Introduction

The Coalition for Creativity (C4C) – more details below – welcomes the opportunity to contribute to the International treaty examination of the UK-NZ Free Trade Agreement (FTA). For further questions on our submission, please do not hesitate to contact Caroline De Cock, C4C's Coordinator, at secretariat@coalition4creativity.org.

About C4C

C4C is a broad-based coalition that seeks an informed debate on how copyright can more effectively promote innovation, access, and creativity. C4C brings together libraries, scientific and research institutions, digital rights groups, technology businesses, and educational and cultural heritage institutions that share a common view on copyright. See our members here: https://coalition4creativity.org/about-us/.

Preamble

As an organisation that has its core of activities and members based in the European Union, we, and in particular our members from the cultural heritage sector, have had ample opportunity to assess the effects of a 70 year copyright protection term, and understand the detrimental impact and consequences of such an excessive term and the lack of formalities in the EU.

Our recommendations

The New Zealand Government should delete Article 17.48 on the term of copyright protection in the UK-NZ FTA. As Michael Wolfe, from the Tohatoha Aotearoa Commons, puts it: "the reward will be a healthier public domain and better public access to knowledge and culture, goods precious beyond measure."[1]

Extending copyright protection with 20 years, going from life plus 50 years to life plus 70 years, blatantly neglects evidence demonstrating the lasting and irreversible negative direct and indirect effects of such an extension.

At a principle level, we oppose any term extension beyond life plus 50 years, because of:

1) the lack of sound legal and economic arguments for a term extension; and,
2) the current protection terms already being too long.

However, should it prove impossible for the government to reverse this ill thought commitment, then:

1) at a minimum, such term extension should not be retro-active;
2) any extension should be linked to a registration requirement: an active act of registration by a rightholder should be required to benefit from an extension after 50 years (or for that matter even earlier); and,
3) reversion rights should be (re)introduced.

Please find more details below.

[1] See Wolfe, M. (2022). NZ agrees to Mickey Mouse copyright law in UK trade deal. *Newsroom*. Retrieved from: https://www.newsroom.co.nz/nz-agrees-to-mickey-mouse-copyright-law.

Our argumentation

The New Zealand Government should not extend its copyright protection term with 20 years, going from life plus 50 years to life plus 70 years, because of:

1) the lack of sound legal and economic arguments for a term extension; and,
2) the current protection terms already being too long.

1) Lack of sound legal and economic arguments for a term extension

The academic community and other stakeholders around the globe have voiced concerns at multiple occasions on the lack of sound legal and economic arguments justifying term extensions. The current terms already do not stem from evidence-based policy-making that properly analysed the actual duration required to recoup investments and encourage creativity. Fro that perspective, economist Rufus Pollock calculated the optimal copyright term to be only 15 years.[2]

The 2011 UK Hargreaves review highlighted copyright term extension as an example of the fact that "IP policy has not always been developed in a way consistent with the economic evidence."[3] In other words: "copyright length has become an emblematic example of copyright excesses."[4]

In 2016, the Australian Productivity Commission, concluded that the scope and term of copyright protection in Australia is now skewed too far in favour of copyright holders and that "while a single optimal copyright term is arguably elusive, it is likely to be considerably less than 70 years after death." The Commission further pointed out that: "nothing better exemplifies the costs of excessive copyright term than the fact that once copyright expires and works enter the public domain, many become commercially available again."[5]

Even creators are revisiting support for longer protection terms. The US Authors Guild spoke up in 2018 against any further extension of the US copyright term, and in favour of the public domain, by stating that: "if anything, we would likely support a rollback to a term of life-plus-50 if it were politically feasible."[6]

A previous push in New Zealand for a 20 year term extension was suspended in the context of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, as it was estimated that: "the long-term cost of this extension would be $55[m] per year to New Zealand consumers."[7]

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[2] See Pollock, R. (2009, 19 July). Forever Minus a Day? Calculating Optimal Copyright Term. *Review of Economic Research on Copyright Issues, 6(1)*, 35-60. Retrieved from: https://ssrn.com/abstract=1436186.
[3] See Hargreaves, I. (2011). *Digital Opportunity: A Review of Intellectual Property and Growth*. Retrieved from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf.
[4] See Frosio, G. (2022). Copyright Term Extension: Good Morning to You Productions v Warner/Chappell Music. In E. Bonadio & A. O'Connell, *Intellectual Property Excesses: Exploring the Boundaries of IP Protection* (forthcoming). Hart Publishing. Retrieved from: https://ssrn.com/abstract=3822018.
[5] See p. 8 & 31. Productivity Commission. (2016). *Intellectual Property Arrangements, Inquiry Report No. 78, Overview & Recommendations*. Canberra. Retrieved from: https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property-overview.pdf.
[6] See Lee, T. B. (2018). Why Mickey Mouse's 1998 copyright extension probably won't happen again. Ars Technica. Retrieved from: https://arstechnica.com/tech-policy/2018/01/hollywood-says-its-not-planning-another-copyright-extension-push/.
[7] See New Zealand Foreign Affairs & Trade. (n.d.). *CPTPP vs TPP*. Retrieved from: https://www.mfat.govt.nz/vn/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/understanding-cptpp/cptpp-vs-tpp/#bookmark4.

