

Libraries and the Trans-Pacific Partnership IP Negotiations

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Previously known as P4, the Trans-Pacific Partnership (TPP) began in 2005 between Brunei, Chile, New Zealand and Singapore. It now includes 12 countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam. It is intended to be a regional trade agreement dealing with the removal of trade barriers and the reduction of compliance costs among members, but it also focuses on other issues such as regional integration, and regulatory coherence and transparency. It includes a major section on intellectual property, including copyright.

The United States, as by far the largest partner, is playing a major role in the development of the TPP. However, its position is diluted somewhat because the TPP is a multi-national, regional agreement, not a bilateral agreement; the United States has had to take the initiative and apply to join the Agreement; and its views are not necessarily accepted by the already-existing partners. The United States has its own reasons for wanting to be part of the TPP: to be seen as a major player in the Pacific Rim area; to counterbalance the growing influence of China in the Asia-Pacific region; to provide an alternative to the RCEP (Regional Closer Economic Partnership), which includes China, India, South Korea, Japan, Australia and New Zealand but not America; and to support its trade initiatives (40% of U. S. merchandise exports go to the other 10 TPP members). Thus the United States wants the TPP to serve its foreign policy and commercial interests. And as with bilateral agreements it has signed (for example with Australia), the United States is pushing for the TPP partners to bring their own laws, regulations and systems into line with those of the United States.

New Zealand has long wanted a free trade agreement with the United States, particularly to gain better access for dairy and beef exports into America – fiercely resisted by the powerful agricultural lobby in the U. S. To get this, New Zealand accepts that there will be some trade-offs – as Trade Minister Tim Groser has said, “the TPP trade deal involves some loss of sovereignty for New Zealand”.

The 15th round of the negotiations was held in Auckland from 3 – 12 December 2012, and negotiations have continued since then. Unfortunately, most of what is being negotiated is secret. However, there have been major leaks which give some insight into the positions being taken by the various parties. It is clear that a number of the United States proposals are being opposed by at least some of the partners – Canada, for example, has recently enacted new copyright legislation, ten years in the making, and apparently does not want to change this. New Zealand’s MFAT and MBIE are also resisting U.S. pressures, for example in relation to Pharmac. As with all negotiations there will be give-and-take, winners and losers, and trade-offs. But LIANZA is worried that New Zealand’s copyright birthright will be sold in exchange for a mess of pottage.

The intention of the United States last December was that the TPP Agreement should be wrapped up by this coming October, but the application from Japan to join the TPP has somewhat slowed the negotiations, which are now unlikely to be concluded until well into 2014.

LIANZA has met on several occasions with MFAT and MBIE officials, and has made submissions and had correspondence with them, so they are well aware of LIANZA's position on the likely impact of what is understood to be in the TPP proposals. At the Auckland round of the negotiations last December LIANZA made a presentation to negotiators and stakeholders entitled *The Possible Effects on New Zealand Libraries of the TPP IP Negotiations*. LIANZA has also been involved in worldwide lobbying co-ordinated by IFLA, and has been an active partner in the Fair Deal Campaign (see <http://fairdeal.net.nz/>).

LIANZA has six major areas of concern:

1. Possible re-introduction of a ban on parallel importing

Many large New Zealand libraries, particularly tertiary and research libraries, order books and other library materials (apart from works published in New Zealand) directly from overseas through specialist library suppliers located in the countries of publication. Because of the volume of business, these materials are supplied at prices which are much cheaper than can be obtained from New Zealand suppliers, and often, materials are supplied freight-free. A ban on parallel importing would therefore steeply increase the cost of library materials, which would result in far fewer books and other materials being acquired by libraries, to the detriment of present and future library users.

Libraries would also be deprived of many of the specialist services provided by overseas library suppliers – specialist services such as obtaining and supplying materials from ad-hoc and non-commercial publishers; supply of cataloguing data direct to national bibliographic databases; shelf-ready book processing; and searching for out-of-print books on the second-hand book market. Also, because of the diversity and specialist nature of library purchases, library materials which had to be ordered through New Zealand suppliers would take much longer to be supplied – this is particularly so because most publishers represented in New Zealand do not carry stock here of the materials required by libraries.

In sum, the re-introduction of a ban on parallel importing would increase library costs, result in fewer books and other materials being acquired, involve slower speed of supply, and remove access to specialist supplier services. It would limit the ability of libraries to make as much recorded knowledge available as cheaply as possible and as quickly as possible to library users, and would therefore impede education, research and scholarly endeavours in New Zealand.

LIANZA insists that, if a ban on parallel importing is to be re-introduced, there must be an exception for libraries.

2. Possible extension of copyright duration

Copyright duration in New Zealand has been the life of the author plus 50 years since 1913 (i.e. for just over a hundred years). Prior to 1913 copyright duration was the life of the author or 28 years, whichever was the greater period (authors lived much shorter lives in those days!). An extension of copyright duration beyond the present period of life of the author or creator plus 50 years cannot be justified.

