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Dear Mr Wardle

**Distilled Spirits Association of NZ submission on the  
Anti-Counterfeiting Trade Agreement (ACTA)**

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I am writing on behalf of the Distilled Spirits Association of New Zealand Inc in response to Associate Commerce Minister the Hon Judith Tizard's invitation<sup>1</sup> to the public to make submissions on the Anti-Counterfeiting Trade Agreement (ACTA).

The Association is the national trade organisation representing New Zealand's leading brand owners, producers and marketers of premium spirits (eg brandy, whisky, rum, gin, vodka) and spirit drinks.

The Association's members include: Anchor Ethanol Ltd, Bacardi Martini Asia Pacific Ltd, Brown Forman Beverages Worldwide, Diageo (New Zealand) Ltd, Federal\*Geo, Lion Nathan Wines and Spirits Ltd, Maxxium NZ Ltd, Moët Hennessy NZ Ltd, Pernod Ricard New Zealand Ltd, The Rum Company (New Zealand) Ltd and Vintage Wines and Spirits Ltd.

The Association's members export and import distilled spirits to and from numerous countries worldwide, including all of the participant countries<sup>2</sup> to the ACTA.

**Summary of the Association's views on ACTA**

All and any efforts to combat counterfeiting are of keen interest to the Association. Counterfeit or fake products risk consumer health and safety, deprive legitimate businesses of income and threaten the good reputation and image of branded distilled spirits products.

On the basis of the information sheet (provided by the Ministry of Economic Development on its website) the Association strongly endorses ACTA's goal of combating infringements of intellectual property rights (IPR) and fully supports New Zealand's participation in the development of a multilateral agreement.

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<sup>1</sup> "NZ to join Anti-Counterfeiting Trade Agreement negotiations", Hon Judith Tizard 28 May 2008

<sup>2</sup> Australia, Canada, EU, Japan, Korea, Mexico, Singapore, Switzerland, USA

There are, however, some further additions to the scope of the agreement that the Association feels could strengthen it even further, as well as considerations to the enforcement of existing legislation.

The following submission will:

- Provide information on counterfeiting issues within the spirits industry
- Outline the Association's suggested improvements to ACTA
- Outline the Association's opinion on enforcement of ACTA

### **Counterfeiting issues within the spirits industry**

Distilled spirits can be highly attractive to counterfeiters and fraudsters. This is due in part to the cachet of international brands and premium products, which generate value for producer and consumer alike. The counterfeiter commits a fraud against both parties.

There are two types of counterfeit distilled spirits:

- Counterfeit brands – e.g. a whisky purporting to be a well-known international brand when it is not
- Counterfeit product – e.g. a product calling itself 'Bourbon' when it was produced outside of the USA, or a 'Whisky' calling itself 'Scotch Whisky' when it has not been produced in accordance with the laws of the UK

Based upon local information other common infringements include:

- The refilling of original bottles with inferior low quality substitutes
- The mimicking of genuine labels through very subtle differences e.g. where a genuine product might state "1 litre" the counterfeit might state "1 L"
- A counterfeit product containing 37% alc/vol whereas the genuine product may contain 40% alc/vol
- The deliberate obscuring or tampering with bar codes or lot codes

The actions of small transient producers may sound insignificant, but left unchecked they can become an increasingly costly problem for legitimate spirit brand owners, producers and marketers.

Counterfeit spirits traded in New Zealand at best are sub-standard, and at worst are harmful or even lethal to consumers. Counterfeit spirits will also be excise tax-evaded and then often offloaded to small, independent off-licences or sold directly to the public e.g. privately, online or via on-premise outlets – e.g. bars, restaurants and clubs – at or near to the full tax-paid price. The public is thus defrauded on two counts.

Counterfeit spirits can pose a severe health risk for New Zealand consumers as well as severely undermining the reputation of legitimate domestic and international spirit brands. We note that the Secretariat to the World Health Organisation has recently referenced the impact of non-commercially produced alcohol, which would include counterfeits. The problem was stated as "Fatal mass poisonings following the drinking of illegally or informally produced alcohol beverages have been reported from several countries"<sup>3</sup>.

### **Possible increase in scope of ACTA**

The Association is delighted that the ACTA has raised the awareness of important IPR issues, and hopes it will stimulate further action by the New Zealand Government and its agencies.

