

Submission on the Proposed Anti Counterfeiting Trade Agreement

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1. Thank you for the opportunity to submit on the proposed ACTA negotiations.
2. I am Mark Harris, an independent technology consultant and technology commentator. I have a wide range of experience in the public and private sectors as a technologist and a policy analyst, including 5 years in the E-government Unit of the SSC. I was a founding member of InternetNZ and have served a number of terms on its Council. I am a past president of the Government Information Managers Forum (GOVIS) and worked for NZPO, PostBank, ANZ, IRD and SSC. I write this submission on my own behalf.
3. My interest in ACTA relates to concerns I have over the potential for misuse of authority granted by such an instrument, the process by which the instrument is being developed and the lack of perceived need for such an instrument.

Background

4. In early June 2008, I first became aware of ACTA through entries in the blogosphere, following the release of a document on Wikileaks ¹ that purported to be a discussion document being passed around a group of nations negotiating a new international intellectual property agreement. I read the document and was surprised to find New Zealand mentioned, as I had seen nothing in our newspapers or other media, including the newzealand.govt.nz RSS feed. I was further surprised to find, via Google, that the Ministry of Economic Development was managing NZ's involvement and that Minister Tizard had made a call for submissions via the Beehive website on 28 May 2008 (5 days after the release on Wikileaks) with a closing date of 14 July 2008.
5. I followed a link from the Minister's release to the appropriate page on the MED site (necessary as the ACTA material is not linked from the public index and the search engine couldn't locate it). The site only had a sparse overview document ² and a copy of the Minister's press release. This raised issues of serious concern regarding the ability of any interested person, body or organization to respond effectively to the Minister's request for submissions, when little or no information was officially available.
6. Consequently, I formulated a request for information under the Official Information Act 1982 ³ and conducted some correspondence regarding that request with George Wardle of MED ⁴. On 4 July, I received notification that MED was extending the timeframe of the request (under section 15A(1)(b) of the Act) and would reply by 21 July, extending my deadline for response to 28 July 2008. I have concerns about this process and will return to them further on in this submission.

What is ACTA?

7. Given the lack of information available from my own Government, I sought to research the matter with other Governments that were allegedly associated with this treaty and found a

¹ http://wikileaks.org/wiki/Proposed_US_ACTA_multi-lateral_intellectual_property_trade_agreement_%282007%29

² http://www.med.govt.nz/templates/MultipageDocumentTOC___34358.aspx

³ Appendix 1

⁴ Appendix 2

similar lack of information officially available (apart from Australia). I did, however, discover quite a lot about ACTA and its approach to intellectual property rights (IPRs) from others who have interests in it.

8. In order to consider the implications of ACTA, it is necessary to examine the origins. Aaron Shaw, in an article for Knowledge Ecology Studies did that very articulately:

“While the USTR [US Trade Representative] has emerged as the loudest voice supporting ACTA in the global arena, the roots of the proposal appear to lie elsewhere. A Discussion Paper published by the Australian Department of Foreign Affairs and Trade indicates that the idea first emerged in the 2004 Global Congress on Combating Counterfeiting. Hosted by the World Customs Organization and Interpol in Geneva, the Congress was sponsored by the Global Business Leaders' Alliance Against Counterfeiting (GBLAAC), an interest group representing some of the world's largest multinational copyright and trademark owners. The following July, during the 2005 G8 summit in Gleneagles, Japanese representatives suggested that member states create stricter regulations and enforcement provisions to combat “piracy and counterfeiting.” The publication of a post-G8 statement entitled “Reducing IPR Piracy and Counterfeiting through More Effective Enforcement” marked the first official step towards what would become ACTA. After Gleneagles, the ACTA supporters tried to promote their agenda in multilateral governance institutions, engaging in a tactic known as “forum shifting.” Not surprisingly, the idea of expensive new enforcement measures and rigid legal restraints did not interest middle- and low-income countries.

“In recent years, wealthy states and multinationals have found themselves on the defensive in the WTO and other global governance institutions. The G22 (together with numerous non-governmental organizations and activists) has drawn attention to the issues of access to protected inventions and works; the “flexibilities” in the agreements to provide limitations and exceptions to intellectual property rights; as well as the ability to implement obligations under domestic legal traditions. Similarly, in the World Intellectual Property Organization (WIPO) support for a new Development Agenda has reduced the influence of G8 representatives over their less affluent peers. [...]

