

Submission: Trans-Pacific Partnership Agreement Amendment Bill

Submission to the Foreign Affairs, Defence and Trade
Select Committee

22 July 2016



1. Introduction

- 1.1. InternetNZ welcomes the chance to submit on the Trans-Pacific Partnership Agreement (TPP) Amendment Bill.
- 1.2. Chapter 18 of the TPP requires member countries to adopt shared rules on intellectual property. If implemented, these rules would change the balance New Zealand has struck between the interests of users and rights-holders, particularly in copyright.
- 1.3. We have engaged with and supported discussion on this aspect of the TPP throughout negotiations and through the policy process. This submission continues that engagement.

Scope of submission

- 1.4. We focus our submission on changes to the Copyright Act 1994. These changes are the most significant for the benefits and uses of the Internet. In particular, we focus on:
 - a) New restrictions relating to “digital locks” or Technological Protection Measures;
 - b) Extension of copyright term and opportunities for balance.
- 1.5. We submit on the basis that:
 - a) Implementation should preserve our current balance as far as possible
 - b) Concessions made under the TPP must be balanced by future reform
 - c) Copyright in New Zealand should achieve a balance which is FAIR:

Flexible	allowing for free expression and non-commercial use
Adaptable	enabling innovative uses of technology
Incentivising	encouraging creation and sharing of new works
Realistic	reflecting pragmatic needs of creators, consumers, and businesses

- 1.6. Our main concerns relate to new restrictions on “digital locks” or Technological Protection Measures, and our submission primarily focuses on these.

Summary of Submission

- 1.7. We submit that:
 - a) New restrictions on TPMs will unfairly restrict New Zealanders’ access to content, unless balanced with broad and usable exceptions
 - b) Proposed exceptions are welcome, but could be made more effective by:
 - (i) Allowing for “**any person**” to assist in the exercise of each exception;
 - (ii) Removing requirements for permission, which are redundant in context;
 - (iii) Making it clearer that the regulation-making power will be exercised to provide certainty, mitigate chilling effects of potential liability, and allow beneficial innovation and use of technology.
 - c) Extension of copyright term, as proposed, will further shift the balance of New Zealand’s copyright system. A review of copyright should consider this balance as soon as possible, in light of changes in technology and uses of content.

We wish to appear before the Committee

- 1.8. We welcome the opportunity to discuss our submission with you. We would appreciate the opportunity to speak to this submission in person. Please contact our Issues Advisor, James Ting-Edwards on james@internetnz.nz or 021 156 5596 for more information.

A handwritten signature in black ink, appearing to read "Andrew Cushen". The signature is fluid and cursive, with a large loop at the top and a long horizontal stroke at the end.

Andrew Cushen
Deputy Chief Executive

2. Balance in copyright

- 2.1. The Trans-Pacific Partnership Agreement promises balance in intellectual property rights. The objectives for Chapter 18 include “the promotion of technological innovation”, and “the mutual advantage of producers and users”.
- 2.2. Article 18.66 requires each Party to seek balance in its copyright system, including by use of “limitations and exceptions ... including those for the digital environment”.
- 2.3. The Bill as proposed does not deliver on this promise. Instead, it further tilts our copyright system to restrict the use of copyright works. It extends copyright terms by 20 years, and creates new restrictions on accessing works covered by TPM “digital locks”.

We must take up future opportunities for balance in copyright

- 2.4. We hope that this shift in balance is a temporary rain-check rather than a missed opportunity. Changes in technology and use of content support reconsidering the balance and effectiveness of our copyright law.
- 2.5. We support a first-principles review of our copyright law, in light of changes in technology and use of content. This review should occur as soon as possible, and should have the scope to consider a range of options such as a flexible “fair use” right as exists in the USA.

3. Technological Protection Measures

- 3.1. Technological Protection Measures (TPMs) are “digital locks” which restrict the use of copyright content.

Current TPM rules target illicit infringement

- 3.2. Currently, the Copyright Act 1994 provides TPM restrictions which relate closely to copyright infringement. Offences relate to the supply of devices or services which circumvent these restrictions, knowing or intending that copyright infringement is likely to result. Conviction results in a fine of up to \$150,000 or a prison term of up to 5 years.

This Bill will make users liable for accessing purchased content

- 3.3. The Bill as proposed creates new restrictions, which do not relate to infringement. These restrictions impact on New Zealanders’ ability to access and use content. In particular:
 - a) The Bill expands restrictions to cover “access controls”
 - b) The Bill creates new liability for users who access content, including purchased content
- 3.4. These proposals implement Article 18.68 of the Trans-Pacific Partnership Agreement. As a net importer of commercial copyright works, New Zealand will not benefit from these rules.