The UK-NZ FTA's National Interest Analysis points out that: "there is no evidence that increasing the term of protection for copyright and related rights would incentivise either the creation of new copyright works or the dissemination of older works (which are the primary policy goals of copyright protection)."[8]

2) Current protection terms are already too long: The cultural heritage institutions' perspective

Evidence shows the current protection terms are already too long: they do not reflect sound economic and legal considerations of the actual duration required to recoup investments and or creative efforts, as demonstrated above.

Lengthy protection terms prevent cultural heritage institutions from digitising and making available in-copyright works, hindering them in their public mission. The 2006 UK Gowers review noted that: "in a system where all works receive protection for the maximum term, the vast majority of works remain in copyright despite not being economically viable for the rights holder."[9]

The Gowers review further added that "extending term may have negative implications for all creators," as it:

1) "may affect future creativity and innovation" due to the need for follow-on creators to "negotiate licences to use the work during that extended period"; and,
2) the fact that it "would make tracing rights holders more difficult".[10]

The second point directly impacts creativity, as "the legal uncertainty surrounding the copyright status of a work might dissuade risk-avoiding reusers from making use of that work."[11]

One outcome of this vicious circle is the so-called '20th century black hole' when it comes to online availability of copyrighted works. This black hole notably means that there are significantly fewer works from the mid to late 20th century available through cultural heritage platforms, such as europeana.eu, than works from the centuries before (many of which are clearly in the public domain) or from the 21st century (many of which are still available commercially and whose rightholders can generally be contacted quite easily).

Through our members, we are strongly aware that extensions risk adding to the problems around orphan works, by decreasing chances of identifying all rightholders in a given work. An extension is thus likely to simply lock away works for longer, without particular added benefits to rightholders. Instead, protection terms must be shortened to enhance access to knowledge and culture more quickly.

[8] See New Zealand Foreign Affairs & Trade. (2022, February). New Zealand-United Kingdom Free Trade Agreement National Interest Analysis. Retrieved from: https://www.mfat.govt.nz/assets/Trade-agreements/UK-NZ-FTA/NZ-UK-FTA-National-Interest-Analysis.pdf.
[9] See p. 52. Gowers, A. (2006). *Gowers Review of Intellectual Property*. Retrieved from The Stationery Office website: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf.
[10] See p. 54. Gowers, A. (2006). *Ibid*.
[11] See Frosio, G. (2022). *Ibid*.

The UK-NZ FTA's National Interest Analysis acknowledged that one of the disadvantages of the envisaged term extension is an "increased number of works for which use and access will be restricted," adding that:[12]

> "This includes a majority of copyright works that do not have commercial value and are not commercially available at the expiry of the current term of protection, including orphaned works. Restricting use and access to such works is to the detriment of education and the gallery, library, archive and museum (GLAM) sectors, and hinders the ability of New Zealanders to publish and make available to the public older copyright works, including those of historical and cultural importance."

Concluding Remarks: Preferably No Term Extensions But At the Very Least Damage Control Measures Are Required

No extension

Extending the protection term without a proper evidence-base, and against all existing argumentation advising not to do so, means that: (1) a group of stakeholders are blatantly ignored once again in a copyright related debate, and (2) that citizens' and creators' access to cultural heritage is deemed to be of lower importance by policymakers than the potential economic gain of a happy few. Moreover, this potential gain, if any, is unlikely to offset the damages such an extension creates, namely by disincentivizing the creation of new works.

As it is clear that such extension will not bring any significant added value, quite the contrary, we encourage the New Zealand Government to backtrack on it, and to maintain its current protection term, to the benefit of creators and citizens. However, should it prove impossible for the government to retract this ill thought commitment, then:

1) at a minimum, such term extension should not be retro-active;
2) any extension should be linked to a registration requirement: an active act of registration by a rightholder should be required to benefit from an extension after 50 years (or for that matter even earlier); and,
3) reversion rights should be (re)introduced.

At a minimum, such an extension should not be retro-active

The extension is being framed as only applying to works that are still within their current term of protection under the Copyright Act. The government must uphold this to ensure that, if a term extension is inevitable, this does not alter the protection term retrospectively, to avoid 'resuscitating' expired copyrights.[13] Especially, seeing that the major beneficiaries of retro-active term extensions are considered to be creators' estates and corporate rightholders.[14]

[12] See New Zealand Foreign Affairs & Trade. (2022, February). *Ibid*.
[13] This risk has been highlighted in EU discussions: See Angelopoulos, C. (2012). Determining the Term of Protection for Films: When Does a Film Fall into the Public Domain in Europe? In S. Nikoltchev (Ed.), *The Lifespan for Copyright of Audiovisual Works* (pp. 7-22). Strasbourg, Luxembourg: European Audiovisual Observatory. Retrieved from the European Audiovisual Observatory website: https://rm.coe.int/1680783bd3.
[14] See p. 132. Productivity Commission. (2016). *Intellectual Property Arrangements, Inquiry Report No. 78*. Canberra. Retrieved from: https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf.

