

Copyright Licensing NZ

Submission to Foreign Affairs, Defence and Trade Committee

30 March 2016

Copyright Licensing Limited (CLNZ) is a not-for-profit company owned by New Zealand authors and publishers through representative organisations, NZ Society of Authors and Publishers Association of NZ.

CLNZ is part of a global network of copyright collectives that provide centralised licensing services for the reproduction of extracts from books, magazines, newspapers, journals and other periodicals. Centralised licensing makes it easier for users of copyright works to legally reproduce material from published works, while generating a valuable revenue stream for content creators.

The recognised RRO (Reproduction Rights Organisation) in New Zealand and a member of IFRRO (International Federation of Reproduction Rights Organisations), CLNZ has non-exclusive mandates to represent authors and publishers from throughout the world in offering licensing services in New Zealand. CLNZ has copyright licenses with all of the universities and polytechnic institutions and wananga in New Zealand as well as schools, businesses and government agencies.

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 New Zealand publishing and music industries have provided unequivocal evidence that Ergas was wrong. In addition to the mathematical errors the calculations excluded any allowance for the positive impact on the income of New Zealand authors and musicians. It also ignored the fact that the term extension brings the term of rights for New Zealand authors and musicians into line with their counterparts in our major trading partner territories.

We provide comment in this submission on the TPM aspects of the implementation as required but note that, in line with areas of the NIA (National Impact Assessment), there are statements in this document that suggest a view of both copyright and content owners that ignores both the economic and cultural opportunities on offer. Legislative change, such as those proposed here, should be made based on evidence, not opinion. Proposed exceptions also need to comply with the TRIPS Agreement and the Berne Convention's Three Step Test. It is difficult to see how a general exception "for any other purpose":

1. is confined to "certain special cases."
2. does not conflict with a normal exploitation of a work
3. does not unreasonably prejudice the legitimate interests of the author

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Submission on consultation document:

Implementation of the Trans-Pacific Partnership Intellectual Property Chapter

Your name and organisation

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Organisation	Copyright Licensing Limited (CLNZ)

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?

Objective 'a' is appropriate.

Objective 'b' "...to maintain an appropriate balance between rights holders and users". Use of the word "maintain" suggests that this is currently the case in New Zealand's intellectual property settings. We submit that this may not be an accurate reflection of the current IP framework and discussion on 'balance' is best left to a more full review of the legislation.

We are pleased to see objective 'c' included. Certainty is a highly desirable objective in any legislation and particularly in copyright law. CLNZ's licensing schemes for the education sector build on the defined and quantified exception for education in Sec 44 of the Act. This exception is useful for both content creators and content consumers. They need look no further than the Act to determine which content can be legally used.

Objective 'c' also refers to minimising compliance costs. We submit that there are a number areas in the framework of the current legislation where content creators bear a heavy burden of cost for little reward. The proposed phase-in of the term extension will add to this cost burden for licensing bodies. Additional costs to licensing bodies result in reduced returns to the copyright owners they represent, which in CLNZ's case is authors and publishers. Each dollar we spend in operations is a dollar less that is paid to an author.

The phase-in means that the copyright termination date for each separate work will need to be individually managed, rather than on a blanket "year of creation" model. The phase-in also creates uncertainty for content consumers in determining when the copyright term has ended and a particular book has entered the public domain.

We note that under New Zealand's current legislation it is exceptionally expensive for an author or publisher to take action when their content is not used in the way they intended. CLNZ receives frequent contact from New Zealand authors and publishers whose copyright has been infringed but the lack of an effective statutory damages regime in New Zealand makes taking legal action prohibitive. We encourage the government to strongly consider adopting the recommendations in Article 18.74 that would enable New Zealand authors and publishers to have more certainty as to the level of compensation that can be sought, rather than the status quo where awards are wholly inadequate relative to the cost of taking action.

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.

We reiterate our comments above in regard to the policy objective of achieving certainty. In order to invest in writing and publishing, authors and publishers need to know that the innovative technologies they (and any content distribution partners) utilise to deliver their books to readers are not able to be undermined by broad circumvention exceptions. Exceptions should only be available for specific uses that achieve a defined policy objective and should, as outlined above, comply with TRIPS and the Berne Convention Three Step Test. The proposal to include an exception “for any other purpose that does not infringe copyright”, leaves a complex legal decision (i.e. whether a particular act of will or will not be an infringement of copyright) down to the individual. There is no certainty in this whatsoever and would not meet the standard required to comply with TRIPS and Berne.

