

## The Trans-Pacific Partnership (TPPA)

Submission to the Foreign Affairs, Defence and  
Trade Committee

11 March 2016



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### 1. Introduction

- 1.1 InternetNZ welcomes the opportunity to submit on the Trans-Pacific Partnership Agreement (TPPA).
- 1.2 We would like to appear before the committee to speak to this submission. Contact details are provided below.

#### **InternetNZ’s vision is “A better world through a better Internet”**

- 1.3 Our mission is to promote the Internet’s benefits and uses and protect its potential. We do that with a cause in mind, that being the Open Internet. In doing this, we act as part of the New Zealand Internet community.
- 1.4 We support beneficial innovation, and broad access to the benefits of that innovation. To achieve those aims, we support competitive markets, open standards, and balanced intellectual property rights.

#### **Expert paper: “TPPA: Intellectual Property and Information Technology”**

- 1.5 To aid informed discussion of the TPPA, InternetNZ supported an expert paper on the intellectual property and information technology provisions (“Expert Paper”).<sup>1</sup> Part of a series supported by the NZ Law Foundation,<sup>2</sup> we attach this to our submission for context.
- 1.6 InternetNZ does not submit on every issue raised in the Expert Paper. We focus our submission on issues directly relevant to the Internet in New Zealand.
- 1.7 In particular, the Expert Paper discusses data exclusivity, biologics, and patent rules relating to medicines. We offer no view on those issues.

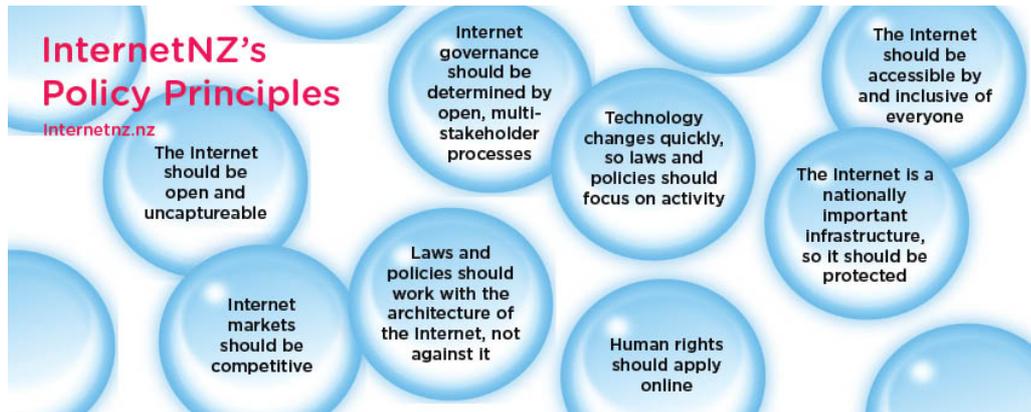
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<sup>1</sup> Ting-Edwards et al “Expert Paper #7: Intellectual Property and Information Technology” (February 2016), at <http://www.tppllegal.wordpress.com>.

<sup>2</sup> Views expressed in the paper should not be attributed to the NZ Law Foundation.

## Our policy principles

- 1.8 InternetNZ's policy work is guided by principles. This submission addresses the TPPA in terms of those principles. In particular:
- Laws and policies should focus on activity rather than specific technologies
  - Laws and policies should work with the architecture of the Internet, not against it



## 2. Summary of InternetNZ Submission

### Intellectual property rights must achieve a FAIR balance

- 2.1 InternetNZ supports balanced intellectual property rights. A sensible balance will result in rights which are FAIR:
- Flexible**, allowing for beneficial non-commercial activity
  - Adaptable**, enabling take-up of new technologies for access, sharing, and selling
  - Incentives** to create, innovate, and share works of commercial and cultural value
  - Realistic**, reflecting pragmatic concerns of creators, consumers, and businesses.
- 2.2 Rights reflecting this FAIR balance have economic and social benefits, and work with rather than against technologies like the Internet.
- 2.3 We recognise that intellectual property involves inherent trade-offs. Protections for owners are restrictions on users. Broader protections for copyright make it harder or more expensive to share works, costing consumers, educators, and many innovative businesses.

