

SUBMISSION ON “TARGETED CONSULTATION DOCUMENT: IMPLEMENTATION OF THE TRANS-PACIFIC PARTNERSHIP INTELLECTUAL PROPERTY CHAPTER

To The Ministry Business Innovation & Employment

1. This submission is from Universities New Zealand.
2. Universities NZ is the operating name of the New Zealand Vice-Chancellors’ Committee, a statutory body established under Part 19 of the Education Act 1989. It has statutory responsibilities for university quality assurance, the approval and accreditation of university academic programmes, entrance to universities, and scholarships. It also represents the interests of New Zealand’s eight universities on a wide range of other matters.
3. The Vice-Chancellors of New Zealand’s eight universities were all consulted in the development of this submission.
4. We can be contacted via the Executive Director of Universities New Zealand, Chris Whelan:

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

Post: Level 9, 142 Lambton Quay, PO Box 11-915, Wellington 6142

SUBMISSION

TPP implementation overarching objectives

1. *Have the overarching objectives been framed correctly for this policy process? If not, what would be more appropriate objectives?*

Given the harmful impact of the extension of the term of copyright will have on educational and cultural institutions and the cultural life of New Zealanders, we submit that consideration be given to replacing paragraph 19 b. with the object of making more substantial changes to the Copyright Act to counter that harm and take account of the rapid technological changes that industry and universities in particular are facing.

We also submit that the objective in 19 b. of providing an “appropriate balance between rights owners and users” be removed. The objectives should reflect the purpose of copyright to encourage the creation of new works. We would submit that in a time of rapid technological

change in which copying is integral to both its use and the creation of new works, both users and creators benefit from and use third party content. The objectives should reflect this and recognise that balance has no part in the development of copyright policy.

We also question whether the copyright is in fact able to “provide certainty”, referred to in 19 c., in a time of rapid technological change. We submit that what is needed is a flexible and principled approach to any changes to the Copyright Act 1994 and that those changes should foster rather than stifle innovation.

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.*

Generally we support the proposed exceptions in paragraph 42, but we are concerned about the specificity of some of the exceptions and would support more principled based exceptions rather than specific examples. We note that TPMs provide perpetual protection against copying which makes it even more important that a generalised exception allows for a flexible approach to circumventing TPMs.

We support the proposition in paragraph 44 to 47 that the exceptions should cover all currently permitted acts under Part 3 of the Copyright Act and that the exceptions be extended to cover both the prohibition on circumvention and the prohibition on providing devices or services which enable circumvention.

We also support the exceptions proposed in paragraph 48, but suggest the following changes to make the changes less specific and consequently more flexible in response to technological change. In particular:

- **To enable the circumvention of a TPM to the extent that it controls geographic market segmentation by preventing the playback of legitimate physical copies of a film, sound recording, or computer game in New Zealand.**

We suggest that the reference to “film, sound recording, or computer game” be removed and replaced with a more generic term “a work”. The provision would read **“To enable the circumvention of a TPM that to the extent that it controls geographic market segmentation by preventing the playback of legitimate physical copies of a work in New Zealand.”** This would provide greater flexibility and enable, for example, the circumvention of a TPM protecting a literary work in electronic form, legitimately purchased overseas.

- **To enable encryption research**
- **To enable good-faith security research**

In the interests of simplicity we query whether encryption research and ‘good-faith’ security research should be separated out as encryption is considered generally part of security. Use of the term ‘good faith’ is confusing for those conducting research in this area. We submit that the term ‘good faith’ should be defined or replaced with a requirement that the research ultimately confers a benefit for the rights owner and/or users. For example the Coordinated Disclosure Guidelines in

vulnerability research require that a researcher notify the rights owner of any vulnerability they discover and cooperate with the rights owner to fix those. See: http://www.nzitf.org.nz/pdf/NZITF_Disclosure_Guidelines_2014.pdf

- **To enable individual play by gamers of legitimate video games for which outside server support has been discontinued.**

We submit that this provision should not be restricted to “gamers”, and “video games” but should be broadened to enable individuals or organisations to continue to use legitimately obtained software which relies on outside server support provided by a third party but for which that support has been discontinued.

