

## **Business Views on Border Protection Measures, Civil Enforcement and Criminal Enforcement**

*Business Response Group Submission to  
Ministry of Economic Development (MED) of New Zealand*

*June 29, 2009*

The following table addresses certain issues raised by the New Zealand Ministry of Economic Development (MED) for public comment with regards to topics being discussed by the negotiators of the Anti-Counterfeiting Trade Agreement (ACTA). The Business Response Group (BRG) has provided comments in prior submissions on the issues outlined below. The table compares those issues raised by the MED and related recommendations provided by the BRG. The last column entitled “Additional Comments” expresses support, concerns and/or other suggestions.

The BRG views are taken from the following memorandums to ACTA negotiators:

- “Business Perspectives on Border Measures and Civil Enforcement” submitted July 28, 2008
- “Business Perspectives on Criminal Enforcement Provisions” submitted October 08, 2008

<b>New Zealand Consultation Points</b>	<b>BRG views previously submitted to ACTA negotiators</b>	<b>Additional Comments</b>
<b><i>Border Measures</i></b>		
- Extending the existing measures concerning copyright and trade marks infringement to goods infringing other types IPRs, such as patents and industrial designs.	No prior recommendation on this issue.	We support the original intention of the Anti-Counterfeiting Trade Agreement (ACTA) to encompass trademark counterfeit and copyright pirated goods.
- Customs detaining shipments of goods suspected of infringing IPRs without having received notification from a right holder.	Extend greater authority and effective powers to local customs and enforcement authorities and provide <i>ex officio</i> authority for customs authorities to suspend import, export and trans-shipment of goods, including merchandise in free trade zones, which are suspected of being counterfeited or pirated.	We support including this element and suggest MED consider the recommendation put forth in the BRG memorandums.

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	Significantly increase inspections of exports/imports to find shipments of counterfeit or pirated goods and refer such findings to appropriate authorities for investigation and prosecution.	
<ul style="list-style-type: none"> <li>Customs targeting shipments being exported from New Zealand for goods infringing IPRs.</li> </ul>	Extend greater authority and effective powers to local customs and enforcement authorities and provide <i>ex officio</i> authority for customs authorities to <u>suspend import, export and trans-shipment of goods, including merchandise in free trade zones, which are suspected of being counterfeited or pirated.</u>	We support including this element and suggest MED consider the recommendation put forth in the BRG memorandums.
<b>Civil Enforcement</b>		
<ul style="list-style-type: none"> <li>Incorporation of system of pre-established or statutory damages as part of the remedies available to right holders for infringement of IPRs.</li> <li>Incorporation of a statutory formula or presumptions for use by the courts in calculating of damages arising from infringement of IPRs.</li> </ul>	Encourage governments to develop calculation methods that lead to fines against counterfeiters and pirates commensurate to the harms caused in order to increase the deterrent impact of fines, and impose sanctions, such as contempt of court, for failure of violators to pay such fines. Calculation methods can be based on information provided by right holders. <u>Right holders should be allowed to elect award of either actual damages suffered or pre-established damages.</u>	We support including these elements and suggest MED consider the recommendation put forth in the BRG memorandums.
<ul style="list-style-type: none"> <li>Incorporation of a statutory formula for use by the courts in taking account of profits arising from infringement of IPRs.</li> </ul>	Grant officials authority to order and/or execute seizure of the infringing goods, and materials and implements used to manufacture and/or package the infringing goods, as well as other	We support the inclusion of provisions that will establish a formula for courts to use in taking into account profits arising from counterfeiting and piracy activities. Measures should be

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	physical and financial assets of violators....	taken to seize the physical and financial assets and profits associated with the counterfeiting and piracy activities to ensure that counterfeiters are not profiting from the illegal activities.
<ul style="list-style-type: none"> <li>- The courts being given the authority to order the delivery up and disposal of those material and implements used in creation or manufacture of infringing goods.</li> </ul>	Counterfeit and pirated goods should be destroyed and definitively removed from the channels of commerce, or disposed of with the rights holders' consent where there is no health or safety risk. Destruction of the seized goods and materials and implements used to manufacture them should be conducted in a manner that minimizes risks of further infringements.	We support including this element and suggest MED consider the recommendation put forth in the BRG memorandums.
<ul style="list-style-type: none"> <li>- The courts being given the authority to order an infringer to provide to the right holder, for the purpose of collecting evidence, any information that the infringer possesses or controls, such as information on the origin and distribution networks of the infringing goods.</li> </ul>	Provide rights holders who are victims of counterfeiting and piracy the right to obtain information regarding the infringer, including their identities, means of production or distribution, and relevant third parties.	This issue has not been addressed in the Summary of Key Elements that was released by ACTA negotiators in April 2009. We are pleased that the New Zealand government has raised this for consideration. We strongly urge ACTA negotiators to consider this recommendation.
<b><i>Criminal Enforcement</i></b>		
<ul style="list-style-type: none"> <li>- Criminal measures being applied to copyright infringement and in particular substantial copying and/or large scale distribution of infringing works that has no direct or indirect motivation for</li> </ul>	Provide for criminal procedures and penalties to be applied to willful acts of counterfeiting and copyright piracy, which includes acts that cause substantial commercial harm. In addition, governments should treat importation or exportation of counterfeit or pirated goods as	We support criminal measures being applied to not only copyright piracy, but also willful acts of trademark counterfeiting including those that are large scale regardless of motivation.

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financial gain.	illegal activities subject to criminal penalties.	
<ul style="list-style-type: none"> <li>- The courts having the authority to order the seizure of proceeds of crime from IPRs offences.</li> </ul>	<p>Ensure the ability of law enforcement authorities to take action at their own initiative and provide relevant officials with the authority to seize all materials and implements used to manufacture or package counterfeit and pirate goods and any documentary evidence relevant to the offense and assets traceable to the infringing activity. Officials should also be given the authority to impose imprisonment as a sanction against failure to comply with a disclosure order.</p> <p>Criminalize the laundering of proceeds from counterfeiting and piracy, to ensure that counterfeiters and pirates are not profiting from their crimes and strengthen confiscation regimes that provide for the identification, freezing, seizure and confiscation of funds and property acquired through counterfeiting and piracy.</p>	We support including this element and suggest MED consider the recommendation put forth in the BRG memorandums.
<ul style="list-style-type: none"> <li>- Criminal measures being applied to the unauthorised copying, such as camcording, of a motion picture or other audiovisual work being exhibited in a facility open to the public.</li> </ul>	No prior recommendation on this issue.	Under a broad agreement like ACTA, it will not be sufficient to list a type(s) of method of infringement since an all inclusive list is not possible given the creative abilities of counterfeiters and pirates.
<ul style="list-style-type: none"> <li>- Trafficking of counterfeit labels, packaging and</li> </ul>	No prior recommendation on this issue.	There is no current recommendation on this issue,

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documents designed to be affixed to, enclose, or accompany counterfeit goods or pirated works.		however, we welcome criminal procedures and penalties for trafficking of counterfeit labels.

**On behalf of:**



*United Kingdom*



*European Union*



*Russia*



*France*



*USA*



*European Union*



*Mexico*



*Austria*



*Ukraine*