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SUBMISSION FROM THE RECORDING ASSOCIATION OF NEW ZEALAND ON THE DIGITAL PROVISIONS IN ACTA.

30 March 2010

RIANZ thanks the government for the opportunity to provide its views on the inclusion of provisions on IP protection in the digital environment in ACTA.

ACTA is an important initiative which is welcomed by the recording industry. Establishing effective enforcement practices at an international level, addressing both physical and digital infringement, is a valuable goal. We strongly support the government's efforts towards achieving it.

New Zealand's existing and pending legislation provides for effective enforcement against infringement of digital works. It is therefore well placed to seek a consensus on the necessity of similar rules in a multilateral agreement like ACTA. This would foster equally effective enforcement in countries around the world and enhance the interests of New Zealand in protecting works made by its nationals in other countries.

With the move from physical to digital formats, online piracy of recorded music has become the biggest obstacle to the development of the legal market for sound recordings. Around 95 percent of all music downloads worldwide are unlicensed. According to industry estimates, over 40 billion music tracks were illegally downloaded in 2008, without payment to the artists, songwriters or producers of these recordings. These unacceptably high levels of unlawful online use inflict massive economic and employment losses. They hinder investment in new music, damage local culture and create a barrier to the development of legitimate online offerings.

As a new multilateral agreement on enforcement, ACTA should address these concerns and include useful mechanisms for addressing online infringement. It should articulate enforcement standards that provide an effective deterrent to online piracy. This goal can be achieved by adopting principles and obligations which recognise the need for coordination and cooperation both at national and international level. Agreed obligations should reflect the challenges involved in the enforcement of rights in digital content in the online environment, and recognise the need for cooperation from intermediaries whose platforms are abused to infringe IP rights.

New Zealand should seek in ACTA obligations that require enforcement standards at a level equivalent to that recognised under New Zealand's laws. These obligations should require countries to adopt effective enforcement rules, while leaving appropriate flexibility for domestic implementation such as New Zealand's.

Our comments below respond to the issues raised in the government's "Invitation for Submissions" in their order of appearance.

I. Safe harbours for ISPs

ACTA should address the role of ISPs in tackling piracy. ISPs have a unique ability to address infringement both because they control their networks and because of their ongoing relationship with their subscribers. They are best placed to put an end to infringement and to take measures to deter future infringing acts. New Zealand already acknowledges the role of ISPs in addressing infringement, by providing under its laws potential liability rules coupled with safe harbour limitations under sections 92B-92E of its Copyright legislation. This combination of potential liability with specific limitations of liability helps ensure that in New Zealand ISPs are encouraged to cooperate with rightholders to curb online piracy.

New Zealand should seek to establish a similar framework in ACTA. Safe harbours along with potential liability can be part of an appropriate balance of incentives for ISPs to assist in controlling online infringement. This approach also reflects a sensible balance between the interests of ISPs and rightholders.

New Zealand should also seek in ACTA a commitment to address all forms of online piracy as they evolve. New Zealand is now in the process of adopting measures to tackle new forms of piracy such as P2P filesharing. Discussions on the Copyright (Infringing File Sharing) Amendment Bill are well advanced and reflect an understanding of the considerable threat that filesharing brings to creative industries. An obligation in ACTA for countries to adopt effective and meaningful policies should both encourage and permit such solutions.

II. ISP liability

Under New Zealand law, ISPs could bear potential liability for online infringement in certain specified circumstances (Section 92C). It is the combination of potential liability with limitations of this liability based on responsible conduct - as established under the Copyright Act - that motivates ISPs to cooperate with rightholders in reducing infringement.

Either explicit ISP safe harbours on the basis of potential liability, or a rule setting out the specific circumstances in which liability would apply, could appropriately encourage ISPs to tackle piracy. Whichever approach is adopted under ACTA, the ability to obtain injunctive relief against ISPs is critical and should be maintained, even where safe harbours are available and the ISP fulfils their conditions. Especially in the online environment, monetary relief is often not a sufficient deterrent and injunctive relief is necessary to stop massive ongoing infringements. As recognised in New Zealand law, rightholders should always be able to obtain effective injunctions to stop infringement, and the courts should be in a position to issue such injunctions. The Copyright Act ensures the availability of injunctive relief even where the ISP meets safe harbour conditions (Sec. 92B(3) and 92C(5)). The same should be established under ACTA.

III. Other matters

· Identifying infringing users

In the online environment, rightholders are unable on their own to determine the identity of the person responsible for infringing activity; this information is only available to the ISP providing access services to that person. Without access to identifying information, rightholders are effectively prevented from exercising their rights and taking measures to stop infringement or recover their loss. Addressing this difficulty, New Zealand's law allows affected rightholders to petition the court for an injunction ordering the relevant ISP to disclose information relating to alleged infringers.

New Zealand should seek under ACTA an obligation relating to the ability to obtain, under a

court order, information necessary for court proceedings, where such information is held exclusively by third parties. This would support countries' interests in allowing effective action against infringement, enabling affected rightholders to bring legal proceedings to recover their losses and stop ongoing infringement.

- **Promoting cooperation between ISPs and Rightholders**

As a matter of policy, it is important for ISPs to work in partnership with rightholders to control infringement on ISP networks. Cooperation between ISPs and rightholders will significantly help reduce infringement levels and raise public awareness of the negative impact of piracy. These initiatives should include effective ways to detect and control infringement; and educational campaigns on the value of the creative process and legal alternatives to piracy.

To this effect, ACTA should contain an obligation to promote meaningful cooperation between ISPs and rightholders. Again, such an obligation should both foster and permit appropriate domestic initiatives, with the result of enhancing effective enforcement.

- **Technological Protection Measures**

Technological Protection Measures (TPMs) are an enforcement mechanism that plays a vital role in enabling the development of a wide variety of consumer offerings. Like many other countries, New Zealand already recognises under its laws the need to allow effective enforcement measures against circumvention of TPM, independently of the work that these TPMs protect (Sec. 226-226E).

In the online world, works in digital formats are vulnerable to unauthorised copying and redistribution on a massive scale. TPMs serve to enforce rights in digital sound recordings and thereby encourage their dissemination and promote the development of legitimate offerings. Importantly, they support producers' efforts to make their recordings available at varying prices and usage rules that meet consumer demands. The necessary role of TPMs in the digital market should be recognised in ACTA through enforcement provisions allowing effective action against circumvention. An obligation to prohibit the circumvention of technological measures and dealing in devices designed to enable circumvention will support legislation such as New Zealand's and assist countries' efforts in safeguarding rightholders' ability to enforce rights in digital works.

- **Copyright Management Information**

Rights Management Information (RMI) provides the basis for online licensing of digital content. RMI assists both rightholders and users, by identifying digital works and certifying their integrity and authenticity. RMI systems also provide information about terms and conditions of use and therefore support new business models for the delivery of content online. These systems, however, are vulnerable to misuse. New Zealand's Copyright Act provides rightholders with the ability to enforce their interests in safeguarding the integrity of RMI (Sec. 226F-228). A similar rule allowing enforcement against interference with RMI should be established under ACTA.

Thankyou 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.



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