

## Summary of ACTA Submissions

Submission Number	Submitter	Summary of Comments
1	NZFACT: New Zealand Federation Against Copyright Theft	<ul style="list-style-type: none"> <li>• Considers that ACTA has real potential to improve the protection and enforcement of intellectual property rights in major markets around the world and to shift the international debate on intellectual property rights in favour of international cooperation and strong enforcement standards.</li> <li>• Implementation of the standards embodied in the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty should be the baseline for ACTA.</li> <li>• Secondary liability regimes for online infringement are essential to make the online marketplace less hospitable for infringers.</li> <li>• Criminalise the unauthorised camcording of motion pictures in theatres.</li> <li>• Interpretation of data privacy rules appropriately balances the fundamental rights of privacy and property to encourage cooperation with telcos/ISPs (in particular implementation of a 'graduated response' mechanism).</li> <li>• Establish a statutory damages regime that compensates rights owners and deters piracy.</li> <li>• 'Commercial scale' test for damages should include harm to the infringed party rather than profit-motive or commercial purpose.</li> <li>• Provide ex-officio authority for law enforcement officials with respect to IPR offences.</li> <li>• Effective and deterrent measures to address P2P streaming of pirated content.</li> <li>• Remedies available to right holders are sufficient to deter future infringement.</li> <li>• Adopt rules to criminalise the wilful unauthorised use or distribution of satellite and cable signals, and the underlying copyright material.</li> </ul>
2	Christopher Mills	<ul style="list-style-type: none"> <li>• Concerned that New Zealand might become a signatory and that the agreement would place unfair powers in the hands of officials seeking to criminalise and control legitimate and legal actions of individuals.</li> <li>• Concerned that Customs will have the right to (at the border):               <ul style="list-style-type: none"> <li>- seize iPods, laptops, mobile phones, PDAs, cameras etc</li> <li>- impose fines;</li> <li>- disclose personal details to authorities and right holders; and</li> <li>- destroy iPods and other items, unless the person can prove they have the right to the files on the item.</li> </ul> </li> <li>• Also concerned that such Customs powers this will have a negative effect on tourism.</li> </ul>
3	Anthony Winter	<ul style="list-style-type: none"> <li>• Opposes New Zealand participation.</li> <li>• Concerned about the negative influence of the RIAA and the MPAA on the development and distortion of copyright law: citing the criminalisation of piracy, attempts to extend the term of copyright and the Digital</li> </ul>

		<p>Millennium Copyright Act (DMCA) as examples.</p> <ul style="list-style-type: none"> <li>• Concerned that pursuant to the DMCA the presumption of innocence until proven guilty has be reversed as anyone publishing material on a website can be accused of infringing copyright, and that material must be removed without further proof of the allegation being subject to detailed investigation.</li> <li>• Concerned about the criminalisation of format-shifting of recorded music and time-shifting of broadcasts.</li> </ul>
4	T J McKenzie	<p><u>Copyright</u></p> <ul style="list-style-type: none"> <li>• Proposed agreement is over-ambitious; ACTA will not solve the problem of dangerous goods, stealing or terrorism and organised crime</li> <li>• Questions how enforcers will distinguish between “large-scale counterfeiting and piracy activities” and “individual consumers”.</li> <li>• Concerned it may result in unreasonable search and seizure powers.</li> <li>• Considers that not all unauthorised copying is harmful e.g. routine backup of computer will make extra copies of files.</li> <li>• Questions the economics of copyright as a tool for creativity and innovation in an age of electronic distribution; both for technological innovations and cultural development.</li> <li>• Suggests that copyright may be a barrier for creativity and innovation.</li> <li>• Suggests that if copyright owners didn’t make such large profits on their monopoly, there would be no incentive for organised crime to use pirated material as a source of revenue (because the gap would be reduced between retail price and costs to manufacture and distribute).</li> <li>• Copyright law is inappropriate; hard to sympathise with claim that enforcement is necessary to raise tax revenue.</li> </ul> <p><u>Trade Marks</u></p> <ul style="list-style-type: none"> <li>• Suggests that not all misuses of trade marks causes harm, especially when unauthorised goods are just as good, if not better, than genuine goods.</li> <li>• Trade marks do not provide an incentive for innovation and creativity and therefore misuse of trade marks only indirectly discourages innovation and creativity.</li> <li>• Protection of consumer health and safety is an issue wider than being an intellectual property issue.</li> <li>• Suggests that if misuse of Trade marks is funding organised criminals, it is because either they are of producing goods at much lower quality that the legitimate goods or the free market is failing to supply the goods as cheaply as it should.</li> <li>• Black markets are the reason for a loss of tax revenue; if genuine goods are sold on black market then still a loss of revenue.</li> <li>• The negotiations about ACTA should make a distinction between dangerous counterfeits and misuse of trade marks.</li> <li>• Mistake to equate theft with IP infringements: theft cause direct loss to the victim; infringement of</li> </ul>