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<sup>3</sup> Strategies to reduce the harmful use of alcohol. Report by the Secretariat. A61/13 20 March 2008

Currently the ACTA proposal covers only trademarks and copyright. The Association believes that an overall treaty can be improved by providing higher standards, and this should include broadening the scope of the ACTA to include geographical indications.

This would not be an additional commitment or be overly burdensome as parties to ACTA are also parties to the World Trade Organisation (WTO) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) especially Articles 22<sup>4</sup> and 23<sup>5</sup>.

For the New Zealand context, the Geographical Indications (Wine and Spirits Registration) Act, mandating a register for spirits and wines with geographical indications, was passed in to law in November 2006. According to the Associate Commerce Minister the legislation was to "...meet(s) our obligations under the TRIPS agreement"<sup>6</sup>. We consider that the implementation of this important piece of IPR legislation will go a long way towards deterring counterfeiting practice and its effects.

Unfortunately the implementation of the GI Act remains unnecessarily stalled and binds the spirits industry into an unrelated process involving international wine negotiations. It sends a mixed message to our overseas trading partners that it is a 'claytons law' – the legislation you have when you don't want to have legislation. It also indicates that the New Zealand Government is not serious about protecting IPR, which is likely to reduce confidence in our legal frameworks.

As New Zealand is regarded as one of the most developed and secure countries to trade with, we strongly urge the GI Act and its registration system (if necessary - for spirits only) be brought into force immediately, as must have been intended when the legislation was passed. This would positively demonstrate to others that New Zealand is committed to strong IPR protections.

#### **Enforcement of ACTA and other IPR legislation**

Preventing the damage caused by counterfeiting requires strong and effective laws and vigilant enforcement.

In terms of the IPR enforcement framework we understand that penalties (e.g. fines and imprisonment), remedies (e.g. seizure and confiscation) and other legal processes (e.g. injunctions and the seeking of damages) can be invoked through the jurisdiction of a range of government agencies. In New Zealand these include relevant divisions of the Ministry of Economic Development, the competition authority, New Zealand Customs Service (NZCS), NZ Police, Ministry of Health, the Food Safety Authority, Public Health Units and Local Authorities.

Given the significant public health and safety issues created by counterfeit spirits, and the fraud they commit against producers and consumers, the above agencies should be highly concerned with preventing them from being marketed in this country. The Association is encouraged by the proposed amendments to the Trade Marks and Copyright Acts which will enable Customs to take discretionary prosecutions against importers of counterfeit goods. Other amendments would enable Customs to have investigative powers specific to counterfeit goods under Customs control.

The Association submits that sufficient powers must reside with national bodies to enforce the IPR concerned. In practice, however, to be truly effective and enduring in protecting against counterfeiting they must be fully coordinated and their efforts proactive and vigilant.

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<sup>4</sup> Protection of Geographical Indications

<sup>5</sup> Additional Protection for Geographical Indications for Wines and Spirits

<sup>6</sup> Hon Judith Tizard, 13 December 2005, Parliamentary Debates Hansard

Where infringements have been notified by the public or detected by agencies themselves, they must treat the incidents seriously and respond in a timely and expeditious manner. This would ensure that affected consumers and IPR holders are assisted and that counterfeiters are held to account for their crime.

To assist with maintaining this level of enforcement, there should be a central office and officer responsible for coordinating robust official action against any IPR breaches. This should also ensure that the probability of detection remains high. Infringements should be treated as criminal offences at least matching burglary, fraud and tax evasion crimes.

Finally, The Association reaffirms it is prepared to work with all the responsible domestic or international organisations, formally or informally, to ensure the maximum legal certainty and protection for spirits. The Association also stands ready to assist agency capacity by providing expert counterfeit recognition, expert forensic support and or expert witnesses for prosecutions if and when required.

### **Summary and Recommendations**

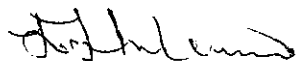
The Association applauds the New Zealand Government for joining with other Governments in the development of the ACTA.

The Association stands ready to support and promote all government initiatives to combat the trade in counterfeit goods.

The Association recommends:

- That geographical indication provisions be part of ACTA
- That the New Zealand Government immediately implement the Geographical Indications (Wine and Spirits) Registration Act 2006
- That health and safety concerns that arise from counterfeiting be a priority remit of ACTA
- That a central office and officer to coordinate all agency activity against counterfeiting and related IPR breaches be instated
- That counterfeiting and related IPR breaches be considered criminal actions requiring prosecution with serious deterrent penalties and sanctions

Yours sincerely



PP Thomas Chin  
Chief Executive