Certainly, an extension will be of no benefit whatsoever to the creators of literary, dramatic, musical, artistic or scientific works – they are long dead. An extension of copyright duration will be of benefit only to the creators' heirs and successors (including large corporate organisations that claim copyright ownership of the original works) – to an extent that in LIANZA's view is well beyond what is reasonable. It will particularly impact on library digitisation projects: there will be a longer period before works come into the public domain and can be digitised; it will be even more difficult than it already is to trace copyright owners, to seek permission to copy their work; public access to works already digitised by libraries and other institutions may have to be withdrawn if a law change is implemented retrospectively; and library users, students and teaching staff will have reduced access to digitised works and the advantages that digitisation brings (such as 24 / 7 access from home, school or work place, keyword searching facilities, etc).

Extension of copyright duration will also restrict the re-use of currently out-of-copyright works (including texts, photographs, illustrations etc) in new scholarly, educational and research publications; frustrate research and scholarship that builds on older scholarship; limit creativity and the production of new knowledge; impact on educational courses and research; and reduce access to recorded information and knowledge by New Zealanders.

3. Possible restrictions on “fair dealing” provisions

The “fair dealing” provisions in current New Zealand copyright law permit use of in-copyright work for criticism or review of a work or performance, for reporting current events, and for research or private study, under already tight restrictions. These exceptions recognise that, while the rights of authors, creators, publishers and other copyright owners must be protected, these rights should not be unlimited. It is well known that most scholarship and research builds on older scholarship. Knowledge will be extended, and society will benefit, if users are able to make use of in-copyright works under prescribed conditions. The further tightening of the fair dealing provisions will therefore impede research and scholarship, and prevent legitimate re-use – to the disadvantage both of users and of society as a whole.

4. Possible changes to library copyright exceptions

One of the primary purposes of a library is to make published information available to its users. Obviously, no library is able to purchase and make available all books, all journals, all databases and all other types of materials ever published. The Copyright Act therefore provides a number of exceptions that permit libraries, under prescribed conditions, to do certain things. These exceptions include making copies for users of parts of published works and of periodical articles; supplying copies for the users or for the collections of other libraries; making copies of works for preservation or replacement purposes; copying certain unpublished works; communicating digital copies to authenticated users; and renting computer programs, sound recordings and films. The Act makes clear that copies may be in print or digital format; but where digital copies are supplied, additional even tighter conditions are prescribed. The continuation of these exceptions is vital if libraries are to fulfil their role in making the world's recorded

information available to all New Zealanders. Any additional restrictions would greatly impede the ability of libraries to meet the needs of their users.

5. Possible increase in the protection given to technological protection measures

TPMs can prevent a work from being utilised in ways that are permitted by New Zealand copyright law, thereby depriving users of the rights granted to them under New Zealand legislation. The New Zealand Copyright Act makes it clear that TPMs that enjoy legal protection in New Zealand do not include processes, devices or systems that “control geographic market segmentation by preventing the playback in New Zealand of a non-infringing copy of a work” (s. 226(b)). The Act also states that the issuer of a work protected by a TPM does not have the right to prevent or restrict the exercise of an act that is itself permitted under New Zealand copyright law (s. 226D(1)). The Act therefore provides a process whereby “qualified persons” such as librarians, archivists and those employed by an educational establishment may, under fairly tight restrictions, lawfully circumvent a TPM on behalf of users – for example to enable them to play a recording on a different type of device, or ensure preservation of a digital copy, etc (s. 226D-226E).

An increase in the protection given to TPMs (for example by stopping librarians from overriding TPMs in order to make materials available to their users) will result in those users being deprived of their lawful rights and prevented from exercising exceptions or undertaking acts permitted by current New Zealand copyright law. LIANZA does not believe that there is any need for an increase in the protection currently given to TPMs.

6. Possible change in the balance of copyright law

Good copyright law is a balance – a balance between encouraging the creativity and protecting the rights of authors and publishers, and providing for the needs of society to benefit from and make use of the ideas and knowledge incorporated within publications. It is essential that this balance be maintained – it must not be changed to be even more in favour of copyright owners than it is already.

In LIANZA’s view, any changes to New Zealand copyright law must be in the best interests not only of copyright owners, but also of users of copyright works, libraries, educational, research and other institutions, and New Zealand society as a whole.

Once the TPP Agreement is signed there is likely to be quick implementation by means of law changes. These will be subject to the normal processes, including submissions through the Parliamentary Select Committee system. Of course, we will not know until the final agreement is signed what changes will be made to New Zealand copyright law. In the meantime, we all need to be vigilant, keep abreast of what is happening, and where the opportunity arises lobby for the best possible outcome for our libraries and our users.