		<p>intellectual property rights never cause the intellectual property owners to suffer material loss. Any loss suffered is only either a loss of potential revenue or loss of reputation.</p> <p><u>General</u></p> <ul style="list-style-type: none"> <li>• Concerned that ACTA would go further than just infringements of a “commercial scale” and would provide criminal sanctions against wilful infringements that occur without motivation for financial gain (such as internet piracy).</li> <li>• Concerned that rights holder initiated border action could allow rights holders to interfere goods crossing the border and lead to rights holders harassing critics and competitors;</li> <li>• Concerned also that right holders could be given personal information simply by alleging infringement.</li> <li>• There shouldn't be compensation for damage that can't be proved.</li> <li>• Technological protection measures inhibit fair dealing with copyright material; it is excessive their circumvention should they be illegal.</li> <li>• Details about ACTA should be made available to the public.</li> <li>• Public advocacy groups should be given just as much influence as major copyright and trade mark owners</li> </ul> <p><u>Concludes:</u></p> <ul style="list-style-type: none"> <li>• Copyright enforcement should be removed from ACTA because stronger enforcement of copyright does not solve problems created by the law in the first place.</li> <li>• Shift the TM focus of ACTA away from intellectual property toward the interception of dangerous counterfeits.</li> <li>• ACTA should not be promoted as tool against organised crime and terrorism.</li> <li>• New Zealand should invite input from competent advocates for the rights of the general public and heed that advice.</li> </ul>
5	Luis Vildosola	<ul style="list-style-type: none"> <li>• The topic of state-sponsored money counterfeiting should be brought forward</li> </ul>
6	Steven Ashley	<ul style="list-style-type: none"> <li>• Concerned that ACTA would require remedies against circumvention of Technological Protection measures (TPM) and trafficking of TPM circumvention devices.</li> <li>• Playing a legally owned encrypted DVD on the Linux Ubuntu (open source) operating system would be illegal, as anti-circumvention methods would have to be in use.</li> <li>• Part 1 of the 'Internet distribution and information technology section' constitutes a breach of privacy and go against the nature of the internet.</li> <li>• New Zealand should not sign ACTA.</li> </ul>
7	Distilled Spirits Association of New Zealand (DSANZ)	<ul style="list-style-type: none"> <li>• Supports NZ's participation in ACTA.</li> <li>• Two types of counterfeiting issues within the spirits industry – counterfeit brands (purporting to be an international brand when its not), and counterfeit products (e.g. 'bourbon' produced outside of the US).</li> <li>• Counterfeit spirits are substandard, may be harmful and evade excise tax.</li> </ul>

		<ul style="list-style-type: none"> <li>• Scope of ACTA should be broadened to include geographical indications – would not be burdensome as parties to ACTA are also parties to WTO TRIPs</li> <li>• Urge that the Geographical Indications (Wines and Spirits) Registration Act 2006 should be brought into force – would show NZ is committed to strong IPR protection</li> <li>• Encouraged by the proposed amendments to the Trade Marks and Copyright Acts to enable Customs to take prosecutions.</li> <li>• Sufficient powers must reside with national bodies to enforce intellectual property rights (IPR). To be truly effective they must be fully coordinated, proactive, vigilant, and where infringements are notified by the public or detected by agencies themselves, they must treat the incidents seriously and respond in a timely manner. This will ensure affected consumers and IPR holders are assisted and that counterfeiters are held to account for their crime.</li> <li>• Should be a central office and officer responsible for coordinating official action against breaches of IPR.</li> <li>• Infringements should be treated as criminal offences at least matching burglary, fraud and tax evasion crimes.</li> <li>• DSANZ is ready to work with all domestic or international organisations to ensure the maximum legal certainty and protection for spirits; also to assist expert counterfeit recognition, forensic support and expert witnesses.</li> </ul>
8	New Zealand Retailers Association	<ul style="list-style-type: none"> <li>• Supportive of the ACTA proposal as it will be important to New Zealand's trade interests and improved enforcement will benefit business and customers.</li> <li>• Pleased to note upcoming legislative amendments for enforcement by the National Enforcement Unit of the Ministry of Economic Development and ability for Customs to take prosecutions.</li> <li>• Interested in holding consultations with relevant officials once the substantive text of ACTA is available.</li> <li>• If legislation is required to formalise ACTA, it is hoped that it can be interrelated to the proposals outlined above affecting the domestic market.</li> </ul>
9	Peter Hewett	<ul style="list-style-type: none"> <li>• Rights of consumers and artists should not be compromised or threatened by ACTA, including the rights to lawfully use copyright material, material in the public domain and material covered by copyright licences.</li> <li>• ISP should not be responsible for the content of their customers' traffic. If they were, it would entail significant additional costs for customs and force ISPs to block whole categories of data traffic, including lawful material.</li> <li>• Regulations should be written so that they do not preclude new developments and innovations, which is a risk where regulations are restrictive or prescriptive.</li> <li>• The privacy, rights and freedoms of New Zealanders must be protected, including the rights to use encrypted data communications.</li> </ul>

		<ul style="list-style-type: none"> <li>• Copyright law should not protect existing business models.</li> </ul>
