SUBMISSIONS ON BEHALF OF

RECORDED MUSIC NEW ZEALAND LIMITED

APRA AMCOS

INDEPENDENT MUSIC NEW ZEALAND

THE NEW ZEALAND MUSIC COMMISSION

THE MUSIC MANAGERS FORUM

IN RESPECT OF MBIE TARGETED CONSULTATION DOCUMENT

30 March 2016

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(1) Introduction

These submissions are presented on behalf of **Recorded Music New Zealand Limited** (Recorded Music), **APRA AMCOS, Independent Music New Zealand** (IMNZ) **The New Zealand Music Commission** and **The Music Managers Forum** (MMF).

Recorded Music

1. Recorded Music is a not-for-profit industry representation, advocacy and licensing organisation for recording artists and their labels.

2. Recorded Music delivers projects and services that promote the recorded music industry to music fans throughout New Zealand. It produces the Annual Vodafone New Zealand Music Awards and publishes the weekly Official New Zealand Top 40 Chart.

3. Recorded Music licenses recorded music to radio and television broadcasters, to businesses using music in public and to webcast and streaming services. It distributes royalties earned from such licences to New Zealand and overseas artists and to recording labels.

4. Its ProMusicNZ team is dedicated to protecting copyright as well as providing information and resources for music fans as to where to find music legally, both online and offline.

APRA AMCOS

APRA AMCOS is an association of New Zealand and Australian composers, songwriters, lyricists and music publishing companies that collectively administers the public performance, communication (including broadcast) and certain reproduction rights in copyright music throughout New Zealand, Australia and the Pacific. APRA AMCOS is controlled by composers, songwriters and music publishers, with a Board of Directors elected by and from its membership.

APRA represents over 60,000 New Zealand, Australian and Pacific songwriters together with many thousands more from similar societies in more than 80 countries around the world.

IMNZ

5. IMNZ is a non-profit association that acts as the New Zealand voice for independent record labels and distributors. Its 90 plus members represent the majority of all musical acts in New Zealand. It represents these interests in representation before select committees or other bodies. IMNZ's members are also members of Recorded Music or participants in the Direct to Artist Scheme operated by Recorded Music on behalf of New Zealand resident artists.

New Zealand Music Commission

6. The New Zealand Music Commission is an organisation with a national reach that is funded primarily through Vote: Arts, Culture and Heritage. It is an independent trust based in Auckland.

7. The mission of the Music Commission is to support the growth of the music industry in New Zealand, both culturally and economically, at home and abroad.

MMF

8. The Music Managers Forum is a national not-for-profit organisation that offers professional development and networking opportunities for New Zealand music managers, self-managed artists and anyone with an interest in becoming a manager.

9. All of these parties together are referred to as 'the Interest Group'.

(2) The Extension of Term of Copyright and the Phase-in Period

10. This issue is referred to on page 9 of the Consultation Document as being a change to be included in the TPP Implementation Bill.

11. Paragraph 17 of the Consultation Document states:

> "The Targeted Consultation document does not cover the TPP Intellectual Property obligations where there is little or no flexibility in the implementation approach. These include copyright term extension ..."

12. There is a need for submissions on aspects of the implementation of copyright term extension for the reasons set out below:

    (a) First, it is clear that the New Zealand Government's view on copyright term extension has been entirely shaped by the Ergas Report in 2009. This is made abundantly clear from *the National Interest Analysis* dated 26 January 2016 which contains eight statements to the effect that:

    > "... the average cost to the New Zealand economy of the planned extension of the term of copyright from 50 to 70 years would be $55 million annually."[1]

    (b) Secondly, New Zealand negotiated a phase-in for the extension of term of copyright.[2] This would enable New Zealand to phase-in an extended term for *up to eight years*. So New Zealand does have some flexibility in its implementation of copyright term extension. Indeed it could choose not to take up the phase-in option provided for in Article 18.83(4)(d);

    (c) Officials at MBIE's presentation on the Targeted Consultation Document, including Mr Rory McLeod (who was lead negotiator for the IP Chapter for the New Zealand Government) have made it clear that the possible phase-in provision was negotiated because of New Zealand's view as to the cost to it of copyright term extension;

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1 This is repeated at pages 17, 22, 24, 85-86, 240, 241, 248-249 and 258 of the NIA.

2 See National Interest Analysis pages 85 and 199; Article 18.83(4)(d) TPP Intellectual Property Chapter.

(d) Officials made it clear that submissions on the Consultation Document could include submissions on the proposed phase-in period.

The Challenge to the Ergas Figures

13. Recorded Music has already made detailed submissions to the Foreign Affairs Defence and Trade Select Committee which is considering the National Interest Analysis. In its Select Committee submissions Recorded Music has provided a detailed rebuttal of the Ergas Report and has demonstrated that this contains arithmetical errors.

14. A short summary of the calculations prepared by Dr George Barker, currently Director of the Centre for Law and Economics at the Australian National University (ANU) and Visiting Fellow at the London School of Economics is attached as **Schedule 1**. The underlying calculations used in the Ergas Report in 2009 are not available and MBIE officials have not been able to produce these or even scrutinise the calculations themselves.

15. Even if all of Ergas' assumptions are adopted, and one uses the out-dated sales data from 2003-08 that he relied on, it is clear that, correcting the Ergas Report for its arithmetical errors, the most that could be claimed for the *average annual cost to the New Zealand economy of copyright term extension for recorded music is $250,000.00* ***not the $17 million claimed by the Government***.

16. This calculation also involves accepting the Ergas assumption that there is no benefit whatever from copyright extension to New Zealand authors, publishers, recording artists, film makers and other creatives. This is not a tenable assumption.

The Phase-in of Copyright Term Extension

17. The wording of the TPP Intellectual Property Chapter states in the case of New Zealand:[3]

> "In the case of New Zealand, with respect to Article 18.63 (Term of Protection for Copyright and Related Rights), eight years. Except that from the date of entry into force of this Agreement for New Zealand, New Zealand shall provide that the term of protection for a work, performance or phonogram that would, during that eight years, have expired under the term that was provided in New Zealand law before the entry into force of this Agreement, instead expires 60 years from the relevant date in Article 18.63 that is the basis for calculating the term of protection under this Agreement. The Parties understand that, in applying Article 18.10 (Application of Chapter to Existing Subject Matter and Prior Acts), New Zealand shall not be required to re tore or extend the term of protection to the works performances and phonograms with a term provided pursuant to the previous sentence once these works performance and phonograms fall into the public domain in its territory."

18. The net effect of this provision can be seen by assuming TPPA comes into force on 1 January 2018. Under the phase-in option negotiated by New Zealand there would be two effects:

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[3] Article 18.83(4)(d).

(a) From 1 January 2018 and for a period of up to eight years ie 31 December 2025, all existing copyright works, performances or phonograms that would during that eight year period have expired under the existing provisions as to term[4] would be extended to a 60 year term ie life of the maker plus 60 years or 60 years;

(b) From 1 January 2026 all existing copyright works performances or phonograms that would have expired under the existing provisions as to term[5] will be extended to a 70 year term.[6]

19. This two-tiered calculation for copyright term will continue not just for the eight years of transition but will have ongoing effects lasting much longer.

- In the case of sound recordings that would otherwise expire in the period up to 31 December 2025, the new 60 year term will last up to 18 years beyond 1 January 2018;

- For musical and literary works measured by the life of the author, the extension to life plus 60 years could also last up to 18 years beyond 1 January 2018.

20. A diagram showing the practical operation of the two tier phase-in is attached as **Schedule 2.**

(3) Term Extension Phase-In: New Zealand Copyright Owners Will Miss Out Internationally

21. A consequence of the phase-in for term extension negotiated by New Zealand is that New Zealand copyright owners whose works will fall into the 60 years phase-in category will miss out on the benefits of the 70 year term extension. This will affect not just TPP countries but all other countries such as the 27 EU countries which have already moved to a 70 year term.

22. This is because most countries apply a comparison of term based on Article 7(8) of the Berne Convention which states:

> "In any case, the term shall be governed by the legislation of the country where protection is claimed; *however unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.*"

23. This approach is adopted in Article 7(1) of the EU Directive on Term of Protection of Copyright and certain related rights.[7] As a result the term of protection granted in the EU "shall expire on the date of expiry of the protection granted in the country of origin of the work ...". This means that if 60 years is all that New Zealand grants for that category of work in the eight year phase-in period, then 60 years is all the protection that New Zealand works will be accorded by EU countries.

