Submission on Anti-Counterfeiting Trade Agreement: Intellectual Property Rights Enforcement in the Digital Environment.

To preface this submission, it should be stated that I am both a consumer and producer of copyright material. The work that I produce (computer software) is used by millions world-wide, and I rely on copyright legislation to uphold the license that that software is released under.

I fear that all the provisions laid out in ACTA regarding the "Digital Environment" are a waste of time and effort. The Internet is designed for one thing, and one thing only: The transfer (and thus copying) of information. It does so extremely efficiently, and any desire to limit such copying is a desire to limit the functionality of the Internet, which quite frankly is doomed to fail. It has been shown time and time again that any attempt to restrict what is essentially limitless transfer of information is fruitless. For example, the Chinese government has attempted to restrict the internet access of its citizens, yet many millions of those citizens can and do circumvent these measures with relative ease. A more telling example, however, is the effortless manner in which the ACTA negotiation documents, supposedly kept top-secret under the guise of "National Security", may be found online. The concept is not hard to understand: Once a single copy of information is posted it is immediately mirrored and re-posted on thousands of computer servers worldwide at virtually no cost. Attempting to restrict this is completely fruitless: The internet can and will route around any such obstacle to ensure that data gets transferred in the most efficient way possible.

With such a problem in front of it, therefore, the Digital Environment provisions of ACTA are doomed to fail. That is not to say that there won't be criminals caught and convicted as a result of such an agreement – I am certain that there will – rather, that it will have very little (if any) effect on large-scale commercial infringement of copyright. My primary concern, however, is not the lack of effect on commercial infringement of copyright; rather on the large potential effect on every day New Zealanders caught up in inaccurate accusations of copyright infringement.

To address the questions in the discussion paper:

1. *Safe Harbour for ISPs.* This is essential. The ISPs job should not be required to monitor (either proactively or retroactively) what its customers are viewing or uploading to the internet. Not only are their privacy concerns with this, but there is also inefficiency - ISPs do not want to have to do this, and the expense to do so would be carried by their customers, many of whom may have no intention of infringing copyright. Given that the ISPs have little or no knowledge, of what their customers are viewing or making available to others, they cannot and should not be held responsible for what their customers may choose to do. They simply provide the service through which their customers do business. Furthermore, even if they did have knowledge as to what their customers may be viewing or making available to others, they are not in the position, nor should they be in the position, to make a decision as to whether or not the customer has the right to

RELEASED UNDER THE OFFICIAL INFORMATION ACT

view or make that content available to others. Thus, ISPs should be considered similar to other telecommunication companies, and should not be liable for any infringement as a result of customer actions.

2. *Identifying Infringing Users*. First it should be made clear that the user is only **alleged** to be engaging in infringing activity. This is a key point: It is simply an accusation based on limited evidence by (one presumes) the company or person who claims to own the copyright to the work in question. Given that the ISP is in no situation to decide as to whether such a claim is valid, the only situation where rights holders should be able to receive any information regarding the identity of an ISPs customer is when there is probable cause as **determined by the courts**. In New Zealand, the copyright tribunal may be a useful arbitrator as to when such information may be handed over. There should, however, be a cost associated in requesting such arbitration, the initial burden of which is carried by the copyright owner, to ensure that the system is not overrun with thousands of specious notices such as has been observed with the DMCA in the US.

3. *Promoting cooperation between ISPs and rights holders*. As per 2, this should not be required, and should in fact be discouraged.

4. *Technological prevention measures*. Such measures are fundamentally broken. They are akin to locking the door and then ensuring you give everyone the key: In order to listen to, view, or otherwise enjoy digital content it must be unlocked first – thus, all users must have the key to unlock that content. The key, therefore, must either reside in the digital data itself, or must reside separately on the user's computer or other playback hardware. It is therefore security through obscurity: Essentially there is a secret piece of information that the supplier of the content tells you – you just may not know where it is. All such schemes, therefore, are nothing more than a bump in the road to having the same material unencumbered. They do nothing to discourage commercial copyright infringement, as one needs only circumvent the TPM once and the unprotected content is then available to all. Given that supplying the key with the player or hardware is generally more useful than embedding the key in every piece of content, this then raises the question of interoperability: Unless you use a particular "approved" player, you don't have access to the content. This is already a problem in many areas: Even DVD videos cannot be played on computers that are running opensource operating systems without first breaking the TPM used on each DVD disk. Given that each incarnation of TPM gets more and more draconian, the ability to circumvent such measures are critical. Indeed, it would be better to ensure that such TPMs do not exist in the first place: the iTunes store has shown that they are not required in order to sell music (over 10 billion songs sold) – merely making content available at a reasonable price and in a convenient manner appears highly successful. It is recommended that the right to circumvent TPMs in order to allow playback and criticism of content, regardless of its copyright status, be made explicit in ACTA.

RELEASED UNDER THE OFFICIAL INFORMATION ACT

5. *Copyright Management Information.* There should be no need for any provisions regarding the removal of copyright management information attached to or embodied in a copyright work. Indeed, given that copyright can and does pass from one organisation to the next, the ability to remove such information from the content may be useful. If it is being removed for nefarious purposes, then one presumes there is copyright infringement going on anyway, thus making such a requirement useless.

New Zealand must ensure that all further contribution to ACTA considers and benefits New Zealanders as a whole. Copyright is considered by many to be equivalent to a large hammer yielded by the large multinational media conglomerates, rather than a tool protecting the artists and creators. I have no doubt that adding more and more penalties and laws in an effort to prevent copyright infringement will only further degrade this. It is trivially easy to copy any digital content at virtually no cost, and there is a global network designed to do just that in the most efficient way possible. Instead of trying to stop this behaviour, creators, artists and "content owners" should be looking to harness it to spread their work far and wide. So much of the artistic content produced by our culture is currently locked up in the chains of copyright, "owned" by large companies, and it looks less and less likely that that content is going to be released into the public domain.

Thank you for considering my submission,

Jonathan Marshall,

S.9(2)(a)

RELEASED UNDER THE OFFICIAL INFORMATION ACT

RELEASED UNDER THE OFFICIAL INFORMATION ACT