

Submission on consultation document: *Implementation of the Trans-Pacific Partnership Intellectual Property Chapter*

Your name and organisation

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Responses to consultation document questions

1

Have the overarching objectives been framed correctly for this policy process? If not, what would be more appropriate objectives?

I would suggest that two of the three stated objectives would benefit from some reframing.

The second objective is internally inconsistent. Every change discussed in the consultation document, and every additional change proposed for the TPP implementation bill but not included in the consultation, strengthens, broadens, or lengthens the rights of IP owners at the expense of everyone else. This has potentially deleterious implications for other New Zealand stakeholders and important societal interests (such as research, education, and access to culture). It is therefore not possible to make *minimal* changes which are both TPP compliant and which simultaneously maintain an appropriate balance between right holders and users. While (as noted below) I commend the attempt to ensure that there are appropriately broad flexible exceptions to both the new anti-circumvention laws and performers' rights, even so, the proposed changes shift the internal balance of New Zealand's IP system significantly in favour of right holders (especially once copyright and patent term extension are taken into account).

New Zealand should be more ambitious in considering any required reform of IP law: it should take steps to ensure protection for the interests of other stakeholders and societal interests at the same time that it makes changes which expand or extend IP rights. Copyright term, for example, should not be extended unless and until New Zealand has appropriate exceptions in place to mitigate the damaging impact of that term extension including appropriately flexible library and preservation exceptions.

A more ambitious agenda need not imply excessive delay in presenting an implementing bill. New Zealand has considerable recent experience and discussion in the United Kingdom (around new exceptions introduced in recent years), Canada (via both legislative and judicial consideration), and Australia (especially via the Australian Law Reform Commission) on which it can draw in developing its own solutions.

Expanding and extending IP rights *without* simultaneously considering the adequacy of exceptions and limitations carries risks for New Zealand's national interests. It is harder to reduce or qualify property rights than to extend them: if New Zealand extends rights without qualification it may find it difficult to introduce necessary exceptions later, and, as a result, find itself locked into a stronger system than serves local interests. Further, the TPP includes investor-state dispute settlement in Chapter 9. Future reforms which are considered by right holders to constitute an expropriation (even an indirect regulatory expropriation) could be challenged, and while such challenges ought not succeed, even unsuccessful challenges are

expensive and legally complex. It would be better, therefore, to consider exceptions and limitations *prior* to Chapter 9 of the TPP coming into effect.

The third objective I would also frame differently. '*Certainty*' is not the appropriate goal in designing IP law. IP law and IP rights significantly affect the ability of individuals and firms to engage in innovative, creative activities. By definition, innovation and creativity are sometimes surprising and disruptive. "No you can't do any activity not already addressed in the legislation" is certain, but not innovation-enabling. Further, experience suggests that the attempt to provide certainty is a fruitless errand: changes in business practice or changes in technology frequently undermine 'certain' rules (such as the specific copyright exceptions enacted by Australia in 2001 and 2006, which have already judged by the Australia Law Reform Commission as too technology-specific and ineffective). The goals should be *predictability and adaptability*, rather than certainty.

Technological protection measures

2

Do you agree with the exceptions or limitations proposed for TPMs? What would be the impacts of not providing these exceptions? Please be specific in your answers.

I agree with New Zealand's intention to allow **circumvention** for the purposes of engaging in non-infringing acts. Acts which do not infringe copyright and acts permitted under Part 3 are not legitimately within the control of copyright owners under the *Copyright Act*. Allowing circumvention in these circumstances does not undermine copyright enforcement.

