

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

## Your name and organisation

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LIANZA, The Library and Information Association of New Zealand Aotearoa / Te Rau Herenga o Aotearoa is a non-profit, membership based organisation that advocates on behalf of library and information professionals within the sector. LIANZA represents public, educational, commercial, industrial, legal and government libraries in New Zealand.

Copyright touches almost all aspects of library operations, and New Zealand’s libraries have a history of respecting copyright and working within the legal exceptions provided for them and their users. These exceptions are only limited, and LIANZA is very concerned at the prospect of New Zealand’s adopting the increased copyright provisions of TPPA without ensuring these are balanced by adequate exceptions and limitations and/or a fair use provision.

## 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?
	MBIE has stated that the consultation document “does not cover TPP intellectual property obligations where there is little or no flexibility in the implementation approach” - extension of copyright term being a case in point.
	But as extension of copyright term required by the TPP shifts the balance between rights

holders and users further in favour of rights holders, making it inaccurate to write of an 'appropriate' balance being 'maintained', we suggest that objective 'b' would be better written as: "minimise the impact of changes to intellectual property settings to facilitate balance between rights holders and users".

If balance cannot be established as a result of implementation of the intellectual property chapter and proposed exceptions to the satisfaction of all players touched by intellectual property matters, as well as TPP Member Parties, then agreement on the IP chapter should be repudiated.

But in other respects, the overarching implementation objectives seem appropriate.

## 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.

Yes, LIANZA believes that providing for lawful circumvention of TPMs for logical purposes is required and would allow for appropriate user rights. We note that the TPP requirements on TPMs go beyond those required by WIPO Internet treaties, which makes it even more critical that balancing exceptions and limitations are provided for in national copyright legislation.

Not providing these exceptions and limitations would work against achieving the appropriate balance between rights holders and users for which the TPP states parties should be endeavouring.

Regarding the wording of exceptions, LIANZA recommends that where proposed wording is specific as to format, this be replaced with more general wording. For example, "preventing the playback of legitimate physical copies of a film, sound recording, or computer game" could be replaced with wording about permitted uses of non-infringing copies of works.

LIANZA supports the exemptions for libraries and other non-profit entities from criminal liability in respect of anything done by these entities in performing their function, and from civil liability in performing their functions provided that the act was done in good faith without knowing the conduct was prohibited. LIANZA is concerned about the additional condition with respect to exemption from civil liability, but hopes that this qualification

reflects recognition that those staffing libraries, particularly where other services may have been incorporated into a library setting, may not always have expertise in copyright matters.

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, LIANZA agrees to both.

As the TPP will prohibit a person from circumventing a TPM even if in accessing the work copyright is not infringed, then LIANZA feels that it is critical that the proposed exceptions should apply to both circumventing a TPM and the provision of devices and/or services that enable circumvention.

Local services may not have the skills to decode and enable specific locks to enable legitimate use of intellectual content or machine processes.

Or conversely, local skills may exceed those of overseas skills when dealing with technology from defunct suppliers, or new owners of intellectual property who may have acquired a firm without having the necessary technical competence or interest in maintaining existing products or formats of intellectual content presentation. Like NASA, the knowledge of the original software programme may be lost with time. It is clear that copyright extension only exacerbates this problem that clearly can arise well within even current prescribed copyright protection periods.

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?

Yes, LIANZA agrees, as long as the catch-all exception “for any other purpose that does not infringe copyright” remains.

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.

An exception should be provided for the use of circumvention for permitted acts when access to the content is covered by a licence or contract, as is often the case with digital content accessed by libraries and their users. It would be good to be clear that user rights

under the Copyright Act are not undermined by contractual arrangements.

An exception should be provided for format shifting to provide access to works in outdated formats, or whose access is based on un-sustained platforms or software.

Likewise there should be exceptions that provide the beneficial options provided in the:

[Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled.](#)

LIANZA is concerned that the Government is pressing ahead with a TPP Implementation Bill before ratifying and implementing the Marrakesh Treaty, as under the latter: *“Nothing in this treaty shall derogate from any obligations that Contracting Parties have to each other under any other treaties, nor shall it prejudice any rights that a Contracting Party has under any other treaties,”* and *The issue of exhaustion of rights is subject to contracting parties existing treaties.”*

LIANZA would like to see the scope of “beneficiary persons” and the scope of actions permissible for their needs under the Marrakesh Treaty, made feasible in the exceptions devised at this time in relation to TPPA implementation. Implementation of its Article 7:

*“Article 7 Obligations Concerning Technological Measures*

*Contracting Parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.*

Part 3, section 69 of the Copyright Act should have less ‘format specific’ wording, such as “accessible format copies for visually and *aurally* impaired” to enable beneficial persons to enjoy what more able might.