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4 Ie on the basis of the current term of life of the maker plus 50 years or 50 years.
5 Ie on the basis of the current term of life of the maker plus 50 years or 50 years.
6 Ie life of the maker plus 70 *or* 70 years.
7 Directive 2006/116/EC.

24. TPP countries are likely to implement term extension in their domestic legislation in a way that is consistent with Article 7(8) of the Berne Convention – thus denying New Zealand copyright owners the 70 year term. New Zealand copyright owners could not have the windfall of a 70 year term when New Zealand in itself grants only a 60 year term during that eight year period.

(4) Term Extension Phase-in Administration and Implementation costs

25. The administration and management costs of a two-tiered copyright term to Recorded Music NZ and APRA AMCOS and therefore the flow on effects in distributing royalties to rights holders are considerable. The proposal also raises significant communication issues for the rights holder and music user.

26. This is not unique in the music industry to either Recorded Music NZ or APRA AMCOS or indeed to individual rights holders. – the composers, record companies and music publishers that each respective organisation represents. The music industry has always administered such term of copyright issues but in the Interest Group's submission adds additional and unreasonable complexity for those groups and perhaps most importantly the end music user.

27. In addition to rights holders managing and administering multiple copyright terms for the next 70 years, music users will also need reliable and accurate information as to which copyright term applies to an individual sound recording and/or the underlying musical work. This is bearing in mind that there are differing applications of copyright term that apply to sound recordings (60/70 years from date of release) and musical works (60/70 years following the death of the songwriter).

28. The Interest Group identifies the following key areas of concern.

Licensing and data

29. Recorded Music and APRA AMCOS collectively license the public performance, broadcast and in certain instances digital communication and reproduction of musical works and sound recordings in New Zealand. Some of their direct licensees include Mediaworks, TVNZ, Sky, NZME, Pandora (or in the case of APRA AMCOS and individual record companies) Spotify and Apple. All of these licensees are required to supply regular music use data which APRA AMCOS and Recorded Music subsequently use for the purposes of royalty distribution.

30. Recorded Music and APRA AMCOS collects data from music users (in the case of Recorded Music those music users which have direct licence agreements with record companies) for the use of their particular repertoire. These include on-demand streaming platforms such as Spotify, Apple Music, YouTube and a la carte digital services such as iTunes. All of these services produce millions of lines of music data every single day and both licensee and licensor are required to identify rights owners and copyright term.

31. Taking into consideration the amount of data that music users are required to supply and rights organisations are required to identify, managing a two-tiered copyright term (unique to the territory of New Zealand) will add significant administration and data system complications when identifying and licensing music.

System development

32. In order to administer a two-tiered copyright term, Recorded Music NZ, and its music industry colleagues at APRA AMCOS NZ will have to modify and adapt existing data management systems in order to accommodate extra data and maintain and monitor a dual copyright term for some 18 years.

33. Other licensing bodies such as Copyright Licensing Limited will have comparable costs in respect of the licensing of reprographic rights for books and journals.

Music user confusion

34. In 2013 Recorded Music NZ and APRA AMCOS created a joint licensing initiative called OneMusic which licenses public performance of music in NZ (both musical work and sound recording). OneMusic licensees include Retail shops, Cafes, Bars, Restaurants, Gyms, Churches, Dance Schools and anywhere music is publicly performed. The primary objective in creating this joint initiative was to eliminate a considerable amount of confusion when obtaining all the necessary permissions or licences to use music. The solution: one licence covering both sets of rights.

35. OneMusic has been universally accepted and adopted by a wide range of industry sectors and very successful in making music licensing simple. OneMusic NZ was a world first and Australia, Ireland, Canada and the UK are now intending to implement similar joint licensing initiatives in the coming years.

36. A two-tiered copyright term will not affect OneMusic's ability to collectively license the public performance of music. However, it will make a very simple licensing process more complicated when communicating with music users. An observation from the successful development of OneMusic has been that the public very much desires simplicity in the licensing process. This will again cloud the licensing process.

37. Another example is music synchronisation licensing which relies in part on copyright term. Synch licences are generally negotiated by rights owners with non-music entities. In order for an advertising agency, film or television producer to be able to license music they need to know whether the music is in copyright.

38. A flat 70 year term is easier to accept, understand and explain to a music user not familiar with the intricacies of copyright, than a two-tiered 60 and 70 year term existing concurrently. It makes copyright more confusing and further complicates a process that rights holders

and collective licensing bodies have worked very hard to simplify for music users.

(5) Calculation of additional costs that will be caused by the two-tiered term extension phase-in

39. In **Schedule 3** to this document Dr George Barker sets out an economic analysis (based again on the Ergas calculation) of the effect of the phase in for recorded music. He addresses the question whether the phase in is justified given the additional implementation and administration costs the phase in involves as outlined above.

40. The Government's decision to adopt a phase-in is based on the understanding that it will generate savings. These savings are assumed to arise from delaying the implementation of term extension. The question then is whether these savings from delaying term extension are likely to exceed the additional administrative and implementation costs associated with the phase-in? The problem confronted when trying to answer this question is that the savings that would be generated by delaying, and adopting a phase-in, have not been estimated by Government, and so cannot be compared to the predicted increase in implementation and administrative costs. In Schedule 3 Dr Barker however provides an estimate of the likely economic effect of phase-in under a number of scenarios, and asks whether this purported effect is ever likely to justify the administrative and implementation costs of a phase-in.

41. It appears that it has been assumed that the phase in of term extension for recorded music would generate benefits for New Zealand because term extension is estimated by the Government to cost $17 million per annum for recorded music. It has been assumed therefore that a phase in would entail some saving on this (Ergas) estimated cost of $17 million. As outlined already there were major errors in Ergas' estimate of the costs of term extension. Dr Barker corrects these errors in Schedule 3. Once these errors are corrected the costs of term extension fall considerably. Indeed as a result Dr Barker estimates the costs of term extension are likely to be offset by the additional output benefit that term extension will generate. This means immediate term extension will have a net benefit, and so term extension should not be delayed. Term extension should instead be implemented as soon as possible, and the phase should be avoided to realise the net benefit from term extension as quickly as possible.

42. Dr Barker also shows however that even if one assumes there is no additional output benefit from term extension offsetting its costs, the purported savings from adopting even the maximum 8 year phase in would be so small as to be unlikely to justify the costs of implementing and administering the phase in.

43. Assuming term extension involves no benefits, and only what Ergas called an import transfer cost, the table below identifies Dr Barker's preliminary estimate of the maximum savings on costs per annum (in $000) in the years during which the phase in cost differs from the no phase in cost. The savings are shown in constant dollars. As shown no savings are realised until the 11th year and even then they start as low

as $4,000 per annum. The purported savings of the phase in never rise higher than $27,000 per year which occurs in year 18, before falling to zero again in year 28 as shown in the table below,. The *total* value of the import transfer saving across all years is only around $263,000. This is the sum of the savings in each year in which there are savings shown in the table below.

Table 1: Import Transfer Cost Savings by Year After implementation

Year after Implementation	11	12	13	14	15	16	17	18
Import Transfer Cost $000	4	8	12	16	19	22	25	27

Year after Implementation Cont'd	19	20	21	22	23	24	25	26	27
Import Transfer Cost $000	26	25	21	17	14	11	8	5	2

44. Dr Barker concludes that the phase in cannot be justified given the likely implementation and administration costs it will involve. Based on the above analysis Dr Barker concludes it would seem likely that the additional administrative and implementation costs associated with the phase-in in any year would exceed the maximum $27,000 savings per annum on import transfer cost. For example using one worker on the minimum wage to cover the additional administrative and implementation burden associated with the phase-in would cost more than the maximum $27,000 savings per annum on import transfer cost alone.

(6) Conclusion on term extension phase in

45. The Interest Group submits that, given the arithmetical errors in the Ergas Report, the whole rationale for New Zealand's special phase-in provision in Article 18.83(4)(d) of the TPPA no longer exists.

46. Further the costs of a two-tiered phase-in will only serve to reduce the payment of public performance licences fees to New Zealand rights holders. As is well known, income from recorded music and the overall industry revenues have been decimated since 2001. Public performance licence fees have been one of the few stable sources of income for composers, publishers, recording artists and labels and are eagerly awaited by them as important income in order to sustain their ongoing creative activities. It seems a pointless exercise to engage in a two tier phase-in when the calculations which originally led to the negotiation of the Article 18.83 special arrangement are now demonstrably wrong and there is no net cost to New Zealand from copyright term extension.