I also agree with New Zealand's intention to allow for the supply of circumvention devices or services for non-infringing purposes and for the purposes of performing permitted acts under Pt 3. Failing to match exceptions for *circumvention* with exceptions that allow the *supply* of tools or services to individual or institutional users to enable exceptions converts copyright exceptions into a geeks-only charter. As the Australian House of Representatives Legal and Constitutional Affairs Committee noted, requiring technical skills for the use of copyright exceptions would be a 'lamentable and inexcusable flaw ... that verges on absurdity'. Further, failing to provide an exception to allow legitimate businesses and institutions *in New Zealand* to enable circumvention forces individuals to look elsewhere for assistance to undertake legitimate activities: which means (a) providing commercial opportunities to companies based overseas that are not available to New Zealand businesses, and/or (b) encouraging individuals to look to less well-regulated sources of circumvention devices and services, possibly at some risk of their own cybersecurity.

I note however that New Zealand (it appears) intends to address all potential concerns regarding the potential of parties to use anti-circumvention law to assert rights of control beyond those provided for by copyright law by way of exceptions. Relying on exceptions has implications for the burden of proof: defendants bear the burden of proving exceptions; claimants bear the burden of proving liability.

New Zealand might consider, in addition, treating certain technologies as falling outside the prohibition altogether. Extending potential breaches to all cases involving *access* to *computer programs* (depending on how 'access' is understood) creates the potential for copyright law to regulate well outside the area intended by the preambular text of art 18.68.1. A number of alternatives could be considered to exclude technologies unrelated to copyright owners' legitimate goals of enforcing copyright against unauthorised consumptive use of copyright content, and to ensure that copyright does not become an indirect means of limiting competition in markets for non-copyright goods and services.

First, New Zealand could consider defining *access* so as clearly to exclude activities which do not involve consumptive access to copyright content, or, in other words, direct visual or aural presentation of copyright content for purposes of enjoyment of that content. Activities that

involve engaging or activating software, for example, embodied in other products (like cars, or phones, or tractors), for the purposes of making the product work, or for the purposes of analysis or repair (for example), ought not be treated as actionable 'access'.

A second alternative is to exclude some technologies from constituting technological protection measures. Australia's implementation of equivalent provisions in the *Australia-US Free Trade Agreement* excluded certain technologies from the scope of access control technological protection measures: see *Copyright Act 1968* (Cth) s 10 (definition of access control technological protection measure). Notably Australia excludes access controls from being TPMs to the extent that 'if the work is a computer program that is embodied in a machine or device—[the access control] restricts the use of goods (other than the work) or services in relation to the machine or device'. This exclusion is intended to prevent copyright law being used to control markets for spare parts and secondary goods (like printer cartridges etc). The exclusion is consistent with AUSFTA (and the TPP) because the preambular text in TPP art 18.68.1 clearly suggests that the prohibition is intended only to ensure protection for measures that authors, performers, and producers of phonograms use *in connection with the exercise of their rights and that restrict unauthorised acts*. The Australian Act also confines protection to measures that are used *in connection with the exercise of copyright* – a qualification that has not been interpreted by the courts but requires a link with copyright.

3

Do you agree that the exceptions proposed for TPMs should apply to both prohibitions (i.e. circumventing a TPM and the provision of devices or services that enable circumvention)? Why / why not?

Yes. As noted above, I also agree with New Zealand's intention to allow for the supply of circumvention devices or services for non-infringing purposes and for the purposes of performing permitted acts under Pt 3. Allowing regulated activity within New Zealand – ie supply *for permitted purposes* – does not undermine copyright enforcement. General supply for any purpose, or unqualified supply likely to undermine the rights of copyright owners would still be actionable.

4

Do you agree that, if our proposals are implemented, the current exception allowing a qualified person to circumvent a TPM that protects against copyright infringement to exercise a permitted act under Part 3 would no longer be required? Why / why not?

Yes.

It would be open to businesses supplying circumvention devices or services to maintain their own systems of record-keeping in order to ensure they can readily establish that supply has only been for permitted purposes.

5

Are there any other exceptions or limitations to the TPM prohibitions that should be included in the Copyright Act? Please explain why any additional exceptions would be necessary.