10	InternetNZ	<ul style="list-style-type: none"> <li>• Recent amendments to copyright law unduly favour rights holders' interest and the expense of the interests of citizens in their regular use of Information Communication Technology.</li> <li>• The government needs to adopt a more balanced approach to the discussion on ACTA to protect the rights of citizens.</li> <li>• New Zealand should not be discussing internet provisions as part of the ACTA negotiations, since New Zealand has recently enacted the Copyright (New Technologies) Amendment Act 2008. Many of that Act's provisions are yet to take root and be fully tested.</li> <li>• The government should adopt a wait-and-see approach with respect to the effectiveness of the amended Copyright Act and MED's enforcement review before committing to sweeping digital copyright enforcement measures as part of ACTA.</li> </ul> <p><u>ISP liability</u></p> <ul style="list-style-type: none"> <li>• New Zealand should focus on improving the situation with respect to ISP liability by recognising that New Zealand ISPs are supportive of copyright and its role in incentivising innovation.</li> <li>• ISP's should not be expected to adopt a quasi-regulatory role in policing copyright infringement by third parties under ACTA.</li> <li>• It is not a proportionate response to allow ISP's to take down material in a response to a complaint by rights holders.</li> <li>• New Zealand should advocate for the adoption of a notice and notice system to keep any copyright dispute between the alleged infringer and alleging rights holder.</li> <li>• If under ACTA ISPs are forced to police copyright, they are not properly protected by statutory indemnity under the Copyright Act, particular in the event that it takes down material or terminates an account in response to a notice from a rights holder which turns out to be incorrect.</li> <li>• The privacy of users' internet viewing and downloading habit should be protected. Any discovery expeditions should not be engaged without the prior approval of the courts.</li> </ul> <p><u>Technological Protection Measures (TPMs)</u></p> <ul style="list-style-type: none"> <li>• TPMs do not work and are ultimately futile in combating internet piracy and IPR infringement. The ineffectiveness of TPMs should be examined in ACTA negotiations.</li> </ul> <p><u>Criminal enforcement</u></p> <ul style="list-style-type: none"> <li>• Criminal enforcement measures are useful tools in helping to prevent IPR infringement, but they should only apply to large-scale commercial counterfeiting and piracy activities.</li> </ul> <p><u>Border enforcement</u></p> <ul style="list-style-type: none"> <li>• Border enforcement measures are useful tools in helping to prevent IPR infringement, but they should only apply to large-scale commercial counterfeiting and piracy activities.</li> </ul>
11	Google Australia Pty Ltd	<ul style="list-style-type: none"> <li>• The government is encouraged to press for openness in the ongoing negotiation process, including the</li> </ul>

		<p>publication of draft text to ensure the greatest range of public consultation, and to promote the benefits of open consultation with other countries participating in ACTA.</p> <ul style="list-style-type: none"> <li>• Consultation with stakeholders is of up most importance particularly where ACTA could impact upon the daily business operations and private activities of many New Zealanders. Consultation should include rights holders, those who police and enforce the agreement, consumers, public interest groups, libraries, educational institutions and Internet service and access companies.</li> <li>• Lack of transparency about ACTA to date prevents effective participation by interest groups, which is a concern given the speed with which the ACTA negotiations are designed to be concluded (by the end of the year).</li> </ul> <p><u>Preserving the copyright balance</u></p> <ul style="list-style-type: none"> <li>• While Google acknowledges the importance of appropriately protecting and enforcing IPRs, it is critical that ACTA does not disrupt or alter the existing copyright balance in international law.</li> <li>• Copyright involves a careful balance of interest between the exclusive rights afforded to copyright owners to incentivise creation and rewarding investment, and giving appropriate access to copyright material in the public interest to facilitate creation and innovation, whether through ensuring access to information for educational purposes or stimulating further innovation and technological development in New Zealand.</li> <li>• ACTA should not target or put at risk activities that currently fall within international and domestically recognised exceptions, limitations to copyright owners' exclusive rights.</li> <li>• ACTA should not address secondary liability nor disturb the existing standard for criminal liability.</li> <li>• ACTA should exclusively concentrate on measures relating to enforcement of IPRs, and in particular focus on international cooperation in the enforcement of those rights.</li> <li>• ACTA should not impede innovation, unduly burden legitimate commerce, undermine consumer privacy or restrict the free flow of information.</li> </ul> <p><u>Online service providers</u></p> <ul style="list-style-type: none"> <li>• ACTA should preserve existing safeguards for online service providers.</li> <li>• ACTA should focus on the facilitation of legal action against those who actually engage in copyright infringement and not target intermediaries and in particular online service providers, that might be used by counterfeiters or infringers. This means that: <ul style="list-style-type: none"> <li>- Existing standards around liability of online service providers should be maintained;</li> <li>- Safeguards for online service providers in relation to infringements by those using their services should be maintained; and</li> <li>- Online service providers should not be required to disclose customer information without independent assessment (such as judicial oversight).</li> </ul> </li> <li>• ACTA should be technology neutral and not create disparate burdens or obligations depending on whether a counterfeit product is sold online or offline. ACTA should not encourage the imposition of technology</li> </ul>
