



Publishers Association of New Zealand

Submission to Foreign Affairs, Defence and Trade Committee

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

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Introduction

The Publishers Association of New Zealand is an incorporated society representing book, educational and digital publishers. Our members are large international publishers and local independents, they are educational and trade publishers, publishers for adults and for children, combining to produce over 2000 new titles a year. Export is a key focus and has been propelled by New Zealand's guest of honour at the Frankfurt and Taipei Book Fairs. In both education and trade publishing, digital—from ebooks to licensed platforms to ecommerce—is business as usual. According to the latest PWC report, the book industry employs 2026 FTEs, brings in \$330m a year in revenue, and has a direct GDP impact of \$128m.

Publishers build their business in New Zealand and around the world by finding talented authors and illustrators, investing money in that talent to turn great ideas into books and online resources, and then selling the resulting intellectual property in multiple formats all around the world—in print books and ebooks, in English and translation, as film and audio rights, in university course packs and serialised magazine articles.

Robust copyright and contract law is the backbone of publishing. We welcome the TPPA's intellectual property provisions because they reinforce New Zealand's commitment to strong copyright law as the enabler of a flourishing creative sector: a decent copyright term that enables authors, like farmers, to pass on the fruits of their creativity; exceptions and licenses that allow critics and school teachers to do their job, while making sure authors still get paid; and enforcement to prevent the freeloaders, who never want to pay authors anything, getting



away with it. The TPPA's intellectual property provisions will harmonise New Zealand law with our key trading partners which will enable more trade in the intellectual property that publishers deal in.

Further to our submission of 11 March 2016, we need to express our ongoing frustration with MBIE officials continuing to reference the 2009 Ergas Report figures in regard to copyright term extension. The true cost of copyright term extension for books is c. \$80,000 a year—more than 200 times less than the government's number. And anything more than a 0.1% output increase of New Zealand originated titles due to the increased copyright term (experts suggest up to a 10% output increase) will make term extension not a cost, but a net economic benefit to New Zealand. The errors contained in the government's National Interest Analysis undermine the value of copyright in the public mind, undermine the creative industries that depend upon copyright, and underestimate the value of free trade. We call for more robust analysis of the economics of the creative industries in the future so that the value of intellectual property as a driver of New Zealand economic growth can be quantified.

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?

Yes.

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.

No. It would be useful to ask ‘what would the impact be of providing these exceptions.’

In order to invest in writing and publishing, authors and publishers need to know that the innovative technologies which they (and any content distribution partners) utilise to deliver their books to readers are not able to be undermined by broad circumvention exceptions.

We would like to see reference to the Berne three step test in these discussions: copyright exceptions are to be limited to certain special cases, that don’t conflict with a normal exploitation of the work, and does not unreasonably prejudice the legitimate interests of the author. Talk below of ‘general exceptions’ allowing people to break TPMs for almost any reason run counter to the letter and spirit of Berne.

Publishers are the biggest users of copyright content—every day we and our authors are using the fair dealing exception to include quotes in our books, we are finding rights holders and paying them to include their work in anthologies, we are securing photographic rights for illustrated books etc. As users of copyright content, we have never found an occasion where we have needed to break a TPM. Legitimate uses of copyright content are, in our experience, available for licensing or available under an existing copyright exception.

There may be some unusual, limited, special cases where some legitimate users of copyright content have to break a TPM to secure their legitimate use. The case needs to be made that ‘The prohibition [on circumventing TPMs] has an actual or likely negative impact on a use that does not infringe copyright.’ That case has not yet been made.

One of the proposed exceptions is to allow New Zealanders to circumvent geographic market segmentation. The Berne Treaty states that ‘Authors of literary and artistic works... shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.’ Authors do that by licensing their work to different publishers in different markets. That’s why a book like Eleanor Catton’s *THE LUMINARIES* has different publishers in the UK, the US, Australia and New Zealand—publishers who can maximise their local market and sell hundreds of times more copies than just one publisher based in one market could

do. To enable a vibrant creative economy for authors and publishers, local publishers buy exclusive rights in their territory and fashion the book for their local readers. Allowing New Zealanders to break TPMs to get around that market segmentation undermines the rights of authors and publishers and their ability to find readers around the world for their work. It is not a special case, it does conflict with the normal exploitation of the work, and it does unreasonably prejudice the legitimate interests of the author.

Another exception proposed is: ‘For any other purpose that does not infringe copyright.’ Providing blanket exceptions is not how copyright law works. Exceptions should only be available for specific uses that achieve a defined policy objective. The proposal to include an exception ‘for any other purpose that does not infringe copyright’ walks our law many steps beyond Berne, outside the TPPA, and beyond our international trading partners.

We do not agree with the exceptions proposed for TPMs—they are very broad and will undermine the normal exploitation of the work and the legitimate interests of the author.

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?

Companies who aim to make money out of selling devices or services that break TPMs are usually called pirates. If they can sell those services and devices in New Zealand legally because the purchaser might want to use them “for any other purpose that does not infringe copyright” then publishers and authors have a big, big problem.

Publishers and authors have built a successful Ebook format (and given readers what they want) by providing access to the world of books at good prices for reading on phones and tablets and ereaders. That business, 20% of many publishers’ revenue now, relies on TPMs that contain content within devices and platforms—Amazon’s Kindle in particular.

Selling TPM circumvention devices to anyone who wants them would quickly destroy that market.

We are happy with Section 226A’s prohibition on dealing in TPM circumvention devices.

Circumventing a TPM is something that the occasional library or Blind organisation (‘qualified person’) may need to do to realise a legitimate copyright exception. The occasions will be very, very rare in part because publishers are ready to enable legitimate uses of copyright work. So, when the Blind Foundation comes to publishers to make a Braille edition of a work, 81% of publishers supply an electronic file with no TPMs attached to make it quicker and easier for the Foundation.

Legislation should identify those exceptional circumstances where breaking a TPM might be required. A blanket exception that allows anyone who thinks they might not be infringing copyright to buy TPM-circumventing devices and services from pirates to have a crack will help destroy the flourishing legitimate market for publisher content in digital form.

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. We are comfortable with the current legislation that restricts the circumvention of TPMs to qualified persons to exercise a permitted Act. That's how breaking TPMs should be limited.

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.

The TPPA requires that: 'The prohibition [on circumventing TPMs] has an actual or likely negative impact on a use that does not infringe copyright.' So far, that government has not uncovered such an impact. Relying on submissions to establish such an impact seems backward. We submit that the current exceptions meet the policy objective.

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.

The suggestion of a "general exception" is totally contrary to the Berne three step text and to a policy objective of providing certainty. It might have been useful to ask the question this way: 'Would there be a likely adverse impact on copyright holders if the exception for any other purpose that does not infringe copyright was provided for?' The answer to that question is yes.

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. It should be a narrow and specific exception for a few qualified people to use in exceptional cases.