### TPPA rules on copyright will cost Kiwi users, educators, and business

- 2.4 InternetNZ is concerned that TPPA changes unfairly upset the balance of copyright rules.
- 2.5 Extending copyright terms by 20 years costs Kiwis and benefits overseas rights-holders. This change is a windfall to owners of old works, which restricts creative re-use and sharing of works, and fails to incentivise new creative output.

- 2.6 Liability for opening TPM “digital locks” puts legal bars around purchased content. Changes mean:
- a) Individual users will become liable for opening “digital locks”
  - b) For the first time, bypassing an “access control” to simply watch or listen to content will become illegal.
- 2.7 Rapid TPPA implementation could expand IP owners’ rights, while users miss out on balance. TPPA extensions to rights are mandatory. Implementing the mandatory components only would unfairly tilt the playing field against users and creative re-users of content.

### **The TPPA is an opportunity to consider balance in intellectual property**

- 2.8 InternetNZ sees some positives from the TPPA.
- 2.9 We embrace TPPA language on balance in intellectual property, where rights are calibrated to “the mutual advantage of producers and users”.
- 2.10 TPPA preserves flexibility to create copyright exceptions in New Zealand. We can and should use this flexibility to achieve a FAIR balance in copyright. In particular:
- a) TPPA would have New Zealand adopt long, USA style copyright terms. To balance this, we could consider a flexible, USA-style Fair Use exception to support innovation.
  - b) TPPA “Digital Lock” rules would restrict ordinary uses of purchased content. To balance this, we can and should create broad protections for non-infringing uses.
- 2.11 We acknowledge that TPPA rules for intellectual property are less damaging than those in earlier leaked drafts. This is due to public pressure, consultation where available, and our skilled negotiators.

### **Data flow rules do not address user concerns**

- 2.12 TPPA rules preserve open data flows for businesses, meaning user data can be readily moved or processed overseas unless there are specific reasons for retaining it in New Zealand.
- 2.13 We would encourage future processes on data flows to allow space for user concerns to be expressed. This would help with the goal of building confidence to do business online.

### **InternetNZ supports open processes for policy**

- 2.14 We encourage effective, broad consultation on future trade arrangements. This improves outcomes and understanding for all parties.
- 2.15 We welcome the opportunity to speak to our submission. Please contact our Issues Advisor, James Ting-Edwards via [james@internetnz.nz](mailto:james@internetnz.nz) or on 021 156 5596.



Andrew Cushen  
Work Programme Director

### 3. InternetNZ supports balanced intellectual property rights

- 3.1 InternetNZ supports balanced intellectual property rights. We summarise this balance as a FAIR one, where rights are **Flexible, Adaptable, Incentives** based on a **Realistic** understanding of creator, consumer, and business interests.
- 3.2 Some elements of this FAIR balance exist in current New Zealand law. We see potential TPPA implementation as an opportunity to go further in realising this balance.
- 3.3 We encourage open public consultation on any moves to review intellectual property law, including changes forming part of TPPA implementation. We will engage as we are able to support a FAIR balance of intellectual property rights in New Zealand.

### 4. TPPA: Longer copyright terms cost New Zealanders

- 4.1 TPPA Article 18.63 would extend copyright terms by 20 years.

#### **Longer copyright terms give a windfall to overseas owners**

- 4.2 New Zealand is a net importer of commercial copyright works. Copyright term extension means Kiwis pay more over time to access these works. This money goes mainly to large overseas companies. The largest and earliest effect is a pure windfall to companies which hold rights in old copyright works. This is an unexpected, unearned gain, not an incentive to create.

#### **Longer terms deprive Kiwis of the public domain**

- 4.3 When copyright expires, works enter the public domain and can be freely copied or modified. Easier access to these works returns a cultural dividend: consider the early movies of Walt Disney, which reinvented public domain works for a new medium. Longer copyright terms delay this dividend.
- 4.4 Under current law, *The Hobbit* and other books authored by JRR Tolkien would enter New Zealand's public domain on 1 January 2024. This would free the words and characters in those books from copyright, enabling their use in new movies, plays, games, and songs without restriction or permission. Under the TPPA copyright term, this would be delayed until 2044.
- 4.5 The creative dividend on old copyright works has value to New Zealand. Kiwis are equipped to re-use and re-imagine existing ideas in new ways for new audiences. This is the opportunity cost of longer copyright terms: we miss out on the cultural and commercial value of re-use.

