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SWITZERLAND

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Committee Secretariat
Foreign Affairs, Defence and Trade
Parliament Buildings
Wellington
NEW ZEALAND

Dear Sirs

Submission by the International Publishers Association to the Trans-Pacific Partnership Agreement Amendment Bill

The International Publishers Association (IPA) is the international federation of national publishers associations, representing all aspects of book and journal publishing from around the world. Established in 1896, our more than 60 members are publishers associations representing book and journal, paper and digital publishers from over 50 countries. We are an industry association, but with an important human rights mandate: IPA's mission is to promote and protect publishing and freedom to publish, and to raise awareness for publishing as a force for economic, cultural and political development.

The IPA welcomes the opportunity to comment on certain provisions of the Trans-Pacific Partnership Agreement Amendment Bill, specifically certain of those relating to the introduction of a new regime for protection of technological protection measures (TPMs).

In doing so, we support the detailed submission made by our New Zealand member, the Publishers Association of New Zealand (PANZ) dated 21 July 2016.

1. The need for a legislative framework to give legal effect to TPMs

The IPA supports the introduction of a legislative framework to give legal effect to TPMs and notes the provisions of new Sections 226 to 226L of the Copyright Act to be introduced by the Bill, as well as Article 18.68 of the Trans-Pacific Partnership (TPP) pursuant to which your Government wishes to introduce such a legislative framework in New Zealand.

TPMs are not solely a mechanism publishers apply to digital versions of works they publish to prevent uses that infringe the copyright in those works. TPMs, especially those that facilitate access control, are technologies enabling dissemination of digital works electronically, such as downloading from a disc or other carrier or from an online source. Licensing services for digital content therefore depend on TPMs, since TPMs regulating access control make the works supplied by publishers available and accessible to their licensed users, which in turn enables publishers and resellers to differentiate, for the benefit of the market, between different kinds of uses (e.g. permanent access, pay-per-view or

rental), bandwidth speeds and, consequently, prices to meet the market. Publishers therefore invest significantly in TPMs.

2. An exception undoing the protection of TPMs for uses that do not infringe copyright also undoes the legislative framework

We submit that it does not follow that any person should be allowed to circumvent TPM protections if that person's intended use of the work is not an infringement of copyright, as proposed by the new Section 226D and elsewhere, since TPMs do more than only prevent infringement of the copyright in the works they are applied to, as described above.

Therefore, the kinds of circumvention contemplated by the new Section 226D, including providing tools or services to carry it out, would undermine the legitimate digital marketplace in copyright works — a marketplace that depends on the integrity of access controls.

Article 18.68.3 of the TPP specifically states that, 'a violation of a measure implementing this Article is independent of any infringement that might occur under the Party's law on copyright and related rights.' The blanket nature of the exception proposed in Section 226D goes much further than the process contemplated for limitations and exceptions in Article 18.68.4 — in fact, the contemplated narrowing of the scope of the exception under the new Section 226L appears to be the opposite of what is contemplated by the TPP.

We therefore submit that there is no place for the kind of exception contemplated by the new Section 226D and that it should not be enacted.

Whilst not directly impacting the publishing industry, we suggest that the broad exceptions in the rest of the Bill's chapter on TPMs should be reviewed.

By the same token, regulations under the new Section 226L allowing new exceptions should take the above considerations into account, as well as considerations relating to the markets for published works protected by TPMs as they exist at the time. We understand Section 234(3) to be framed on this principle.

3. Publishers already support not-for-profit entities in their legitimate uses of published works supplied with TPMs

PANZ mentions in its submission that publishers generally cooperate to enable legitimate uses of copyright works by not-for-profit entities, referring specifically to the making available of electronic files with no TPMs attached to it to the Blind Foundation. This kind of cooperation also exists on an international level, as well as in other countries. For instance, the IPA supports the Accessible Books Consortium, which is managed by the World Intellectual Property Organization¹, and publishers contribute to its TIGAR service². These endeavours are over and above investments publishers are making to produce 'born accessible' works for the visually impaired³.

Publishers support other legitimate uses too by making works available, such as the Portico and CLOCKSS services for archiving electronically published content⁴.

¹ See homepage at <http://www.accessiblebooksconsortium.org/about/en/>.

² <http://www.accessiblebooksconsortium.org/tigar/en/>.

³ See for instance the *Report of the Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities* (2011), at <http://www2.ed.gov/about/bdscomm/list/aim/meeting/aim-report.pdf>, which refers to 'Large learning technology companies, such as C-engage, Elsevier, McGraw-Hill, Pearson and Wiley are providing versions of their educational materials with accessibility features.'

⁴ <http://www.portico.org/digital-preservation/> and <https://www.clockss.org/clockss/Home>.

Whilst there is no objection to granting immunity to persons engaged by not-for-profit entities when circumventing TPMs in good faith for what they believe to be specifically defined purposes for the public benefit (subject to the limitations on such exceptions contained in TPP and other applicable treaties), we have reason to believe that the true need for circumvention under such an exception may well be rare. We submit that exceptions should not apply when a TPM-free version of the work can be made available by the rightsholder for the specific purpose, and that even not-for-profit entities should at least be required to investigate the availability of TPM-free works in advance of any circumvention.

In this regard, we can only repeat the comment of PANZ, with which we agree, that 'Legislation should identify those exceptional circumstances where breaking a TPM might be required. A blanket exception that allows anyone who thinks they might not be infringing copyright to buy TPM-circumventing devices and services from pirates to have a crack will help destroy the flourishing legitimate market for publisher content in digital form.'

The above are our main responses to the Bill. We would welcome an opportunity to answer any supplementary questions you may have and present our perspective in more detail.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'J Borghino', with a long horizontal stroke extending to the right.

José Borghino

Secretary General