New Zealand might also consider exceptions for the following:

- Access where a software or hardware TPM is obsolete, lost, damaged, defective, malfunctioning, or unusable, and where support or a replacement TPM is not provided;
- Access where a TPM interferes with or causes damage or a malfunction to a product, or where circumvention is necessary to repair a product.

Australia included exceptions of this kind in response to examples around the time of the

legislation (2006) about 'abandonware' and incidents such as the Sony Rootkit case.

There are a number of activities not presently covered by copyright exceptions in New Zealand which ought arguably to be allowed under both copyright and anti-circumvention laws, based on recent discussions by the Australian Law Reform Commission. These include, for example:

- making back-up copies of copyright material other than computer programs (such as electronic books);
- making personal copies of copyright material other than sound recordings (for example, literary or artistic works being copied to tablets and other personal devices);
- copying by libraries, galleries and archives in accordance with best practice preservation practices and for the purposes of administration of collections (the ALRC has discussed these exceptions in some detail, but in short, best practice preservation is not confined to replacing already damaged material, but involves making low cost digital copies for long term storage in advance of damage or loss, and in a range of formats).
- Use for the purposes of parody or satire, and/or in the context of other non-commercial user-generated content.

New Zealand has a set of specific exceptions in copyright which arguably suffer from the same weaknesses as the ALRC identified in Australian copyright law: in particular, a lack of flexibility in the face of economic and technological change. Like Australia, New Zealand should consider the introduction of a flexible and open-ended exception, and should engage in that consideration *at the same time* as it considers any TPP-related moves to expand copyright protection. It will be significantly more difficult to implement reform to exceptions at a later time, because it is hard to remove or qualify rights that have been granted.

6

Would there be a likely adverse impact on non-infringing uses in general if the exception for any other purpose that does not infringe copyright was not provided for? Please be specific in your answers.

It is important that a general exception of this kind be included in any legislation, so that individuals engaged in non-infringing activity have the assurance that they will not be civilly or criminally liable for their activities. The alternative of requiring that individuals apply for government's permission prior to engaging in circumvention (as occurs in the US for example) creates costs for everyone (government, copyright owners, *and* users). Notably, a regulation-making power has not been a successful model in Australia, where the regulation-making power to create new exceptions has not been used despite the existence of outstanding requests for exceptions.

7

Should there be a regulation-making power to enable the exception for any other purpose that does not infringe copyright to be clarified, and if so, what criteria should be considered?

It is not entirely clear what is intended by such a regulation-making power: whether it is intended to (a) create new specific exceptions, (b) limit exceptions or (c) provide some kind of 'assurance' to institutions or individuals that their activity is in fact non-infringing and legitimate. The New Zealand government should make clear in its own mind exactly what purpose the regulation-making power is intended to serve, and how it would be envisaged to work. As noted above, the Australian regulation-making power has been unsuccessful in practice.

Patent term extension for delays in patent grant

Patent term extension for pharmaceuticals

Performers' rights

8 Do you agree that a performer's moral rights should apply to both the aural and visual aspects of their live performance and of any communication of the live performance to the public? Why / why not?

See below (next question).

9 Should performers' moral rights apply to the communication or distribution of any recording (i.e. both sound recordings and films) made from their performances, rather than just sound recordings as required by WPPT? Why / why not?

This response is to questions 19 and 20. Both of these questions raise the same question: how to implement performers' rights in a non-confusing way, consistent with broader objectives stated by New Zealand for implementation of the TPP in a way that minimises the impact of changes to IP settings and maintains a balance between rights holders, users (and societal interests).

Three background matters are relevant to implementation of the WPPT in the context of TPP implementation. First, while the US has in its FTAs generally required countries to ratify the WPPT, the US has not reformed US copyright law to implement the WPPT. The US recognises some performers as joint authors, and has no separate moral rights regime addressing the rights of performers. There is some irony in the way that countries (such as Australia) have implemented extensive performers' rights regimes in response to US FTAs given the US' own rather minimal approach. Second, performers' rights in the context of audio-visual recordings have been particularly controversial; although a the Beijing Treaty has been concluded (many years after the WPPT) it remains controversial and has not yet achieved sufficient ratifications to come into force. Third, more and more people have the capacity to make films of assorted (professional and non-professional) performances. The performers' rights being contemplated are not confined, in their impact, to professional or commercial contexts. Given these three factors, there is some merit in a minimal, incremental approach to implementation of performers' economic and moral rights.

