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

Your name and organisation

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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?
	Inevitably, changes to New Zealand intellectual property law designed to comply with the requirements of the Trans-Pacific Partnership (TPP) run the risk of tipping the delicate policy balance at the heart of copyright in favor of rightsholders at the cost of users and the general public. This is obviously true in major changes such as copyright term extension, but the same risk is posed by the other protectionist reforms that TPP would require. Experience in the United States has shown that once a shift of this type has taken place, it is extraordinarily difficult to redress after the fact. Thus, measures to assure continued balance should be part of the design from the outset. Fortunately, the text of the TPP gives implementing nations significant flexibilities in their effort to assure such balance. In addition to the specific changes suggested here, the policy process should include a consideration of adding an general, open, and flexible fair dealing provision to New Zealand copyright law. Where the second objective (to minimise the impact of change to maintain balance) is concerned, it would appear that the stated objective cannot be accomplished consistent with the TPP merely by cutting back at the margins on new protectionist measures. Rather, as the consultation document as a whole recognizes, that objective can be accomplished only by baking significant new or expanded copyright limitations or exceptions into the original project. Fortunately, the language of the TPP makes this possible. As to the third objective, while the goal of consistency is is unobjectionable, certainty, as such, may not be achievable in intellectual property law, any more than it is in other less exotic branches of jurisprudence. We should be careful not to hold intellectual property law to standards of certainly that are not met in, for example, the general law of torts (see negligence standards) or contracts (see “sufficient assent” or “undue influence”). More appropriately, in intellectual property law as elsewhere, we can aspire to the statement of general legal standards, which over time will acquire a high level of predictability in the balance they strike between rightholders and the public, both in and out of court. Countries with a strong common law interpretive tradition, such as the United States and New Zealand, are familiar with and prepared to advance the goal of predictability through iterative decision-making.

Moreover, especially where limitations and exceptions are concerned, the formalistic quest for certainty through specificity can put at risk the values of dynamism and flexibility. A theme of the comments that follow is the importance of building general, open, and flexible norms into the fabric of national law, so as to assure that among other things, new, unanticipated, emergent trends in culture, technology, and business practise can be accommodated. No closed list of exceptions, no matter how comprehensive, can accomplish this objective. Rather, a flexible provision provides the substantive certainty that new problems will be subject to predictable solutions without the need for legislative intervention. The considerable success of United States information and creative industries in the last 35 years is directly attributable to the fact that as new forms of information and new productive uses of information developed, our law was prepared to address them without the need for a resource-intensive and politicised legislative debate. A hybrid approach that combines specific exceptions with a general, open, and flexible provision can prove to be both effective and efficient.

The provision we propose would have three core criteria:

(1) Flexibility: the exception is applied through a flexible proportionality test that balances factors such as nature and importance of the new use, the interests of the author or copyright holder, and the impacts on third parties and society at large;

(2) Openness: the exception can be applied to uses not specifically enabled by enumerated limitations and exceptions (as distinguished from a closed list);

(3) Generality: the exception applies to all uses, purposes and uses, including those covered by specific limitations and exceptions.

Flexible exceptions that turn on general balancing tests are useful in allowing the law to adapt to the "next wave" of developments in culture, technology, and commerce which often cannot be foreseen.

There is a trend in modern copyright laws towards providing exceptions that are open as well as flexible. By "open" we mean to refer to the ability to apply the flexible exception to purposes not explicitly identified in the statute. It thus can be applied in cases of other purposes not foreseen in the original Act, which has been extremely useful in enabling new uses by artists and entrepreneurs alike. Open flexible exceptions have been included in recent copyright reforms in the Philippines, Israel, South Korea, Malaysia and Singapore; while in Canada a similar result has been accomplished through case law development. See, e.g. Michael Geist, The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law 2013. Open flexible exceptions have also been recommended by the Australian Law Reform Commission and by the South African Department of Trade and Industry, though not yet implemented in either country. *See, e.g.,* ALRC, *Copyright and the Digital Economy,* at ***https://www.alrc.gov.au/publications/copyright-report-122***.

Generality makes it possible for the balancing test to apply event to subjects covered under specific exceptions -- allowing the two to co-exist within the law. This permits, for example, the provision to be applied to library activities not specifically authorized by a library exception, as long as the provision meets the fairness test describes in law.

The most important reason to include an open and flexible exception in the law is to provide a mechanism for the law to adapt to gaps in coverage of users' rights that may be necessary to accommodate unforeseen uses of protected material that benefit society without harming the interests of the copyright owner. An open and flexible exception prevents the copyright law from pre-deciding that all unforeseen uses are prohibited.

