

17 March 2015

To: Hon Stephen Joyce, Minister of Tertiary Education, Skills & Employment.
Hon Tim Groser, Minister of Trade.
Hon Paul Goldsmith, Minister of Commerce and Consumer Affairs.
Hon Maggie Barrie, Minister of Arts, Culture and Heritage.
Hon Peter Dunne, Minister of Internal Affairs.

Dear Ministers,

I am writing to you on behalf of New Zealand's eight universities.

We understand from our counterparts in Australia that New Zealand is likely to agree to Trans-Pacific Partnership Agreement terms that will commit us to life plus 70 years for the term of copyright in New Zealand.

This is of great concern to New Zealand universities which have at their core the generation and use of copyright material. Under the Education Act 1989 universities have a statutory obligation to *maintain*, advance, disseminate, and assist the application of, knowledge, develop intellectual independence, and promote community learning.^[1] Extending the term of copyright will, we believe, negatively impact on universities' ability to fulfil those obligations and in particular to disseminate and assist the application of knowledge and in particular promote community learning.

We consider that the adoption of a 70 year plus life of the author term for copyright is unnecessary and goes far beyond what is required by international standards set out in the Berne Convention (WIPO) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Economists and law scholars who have studied this rationale have found that "*the optimal length of copyright is at most seven years*"^[2] and more conservatively fifteen years.^[3]

New Zealand cultural and educational institutions have significant holdings of early New Zealand books, newspapers, pamphlets, photographs, films etc. that are owned but not commercialised but which are held in libraries and archives. These works are being digitised and made available to the public as they come out of copyright.

^[1] Section 162(2)(b)(iii) Education Act 1989

^[2] Gowers Review of Intellectual Property, p. 50 (Dec. 2006) citing Growth and Intellectual Property, Boldrin M. and Levine D., 2005.

^[3] Pollock, Rufus, *Forever Minus a Day? Some Theory and Empirics of Optimal Copyright*. JEL Classification: O31 O34 L10 at: http://rufuspollock.org/papers/optimal_copyright.pdf

Any extension in the term of copyright will see these works remaining unavailable digitally with no benefit to deceased copyright owners and without the recognised stimulus to creative enterprise that occurs when works come out of copyright and are made available digitally.

New Zealand is a small country with a dearth of culturally significant works in the public domain that can be freely copied and incorporated into new and transformative works.

The most significant cultural works produced by New Zealand artists and writers will be delayed from entering the public domain until 2040 at the earliest. Professor Roger Horrocks observed in his 2011 publication that it was only during the Depression and the Second World War that a critical mass was reached of serious, thoughtful work in poetry (Allen Curnow and ARD Fairburn), painting (Colin McCahon, Toss Woollaston and Rita Angus) fiction (Frank Sargeson, John Mulgan and Dan Davin) and music (Douglas Lilburn).^[4] These works form a critical part of our cultural heritage and to delay the release of these works to the public domain even further will deprive New Zealand of the stimulus the entry of important works to the public domain has on the artistic and the wider economy. It is particularly important for young emerging artists who may struggle to find a means of expressing themselves in a manner that sets them apart from the rest of the world. The uncertainty of what constitutes copyright infringement also makes references to earlier work difficult, particularly when an artist seeks to venture into the public space.

Popular music such as the song *Blue Smoke* will be one of the first significant New Zealand works to be out of copyright at the end of 2020. It featured in the soundtracks of a series of New Zealand films that were box office successes in the early 1990s including *Ruby and Rata*, *Bread and Roses* and *An Angel at my Table*. These early songs with a distinctive New Zealand voice are important for film makers. Having such songs in the public domain would greatly assist our students and other emerging New Zealand filmmakers who have small audiences and limited budgets and cannot afford the licence fees to include copyright protected musical works in films for public viewing. These are particularly necessary for period pieces.

Locking up music, dance and dramatic works which are in the public domain in New Zealand or which are about to emerge from copyright, but which are protected by copyright in Australia, the UK and the US will mean increased costs for orchestras, theatre companies, dance and opera companies who will have to start paying licence fees to perform significant works which have been free to perform because they are out of copyright in New Zealand. Most are struggling with funding cuts and will just not stage these works.

