Submission on the Anti-Counterfeiting Trade Agreement (enforcement in the digital environment)

General

The interests of creative people are not necessarily served by this treaty. What ACTA seeks to protect are the rights of intermediaries – publishers, big movie companies and record "labels" – who are attempting to perpetuate an old pre-digital business model.

It's optimistic to see greater protection for New Zealand's creative industries in this treaty, but I fear it is not realistic. New Zealand is very much the weaker partner in negotiations steered by the US and Japan.

Lawrence Lessig tells the story of a documentary on the staging of an opera, whose maker sought permission to show a few seconds of *The Simpsons* on a TV set in the background of a scene of stagehands relaxing. Creator Matt Groening gave permission; rights-holder Gracie Films rescinded that permission and demanded a large fee.

If we agree to this treaty and its enforcement provisions, there is a risk our authors and film-makers will have it used against them as a weapon more often than they will benefit from it. If Hollywood can find the smallest scrap of cultural reference in a New Zealand work that treads on their "intellectual property", they will have no hesitation in making the environment for NZ producers inhospitable and costly. Most of the time, we will be on the wrong end of the deal; it's a simple matter of force of numbers, money and lawyer-power.

Permitted acts

With that in mind, we should be negotiating and tying down as part of this treaty, with strict definitions, "fair" or "permitted" use - preferably with a shift in the direction of toleration for parody, irony and other creative adaptation using elements of established work and for the burgeoning craft of the "mash-up".

The right to adapt and re-purpose works in this way seldom materially reduces the saleability of the original work – in fact it may encourage it – and should not be strangled in the cause of profits for intermediaries. Science, art and civilisation itself progresses by "standing on the shoulders of giants", in Isaac Newton's memorable phrase.

The validity of this model has most recently been recognised by Parliament's Commerce Select Committee in recommending against patents on computer software.

Now we have new technological tools to bring such adaptation within the reach of many more people, the right to fence off source material against adaptation should be cut back, not extended or made the subject of more stringent penalties.

Injunctions

Provision for injunctions to stop an alleged offence, without giving the defendant a right to be heard, amounts to "guilt upon accusation" and offers itself as a powerful commercial weapon to obstruct, not encourage, innovation. Such an accommodation

should be resisted. Before an infringement can be stopped and/or punished it must be *proved* to be an infringement; this means offering both sides the right to put their case.

Such an injunction *inaudita altera parte* can be used as a weapon to obstruct freedom of speech. Its inclusion in the ACTA terms should be resisted.

In particular, the application of injunctions to enforce the takedown of material from a website without proof of infringement should be resisted.

Sanctions should be levied against alleged right-holders who make unsubstantiated accusations of infringement or falsely claim right of ownership in a work and the falsely accused party should be compensated for any loss of earnings suffered through being enjoined to take down their material.

Effect on domestic law
We hear repeatedly from negotiators "if an activity is legal under New Zealand law it will continue to be legal after ACTA is signed", yet we also hear that amendments to our law may be required in the wake of signing the agreement. These positions appear contradictory. I strongly support the first position. The interested people of New Zealand (including many of the artists and writers whose interests you claim ACTA will protect) fought hard for an amended version of Section 92A of the Copyright Act. I would like to see this position held, not given away or cut back in the course of ACTA negotiation.

Liability of third parties (ISPs)
An internet service provider's position as neutral conduit, uninvolved in what its customers do, should be preserved. The owner of a vacant lot where a market is held may "know" in general terms that illegal buying and selling could be taking place; but it is not the owner's responsibility to ferret out the dishonesty or to levy or administer punishment of the culprits.

It should be the same with ISPs. They should not be held liable for (or forced to become involved in policing) what their customers do.

Most ISPs' terms of use include prohibition on illegal activity, and they are quite capable of calling a user to account if and when an offence of appropriate gravity is *proved.*

Safe harbour for ISPs should not be contingent on their performing surveillance or record-keeping on alleged offences or levying penalties against infringing users.

In practice, ISPs often have not the technical facilities to sort out one user's stream of content from another's and identify what is in every data packet. To require then to do so would raise their costs and punish their innocent customers with higher charges and/or degraded service. It also poses risks that the privacy of innocent users will be invaded.

Termination of internet access
Access to the internet is close to becoming a basic ingredient of functioning in today's world; any proposal to punish internet users with disconnection or cancellation of

their internet account should be resisted as a penalty out of all proportion to the offence.

Technological protection measures

The proposed ban on equipment or instructions for circumventing technological protection mechanisms (TPMs) poses the risk of interfering with permitted uses of copyrighted content under New Zealand's domestic legislation (Copyright Act, Sections 42, 43, 43A and 226E). This is a particular case of a growing danger also pointed to by Lawrence Lessig, originally in his book *Code and other Laws of Cyberspace* (1999) – that domestic law could become powerless in the face of instructions transnationally hard-coded into technological devices and recording media and effectively making certain acts impossible. The ingenuity of digital experts often finds a way round such "code"; I would not wish the commission of legal acts to be circuitously made illegal by prohibitions such as those contemplated under ACTA.

A final comment

It has always puzzled me that where illegal pornography is concerned we are told that free-of-charge trading of material over the internet through peer-to-peer networks and the like encourages its consumption and production and thereby the abuse of children, adults and animals to create it. If those who exchange and consume such material were stopped, we are told, its creation would become less lucrative and the abuses would be reduced. Implicit in this argument is the assumption that even free trading of the material encourages payment for additional quantities of it, thereby making the exploitation profitable.

Yet with regard to legal movies, images and sound recordings we are told that continued free online file-sharing through peer-to-peer networks and the like is inflicting massive damage to the producing and distributing industries and that if this continues it will eventually become uneconomic to produce any music or movies at all.

Which of these contradictory positions is true? Other ACTA submissions I have seen from artists suggest that the former is closer to the truth than the latter; that free distribution can encourage rather than discourage purchase of further material, given appropriate business models and price-points.

This would suggest that excessive penalties and bureaucratic mechanisms imposed on exchange of copyrighted material may be misconceived and counterproductive to the thriving of the legitimate industry, estranging the very consumers the industry and artists are seeking to encourage.

Thank you for your attention to this somewhat hurried and rambling account.

Regards,

Stephen Bell