Universities spend a lot of money on using collaborative software solutions with a central server or service. Considerable investment is made in these services with no long term security that it will continue. More and more universities are relying on “software as a service” solutions and if a third party provider no longer offered that service for various reasons it could be critical for the continuation of support services that these providers offer. For example career services in New Zealand universities have entered into an agreement with a software provider which provides a centralised hub which employers can access and post job opportunities for graduates. Loss of access to this for any reason would impact on the ability of graduates and students to find jobs until such time as a replacement could be obtained.

- **For any other purpose that does not infringe copyright**

We submit that this exception should specifically include any act permitted under Part III so the exclusion would read:

For any other purpose that does not infringe copyright including any act permitted under Part III

- **Exceptions relating to libraries and other non-profit entities**

We support specific exceptions for libraries and other non-profit entities, however we have concerns regarding paragraph 51 b. ii. We submit that the exemption from civil liability be limited to “good faith” and the requirement that “without knowing the conduct was prohibited.” be removed as knowledge would be difficult to ascribe to an institution as opposed to an individual. This would also raise evidentiary issues.

We support the exceptions and limitations proposed for TPMs with the suggested amendments set out above. If these exceptions were not provided it would prevent the research and development of software solutions which may depend on the interoperability of various devices and software.

Without the exceptions many of the audio-visual collections of libraries would be inaccessible and it would also significantly reduce the content that would be available to purchase. Universities hold large collections of audio-visual content purchased in the US and Europe. Academics also hold personal collections of specialist audio visual content purchased overseas and used for their teaching and research. It is critical that both institutions and individuals are able to circumvent TPMs, for legitimate purposes.

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?*

We agree that the exceptions proposed for TPMs should apply to both prohibitions and the provision of services or devices that enable circumvention. Without extending the exception to the provision of services and devices it would be impossible to obtain the devices needed to access and play the specialised works in our collections or to undertake much software research.

4. *Do you agree that, if our proposals are implemented, the current exception allowing a qualified person to circumvent a TPM that protects against copyright infringement to exercise a permitted act under Part 3 would no longer be required? Why / why not?*

Yes we agree a specific exemption for a qualified person is not required if there is a more generic exception allowing for anyone to circumvent a TPM to exercise a permitted act. Given the ubiquitous nature of TPMs, it is critical that anyone can circumvent one in order to exercise a permitted act. We reiterate our support for anything which increases flexibility.

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.*

We do not think that any other exceptions or limitations, other than those suggested above in response to question 2, are necessary.

6. *Would there be a likely adverse impact on non-infringing uses in general if the exception for any other purpose that does not infringe copyright was not provided for? Please be specific in your answers.*

A generalised exception encompassing “for any other purpose that does not infringe copyright” is vital as it allows for technological or other changes. It also makes it clear that any other permitted acts and any subsequent amendments to the Act are covered. This is particularly important given that the Copyright Act is due to be reviewed in the coming year. We support Judge David Harvey’s observation that “copyright has nothing to do with limiting access to a work by means of a technological protection measure. The proposal that the act of circumvention in and of itself be prohibited serves no purpose.” The copyright owner already has a remedy where copyright is infringed.

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?*

This would be unnecessary if the general exception was retained. To allow for a regulation-making power to enable the exception for any other purpose adds an unnecessary layer of complexity to an already complex law.

If a general exception was not provided for then it would be of benefit to enact a regulation-making power

Performers' rights

19. *Do you agree that a performer's moral rights should apply to both the aural and visual aspects of their live performance and of any communication of the live performance to the public? Why / why not?*

We submit that a performer's moral rights should apply to both the aural and visual aspects of their live performance, however we support the proposal that in respect of recordings made from performances, those rights are limited to the communication or distribution of sound recordings as required by WPPT and TPP. A visual recording of a performance may capture performances which are incidental to the main purpose of the recording and leaves a director or producer open to claims from those who may have appeared in the performance in the background or incidentally to the main purpose of the recording. It would also make obtaining permission to show or use the visual recording of the performance much more difficult.

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?*

We do not think they should apply to films for the same reasons as set out in response to 19 and we think it would add too much complexity to the Act and in the process create uncertainty which would limit the creation and communication of films.

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

We agree that the exceptions and limitations to a performer's right to be identified be aligned with existing exceptions and limitations to authors' moral rights.