Unfortunately, it is difficult to implement these performers' rights in a non-confusing way: given the three different types of rights set out in the consultation paper, the dual context of *live* and *recorded* performances, the distinction between *aural* and *visual* aspects of both performances and recordings, *and* the fact that any rights inevitably overlap with and potentially conflict with a plethora of other rights holders in both copyright works, and films/sound recordings.

I would therefore query the reasoning that suggests extending moral rights to visual aspects of performances on the basis that this is going to be less confusing. Adding moral rights relating to the visual aspects of a performance would have two expansionary effects:

- It would expand the *number of performers* granted rights, to include performers who contribute only to visual aspects of a performance (such as dancers); and
- It would *expand the scope* of the right and the kinds of activities giving rise to a claim: for example, to cover a range of further aspects of presentation.

Multiplying the number of performers with the ability to make moral rights claims will not, in practice, make things simpler at least in practice. Distinguishing between aural and visual

	<p>aspects of performance <i>is</i> confusing, but so is distinguishing between live and recorded performances, and the solution is not to extend rights to visual aspects generally, given the potential for impact on both commercial and non-commercial film-making.</p> <p>The better approach could therefore be to proceed with the extension of rights incrementally: start with ‘aural performers’ (ie contributors to the aural aspects of a performance) and consider further extensions at some future point.</p>
10	<p>Do you agree or disagree with any of the exceptions or limitations proposed for a performer’s right to be identified? Why?</p> <p>See below (question 24)</p>
11	<p>Are there any other exceptions or limitations to a performer’s right to be identified that should be included in the Copyright Act? If so, can you please explain why they would be necessary.</p> <p>See below (question 24)</p>
12	<p>Do you agree or disagree with providing for any of the exceptions or limitations proposed for a performer’s right to object to derogatory treatment? Why?</p> <p>See below (question 24)</p>
13	<p>Are there any other exceptions or limitations to a performer’s right to object to derogatory treatment that should be included in the Copyright Act? If so, please explain why they would be necessary.</p> <p>It is difficult to assess what exceptions should or should not exist for <i>performers’</i> moral rights outside of a more general review of the success or otherwise of the exceptions to New Zealand’s existing moral rights. Extending similar rights and exceptions <i>without</i> deciding whether the current system works for authors, directors, and those impacted by authors and directors’ moral rights seems incomplete – noting, again, that this is not an area where the US is in a position to demand immediate action (since it has no specific moral rights regime). I do not have information on the success or otherwise of New Zealand’s present approach, but it is not intuitive that the relatively detailed, complex UK approach makes sense in a smaller jurisdiction like New Zealand.</p> <p>From the perspective of an Australian commentator, the most obvious absences from the proposed exceptions are:</p> <ul style="list-style-type: none"> • Exceptions for acts (relating to the right of attribution <i>and</i> integrity) occurring in the context of employment relations or other contractual relations; • Exceptions to the right of integrity for criticism, review, or parody/satire. <p>I am not familiar with New Zealand’s current methods for addressing moral rights in the context of employment relationships. I also note that in Australia moral rights are subject to an open-ended exception (the ‘reasonableness’ exception) which ensures no infringement of moral rights in a context where an alleged infringer has acted ‘reasonably in all the circumstances’. This has not created an infringers’ charter: in the sense that both the right of integrity and the right of attribution have been found to be breached in cases in Australian courts.</p>
14	<p>Should the new property rights for performers be extended to apply to the recording of visual performances in films? Why / why not? (Please set out the likely impacts on performers and</p>

producers, and any others involved in the creation, use or consumption of films.)

