

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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Business Law
Building, Resources and Markets
Ministry of Business, Innovation & Employment
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New Zealand

Dear Sirs:

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to respond to the Targeted Consultation Document (TCD) on implementation of the TPP IPR chapter, issued by the Ministry of Business, Innovation and Employment (Ministry).

IIPA is a private sector coalition, formed in 1984, of trade associations representing copyright-based industries working to improve international protection and enforcement of copyrighted materials. Members of the IIPA include Association of American Publishers (www.publishers.org), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association of America (www.mpa.org), and Recording Industry Association of America (www.riaa.com). IIPA's five member associations represent over 3,200 companies producing and distributing materials protected by copyright laws throughout the world. We have closely followed copyright law developments in New Zealand, and were active observers in the negotiations that culminated in the signing of the Trans Pacific Partnership (TPP) agreement last month.

In the very limited time available to us for review and analysis of the TCD, we have focused on the first issue it addresses, regarding technological protection measures (TPMs). Our only comment at this time on the other copyright issues listed on page 9 of the TCD concerns the extension of copyright term. While New Zealand may not be obligated to extend term immediately, we urge its government to reconsider its position and to extend term along with its other TPP partners. Such harmonization of terms of protection facilitates legitimate trade in creative works, especially in a digital environment in which the significance of national boundaries is decreasing in many respects. We also understand that at least part of the motivation and rationale for the extended transition period New Zealand negotiated in the TPP

related to an economic study conducted in 2009, which has now been severely criticized.¹ Immediate extension of term will expand the commercial opportunities for New Zealand creators, as well as those of other nationalities, and will minimize disruptions in the digital marketplace caused by differences between national regimes in an increasingly borderless world.

We hope to have the opportunity to comment in more detail both on the issues addressed in this submission, and on other copyright and enforcement issues of relevance to New Zealand compliance with the TPP.

Technological Protection Measures

Today, more consumers in New Zealand and around the world enjoy authorized access to more copyright works in more diverse ways, and at more affordable price points, than ever before. A major contributor to this progress is the use of technological measures that control and manage access to copyright works (“access controls”). Myriad innovative products and services are currently made available in connection with works protected by access controls, and new business models that depend on such controls are emerging and being extended to new markets constantly.

Legal protections for access control technologies first began to be incorporated into international copyright norms in the 1990’s, most notably in the WIPO “Digital Treaties” (WCT and WPPT) concluded in 1996. In those days, most discussions focused on the use of access controls with physical media such as CDs, and later DVDs and Blu-Ray Discs. Access controls remain vital to offering of copyright works – especially videogames and audio-visual works – on such physical media. But an increasingly important role for access controls in the 21st century is online.

Access controls are at the heart of most of the cutting edge internet-based services that play an increasingly large role in the dissemination of creative content. For example, without legal protection for access controls, copyright owners could not securely offer music streaming services to mobile phone users, online access to televised content for cable and satellite television subscribers, online access to journal databases, or cloud-based software applications. In today’s digital marketplace, access controls are enabling innovators rapidly to develop new services that meet consumer demand and expectations while enabling copyright owners to recoup investments in content production. In turn, sound legal protections for technological protection measures such as access controls are a critical feature of the standards contained in the TPP agreement, and indeed an essential element for 21st century copyright laws.

¹ See Dr George Barker’s report on “Copyright Term Extension and the Effect on the NZ Economy” http://www.parliament.nz/resource/en-nz/51SCFDT_EVI_00DBSCH_ITR_68247_1_A495603/a5967d8b7792b2278930a0f3a3d10a5c71c2fd00, submitted to the New Zealand House of Representatives Select Committee on Foreign Affairs, Defence and Trade on March 17 2016, see http://www.parliament.nz/resource/en-nz/51SCFDT_EVI_00DBSCH_ITR_68247_1_A495602/4c00ab67e3698415cea760cc34c43eb57985ede5.