Early New Zealand television and radio shows are just now emerging from copyright and the technology to share these freely with the public is readily available. The difficulty of obtaining clearances for works of this age means that they cannot be shared until they enter the public domain. These works serve a valuable purpose in confirming our cultural identity and providing a basis for new and transformative works.

^[4] Roger Horrocks in *New Zealand Film: An Illustrated History*. Ed Pivac, Diane, Stark, Frank and McDonald, Lawrence, Te Papa Press 2011

University of Illinois researcher Paul Heald demonstrated that ownership of copyright does not ensure availability of the work and adequate distribution; rather works disappear after their initial publication and do not reappear until they are out of copyright.^[5] Heald notes that the US Congress relied on the assertion made by Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks that, "*One reason quality copies of public domain works are not widely available may be because publishers will not publish a work that is in the public domain for fear that they will not be able to recoup their investment or earn enough profit.*" Empirical studies have failed to support this key assertion made by copyright lobbyists.^[6]

Given the difficulty in accurately quantifying the benefits and contribution to the economy that the creative industries and the educational sector make, further caution should be exercised before extending the term of copyright. As copyright commentator Rufus Pollock has noted, "*In most systems of law, it is extremely difficult to remove or diminish rights once they have been granted. Thus, once a given level of protection has been awarded it will be all but impossible to reduce it. ... This being the case, a prudent policy-maker faced with uncertainty would want to be especially careful about increasing the level of copyright.*"^[7]

Extrapolating from research done by the economist Professor Philippa Dee for the Australian Productivity Commission,^[8] extending the term of copyright will likely mean that universities and other institutions will be paying 25% more per year in net royalty payments, not just to US copyright holders but to all copyright holders. Dee has estimated that the extension of the term of copyright under the Australian-US Free Trade Agreement could result in an annual net cost to Australia of \$88 million.^[9]

As one example, the University of Auckland spends in excess of \$15 million to access copyright content provided by publishers and aggregators in digital form and on licences to copy copyright material for teaching purposes. Extending the term of copyright means content aggregators and reproduction rights organisations can legitimately demand an increase in licence fees on the basis that the usage has been extended by 20 years. This is a pure transfer overseas and a pure cost to universities and the tax payer to the extent that they fund universities.

Universities urge the Government not to enter into any agreement which would extend the term of copyright and disadvantage universities and New Zealand cultural institutions and the wider community.

^[5] In Heald, Paul J *How Copyright Keeps Works Disappeared* at page 5, available at: https://www.law.berkeley.edu/files/How_Copyright_Keeps_Works_Disappeared_-_Paul_Heald.pdf quoting from *Copyright Term, Film Labelling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. On the Judiciary*, 104th Cong. 217–18 (1995)

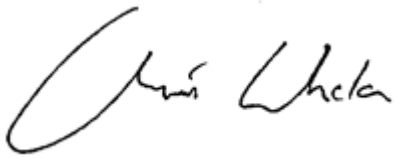
^[6] In Heald, *ibid* at page 5.

^[7] Pollock, Rufus, *Forever Minus a Day? Some Theory and Empirics of Optimal Copyright*. JEL Classification: 031 034 L10 at page 3: http://rufuspollock.org/papers/optimal_copyright.pdf

^[8] Australian Productivity Commission, 13 December 2010 *Bilateral and Regional Trade Agreements Research Report*, available at http://www.pc.gov.au/data/assets/pdf_file/0010/104203/trade-agreements-report.pdf

^[9] Dee, P., 2004, Quoted in Australian Government Productivity Commission, 13 December 2010 *Bilateral and Regional Trade Agreements Research Report*, available at www.pc.gov.au at page 166

Yours sincerely,

A handwritten signature in black ink that reads "Chris Whelan". The signature is fluid and cursive, with the first name "Chris" written in a larger, more prominent script than the last name "Whelan".

Chris Whelan
Executive Director
Universities New Zealand