

# Submission template

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

### Your name and organisation

Name                      Keitha Booth                      Redacted s.9(2)(a) OIA 1982  
Organisation            Creative Commons Aotearoa New Zealand

### Responses to consultation document questions

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| 1  | Have the overarching objectives been framed correctly for this policy process? If not, what would be more appropriate objectives?<br><br>Please note that all of our comment is in Other Comments at the end of the document.                                |
| <b>Technological protection measures</b> |  |
| 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.  |
| 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?   |
| 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? |
| 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.   |
| 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.   |

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?

#### 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?

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?

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

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.

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?

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.

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.)

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

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.

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 you 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

Creative Commons Aotearoa New Zealand (CCANZ) supports a balanced approach to copyright in New Zealand. Our free, open licences enable copyright owners to give a range of permissions in advance, enabling New Zealanders to take advantage of the internet and digital technologies to legally engage with and innovate on our country's knowledge and culture. This has contributed to a global commons of 1.2 billion Creative Commons licensed works.

However, Creative Commons licences are a patch, not a fix, for an imbalanced copyright system. They apply only to works whose creators make a conscious decision to use an open licence. The success of open licensing demonstrates the benefits that sharing and remixing can bring to individuals and society as a whole. However, Creative Commons operates within the frame of copyright law, and as a practical matter, only a small fraction of copyrighted works will ever be covered by our licenses.

Our experience has reinforced our belief that to ensure the maximum benefits to both culture and the economy in this digital age, the scope and shape of copyright law need to be

reviewed. However well-crafted a public licensing model may be, it can never fully achieve what a change in the law would do. The public would benefit from more extensive rights to use the full body of human culture and knowledge for the public benefit. CC licenses are not a substitute for users' rights, and CC supports ongoing efforts to reform copyright law to strengthen users' rights and expand the public domain.

Specifically, we recommend, **first, that any copyright term extension should be balanced by a broad and flexible exception for fair copying and reuse.** This will go a long way towards moderating any negative effects from the extension in terms of a reduction in user access to copyright material. The vast majority of works to which the term extension applies will have little or no commercial value during the extra 20 years of protection<sup>1</sup>. A flexible exception such as fair use ensures that such materials can still be used in ways that are fair as the ability to license them naturally declines, either because their copyright owners cannot be contacted (orphan works) or because their commercial value is so low that they are abandoned by their owners (out of commerce works). Thus fair use helps to counteract one of the major risks of the term extension - that large categories of copyright materials will essentially be locked away, unusable, for a longer time without any additional benefit flowing to their creators.

Furthermore, we agree with the recommendations of the Australian Law Reform Commission (ALRC), which concluded that:

Although standards are generally less certain in scope than detailed rules, a clear principled standard is more certain than an unclear complex rule. The Report recommends replacing many complex prescriptive exceptions with one clear and more certain standard—fair use.

As the ALRC concluded in the Australian context, the exceptions in New Zealand are too complex and detailed for affected professionals, which include 100,000 New Zealand teachers, and many thousand heritage workers. In our experience in the compulsory education sector, this leads to one of two behaviours, neither of which are intended by the Act. On the one hand, educators ignore copyright altogether, and copy and reuse whatever they wish. On the other hand, educators become overly fearful and fail to take advantage of the limited exceptions the Act provides, to the detriment of their students.

There is no New Zealand specific data on the use of the existing regime of exceptions that we are aware of. However, we strongly recommend that MBIE, in the event of a broader review of the Act, actively consult with education sector organisations to understand the on-the-ground impact of the existing regime of exceptions. Specifically, this should include relevant professional bodies and associations for teachers, librarians, trustees and principals.

**Second, we recommend that copyright term extension requires formalities.** While New Zealand is bound to require formalities for the 'life plus fifty' term, it is arguable that this requirement does not apply for any term extension beyond this point. In order to ensure a vibrant, accessible and re-usable public domain, we argue that the Act should require copyright owners who wish for an additional twenty years protection to register their work with an appropriate office.

This will ensure that only those works that require the extension receive it, while the vast majority of works that are no longer in commercial circulation are freely available to access and reuse. As with the fair use exception recommended above, this will reduce the risk of the

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<sup>1</sup>

A study of books available on Amazon.com by legal scholar Paul Heald found that "A random sample of new books for sale on Amazon.com shows more books for sale from the 1880's than the 1980's."

Paul J. Heald. "How Copyright Keeps Works Disappeared" (July 5, 2013). Illinois Program in Law, Behavior and Social Science Paper No. LBSS14-07; Illinois Public Law Research Paper No. 13-54. Available at SSRN: <http://ssrn.com/abstract=2290181> or <http://dx.doi.org/10.2139/ssrn.2290181>.

copyright extension creating negative impacts for users whilst providing little or no benefits for creators.

We support a registration system for extension of protection beyond 50 years, combined with a flexible exception to permit fair uses even while a work remains in copyright. This is the best way to ensure the copyright term extension meets its aim of providing extra protection to those copyright owners who may be able to make use of it without creating an unnecessary barrier to the free use and dissemination of knowledge for the benefit of society.