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Building, Resources and Markets
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30 March 2016

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

The New Zealand Screen Association (**NZSA**) represents the Motion Picture Association in New Zealand and the New Zealand interests of the six major Hollywood studios: Twentieth Century Fox, Paramount Pictures, Sony Pictures, Universal Pictures, Warner Bros., and Walt Disney Pictures, as well as Roadshow Pictures.

Film and television in context

NZSA's members produce and distribute film and television content in New Zealand and abroad. The film and television industries involve scores of dynamic businesses which, together, make a major contribution to the New Zealand economy. In a 2013 study, PwC found that film and television:

- directly employed more than 14,000 people in New Zealand, with a total employment impact of over 31,000 employees; and
- contributed \$1.3 billion to New Zealand's GDP with a total impact of \$2.8 billion.

New Zealand Screen Association Comments

NZSA's response to the Consultation Document focuses largely on Technological Protection Measures (TPMs). We also responded to the Ministry's invitation to provide input on other relevant issues to Chapter 18 implementation. This discussion can be found at the back of this submission under "other comments" and includes comment on term extension, camcording, and exceptions and limitations.

The NZSA and its members appreciate this opportunity to offer preliminary comments on the Government's proposals to implement the TPP. We look forward to working closely with the Ministry throughout its process to implement Chapter 18 of the TPPA.

We welcome the opportunity to discuss any of the issues raised in this response in more detail. I can be contacted on +64 21304228 or by email: matthew.cheetham@screenassociation.co.nz.

Yours Sincerely,

A handwritten signature in black ink, appearing to be 'M Cheetham', written in a cursive style.

Matthew Cheetham
Managing Director
New Zealand Screen Association

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

Your name and organisation

Name	Matthew Cheetham, Managing Director
Organisation	New Zealand Screen Association

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?

We support the objectives set out in paragraph 19 of the consultation document and particularly the Ministry’s objective of providing certainty. We encourage the Ministry to take this opportunity to create certainty for content users and rights holders in implementing the amendments in the consultation document. In particular, where New Zealand implements exceptions to TPP obligations, the Ministry must ensure those exceptions are clearly prescribed and limited, giving certainty to content creators and rights holders of their rights, and to content users of their legal obligations.

Respectfully, however, the Ministry has overlooked an important objective – ensuring that New Zealand’s legal regime incentivizes investment in new and innovative distribution platforms for creative works. A recent study indicated that stronger copyright protection, including specifically respect for TPMs, is closely correlated with better access to online delivery services for creative works and even to greater online creative outputs. [GIPC IP Index Annex 2016 at 2].

TPMs are the engine for new, innovative online services– they ensure that an inexpensive rental or a free ad-supported service does not in fact become a permanent copy, or worse, a permanent copy distributed to anyone with an Internet connection. TPMs ensure that when a service utilizes exclusive access to premium content in order to help generate buzz, that access remains exclusive. TPMs also allow cable and satellite subscribers to access televised content online. In short, all the new forms of digital and online access to creative content that consumers value and enjoy owe their existence to respect for TPMs.

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.

TPMs control and manage access to copyrighted works. TPMs foster dynamism, enabling rights holders to respond rapidly to consumer demand by creating new content and services while recouping their enormous investments in content creation. TPMs are critical to incentivise the creation of new and innovative content distribution models, allowing consumers to enjoy content at a time, from a place, on a device, and at a price point, that works for each individual. We support effective and accurate implementation of Article 18.68 of the TPP and believe that effective implementation will foster a dynamic marketplace for

creative content.

New Zealand's current law on permissible exceptions, which is tailored to specific permitted uses and includes safeguards, more closely comports with the TPP than the proposed revisions. The TPP consultation document discussion on TPMs exceptions would swing New Zealand far away from compliance with the TPP by providing broad and unbounded exceptions that swallow the rule. In so doing, the proposed exceptions in many instances belie the Ministry's stated objective in para 19.b of the consultation document. Moreover, as discussed in the responses to Questions 3 and 6 below, elements of the Ministry's proposed approach on TPMs do not comply with the TPP Art 18.68 and, therefore, do not comport with the Ministry's objective stated in para 19.a.

NZSA agrees with para 41 of the Consultation Paper that current prohibitions on trafficking in circumvention devices or services must be extended to cover those that circumvent access controls as well as those that circumvent "copy" controls. However, other additional changes to existing law would be needed to achieve compliance. For instance, Section 226 (definition of circumvention device) must be broadened to cover devices that are promoted, advertised or otherwise marketed for the purpose of circumventing effective technological measures consistent with TPP Art. 18.68.1.b.i. Moreover, the definition of such devices must be broadened to meet any one of the criterion, which means the "and" in the current definition must be changed to "or".