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		<p>mandates, such as mandatory filtering of Internet access or services.</p> <p><u>Court's discretion</u></p> <ul style="list-style-type: none"> <li>• ACTA should not go beyond intellectual property – it should not encompass general matters of civil procedure.</li> <li>• Courts should maintain their existing discretion, including with respect to the assessment of damages appropriate to a particular case of infringement.</li> <li>• It is critical that the key, underlying principles of the New Zealand justice system be preserved – fundamental legal principles such as the presumption of innocence and the requirement to prove the occurrence of loss or damages before legal remedies are awarded.</li> <li>• Copyright owners should be required to prove loss in order to recover damages, just as any other litigant must do (or appropriately establish remedies such as an account of profits). ACTA should not establish an alternative standard to these fundamental legal principles for IPR holders.</li> </ul> <p><u>Powers of enforcement authorities</u></p> <ul style="list-style-type: none"> <li>• Google would be concerned if the ACTA contemplated enforcement or border protection measures such as invasive searches of personal computer or increased surveillance of online activities. If such powers were to be included, safeguards around such search and seizure powers would have to be very carefully constructed.</li> </ul>
12	Leslie Boardman	<ul style="list-style-type: none"> <li>• ACTA should not apply to digital products unless those products are passing themselves off the original.</li> <li>• Consumers can also be harmed by illegal copies passing themselves off as originals.</li> <li>• Digital piracy that the industry is worried about is not passing off, rather it is community based “person to person” copying.</li> <li>• While there must be some restrictions on the use of intellectual property that is owned by others, without such restrictions it would make it difficult to justify the effort without a guarantee of gain.</li> <li>• Media industries (music, movie, television and software) control their intellectual property in a way that is stifling creativity and fair use by purchasers, and are they are constantly abusing copyright law to squeeze excessive profits from consumers and driving people to consume pirated copies. They are using copyright law in an attempt to justify their poor business decisions and failure to adapt to a changing market place and technology and failure to earn the trust of their consumers by market control. Their badly conceived attempts to “protect” their IP have resulted in people who legally purchase their products suffering numerous problems (numerous examples given), whilst those who obtain pirated copies have no such problems.</li> <li>• The media industry have been proven time and time again to have used faulty or poor judgement, including admitting to flawed calculations for overstating the extent of the problem, when creating piracy figures they release to the public and use for lobbying governments.</li> <li>• The media industry largely relies on the lack of experience of government representatives and lack of</li> </ul>

		<p>lobbying by consumers to get what they want.</p> <ul style="list-style-type: none"> <li>• Now the media industry is trying to further increase the powers of law enforcement agencies to use time and resources funded by the very public that these industries have made their “enemy” to combat a problem that their failed business model and failure to properly react to market changed created.</li> <li>• The media industry that is pushing for changes to international IP law do not care for what is fair nor for what will protect cultural rights. They are only concerned with their ability to sell products to consumers, especially their ability to sell consumers multiple copies of the same product.</li> <li>• Excessive enforcement of IP law internationally will give these companies the ability to further abuse DRM at the expense of society both financially and culturally.</li> <li>• It is not clear why consumers, who have been abused by these industries, are being asked to indirectly put resources into protecting an industry that has treated every user of their products like a criminal when there are already methods that these companies can pursue to stop illegal distribution of their IP.</li> <li>• They have been abusing these channels to vilify end users and do not appear to be at all interested in reviewing the source of the problem, their treatment of consumers.</li> </ul>
13	New Zealand Institute of Patent Attorneys Inc.	<ul style="list-style-type: none"> <li>• Supports the ACTA proposal and all other proposals and legal mechanisms which will help reduce the amount of counterfeit products arriving at or manufactured in New Zealand.</li> <li>• New Zealand is not currently a major source of counterfeiting and counterfeit product, with most of the problems in this area arising from importation of products from overseas, and supply of electronic material over the internet.</li> <li>• Legal mechanism to prevent importation of counterfeit product and unauthorised copying of data need to be kept strong and relatively straight forward so that IPR owners can use the remedies without excessive bureaucratic requirements.</li> <li>• A review of each country’s procedures for exercise of legal remedies for import of counterfeits, with a view to simplification and streamlining would be very useful.</li> <li>• It is important from the legal perspective to have stronger legal remedies available against dissemination and downloading of data from the internet which infringes IPRs.</li> <li>• There also needs to be allied with more comprehensive and harder hitting information given to the public about the illegality, and long term effects, of dissemination and downloading of infringing material form the internet.</li> </ul>
