



SUBMISSION FROM SKY NETWORK TELEVISION LIMITED

TO

THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT

ON

"Targeted Consultation Document: Implementation of the Trans-Pacific Partnership Intellectual Property Chapter"

30 March 2016

1. INTRODUCTION

- 1.1 This is a submission by SKY Network Television Limited (**SKY**) on the Ministry of Business, Innovation and Employment (**MBIE**) discussion paper "Targeted Consultation Document: Implementation of the Trans-Pacific Partnership Intellectual Property Chapter" (**consultation paper**).
- 1.2 Any questions regarding this submission should be directed to:

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- 1.3 SKY is grateful for the opportunity to provide a submission on the consultation paper. SKY can provide further information if required.

2. SUMMARY

- 2.1 Copyright and the protection of TPMs are important for investment and innovation, and TPMs are critical to the commercialisation of copyright works in the digital world. TPMs help facilitate the use of a digital environment to provide new information and services to businesses and consumers (see sections 3, 4 and 5 below).
- 2.2 New Zealand's copyright law is one part of a wide international framework of law that protects copyright and TPMs. Given this, and the various related treaty obligations, New Zealand needs to take a careful approach to implementing the intellectual property aspects of the TPP (see paragraph 3.4).
- 2.3 The TPP requires changes to be made to New Zealand law, and New Zealand should comply with its TPP obligations. We agree this is not the time to introduce new changes that are not required by the TPP. There may be submissions seeking unrelated changes, including changes to the parallel importing rules and the introduction of a US style "fair use" doctrine. Such unrelated changes should be avoided until a proper review process, with proper consultation, can take place (sections 6 and 7 below).
- 2.4 The TPP is explicit about the new protection that is required for access control TPMs. In our view MBIE's proposed approach to exceptions and limitations does not comply with the TPP and would be a significant and dangerous departure from the approach taken by other countries. This is unwise and inappropriate (see section 8 and Appendix A).
- 2.5 In particular this suggestion that an exception would be introduced "*for any other purpose that does not infringe copyright*" would not comply with the TPP and would have significant unintended consequences (see section 2 of Appendix A, and Appendix B).

3. WHY COPYRIGHT IS IMPORTANT

- 3.1 **Copyright enables NZ authors to commercialise:** Copyright aims to incentivise the creation of original works by allowing authors and owners to recover the investment in creating those works. This is achieved by giving authors and owners control over the work (so that they can require people to pay for the work and prevent others from doing restricted acts in relation to it), and facilitating a system of licensing.
- 3.2 **Copyright is essential to investment:** Because of this, copyright is essential to investment in development and innovation.¹ It is particularly important in relation to small businesses and small countries like New Zealand. This is because large international companies are often able to make goods and services available to larger audiences more quickly and at a cheaper price than smaller companies. So it is only by having strong, internationally recognised intellectual property rights that small companies from small countries like New Zealand can bring their innovative products and services to the world stage.
- 3.3 **Copyright is important for 'NZ Inc':** From IT start-ups, to exercise companies that deliver their programmes on-line, the New Zealand film industry, Booker Prize authors and international pop stars, the most well-known examples of 'NZ Inc' all rely on strong protections for copyright (and the ability to license that copyright in order to commercialise it) to be successful.
- 3.4 **Copyright is International:** Copyright is international, with most country's copyright law providing protection for foreign works on a reciprocal basis. New Zealand is a beneficiary of this international framework, since New Zealand works are protected as foreign works in most other countries. As part of this, New Zealand should follow an approach to copyright and the protection to TPMs that is consistent with the approach taken by other countries. Due to the international aspects of copyright and the protection of TPMs, and the various international treaties that reinforce this, it would be unwise and inappropriate to take a new and experimental approach in this area.

4. COPYRIGHT IN A DIGITAL WORLD

- 4.1 Digital technology has created huge growth in the information and services that are available to businesses and consumers. There are substantial benefits from this growth, and these benefits will increase as more services are developed and used. At the same time digital technology has created new challenges for rights holders, since digital technology enables immediate and perfect reproduction of copyright material by basically everyone, and there often is no physical item attached to the copyright work, so the author cannot rely on traditional property rights to prevent the work from being "stolen". Copyright therefore becomes particularly important to authors of digital/electronic works.
- 4.2 To counter the unease and risks associated with making digital copies available, rights holders have developed devices and technologies to protect copyright material within the digital environment. These are commonly referred to as technological protection measures or TPMs,

¹ Some parties inevitably argue the opposite, but these tend to be self-interested parties like large multi-national technology companies (that are interested in commercialising and monetising other parties' creations) or user-organisations (that are interested in getting access to content and technology cheaply or for free) rather than local developers or innovators.

and are now a very common part of the digital world. The development of these TPMs is however countered by the corresponding ability of others to circumvent these devices and to distribute circumvention devices or information about them on the internet. In response to this situation, and to enable rights holders to maintain control of the rights that are protected by copyright, many countries have introduced limited rights and remedies in relation to the circumvention of TPMs. At an international level the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (**WPPT**) recognise the need to protect TPMs.

