions of ERMI. We are not convinced that the Act should provide new rights to content owners to assist them to take advantage of these new business opportunities. It seems to us that the tracking functions of ERMI are quite removed from what has traditionally been the scope of copyright law. Many of these features are designed to ensure that the terms and conditions of licence agreements are observed. The law of contract, not copyright therefore applies.*
>
> - Digital Technology and the Copyright Act Position Paper, December 2002

Clearly this identifies that there is a concern that providing protection for technology which controls access to works is outside the scope of copyright. Many of the subsequent submissions reinforced this position.

> *It is also agreed that there must be the development of ERMI which would be so carefully drawn as to avoid any confusion with a technological protection measure. It is agreed that such definition should not encompass tracking functions of the RMI.*
>
> - David Harvey

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The Electronic Frontier Foundation also submitted their opinion on technological protection measures.

> *First, section 226's prohibition on tools (circumvention devices) is overly broad. As recognized in both the Ministry's Discussion Paper and Position Paper, the key principles guiding development of New Zealand's copyright policy are balance, broadly understood, and the enhancement of the public interest. This involves a complex balancing exercise involving provision of incentives to "ensure creation, production and distribution of creative works that meet society's needs and demands", "minimising the costs to society of copyright protection" and "ensuring reasonable access to copyright material, both for creators as an input in cumulative creation, for special needs groups and for consumers in general."*
>
> *In order to preserve the existing copyright balance, the law must provide for circumvention for non-infringing uses. To limit the prohibition to circumvention undertaken only for copyright-infringing purposes, individuals need to have access to tools that enable them to circumvent technological protection copy control measures for non-infringing purposes.*
>
> *- Electronic Frontier Foundation*

The key point in the submission from the Electronic Frontier Foundation was that there should be balance between the rights of individuals and those of rights holders. The specific point in relation to Technological Protection Measures is that they should not extend the rights of copyright holders.

Section 92a

In the process of considering the new Copyright Bill it went to the Select Committee where people had the opportunity to present their submissions. Section 92a allowed for copyright holders to file notices, and for an individuals internet connection to be terminated based only on those notices. This approach was widely condemned, with InternetNZ saying:

> *"A deeply flawed law that undermines fundamental rights and simply will not work". That is what the telecommunications industry, internet service providers, user groups, internet advocates and IT professionals think of parts of the recently passed Copyright (New Technologies) Amendment Act.*
>
> *Section 92A, when it is brought into force, will require ISPs to "reasonably implement" a policy to disconnect "in appropriate circumstances" the internet services of users who have repeatedly downloaded or uploaded infringing music, movies, games and other copyright material.*
>
> *"The Act gives no guidance on what 'reasonably implement' or 'in appropriate circumstances' mean," Mr Chivers said. "This leaves the door wide open to those who seek disconnection of an alleged repeat infringer based on flimsy evidence, or worse, allegations alone".*
>
> - InternetNZ

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As a consequence this section was removed by the Select Committee, only to be reinstated by Judith Tizard shortly before the legislation was passed. A subsequent meeting with Judith Tizard was reported by Colin Jackson.

> *When it opened, Judith Tizard spent 30 minutes telling us why the change had to be made. She began by strongly expressing her anger that we had complained to her at this stage in the proceedings. None of us, she said, had been to see her before this on this topic. When we protested that we had worked with the Select Committee, which had removed this provision - and balanced it with one which made licence holders liable for false accusations - she said that this was completely inappropriate of the Select Committee, because Cabinet had already decided this was going ahead. We should not have been surprised, we were told, that this provision was reinserted by the government at the last minute before the bill was passed.*
>
> - Colin Jackson

After the Bill passed into law with the section in question intact there was an open question about why it was necessary for the Government to override a decision made in Select Committee that was made in consultation with a huge number of experts in the industry. How was it possible that a Minister of the Crown was able to suggest that Select Committee was not the appropriate place to provide input to Government when it is the express purpose of the Select Committee process?

More importantly what invisible agenda was driving the adoption of this legislation in direct opposition to the vast majority of New Zealand citizens?

Internet Blackout Campaign

As a consequence of the undemocratic treatment in the aftermath of the Select Committee a campaign was developed and headed up by the Creative Freedom Foundation to pressure the Government into delaying and reversing the implementation of Section 92a. This included hundreds of web sites blacking out their web sites in support of the cause. The new National Government considered this position and decided to initially postpone this section, and then later decided to redraft the legislation.

Transparency

When we are critical of Transparency in the ACTA process it is not because we have an academic interest in the subject. It is clear that the Copyright Amendment Act 2008 was at the very least engineered to enable the same kinds of provisions as the DMCA around ISP liability, disconnection of individuals, and provisions around Technological Protection Measures. When a provision required by that agenda was reversed in Select Committee the Government acted to reinstate it. It is very clear that there is a secret agenda at work to introduce every provision of the DMCA in New Zealand. Furthermore this is an agenda set by content companies that comes at the expense of our freedoms and privacy. This is not speculation. This is documented fact as in evidence in the United States were the DMCA has been in effect for more than ten years.

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It is in this context that we are calling for transparency. We do not wish to see hidden agendas influence agreements negotiated in secret decide what the laws of New Zealand will be. We fear that the few concessions we have achieved will be reversed in order just to get to the negotiation table with the United States for a Free Trade Agreement.

The text of proposed agreements have not been officially released. Briefings by the Ministry of Foreign Affairs and Trade have tried to explain that ACTA is an agreement only about enforcement, and will not effect our human rights.