In addition to assuring that copyright exceptions remain dynamic and relevant, the inclusion

of a flexible open exception in Part 3 of the Copyright Act would provide an additional safeguard that the implementation of new rights required under the TPP do not result in unnecessary and inappropriate burdens on the public's access to information and their ability to innovate. In addition, it would protect against the excessive future demands on legislative resources that would be involved in keeping technologically and situationally specific limitations and exceptions up to date.

Likewise, it is inevitable that implementation of the TPP provisions on copyright term extension will result in some harm to the public interest. However, inclusion of an general, open, and flexible copyright exception is one way to minimize future harms, including, but not limited to an increased problem of orphan works.

Notably, the Art. 18.66 of the TPP specifically authorizes and encourages parties to adopted general, open, flexible limitations as part of the implementation process:

> Each party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exception … giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes.

Legislative language implementing this provision can take various forms -- from U.S.-style "fair use" through open clauses that authorize judge-made exceptions by analogy to existing statutory ones. In any case, a new general, open, and flexible exception would benefit from the the existence of a considerable volume of jurisprudence from other common law jurisdictions, including Canada, the United Kingdom, and the United States. In Israel, for example, the decision was to follow the United States relatively closely so as to be able to selectively adopt locally useful concepts from U.S. caselaw. (Another advantage is that the U.S. government would be hard pressed to object to such a legislative move, either on the basis of the three-step test or otherwise.) Whatever choice New Zealand would make about how to implement flexible exceptions, it would find itself part of a large and growing international community, as Sec. 18.66 of the TPP recognizes.

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.

The consultation expresses a justified purpose to make limitations and exceptions for TPMs as broad as possible to protect lawful uses of works. However, even incorporation by reference of the ample list of specific exceptions that appears in Annex 1 may not provide a sufficient check on overreaching use of TPMs in the absence of an additional open and flexible provision. We advise making clear that the general, open, and flexible exception we support above (Question 1) apply to TPMs.

As an example where the current exceptions may be lacking, current Section 69 of the Copyright Act addresses only the needs of the blind and print disabled. An open and flexible exception could be applied case by case to other disabilities, such as

- for the use of persons with cognitive or processing disabilities, such as dyslexia, or
- to the creation of captioned versions of audio visual works for individual with hearing disabilities, a process which often will include the circumvention of the TPM on the commercially available copy of the audio visual work.

Likewise, the proposed framework fails to deal with a situation in which a copyrighted object is integrated with public domain material and the combination is placed behind a TPM (for

example, an old text with new annotations.) A user who wants to access the PD content only will be required (1) to circumvent the access control, and (2) to produce an intermediate copy of all the material in order to extract the unprotected part. This copying is not covered by any of the existing exceptions or proposed exceptions in New Zealand law, nor is it easy to craft a narrow, specific exception that would cover it (and other cognate problems) As a result, the "piggy-back" approach proposed to cover circumvention in aid of various non-infringing activities will not reach this case if circumvention. A general, open and flexible exception would solve the problem.

More generally, the currently proposed specific copyright exceptions may fail to anticipate the full range of future situations in which TPMs may pose a challenge to the legitimate use of copyrighted material. new kinds of TPMs and new applications of TPMs, leading to a slow erosion of the balance between TPMs and permitted circumvention.

Thus, a flexible exception could be useful for application to text-mining and the creation of digital databases increasingly used in social science research. Depending on the nature of the work, these methodologies may involve the avoidance of various types of TPMs for large volumes of works. No provision or combination of provisions in current Section 50 et seq. which were written for the copying and communication anticipates this innovative and important research technique. A flexible exception would assure that such research could go forward without unnecessary concerns about liability for either copyright infringement or circumvention.

More generally, a flexible exception would be useful to reach the full range of library practises that rely on use of copyrighted works. In the consultation, the preservation copying exception is limited to situations in which the item has been lost, damaged, or destroyed. In practise, however, librarians and archivists dealing with digital goods are often concerned with format updating and redundant digital backup, and thus the provision, as written, does not apply clearly to the preservation of digital objects. They contemplate the more well-established set of practises about making digital preservation copies of analog objects. As more material come in born digital or digital only formats, the challenges of preservation changes and the problem posed by TPMs becomes more significant. The proposal to rely on the exceptions in Part 3 of the Copyright Act as the source of exceptions thus creates no space for increasingly common library practises such as the preservation of digital objects by reformatting or the creation of extensive databases of material drawn from digital sources to enable systematic research employing data-mining techniques. However, a general, flexible, and open exception could reach these activities, which are clearly analogous to ones that Part 3 now specifically permits. Further, the limitations of these library provisions exacerbates the difficulties that will be caused by copyright term extension.

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, the availability of legitimate tools for legitimate users is important. Although in practise the availability of tools to enable legitimate circumvention may not often be a insurmountable impediment, conscientious and observant users may treat this prohibition seriously and be discouraged by it from obtaining the tools they require. Less technologically adept and sophisticated users are also disproportionately discouraged from exercising their right to circumvention. If a legitimate local company is able to say, "here is everything you need to engage in this lawful act of circumvention", it enables less sophisticated users and may help ensure that these same users do not risk the security of their devices by downloading tools from less legitimate sources.

