

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

## Your name and organisation

Name	John Calder
Organisation	(self, from perspective as emerging film-maker and educator)

## 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?
	Yes

### 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.
	<p>I Agree</p> <p>If you do not provide these exceptions, then New Zealanders can purchase DVDs only to discover regional restrictions applied for no valid reason under NZ Copyright Law. These regional restrictions can exist without fair warning at the time of sale.</p> <p>FOR EXAMPLE:</p> <p>I asked my wife to buy me a BBC Katherine Mansfield DVD for my birthday. She found it at:</p> <p><a href="http://www.amazon.co.uk/Picture-Katherine-Mansfield-DVD-Vanessa-Redgrave/dp/B00XNB1JXU/ref=sr_1_9?ie=UTF8&amp;qid=1459029959&amp;sr=8-9&amp;keywords=katherine+mansfield">http://www.amazon.co.uk/Picture-Katherine-Mansfield-DVD-Vanessa-Redgrave/dp/B00XNB1JXU/ref=sr_1_9?ie=UTF8&amp;qid=1459029959&amp;sr=8-9&amp;keywords=katherine+mansfield</a></p> <p>The prospective customer does NOT need to scroll down to complete this purchase. All purchasing information and controls are available at the immediately visible top of this web page. Furthermore the immediately visible top of page displays this text:</p> <p>“This item can be delivered to New Zealand”</p> <p>The prospective customer needs to scroll down a long way to see this warning:</p> <p>“<b>Region:</b> Region 2 (This DVD may not be viewable outside Europe. Read more about <a href="#">DVD formats.</a>)”</p> <p>On delivery, this item could not play in our DVD player.</p> <p>-----</p> <p>Regional restrictions on DVDs are widely recognised as ineffective and obsolete. This gives the possibility of encountering old DVDs with regional restrictions where the rightsholders are no longer requiring equivalent restrictions on their more recent publications.</p>

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Regional restrictions on DVDs are badly defined because the regions themselves cover areas with big variations in copyright law. I argue that New Zealand gets especially unfairly treated as our relatively straightforward 50 year rules, changing to 70 year rules but still straightforward, contrast with other countries in the same region. Others give much longer copyright durations for some circumstances eg posthumous publication. In other words NZ gets treated unfairly in the DVD Oceania Region system by being lumped in with the incompatible Australia and the incompatible French Territories.

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

Devices or services that enable circumvention may be of a nature that they are not manufactured, sold or bought for that purpose.  
FOR EXAMPLE: it is sometimes possible to play Region-restricted DVDs on the DVD drives in computers.

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?

Disagree, Required.

Persons with valid legal reason to workaround TPM may not have the specialist technical expertise to do so.  
FOR EXAMPLE A Teacher playing a media clip from a Region-Restricted DVD during an exam for their own students to review for examination purposes may need “qualified person” technical help to make this happen.

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.

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

We need to provide for new forms of communication made possible by advances in technology  
FOR EXAMPLE virtual reality for education; teaching examples of problem solving in designs for 3D printing.  
Future case law could alter the effective definition of “infringing” and “non-infringing”.

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?

Yes

Criteria – what is the justification for a new TPM? Have the rightsholders applying a new TPM considered its relevance to NZ Copyright Law? (ie do they even know or care about the

existence of NZ?)

### 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?

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?

10

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

### 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?

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?

13

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

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?

15

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

16

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

17

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

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?

### 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?

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?

21

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

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.

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?

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.

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

This will do nothing except add to compliance tasks and costs for producers. This has some team-building theoretical appeal but in practice the producer needs complete rights

	empowerment (“chain of title”) to be able to market the film and anything that could cast doubt on the producer’s power to act for the film when selling it can kill the sale stone dead meaning that no-one gets any benefit from this including the performers. Any viable film production will require the performers to assign such rights to the producer which means such a law change makes no real difference and only creates more paperwork. This may be workable with difficulty for principal actors but it opens a big can of worms when dealing with extras. Because there is a big range of significance of contribution of performers to a film and those in smaller supporting and extra roles are going to create a big compliance workload for their relatively small contributions.
26	Do you agree or disagree with any of the exceptions or limitations proposed above? Why?
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.
28	Do you agree or disagree with any of the proposals above? Why?
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.
<b>Border protection measures</b>	
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.
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?
	Yes

## Other comments

### Parody and Satire

With the TPP we are importing some of the arguably less desirable elements of US copyright law eg longer duration of copyright. Let us also exercise the TPP freedom to set exceptions to import similar exceptions to the US “Fair Use”.

FOR EXAMPLE: “Weird Al Yankovic” parodying “Royals” by Lorde – ref:

<https://www.youtube.com/watch?v=w-0TEJMJOhk>

In the US under “Fair Use” this is permitted with no licensing required. NZ freedom of expression of this kind needs to be equally well defined.

This is one of the few elements that Australia gets right.

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1968133/s41a.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s41a.html)

#### **COPYRIGHT ACT 1968 - SECT 41A**

##### **Fair dealing for purpose of parody or satire**

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.

Comment on how this has worked out:

<http://www.artslaw.com.au/articles/entry/the-parody-and-satire-defence-what-do-we-make-of-it-so-far/>

Some years ago before the defence was introduced, one of the authors remembers having to advise an art gallery on a provocative performance piece that was to be presented by one of Australia's more cutting edge artist troupes. Their work used copyright material owned by a multinational corporation and the piece made various allegations against that company. The presentation of the work was sadly but inevitably pulled as the volunteer board of directors was not prepared to take on the legal risk. Since then, the introduction of provisions into the Defamation Acts across Australia, which now say that corporations with ten or more employees cannot sue for defamation (see for example, section 9 of the Defamation Act 2005 (NSW)), combined with the parody or satire defence to copyright infringement, have liberated such artistic endeavours from legal constraints. Today, that performance piece would be risk free.