The TCD Proposals

In IIPA's view, the Ministry's proposed approach on TPMs falls well short of achieving compliance with the standards set forth in Art. 18.68 of the TPP. It appears to propose both an unduly narrow set of legal prohibitions to activities involving or facilitating the circumvention of access controls and other TPMs; and an extremely wide set of exceptions that would in practice swallow the rule. If enacted as projected in the TCD, the result could be a legal environment hostile to, rather than supportive of, the use of innovative technological means to manage licensed access to copyright works. Since the use of access controls has worked to maximize the availability of these materials to the broadest range of consumers, using a wide spectrum of delivery media, and at a variety of price points, we urge the Ministry to reconsider its approach. The remainder of this submission outlines five areas where the proposals in the TCD raise serious questions about compliance with the standards set in the TPP.

1. Proposed Prohibitions. IIPA fully agrees with the TCD (para. 41, first bullet) that the TPP would require New Zealand to enact legal prohibitions against trafficking in circumvention devices or services that cover those tools that circumvent access controls. We disagree, however, that this could be achieved by simply "extending" the current provisions (Sec. 226A) against trafficking in tools that circumvent TPMs that directly "prevent or inhibit the infringement of copyright," as defined in Sec. 226 (see clause (a) of the definition of TPM). A number of other provisions of current law would need to be amended to achieve the breadth of coverage that the TPP standards require. These provisions include:

- Section 226: definition of TPM must be broadened in clause (a) to cover measures that, in the normal course of operation, control access to a protected work or other subject matter; and clause (b) (which currently excludes such measures from coverage) must be fully or partly repealed;
- Section 226: definition of circumvention device must be broadened to cover:
 - Devices that are promoted, advertised or otherwise marketed for the purpose of circumventing effective technological measures (TPP Art. 18.68.1.b.i);
 - Devices that meet any of the two current or added third criterion (above); i.e., the "and" in the current definition between clauses (a) and (b) must be changed to "or";
- Section 226A(1): prohibition on trafficking in circumvention devices must be changed to eliminate requirement to prove that the trafficker "knows or has reason to believe that it will, or is likely to, be used to infringe copyright in a TPM work." TPP Art. 18.68.1.b does not permit imposing an additional hurdle on injured parties to prove the trafficker's state of mind or knowledge in order to obtain a remedy;
- Section 226A(2): prohibition on providing circumvention services must be changed to eliminate both the knowledge requirement (as above) and the

requirement to prove that the service provider intended the service to enable the recipient to circumvent a TPM. Neither requirement is permissible under TPP Art. 18.68.1.b;

- Section 226C: parallel changes are needed to the criminal prohibitions. Knowledge or intent requirements are not permitted under TPP Art. 18.68.1 final paragraph, other than willfulness. Although fn. 88 provides that “willfulness contains a knowledge element,” that reference is to knowledge of the circumvention capabilities of the device or service, not to knowledge of the likelihood of future downstream infringement.

The provisions of current law identified in the three preceding bullets are particularly inappropriate in light of the planned extension of the prohibition to cover devices and services for circumventing access controls, where no copyright infringements may be directly involved.

The Ministry’s proposal also risks running afoul of the requirement in TPP Art. 18.68.3 that the prohibitions involving TPMs must be “independent of any infringement that might occur under the Party’s law on copyright and related rights.” As discussed more fully below, the TCD proposes a sweeping “exception” that would eliminate the risk of liability in any “situation where copyright is not infringed.” TCD para. 42 (second bullet) and 48. This is tantamount to a requirement to prove copyright infringement in order to state a valid claim under the TPMs prohibitions. If so, that would mean that the TPMs prohibitions are no longer “independent” of infringement liability, but in fact completely “dependent” upon infringement to be operative. While of course the issue may turn on the exact wording, both of the prohibitions and of the exceptions or defenses available, IIPA urges the Government to carefully review this proposal, keeping in mind the need to establish an independent (from infringement) basis for liability in order to comply with TPP standards.

As just noted, creating an “exception” to cover all cases in which “in accessing the relevant work, copyright was not infringed” (TCD para. 48) could allow the exception to swallow the rule, and in effect take the TPMs prohibitions out of compliance with TPP standards. However, the Government’s broad proposals for exceptions, when measured against the TPP text, raise other concerns as well.