47. Finally New Zealand copyright owners will miss out on the benefits of the 70 year term extension because of the way in which other countries will apply the rule of the shorter term.[8] Even though they have moved to a 70 year term, New Zealand copyright owners will be denied that benefit.

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[8] See Section (3) of these submissions.

(7) Performer's Rights

48. This issue is dealt with in section 7 of the Consultation Document. Paragraph 107 sets out MBIE's thinking that the provisions in the UK CDPA that were necessary for the UK's compliance with WPPT provide a useful guide for New Zealand.

49. The Interest Group agrees with this intended approach for performers' rights in respect of sound recordings. It is preferable to provide (as does the UK) for performer's property rights to sit alongside the sound recording copyright rather than to adopt the Australian approach of retrospectively subdividing the sound recording copyright into producer's copyright and performers' copyright (held as tenants in common).[9]

50. There are some consequences which will flow from adopting the UK model (and the fact that the existing Part 9 of the New Zealand Copyright Act already confers rights on performers to prevent illicit recordings of their performances).[10]

51. Article 15 of WPPT confers on the performer the equitable right to remuneration for the direct or indirect use of recordings published for commercial purposes for broadcasting or for any communication to the public. In the UK CDPA this is given effect to in the s 182D which provides that the performer is entitled to equitable remuneration from the owner of copyright in the sound recording. In turn there is recourse to the Copyright Tribunal if the performer and sound recording copyright owner are unable to agree.

52. The Interest Group supports this approach in section 192D. It is important too that the rights conferred by Article 15 WPPT are kept separate from the rights conferred in Article 10 of WPPT (the exclusive right of making available of fixed performances). *Questions 19, 20 and 25 Cover Similar Issues*

53. **Questions 19 and 20** seek a response as to whether the two proposed performers' moral rights should apply to both aural and visual aspects of their live performances and communications of these.

54. In response to questions 19 and 20 the Interest Group agrees that a performer's moral rights should apply to both aural and visual aspects of a live performance and any communication to the public.

55. What amounts to a "live performance" will include a live performance by a band or artist (plus session musicians). Music artists and their

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9 For completeness, s 97(3) of the Australian Copyright Act does provide:

> "*Where:*
> *(a) A person makes, for valuable consideration, an agreement with another person for the making of a sound recording by the other person; and*
> *(b) The recording is made in pursuance of the agreement;*
> *The first-mentioned person is, in the absence of any agreement to the contrary, the owner of any copyright subsisting in the recording by virtue of this Part.*"

10 Drawn from the CDPA 1988 before inclusion of WPPT compliant provisions.

labels release not only sound recordings of their performances but also (very frequently) music videos of the band or artist performing the song live or incorporating other sorts of live performance by the band/artist synced to the sound recording. In this regard New Zealand On Air frequently provides funding for New Zealand artists to produce music videos to accompany the release of a new sound recording.

56. In these circumstances the Interest Group submits that moral rights should extend to visual aspects of live performances and the communication and distribution of any recording made from their performances. If New Zealand does introduce performers' rights for audio visual performances, *the rights and transfer of rights provisions* should mirror those of WPPT performers. **Question 25** asks "*Should the new property rights for performers be extended to apply to the recording of visual performances and 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 film).*"

57. The Interest Group addresses this issue solely with an emphasis on the recording of visual performances in film by sound recording artists. They cannot speak more widely than that. There appears no logical reason why performers' rights should not extend to films. However in terms of the distribution of licensing income, Recorded Music will be licensing only sound recordings and the property rights of performers in respect of sound recordings.

Question 21

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

Question 23

Do you agree or disagree with providing for any of the exceptions or limitations proposed for performer's right to object to derogatory treatment? Why?

Question 26

Do you agree or disagree within the exceptions or limitations proposed above [ie for the new property rights for performers]? Why?

58. As can be seen Questions 21 and 23 concern exceptions and limitations to the new intended performers' moral rights whereas Question 26 relates to the intended new performers' property rights. The Interest Group is agreeable to the existing exceptions and limitations to sound recording copyright applying equally to performers' property rights. However this comes with a very substantial caveat.

59. Any such acceptance or existing exceptions and limitations is purely driven from the fact that MBIE is dealing with the TPP–related amendments to the Copyright Act ahead of a full review of the Copyright Act itself. There are a number of exceptions and limitations

in Part 3 of the Copyright Act 1994 which will require further consideration. The fact that the Interest Group accepts the application of existing exceptions and limitations in Part 3 as applying to the new performers' property rights (and moral rights) must not be taken as conveying any acceptance by the Interest Group of any continuing validity of those exceptions or limitations when it comes to the full review.

Question 28

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

60. The Interest Group agrees with each of the proposals contained in paragraphs 127-130 of the Consultation Document. In particular it strongly endorses the need for there to be provision allowing performers to assign their future property rights. It is frequently the case that performers will enter into contractual arrangements with recording labels and it is necessary and desirable in the interests of both the performers and the labels that there be an ability to deal with the performers' property rights as part of such contract negotiations.

61. As to exclusive licenses, the Interest Group sees this as entirely sensible where there is an exclusive licence in existence. It is also consistent with section 123 of the Act in respect of copyright.

Question 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.

62. The Interest Group has no additional comments.

Date: 30 March 2016

SCHEDULE 1

Schedule 1
Brief Summary of Mathematical Errors – Ergas Report

Dr George R Barker

Update – 30 March 2016
Import Transfer Cost for Music is estimated to be $250,000 and not $18,000,000

1. This is a follow up to my written submission, and presentation on 17 March to the Select Committee in light of Minister McClay's and David Walker's subsequent comments on the costs and the phase-in on 18 March, and newly obtained recorded music revenue numbers for 2003-2008, which I only recently obtained from the internet archive and which appear to be the numbers Ergas based his analysis on.

2. The underlying calculation models/spreadsheets used by Ergas cannot be located so my work has required educated guess work on in order to replicate his work. I originally assumed Ergas based his analysis on the recorded music wholesale sales numbers from 2008-10 that are currently published on Recorded Music New Zealand's website. I have now obtained from the internet archive however a snapshot of data which appears to be a copy of the actual retail sales data for 2003-2008 that Ergas obtained and used from RIANZ's (now redundant) website. In what follows I thus update my analysis using the actual data Ergas relied on.

3. My key conclusion however remains. Even using the outdated and inflated sales data from 2003-2008 that Ergas relied on, I prove in this note that the Government's estimate of the cost of copyright term extension under the Trans Pacific Partnership is wrong. Rather than $17 million per annum the cost at most would be around $250,000 per annum. This is true even if one relied on Ergas's outdated and inflated sales data and a generous interpretation of the Ergas method. This implies that the Government's estimate of the costs of term extension is too high by at least by a factor of 60 even based on the data used by Ergas. The Government has not only overestimated the costs of term extension enormously as outlined in this note however, it must be remembered that it also underestimated the benefits of term extension as noted in my earlier submission.

How can the $18million import transfer cost for music be reconciled to music revenue data presented below?

4. At the Roadshow on Friday, 18 March 2016, Minister McClay commented on the $55 million per annum cost estimate for copyright term extension that - "*Officials assured me that the number was robust*". David Walker from MFAT also noted that the phase-in to term extension was negotiated because of the cost estimate and noted that MBIE were the officials providing the relevant estimate.

5. An MBIE spokesperson was cited by the media on that Friday afternoon as follows:

> "as far as the Ministry is aware, the 2009 study and report is *"the most comprehensive analysis of the economic impact of copyright term extension on the New Zealand economy"* and that's why the government has used its findings in the national interest analysis.

"The report clearly sets out the methodology and assumptions it used to estimate this, which the government considers to be a robust approach," the spokesperson said in a statement to NZ Newswire. [1]

Read more: http://www.newshub.co.nz/nznews/govt-stands-by-tpp-copyright-figures-2016031814 - ixzz43akt7LwW

6. Focusing on the Ergas Report, it identified the following elements to the Cost Benefit Analysis (CBA):

(a) Benefits
- Future Production
- Export Markets Berne Convention Arts 5 & 7
- Increased Foreign Investment

(b) Costs
- Import Transfer Cost
- Consumer Deadweight Cost
- Derivative Works Reduction
- Intermediaries Administrative Costs

7. Ergas' estimate of the import transfer cost for music which was $18million. This constitutes most of Ergas' total cost estimate for music of $17 million per annum. The $17 million cost estimate for music was also used to approximate the cost estimate for film. The music cost estimate therefore makes up $34 million of the $55 million cost estimate in total (i.e. 62%).