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*

Under s 169 of the current Act, the performance of a literary, dramatic, or musical work before an audience of staff and students is not a performance for the purposes of Part 9. We suggest that this exclusion be retained in any amendments to the Act.

It is imperative that an educational establishment does not infringe copyright by failing to identify a performer in recording of performances by a presenter or student in the course of instruction for the establishment's educational purposes. We believe it is necessary as educational institutions are increasingly recording lectures and presentations by staff and students during the course of their educational activities and making them available on learning management systems to assist students with their learning. Granting academics and students performance rights in these learning environments creates unnecessary complexity and risk for educational institutions.

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?*

Yes, we support those exceptions which are a combination of the existing exceptions and the exceptions listed in paragraph 121 of the Targeted Consultation Document.

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*

We cannot at this point in time identify any additional exceptions to the performer's right to object to derogatory treatment.

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.)

We do not think that this right should be extended to visual performances of films for the same reason as identified in response to question 19.

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

We agree with the exceptions listed in paragraph 126. Without these exceptions which do not interfere with a copyright owner's economic rights, it would in effect limit the ability of institutions to carry out their objectives and on ordinary New Zealanders to enjoy the cultural benefits provided by recordings of performances.

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.

We believe that the current exception which provides that a performance before an audience of staff and students at an educational establishment is not a performance for Part 9 of the Copyright Act be retained, so that property rights do not arise in a performance by presenter and students in the course of instruction for the establishment's educational purposes. We believe it is necessary as educational establishments are increasingly recording lectures and presentations by staff and students during the course of their educational activities and making them available on learning management systems to assist students with their learning. Granting academics and students property rights in these learning environments creates unnecessary complexity and potential costs for educational institutions.

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

We agree with the proposals set out in paragraph 126.

SUPPLEMENTARY SUBMISSION - EXTENSION OF THE COPYRIGHT TERM

We acknowledge that the scope of this consultation process is limited to implementation of changes required to ratify the TPP. Nevertheless we add to this submission the following general comments in relation to things that are related but not strictly within this scope. In part we do so because these related elements formed part of a discussion with Ministry officials during our consultation meeting on 22 March 2016, who encouraged us to comment on these issues so as to form as complete a picture as possible as the Government considers the changes that need to be made now, as part of the TPP process, and in the future as part of a wider review of the Copyright Act.

As we have maintained in separate submissions,¹ Universities New Zealand does not support the extension of the copyright term. As the Government has itself acknowledged,² as a net importer of intellectual property, the extension will cost the New Zealand taxpayer and predominantly benefit overseas interests. Some New Zealand rights holders will benefit but this will be a very small minority; and where authors are already deceased, the authors' estates are the beneficiaries.

Copyright is a monopoly granted to creators of works for a limited period. Works fall into the public domain when this period expires so that there is no barrier to accessing or reusing the knowledge or other value contained in those works. From the perspective of New Zealand universities, the cost of extending the length of copyright is both economic and cultural.

In terms of economic cost, we have already submitted³ that with an increased copyright term there will be increased licensing costs for universities in order to access research databases and other academic literature vital to New Zealand's research community. Publicly available figures show that in 2013 New Zealand universities and Crown Research Institutes spent around \$55 million on access to journal subscriptions.⁴ This figure excludes other licensing costs incurred by universities that would add a further \$4 to \$5 million dollars.⁵ Even now, with a life+50 year term, the vast majority of works used in teaching and research are in copyright and we lack any exception in the Copyright Act to use any of that material beyond 3% of standard book⁶ without a licensing cost being incurred. Increasing the term means that rights-holders can charge for access to works for the additional 20-year period that would otherwise have fallen into the public domain.

In the cultural sense, many universities manage or administer museums, archives and other collections of works that are of cultural and historical importance. Around the world these types of cultural institutions, including our national museum Te Papa, are digitising collections in order to

¹ See part 10 (pp. 4 ff.) of the *Universities New Zealand Submission on the International Treaty Examination of the Transpacific Partnership Agreement to the Select Committee on Foreign Affairs, Defence and Trade*.