- 4.3 The protection given to TPMs helps facilitate the use of the digital environment by copyright holders and their licensees. For example, the ability to use TPMs enables:
- (a) owners of computer programs to distribute digital copies of their programs, knowing that unauthorised use or reproduction is controlled by TPMs;
 - (b) copyright owners and their licensees to invest in and offer services on a limited geographic basis targeted at a particular country, knowing that the distribution and reproduction of the copyright material outside the target country is controlled via TPMs. This facilitates, for example, internet based services to be designed and tailored to the particular legislative or regulatory rules of a target country or to take account of the languages and culture of the country (while at the same time keeping technology compliance, marketing, licensing and other costs limited to those that are needed for that country only); and
 - (c) copyright owners and their licensees to have confidence in using digital technologies as part of their standard licensing practices, whereby copyright such as books and films are licensed on a territory by territory basis to a local licensee who is committed to appropriate local marketing and distribution.

5. HOW TPMS ARE CONNECTED TO COPYRIGHT

- 5.1 **Different stages in the life cycle of copyright material:** In considering the protection of TPMs and the exceptions to that protection, it is helpful to consider and understand the lifecycle of copyright material and the different and separate stages involved in that lifecycle, as follows:
- (a) **Creation:** Firstly, the copyright work needs to be created or generated in some manner;
 - (b) **Upstream availability or access:** Secondly, the owner of the copyright material decides whether or not to put that material into public circulation. Copyright essentially allows the copyright owner to determine and control if and when the material that has been created is made available and if so to whom and on what basis. For a book author, this is a decision to publish or not, and if the decision is to publish whether to sell the book or give it away, whether to publish in physical or electronic form, and whether the book is sold only in New Zealand or in multiple countries. This might involve engaging a publisher or distributor to carry out the decisions made by the copyright owner;
 - (c) **Downstream use and reproduction:** Thirdly, after copyright material has been made available or released to the public, that material can be accessed/used and, subject to copyright, reproduced to some extent (principally by virtue of statutory permitted rights).

Not all use infringes copyright, so listening to a CD or reading a book is using copyright material without infringing copyright.

- 5.2 **Different types of TPMs:** As the consultation paper notes, there are two main types of TPMs: (a) those that control access (**access TPMs**) and (b) those that protect against copyright infringement (**copy control TPMs**). The distinction between these two types of TPMs is important to understand and maintain, since the rights of access to a work and the right to use a work are two different matters.
- 5.3 **Link between TPMs and copyright:** While the infringement of copyright and the rules protecting the circumvention of TPMs are distinct and separate from one another in one sense, the protection of TPMs exists for the purpose of better protecting copyright in the digital environment and enabling recovery of investment in the creation of digital works. That is the reason that we have protection for TPMs; it is a recognition of the challenges that digital technology poses for copyright owners and their licensees, and that protection supports the measures used by copyright owners and their licensees to control access and reproduction of copyright material in the digital environment, and thereby recover their investment. Therefore, the protection of TPMs is inextricably linked to copyright protection. Put another way, TPMs acknowledge the fact that digital content is not embodied in a physical medium, so it may not attract the same protection as physical property under the general law. For example, there are separate protections against stealing a book under the Crimes Act, but the only protection against stealing access to an e-book is copyright law (while the computer crimes in the Crimes Act 1961 provide some limited protection, the proposed exceptions to TPM circumvention prohibitions could create exceptions or defences to these computer crimes – see further explanation in paragraph 2.9 of Appendix A). In the digital world, a TPM performs the same function as a cash register in a book store performs in the physical world.
- 5.4 **TPMs are particularly important to distributors:** Distributors of digital content (ie licensees) like SKY and other New Zealand broadcasters and content providers have a particular interest in the protection of TPMs. This is because a distributor has upstream obligations to the copyright owner (ie it needs to be able to comply with the terms of its licence), and TPMs are essential to the distributor's ability to comply with the limited licence they are granted. For example, SKY has obligations in some of its licences for TV programmes to only make those programmes available on a subscription basis. So it uses access TPMs (like a username and password) to ensure that it only communicates the licenced copyright works to the correct sector of the public. If these TPMs were circumvented, SKY would be communicating a copyright work to the public in breach of its licence and that may constitute copyright infringement. This would be a separate breach to any infringement by the person that accessed or copied the copyright work by circumventing the relevant TPM, but the TPM is equally important to the prevention of both kinds of infringement.
- 5.5 **TPMs enable a local rights holder to take action to enforce a legitimate interest:** TPMs also give standing to local licensees to take direct action to protect their legitimate interests in copyright works. In New Zealand an action for copyright infringement can only be brought by the copyright owner or an exclusive licensee. In reality though, overseas copyright owners are often not interested in taking action for infringement in New Zealand, and the concept of an "exclusive

licensee" in the Copyright Act is relatively narrow. TPM protection can sometimes be the only recourse that a local distributor or licensee has to prevent unauthorised access or reproduction of the content they have licensed.