14	Colin Jackson	<ul style="list-style-type: none"> <li>• The internet makes New Zealand a more effective exporter and advertiser of our culture, whilst making New Zealand and the New Zealand Government more efficient through the use of electronic channels to deliver information and services to people in a manner they find convenient.</li> <li>• The Internet contributes strongly to the government’s goal of building a sustainable economy and to the government’s goal of strengthening national identity.</li> <li>• The Internet is considered to be critical infrastructure and is reliant upon principles of openness to new</li> </ul>

		<p>services under the “end to end principle” that provides for Internet Service Providers (ISPs) to have no business but moving data from one place to another as their customers desire, and that in particular they may not differentiate between types of data or attempt to substitute their own services for what their customers are try to achieve.</p> <ul style="list-style-type: none"> <li>• Some measures which are proposed by intellectual property lobbyist to be inserted into ACTA would be inimical to the further development of the Internet.</li> <li>• Any measure requiring ISPs to be liable for the actions of their customers would effectively require ISPs to break the “end to end principle” by forcing ISPs to inspect the contents of their customers’ data flows and to filter them based up whether they might contain copyright material.</li> <li>• Since ISPs cannot determine definitively what is and is not subject to copyright, they would be forced to stop all videos, sound files and software downloads to avoid being sued. Furthermore, some data is encrypted making it even harder to filter for copyright material.</li> <li>• Confining video, sound or software distribution to “licensed” sites would break the rights of free software producers and independent artist to distribute their works as they wish. Since the internet depends on free software for its very existence, this would suppress the openness which has led to it being the platform for innovation it is today.</li> <li>• In addition, the right of Internet users to privacy would be severely curtailed if their Internet connections were to be subject to anti-counterfeiting measures.</li> <li>• The New Zealand Government should not agree to anything which requires Internet suppliers to control people’s actions on the Internet.</li> </ul>
15	Trade Me	<ul style="list-style-type: none"> <li>• Strongly support measures to combat counterfeiting and welcome’s the decision to participate in the ACTA negotiations.</li> <li>• Counterfeiting is an international problem and international co-operation is required to combat.</li> <li>• In designing measures to be adopted in New Zealand and overseas, it is suggested that: <ul style="list-style-type: none"> <li>- All requirement must be enforceable, both online and offline. In particular websites that host third party content can only act on what they know about;</li> <li>- To facilitate greater co-operation between all parties, that the notice and take-down laws apply to websites that host third party content should be consistent under both the Copyright and Trade Marks Acts;</li> <li>- To assist ISPs and websites to take prompt action, that consideration be given to incentives to ensure full and accurate notifications, and to minimise opportunity for anti-competitive behaviour;</li> <li>- Due consideration be given to privacy laws in each country and how those laws interrelate; and</li> <li>- Governments empower and resource enforcement agencies to assist IPR holders through stopping counterfeits and in(sic) the border and investigating and prosecuting infringers.</li> </ul> </li> <li>• The online world is increasingly an extension of the offline world, but where online differs is that</li> </ul>

		<p>counterfeiters act in full view of the world and leave deep footprints which can assist in taking legal action against them.</p> <ul style="list-style-type: none"> <li>• In an average week there are 1.4 million auctions and about 250 members are warned or banned for IPR breaches, ranging from using unauthorised photos to attempting to sell counterfeits.</li> </ul> <p><u>Website host liability</u></p> <ul style="list-style-type: none"> <li>• Trade Me would support an amendment to the Trade Marks Act to insert equivalent provisions to that found in the Copyright (New Technologies) Amendment Act 2008 for websites hosting third party trade mark infringements.</li> <li>• The issues as they apply to websites hosting third party content are essentially the same whether the intellectual property infringement is a breach of copyright or a breach of trade marks rights.</li> <li>• Third party websites can only act on what they know about. However, one notified they can both act to remove infringing content, terminate repeat offenders' accounts, and can also assist in providing a clear evidence trail for use in civil or criminal proceedings.</li> <li>• While Trade Me support a notice and takedown regime and have long-implemented a notice and take-down policy, there needs to be some balance to protect innocent sellers from anti-competitive behaviour. It is not uncommon for some rights holders, licensees or exclusive distributors to allege IPR infringements against sales of genuine parallel imports or second hand items, or against sellers of similar non-infringing goods. It is important therefore that sufficient and accurate information is provided to enable appropriate action to be taken.</li> <li>• Trade Me supports incentives designed to ensure rights holders provide full information which is true to the best of their knowledge when alleging infringements.</li> <li>• Trade Me supports a proposal to close the perceived loophole in the Trade Marks Act through which some local importers have been able to threaten parallel importers of genuine items with litigation for trade marks infringement.</li> </ul> <p><u>Privacy issues</u></p> <ul style="list-style-type: none"> <li>• Right holder often request personal details of sellers that are alleged to have infringed their IPRs. Principle 11(e) of the Privacy Act 1993 provides for this where reasonably necessary for the purpose of court proceedings that are underway or reasonably contemplated. The Act does not allow for the release of these details simply to enable the rights holder to contact the seller.</li> <li>• Where rights holders have no intention of taking legal proceedings, but wishes to communicate with the seller, we instead forward correspondence from the rights holder to the seller. In most cases this works reasonably well and we do not recommend lessening these privacy protections.</li> </ul> <p><u>Role of government combating counterfeits</u></p> <ul style="list-style-type: none"> <li>• Trade Me supports proposed for the Ministry of Economic Development and Customs to play a role enforcing trade marks breaches and for them to have greater enforcement powers.</li> </ul>