8. To calculate this $18 million cost, Ergas starts with music revenues (p30):

"We obtained data on the total value of retail recorded music sales from the RIANZ website and data on nominal GDP from Statistics New Zealand for period 2003 to 2007. This data was used to calculate a weighted average ratio of retail sales of recorded music to GDP of 0.00107. "

9. The table below identifies the data on the total value of retail recorded music sales from the RIANZ website for period 2003 to 2007, plus nominal GDP for the period and calculates the ratio for music sales to GDP.

	2003	2004	2005	2006	2007	Average
Retail Sales $m	$190.30	$176.30	$173.30	$155.90	$140.10	$167.18
Gross Domestic Product - expenditure measure $m	$141,657.00	$152,947.00	$160,751.00	$169,061.00	$183,301.00	$161,543.40
% of GDP	0.00134	0.00115	0.00108	0.00092	0.00076	0.00103

10. This suggests that over the period 2003-2007 the recorded music revenues used by Ergas' averaged $167.2 million. The average of retail sales as a ratio to average GDP for the period was thus 0.00103. This is close to Ergas' *weighted average* estimate of 0.00107. If one were to use Ergas' estimate of the ratio of music sales to GDP the sales would be around $172 million - not $167.18 million. But this is not that great a difference.

[1] http://www.newshub.co.nz/nznews/govt-stands-by-tpp-copyright-figures-2016031814#axzz43TVniLaO

11. So let's agree to simplify the analysis of the revenue data used by Ergas and assume revenues for the period were $170 million.

12. Given Ergas assumed:

    - music revenues were around $170 million, based on the above RIANZ data; and
    - sales in the category covered by term extension were 3.1% based on National Library of NZ holdings,

    the implication is that if term extension had already been fully implemented based on the above data, the total value of music sales affected by it would only have been $5.72 million at most. That is 3.1% of $170 million.

13. This already proves that the costs of term extension for music could not be $17million per annum. It is simply not possible to reconcile the cost estimate to record sales data. This is because $17 million per annum is 3.45 times than the total value of sales per annum in the 50-70 year old category (estimated using Ergas' own approach). One cannot reconcile the cost estimate to actual data. It must be wrong. Assumptions are not relevant here – it is an issue of maths.

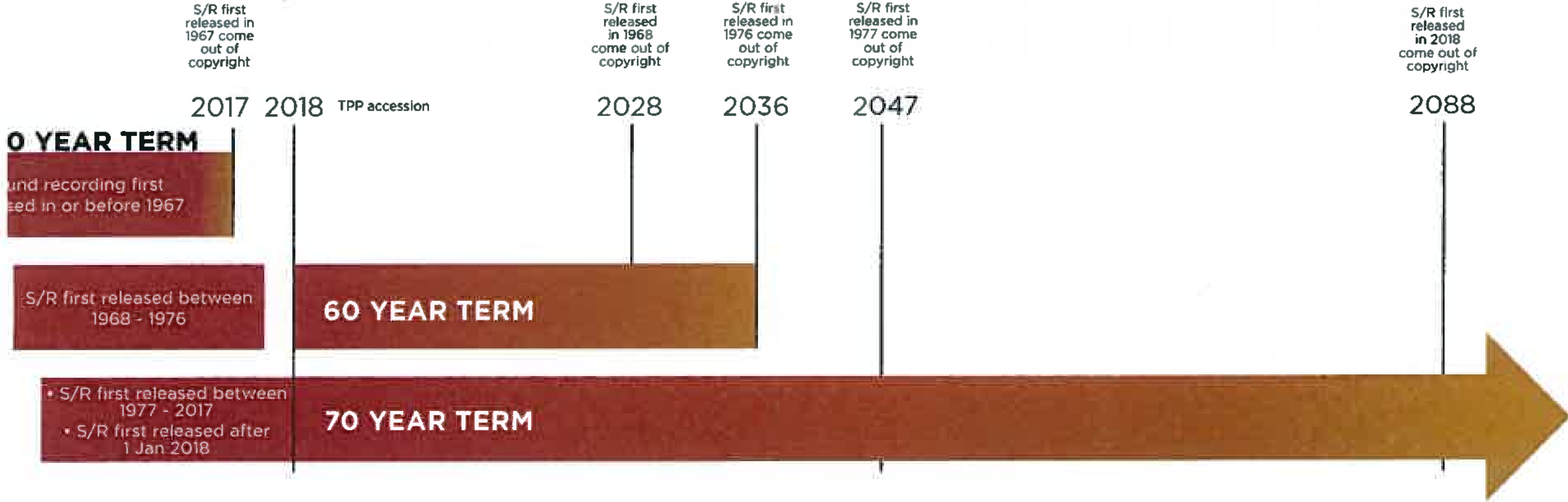
14. The table below goes further, and fully implements the remaining three steps which Ergas said he adopted in his calculation of the import transfer cost. In particular:

    - Step 3: he excluded sales of classical and singles sales from the calculation which he assumed were 25% of the total;
    - Step 4: He focused on a price rise of 26% as the impact of the term extension on the category; and
    - Step 5: He assumed the import share was 25%.

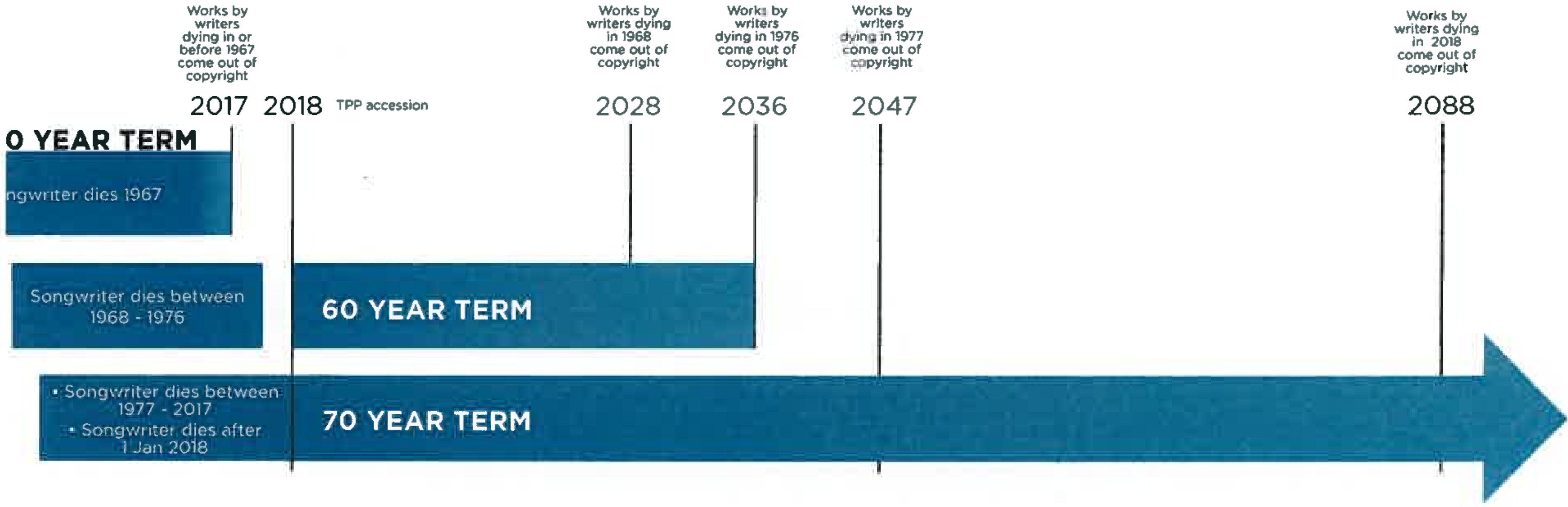
15. As shown below, this suggests the import transfer cost for music is around **$250k not $18 million.**

Steps by Ergas	**Assumption made by Ergas**	**Value $**
1. Total Sales	Average 2003-07 estimate	170,000,000
2. Share 50-70 Vintage	Ergas NLNZ Holdings %	3.10%
Sub Total		5,270,000
3. Classical & Singles	Ergas @25%	3,952,500
4. Higher Price	Ergas @ 26%	1,027,650
5. Imports	Ergas @25%	256,913

