

30 March 2010

Simon Power
Minister of Commerce
Parliament Buildings
Wellington 6011
New Zealand

Via email



Dear Minister

Submission on the Anti-Counterfeiting Trade Agreement Proposals (ACTA)

This submission on the Anti-Counterfeiting Trade Agreement Proposals is made by the Telecommunications Carriers' Forum (TCF). TCF members provide more than 90% of the internet connections in New Zealand. Our members are BayCity Communications, CallPlus, Compass Communications, FX Networks, Kordia, Telecom New Zealand, TelstraClear, TrustPower, Vector Communications, Vodafone, Woosh and WorldxChange.

The TCF appreciates the opportunity to comment on what it knows of ACTA.

It is a little difficult to do so since we do not know the exact detail of what is being discussed. As has been publicly highlighted by others, there is considerable concern that a treaty of such importance in the digital environment is being negotiated in relative secrecy. This is particularly the case for ISPs since the digital enforcement aspects of ACTA do appear to be targeted at having ISPs take further responsibility for *policing the internet*.

The TCF acknowledges that any agreement reached in ACTA will need to be introduced into New Zealand law in normal fashion and that will include opportunity for comment. However, the reality is that such an agreement will represent Cabinet policy by the time the final form is settled and it will be difficult to make any substantive changes at that stage. As we have seen with section 92A of the Copyright Act, no matter what philosophical position one takes, these issues are very complex and they do reward open debate so that unintended consequences can be avoided. That debate needs to be informed by the actual detail of what is proposed since the balance between intellectual property owners, users and ISPs is a very delicate one.

TCF members would therefore strongly urge New Zealand's negotiators to continue to push for public disclosure of the working text and proposals being debated by ACTA participants. It is noted that the European Parliament, by an overwhelming majority, has resolved that ACTA negotiations should be made public and, given New Zealand's historical openness, we hope that a similar position will be taken here.

That said, from what TCF members have seen (including documents leaked from the European Union¹), we do have some high level concerns. More issues may arise once we see any more concrete proposals so these can only be tentative conclusions at this stage.

Our comments are split into two categories below:

- Critical overarching issues;
- Issues of detail.

Critical Issues

Change upon change

1. As you know, the TCF and its members have devoted significant time and resources to the development of a workable, balanced approach to p2p repeat infringement under section 92A as it was and the proposed Copyright (Infringing File Sharing) Amendment Bill (the Bill) as it is proposed. First in the development and consultation on a draft code and subsequently in providing feedback on the new proposals, since at least September 2008, we have been at pains to explain how such a regime will impact on New Zealand ISPs and TCF members' customers.
2. Further, once the Bill is enacted, in whatever form, it is clear that ISPs will need to alter their systems and implement measures to cater for the new regime on an ongoing basis. We are pleased to see that the Bill proposes that those costs will be met by a per notice fee payable by copyright owners.
3. Our grave concern however is that if ACTA makes any change whatsoever to the regime instituted by the Bill once the Bill is enacted, the result will be twofold:
 - 3.1 TCF members will again need to devote time and resource to understanding the changes and, if necessary, requesting any amendments that are able to be made at the late stage when ACTA is introduced as New Zealand legislation; and
 - 3.2 The changes will almost certainly require changes to TCF members' systems.
4. Not only will both these consequences carry a cost for ISPs, which may not be recoverable, but they will also add confusion for users given the timing of the two work streams.
5. By our assessment, the Bill is scheduled to be passed in the middle of the 2010, whereas ACTA will not be settled until the end of the year and would not make its way into New Zealand legislative proposals until 2011. If that is correct, then, given the proposed three month lead-in for the Bill, TCF members and their customers will have had the Bill processes in place for a mere 9 months before they might be forced to change again.

ISPs as mere conduits

6. In New Zealand in the Bill and in Australia in the *iiNet*² case, it has been accepted that it is inappropriate for ISPs to be forced to perform a quasi-judicial role in determining whether or not a user has infringed copyright. Nor should an ISP be

¹ <http://blog.die-linke.de/digitalelinke/wp-content/uploads/ACTA-6437-10.pdf> (accessed 15/03/10)

² *Roadshow Films Pty Ltd v iiNet Limited (No. 3)* [2010] FCA 24 (4 February 2010) (accessed 15/03/10)

forced to decide whether external circumstances justify imposing a penalty, such as termination, on a user. ISPs must not be forced to monitor users' internet connections nor be subject to Court or tribunal action more properly involving an intellectual property owner and an alleged infringer.

7. To the extent that any proposals put forward in ACTA seek to:
 - 7.1 re-introduce any requirement that ISPs act in a role other than as a mere conduit;
 - 7.2 impose greater administrative or quasi-judicial functions on ISPs;
 - 7.3 involve ISPs more directly in Court or tribunal action,then TCF members would be strongly against that. If such proposals are made, we submit that they do not and should not form part of New Zealand policy in this area, as is now reflected in the Bill.

Issues of detail

8. To the extent that the leaked EU document referred to at paragraph 0 above reflects the current state of play with ACTA:
 - 8.1 We are concerned at the various suggestions that ACTA should allow intellectual property owners to obtain injunctions against ISPs. As part of a proceeding against an alleged infringer, it is not unheard of for an ISP to be joined as a party if orders against the ISP are necessary. TCF members would normally abide by such orders without argument. However, if it is envisaged that there be some ability obtain injunctive relief against an ISP without that ISP in any way being the subject of the proceeding, then that would be most unusual. In any case, any such injunction should only be issued on the condition that all ISP costs are paid by the applicant on a full indemnity basis (as is generally the case where third party discovery is sought in New Zealand, for example³).
 - 8.2 We welcome the commitment to ensuring strong safe harbours for ISPs. However, as has been seen in the *iiNet* case and has been recognised in New Zealand, making safe harbours conditional on implementation of so called "reasonable" policies is fraught with difficulty. That is particularly the case if termination is envisaged.
 - 8.3 TCF members remain of the view that termination of an infringer's internet account is a remedy out of proportion to any civil infringement. This is particularly the case if it is suggested an infringer is to be blocked entirely from the internet.
 - 8.4 TCF members would strongly object to any proposal that gave intellectual property owners the right to obtain ISPs' customers' details without an order of a Court or other competent authority. Again, this has been accepted in the Bill.

Concluding comments

³ See High Court Rule 8.27

9. Overall, if the leaked EU document is accurate, we appreciate the New Zealand negotiators' recognition of most of the above issues. New Zealand seems to be taking a principled approach consistent with the lessons learnt during the s92A debate over the past few years. TCF members fully support and welcome that approach. However, should it appear likely that any of the above principles might be undermined by ACTA proposals, TCF members would have significant concerns. In those circumstances, we request an opportunity to provide further feedback before any policy changes that might result are finalised.

The TCF appreciates the opportunity to comment on the ACTA proposal. Please do not hesitate to contact me if you have any questions in relation to our submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'DS', with a large loop and a trailing flourish.

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