Proposed exceptions are vital to allow normal, legitimate uses of content

- 3.5. Recognising that Article 18.68 is a concession by New Zealand, the Bill seeks to limit the impact of these restrictions. New restrictions on TPM works are subject to proposed exceptions. These exceptions are vital to allow legitimate, non-infringing uses of content.

4. Access Control TPMs

4.1. An “access control” TPM is a technical restriction on merely accessing a work. For example:

Work	Access Control Example
Purchased eBook	A “digital lock” restricts users from reading on another supplier’s device, or using accessibility tools such as a screen reader.
DVD Movie	A “digital lock” restricts users from skipping advertising or previews before watching the title movie or television show.
Website	A “digital lock” requires users to provide an email address and agree to receive messages before viewing content.

4.2. These restrictions are unprincipled and technology-specific. Physical copies of copyright works have no similar restriction, and can be shared, rented, and sold second-hand.

4.3. Access controls restrict user choices, and create a risk of lock-in that impedes competitive markets.

Proposed s 226AC introduces liability for users

4.4. The Bill expands restrictions on “access controls”. The proposed section 226AC creates new liability for end users:

<p>226AC Circumventing access control TPM</p> <p>(2) A person (A) must not circumvent an access control TPM if—</p> <p>(2)(d) A knows, or has reason to believe, that A is circumventing an access control TPM; and</p> <p>(2)(e) A does not have the authority of the issuer of the TPM work to circumvent the access control TPM.</p> <p>(3) However, this section does not apply if A circumvents the access control TPM in accordance with any of sections 226D to 226K.</p>

Ordinary users, doing ordinary things will be treated as infringers

4.5. A user who has purchased a TPM-restricted work, who bypasses the TPM, will be treated as an infringer.¹ This restricts legitimate acts in a way which goes beyond the balance of rights set under copyright law, and which has no parallel in relation to physical works.

4.6. It is unclear what the measure of harm for bypassing an access control would be. Where a work has been purchased, and is re-used, the harm to the rights-holder is presumably less than the full sale price of the item. The relevant sale has already been made.

¹ Copyright Act 1994, s 226B with amendments as proposed by the present Bill.

- 4.7. If done in the course of business, bypassing an access control would be an offence under s 226C, carrying a fine of up to \$150,000 and a jail term of up to 5 years.²
- 4.8. Acts “in the course of business” will include things done by employees in the course of their duties. In practice, this rule will either be ignored, or create chilling effects on legitimate uses of content and technology.
- 4.9. For all these reasons, a regime which allows access controls to restrict uses of content risks undermining respect for copyright law in general.

5. Proposed Exceptions under s 226AC

We welcome exceptions to enable normal use of content

- 5.1. New restrictions on TPMs, particularly new liability for end users, have the potential to interfere with legitimate uses of copyright content, and legitimate and innovative uses of technology. The Bill recognises this concern by proposing exceptions to allow non-infringing action to bypass TPMs.
- 5.2. We welcome each of the exceptions proposed, and the objective of enabling legitimate, non-infringing use of copyright content. We assess each against that objective.

Effective exceptions must allow for assistance

- 5.3. All of the exceptions under proposed sections 226D to 226K allow “any person” to do something which allows “that person” to bypass a TPM.
- 5.4. This wording assumes a degree of technical skill or knowledge by every person who would access content. It does not make clear that people with those skills can assist others who lack them.
- 5.5. We submit that for each exception, the words “that person” should be changed to “any person”:

Nothing in this Act prevents any person from circumventing a technological protection measure to enable any person to ... [do the permitted act] ...

- 5.6. This wording allows colleagues, family members, and paid professionals to help others in exercising their right to access and use content.

226D - Acts that do not infringe

- 5.7. We welcome this exception to TPM restrictions, which enables non-infringing uses of copyright content. It allows TPMs to be bypassed for permitted acts under present copyright law.
- 5.8. Current permitted acts include criticism, news reporting, educational and archival uses, and making literary works available in Braille and other accessible forms. These are vital to free expression, including access to and preservation of our shared culture.

226E - Geographic market segmentation

- 5.9. We welcome this exception to TPM restrictions. New Zealand is a small market and benefits from the ability to parallel import content, just as we parallel import physical goods.

² Copyright Act 1994, s 226C, with amendments as proposed by the present Bill.

- 5.10. Unfortunately, the proposed 226E(3) limits this exception to “a physical copy” of the TPM work. This may mean that the exception becomes less useful as online streaming and downloads become the most important mode of distribution.

226F - Law enforcement, national security, public functions

- 5.11. We welcome this proposed exception. The need for this exception shows how far TPM restrictions can go in restraining otherwise legitimate activity.