“Having failed to achieve their aims through multilateralism, the ACTA supporters returned to Japan's original plan. Less than two weeks after the WIPO General Assembly voted to create a permanent Committee on Development and Intellectual Property, the USTR and the European Commission announced their intent to open ACTA negotiations before the end of the year. They promptly extended invitations to a short list of trading partners and corporate lobby groups to participate in consultations and negotiations. Instead of merely shifting the debate from one forum to another, the ACTA supporters now seek to create an entirely new layer of global governance.⁵

9. This is very significant. From this it appears that the source of ACTA is not political, or related to actual trade issues, but is an industry (or industries) that seek to protect an existing model of business. Any discussion of the economic implications of IP infringement and ACTA must take note that the prime mover was not actual economic impact on citizens and national populations, but on companies that have pecuniary interests in the management of IPRs.
10. Also of concern to me was the use of the word “plurilateral”. It was not one I was familiar with, though its meaning seemed easily comprehended. I compared it to the more familiar “multilateral”:

multilateral - *a. many-sided; involving several parties, nations, etc*

plurilateral - *a. of more than two sides or parties.*

5 Shaw, Aaron, “The Problem with the Anti-Counterfeiting? Trade Agreement (and what to do about it),” KESTudies, Vol. 2 (2008). <http://www.kestudies.org/ojs/index.php/kes/article/view/34/59> Aaron Shaw is a PhD student in Sociology at the University of California Berkeley. His most recent research examines the politics of the knowledge economy in Brazil. He is currently conducting a study of the U.S. political blogosphere as part of a project at Harvard University's Berkman Center for Internet and Society.

11. A plurilateral agreement is an agreement between more than two countries, but not a great many, which would be multilateral agreement.
12. Wikipedia, while not authoritative, had this to say: ⁶

Use of the term in the World Trade Organization

A plurilateral agreement implies that member countries would be given the choice to agree to new rules on a voluntary basis. This contrasts with the multilateral agreement, where all members are party to the agreement.

13. Aaron Shaw went further⁷:

“The so-called “plurilateral” approach represents an outdated model of international treaty-making whereby the unelected representatives of Northern states and a few corporate lobbyists dictate the rules of global markets. Such arrangements were commonplace during the 1990s under the neo-liberal “Washington Consensus” and prior to the Doha Round of negotiations in the WTO. Today, however, this kind of blatant disregard for global consensus and the needs of developing regions poses a threat to the world’s prosperity, security and health.”

14. A significant document is one that was prepared by Professor Claudio Dordi, of the University of Bocconi in Milan, at the request of the European Parliament⁸:

“In conclusion, the ACTA could be sharper than WIPO system (without the constraints of consensus building, developing countries and civil society groups) but, in next future, it is probable that there will be overlapping and intermingled IP agreements (on bilateral, regional, plurilateral and multilateral basis) with consequent legal problems.”

15. Please note that no cite is available for this paper. It was originally published on the European Parliament's website, it was removed sometime in June and is no longer available there.. However, it is still available from a number of sites on the Internet via Google.
16. A multi-lateral approach, while slower, allows for gradual change of all parties with processes that work to overcome future problems, rather than creating them. A plurilateral approach smacks of the largest children on the field monopolizing the bat and ball, and forcing others to play by their rules.
17. Further, the scarce official information available about ACTA would appear to indicate that it was intended to harmonize the enforcement of existing IPRs. However, the only current approach to a harmonized global concept of IP is occurring through WIPO, and ACTA appears to seek to operate independently of WIPO. There seems to be a fatal disconnect here – how can you harmonize enforcement if you don't first harmonize the definition of infringements?

Is There a Requirement for ACTA?

18. Having determined that the source of ACTA was not necessarily matters of national economic importance, I set out to discover if there was indeed a need, i.e. were “piracy” and “counterfeiting” the threat to global economic stability that the various official sources seemed to take for granted.
19. In his report to the European Parliament, Claudio Dordi said:

“ there is not enough evidence as to the extent or effects of international trade in “counterfeiting and pirated products”. There is a lack of reliable information and objective

⁶ <http://en.wikipedia.org/wiki/Plurilateral>

⁷ Shaw *ibid*

⁸ Dordi, Claudio p25 IMPACT OF COUNTERFEITING ON INTERNATIONAL TRADE, a study was requested by the European Parliament's Committee on International Trade May 2008

data as well as of harmonized definitions that would allow a proper quantification of the magnitude and impact of international trade in counterfeit and pirated goods and an adequate assessment of the problems it poses”⁹