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?
	No opinion.
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.
	If New Zealand is going to follow the TPP and expand the prohibition on services and devices to include access controls, it is particularly important the legislature clarifies that this prohibition does not apply to scholarly and technical communications related to circumvention technology, as distinct from hardware and software tools.
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.
	Yes. Maintaining New Zealand's distinctive and well-tailored approach to TPM exceptions would be important in assuring continued balance in an expanded TPM regime. It is the provision relating to non-infringing uses which would permit circumvention for the purpose of accessing unprotected information from behind a TPM barrier applied to a group of information objects, some copyright protected and some not - for example, a minimally protected compilation of factual data. Note, however, that where protected and unprotected content are integrated behind a circumvention barrier, the provision on non-infringing uses, standing alone, will be insufficient to allow circumvention aimed at the extracting the public domain or other non-copyrighted content. (See question 2).
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?
	No, the correct safety valve is a general, open and flexible copyright exception, to which the TPM provisions can refer. The infringing or non-infringing nature of the underlying action will determine the legitimacy of circumvention. Providing a list of clear exceptions and limitations to TPM provisions is important for reducing the administrative burden of a regulatory process, but case-by-case adjudication will always be important in new, unusual, or unanticipated circumstances.
Patent term extension for delays in patent grant	
8	Do you agree with the proposals for patent term extensions for unreasonable grant delays? Why / why not?
9	Do you think that there should be a limit on the maximum length of extension available for grant delays? If so, what should it be?
10	Do you consider that third parties should be able to oppose decisions to extend patents on

	the ground of unreasonable delays in grant?
Patent term extension for pharmaceuticals	
11	Do you agree with the proposed definition of “unreasonable curtailment” for pharmaceutical patent term extensions? If not, what other definition should be used?
12	Do you agree that the definition of “unreasonable curtailment” should apply different time periods for small molecule pharmaceuticals and biologics? If so, what could these time periods be? If you consider that only one time period should apply to both, what should this be?
13	Do you agree with the proposed method of calculating the length of extensions for pharmaceutical patents?
14	The proposed method of calculating extensions for pharmaceutical patents includes a maximum extension of two years. Do you agree with this? If not, what do you think the maximum extension should be?
15	Do you agree or disagree that only patents for pharmaceutical substances *per se* and for biologics should be eligible for extension? Why?
16	Do you think the Australian definition of “pharmaceutical substance” should be adopted? Why / why not?
17	Do you agree that patent rights during the extended term should be limited in the manner proposed?
18	Do you agree that third parties should be able to oppose decisions to extend patents for pharmaceuticals through the Commissioner of Patents? Why / why not?
Performers’ rights	
19	Do you agree that a performer’s moral rights should apply to both the aural and visual aspects of their live performance and of any communication of the live performance to the

	public? Why / why not?
	Recognition of the visual aspects of live performance would significantly increase the burden on compliance without producing any obvious additional benefits to performers. Any requirement for the recognition of the moral rights of performers poses significant new challenges for some categories of legitimate users. For example, documentary filmmakers whose practises involve capturing real events in public places will often encounter activities which arguably constitute performances; some activities such as dance for example may be exclusive or predominantly visual. Their recording of those activities may be interpreted as having been done with the implied consent of the performers in question. However, a moral right of identification, or integrity is by definition non-waivable. So the filmmaker who documents activities in public places will acquire an ongoing obligation with respect to any performers whose activities were captured which may be difficult or impossible to discharge. The identity of such performers may be unknown, although potentially ascertainable with considerable effort. Where the integrity right is concerned, the filmmaker will be poorly positioned to determine in advance what uses of the visual aspects of a performance might be considered derogatory. in the case of integrity, the significance of the moral right may be impossible to ascertain in advance, putting the filmmaker in a position of considerable uncertainty. The fact of this dilemma suggests, first, that at least until there has been additional experience, the moral right should be extended cautiously rather than broadly, or selectively rather than generally where performers are concerned. Specifically, there seems to be no urgency attached to New Zealand's providing moral rights to the visual aspects of live performance, or indeed to any performances. Therefore, it would be preferable to implement narrowly rather than broadly, as the WPPT does not require any protection for the visual aspect. Since there is little international experience with administering performers' visual rights it would be preferable to move cautiously. Expansion of the integrity right will necessarily put greater stress on the difficult distinction between derogatory use and legitimate critique. The integrity right collides with the idea that critique is a free and open expressive activity. Because performers' rights are unexplored territory, recognized in theory but little tested in practise, it would seem that initially the wisest course would be to pursue a minimal path towards implementing New Zealand's international obligations.
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?
	As discussed above, the issue of what constitutes derogatory use is likely to be more controversial and less well marked in the context of visual uses, and so New Zealand should not currently go beyond the protection of recordings as required by the WPPT. Viewed from an international perspective, it would unusual to take such a dramatic step without the benefit of a comprehensive public review of New Zealand copyright law.
21	Do you agree or disagree with any of the exceptions or limitations proposed for a performer's right to be identified? Why?
	As discussed in Question 22, below, the exceptions or limitations should include a general, open and flexible provision.
22	Are there any other exceptions or limitations to a performer's right to be identified that should be included in the Copyright Act? If so, can you please explain why they would be necessary.