In order to ensure that no investor state dispute or other legal steps are encouraged with respect to challenging options for the visually, aurally or otherwise challenged, LIANZA would like to see additional related elements of the Marrakesh Treaty passed in our law, before implementation of TPP requirements, in order that the full benefit of the Marrakesh Treaty options may be experienced. The authorised entities named under that treaty’s Article 2(c) should be recognised in the TPP exceptions as actors permitted to make TPM and DRM subsequent amendments; also Article 4 enabling authorised entities to establish their own

policies and practices within the qualified circumstances of the Marrakesh Treaty's subsections (i)-(iv); and Article 5 allowing for cross-border exchange of alternate format copies without the authorization of the rightsholder.

Another consideration: an exemption for non-profit libraries, archives, and educational institutions to gain access to a commercially exploited copyrighted work solely to make a good faith determination of whether to acquire such work.

We refer you to points made in the American Library Association's web page:

<http://www.ala.org/advocacy/copyright/digitalrights> for other considerations that should be allowed for in limitations and exceptions with regard to the TPP Implementation Bill.

For example, an item that may be legitimately rented, may need modification to operate correctly. This could apply not only in libraries but in other business situations.

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.

LIANZA recommends the inclusion of an exception for "any other purpose that does not infringe copyright". This will mitigate the risk of specific permitted acts being missed in any list of exceptions, whether now or as the legislation may change over time, particularly in response to changes in technology. The inclusion of such a statement is only right and just in that it recognises that a user should be able to access and make use of a non-infringing copy in ways permitted under the Copyright Act.

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?

In principle, non-copyright issues should be dealt within applicable legislation outside the Copyright Act.

Regulation should not be used for clarification of substantive issues or be made not in accordance with the general objects and intentions of the statute under which they were made.

As a matter of good practice, it should be a requirement that any proposed substantive, or clarification changes to content of the Copyright Act 1994 or related act to be included in a

bill permitting non-urgent consideration by the public.

Acts should be subject, as always, to periodic review.

It would be preferable to have a fair use framework to allow for changing technology and normal operation of legally acquired or owned material which could avoid the need for clarification of particular exceptions.

Certainly there should be no regulatory power permitting changes to the Copyright Act on account of external demands for change (e.g. US certification of our domestic law) or other TPP Member Party amendments without their submission to the public under normal statutory legislative process that allows for a fair period of time for their consideration and feedback.

The proposed Trans-Pacific Partnership Commission should not be given supranational regulatory powers of change that override standard domestic processes.

Nor should New Zealand provide in its TPP implementation bill for amendments to the international treaties to which it is obliged to accede to enter into force automatically.

## 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?

Such rights exceed those to which we need to accede. The matter is well put in the National Interest Analysis: "Additional performers' rights could also impose additional transaction and compliance costs on second generation creators, businesses and organisations like libraries, galleries and museums. Where performers have not assigned their performance rights to the producers of sound recordings, such businesses and organisations would be required to negotiate multiple licences, or bargain with more parties, to use the sound recordings. The higher the number of performers, and the higher the number of performers who decide to retain their rights, the higher the transaction costs are likely to become. If higher transaction costs did result, they could mean that new products or services dependent on using sound

recordings as inputs (including online products and services) are either not provided, or are provided at a higher price. Either scenario would be likely to result in foregone consumption of those products and services.”

Therefore LIANZA is reluctant to 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. We feel that performers’ rights are best handled through contractual arrangements, as would be the case now for many audio-visual productions, and that extending these rights could make it much harder for producers to distribute material and for users to use it.

We approve of suggestions made in points 112-115 in the Discussion document.

As for derogatory treatment, New Zealand should institute a generic exception for parody and satire in our copyright legislation.

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?

Such rights exceed those to which we need to accede. The matter is well put in the National Interest Analysis: “Additional performers’ rights could also impose additional transaction and compliance costs on second generation creators, businesses and organisations like libraries, galleries and museums. Where performers have not assigned their performance rights to the producers of sound recordings, such businesses and organisations would be required to negotiate multiple licences, or bargain with more parties, to use the sound recordings. The higher the number of performers, and the higher the number of performers who decide to retain their rights, the higher the transaction costs are likely to become. If higher transaction costs did result, they could mean that new products or services dependent on using sound recordings as inputs (including online products and services) are either not provided, or are provided at a higher price. Either scenario would be likely to result in foregone consumption of those products and services.”

For this reason, in line with our response to question 19, LIANZA is reluctant to agree that a performer’s moral rights should apply to the communication or distribution of any sound recording (i.e. both sound recordings and films) made from their performances.