20. On the University's website, he was more open:

“Was a new treaty on intellectual property needed? Already the WIPO (World Intellectual Property Organization) and the WTO agreement on TRIPS (Trade-Related Intellectual Properties) contain norms to fight counterfeiting. A new legal tool could cause normative overlaps and fragmentation, which could hamper the international struggle against counterfeiting. Also, when it comes to the protection of intellectual property, the EU states that are G8 members should look at home before engaging themselves abroad. Statistics say the Naples and London are the European capitals of counterfeiting, and the EU at the moment does not have consistent legislation and policy on the issues, which undermines the position of EU negotiators in discussing trade treaties on intellectual property. The situation should improve with the Lisbon Treaty, if it will be still adopted after the Irish no, which lists under Article 207 uniform principles for trade policy that apply to the commercial aspects of intellectual property.”¹⁰

21. Susan K. Sell is a Professor of Political Science and International Affairs, and Director of the Institute for Global and International Studies at George Washington University. She is a respected commentator on the WTO and IPRs.¹¹ In a recent paper, she wrote:

“Clearly, in this field, evidence-based empirical analysis is necessary to counter some of the more outlandish claims advanced in support of this enforcement agenda. The current ACTA push is based on highly suspect data. The IP enforcement agenda advocates’ use of data can be creative. For example, while BASCAP claims that worldwide losses to counterfeiting and piracy amount to \$600 billion per year, \$250 billion in the U.S. alone, the more sober yet still supportive OECD estimates that worldwide trade in counterfeit and pirated goods is closer to \$200 billion per year. The IIPA quoted one study as estimating lost tax revenue in the US to be \$2.6 billion in 2006. Many IP enforcement agenda advocates rely on just one economist, who continues to produce reports that echo the ACTA lobbyists’ narrative. Steve Siwek provides figures for IIPA, and Institute for Policy Innovation, RIAA, and MPAA with his “True Cost of Piracy” series. Siwek has conducted over 11 studies for industry and also helped to formulate methodology for WIPO to calculate the copyright industries’ role in all economies.[87] Figures provided by self-interested industry lobbyists can be inflated, by assuming, for example, that one may calculate lost revenue based on the differential between the full retail price of a good and the lower price of the “knockoff.” Yet often those who buy the cheaper version could not afford to pay the full retail price and would not buy it if the knockoff were unavailable. Thus the industry-generated numbers are unreliable guides for policymaking. Finally while the danger rhetoric is sensational, a USPTO- commissioned study on injuries and counterfeit goods concluded that over 60% of counterfeit seizures have nothing to do with health or safety.[88] Independent studies must be conducted by economists who are not on industry’s payroll and who will not be tempted or obligated to inflate numbers.”¹²

22. So, we can see that several experts agree that the figures as published are suspect. Yet, even if we accept the \$US 200 billion figure used by the OECD, in the light of the \$US65 trillion global economy¹³ it's around 0.31%¹⁴ of that total- I have difficulty seeing this as being the most important issue on the global economic agenda. This view appears to be shared by many nations outside the G8.

9 Dordi (*ibid*)

10 http://www.unibocconi.it/index.php?proc_id=104&nav_level1=15&nav_level2=2&nav_level3=6&news_id=2419&sub_action=news/nw_meet_view_news.php

11 <http://www.gwu.edu/~elliott/faculty/sell.cfm>

12 The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play June 2008
http://www.keionline.org/misc-docs/Sell_IP_Enforcement_State_of_Play-OPs_1_June_2008.pdf

13 http://en.wikipedia.org/wiki/World_economy

Counterfeiting

23. It's fair to say that New Zealanders, as a whole, do not approve of fakes and fraud. Part of our national mythos is straight-talking honesty and fair dealing. I think it's fair to say that this concept is shared by many nations in the G8, and that's why this agreement is named the "Anti-Counterfeiting Trade Agreement" - who could argue that false things should be tolerated?