It seems to me that considering extension of performers' proprietary rights to films where this is not required by the treaty is inconsistent with New Zealand's expressed goals for TPP implementation outlined above. The issues are arguably different in relation to film:

- In the context of *professional* films, there are a range of established industry practices that ought to be taken into account (and may provide a substitute for performers' rights, although I do not have sufficient experience or information to reach a concluded view on this point);
- In the context of *non-professional* films, any extension of proprietary rights would significantly complicate matters: including for user-generated content (in a context where it appears that New Zealand does not have copyright exceptions tailored to address issues around user-generated content).

Most importantly, economic rights in copyright should not be simply handed out for the sake of some goal of elegance or legislative coherence without positive proof that they solve some problem. Copyright rights are long, and broad, and strong, and intended to act as an incentive for creation. In the absence of some proof of a need for more incentives for performances embodied in film (and I am not aware that there is any lack of new films or new performances), there is no reason to create a new property regime. Certainly the onus is on anyone asserting such rights are necessary to present evidence to that effect.

15 Do you agree or disagree with any of the exceptions or limitations proposed above? Why?

(see below next question)

16 Are there any other exceptions or limitations to the new performers' property rights that should be included in the Copyright Act? If so, can you please explain why they would be necessary.

It would seem appropriate for similar exceptions to apply to economic rights in sound recordings of performances as apply to other copyright rights in sound recordings. I do not have information on whether the specific list of exceptions to sound recording copyright is satisfactory, but as noted above, the Australian Law Reform Commission has in Australia found that a similar list of exceptions does not provide sufficient flexibility in the digital environment. The introduction of a new set of economic rights is an appropriate time to review exceptions more generally: I would therefore suggest, as noted above, that TPP implementation ought to be accompanied by a more general debate on the adequacy of New Zealand's copyright exceptions (including consideration of whether a flexible exception is needed as has been proposed after extensive review in Australia by the ALRC).

17 Do you agree or disagree with any of the proposals above? Why?

18 Are there any other amendments that need to be made to the Copyright Act, and in particular to Part 9, to clarify the new performers' property rights? If so, can you please explain why they would be necessary.

I note that the consultation document does not outline whether New Zealand intends to make specific provision for the management of rights (including in particular moral rights) of groups of performers.

Other comments

A broader consideration of IP law (particularly patent and copyright law) is urgently required before any of the contemplated changes are implemented.

I would suggest that the New Zealand government should (re)consider the timing and manner of these proposed changes to IP law.

First, it is clear that *no* changes to IP law should be made unless and until New Zealand is certain *both* that the TPP will come into effect (ie, that a sufficient number of countries will ratify it, including the US and Japan), *and* that the benefits of the agreement as a whole outweigh the costs and that New Zealand will therefore ratify the TPP.

More importantly, however, there is legitimate cause for concern in the way that the IP changes are being considered: namely, in isolation from broader policy questions. This is true in the area of copyright but is even more obviously true in relation to patent which is no more or less than economic policy. A number of the questions raised in the discussion of *patent* changes can and should be the subject of economic modelling of their impact (some ideas for ways to conduct this would be found in the final report of Australia's Pharmaceutical Patent Review Committee: Harris, Tony, Nic Gruen and Dianne Nicol, *Pharmaceutical Patents Review Report* (Commonwealth of Australia, 2013)). Extensions of patent term for even a year can be of immense economic significance for a country's medical system especially in the context of subsidised access to medicines. No changes should be made without economic modelling (and certainly no arguments for broader or longer extensions than contemplated in the consultation document ought to be entertained without economic modelling of the costs and benefits for New Zealand).

Finally, New Zealand would be well advised to take its time and implement the IP provisions of the TPP carefully and with a full review of the changes and the legislative context in which those changes are being made. In particular, as discussed elsewhere in this submission, changes that extend IP rights ought not be made without considering whether countervailing extensions or reform of exceptions and limitations are required.