	<p>In the case of commercial communication or distribution such rights are probably best dealt with via specific agreements or contracts ahead of time. The United Kingdom's approach under S. 205E of the U.K Act is a useful option.</p> <p>As for derogatory treatment, New Zealand should institute a generic exception for parody and satire in our Copyright legislation.</p>
21	<p>Do you agree or disagree with any of the exceptions or limitations proposed for a performer's right to be identified? Why?</p> <p>LIANZA agrees that it will be simpler for users if the exceptions and limitations to a performer's right to be identified be aligned with those for authors, and we support points 117-119 regarding situations you have identified.</p>
22	<p>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.</p> <p>How do the amendments to the Copyright Act 1994 envisaged for TPP implementation, plan to acknowledge abrogation of copyright by performers who chose to do so - and their scoping of abrogated rights?</p>
23	<p>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?</p> <p>LIANZA agrees with proposed exceptions; it makes sense to align them with those already provided to authors and directors.</p>
24	<p>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.</p> <p>Introduction of an exception for Parody and satire (Cf. Australia Copyright Act 41A and 103AA) could obviate introduction of a number of changes to the act regarding moral rights.</p>
25	<p>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.)</p> <p>In line with our responses to questions 19 and 20 LIANZA observes that extending new property rights for performers to apply to the recording of visual performances in films would involve high transaction costs, and given the extension of copyright as this option will make it more difficult to preserve, maintain access and use such works. Although the</p>



government in its National Interest Analysis indicated that it perceived “No economic, social, cultural and environmental costs and effects [in acceding to] the treaty action,” the reality for libraries attempting to provide consistent, comprehensive access to the nation’s cultural and socio-economic values and history is that this is not the case.

**26** Do you agree or disagree with any of the exceptions or limitations proposed above? Why?

LIANZA agrees with the proposed exceptions and limitations, and the removal of any of them would severely impact the ability of New Zealand’s libraries to provide access to a broad range of sound recordings for recreational, educational, and cultural purposes.

**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.

To avoid permanent inaccessibility, reproduction or dissemination of works or of preserved, reformatted works, upon performers’ deaths without clear legatees or representatives being known, options available elsewhere be considered for New Zealand, e.g. a collecting society, national library or specialised library/institution being authorised to maintain a register of orphan performer names/works; that the above-named actions may take place within X years, and there be an agreed process for negotiation of retrospective royalty or other (full or partial) intellectual content rights or ongoing rights to reproduce by third parties put in place.

An exception should be created to enable libraries or third parties (with permission of original recording companies - if they still exist, and more particularly if they don’t) to provide family members) including descendants of sound recording performers) with copies of recordings that are no longer commercially available.

They should not have to invoke a false “research and study” stance to be able to have a copy permanently available to them. If need be a record could be kept of such instances for inspection. Or we suggest a technique such as that utilised in France for out of print works, could be instigated.

**28** Do you agree or disagree with any of the proposals above? Why?

Re: point 129-130:

	<p>As individuals' (including new performers') acquaintance with legal processes cannot be guaranteed, it would be helpful if New Zealand instituted funding and provision of copyright educational tools for the public so that egregious exclusive intellectual property and copyright specific contracts stand less chance than they do at present from being imposed on performers. The UK has shown good practice worth emulating.</p> <p>Re point 130: Many, especially in a world awash with non-commercial recordings, are not aware of steps they might like taken with regard to their performances, in the event of their death.</p> <p>Other: Germany has instituted options for challenging current commercial copyright holders' ongoing rights.</p>
29	<p>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.</p>
<b>Border protection measures</b>	
30	<p>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.</p> <p>It seems reasonable.</p>
31	<p>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?</p> <p>Agree.</p> <p>Period should be shorter in the event of response required for an urgent medical decision or procedure, or other critical emergency.</p>

## Other comments

It is recognised that Technological Protection Measures can be flawed in their programming and designed merely to maintain existing, or old business models, as much as to prevent copyright infringement.

There is a question as to whether TPMS designed to affect access should be in a copyright act at all, as they may be designed to reduce business competition or maintain the otherwise unsustainable in the face of technological change.

We would urge the government to give very careful thought to the implications of building into New Zealand legislation elements that become outdated because of changing technology, and involve many detailed additions to law that could be obviated with reflection on more generic desirable outcomes and a framework like fair use. We refer the government to the [Fair Use Index](#) recently provided by the US Register of Copyrights to gain an idea of the flexibility and common-sense that such a framework can provide to obviate the extensive legislative changes laid out in the “Targeted Consultation Document: Implementation of the Trans-Pacific Partnership Intellectual Property Chapter.

Moves to a digital era have led to contractual restrictions that impede the provision of information by libraries in ways that did not occur in a paper-based world. TPMs, DRM limitations, poor infrastructural arrangements to assist respect of author/performer/producer rights do not help the critical role libraries play as trusted suppliers of information in preserving, lending, sending, receiving or exchanging copies of copyright works digitally in compliance with fair practice in law. We look to the government to govern for the whole of society, and therefore to obviate at national level, biases in intellectual property rights deriving from trade treaty or agreement origins.