24. There is, however, much dispute over what is counterfeit and what is not, especially in the medical arena. Prof. Kevin Outterson¹⁵ and Ryan Smith¹⁶, two American academics, have explored this area in some detail:

"Good drugs are safe, effective and less expensive, but can violate some technical requirement of U.S. law. A prime example is prescription drugs purchased by U.S. citizens from brick and mortar pharmacies in Canada. The purchase is legal, but the FDA states that bringing these drugs back into the United States violates federal law.³⁵ These are safe and effective drugs purchased in person in Canada, but the consumer violates the U.S. personal importation rule by bringing them back to the United States for personal use."¹⁷

25. They also contend that

"the underlying cause of drug counterfeiting as the legal system of intellectual property laws [and] explore alternative systems which would accomplish recovery of R&D expenditures without the patent rents which attract counterfeiting."

26. Essential Action, an advocacy group focussing on access to medicine, warned in a statement to the Office of the United States Trade Representative, that

"commercially interested parties sometimes cast compulsory licensing for medicines - legal under national legislation and World Trade Organization rules - as patent theft or 'piracy,' but no one can argue these practices bear any resemblance to counterfeiting."

At the same time, an agreement focused on patent, copyright and trademark infringement was likely to overlook important options to control counterfeiting, including by requiring companies to disclose knowledge of counterfeit product.¹⁸

27. Parallel importing is another area of concern. Knowledge Ecology International (KEI) said in their submission to the USTR:

"It is important, however, to differentiate between counterfeiting (i.e. fake goods) and the importation of legitimate stock at a lower price, as "grey market" parallel traded goods that are acquired legitimately in one market, and resold legally under the exhaustion of rights doctrine in another market. There is a tendency by some to conflate the two issues in order to stigmatize the practice and ignore the benefits of parallel trade. Restrictions on parallel trade can lead to anti-competitive behavior, and by facilitating market segmentation and price discrimination, lead to higher prices for consumers in markets that have a lack of competition."¹⁹

28. New Zealand currently allows parallel importing. The MED's website states that:

"Parallel imported goods are legitimately manufactured goods that are sourced from an authorized or licensed overseas supplier rather than the owner of the intellectual property

14 I am happy to have my math corrected – I have used the American convention of measuring a billion as 1,000,000,000

15 http://www.bu.edu/law/faculty/profiles/bios/full-time/outterson_k.html

16 J.D. candidate, West Virginia University - College of Law

17 Outterson, Kevin and Smith, Ryan, Counterfeit Drugs: The Good, the Bad and the Ugly. Law Journal of Science and Technology, Vol. 15, 2006 - Available at SSRN: <http://ssrn.com/abstract=926985>

right in the importing country. Pirate or counterfeit goods, on the other hand are infringing manufactured goods that are produced without the authorization of the owner of the intellectual property right.”²⁰

29. In my reading of the available ACTA documentation, it appears that ACTA is to be enforced by border officials at the point of entry to NZ acting *ex officio* to determine whether an item infringes IP law. This may be in conflict with our current regime which makes the courts the arbiter of the law. In the economic impact analysis in MED's documentation as supplied, there is no indication as to how border officials will be educated to the point of being able to make such distinctions and what that will cost, especially as this currently takes a formal court process to achieve.
30. There is no discussion of why it is considered more effective to transfer decisions in this area from the High Court and the independent judiciary to border officials who would have the power to destroy the goods in question, thereby pre-empting an appeal process.
31. Without a global agreement on what constitutes IP and therefore counterfeit, you can't have global enforcement. Unless you stop counterfeiting at its source, you can't stop it. To do that, you need to include the countries that countenance the manufacture of counterfeit goods. The “plurilateral “ nature of ACTA is self-defeating in this instance. It is transparently an “end run” around the WTO and WIPO process that could legitimately bring this about over a longer timeframe.
32. An assertion is being made that counterfeit goods present a danger to consumers through lack of quality control, but no data is presented to back this up. A counter-assertion can be made that counterfeit goods are being made in the same places that non-counterfeit goods are made and by the same people (e.g. China) and that the low quality argument applies more to goods produced at the lowest possible cost than to counterfeiting.