Refraining from retro-actively extending protection terms further safeguards the current status-quo of the public domain, whilst recognising its function as a stimulus for creativity. Nevertheless, it should be acknowledged that a term extension is still set to deprive the public domain for an extra 20 years of "millions and millions of works that were promised decades ago as guaranteed additions."[15]

The 'logic' of copyright rests on a monopoly right being granted for a limited time in order to encourage and reward creativity. This monopoly restricts competition and imposes restrictions on the access and use by consumers of the copyrighted works. The 2006 UK Gowers Review rightfully argued that extending this monopoly would be unfair:[16]

> "Copyright is a contract between creators and society; once the work has been created, altering the length of [the] term of protection changes the terms of that contract. This is not fair for consumers, as they would be forced to pay monopoly prices for longer than they had implicitly accepted. The same logic applies to all forms of IP rights."

From a user/creator perspective, public domain works are a key foundation on which both old and new forms of expression (such as remix) can flourish thanks to the lack of copyright restrictions. Longer copyright terms means less public domain works available for distribution, use and re-use.

The public domain is not merely a 'graveyard' for old content, but "an essential source of inspiration to subsequent creators, innovators and distributors."[17] Jessica Litman concluded that: "a vigorous public domain is a crucial buttress to the copyright system; without the public domain, it might be impossible to tolerate copyright at all."[18]

Any extension should be linked to a registration requirement

An active act of registration by a rightholder should be required to benefit from an extension after 50 years (or for that matter even earlier). In the context of the Canada-US-Mexico Agreement (CUSMA), the Canadian Industry Committee argued that such 'damage control' could help to "mitigate some of the disadvantages of term extension, promote copyright registration, and thus increase the overall transparency of the copyright system."[19]

Reintroduce reversion rights

New Zealand scrapped its reversion right through the 1962 Copyright Act.[20] We believe that, in an attempt to counter the negative impact of a term extension, reversion rights should be reintroduced.

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[15] See Moody, G. (2022). *New Zealand is about to commit copyright theft – the real kind*. Walled Culture. Retrieved from: https://walledculture.org/new-zealand-is-about-to-commit-copyright-theft-the-real-kind/.
[16] See p. 56. Gowers, A. (2006). *Ibid*.
[17] Helberger, N., Dufft, N., van Gompel, S., & Hugenholtz, B. (2008). Never Forever: Why Extending the Term of Protection for Sound Recordings is a Bad Idea. *European Intellectual Property Review*, 2008(5), 174-181. Retrieved from https://www.ivir.nl/publicaties/download/EIPR_2008_5.pdf.
[18] See Litman, Jessica D. (1990) The Public Domain. *Emory L. J. 39 (1990)*: 965-1023. Retrieved from: https://repository.law.umich.edu/articles/222/.
[19] See House of Commons. (2019). *Statutory Review Of The Copyright Act: Report of the Standing Committee on Industry, Science and Technology*. Ottawa. Retrieved from: https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf.
[20] See Yuvaraj, J., & Giblin, R. (2019). Why Were Commonwealth Reversionary Rights Abolished (And What Can We Learn Where They Remain?). *European Intellectual Property Review*, 2019(4), 232–240. Retrieved from: https://ssrn.com/abstract=3296902.

Dr Rebeca Giblin has, for example, argued that by introducing new reversion rights for authors, combined with safeguards against orphaning: "it is possible to maintain incentives for creation and distribution, reclaim currently-lost culture, and secure to creators a fairer share – all while remaining consistent with treaty obligations."[21] The potential positive impact of doing so is hard to negate:[22]

> "Reversion rights have immense potential to reduce the collateral damage of copyright transfers that outlast rightholders' commercial interest. Creators can benefit from additional exploitation opportunities, financial rewards and recognition. The public can benefit from access to works that could otherwise have been lost. A growing body of empirical research methods is exploring the use and impacts of reversion rights in contract and statute, demonstrating both the potential positive impacts of reversion rights and shortcomings of existing systems."

[21] See Flynn, J., Giblin, R., & Petitjean, F. (2019). What Happens When Books Enter the Public Domain? Testing Copyright's Underuse Hypothesis Across Australia, New Zealand, the United States and Canada. *University of New South Wales Law Journal*, Vol. 42, No. 4, 2019, U of Melbourne Legal Studies Research Paper No. 878. Retrieved from: https://ssrn.com/abstract=3401684; as well as, Giblin, R. (2018). A New Copyright Bargain?: Reclaiming Lost Culture and Getting Authors Paid. Columbia Journal of Law & the Arts, Vol. 41 (2018), 369-411. Retrieved from: https://ssrn.com/abstract=3252838.

[22] See Yuvaraj, J., & Giblin, R. (2021). 21 for 2021: Copyright Reversion. CREATe Blog. Retrieved from: https://www.create.ac.uk/blog/2021/10/15/21-for-2021-copyright-reversion/.