- 5.6 **TPMs are beneficial and effective:** Although critics of TPMs may argue that TPMs can result in unjust situations (eg electronic files like a digital music libraries not being able to be passed to next of kin when you die, or not being able to correct security holes), these are generally isolated circumstances rather than blanket or widespread problems. Generally, TPMs are effective and are linked to protecting legitimate rights (being either upstream rights to control availability or access or downstream rights to control use or reproduction) and ensuring compliance with contractual obligations. TPMs are very common and include things like passwords, paywalls, time-limited access (eg "renting" a movie on iTunes), encryption, and so on. They enable and facilitate e-commerce and many copyright owners would not allow their works to be distributed electronically without effective TPMs.
- 5.7 **TPMs and SKY:** As a New Zealand distributor of overseas copyright works, Sky (along with the other New Zealand broadcasters and content providers) relies heavily on TPMs to protect its rights, and also to comply with its contractual obligations. Some of these obligations relate to only making content available on a paid basis, only using a particular distribution means (eg streaming) and/or only making content available to New Zealand viewers. SKY cannot meet its obligations to rights holders if it cannot restrict access and use via effective TPMs. In many cases, circumventing a SKY TPM would result in SKY breaching its licence, and thereby being in breach of copyright. Similarly, overseas content providers (like Netflix) apply TPMs to reflect the scope of their licences. If TPMs were too easily circumvented, then New Zealand viewers would avoid paywalls or flock to overseas services to avoid paying access charges. This would ultimately reduce both subscription and advertising revenue to the point that New Zealand broadcasters and content providers might not be financially viable. In turn, this leads to reduced availability of New Zealand specific content (local productions would not get made), and reduced funding available to New Zealand sport (a significant portion of which is currently provided by New Zealand broadcast rights payments). While the global model of breaking down rights by territory has its critics, that model is largely set by overseas copyright law and large global rights holders (that are many times bigger than SKY), so any change that would bring New Zealand out of step with that system should be approached with extreme caution.

6. COPYRIGHT IN NEW ZEALAND

- 6.1 **Copyright law in New Zealand:** Copyright law in New Zealand has not kept pace with technological change. There has not been a major review of copyright legislation in New Zealand since 2008 (which was when the Copyright (New Technologies) Amendment Act was enacted, at the end of a review which started in 2003). It is clear that a review is well overdue. When compared to other common law countries the New Zealand Copyright Act has significantly less protection for rights holders (see Appendix B).
- 6.2 **The current protection for TPMs under New Zealand law:** The current protection for TPMs under the New Zealand Copyright Act is limited to providing services or devices that enable circumvention of copy control TPMs. When compared to Australia, the UK, Singapore and

United States, New Zealand is the only country that has granted a blanket exception to the protection for copy control TPMs for the exercise of permitted acts (see Appendix C).

6.3 **Permitted acts:** Part 3 of the Copyright Act sets out a limited number of exceptions to copyright. These all focus on the downstream use and reproduction of copyright material, and seek to ensure that copyright does not prevent or interfere with what policy makers have determined are beneficial uses in particular limited circumstances for particular groups (that should be allowed as a right, and not restricted by copyright). It is important to understand that none of these exceptions in Part 3 interfere with the author's upstream right to control access or the public availability of the copyright material. There is good reason for this:

- (a) to interfere with the upstream right would be a direct attack on the copyright owners rights, and would substantially undermine copyright (it would be like interfering with an author's right to decide when and how to publish a book, or allowing a journalist to steal the book from a store in order to quote it in a newspaper article);
- (b) to interfere with the upstream right may result in inadvertently causing a distributor to breach the terms of their licence and thereby infringe copyright (as explained in paragraph 4.4 above).