Piracy

33. As with copyright, ACTA advocates are providing on definition around the term piracy. The term is emotive and subjective, having gained currency due to the prolonged campaigns of the American IP industry associations (the Motion Picture Association of America, the Recording Industry of America, and the Business Software Alliance).
34. KEI addresses this in their submission:

“Piracy is a colorful and emotive term that does not elevate or inform debates about enforcement in areas where the intent or the appropriateness of infringing activities are subject to nuance or legitimate policy debate. For example, in the recent U.S. Supreme Court decisions involving eBay and KRS, the Court addressed cases where the exclusive rights of a patent should not be enforced, and a court should permit infringement under a court authorized royalty payment (eBay), or where government agencies and lower court judges make errors in their evaluations of the validity of patent claims (KSR).”²¹

35. Claudio Dordi also addresses this matter:

“It is important to note the specific language and linkages in the discourse. For example, while not making any distinction as to the types, areas and scope of the infringement, generally the arguments seek to connect intellectual property rights “piracy and counterfeiting” to theft, criminal activities and organized crime, even to terrorism. While there might be instances where this in fact occurs, it could distort the perspective of what intellectual property rights infringement is and what intellectual property rights enforcement is

18 <http://www.essentialaction.org/access/index.php?archives/131-Comments-on-Proposed-Anti-Counterfeiting-Treaty.html>

19 http://www.keionline.org/index.php?option=com_content&task=view&id=169

20 http://www.med.govt.nz/templates/Page_1230.aspx

21 KEI *ibid*

about”²²

36. The evidence that piracy harms innovation is not conclusive. It comes mainly from those with a vested interest (the MPAA, RIAA and the BSA again) but is countered by many academics and other interested parties who are looking into the matter. Using the MPAA's own figures, the US Pirate Party has shown that:

“Finally, with the continued rise in popularity of filesharing networks, the increasing power of computers, the decreasing complexity of such programs, the greater public knowledge of filesharing, and the increasing connectivity of computers with televisions, as well as the increased availability of hardware able to play video files from the internet, it's contrary to film industry claims, that despite all of this, ticket sales increased in 2007. The top 5 and top 10 films for [2]007 gross more than any year studied except 2004. a year when filesharing was already common.”²³

37. Of particular interest is the Free and Open Source Software movements, which allow use of intellectual property without payment (mostly) under particular licenses and have seen a boom in innovation in the last 15 years. To create an enforcement regime which is based on only one interpretation of a term (and that not a legal interpretation) is to create a regime that **will** criminalize individuals that disagree with that interpretation, or who are unaware of it.

38. The irony of the USA leading the charge against piracy is that until the US became a party to the Universal Copyright Convention in 1952 (specifically created to accommodate the US) and the Berne Convention proper in 1989, its activities fitted the description of piracy. It's fair to state that the US publishing industry was constructed through pirating European works, especially from Britain.²⁴

39. The ACTA proposal is about protecting an obsolete business model, not content creators. The publishers (whether book, film or music) claim that their industries suffer losses through piracy in that people able to download a work for free represent a loss of potential income. Creators like Cory Doctorow (www.craphound.com), Neil Gaiman (<http://journal.neilgaiman.com/search/label/free%20book>) and Nine Inch Nails (<http://www.nin.com/>) have experimented with giving away their work to see what happens and have pronounced themselves happy with the results. Doctorow says:

“I've given away more than half a million digital copies of my award-winning first novel, Down and Out in the Magic Kingdom, and that sucker has blown through five print editions (yee-HAW!), so I'm not worried that giving away books is hurting my sales.”²⁵

Sovereignty

40. ACTA (as I understand it from the material available) will put New Zealand's sovereignty largely in the hands of US corporations and industry organizations, as these are the prime movers in copyright infringement counter-activities. But where is the evidence that New Zealand is suffering from counterfeiting and piracy? In fact, where is the evidence that any national economies are suffering?

41. Analysis of the much touted OECD report²⁶ shows that:

“there's no indication in the executive summary that the magnitude of international trade

22 Dordi, p29

23 http://pirate-party.us/files/PPUS_press_release_070808.pdf

24 <http://original.britannica.com/eb/article-28634/history-of-publishing>

25 <http://craphound.com/someone/?p=363>

26 http://www.oecd.org/document/50/0,3343,en_2649_34173_39542514_1_1_1_1.00.html

might be substantially less than \$200 billion: that's the only number one finds. But if you actually plough through the methodology in the 158-page Overall Assessment, it turns out that the real number is probably much, much lower. In fact, a quick-and-dirty back-of-the-envelope calculation puts the amount of international trade in counterfeits as low as \$5 billion."²⁷

42. That may be a lot for a particular company in the US, or even a group of companies, but it's hardly a drop in the ocean of the global economy.
43. I submit that international treaties and trade agreements should be for the benefit of nations, not corporations or specific industries. And I do not subscribe to the view that "what's good for GM is good for the country".²⁸

Process

44. My principal concern around the ACTA process in New Zealand is the secrecy under which it is being developed.
45. The MED and MFAT websites include an FAQ which says

"Why has this process been kept from the public?"