SCHEDULE 2



SOUND RECORDINGS
S/R first released in 1967 come out of copyright
2017
2018
TPP accession
S/R first released in 1968 come out of copyright
2028
S/R first released in 1976 come out of copyright
2036
S/R first released in 1977 come out of copyright
2047
S/R first released in 2018 come out of copyright
2088
0 YEAR TERM
und recording first
sed in or before 1967
S/R first released between 1968 - 1976
60 YEAR TERM
• S/R first released between 1977 - 2017
• S/R first released after 1 Jan 2018
70 YEAR TERM



MUSICAL WORKS
Works by writers dying in or before 1967 come out of copyright
2017
2018
TPP accession
Works by writers dying in 1968 come out of copyright
2028
Works by writers dying in 1976 come out of copyright
2036
Works by writers dying in 1977 come out of copyright
2047
Works by writers dying in 2018 come out of copyright
2088
0 YEAR TERM
ngwriter dies 1967
Songwriter dies between 1968 - 1976
60 YEAR TERM
• Songwriter dies between 1977 - 2017
• Songwriter dies after 1 Jan 2018
70 YEAR TERM

SCHEDULE 3

March 30 2016

By Dr George Barker
Law and Economics Consulting Associates

Is the New Zealand Phase-in of Copyright Term Extension under the Trans Pacific Partnership worth doing?

Executive Summary

1. This note addresses the question whether the New Zealand phase-in of copyright term extension for recorded music agreed under the Trans Pacific Partnership (TPP) is worth doing?[1] *It concludes the phase-in is not justified based on a cost benefit analysis, and that instead it is likely to make New Zealand worse off.*

2. The New Zealand Government has not undertaken an explicit cost benefit analysis of the phase in. It appears that the Government has instead simply assumed that the phase-in of term extension for recorded music under the TPP would generate benefits for New Zealand. The reason why is that term extension is estimated by the Government to cost New Zealand $17 million per annum for recorded music alone. It has therefore simply assumed that a phase-in would entail some saving on this estimated cost of $17 million.

3. The $17 million cost estimate of term extension adopted by Government is based on a report by Henry Ergas, commissioned by the Government in 2009 (the Ergas Report). As we show in this report however Ergas' estimates of costs are clearly wrong and the data used was out of date. We prove that there were major mathematical errors in Ergas' estimate of the costs of term extension. Once these errors are corrected the costs of term extension fall considerably.

4. Indeed once the errors in the Ergas' report are corrected it is clear the costs of term extension are likely to be offset by the additional output benefit that term extension will generate. Ergas however assumed the additional output benefit that term extension will generate was zero. Again this seems incorrect and underestimates the benefits of term extension. Instead we show the additional output benefit that term extension will generate is likely to be sufficient to offset the costs of term extension, when properly measured. We thus conclude immediate and full term extension will have a net benefit. Term extension should instead be implemented as soon as possible, and the phase-in should be avoided to realise the net benefit from term extension as quickly as possible.

5. This report also shows however that even if one assumes there is no additional output benefit from term extension offsetting its costs, the purported savings on costs from adopting even the maximum 8 year phase-in would still be so small as to be unlikely to justify the costs of implementing and administering the phase-in.

6. Assuming term extension involves no benefits, and only what Ergas called an import transfer cost, we show that no savings from a phase-in are realised until the 11th year after implementation, and even then they start as low as 4,000 per annum. The purported savings from the maximum allowable phase-in indeed never rise above $27,000 per year in year 18 after implementation, before falling to zero again in year 28 after

[1] See the Appendix for the detailed text on the NZ phase-in in the TPP.

implementation. The *total* value of the import transfer saving across all years is only around $263,000.

7. *In conclusion it is likely that the additional administrative and implementation costs associated with the phase-in in any year would exceed the* ***maximum*** *$27,000 savings per annum on costs. The phase- in introduces a three tier system (50, 60 and 70 year terms) that*

   - *has to be implemented over an 18 year period, starting in year 10 after implementation;*
   - *does not work through to full implementation until 28 years after the start of implementation; and*
   - *even after 28 years still has to be operated in a steady state in perpetuity.*

   Employing just one worker on the minimum wage to cover the additional administrative and implementation burden associated with the phase-in would cost more than the maximum 27,000 savings per annum on import transfer cost. The phase-in is thus not justified on a cost benefit analysis. The phase-in looks likely to make New Zealanders worse off.

Introduction

1. New Zealand needs to change its copyright term to comply with the Trans Pacific Partnership (TPP). New Zealand (NZ) has two options[2]. One is to legislate for a full and immediate implementation of the new term agreed under the TPP – "the TPP rule". The second is to adopt a phase-in as permitted by the TPP for NZ – "the phase- in". There are thus three scenarios under discussion

   - The current law;
   - Immediate and Full implementation of the TPP Rule;
   - The NZ Phase-in - which involves a *"delay"* in implementation.

2. The current law and its effect is what can be called "the baseline". Considerable work has already been done on the effect of immediate and full implementation of the new term agreed in the TPPA compared to current law or relative to the baseline.

3. This note addresses the question "Is the NZ Phase-In worth doing?" As we shall see the phase-in and the full implementation options both involve benefits and costs compared to the baseline or current law. It is the net benefits (benefits less costs) of each that need to be compared. If the net benefit of the phase-in is less than the net benefit of full implementation then it should not proceed

4. To identify the benefits and costs of the phase-in one has to
   (i) First clarify the total *net* benefit to NZ of full and immediate TPP implementation compared to current law or the baseline. This is the relevant counterfactual - or comparator, for the phase-in. We shall first do this drawing on existing analysis
   (ii) Second one needs to clarify the total *net* benefit of the phase-in compared to the baseline. Again we address this initially drawing on existing analysis.
   (iii) Finally one needs to clarify the difference in the net benefit between i) and ii). If the net benefit of the phase in is less than the net benefit of full implementation - (i > ii) - then the phase in should not proceed.

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[2] See the relevant text of the TPP in appendix One.

5. As noted there has been considerable analysis to date of (i) the costs and benefits of full implementation, which we will discuss first. There has however been less analysis of (ii) the costs and benefits of the phase-in. This is therefore a particular focus of this note in the second section. We shall do this drawing on existing analysis. In this regard we distinguish between two effects related to the phase-in.

   (a) The first is the indirect effect on economic outcomes of *the delay* proposed under the phase-in. We shall incorporate this effect in to our analysis above directly. The question is whether the delay in the phase-in generates a benefit compared to immediate and full implementation.
   (b) The second effect of the phase-in that is addressed separately is the more direct implementation and administration costs associated with the phase-in compared to immediate and full implementation? As we shall see the phase-in involves greater implementation and administration costs than immediate full implementation. The question then is whether these increased direct implementation and administration costs, outweigh any indirect benefits of the phase-in due to the *delay* it entails?

   The Government has not explicitly addressed or quantified the benefits and costs associated with these two issues (a or b). We seek to fill this gap.

Outline

6. In this paper we undertake two steps

   i. first we address the net benefit of full implementation compared to current law. We do this drawing on the Ergas Report commissioned by the Government in 2009. As noted in doing this we exclude consideration of direct implementation and administration costs which were not considered by Ergas.
   ii. second we discuss the net benefit of phase-in compared to current law, drawing on the Ergas Report *factoring in the effect of the delay* it involves,. As noted again in doing this we exclude consideration of direct implementation and administration costs which were not considered by Ergas.

7. Thus our focus initially is on how Ergas' analysis of the impact of term extension (6 i) needs to be amended focusing on the impact of *the delay in implementation* proposed in the phase-in (6 ii.). Again this analysis excludes consideration of direct implementation and administration costs of the phase-in that were not considered by Ergas.

8. On this basis we are able to compare the net benefits of the delay in the phase-in compared to the full implementation option (6i. - 6ii.) drawing on existing analysis and identify

   - if the "threshold" net benefits *of the delay* in the phase-in are positive (ie whether 6ii - 6i > 0), and
   - if so, how large.

9. Even if the delay effect of the phase-in generates a "threshold" net benefit (6ii.-6i. >0) it still should not proceed unless this threshold net benefit exceeds the additional direct implementation and administration costs of the phase-in. Thus the first "threshold" test of the effect of the delay is only a necessary, not a sufficient condition for adopting the phase-in. That is to say the phase-in should only occur.

(a) if the phase-in generates the necessary "threshold" net benefit (6 ii.- 6 i >0) *due to the delay* – i.e. excluding a consideration of its direct implementation and administration costs and

(b) if the "threshold" net benefit the phase-in might generate due to delay is greater than the additional direct cost of implementing the phase-in.