#### **New Zealand can and should use exceptions to balance longer terms**

- 4.6 The balance of copyright depends on both rights and exceptions. Under TPPA, New Zealand can still decide which copyright exceptions to adopt.

### 5. "Digital lock" rules put legal restrictions on consumers

- 5.1 A Technical Protection Measure (TPM) is any device or system which restricts use of a copyright work - it is a "digital lock" on that work. For example:
  - a) A TPM on a DVD can prevent skipping past advertising or previews to view title content
  - b) iTunes songs or Kindle ebooks are "locked" to open only on official hardware or apps

- c) Online text, sound, or video content may be restricted to logged-in user accounts.

### **TPM liability puts legal bars around content**

- 5.2 Like ordinary locks, TPMs restrict access. This restriction is on top of ordinary obligations in copyright law. Owners of digital copyright works use TPMs to make copying more difficult in the digital realm.
- 5.3 These TPM “locks” are already backed up with legal protections linked to copyright infringement. Current New Zealand law:
  - a) Prohibits supplying devices, services, or information for opening a TPM
  - b) Imposes a fine of up to \$150,000 and jail term of up to 5 years where supply is “in the course of business” and where copyright infringement is known to be a likely result
  - c) Does not penalise users for removing TPMs which simply control access to works.
- 5.4 TPPA Article 18.68 would impose broader civil and criminal liability for opening TPMs. In particular:
  - a) Individual users will become liable for “circumventing” a TPM lock
  - b) Bars on access, which restrict users viewing or hearing content will be protected TPMs
  - c) Users will become liable for opening a TPM even when there is no copyright infringement.
- 5.5 InternetNZ is concerned that these TPM rules allow restrictions on users beyond ordinary copyright law. TPMs are programmed by owners of copyright content, and do not necessarily respect the ordinary balance of rights found in copyright law.

### **We must have TPM exceptions to support beneficial acts and technologies**

- 5.6 Copyright law provides exceptions to allow socially beneficial acts, such as archiving works for future access, or making Braille copies to make written content accessible to the blind. TPM “locks” do not necessarily respect these exceptions.
- 5.7 Any legal rules on TPMs must have exceptions to allow for legitimate, beneficial access to and copying of protected works.

### **TPM rules should not interfere with secure use of the Internet**

- 5.8 The Internet is not built for security. Much of the benefit of the Internet comes from business and other uses which rely on secure, private communications.
- 5.9 Rules on TPM liability must not interfere with the secure use of the Internet. Copyright is important, but technical protection of copyright needs to be balanced against other priorities. Rules which inhibit security or privacy tools would harm the Internet and New Zealand.

## **6. New Zealand should consider a Fair Use copyright exception**

- 6.1 A Fair Use exception would help to balance copyright term extensions under the TPPA. The overall burden of copyright on users and re-users depends on both the rights of owners, and the allowed exceptions to those rights.

- 6.2 Under the TPPA, New Zealand would import USA-style copyright terms. We should consider balancing our copyright system by implementing a broad, flexible, USA-style Fair Use right. Without such an exception, our copyright regime would have both extremes of long term, and limited exceptions to provide flexibility.
- 6.3 It is important to consider Fair Use and other exceptions now, lest a partly implemented TPPA create an imbalanced copyright regime which stifles rather than rewards creativity. There is a risk that such an unbalanced system would set a new status quo, with overseas copyright owners then protesting moves to introduce balance.
- 6.4 A balanced Fair Use right would enable non-commercial and other uses of current copyright material that do not interfere with the primary market. In the USA, Fair Use rights have been important to the growth of innovative technology companies. Internet services provided by Google, YouTube, Facebook, Twitter, and others are enriched by the ability to quote and re-use copyright material in a manner which does not damage the primary market for a protected work.