> *ACTA will not interfere with the rights enshrined in, for example, the Privacy Act 1993 and the Bill of Rights Acts 1990, nor will enforcement agencies be provided any additional surveillance powers under ACTA*
>
> - Ministry of Foreign Affairs and Trade (ISBN 978-0-477-10227-8)

In the sense that this statement is true it is trivial, in the sense that it is important it is false. It is true that ACTA itself will not directly affect our human rights, privacy or freedoms. This is because it is a trade agreement without the force of law. In the larger view, one that incorporates both the legislation that has already been passed and any future legislation in support of ACTA, our rights, freedoms and privacy have already been affected.

Expansion of Powers

According to the briefing by the Ministry of Foreign Affairs and Trade two organisations will see increased powers. Both NZ Customs and the Ministry of Economic Development will have increased powers of prosecution, as it is believed that the Police do not give copyright violation a high priority.

Currently the Search and Surveillance Bill is before Parliament. There has been widespread critique that the changes are too broad and give too many agencies enforcement roles. This document cannot address a detailed analysis of this problem as it relates to the increased role of NZ Customs and the Ministry of Economic Development.

Economic Impact if ACTA

We now depart from our analysis of ACTA itself, and look at the wider drivers for ACTA and New Zealand foreign policy.

Australia negotiated a Free Trade Agreement with the United States in 2004. As part of this agreement Australia made several modifications to it's intellectual property laws, including modification of the term of copyright protection. What did Australia get in return?

> *Five years on, it is clear the free trade agreement between Australia and the United States was a dud. Despite the fanfare with which the Howard government introduced it, no tangible benefits have resulted for Australia.*
> *Australia's exports to the US in the five years to last year grew by only 2.5 per cent, compared with double-digit growth for exports to all the major Asian trading partners. Since the signing, America has slipped from third to fifth among Australian export destinations, overtaken by Korea and most recently India.*
> *The value of Australian exports to the US is now only about a quarter of those to the two leading customers, China and Japan. The four Asian countries together take more than 10 times the value of exports to the US.*

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Moreover, between 2004 and 2009, the bilateral trade gap in America's favour grew even larger. Australia's imports from America have grown much more quickly than its exports to America. According to US data, the gap in America's favour grew from $US6.4 billion ($A7.1 billion) to $US11.6 billion.
In 2004 Australian exports to America were worth about 54 per cent of the value of imports from that country. By last year the figure was down to 41 per cent.

- Sydney Morning Herald, March 3, 2010.

Clearly if New Zealand is to negotiate a Free Trade Agreement with the United States we should be maintaining any potential political leverage. It is very clear from the Australia Free Trade Agreement and the content of ACTA that the US is very interested in having counties adopt copyright legislation that will give it's content companies protection from the forces of inevitable progress. ACTA is simply a conduit to get New Zealand to implement legislation that it would otherwise need to negotiate over.

Instead we appear to be sacrificing our own leverage just to placate the US administration sufficiently for them to sit down at the table. The Ministry of Foreign Affairs and Trade talk of millions of dollars lost to copyright infringement in New Zealand. That money is pocket change compared to the losses we will incur from being too ready to sacrifice these important political concessions. If supporting ACTA will undermine our own leverage, potentially costing us the ability to reduce US subsidy support of their dairy farming industry, why are we involved?

Impacts of ACTA

The NZOSS fears that ACTA will be used to:

- Force changes to law that will compel Internet Service Providers to terminate Internet Access based on accusations from content providers.

- Force changes to law that will strengthen Digital Rights Management, and in the process impact innovation and creativity in the content industry.

The question is, do we have any basis in fact for these fears? Are there any provisions in the text of ACTA that would in fact impose requirements for the laws described above? If we only depended on official sources there would be no way to determine the facts. However, as luck would have it the text of ACTA has been leaked. Of course without an official text it is difficult to be certain, but the leaked text appears to be genuine.

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Internet Service Provider Account Termination:
In the following excerpt we identify that ACTA may indeed create the obligation to maintain a Internet disconnection policy.

> *Option 1*
> *(b) condition the application of the provision adopting and reasonably implementing a policy to address the unauthorized storage or transmission of materials protected by copyright or related rights.*
> *[29] An example of such a policy is* ***providing for the termination in appropriate circumstances of subscriptions and accounts on the service provider's system or network of repeat infringers.***
> *(ii) an online service provider* ***expeditiously removing or disabling access to material or, upon receipt of legally sufficient notice of alleged infringement,*** *and in the absence of a legally sufficient response from the relevant subscriber of the online service provider indicating that the notice was the result of mistake or misidentification.*

Digital Rights Management strengthened:
In the following excerpt we identify that ACTA may indeed expand the meaning of circumvention devices beyond the scope that was accepted in New Zealand. That is it will expand it beyond copying to playback.

> *In implementing Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty regarding adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers or producers of phonograms in connection with* ***the exercise of their rights and that restrict unauthorized acts*** *in respect of their works, performances, and phonograms, each Party shall provide for civil remedies, as well as criminal penalties in appropriate cases of wilful conduct.*

Our Recommendations

At the very least we do not wish to see the following introduced as a consequence of ACTA:

1. a regime were citizens will be disconnected from the Internet based only on notices from rights holders, but rather maintain a position where proper judicial oversight and process will be maintained.
2. extension of Technological Protection Measures beyond the right of duplication to include for example playback and access rights.

Furthermore we would like to see the proper application of transparency and accountability in decision making to ensure that decisions are made in the open and in the interests of New Zealand.

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