10. Based on our analysis we conclude the phase-in involves greater implementation and administration costs than full implementation, and that these additional costs are likely to exceed any claimed savings from delay that can be attributed to the phase-in. The Phase-in is thus not justified.

The Net Benefit of Immediate TPP Copyright Term Extension Implementation

11. The Government has estimated that copyright term extension under the TPP will cost New Zealand $55million per annum. The last column in table 1 below identifies how this $55m cost was derived. The total cost of $55m is identified in the bottom right hand cell of table 1. It is the sum of the cost estimates for books ($21m) music ($17m) and film ($17m) shown in the second to fourth rows of the last column of table 1.

12. As shown in the second and third rows of the last column in table 1. the $55m includes an estimated $21m per annum cost for books, and $17m per annum cost for recorded music. These annual cost estimates for books and music were in turn derived by the Government applying a 7.5% discount rate (shown in the third column) to the Ergas Report estimates of the total future cost of term extension (shown in the second column) for books ($281.5m) and music ($224.1m). Ergas did not however estimate the total future cost for film. Instead the Government instead used Ergas' estimate for music as its estimate for film, and that is why the numbers for film and music are the same ($17m per annum).

Table 1: The Government's Estimate of the Cost of Term Extension

	Total Future Cost $M	**NZ Gov't Discount Rate**	**Per Annum $M**
Books (Ergas)	281.5	7.50%	21
Recorded Music (Ergas)	224.1	7.50%	17
Film (NZ Government Est.)	224.1	7.50%	17
TOTAL COST- NZ Gov't Est.	729.7	7.50%	55

13. Given the Government used Ergas' estimates of the future cost of term extension for recorded music as an estimate of the cost of term extension for film as well, the Ergas estimate of the cost for recorded music in effect forms the basis for 62% of the Government's 55 million per annum estimate of the total cost of term extension (34/55). The problem then is that it appears Ergas' estimate of the cost of term extension for recorded music used by the Government is clearly wrong. As we show, it enormously overestimates any likely costs, while failing to incorporate the significant offsetting benefit of additional output associated with term extension.

14. Table 2 below identifies the relevant components of the Government's $17 million estimate of the cost of term extension for recorded music in the last column. This is based on how Ergas derived his $224.1m estimate of the total future cost of term extension for recorded music (shown in the second to last column). On the benefits of term extension as shown in the table. Ergas assumed zero output benefit, and only a small export benefit ($1m per annum). This involves a significant under-estimation of the benefits of term extension, and is something we return to later. The main driver of the $17million estimate of the total costs of term extension however is Ergas' estimate that term extension would

lead to additional payments to overseas owners of copyright, or an import transfer cost of around $18 million per annum (see row 5 table 2.). As we shall see this involves a major factual error, and over-estimates this key cost item.

Table 2: The Government's Estimate of the Cost of Term Extension for Recorded Music

Ergas' Model of Term Extension Benefits and Costs		**Total Future Cost $M**	**Per Annum at 7.5% $M**
Benefits	Output Increase	-	-
	Export Benefit	15.7	1
Costs	Import Transfer Cost	-239.0	-18
	Deadweight Cost	-0.8	-0
Total Net		-224.1	-17

15. It is important to note before proceeding however that reducing the *loss of public domain* has often been specifically cited by Government officials in public as justifying the phase-in. Loss of public domain is however not a separable issue from other issues addressed in the above table. Rather it is already included in the factors addressed in the Ergas model. The cost of any loss of public domain is in fact probably best captured in the relatively small deadweight cost to consumers that Ergas estimates at $0.8 million in total terms. This has an insignificant impact, or very minimal role to play in the Government's $17 million per annum total cost estimate. The main driver of the $17 million dollar total cost estimate for term extension for music relied on by Government to justify a phase-in is instead the $18 million per annum import transfer cost estimated by Ergas shown (row 5 in the table above). As we show below however the $18 million estimate of the import transfer cost is wrong. This estimate is fundamentally flawed, quite simply mathematically impossible. As a result the Government's total cost estimate of term extension for music of $17m used to justify a phase-in is wrong. As we shall see it is not only based on a huge overestimate of import transfer costs, it also under-estimates the key benefit of term extension. The Government's justification for a phase-in thus fails.

16. To more accurately re-calculate the net benefit (cost) of immediate term extension (i.e. no phase-in) we replicate the methodology used by Ergas in 2009 while correcting for key factual errors. Ergas started as follows with music revenues (p30):

> "We obtained data on the total value of retail recorded music sales from the RIANZ website and data on nominal GDP from Statistics New Zealand for period 2003 to 2007. This data was used to calculate a weighted average ratio of retail sales of recorded music to GDP of 0.00107. "

17. Table 3 below in the second row identifies the actual data which was on RIANZ website at the time Ergas wrote on the total value of retail sales for recorded music for the period 2003 to 2007, by year, and on average for the period. In the third row the table also shows nominal GDP by year, and on average for the period.[3] In the fourth row we identify the ratio for music sales to nominal GDP by year, and on average for the period.

Table 3: Recorded Music Record Sales data used by Ergas 2003-07

	2003	**2004**	**2005**	**2006**	**2007**	**Average**
Retail Sales $m	$190.30	$176.30	$173.30	$155.90	$140.10	$167.18
Nominal GDP $m	$141,657	$152,947	$160,751	$169,061	$183,301	$161,543
Sales % of GDP	0.00134	0.00115	0.00108	0.00092	0.00076	0.00103

[3] Gross Domestic Product - expenditure measure: Series, GDP(E), Nominal, Actual, Total (Qrtly-Mar/Jun/Sep/Dec). Obtained from Statistics New Zealand website March 2016.

18. This suggests that over the period 2003-2007 the recorded music revenues used by Ergas averaged $167.2 million as shown in the last column second row. The average of retail sales as a ratio to average GDP for the period was thus 0.00103 as shown in the last column final row. This is close to Ergas' *weighted average* estimate of 0.00107.[4] If one were to use Ergas' *weighted average* estimate of the ratio of music sales to GDP (0.00107), and multiplied it by the average nominal GDP data for the period presented in the table above, then one obtains an average sales estimate of around $172 million. This is more than the $167.18 million actually identified in the RIANZ website data in the second row. But this is not that great a difference.

19. So we propose to simplify the analysis of the revenue data used by Ergas, and assume he estimated the revenues for the period 2003-2008 were $170 million. This is more than actual RIANZ data suggested it was for the period but rounding up makes the analysis easier.

20. Given Ergas assumed:

- music revenues were around $170 million, based on the above RIANZ data; and that
- sales in the category covered by term extension were 3.1% based on National Library of NZ holdings.

The implication is that if term extension had already been fully implemented based on the above data, the total value of music sales affected by it would only have been $5.72 million at most. That is 3.1% of $170 million. This disproves the Government's conclusion that the cost of term extension for music could be $17 million per annum. It is simply not mathematically possible for it to be $17 million based on the data Ergas relied on. It is not a question of assumptions or modeling. It is instead simply a huge factual or mathematical error.

21. Table 4 below goes further, and fully implements the remaining three steps that Ergas said he adopted in his calculation of the import transfer cost. In particular:

Step 3: Ergas excluded sales of classical and singles sales from the calculation that he assumed were 25% of the total;
Step 4: Ergas focused on a price rise of 26% as the impact of the term extension on the category; and
Step 5: Ergas assumed the import share was 25%.

22. As shown below, this suggests based on the old retail sales data used by Ergas that the import transfer cost for recorded music would be around $257k if it were fully implemented for all recorded music in the 50-70 year catalogue in year one. The $18 million estimate of the *import transfer cost* adopted by Government is 70 times this more accurate estimate of $257k derived in Table 4 below using Ergas' method and the correct data. This again disproves the $17 million *total* cost estimate. It is a huge error totally undermining the case made for a phase-in.

[4] Ergas does not provide data or explain how this weighted estimate is calculated. Indeed more generally the data and calculations underlying Ergas report have been lost.

