

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

## Your name and organisation

<b>Name</b>	Julie Koke, Senior Registrar
<b>Organisation</b>	Auckland Art Gallery Toi o Tamaki

## 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?
<b>Technological protection measures</b>	
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.
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?
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?
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.
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?

#### 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

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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.)

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 you 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?

## Other comments

***The Auckland Art Gallery has read the submission of Christchurch Art Gallery. The Auckland Art Gallery face the same copyright problems and challenges set out in that submission and urge the Government to amend the Act in the ways it has outlined, as below:***

Auckland Art Gallery Toi o Tamaki seeks amendments to the Copyright Act 1994 so the interests of users such as public galleries (as well as libraries, museums and archives already noted in the MBIE discussion document) are properly addressed.

While the copyright needs of libraries and archives are, to a certain extent, covered in the Act as currently drafted, the legitimate needs of public galleries and museums are not, because the current definition of "archives" does not appear to (and in practice is not taken to) include either public galleries or museums.

Day to day collection management tasks in galleries and museums (such as copying for preservation and administrative purposes) currently require copyright clearances. The same applies to uses of copyright material that are now expected of collecting institutions such as making images of collection material available within the premise (for example, on iPads and terminals) and as thumbnails online for public access.

We submit that (firstly) the Act must be clarified to ensure that museums and galleries are within the scope of the definition of archives and (secondly) exceptions should be introduced that ensure that uses such as those outlined above are available to museums and galleries under the Act. We further submit that neither of these amendments would unreasonably prejudice the interests of copyright holders nor present any conflict with what should be regarded as a normal exploitation of their commercial rights. As a result, such amendments would be in line with what is permitted under the TPP and under the other international copyright treaties to which New Zealand is a party.

In particular, Auckland Art Gallery submits that a "fair use" exception should be introduced into the Act, supported by specific exceptions that clarify that using copyright material for any administrative purpose and for purposes such as exhibition purposes does not infringe copyright.

We are aware of changes made to like legislation in other countries and how the amendments we propose fairly balance the interests of copyright holders and the needs and endeavours of collecting organisations.

We refer in particular to the Australian Law Reform Commission's recent review of the Australian Copyright Act 1968. The ALRC consulted the sector with respect to copyright and the digital environment and over 850 submissions were made including a significant number by galleries, libraries, archives and museums who raised valid points for consideration. We urge the MBIE to review submissions made by our Australian colleagues as their concerns reflect global realities for institutions who collect copyright protected material.

We refer also to:

- the 2014 amendments introduced by the United Kingdom that allow the reproduction of collections on terminals located in galleries, libraries, archives and museums as a means to ensure collections remain publicly accessible (and note that these amendments also clarified that museums and galleries might rely on library and archive exceptions);
- section 51A(2) of the Australian Copyright Act that permits libraries and archives to use copyright material for administrative purposes;
- section 200AB of the Australian legislation that permits further uses of copyright material provided that that use meets the international "three-step test"; and
- fair-dealing as it applies in Singapore and Canada (which is analogous to "fair use").

Put simply, New Zealand collecting institutions are concerned that our sector is not aligned with international standards that work in the interest of both users and copyright holders and that galleries and museums either infringe copyright on a daily basis or spend considerable resources on getting clearances that are simply not needed in comparable countries.

Please feel free to contact me if I can be of further assistance.



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Redacted s.9(2)(a) OIA 1982