2. Blanket treatment of exceptions to act of circumvention and to trafficking. In every case in which it proposes to provide an exception to the prohibition on the act of circumvention of access controls, New Zealand proposes also to provide an exception for all provision of circumvention products and services to enable such acts. See TCD paras. 47, 48. TPP does not permit this lockstep approach. Instead, Art. 18.68.4.b requires an analysis of whether an exception to the anti-trafficking prohibitions extends beyond “enabl[ing] the legitimate use of a limitation or exception permissible under the Article by its intended beneficiaries,” and whether the exception would “authorise the making available of devices, products, components or services beyond those intended beneficiaries.” If either of these conditions is applicable, the anti-trafficking exception is out of compliance with TPP standards.

The TCD itself reflects no analysis of whether the lockstep approach would meet these requirements, but it stands to reason that it would not. Simply because a circumvention tool is

provided to someone who is in a position to use it in accordance with a valid exception to the prohibition on the act of circumvention does not ensure that the tool will in fact always be used in that way, much less that the recipient of it will inevitably refrain from making it available to a person not entitled to use it. Indeed, as a factual matter, the circumstance is usually precisely the opposite: a tool to hack through access controls normally functions in the same way whether or not the user, or the circumstances, meet whatever criteria are established for the boundaries of a valid exception to the prohibition on the act of circumvention; and the result of its use may well be to render the work previously protected by the TPM “in the clear” for use by anyone for any purpose, infringing or non-infringing.

As one example of a regime that more carefully takes into account the types of conditions imposed by Art. 18.68.4.b, one might examine current section 226D. This provision allows a specified list of “qualified persons” (e.g., librarians, archivists, educators) to obtain circumvention devices for specified purposes on behalf of a specific user, based upon the submission of a formal declaration by the “qualified person.” This provision appears to be tailored to respect the limits set forth in the TPP, by limiting trafficking in circumvention devices to enabling legitimate actions by specified beneficiaries, and by providing a level of accountability to ensure that the device is used only in that manner. Ironically, the Government now proposes to repeal section 226D, in favor of a regime in which “any person would now be able to provide a TPM circumvention device or service to [any other] person,” for the ostensible purpose of “enabling the exercise of a permitted act” referenced in any of 71 listed sections of the Copyright Act. TCD para. 52 and Annex 1. On a spectrum of responsibility, the proposed lockstep regime lies at the far end compared to current law, and raises serious questions about fulfillment of TPP standards.

3. Procedural requirements for new or expanded exceptions. TPP Art. 18.68.4.a sets out procedural requirements that New Zealand must follow in enacting any new exceptions to TPMs prohibitions, including considering “evidence” about impact on non-infringing uses, steps taken by right holders to enable the exercise of copyright limitations and exceptions, and other issues. Footnote 92 exempts pre-existing exceptions from this requirement, if they are otherwise substantively compliant with TPP. Certainly all exceptions in New Zealand law relating to access controls would be new,² and would fall squarely within Art. 18.68.4.a. This includes both prohibitions on circumvention of access controls, and on trafficking in devices or services to enable such circumvention. Thus, any exceptions to either category of prohibition can only be enacted after “due consideration of evidence” on factual questions about the impact of a proposed exception, including the question of to what extent circumvention is even necessary to make specific non-infringing uses of copyright materials. While the consultation process now underway might represent a first step in meeting those procedural requirements, much more fact-finding will certainly be needed in order to craft a set of exceptions that meets both the substantive and the procedural requisites of TPP Art. 18.68.4.

4. The paragraph 48 proposal. IIPA was uncertain whether the Government is proposing, in para. 48 of the TCD, a finite list of specific exceptions involving assertedly non-infringing conduct, or whether it is literally a blanket exception for any situation where there is no infringement, and the list provided following the paragraph is simply illustrative. If the

² Currently, access controls are specifically carved out of the law, see section 226 (clause (b) of definition of TPM).

former, then at the conclusion of the type of examination called for in Art. 18.68.4.a, further light might be shed on whether the specific exceptions proposed satisfy TPP criteria. However, the latter seems the most likely interpretation, since the last entry on the list is “for any other purpose that does not infringe copyright.” If that is the case, then numerous problems arise.