Table 4: Ergas' Import Transfer Cost Estimate using 2003-07 data

Steps by Ergas	**Assumption made by Ergas**	**Value $**
1. Sales NZD	1.6 NZD/USD	170,000,000
2. Share 50-70 Vintage	**Ergas NLNZ Holdings 3.1 %**	**5,270,000**
3. Classical & Singles	Ergas @25%	3,952,500
4. Higher Price	Ergas @ 26%	1,027,650
5. Import Share	Ergas @ 25%	256,913

23. Table 5 below shows an updated and probably more realistic estimate using sales data from 2008-2010 or at the time Ergas wrote. The key point is that sales of music collapsed from 2003 due to the falling effective rate of copyright protection with the advent of the internet and digitization, and the greater ease of copying this entailed. The only difference between the table 5 below and table 4 is that

- Table 5 uses the average retail revenues for 2008-2010 as identified by IFPI, rather than data for the time period 2003-2007 as used by Ergas; and that
- rather than using the share of the National Library of New Zealand (NLNZ) holdings as used by Ergas (3.1%), we use the average of the NLNZ share of holding (3.1%) and the share of sales in the 50-70 year group (1.0%) which is 2.05%

24. As can be seen updating the sales data and using the lower share of sales leads to a lower estimate of the import transfer cost, around 130K in year one, or half that estimated using Ergas' method and the older less accurate data.

Table 5: Import Transfer Cost Estimate using 2008-10 data

Item	**Assumption**	**Value**
1. Sales NZD	2008-10 data from IFPI [5]	129,280,000
2. Share 50-70 Vintage	Ergas NLNZ Holdings %	3.1%
	Sales Share %	1.0%
	Avge @ 2.05%	**2,650,240**
3. Classical & Singles	Ergas @25%	1,987,680
4. Higher Price	Ergas @ 26%	516,797
5. Import Share	Ergas @ 25%	129,199.20

25. In order to project the value of sales out into the future a number of further adjustments are required. First we need to factor in the impact of grandparenting over time, or the fact that any new term will only apply to works that have yet to fall out of copyright, and only as they begin to do so. Each year after implementation the share of sales in the 50-70 year category under copyright protection will increase by 5% (1/20th) until it reaches 100% in the category being protected 20 years after implementation. Thus the effect of even immediate and full implementation of the 20-year term extension would only gradually build up to reach its full effect over a twenty-year period.

26. Table 6 below in the last row thus identifies the import transfer cost in year 1, assuming 5% of imported sales in the 50-70 years category become covered by the new copyright term in year 1. The estimate in the second column last row is based on Ergas' estimate of retail sales value in 2003-2008. The estimate in the last column, last row presents an estimate of retail sales in 2008-10 when Ergas wrote. As can be seen, even the corrected

[5] IFPI presents the sales data in USD. We use the 1.6 NZD/USD exchange rate adopted by IFPI to convert back to NZD.

Ergas estimate for 2003-2008 in the second column last row is twice the value of the last column for 2008-10, which estimates the actual value at the time Ergas wrote.

Thus as shown in the last column using updated 2008-10 sales data the import transfer cost of the term extension with grand parenting ***in the first year*** *is only around 6500 a year.*

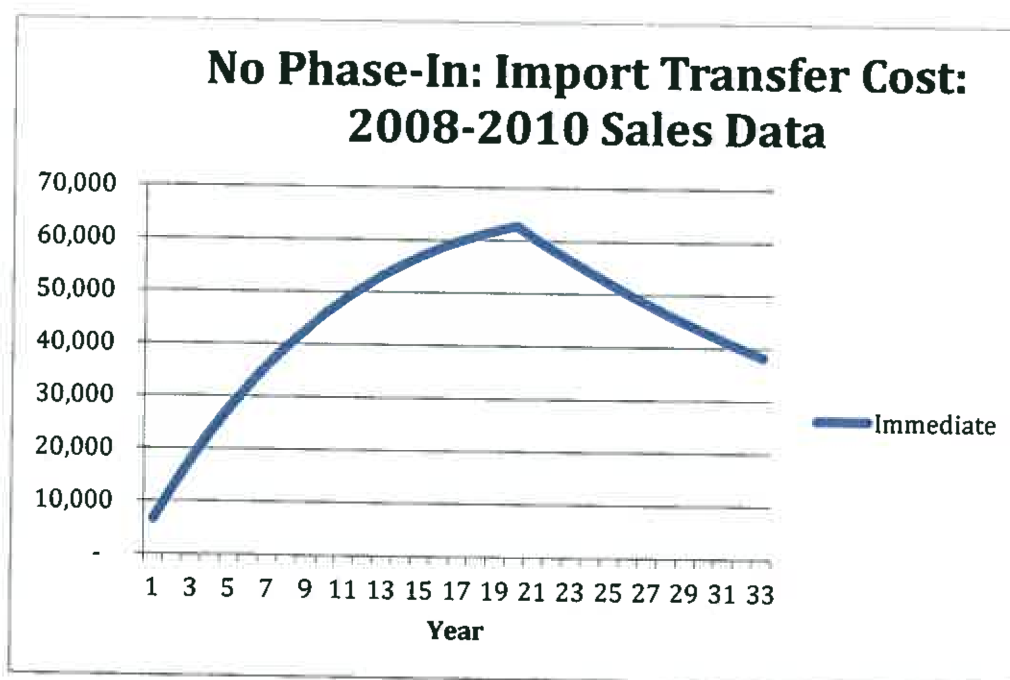
Table 6: Import Transfer Cost Estimate with Grandparenting

Item	Ergas 2003-2008	Updated 2008-10
Import Transfer Cost	256,913	129,199
Year 1. Grandparenting @ 5% p/a	12,846	6,460

27. As one moves beyond year 1, one needs to make two further adjustments

- we need to allow for growth in the value of the 50-70% category over time. Ergas assumed this would grow by 3% per annum;
- we need to apply an appropriate discount rate to the value of future sales to express this in present value terms. Ergas assumed a 7% discount rate

28. After making these adjustments the graph below identifies how the import transfer cost rises over time by 5% per annum *with no phase-in*.



29. The above import transfer costs of immediate and full implementation of term extension with grandparenting are relatively small. At their highest point around year 20, the Import transfer cost reaches approximately 62,000 per year in present dollar terms. This is only 0.048% of the sales revenues of 129 million in 2008-2010. It seems likely that term extension would generate an additional output with a benefit or value sufficient to offset this cost. The problem is Ergas assumed the output benefit of term extension was zero.

30. Given the output benefit of term extension is likely to be positive and exceed the small import transfer cost in all years, the implication is that immediate implementation of term extension would have a net benefit for New Zealand. To delay implementation with a

phase-in would delay realization of this benefit and thus only give rise to an opportunity cost. Thus the phase-in would have no net benefit, but only entail the opportunity cost of delaying realization of the benefit of term extension.

Once one acknowledges the likely output benefit, the phase-in is clearly not justified, and it does not make sense to delay implementation.

31. Leaving this fundamental point to one side, if instead one ignores the offsetting output benefit, and just focuses on the savings the phase-in might offer on import transfer costs alone, as we shall see any savings on import transfer cost would be small, and likely to be offset by the phase- in implementation and administration costs. This is what we turn to next

The Net Benefit of the Phase-in

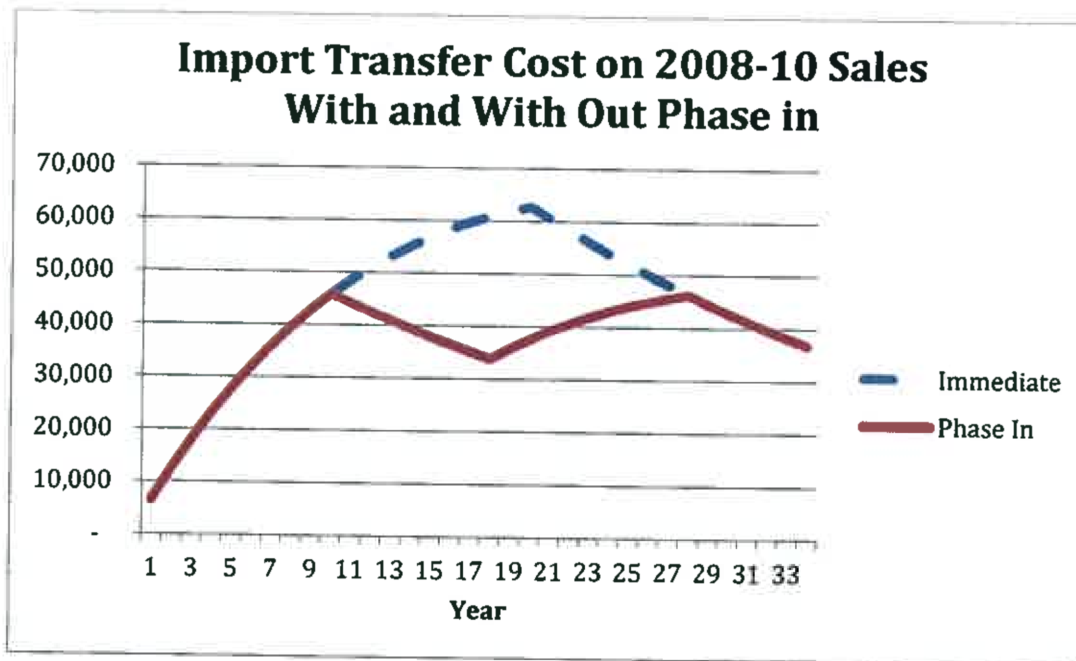
32. See the Appendix for the detailed text on the NZ phase-in in the TPP. In summary the TPP phase- in rule for NZ is as follows:

   - During the phase-in (maximum is 8 years from TPP implementation) all works coming out of the current 50-year term will enjoy a 60-year term, then fall out of copyright protection.
   - After the phase-in (8 years from TPP implementation) all works coming out of the current 50 year term will enjoy 70 year term, , then fall out of copyright protection.