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16	Cosmetic Toiletry and Fragrance Association of New Zealand Inc. (CTFA)	<ul style="list-style-type: none"> <li>• CTFA opposes parallel importation and allowing this has been damaging and costly to its members. CTFA accepts, however, that it is legal in New Zealand for products to be parallel imported providing they are genuine products.</li> <li>• The issue is more of trade marks damage where parallel importing is permitted, but the greater concern is the potential damage that such laws invites through the illegal importation and local productions of counterfeit and pirated products under the guise of being legal.</li> <li>• CTFA continues to oppose provisions allowing parallel imports under intellectual property laws and believes that rules about this trade should be also be covered in international agreements.</li> <li>• Such agreements need to show a collaborative approach on enforcement for both New Zealand and international markets in line with the TRIPS Agreement.</li> <li>• The market for cosmetic products has been somewhat protected from parallel imported goods over the last ten years by low exchange rates, but this has not stopped parallel importation. This had tended to be at the high price end of the market with prestige brands being primarily targeted by the Warehouse.</li> <li>• What has been prevalent has been the facilitation of pirated products either made in Asia or in some cases locally and passed off as genuine products. Products being passed off are often of poor quality and providing some degradation of brand.</li> <li>• The industry has collectively spent hundreds of thousands of fight piracy with private investigators and whilst all major brands are registered with Customs, it is evident that much is getting through.</li> <li>• The Warehouse has been the major legitimate parallel importer of cosmetic products, but it is evident that the products are often sub-standard quality end of line or surplus stock. Packaging is often damaged and the use by dates have been exceeded or are close to expiry. In some cases these and the source codes are cut off to ensure the brand owners cannot trace the source or check production dates and thus verify the product is in fact genuine or not.</li> <li>• When products are counterfeit there is no guarantee of safety through ingredients and mixtures complying with international best practice for safety use. Counterfeit products can contain higher than permitted levels of restricted ingredients, contained banned ingredients or be mixed in such a way that the pH level is harmful to skin through to toxic shock syndrome.</li> <li>• When a product is counterfeit even the fact that the consumer buys it knowing it is fake, there is still a perception by the consumer that the products will perform broadly as if it were the genuine product.</li> </ul>

		<ul style="list-style-type: none"> <li>• Sellers of such products will not normally admit that the product is counterfeit and therefore consumers are misled about the value of they are purchasing and the perceived quality of the product. This perception is damaging to the brand which cannot easily be quantified, but clearly has a direct impact on the value of the brand.</li> <li>• The greatest single evidence of this is the occasions where product is returned as defective to the brand owner and on investigation is found to be counterfeit. The consumer then finds that not only have they paid for a defective product, they cannot get a legal remedy.</li> <li>• Where New Zealand is let down badly is in the enforcement area. While Customs does its best through registered brands even that mechanism allows products to pass through without check when it is mis-declared and the brand name is not shown on the importing documentation. Those involved in commercial quantity importation of counterfeit products understand what they need to do in order to get most shipments through un-checked.</li> <li>• Once in the market, it is up to brand owners to protect its brand, but brand owners have finite resources.</li> <li>• CTFA is concerned that New Zealand does not meet its TRIPS obligations. New Zealand must do more both domestically and internationally to enforce intellectual property rights and this must involve information sharing, tough penalties, including prison for serious and repeat breaches of the law.</li> <li>• The need to undertake a proactive stance to this issue regardless of the product.</li> <li>• Due to the light handed enforcement of counterfeit products in many jurisdictions, this has become a preferred vehicle for the laundering of organised crime drug money.</li> <li>• This link should not be underestimated and part of the need for enforcement is about closing down this avenue so that organised crime cannot use this option to move drug money from country to country.</li> </ul>