6.4 **Exception for physical copies of films:** We were pleased to note that MBIE staff confirmed at the TPP Workshop in Auckland on Monday 21 March that there was no intention to change the current exceptions for TPMs relating to physical copies of films. In other words there was no intention to extend this exception to any non-physical situation. SKY has relied on that assurance. We read the exception for TPMs relating to physical copies of films to be necessary in order not to conflict with parallel importing of physical goods as implemented by the Copyright (Removal of Prohibition on Parallel Importing) Amendment Act 1998. That Amendment Act (and related provisions in the Trade Marks Act 2002) permit parallel importing of *objects*. SKY's firm view is that parallel importing of digital services is not currently permitted under New Zealand law, and it would be concerned if the effect of implementing the TPP in New Zealand was to expand the parallel importation rules, as this would have significant impacts on SKY's (and other broadcasters' and content providers') ability to purchase New Zealand rights to content from overseas distributors (and the change would probably also go against the objective of making the minimum changes necessary to implement the TPP).

6.5 **Extension of parallel importing to digital services is problematic:** The extension of parallel importing concepts to digital services problematic. Parallel importing is justified based on an exhaustion of rights principle or first sale doctrine, which says that once a product protected by an intellectual property right has been sold to the public, the rights of commercial exploitation over that product (ie the actual product that is sold) can no longer be exercised by the rights holder, as they are exhausted. It is not straight forward to apply this principle to digital services which are not embodied in a physical product.

7. APPROACH TO CHANGE

7.1 **NZ is committed to shifting the "balance":** As a signatory to the TPP, New Zealand has committed to introducing new protections on TPMs. This inevitably means a subtle shift in the

"balance" between rights holders' and users' interests in New Zealand copyright law in favour of rights holders, but this is simply part of the TPP "deal", and we think it is fair to say that the TPP requirements (and the requirements of the other treaties) cannot be implemented without shifting that balance. We explain this further in paragraph 1 of Appendix A.

7.2 **Only necessary changes should be made:** That said, we appreciate that the current review of copyright law is simply to make the changes necessary to implement the TPP (and the other relevant treaties), and think that approach is correct. We submit that (especially given the aggressive timeframe for implementation), it would be unwise and inappropriate to make more changes than are necessary to give effect to the TPP at this stage.

7.3 **We should avoid getting caught up in a debate on wider issues:** SKY is very supportive of a broader review of New Zealand copyright law, but we think that the complexities of this exercise require much more consideration and consultation, and that any unnecessary changes now (even small ones) should be avoided. This is because our copyright system is not only mandated by the TPP – New Zealand is a signatory to many other international treaties that limit our flexibility to make change. Also, small changes can have big effects, and these should be properly considered beforehand. For example, we expect that other submissions may suggest that introducing greater protections for TPMs mean that a US-style "fair use" defence should be added to the Copyright Act. We think this would be a major shift in New Zealand copyright law that affects far more than just TPMs and would create significant uncertainty (especially in a non-litigious jurisdiction like New Zealand that already has very little case law on Part 3 permitted acts). Therefore, any fair use exception should not be considered without full exploration and debate. Other common law countries (eg the UK and Singapore) have implemented additional TPM protections successfully without adding a fair use defence, and the same approach should be taken here.²

8. COMMENTS ON PROPOSED AMENDMENTS TO THE TPM REGIME

8.1 In Appendix A, we have responded to the questions in the consultation document that relate to TPMs. We also make some general comments, as follows:

- (a) **The definition of TPM should be carefully drafted:** The definition of "TPM" should reflect the broad range of TPMs that are available today and take account of the rapid development of technology. In particular, to reflect the fact that TPMs protect against both upstream and downstream infringements of copyright (as explained in paragraph 5 above), the scope of the definition should be linked to "acts restricted by copyright" or similar (as it is in Australia and the UK), rather than infringing use.
- (b) **Exceptions should be individually justifiable and not overly broad:** We expand on this in paragraph 2 of Appendix A.
- (c) **Protections for satellite transmissions should be retained:** Any exceptions to the new TPM protection provisions should be careful not to undermine the existing protections for

² There is also significant uncertainty in the US as to whether fair use operates as a defence to the TPM circumvention prohibitions at all – see footnote 4 in Appendix C.

satellite transmissions in s227 and s228 of the Copyright Act and the new protections for satellite and cable transmissions in Article 18.79.

- (d) **Changes should not limit freedom of contracting:** New Zealand law currently recognises broad freedoms for commercial parties to agree to contract terms as they see fit. As explained above (see paragraph 5 in particular), TPMs are important tools to enable parties to comply with contracts that they are bound by. TPM exceptions should not prevent parties from complying with such contracts – this would be a major change to New Zealand contract law.

Appendix A

Questions relating to TPMs and Responses

1. HAVE THE [MINISTRY'S] OVERARCHING OBJECTIVES [IN DEVELOPING ITS APPROACH TO IMPLEMENTING THE INTELLECTUAL PROPERTY CHAPTER OF THE TPP] BEEN FRAMED CORRECTLY FOR THIS POLICY PROCESS? IF NOT, WHAT WOULD BE MORE APPROPRIATE OBJECTIVES?

