Submission on Targeted Consultation Document

Implementation of the TPP IP Chapter

30 March 2016

WeCreate is an alliance of New Zealand's creative industries with the mission to grow and promote New Zealand's creative sector. WeCreate's 23 member organisations represent content creators and owners across the spectrum of the creative industries from film and television, to games and books, visual arts, music, design, photography and architecture.

Our comments here are made in light of WeCreate's strategy to facilitate growth of the New Zealand creative industries in ways that benefit individual creators and creative businesses – both of which lead to economic prosperity for New Zealand.

In our submission of 11 March 2016, we expressed concern with how both content owners and copyright are portrayed in the National Interest Analysis (NIA) and various Government communications on the TPPA. This seems totally at odds with the potential of the sector as outlined in the Business Growth Agenda and with the effort the Government is investing in the Creative Sector Study and Convergence Review. This portrayal was also very obvious during the Ministry's presentation sessions held in advance of these submissions being due. We were not aware that separate rightsholder and user sessions were being held, apparently to "focus" discussions. We were also extremely disappointed that the Ministry continues, in public fora, to refer to the strongly contested figures that are claimed to be the cost to New Zealand of the copyright term extension (i.e. the Ergas Report and $55m).Term extension has a direct benefit for New Zealand content creators and brings their rights into line with the term afforded to content creators in our trading partners, and yet this is not factored into the Ministry's positioning or calculations.

We have responded at a strategic level to the consultation document questions below, but note that the questions are targeted in particular areas and do not cover the complete implementation of the IP Chapter. In light of this, we need to premise this submission with a reminder:

Copyright exists to benefit both content creators and those who wish to access creative content.
There is common ground in the public and private interests in copyright.
It is not a "them versus us" situation.

We also draw your attention to the small number of organisations in the New Zealand music industry. The number of submissions made on Performers' Rights by content owners is not any reflection on the importance of these rights to that creative industry.

Submitted by:

Paula Browning

Chair, WeCreate

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

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

Your name and organisation

Name	Paula Browning
Organisation	WeCreate Inc

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?

Objective 'a' is appropriate.

Objective 'b' "....to maintain an appropriate balance between rights holders and users". Use of the word "maintain" suggests that this is currently the case in New Zealand's intellectual property settings. We submit that this may not be an accurate reflection of the current IP framework and discussion on 'balance' is best left to a more full review of the legislation.

We are pleased to see objective 'c' included. Certainty is a highly desirable objective in any legislation and particularly in copyright law. The certainty provided in some areas of New Zealand's current Act (e.g. the defined and quantified exception for education in Sec 44) are useful for both content creators and content consumers. They need look no further than the Act to determine how content can be legally used.

Objective 'c' also refers to minimising compliance costs. We submit that there are a number areas in the framework of the current legislation where content creators bear a heavy burden of cost for little reward. The proposed phase-in of the term extension will impose significant costs on WeCreate's members that are licensing bodies. The copyright termination date for each separate work will need to be individually managed, rather than on a blanket "year of creation" model. The phase-in also creates uncertainty for content consumers in determining if and when the copyright term has ended.

We note that under New Zealand's current legislation it is exceptionally expensive for a content creator to take action when their content is not used in the way they intended. The lack of an effective statutory damages regime in New Zealand denies our content creators (many of whom, like the rest of the New Zealand economy, are SME's or sole-proprietor businesses) appropriate compensation. We encourage the government to strongly consider adopting the recommendations in Article 18.74 that would enable New Zealand creative businesses to have more certainty as to the level of compensation that can be sought, rather than the status quo where awards are wholly inadequate relative to the cost of taking action.

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.
	We provide comment here at a strategic level in regard to TPMs. A number of WeCreate's member organisations will submit on specific aspects of TPMs as they relate to their creative industries. *We reiterate our comments above in regard to the policy objective of achieving certainty. In order to invest in content and content services, creative businesses need to know that the innovative technologies they (and any content distribution partners) utilise to deliver services to consumers are not able to be undermined by broad circumvention exceptions. Exceptions should only be available for specific uses that achieve a defined policy objective. The proposal to include an exception "for any other purpose that does not infringe copyright", leaves a complex legal decision (i.e. whether a particular act of will or will not be an infringement of copyright) down to the individual. There is no certainty in this whatsoever.* *Similarly, the establishment of exceptions through regulations would create another area of uncertainty for both copyright owners and consumers. A recent example where regulations have been, we submit, inappropriately used/managed is the decision not to extend Sec 122a of the Act to include activity on mobile networks. The decision was made without consultation and yet has a significant impact on content owners' business.*
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	
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?
	We draw your attention to the submission of our member organisations Recorded Music NZ , Independent Music NZ, APRA AMCOS and NZ Music Commission in relation to Performers' Rights. We also note that consideration should be given to the small number of organisations in the NZ music industry. The number of submissions made on Performers' Rights by content owners is not any reflection on the importance of these rights to that creative industry.
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.
Border protection measures	
30	Do agree that Article 4 of European Union Council Regulation (EC) No 3295/94 is an appropriate model for implementing *ex officio* 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 *ex officio* 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