226G - Encryption research

- 5.12. We welcome this proposed exception. Encryption research is important for computer security. Leading work in this field has been done in New Zealand and by New Zealanders such as Peter Gutmann.
- 5.13. Unfortunately, s 226G(1)(b) requires a person using the exception to seek permission. This requirement undermines the exception. In particular:
- a) If a researcher had permission from the owner or licensee, then the exception would not be needed at all
 - b) The “reasonable steps” to obtain permission standard is uncertain, and will chill legitimate research efforts
 - c) With or without permission, this exception would never enable infringement. Section 226G(1)(c) limits the exception to non-infringing use of content
- 5.14. We welcome the approach of using exceptions to enable legitimate uses of content, and avoiding uncertainty. This exception as proposed fails in that aim. We submit that removing proposed s 226G(b) would allow it to succeed, without limiting the legitimate rights of copyright owners and licensees.

226H - Embedded computer program involving use of goods or services

- 5.15. We welcome this proposed exception. Some copyright works have value mainly because they accompany other goods or services. For example, the software on a smart watch or fitness tracker is itself a copyright work. However, the value to the user is the function of the physical device. Software which restricts the uses of such a device is anti-competitive, and undermines the interests of users.

226I - Computer programs no longer supported by remote server

- 5.16. We welcome this proposed exception. Game and other software may be designed such that authorisation from an external server is required for access.
- 5.17. We understand that there may be commercial and technical reasons for this “phoning home”. However, when a server is withdrawn or fails to operate, users may be unreasonably restricted from legitimate access to purchased content.
- 5.18. This exception enables users to restore access in these circumstances. As with other exceptions, it is important that this be worded to allow technical assistance by other people.

226J - Other acts relating to computers

- 5.19. We welcome these proposed exceptions. Allowing computer programs to communicate and build on one-another is critical to beneficial innovation, and to maintaining competitive markets in technology.

Interoperability

- 5.20. We welcome the proposed exception. It is legitimate for users to choose which computer programs they use. Restrictions on moving personal and other information between programs are anti-competitive, and should not be supported by copyright or other areas of law.

Computer security

- 5.21. We welcome the proposed exception. Businesses and users must be able to test and improve the security of their computer systems.

Protecting privacy

- 5.22. We welcome the proposed exception. Privacy is an important interest for users, and should not be impaired by copyright. Where an exchange of user information is part of a commercial transaction, any complaint should be addressed under contract rather than copyright law.

226K - Regulations

- 5.23. We welcome this proposed exception. A regime of rules with exceptions creates substantial uncertainty, which can chill legitimate uses of content, and prevent useful innovations from being adopted.
- 5.24. The default position should be that people are free to use purchased works in non-infringing ways, as is the case with physical copies of works.
- 5.25. Regulations can help by providing certainty, enabling reasonable business decisions and beneficial uses of content and technology.

Clause 44 - Proposed amendments to s 234

- 5.26. We welcome the proposed power under s 234(2)(e)(i) to regulate where necessary or desirable to provide certainty that particular acts are non-infringing.
- 5.27. Access control TPMs can create a locked-in market. Considering whether to open these locks by regulation supports consumer choices and competition in New Zealand.
- 5.28. Proposed s 234(2)(e)(i) can encourage use of the proposed exceptions, and assist in realising the benefits of new technologies and uses of content.

Regulations to restrict use risk chilling effects

- 5.29. Proposed s 234(2)(d) and s 234(2)(e)(ii) allow regulations to further restrict acts permitted under the proposed exceptions.
- 5.30. This power is redundant, as the proposed exceptions are already limited to non-infringing uses. Everyone wishes to avoid infringement, but restrictions on non-infringing use are not principled or desirable.
- 5.31. The potential for restrictive regulations creates uncertainty, which is likely to deter legitimate uses of content and technology. This risk could deny New Zealand businesses the opportunity to innovate in providing access to content. The potential for new restrictive regulations would be a bar to investment in such businesses.
- 5.32. We submit that the goal of certainty is best served by removing proposed s 234(2)(d) and 234(2)(e)(ii).

About InternetNZ

A better world through a better Internet

InternetNZ's vision is for a better world through a better Internet. We promote the Internet's benefits. We protect its potential. And we focus on advancing an open and uncapturable Internet for our country.

We provide a voice for the Internet in New Zealand and work on behalf of all Internet users across the country.

We are the designated manager for the .nz Internet domain. And through this role we represent New Zealand at a global level.

We provide community funding to promote research and the discovery of ways to improve the Internet. We inform people about the Internet and we ensure it is well understood by those making decisions that help shape it. Every year we bring the Internet community together at events like NetHui to share wisdom and best practice on the state of the Internet.

We are a non-profit and open membership organisation.

Be a member of InternetNZ and be part of the Internet community. You can keep a close watch on the latest tech and telecommunications developments and network with other like-minded people at cool events. Being a member of InternetNZ only costs \$21 per year. Find out more at internetnz.nz/join

For more information about InternetNZ, visit internetnz.nz