1.1 The objective in paragraph 9(b) of the consultation paper (to "*minimise the impact of changes to intellectual property settings to maintain an appropriate balance between rights holders and users*") directly conflicts with the objective in paragraph 19(a) relating to New Zealand meeting its TPP obligations. The TPP obligations expressly require a change to the balance between rights holders and users. It is not possible to meet TPP obligations without changing this balance. Accordingly we think the objective in paragraph 19(b) would be better staged as follows:

"minimise the impact of changes to intellectual property settings except to the extent required to meet the TPP obligations"

1.2 The reference to minimising compliance costs in the objectives stated in paragraph 19(c) of the consultation paper is difficult to understand. It is not clear whether the compliance costs being referred to are the costs of complying with the TPP, the costs that changes impose on rights holders, or to the costs of users complying with the Copyright Act. If it is the latter, this is a wholly inappropriate objective in the context of the TPP, which seeks to strengthen intellectual property protection. These comments we think the objective in paragraph 19(c) is either redundant or should be simply stated as to "*provide certainty*".

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.

2.1 We understand that some specific limited exceptions to the TPM protections may be justified, subject to suitable evidence being provided and assessed in accordance with Article 18.68.4 of the TPP. However we believe that:

- (a) these should be limited to specific well defined single purpose exceptions for particular beneficiaries, that are drafted in a similar defined manner to either the UK or Australian legislation. Exceptions that are drawn more widely, or without defined parameters, lead to uncertainty of scope and meaning (which would directly conflict with MBIE's objectives stated in paragraph 19(c) of the consultation paper, and would also be contrary to the requirements of Article 18.68.4 of the TPP); and
- (b) the proposed exception "for any other purpose that does not infringe copyright" ("**Proposed Non-Infringing Use Exception**") cannot proceed as it would:
 - (i) seriously undermine the exclusive rights of copyright owners; and

- (ii) would mean that New Zealand would fail to meet its TPP obligations, would not satisfy the requirements of the WPPT and would likely breach the Berne Convention as well as other international copyright obligations that New Zealand is a signatory to.

The comments in paragraph 2.1(b) above are explained further below.

Why the Proposed Non-Infringing use exception cannot proceed.

- 2.2 The Proposed Non-Infringing Use Exception directly contradicts the requirements of Article 18.68.1 of the TPP which requires New Zealand "*to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures*". If New Zealand provides a unique opened ended exception for all non-infringing uses, then that essentially destroys the exclusive rights of a copyright owner. New Zealand rights holders, including SKY, rely heavily on the current TPM provisions to protect their rights.
- 2.3 The Proposed Non-Infringing Use Exception does not meet the TPP criteria set out in Article 18.68.4 for limitations and exceptions to the TPM protection required by the TPP. This criteria is as follows (emphasis added):
 - (a) there must be an *actual or likely adverse impact* of those measures on non-infringing uses (Article 18.68.4(a));
 - (b) this *must be determined* through a legislative, regulatory or administrative process (Article 18.68.4(a));
 - (c) that process must give *due consideration to evidence* presented in that process, including *whether appropriate and effective measures have been taken by rights holders to enable the beneficiaries to enjoy limitations and exceptions to copyright* (Article 18.68.4(a)); and
 - (d) the exceptions and limitations can only enable the legitimate use of a limitation or exception that is permissible under Article 18.68.4(a) by its intended beneficiaries, and not others (Article 18.16.4(b)).
- 2.4 The above criteria are explicit, and to simply adopt the whole of Part 3 of the Copyright Act, and any other non-infringing use, as an exception to all TPM measures cannot be consistent with Article 18.68.4. The statement in footnote 92 to the Chapter 18 of the TPP cannot allow the Proposed Non-Infringing Use Exception, since that exception is new, at least in relation to access control TPMs and would potentially be wider than any existing exception.
- 2.5 Introducing the Proposed Non-Infringing Use Exception will result in New Zealand copyright law being even more out of step with comparable countries. As indicated in Appendix C, New Zealand's current regime around TPMs is already highly unusual, and the Proposed Non-Infringing Use Exception would make New Zealand's copyright law unprecedented. When TPMs are a critical component of a system that allows copyright owners to recover investment in original works, the Proposed Non-Infringing Use Exception would discourage investment in innovation in New Zealand.
- 2.6 The Proposed Non-Infringing Use Exception appears to ignore the different stages of the lifecycle of copyright material (see paragraph 4.1 above) and such an exception would, for the first time, introduce wide and uncertain exceptions and limitations on a copyright owner's right to

control the upstream availability of copyright works. As explained above, many uses of copyright works are non-infringing (e.g. reading a book, listening to a CD or watching a film) but this does not and cannot mean that a person should have free access to a work in order to do those things (eg it does not mean that the book, CD or film should be given away for free to anyone for the purpose of fair dealing). We have provided some further examples of the potential consequences of allowing circumvention of access control TPMs for non-infringing use and permitted acts in Appendix D – these illustrate the potential breadth of these exceptions and limitations in greater detail.