17	Recording Industry Association of New Zealand (RIANZ)	<ul style="list-style-type: none"> <li>• RIANZ strongly support New Zealand's participation in the negotiations and membership of ACTA and welcomes the proposed agreement as an important new global standard for the enforcement of IPRs among nations committed to combat counterfeiting and piracy.</li> <li>• RIANZ also welcomes the fact that the Ministry of Economic Development recognises that an improved enforcement of IPRs internationally will benefit both businesses and consumers.</li> <li>• The threat of IP infringement continues to grow worldwide. The International Federation of Phonographic Industry (IFPI) estimating that over 1 billion physical piracy products were sold in 2007 for estimated value of US\$3 billion at pirate prices. Worldwide digital piracy is estimated by IFPI to be 30 billion downloads in 2007, with an estimated ratio of 20 illegal downloads for every track sold.</li> <li>• 18% of New Zealand companies surveyed in the 2007 PricewaterhouseCoopers Global Economic Crime Survey believe that IP infringement is the most prevalent economic crime threat they face after asset misappropriation, accounting fraud, corruption and bribery and 16% claimed to have actually experienced it. These figures are slightly higher than the figures of the Asia-pacific region and globally. The threat of IP infringement "looms large" for New Zealand companies, with an average loss due to IP infringement</li> </ul>

		<p>estimated at US\$786,000 between 2005 and 2007.</p> <ul style="list-style-type: none"> <li>• Strong government action is needed to curb the negative impact piracy has on everyone making a living or a business in the creative industries, on consumers and on governments which loses significant tax revenue.</li> <li>• To ensure that ACTA will constitute a meaningful tool for the ACTA negotiating countries to enhance their enforcement practices, the New Zealand government is strongly urged to support the following elements: <ul style="list-style-type: none"> <li><u>Civil remedies</u> <ul style="list-style-type: none"> <li>- Damages: rules should be established on calculating damages that provide complete indemnification of the rights holder, allows rights holders to recover all profits gained from the infringement and provides an effective deterrent.</li> <li>- Legal costs and fees: rights holders should be able to recover fully their actual costs of enforcing their rights against infringers, including attorney's fees.</li> <li>- Publication of judgements: Decisions should be available to the parties and published in an official publication accessible to the public. Courts shall also have the power to order the defendant to bear the cost of publishing a judgement against him or her in any additional publication (such as a newspaper).</li> </ul> </li> <li><u>Criminal penalties</u> <ul style="list-style-type: none"> <li>- Deterrent fines and sentences: Minimum fines should be set at a sufficient level to remove all gain from the infringer.</li> <li>- Criminal remedies guidelines: guidelines should be issued to assist the judiciary in deciding the levels of fines and sentences with regular reviews of sentencing to ensure application of the guidelines.</li> <li>- Proceeds of crime: courts should be granted the power to order forfeiture of proceeds made by the defendant from infringing activities.</li> <li>- Criminal liability from non-commercial online infringements: it should be clarified that criminal liability can apply whenever protected works are made available online in substantial quantities or value or to an extent that causes substantial commercial harm to the rights holder.</li> <li>- Criminal liability for dealing with TPM circumvention devices and related services: these should also apply to the importation and exportation of products and components.</li> </ul> </li> <li><u>Other measures</u> <ul style="list-style-type: none"> <li>- Destruction of infringing goods and equipment used.</li> <li>- Recalling pirate goods: courts should be empowered to order the defendant to recall infringing goods from retailers at the infringer's expense.</li> <li>- Right of information: courts should have the power to order the defendant and third parties, including intermediaries that hold relevant information, to disclose information relating to the infringement or other persons involved in the infringement.</li> </ul> </li> </ul> </li> </ul>
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18	Mark Harris	<ul style="list-style-type: none"> <li>• A multilateral approach, whilst slower, allows for gradual change of all parties with processes that work to overcome further problems, rather than creating them. A plurilateral smacks of the largest children on the field monopolising the bat and ball, and forcing others to play by their rules.</li> <li>• The scarce official information available about ACTA would appear to indicate that it is intended to harmonise the enforcement of existing intellectual property rights. The only current approach to a harmonised global concept of intellectual property is occurring through WIPO, and ACTA appears to seek to operate independently of WIPO.</li> </ul>

		<ul style="list-style-type: none"> <li>• Before harmonising enforcement, there must be harmonisation of the definition of infringement.</li> <li>• Piracy and counterfeiting are taken as threat to global stability and various official forces take this for granted, but a number of people have disputed the extent to which this is so. If the OECD figure of US\$200 billion is accepted as the cost to the global economy, it only represents around 0.31% of the total global economy. This means that counterfeiting and piracy is not the most important issue on the global economic agenda.</li> </ul> <p><u>Counterfeiting</u></p> <ul style="list-style-type: none"> <li>• New Zealanders do not approve of fakes and fraud, but this concept is not shared by many nations in the G8. There is, however, much dispute over what is counterfeit and what is not, especially in the medical arena. Parallel importing is another area of concern.