## **7. Data flow rules do not address user concerns**

- 7.1 Chapter 14 of the TPPA, on Electronic Commerce, prevents member nations from requiring local storage or processing of data except in certain circumstances.
- 7.2 These provisions ensure businesses can move user data offshore. Corresponding user protections are optional and limited in effect. There is no concrete proposal to ensure users can track or bring claims in relation to personal data held overseas.
- 7.3 InternetNZ does not advocate local data requirements. We do however, recognise user concerns over data security and privacy as a barrier to confident use of the Internet. These concerns are justifiably acute where data moves overseas, as it can be difficult to know what legal and other user protections remain when overseas agencies hold data.
- 7.4 We would encourage discussion of potential user concerns in future trade processes. Open consultation on proposals would help to assess these concerns, and to develop options for addressing them without.

## **8. Open processes get better outcomes**

- 8.1 InternetNZ supports open consultation on policy. As a matter of principle, those affected by a change should have a chance to be heard. As a matter of pragmatism, open conversations can refine proposals, improve outcomes, and support mutual understanding.
- 8.2 Public consultation on the TPPA has been limited. This “behind-closed-doors” approach has made space for public doubts and concerns. Though the final agreement is now revealed, doubts which emerged during negotiations will continue to sway people’s views.
- 8.3 Through the TPPA process, InternetNZ has sought to inform our community of relevant issues. This has been difficult, requiring use of unofficial leaked texts to assess likely outcomes.
- 8.4 Where possible, we have engaged constructively with the TPPA process. Those engagements have allowed us to provide information and raise concerns. By learning and reassured us on others. We have in turn been able to reassure our community that potential worst-case outcomes have not

come to pass, and to focus our analysis on those real concerns which remain. This benefits everyone.

- 8.5 We have appreciated opportunities to engage on domain name provisions. InternetNZ is the delegated manager for the .nz Top-Level Domain (TLD), which we manage through our subsidiaries NZRS and the Domain Name Commission Limited. Nevertheless, we would prefer that policies for the .nz TLD be arrived at by open, multi-stakeholder processes rather than through trade agreements.

### **Short deadlines limit the value of consultation**

- 8.6 Effective consultation means reaching all those interested, and allowing sufficient time to understand the issues and form a view in response.
- 8.7 On March 9, proposals for implementation of TPPA intellectual property rules were released. Submissions close on 30 March. This is an extremely tight deadline for an adequate analysis and response.

### **We encourage broader consultation in future**

- 8.8 In future trade negotiations, we would encourage broader consultation and opportunities for engagement. Where information is sensitive, we would encourage a staged approach to sharing with independent organisations such as InternetNZ.

## About InternetNZ

### A better world through a better Internet

InternetNZ is a voice, a helping hand and a guide to the Internet for all New Zealanders. It provides a voice for the Internet, to the government and the public; it gives a helping hand to the Internet community; and it provides a guide to those who seek knowledge, support or any other method of benefiting the Internet and its users.

InternetNZ's vision is for a better world through a better Internet. To achieve that, we promote the Internet's benefits and uses and protect its potential. We are founded on the principle of advancing an open and uncapturable Internet.

The growing importance of the Internet in people's everyday lives means that over the last twelve months we have significantly reoriented our strategic direction. The Internet is everywhere. We are a voice for the Internet's users and its potential to make life better.

InternetNZ helps foster an Internet where New Zealanders can freely express themselves online – where they can feel secure in their use of the Internet. We foster an Internet where a start-up can use the web to develop a presence and customer base for a new product, and we foster an Internet where gamers can get online and battle it out.

We work to ensure this Internet is safe, accessible and open.

The work we do is as varied as what you can find on the Internet.

We enable partner organisations to work in line with our objects – for example, supporting Internet access for groups who may miss out. We provide community funding to promote research and the discovery of ways to improve the Internet. We inform people about the Internet and explain it, to ensure it is well understood by those making decisions that help shape it.

We provide technical knowledge that you may not find in many places, and every year we bring the Internet community together at NetHui to share wisdom, talk about ideas and have discussions on the state of the Internet.

InternetNZ is the designated manager for the .nz country code top-level domain and represents New Zealand at a global level through that role.

InternetNZ is a non-profit open membership incorporated society, overseen by a council elected by members. We have two wholly owned subsidiaries that ensure that .nz is run effectively and fairly – the Domain Name Commission (DNC) develops and enforces policies for the .nz domain name space, and .nz Registry Services (NZRS) maintains and publishes the register of .nz names and operates the Domain Name System for .nz