

31 March 2010

Via email: trademarks@med.govt.nz

Anti-Counterfeiting Trade Agreement
Submission about Intellectual Property Rights Enforcement in the Digital Environment

1. This submission is from Trade Me Limited ("Trade Me").
2. We acknowledge the risk that piracy and counterfeit goods causes to business and innovation. We welcome the international move towards mitigating this risk.
3. Overall, we support the approach taken by the New Zealand Government in addressing these issues in the Copyright Act and current amendment bill. However, we consider that the current ACTA definition of ISP, and the scope of safe harbour for hosting content needs clarification to allow meaningful implementation.

Background

4. Trade Me provides an online market place where its 2.5 million members can buy and sell goods. In providing the marketplace, Trade Me enables its members to post content advertising items for sale.
5. The sheer volume of content posted on Trade Me makes it impractical to verify. However, there are a number of ways that people can bring infringing content to our attention. Trade Me's 24/7 customer service team monitor alerts received through our Community Watch programme. We have an IP liaison programme that enables rights holders and their representatives to seek action on alleged infringing content. We assess all complaints and remove content where there is sufficient evidence to indicate that it is infringing. In a typical month we would action around 800 copyright-related requests.

ISP definition – clarification needed

6. The ISP definition footnoted in the MED submission request is unclear, in particular about whether it includes websites that host third party content. The definition states:

"an Internet service provider means a provider or operator of online services or network access, or the operators of facilities therefore, and includes an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received".

7. There are many people and organisations that provide or operate an online service, Trade Me included, which could be caught by such a broad definition, certainly a much broader range of organisations than just traditional ISPs.

8. We seek clarification of the definition of an ISP and specifically whether it includes hosting services. We would favour an approach that differentiates between ISPs and websites that host content.
9. Websites that host content should not be liable for any pirated or counterfeited goods if they are not aware the goods on their site are infringing copyright. Not only is it unfair to hold them accountable for the infringements they are unaware of, it's impossible to enforce such a requirement given the gargantuan number of content hosters and the amount of content being uploaded daily.

Safe harbour provisions

10. Many websites provide for content to be posted on them without the operators seeing it, and this content can include infringing content. Examples of this include Facebook, Twitter, Craigs List, eBay and Wordpress. Consequently, these websites may unwittingly be hosting counterfeit or pirated goods depending on the interpretation of the current ACTA definition.
11. The New Zealand Government has contemplated these situations and provided a safe harbour under sections 92B and 92C of the Copyright Act. We support this approach, although we think section 92C could be clearer.
12. Section 92B provides that an ISP is not liable for the copyright infringement of another person. Section 92C essentially provides that an ISP does not infringe copyright in the work by storing infringing material unless it is aware of the infringing material. Unfortunately, section 92C uses the term "reason to believe", which is unclear.
13. The 'notice and take down' safe harbour provisions within the Copyright Act are an effective way that Trade Me, and other website hosts, can address counterfeit and pirated content. As such, we strongly suggest the ACTA contains safe harbour provisions akin to those in the New Zealand Copyright Act.

Contact

14. Please contact us if you wish to discuss this submission further; please contact us on

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