² The Ministry of Foreign Affairs and Trade National Interest Analysis (NIA) (<https://tpp.mfat.govt.nz/assets/docs/Trans-Pacific%20Partnership%20National%20Interest%20Analysis,%2025Jan2016.pdf>) notes that New Zealand is "a very substantial net importer of IP protected goods (e.g. books, recorded music, films, software, pharmaceuticals), ...the greater benefit of any additional IP protection in New Zealand would accrue to foreign IP owners." (p. 24).

³ See part 10 (pp. 4 ff.) of the *Universities New Zealand Submission on the International Treaty Examination of the Transpacific Partnership Agreement to the Select Committee on Foreign Affairs, Defence and Trade*.

⁴ <http://www.radionz.co.nz/news/national/255421/research-publishers-costing-taxpayers>

⁵ Other licences cover copying from print-sourced publications, music and audio-visual materials.

⁶ See Copyright Act s 44 (3) (f) (ii).

<http://www.legislation.govt.nz/act/public/1994/0143/latest/DLM345964.html>

make these valuable works available to researchers and the general public. In some cases these have created new revenue streams.⁷

When undertaking a new digitisation project, naturally these organisations consider the costs involved. One of the first questions they will ask themselves is whether the works in question are still in copyright. If they are not then many things are simplified and cost is reduced in terms of administration and resources. Thus, extension of the copyright term will mean that many works of cultural significance will not enter the public domain for a further 20 years.

Two examples of renowned New Zealand artists whose works would enter the public domain in the near future under the existing life+50 regime are Rita Angus and James K Baxter (died 1970 and 1972 respectively). Depending on when the term extension came into effect, a phased implementation for 60 years for a period of time could mean that these works enter the public domain sooner than an immediate change to 70 years.

If works identified for a digitisation project are still in copyright, cost and complexity are incurred in terms of:

- attempts to determine who are the rights owners (which may be the creator's estate) and how they may be contacted – often no clear rights owner can be identified;
- contacting rights owner(s);
- for those who respond, negotiating usage rights, which often involves explaining to them that they have rights to begin with (i.e. often rights holders are not aware that they have any rights in the works in question); and
- following up with those who do not respond.

Where creators are unknown, cannot be contacted or do not respond the works cannot be digitised and made available, limiting use to people who can physically access the works on site.

If the works in question are out of copyright then none of these steps need be undertaken, provided of course that there are not non-copyright issues that need to be taken into consideration, such as privacy concerns or if the works may be considered taonga.

Naturally these issues affect not only cultural institutions but also authors, historians, researchers or publishers who wish to create new works based on the works or life of these artists, who must either seek permission (in the same way as outlined above) or wait a further 20 years.

In light of these comments, we support the phased implementation of the copyright term extension and signal our appreciation of the efforts of TPP negotiators to secure this reduction in the impact of the extension, however slight.

Finally, we reiterate a point made in a prior submission that the impact on the public domain of the term extension could be lessened by requiring registration of copyright beyond 50 years.⁸ Kimberlee

⁷ See Pekel, Joris (2014). *Democratising the Rijksmuseum*: "releasing the medium quality images to the public in 2011 still allowed them to have a viable business model, and in fact increased the amount of image sales." (p. 12-13).

http://pro.europeana.eu/files/Europeana_Professional/Publications/Democratising%20the%20Rijksmuseum.pdf

⁸ Maria Pallanate, 'The Next Great Copyright Act' [2013] 36(3) Columbia Journal of Law and the Arts 315 in Kimberlee G. Weatherall. 2015. "Section by Section Commentary on the TPP Final IP Chapter Published 5 November 2015 – Part 2 – Copyright" The Selected Works of Kimberlee G Weatherall Available at: <http://works.bepress.com/kimweatherall/32>

Weatherall identified that the 'no formalities' provision seen in earlier proposals for the TPP is not included in the final version, leaving "open to TPP parties who *do* have to extend the term the possibility that formalities (like registration) could be introduced at least for the Berne-plus part of the copyright term – mitigating, albeit not entirely removing, the orphan works problem."⁹

⁹ Kimberlee G. Weatherall. 2015. "Section by Section Commentary on the TPP Final IP Chapter Published 5 November 2015 – Part 2 – Copyright" p 12, The Selected Works of Kimberlee G Weatherall Available at: <http://works.bepress.com/kimweatherall/32>