- 2.7 Introducing the Proposed Non-Infringing Use Exception is likely to result in non-compliance with the Berne Convention and the TRIPs Agreement, since the blanket application of the Part 3 permitted acts to access control TPMs directly impacts on the exclusive rights of the copyright owner, particularly in relation to the owner's right to control the upstream availability of their work. Both Berne Convention and the TRIPs Agreement require a three step test for limitations and exceptions to the copyright owner's exclusive rights: in particular limitations and exceptions must be limited to special cases which do not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of rights holders.³
- 2.8 The Proposed Non-Infringing Use Exception would also contradict MBIE's own objectives since it is a change which isn't required, nor permitted, by the TPP and if introduced it would substantially change the balance between rights holders and users. It also creates massive uncertainty, given that no other country has a wide and unfettered non infringing use exception. For this reason, if the Proposed Non-Infringing Use exception is to be pursued at all, this should be left to be considered further and reviewed as part of a more general review of the Copyright Act.
- 2.9 The Proposed Non-Infringing Use Exception would also seriously undermine, and perhaps make meaningless, the protection in the Crimes Act for unauthorised access to computer systems. Section 252 of the Crimes Act makes it an offence to access a computer system without authorisation (subject to certain *mens rea* elements), but because "authorisation" includes authorisation conferred under an enactment or rule of law (see section 248), arguably an exception to a prohibition on circumventing an access control TPM would constitute "authorisation", meaning section 252 would no longer be relevant. Similarly, the Proposed Non-Infringing Use Exception may undermine common-law actions for breach of confidence or privacy torts.
- 2.10 The suggestion (at the bottom of the table in paragraph 48 of the consultation document) that there should be a regulatory power to clarify the Non-Infringing Use Exception (e.g. by excluding specific activities via regulation) suggests that a blanket exception is proposed, with the ability to exclude specific activities from the exception by later regulation. This not only creates uncertainty but in itself is non-compliant with the requirements of the TPP as explained above.

³ See *Copinger and Skone James on Copyright* (16th ed), para 23-143.

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?

3.1 We suggest that exceptions for the provision of devices or services that enable circumvention should be narrow, or should at least only apply where the circumvention device or service exists for a purpose that sits solely within one of the exceptions. SKY would be concerned if makers of TPM circumvention devices and services were able to make their services freely available for illegitimate purposes (and obtain revenue from those illegitimate uses), just because the device or service had a secondary legitimate use.

4. DO YOU AGREE THAT, IF OUR PROPOSALS ARE IMPLEMENTED, THE CURRENT EXCEPTION ALLOWING A QUALIFIED PERSON TO CIRCUMVENT A TPM PROTECTS AGAINST COPYRIGHT INFRINGEMENT TO EXERCISE A PERMITTED ACT UNDER PART 3 WOULD NO LONGER BE REQUIRED? WHY / WHY NOT?

4.1 The qualified person regime should be retained, and amended to be more in line with the UK regime, which fits better with TPP requirements. There is no basis or justification in the TPP to remove the qualified person requirement, and to do this would not only conflict with the TPP but also conflict with the MBIE's own objectives.

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.

5.1 We appreciate that as technologies change, new exceptions may be appropriate on a case-by-case basis, but that this should be carefully controlled to avoid defeating the purpose of the changes mandated by the TPP – see paragraph 7 below.

6. WOULD THERE BE A LIKELY ADVERSE IMPACT ON NON-INFRINGEMENT 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.

6.1 As set out in paragraph 2 above, we think it is important that there is not an exception for "any other purpose that does not infringe copyright", as this would defeat the purpose of the TPP changes and create significant unintended consequences.

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?