First, as noted above, such an approach is entirely inconsistent with the concept of TPMs violations as “independent” from infringement, and with the principle that unauthorized access to a copyright work, enabled by circumvention of access controls applied to that work, must in principle be prohibited, whether or not that particular access leads to an infringing act. Another potential consequence of the paragraph 48 proposal as broadly interpreted is that it could be read to immunize the commercial manufacture and export of circumvention devices for use solely outside New Zealand. Ordinarily, no infringement of copyright under New Zealand law would occur in that situation. Finally, another practical difficulty, referenced in more general terms above, is that when a circumvention device or service is supplied to a person for one purpose, there is no way to know whether it is actually used for that stated purpose, and whether it will be subsequently used for another purpose. In either case it might not be apparent at the time of the provision of the tool or service whether infringement of copyright would occur.

In order to avoid these and other problems, the scope of the para. 48 proposal should be clarified.³

In the limited time available, and in the absence of the type of factual record that TPP Art. 18.68.4.a calls for with respect to any proposed new or expanded exceptions, IIPA has not had the chance to evaluate each of the nine “proposed exceptions” listed following paragraph 48 against TPP standards. We look forward to the opportunity to do so if in fact it is confirmed that the enumeration of such specific exceptions is the Ministry’s intent.

5. The “fail-safe” test. TPP Art. 18.68.4.c provides that even if New Zealand’s exceptions to its TPMs prohibitions (assuming that these prohibitions are drawn with the necessary breadth) fulfill the procedural and substantive requirements of paragraphs 4.a and 4.b, they would nonetheless violate TPP’s standards if, taken as a whole, they “undermine the adequacy of [New Zealand’s] legal system for the protection of effective technological measures, or the effectiveness of legal remedies against the circumvention of such measures.” While at the current state of their development, it is impossible to evaluate New Zealand’s TPMs exceptions regime against this measuring stick, IIPA urges the government to keep this “fail-safe” test clearly in mind.

³ We also note that paragraph 49c of the TCD refers to a possible “regulation-making power.” IIPA commends the concept of a fact-based inquiry, under a regulatory framework, to identify specific situations in which the use of TPMs is making it difficult or impossible for specified classes of users to carry out specified non-infringing activities, for which no viable alternative means are available, and to craft specific and time-limited regulatory exceptions to TPMs prohibitions in order to address these situations. We would be more skeptical of a “regulation-making power” that is limited to “clarify[ing] from time to time” whether specific (non-infringing) activities should be “excluded” from the scope of a very broad exception under paragraph 48. This seems to us to confuse the prohibitory rule with the exception allowing circumvention activities when the need for them has been established in a fact-based proceeding. Further clarification of what the government is proposing regarding a “regulation-making power” would be welcomed.

If New Zealand takes the approach of defining the “intended beneficiaries” of exceptions to include any person who is capable of making a non-infringing use of a copyrighted work, i.e., the entire universe, then even if the broad exceptions for trafficking in circumvention tools that the government seems to contemplate could conceivably pass muster under a literal reading of the criteria in TPP Art. 18.68.4.b , that regime would still have to clear the “fail-safe” hurdle. A system of exceptions that would allow circumvention services or devices to be supplied by anyone to anyone for the ostensible purpose “to enable” the exercise of a permitted Act as spelled out in any of 71 statutory provisions; or to enable any non-infringing act, whether or not specifically permitted by the statute; or to enable any good faith act (whether infringing or not) by a library, archive, museum or public broadcaster, would have difficulty surmounting that hurdle. Such a system would not only “undermine the adequacy of [New Zealand’s] legal system for the protection of effective technological measures”; with an exception this broad, it could be seriously questioned whether New Zealand would any longer have such a system.

IIPA thanks the Ministry for considering our views. If there are any questions or further information is needed, please do not hesitate to contact the undersigned.

Respectfully submitted,

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