	As we recommended generally, (Question 1) we would urge the inclusion of a general, open and flexible exception where moral rights are concerned. There is a particular risk that without such a provision, conflicts between the moral rights principle and other important legal values might be difficult to resolve. For example, there are situations in which a new work might include a brief excerpt of a recorded performance for purposes of illustration and likewise, especially in performance-oriented instructional programs, recordings of performances may be used for educational purposes. Although it would be difficult to prescribe in advance the exact scope of an exception for illustrative or educational use there clearly will be cases in which the beneficial purpose of the use outweighs the interest of the rightsholder. Because this is an experimental venture into a new terrain, an open provision should be included as a kind of safety valve.
23	Do you agree or disagree with providing for any of the exceptions or limitations proposed for a performer's right to object to derogatory treatment? Why?
	As discussed in Question 24, below, the exceptions or limitations should include a general, open and flexible provision.
24	Are there any other exceptions or limitations to a performer's right to object to derogatory treatment that should be included in the Copyright Act? If so, please explain why they would be necessary.
	The current limited list of exceptions to the integrity right (current events, normal editorial practise, etc) appear to leave out of account situations in which the integrity right may conflict with expressive uses, including: criticism, review, and study. Without a general, open, and flexible exception, there is a real risk that the moral rights enforcement might conflict with legitimate speech. Moreover, there is a risk that in the absence of flexible exception courts will be called upon to make difficult binary choices (legitimate critique vs derogation) for which they may have neither the requisite institutional competence nor the ability to develop an adequate factual record.
25	Should the new property rights for performers be extended to apply to the recording of visual performances in films? Why / why not? (Please set out the likely impacts on performers and producers, and any others involved in the creation, use or consumption of films.)
	No, if this choice could be avoided at the current time, it would be wise to do so. There are unknown and unknowable follow on effects for, among others, the makers and distributors of films. To what extent, for example, can a performer who has been paid modestly to perform a small role, demand additional compensation if the film in question meets with a high level of commercial success? Many of these problems will normally be obviated by contract, but experience suggests that this will not always be the case, especially where works produced by new or inexperienced filmmakers are concerned. Given that performers' rights are again an uncharted area, New Zealand should proceed deliberately and go only as far as the WPPT requires -- that is protecting only rights in performances fixed in phonograms, i.e. musical performances. A more general copyright policy review should have, as one of it's objectives, a determination of whether or not a significant problem of the bootlegging of visual performances exists in New Zealand exists at this time. However extensive or modest the implementation of performers' economic rights may be, there are certain general principles that should be observed. - These rights should be fully transactable, unlike moral rights. To the extent possible

	downstream users should not be confronted with separate economic claims with respect to uses of the same recorded performance. - Where the performer has transferred this right to a producer or other commercial exploiter of the performance only one action for the violation of the producer's and performer's rights should lie against any alleging infringing outside party, and only one set of damages should be available.
26	Do you agree or disagree with any of the exceptions or limitations proposed above? Why?
	As discussed in Question 27, below, the exceptions or limitations should include a general, open and flexible provision.
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.
	The long list (at paragraph 126 of the consultation document) of exceptions for sound recordings seems relatively comprehensive, but it should be complemented by a provision that is general, open, and flexible. In the short term this would, for example, assure space for instructional, critical and illustrative uses of sound recordings and in the longer term it would provide a facility for dealing with new socially productive uses not currently predicted or envisioned.
28	Do you agree or disagree with any of the proposals above? Why?
29	Are there any other amendments that need to be made to the Copyright Act, and in particular to Part 9, to clarify the new performers' property rights? If so, can you please explain why they would be necessary.
Border protection measures	
30	Do agree that Article 4 of European Union Council Regulation (EC) No 3295/94 is an appropriate model for implementing *ex officio* powers into the border protection measures set out in the Copyright Act 1994 and Trade Marks Act 2001? If not, please explain why not and outline an alternative approach to implementing *ex officio* powers.
31	Do you agree that the detention period of three business days following notification to the rights holder is appropriate? Can you outline the impact on both the right holders and any importer/exporter where you consider the period should be shorter or longer than three business days?

Other comments