This process has not been kept from the public. On 23 October 2007, the partners involved in the proposed agreement at that time publicly announced that they had initiated preliminary discussions on the development of ACTA. The New Zealand Ambassador in Washington DC attended this announcement.²⁹

46. This is disingenuous at best. No information was made available to the New Zealand public by its Government until the publication of the Wikileaks document on May 23 2008
47. This situation is mirrored in other countries of the world that are parties to the negotiations, with the exception being Australia. Secrecy engenders a lack of trust in a process that should be all about engendering trust in intellectual property rights.
48. Reports have appeared on the Internet of participants in ACTA negotiations (and pre-negotiations apparently) being required to sign non-disclosure agreements. While I can't confirm that specifically, my own OIA request resulted in a statement from Bronwyn Turley:

"However, ACTA participants have also agreed that information relating to formal negotiating positions of governments should be protected, as is the standard practice in international treaty negotiations. It is in this context that we are unable to release many of the items you request."³⁰

49. How can the public in any country trust the negotiators if they won't tell us what they are negotiating about. Not disclosing other countries' positions is understandable, in that diplomacy should respect confidences, but to not disclose your country's position to your own citizens smacks of unaccountability in public office.
50. It seems to me that this process is in conflict with the OIA.
51. MED stated to me that they're looking for input to create a NZ position, yet in the material that was released to me, numerous paragraphs under headings of "New Zealand Position" were completely redacted. This raises the notion that the "consultation period" was a sham, that a "New Zealand Position" had already been developed and discussed by officials

27 <http://www.portfolio.com/views/blogs/market-movers/2007/10/26/counterfeiting-much-less-prevalent-than-you-think>

28 <http://www.bartleby.com/59/18/whatsgoodfo2.html>

29 http://www.med.govt.nz/templates/MultipageDocumentTOC_36459.aspx#A3

30 Correspondence with the author- see <http://acta.lemming-brothers.com/tiki-index.php?page=Final+response>

without any input from either the political Government, or the public.

52. The process has also excluded developing countries from the negotiation process. Given that developing countries are frequently cited as the source of counterfeit products, it is critical that the negotiation process be opened to those countries. The creation of an international anti-counterfeiting treaty without the active participation of the developing world significantly hampers the likelihood that the treaty will have the desired effect in countering global counterfeiting activities.

Forum shifting

53. The ACTA process has been marked by a tendency to seek venues which are favourable to its aims, rather than use existing appropriate international fora. Dordi writes in his report:

“... we now observe another forum shift in the international regime of intellectual property. One such shift took place in 1994 when discussion on IP moved from WIPO to the WTO. The current forum shift is now occurring from the WTO to bilateral negotiations. While civil society and emerging developing countries exercises pressures to the WTO to maintain or even lower TRIPs standards, the United States and the Europeans countries have found in bilateralism a way to extend international IP protection.”³¹

54. Without participation from all levels of global society, agreements such as ACTA become an “arms race”, and the advantage will always be with the infringers seeking loopholes in incomplete frameworks. Agreements must include the infringing countries at a sincere level if they are to have the effect of preventing infractions. Otherwise, it is time-wasting window dressing that does not address the problem.

Unintended Consequences

55. Supporters of the proposed agreement have been at pains to point out that ACTA will apply to major breaches, not individuals with iPods, or individual laptops being carried onto planes. But laptops are currently searched now at some airports (mainly in the USA)³², despite there being no clear ruling on the matter.
56. Good intentions have a way of getting out of hand. Once a capability is permitted, it will be used to the fullest extent it can be. This is the “slippery slope” argument which calls for care in making regulations that allow far more than is initially intended. In New Zealand, we have regulations and oversight regarding inter-departmental sharing of personal information for precisely this reason. ACTA, as discussed openly, will apparently not permit such oversight or regulation, vesting judgement in border officials only. It will be, in effect, supra-national without passing through due process.
57. An example of this is the infamous US “no-fly list” - a list of those deemed by US authorities to be too dangerous to fly. Such lists have always existed but, in the post-9/11 environment, the list has ballooned. On September 11 2001, the list stood at 16, by November there were more than 400 names, by October 2006 there were 44,000 names. Numerous people have been blocked from flying because their name matched one on the list, including US soldiers returning from Iraq and, famously, Senator Edward Kennedy in 2004 . This is an example of a facility, once useful, becoming a farce (and an infringement of personal rights) because of misuse.³³
58. Allowing the ACTA process to proceed allows the capability for more fine-grained