33. With the NZ phase-in there will thus be three stages in how % of sales in the 50 to 70 year vintage with term extension will change compared to full and immediate implementation.

   (a) Initially there will be no difference in the % of sales in the 50 to 70 year term enjoying term extension under the phase-in versus the full implementation options. Initially under the phase-in the share of sales in the 50-70 year category under copyright protection will increase by 5%, until it reaches 50% protected after 10 years. The same is true with full TPP implementation.
   (b) After 10 years the situation changes. Under the phase-in ten years after implementation, the percentage of sales in the 50-70 category with protection will remain constant at 50% for 8 years, as the "group of 8" with the phase-in term of 10 years "transit out" or drop out, year by year, and the 20 year term "transits in", and
   (c) After 18 years from implementation, the group of 8 with ten years term will have exited the system, and the percentage of sales in the 50-70 category with protection will start to rise again at 5% per annum as the 20-year term "transits in" fully to 100%.

34. The graph below identifies how the import transfer cost rises over time with and without the phase-in. The blue line with a single peak shows the annual import transfer cost for the immediate implementation option as before. The red line with two peaks shows the annual import transfer cost (ITC) for the phase-in. As shown from year 10 the phase-in ITC falls compared to the full implementation cost. This is because the "group of 8" with ten year term start to exit the system. This continues for 8 years at which point costs under the phase-in then start to rise again until they equal the full implementation option, once the "group of 8" with ten year term exit the system. There is therefore an 18 year period from year 10 when the import transfer costs of the two systems diverge, and the phase-in might be said to generate a "saving" on the import transfer cost which is shown by the diamond in the diagram.



35. The table below identifies the cost per annum (in $000) in the years during which the phase-in cost differs from the no phase-in cost. It is never higher than $27,000 per year which occurs in year 18 as shown in the table below. The *total* import transfer saving value is around 263,000, this is the area in the diamond above.

Table 7: Import Transfer Cost Savings by Year After implementation

Year after Implementation	11	12	13	14	15	16	17	18
Import Transfer Cost $000	4	8	12	16	19	22	25	27

Year after Implementation Cont'd	19	20	21	22	23	24	25	26	27
Import Transfer Cost $000	26	25	21	17	14	11	8	5	2

36. *In* conclusion *it is likely that the additional administrative and implementation costs associated with the phase-in in any year would exceed the* <u>*maximum*</u> *$27,000 savings per annum on import transfer cost in any year. For example using one worker on the minimum wage to cover the additional administrative and implementation burden associated with the phase-in would cost more than the maximum $27,000 savings per annum on import transfer cost. The phase-in costs clearly seem likely to be more than $27,000 per annum, as it introduces a three tier system (50, 60 and 70 year terms) that*

- *has to be implemented over an 18 year period, starting in year 10 after implementation and.*
- *does not work through to full implementation until 28 years after the start of implementation and.*
- *even after that 28 years has to be operating in steady state in perpetuity.*

Conclusion

37. It appears that it has been assumed by the Government that the phase-in of term extension for recorded music under the TPP would generate benefits for New Zealand. The reason

why is that term extension is estimated by the Government to cost $17 million per annum for recorded music. It has been assumed therefore that a phase-in would entail some saving on this estimated cost of $17 million.

38. The $17 million cost estimate of term extension adopted by Government however is based on a report by Henry Ergas, commissioned by the Government in 2009. In conclusion we have clearly proven in this report that Ergas' estimates are wrong. There were major errors in Ergas' estimate of the costs of term extension. Once these errors are corrected the costs of term extension fall considerably.

39. Indeed once the errors in the Ergas' report are corrected it is clear the costs of term extension are likely to be offset by the additional output benefit that term extension will generate. This means immediate and full term extension will have a net benefit, and so term extension should not be delayed. Term extension should instead be implemented as soon as possible, and the phase should be avoided to realise the net benefit from term extension as quickly as possible.

40. This report also shows however that if one uses correct data, and *even if* one assumes there is no additional output benefit from term extension offsetting its costs, the purported savings from adopting even the maximum 8 year phase-in would be so small as to be unlikely to justify the costs of implementing and administering the phase-in.

41. Assuming term extension involves no benefits, and only what Ergas called an import transfer cost, we have shown that no savings from a phase-in are realised on this import transfer cost until the 11th year and even then they start as low as 4,000 per annum. The purported savings on import transfer cost from the maximum allowable phase-in then never rise higher than 27,000 per year in year 18, before falling to zero again in year 28. The total value of the import transfer saving across all years is only around 263,000.

42. *In* conclusion *it is likely that the additional administrative and implementation costs associated with the phase- in in any year would exceed the maximum $27,000 savings per annum on import transfer cost. For example using one worker on the minimum wage to cover the additional administrative and implementation burden associated with the phase would cost more than the maximum $27,000 savings per annum on import transfer cost. The phase-in introduces a three tier system (50, 60 and 70 year terms) that*

    - *has to be implemented over an 18 year period, starting in year 10 after implementation.*
    - *does not work through to full implementation until 28 years after the start of implementation.*
    - *even after that 28 years has to be operating in steady state in perpetuity.*

Appendix One – The TPP Rules

Chapter 18 of the TPPA provides for each party to implement a 70-year term for copyright as follows:[6]

> **Article 18.63: Term of Protection for Copyright and Related Rights:** Each Party shall provide that in cases in which the term of protection of a work, performance or phonogram is to be calculated:

- on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and

- on a basis other than the life of a natural person, the term shall be:
  - not less than 70 years from the end of the calendar year of the first authorised publication of the work, performance or phonogram; or
  - failing such authorised publication within 25 years from the creation of the work, performance or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance or phonogram.

NZ is allowed a phase-in on term extension under Article 18.83: Final Provisions: (and specifically 4. (d)) of Section K, of Chapter 18 of the TPP as follows

Article 18.83: Final Provisions

Except as otherwise provided in Article 18.10 (Application of Chapter to Existing Subject Matter and Prior Acts) and paragraphs 2, 3 and 4, each Party shall give effect to the provisions of this Chapter on the date of entry into force of this Agreement for that Party.160

.....

With regard to obligations subject to a transition period, a Party shall fully implement its obligations under the provisions of this Chapter no later than the expiration of the relevant time period specified below, which begins on the date of entry into force of this Agreement for that Party.

In the case of New Zealand, with respect to Article 18.63 (Term of Protection for Copyright and Related Rights), eight years. Except that from the date of entry into force of this Agreement for New Zealand, New Zealand shall provide that the term of protection for a work, performance or phonogram that would, during that eight years, have expired under the term that was provided in New Zealand law before the entry into force of this Agreement, instead expires 60 years from the relevant date in Article 18.63 that is the basis for calculating the term of protection under this Agreement. The Parties understand that, in applying Article 18.10 (Application of Chapter to Existing Subject Matter and Prior Acts), New Zealand shall not be required to restore or extend the term of protection to the works, performances and phonograms with a term provided pursuant to the previous sentence, once these works, performances and phonograms fall into the public domain in its territory.

[6] The full text of the TPP here: https://www.mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership The IP chapter 18 here: https://www.mfat.govt.nz/assets/_securedfiles/Trans-Pacific-Partnership/Text/18.-Intellectual-Property-Chapter.pdf