7.1 We appreciate that there will be circumstances where a prohibition on TPM circumvention may result in an unjust outcome in individual situations, and that a regulation or exception-making power may be an acceptable way to address those circumstances on a case-by-case basis. However:

- (a) the regulation power should be limited to allowing particular acts or circumstances, rather than granting broad exceptions;
- (b) the ability to grant exceptions or make regulations should not be based on whether or not the proposed use of the TPM work would infringe copyright. This is because:
 - (i) the purpose of the changes to the TPM regime in the TPP is to protect access control TPMs as well as copy control TPMs, so allowing the ability to grant an exception in any situation where copyright was not infringed would defeat the purpose of the changes mandated by the TPP. It would probably also not pass the "3 step test" that applies to exceptions to the TPM rules required by the TPP;
 - (ii) the question of whether or not an act infringes copyright is something that should be determined by legislation or the courts, rather than by regulations; and
 - (iii) circumventing a TPM may not in itself infringe copyright, but it may cause the person that applied the TPM to infringe (eg circumventing a TPM to watch SKY's content from outside New Zealand may not itself infringe copyright, but it may cause SKY to infringe copyright by communicating works to the overseas public in breach of SKY's New Zealand-only licence).
- (c) The regulation power should at the very least require comprehensive consultation with potentially affected parties. This is because sometimes relatively minor changes can have unexpectedly large impacts on third parties. For example, the repeal of section 122S(2) of the Copyright Act in the Copyright (Infringing File Sharing and Cellular Mobile Networks) Order 2015 occurred with minimal consultation and SKY did not know of it in advance. That change affected SKY's ability to take action in relation to infringing file sharing, but this would not have come to the regulator's attention, as SKY did not have the opportunity to make a submission.

7.2 We suggest that the UK model for exceptions may be the most appropriate (and fits most closely with the "3-step test" for exceptions). This is set out in section 296ZE of the UK Copyright Act and enables a person to complain to the Secretary of State if they are prevented from carrying out a permitted act by a TPM. The Secretary of State considers whether there are voluntary measures or agreements in place, and if there are not, it may direct the copyright owner or exclusive licensee to make available a means of carrying out the permitted act. This regime only applies where the complainant or the class of persons that the claimant represents has lawful access to the protected copyright work – ie it does not allow a complainant to effectively dodge a paywall or breach confidentiality in order to exercise a fair dealing right.

Appendix B

Key reforms from overseas jurisdictions that assist copyright holders

Other common law jurisdictions have implemented key reforms to help copyright holders deal with piracy and other infringement.

Jurisdiction	Recent/current copyright review process	Site blocking injunctions for pirate and infringing sites	Improved criminal penalties and remedies for individual infringement	Expanded role of regulatory bodies	Overview of key reforms
United Kingdom	Yes	Yes	Yes	Yes	<p>Copyright has been subject to a review process study, predominately beginning with the Hargreaves review in 2011, which has prompted much discussion and change in UK copyright law. Key reforms include:</p> <ul style="list-style-type: none"> • Clarification of definitions to show more transparently and with greater certainty that the copyright owner has the right to control any communication to the public by electronic transmission, including by means of a broadcast. • Improved criminal sanctions and civil remedies so that they are effective, proportionate and dissuasive; including: <ul style="list-style-type: none"> ◦ injunctions against service providers; ◦ search warrants and forfeiture for devices/services designed to circumvent technological measures; and ◦ non-exclusive licensee can bring an action for infringement of copyright. • Patents County Court role broadened to include copyright cases. • Introduction of IP Crime Group – a focused IP group who provide guidance and strategies for

Jurisdiction	Recent/current copyright review process	Site blocking injunctions for pirate and infringing sites	Improved criminal penalties and remedies for individual infringement	Expanded role of regulatory bodies	Overview of key reforms
					IP crime, and also work with overseas territories for enforcement.
Ireland	Yes	Yes	Yes	Yes	<p>Ireland has been reviewing and identifying possible reforms in copyright law since 2011, when the Copyright Review Committee was established. Many changes have been made since (with key reforms listed below).</p> <ul style="list-style-type: none"> • Copyright Council of Ireland powers have expanded to a statutory body to protect copyright and general public interest and, a Digital Copyright Exchange and an Alternative Dispute Resolution Process has been established. • Specialist IP tracks in the court system including: <ul style="list-style-type: none"> ◦ civil search and seizure procedures to enhance effectiveness of civil remedies; and ◦ a reduced evidential burden for the rights owner. • Strengthening of criminal and monetary penalties. • Injunctions against service providers.
Australia	Yes	Yes	Yes	Yes	<p>Australian copyright law has been under review recently with the Australian Law Reform Commission releasing a report in 2013 '<i>Copyright and the Digital Economy</i>'. There are ongoing discussions in the Government and with industry leaders as to what further measures should be</p>