31 Dordi *ibid*

32 <http://www.google.com/search?q=searching%20laptops&ie=utf-8&oe=utf-8>

33 http://en.wikipedia.org/wiki/No-fly_list

investigation further down the line. As one commentator says:

“The proposals on Internet file sharing are rather interesting as well, as they have the potential to move the liability for copyrighted infringement from ISPs and place it at the feet of the user instead. According to the document, ACTA would include ‘safeguards for ISPs from liability, to encourage ISPs to cooperate with right holders in the removal of infringing material.’ As well as this, ISPs would also have to provide the details of suspected copyright infringers if requested. Copyright holders who’ve given notification of copyright infringement would legally be able to ‘obtain information identifying the alleged infringer.’

Let’s get the real picture here, let’s remove the wording about Piracy and Copyright infringement, What are we really allowing them to do?

We are giving non elected officials who answer only to the Corporations, open access to monitor, obtain information about and to even restrict our access to communications and media.”³⁴

Benefit to New Zealand

59. As New Zealand has not been identified as either a source of counterfeit goods, nor as being adversely impacted by piracy or counterfeiting, it's hard to see any benefit. Moreover, as Minister Tizard has said:

“New Zealand already has strong IPR enforcement measures with substantial penalties and terms of imprisonment for persons convicted of trafficking in counterfeit goods”³⁵

60. Unless officials can point out significant economic advantage to New Zealand in participating in this agreement, which they have not so far, we can safely assume there is none.

34 <http://rh-force.org/modules.php?name=News&file=article&sid=222&mode=thread&order=1&thold=0>

35 NZ Associate Minister of Commerce – Paper to the Cabinet External Relations and Defence Committee, March 2008. File P/025/PRO05/O02

Conclusion

61. Rigorous enforcement of law is not necessarily the best way to achieve an end. Rigorous enforcement of bad or imprecise law will certainly lead to poor results and tend to bring law into disrepute (e.g. Electoral Finance Act) and thus increase the likelihood of infringement. “Zero tolerance” can lead quickly to a police state where harmless activities become something to be suppressed, and where innocent people become “collateral damage”.

62. A final word from KEI:

“Before investing enormous public sector resources to enforce private intellectual property rights, policy makers should at least consider the reasons why infringement flourishes today, and some alternative solutions to some of the more important problems.

“The widespread infringement of patented inventions in software and information technology sectors is based upon deep flaws in the patent system itself. The issues recently addressed by the US Supreme Court in the KSR and eBay decisions illustrate the concerns of many that the USPTO standards for inventive step are too low, and it is highly problematic to enforce exclusive rights in products that use complex technologies where it has become impossible to avoid infringement. Likewise, the entire rise of user generated content illustrates the widely shared belief by the public that they should enjoy some freedom to remix copyrighted content for personal use. Excessive pricing of copyrighted works in developing countries has created a huge market for infringing works. High prices for pharmaceutical products in the US and Europe attracts criminal counterfeiters, who can make greater profits manufacturing fake copies of Pfizer’s Lipitor or Viagra, than distributing cocaine or heroin.

“In many of these cases, a combination of reforms in the intellectual property systems, curbs on excessive pricing, and the development of new systems of rewards for creative and inventive communities may be more fruitful avenues for addressing the twin concerns of enforcing private intellectual property rights, and providing sustainable incomes for our workforce.”³⁶

63. There is no evidence of obvious benefit to New Zealand, its economy and its citizenry in being part of ACTA

64. Therefore, I submit that the NZ position should be to:

- **regularly review the IPR regime in New Zealand to ensure that it encourages actual innovation while respecting the rights of creators**
- **does not allow measures to continue within New Zealand that encourage infringements of IPR**
- **respect the existing global bodies (WIPO and WTO) and refer trade and IP matters through them**
- **not be a party to the development of ACTA**
- **not recognize ACTA if it reaches fruition**

³⁶ http://www.keionline.org/index.php?option=com_content&task=view&id=169