</li> <li>• It appears that ACTA is to be enforced by border officials acting <i>ex officio</i> to determine whether an item infringes IP law, which would conflict with our current regime where the courts are the arbiter of the law. There is no information to indicate how border officials will be educated to make such determinations and what that will cost, especially as this currently takes a formal court process to achieve. There is no discussion why it is considered more effective to transfer decisions from the High Court to border officials who would have the power to destroy goods in question, pre-empting an appeal process.</li> <li>• Without a global agreement on what constitutes intellectual property and therefore counterfeit, you cannot have global enforcement. Counterfeiting must be stopped at its source and to do that countries that countenance the manufacture of counterfeit goods must be included. The plurilateral nature of ACTA is self-defeating in this instance. It is transparently an end run around WTO and WIPO process that could legitimately bring this about over a longer timeframe.</li> <li>• Not all counterfeit goods present a danger to consumers as counterfeit goods may be made in the same place and by the same people (e.g. China) as the non-counterfeit goods and that the low quality argument applies more to goods produce at the lowest possible cost than to counterfeiting.</li> </ul> <p><u>Piracy</u></p> <ul style="list-style-type: none"> <li>• The evidence that piracy harms innovation is not conclusive and comes mainly from those with a vested interest (the MPAA, RIAA and BSA), but is countered by many academics and other interested parties.</li> <li>• The Free and Open Source Software movements, which allows use of intellectual property without payment and mostly under licence agreements and have seen a boom in innovation in the last 15 years. To create an enforcement regime which is based on only one non-legal interpretation of the term is to create a regime that will criminalise individuals that disagree with that interpretation, or who are unaware of it.</li> <li>• The ACTA proposal is about protecting an obsolete business model, not content creators. Publishers claim that their industries suffer losses through piracy and that downloading a work for free represents a loss of potential income. Some creators have, however, experimented with giving away their work to see</li> </ul>
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		<p>what happens and have pronounced themselves happy with the results.</p> <p><u>Sovereignty</u></p> <ul style="list-style-type: none"> <li>• ACTA will put New Zealand's sovereignty largely in the hands of US corporations and industry organisations, as these are the prime movers in copyright infringement counter-activities. There is no evidence that New Zealand is suffering from counterfeiting and piracy and no evidence that any national economies are suffering.</li> <li>• International treaties and trade agreements should be for the benefit of nations not corporations or specific industries.</li> </ul> <p><u>Process</u></p> <ul style="list-style-type: none"> <li>• Concerned that ACTA process in New Zealand is the secrecy under which it is being developed. No information was made available to New Zealand public by its government until publication of Wikileaks document on 23 May 2008. This situation is mirrored in other countries, except Australia. The public cannot trust the negotiators if they won't tell us what they are negotiating about and failure of MED to disclose New Zealand's negotiating position smacks of unaccountability in public office and in conflict with the OIA. This raises the notion that the consultation was a sham, that New Zealand's position had already been developed and discussed by officials without input from the government or the public.</li> <li>• It is critical that ACTA should be open to developing countries as they are often cited as the source of counterfeit products. Without developing countries the treaty is unlikely to be effective in counterfeiting global counterfeiting activities.</li> </ul> <p><u>Unintended Consequences</u></p> <ul style="list-style-type: none"> <li>• While supporters of ACTA have pointed out that ACTA will apply to major breaches, not individuals with ipods or laptops, laptops are currently searched at some airports. ACTA will not permit oversight or regulation to protect privacy of individuals and will vest judgement in border officials who will only answer to the corporations.</li> </ul> <p><u>Benefit to New Zealand</u></p> <ul style="list-style-type: none"> <li>• Because New Zealand has not been identified as a source of counterfeit goods nor as being adversely impacted by piracy or counterfeiting, there is no economic advantage or benefit to New Zealand participating in this agreement, because officials cannot point out any.</li> </ul> <p><u>Conclusion</u></p> <ul style="list-style-type: none"> <li>• New Zealand's position should be to: <ul style="list-style-type: none"> <li>- Regularly review the intellectual property rights regime to ensure that it encourages innovation whilst respecting the rights of creators;</li> <li>- Does not allow measures to continue within New Zealand that encourage infringement of intellectual property rights;</li> <li>- Respect existing WIPO and WTO and refer trade and intellectual property matters through them;</li> </ul> </li> </ul>
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19	New Zealand Open Source Society	<ul style="list-style-type: none"> <li>• Full support given to the submission from Mr Harris.</li> <li>• There is no evidence of obvious benefit to New Zealand, its economy and its citizenry in being part of ACTA.</li> <li>• New Zealand position should be to: <ul style="list-style-type: none"> <li>- Regularly review the intellectual property rights regime to ensure that it encourages innovation whilst respecting the rights of creators;</li> <li>- Does not allow measures to continue within New Zealand that encourage infringement of intellectual property rights;</li> <li>- Respect existing WIPO and WTO and refer trade and intellectual property matters through them;</li> <li>- Not be party to the development of ACTA; and</li> <li>- Not recognise ACTA if it reaches fruition.</li> </ul> </li> </ul>