Jurisdiction	Recent/current copyright review process	Site blocking injunctions for pirate and infringing sites	Improved criminal penalties and remedies for individual infringement	Expanded role of regulatory bodies	Overview of key reforms
					<p>introduced. Recent reforms include:</p> <ul style="list-style-type: none"> • Strengthened criminal infringement provisions. • Expanded remedies for large scale online commercial infringement. • Increased jurisdiction of the Copyright Tribunal. • Injunctions against service providers providing access to online locations outside Australia.
New Zealand	No current official review (although we understand a review will be undertaken in the near future)	No	No (other than the 3 strikes regime, which has not proved to be effective)	No	<p>The most recent amendment to NZ copyright law was in 2011 with the introduction of the three strikes regime for copyright infringement via file sharing. The regime is controversial and has not been used extensively by rights holders due to its narrow application, administrative burden, and low damages awards.</p> <p>The Government has recently decided to permanently extend the exception to the three strikes regime for mobile networks.</p>

Appendix C

TPMs – Permitted Acts

	US	UK	Singapore	Australia	NZ
All permitted acts	No ⁴	No	No	No	Yes
Which permitted acts apply to allow TPM circumvention?	Libraries and archives Education Criticism or comment of motion pictures Computer/technology matters ⁵ Law enforcement and national security Online privacy (Possible fair use defence available) ⁶	Libraries and archives ⁷ Education/private study ⁸ Disabilities Cryptography research Law enforcement and national security Government and judicial matters Broadcasting/time-shifting Single copy for personal use	Libraries and archives Educational use of films Disabilities Criticism or review of film Computer/technology matters ⁹ Law enforcement and national security Privacy	Libraries and archives Education Disabilities Computer/technology matters ¹⁰ Law enforcement and national security Sound recordings for broadcasting	All permitted acts ¹¹

⁴ Section 1201(c) states that nothing in section 1201 shall affect rights, remedies, limitation, or defences to copyright infringement, including fair use, under the Act. While fair use can apply as a defence to copyright infringement (for example in instances of news reporting), the Act does not specifically state that fair use applies as a defence to circumvention of TPMs. Some have suggested that this was implied. While the matter is unresolved, the general approach of the courts is that fair use will not act as a defence to circumvention, where circumvention is needed in order for the user to make what would be a fair use of a copyright work.

⁵ Refers to reverse engineering, encryption research, online privacy, security testing, enabling connection of wireless devices to wireless telecommunications networks, enabling smartphones to execute software, enabling smart televisions to execute software, and video games.

⁶ See above at footnote 4.

⁷ Includes recordings of folk songs.

⁸ Includes research and private study.

⁹ Refers to encryption research, correcting security flaws, and computer programs involved in essential or emergency systems.

¹⁰ Refers to interoperability of computer programs, encryption research, computer security testing, online privacy and malfunctioning TPMs.

¹¹ See Part 3 of the Copyright Act 1994, ss 40–93.

	US	UK	Singapore	Australia	NZ
Regulated process for determining additional permitted acts that allow TPM circumvention?	Yes, see s 1201(a)(1)(B) to (E) The Librarian of Congress will review the permitted acts every 3 years to determine whether users are being adversely affected by TPM legislation.	Yes, see s 296ZE(2) Person may complain to secretary of state if they are prevented from carrying out a permitted act under sch 5A.	Yes, see s 261D(2) Minister may add to the permitted acts by order published in the Gazette.	Yes, see s 249 ¹² Prescribed by regulations as recommended by the Minister.	No

¹² Section 249 refers to the Copyright Regulations 1969, in which Schedule 10A contains the permitted acts.

Appendix D – Potential Consequences of Allowing Circumvention of Access Control TPMs for Non-Infringing Use & Permitted Acts

Non-infringing use or permitted act under Part 3 of the Copyright Act	Example of potential consequence if applied to allow circumvention of access control TPMs
1. Reading a copyright work	Circumvention of access control on all Government, business and private systems and websites that have copyright works.
2. Listening to music	Circumvention of access controls that require payment for music streaming services and iTunes
3. Watching films, television programmes and other videos	Circumvention of access controls that require payment for video content on subscription based services like Netflix, Lightbox, and SKY.
4. Fair dealing with a work for the purpose of criticism or review (s.42(1))	Circumvention of any access controls on confidential Cabinet papers and on the Budget papers prior to release.
5. Fair dealing with a work for the purpose of reporting current events (s.42(2))	<p>Circumvention of access controls used by Governmental Communication Security Bureau (GCSB) and the Security Intelligence Service (SIS) for the purpose of reporting current events.</p> <p>Circumvention of access control used to protect police evidence for the purpose of reporting current events.</p> <p>Circumvention of access control used to protect Ministerial and official emails for the purpose of reporting current events.</p>
6. Fair dealing with a work for the purpose of research or private study (s.43(1))	Circumventions of access controls protecting confidential research papers at NZ Crown Research Institutes (eg AgResearch, Institute of Environmental Science and Research, GNS Science, NIWA).