

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?

For the most part, yes. We particularly support the objective to minimise the impact of changes to intellectual property settings to maintain an appropriate balance between rights holders and users. However, we also suggest that the objectives be made conditional upon the ratification of the TPP by the United States. If the TPP implementation were to be passed in New Zealand and the TPP were not ratified in the United States, New Zealanders would be suffering new restrictions and obligations for no reason.

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.

The extension of anti-circumvention liability to include access control TPMs (rather than just copy control TPMs) is unwarranted and harmful, and therefore New Zealand should ensure that its new obligations are limited by exceptions and limitations to the maximum extent that is consistent with its obligations. One of the most obvious risks if this is not done is that New Zealanders will be constrained in their ability to access content that from overseas markets which has been region locked or geoblocked. Due to New Zealand's geographical isolation and small market size, the inevitable result will be to lock Kiwis out of the ability to access content that they have lawfully acquired.

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. There is no advantage to the user in having the right to circumvent an access control TPM if they cannot utilise a third party device or service to exercise that right. Otherwise, the right could only be exercised by a tiny proportion of the most technically sophisticated users.

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?

This depends on the wording of the proposals in the legislation. They should be drafted to make this intention very clear. If so, this would be a positive change. There are many independent software developers, small businesses and technology enthusiasts who are well-suited to assisting in lawful TPM circumvention, but who do not qualify under the current law to provide these devices or services.

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.

Yes:

1. The proposed exception to allow circumvention of TPMs that control geographic market segmentation should not be limited to physical copies, but should include digital or cloud-hosted copies.
2. It should be permitted to circumvent TPMs to allow playback of works using free and open source software that by its nature does not support proprietary DRM systems.
3. It should be permitted to circumvent TPMs to extract clips or quotations for purposes that do not infringe copyright.
4. It should be permitted to circumvent TPMs to translate copyrighted works into different formats to allow people with sensory disabilities to experience their own legally purchased products.
5. It should be permitted to circumvent TPMs to archive and preserve digital works. This exception will become ever more critical if the term of copyright is extended in New Zealand, where limited edition copies of works may be destroyed or otherwise disappear even before the term of copyright runs out.

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.

Yes. The availability of this catch-all exception provides much needed flexibility to allow the circumvention of TPMs in cases of innovative non-infringing uses. Some of the non-infringing uses under Part 3 of the Copyright Act are in quite general terms, eg. fair dealing for the purposes of research or private study (section 43). New technologies and cultural practices may allow this private study exception to be exercised in different ways that today we cannot envisage. The catch-all exception is necessary to ensure that TPMs can be circumvented in these cases.

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?

There should be a regulation-making power to enable new exceptions to be added for other purposes that do not infringe copyright, and to allow for maximum flexibility, it could be based on the factors in Article 18.68.4.

Patent term extension for delays in patent grant

8

Do you agree with the proposals for patent term extensions for unreasonable grant delays? Why / why not?

No comment.

9

Do you think that there should be a limit on the maximum length of extension available for grant delays? If so, what should it be?

No comment.

10

Do you consider that third parties should be able to oppose decisions to extend patents on the ground of unreasonable delays in grant?

No comment.

Patent term extension for pharmaceuticals

11

Do you agree with the proposed definition of “unreasonable curtailment” for pharmaceutical patent term extensions? If not, what other definition should be used?

No comment.

12

Do you agree that the definition of “unreasonable curtailment” should apply different time periods for small molecule pharmaceuticals and biologics? If so, what could these time periods be? If you consider that only one time period should apply to both, what should this be?

No comment.

13

Do you agree with the proposed method of calculating the length of extensions for pharmaceutical patents?

No comment.

14

The proposed method of calculating extensions for pharmaceutical patents includes a maximum extension of two years. Do you agree with this? If not, what do you think the maximum extension should be?

No comment.

15

Do you agree or disagree that only patents for pharmaceutical substances *per se* and for biologics should be eligible for extension? Why?

No comment.

16

Do you think the Australian definition of “pharmaceutical substance” should be adopted? Why / why not?

No comment.

17

Do you agree that patent rights during the extended term should be limited in the manner proposed?

No comment.

18

Do you agree that third parties should be able to oppose decisions to extend patents for pharmaceuticals through the Commissioner of Patents? Why / why not?

No comment.

Performers' rights

19 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?

No. In general there is the risk that assigning new moral rights to the performer will infringe upon the free speech rights of the producer, who may be limited in realising their own artistic vision for the work that incorporates that performance. The performer's rights are better safeguarded in his or her contractual arrangements with the producer.

20 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 would go beyond the requirements of the WPPT and TPP and create new roadblocks to the use of multimedia recordings. A performer has the full opportunity to negotiate contractually for any limitations on the reuse of aural and visual recordings of their live performances. There is no need for legislation to create additional statutory rights.

21 Do you agree or disagree with any of the exceptions or limitations proposed for a performer's right to be identified? Why?

We agree.

22 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.

Non-commercial recordings of performances posted by fans to social media (to the extent that these are non-infringing or published under license) should not attract an obligation to identify the performers.

23 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?

We agree.

24 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.

In comparison to the right to be identified, which is relatively uncontroversial, there are much greater concerns with the right to object to derogatory treatment. In the United States, the case of *Garcia v Google* is instructive. In that case a single performer included in the film "The Innocence of Muslims" sought to have the entire video removed from YouTube and other platforms, because it reflected on her in a derogatory way. Notwithstanding the dubious merits of the film in question, this is a serious violation of the freedom of expression rights of the producer and the public. We suggest that a broad exception to the performer's right to object to derogatory treatment should be included covering any case in which the performer and the producer have a contractual relationship, since any disputes between them in such a

	case can be dealt with privately.
25	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 producers, and any others involved in the creation, use or consumption of films.)
	No. Again, this could inhibit access to recordings that do not infringe copyright, on the false assumption that the performer did not already have the opportunity to negotiate with the producer over the fixation and distribution of their performance. It could create additional road blocks for the film and video industry, with no added benefit to performers.
26	Do you agree or disagree with any of the exceptions or limitations proposed above? Why?
	We agree.
27	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.
	We suggest that a broad exception to the performer's property rights should be included covering any case in which the performer and the producer have a contractual relationship, since any disputes between them in such a case can be dealt with privately.
28	Do you agree or disagree with any of the proposals above? Why?
	As to the miscellaneous amendments in paragraphs 127 to 130, no.
29	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.
	No.
Border protection measures	
30	Do agree that Article 4 of European Union Council Regulation (EC) No 3295/94 is an appropriate model for implementing <i>ex officio</i> powers into the border protection measures set out in the Copyright Act 1994 and Trade Marks Act 2001? If not, please explain why not and outline an alternative approach to implementing <i>ex officio</i> powers.
	No comment.
31	Do you agree that the detention period of three business days following notification to the rights holder is appropriate? Can you outline the impact on both the right holders and any importer/exporter where you consider the period should be shorter or longer than three business days?
	No comment.

Other comments