Also, the requirements under paragraph 2 of Section 226A (prohibition on providing circumvention services) must be removed. Section 226A (2) provides that "A person (A) must not provide a service to another person (B) if– (a) A intends the service to enable or assist B to circumvent a technological protection measure; and (b) A knows or has reason to believe the service will, or is likely to, be used to infringe copyright in a TPM work." Neither of these requirements is found in TPP Art.18.68.1.b., and their inclusion unreasonably narrows the scope of the prohibition by requiring burdensome proof of the intention or knowledge of the service provider. This frustrates the intended protection and would significantly impede the benefit thereof.

Similar changes are needed to the criminal offenses in section 226C in order for New Zealand to comply with the TPP. Knowledge or intent requirements are not permitted under the TPP Art. 18.68.1, other than wilfulness; TPP footnote 88 is a reference to knowledge of the device or service's circumvention capabilities, not to knowledge of likely future infringement.

NZSA agrees with the Ministry that both civil and criminal remedies must be provided for the circumvention of a TPM that controls access to a copyrighted work.

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?

The Government's proposed approach of applying its exceptions, in every case, to both the act of circumvention and the provision of devices or services that enable circumvention (i.e., trafficking) is inconsistent with the TPP. The TPP does not provide for this equivalence of exceptions to these two discrete prohibitions. Permitting the trafficking in circumvention devices or provision of services to enable circumvention carries significant risk of harm for right holders and creators. It is extremely difficult to ensure that such activities are not carried out for unforeseen or unauthorized purposes, in a manner that would eviscerate protection for the underlying content.

Art. 18.68.4.b permits exceptions to the trafficking violations in narrow circumstances, specifically, only "to enable the legitimate use of a limitation or exception permissible under this Article by its intended beneficiaries," and states that such exceptions cannot extend to

“authoriz[ing] the making available of devices, products, components or services beyond those intended beneficiaries.” However, the consultation document indicates that “intended beneficiaries” includes any person who is capable of making a non-infringing use of a copyrighted work, i.e., anyone. Such an unbounded provision clearly is inconsistent with Art. 18.68.4.c, as it would clearly undermine the adequacy of New Zealand’s legal system for the protection of effective technological protection measures. Finally, the proposed exception would appear to allow the circumvention services or devices to be supplied “to enable” the exercise of a permitted Act and there is no indication that the supply must be carried out only for that purpose, or that the recipient of the device or service would have to surrender it after making the non-infringing use in question.

Importantly, New Zealand’s current law arguably is more closely aligned with the TPP limitations on permissible exceptions since it applies only to a specified list of beneficiaries; requires them to make a written declaration before obtaining the circumvention tool, device or service; applies only to permitted uses listed in part 3; and, does not apply at all to circumvention services. These safeguards reflect the sort of tailoring to specific permitted uses that Art. 18.68.1.b contemplates.

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?

Please see responses to questions 2 and 3.

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.

No further exceptions or limitations are warranted.

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 TPP Art. 18.68.3 prohibits TPP parties from subsuming TPMs violations under copyright infringement. The consultation paper appears to suggest that there can be no civil or criminal liability for any TPM violation in “situations where copyright is not infringed.” This is entirely inconsistent with the concept of an independent violation and with the principle that unauthorized access to a copyright work, enabled by circumvention of access controls applied to that work, must in principle be prohibited, whether or not that particular access leads to an infringing act.

Moreover, a general exception would be inconsistent with the TPP’s obligation that exceptions cannot undermine the adequacy of the legal system for the protection of TPMs nor effective legal remedies against circumvention. Once TPMs have been circumvented, a work is “in the clear” and can be distributed millions of times. As noted above, TPMs create the functionality of new distribution platforms and such an undefined and uncertain exception would discourage investment in new and innovative distribution models.

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?

The marketplace for creative works is constantly evolving as industry develops new business

models to respond to consumers' demands. A rule-making process, such as the U.S. 1201 triennial rulemaking procedure, is evidenced-based and can nimbly review and respond to changes in the marketplace, which is in contrast to statutory exceptions which may become outdated as technology evolves.

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?

As the current process aims to implement the provision to the TPP, the Ministry is rightly focused on performers' rights in sound recordings which are covered in the WPPT, which New Zealand will be obliged to accede to as a result of the TPP implementation process.

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.)