Similarly, the establishment of exceptions through regulations would create another area of uncertainty for both copyright owners and consumers. A recent example where regulations have been, we submit, inappropriately used/managed is the decision not to extend Sec 122a of the Act to include activity on mobile networks. The decision was made without consultation and yet has a significant impact on content owners’ business and the rights of authors and publishers.

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?

Article 18.68 of the TPP requires New Zealand to provide civil remedies against any person who circumvents a TPM that controls access to a copyright work¹. In order to comply with this requirement, New Zealand will now need to implement such a provision.

The UK CDPA 1988 (as amended in 2003) contains a prohibition (section 296ZA) on any act of circumvention of TPMs at: [Section 296ZA](#).

¹ Para 36 MBIE Targeted Consultation Document Article 18.68 provides:

“1. In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms used in connection with the exercise of their rights and that restrict unauthorised acts in respect of their works, performances, and programmes, each Party shall provide that any person that:

(a) Knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram; or

...

Is liable and subject to the remedies provided for in Article 18.74 ...”

The amendments to the Australian Copyright Act 1968 (made in 2006) also included a prohibition on the act of circumventing an access controlled technological protection measure: [Section 116AN](#).

The consultation document does not provide any guidance as to the actual form of prohibition intended. The section which CLNZ proposes should be adopted to implement Article 18.68 is modelled on Section 296ZA of the UK Act:

Where a TPM work has been issued to the public by, or under licence from a copyright owner, a person (A) must not do anything which circumvents the technological protection measure if (A) knows or ought reasonably to know that (A) is pursuing that objective.

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?

Article 18.68 of the TPP IP Chapter Footnote 83 makes it clear that “a party may provide that reasonable grounds [for knowing the person is circumventing a TPM by their actions] may be demonstrated through reasonable evidence, taking into account the facts and circumstances surrounding the alleged illegal act”. In other words knowledge may be constructive knowledge. CLNZ submits therefore that the use of the terminology “ought reasonably to know” in the suggested provision is specifically catered for in the TPP IP Chapter and is warranted. Those users who receive access to a copyright work via an access controlling TPM are entirely aware that they are receiving controlled access. Constructive knowledge is necessary to provide adequate protection for copyright owners from persons who hack or circumvent that access control.

We are very concerned with the language in para 51 that exempts non-profit entities from both criminal and civil liability in “....performing their functions”. This suggests an ability to self-define and therefore assume rights in a situation where authors and publisher are not afforded any level of input. CLNZ, through its licensing business, is aware of existing examples of what we consider to be over-reach in self-definition by some libraries that operate within commercial organisations and yet avail themselves of the current library exceptions.

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 submit that the current exceptions meet the policy objective and no others are necessary.

6	<p>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.</p>
	<p><i>The suggestion of a “general exception” is totally contrary to the policy objective of providing certainty. We submit that providing this form of general exception places content users in the position of making complex legal decisions which is wholly inappropriate and unnecessary and is also in conflict with the governments responsibilities to TRIPs and Berne.</i></p>
7	<p>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?</p>
	<p><i>No. As noted above, ad hoc regulation-making is a significant threat to maintaining balance in the implementation of copyright law.</i></p>
<p>Patent term extension for delays in patent grant</p>	
8	<p>Do you agree with the proposals for patent term extensions for unreasonable grant delays? Why / why not?</p>
9	<p>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?</p>
10	<p>Do you consider that third parties should be able to oppose decisions to extend patents on the ground of unreasonable delays in grant?</p>
<p>Patent term extension for pharmaceuticals</p>	
11	<p>Do you agree with the proposed definition of “unreasonable curtailment” for pharmaceutical patent term extensions? If not, what other definition should be used?</p>
12	<p>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?</p>
13	<p>Do you agree with the proposed method of calculating the length of extensions for pharmaceutical patents?</p>

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 <i>per se</i> 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?
	<i>We support the submission of Recorded Music NZ, Independent Music NZ, APRA AMCOS, MMF and NZ Music Commission in relation to Performers’ Rights. We also note that consideration should be given to the small number of organisations in the NZ music industry. The <u>number</u> of submissions made on Performers’ Rights by content owners is not any reflection on the importance of these rights to that creative industry.</i>
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	<p>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.</p>
23	<p>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?</p>
24	<p>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.</p>
25	<p>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.)</p>
26	<p>Do you agree or disagree with any of the exceptions or limitations proposed above? Why?</p>
27	<p>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.</p>
28	<p>Do you agree or disagree with any of the proposals above? Why?</p>
29	<p>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.</p>
Border protection measures	
30	<p>Do agree that Article 4 of European Union Council Regulation (EC) No 3295/94 is an</p>

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