	<i>We agree with the Ministry's approach to limit performers' property rights to sound recordings at this time.</i>
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 agree that Article 4 of European Union Council Regulation (EC) No 3295/94 is an appropriate model for implementing <i>ex officio</i> 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 <i>ex officio</i> 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

Term extension

The Government has repeatedly stated, including in the recently-released National Impact Analysis (NIA) of the TPP, that the extension of the term of protection for copyrighted works would cost the New Zealand economy NZ\$55 million annually. This erroneous data point comes from a seriously flawed study commissioned by the Government called the Ergas Report from 2009. This data point was used to justify the eight year phase-in New Zealand negotiated in the TPP. While it is unfortunate that the Government relied on flawed data to negotiate the TPP, there is no need to allow this flawed data to guide implementation. As with our colleagues in the WeCreate Coalition, including the local music association (Recorded Music New Zealand) who have

provided a detailed analysis of the flaws in the Ergas Report, we strongly encourage the Government to remove references to this data in its TPP impact assessments and to reconsider the phase-in for term extension recalling that term extension benefits content creators and innovators in New Zealand, particularly those competing on a global stage.

Camcording

NZSA is pleased that TPPA parties recognized the serious damage that unauthorized camcording does the motion picture industry by criminalizing this activity in Article 18.77(4). Illegal camcords account for **over 90% of piracy** while movies are in theatres and materially impacts theatre revenue.

We recommend that in amending the Copyright Act, the Ministry implements a specific prohibition against unauthorised recording in movie theatres, supported by criminal liability. A recent study found that such piracy results in 15% reductions in box office revenue. Experience globally demonstrates that an appropriately targeted camcording law, which allows enforcement against someone caught in the act of camcording, is necessary to have a significant deterrent impact on illegal camcording. Moreover, a specific prohibition would address concerns raised as recently the summer season of 2015/2016, when the local enforcement authorities were willing to work with local exhibitors but were unsure themselves of what to do in the event they caught someone in the act of illegally recording the movie.

It bears emphasis that a criminal sanction is only as good as its ability to be enforced. The New Zealand Police will be the prosecuting agency in camcording offences. The Police need the best and clearest offence provision in order to:

- make good arrest and prosecution decisions; and
- accurately reflect the offence in the charging document pursuant to s17 of the Criminal Procedure Act 2011.

At a minimum we suggest the Ministry consults with Police over whether they believe that officers could accurately stitch together sections 131, 132 and 134 of the Copyright Act, or whether they feel – as we do – that camcording requires a standalone offence provision in Part 6 of the Copyright Act 1994.

Exceptions and Limitations

NZSA believes that New Zealand's current system of exceptions and limitations fully complies with the TPPA and requires no modification. New Zealand has developed its extensive fair dealing exceptions over decades to thoughtfully balance the interests of rights holders and users. The TPPA does not require any recalibration of New Zealand's existing approach.

NZSA notes that several groups have pressed the Government to amend its legal regime and incorporate the US-style "fair use" exception even though this is clearly beyond the scope of what is necessary for New Zealand to comply with the TPP and that such a change could, in fact, pull New Zealand out of compliance with the TPP. The TPP text on exceptions and limitations was negotiated specifically to accommodate TPP parties' different legal traditions. New Zealand's Part 3 exceptions are based on long-established principles of fair dealing espoused in the UK Copyright Act and case law across the British Commonwealth. While fair use is a defence to copyright infringement, the fair dealing exceptions to copyright infringement allow permitted acts. These exceptions are specific and limited to certain cases which don't conflict with a normal exercise of the copyright material and which do not unreasonably prejudice the legitimate interests of the rights holder. The fair dealing provisions in Part 3 serve an effective balancing purpose between rights holders and content users. By contrast, a recent study found that introducing a "fair use"-type exception in Australia would add significant uncertainty to copyright law there, resulting in annual litigation costs of AUS \$24-136 million. A general fair use concept is incompatible with the established fair dealing position and creates unworkable uncertainty for rights holders and content users.

Effective remedies in the digital world

NZSA commends TPPA parties for recognizing the importance of effective enforcement in the digital marketplace. TPPA Art. 18.77.5 (criminal aiding and abetting) requires Governments to provide for criminal procedures and penalties for all criminal copyright offenses and Art. 18.71.2 is an explicit obligation to apply enforcement procedures set forth in Articles 18.74, 18.75 and 18.77 to the digital environment. We look forward to working with the Government of New Zealand to effectively implement these obligations and, in so doing, fostering a safe and healthy online marketplace.