Position Paper

on

the Trans Pacific Partnership agreement

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(Public version. There is no confidential version.)

1 Introduction

The mission of InternetNZ, the Internet Society of New Zealand Inc, is to protect and promote the Internet for New Zealand. We advocate the ongoing development of an open and uncaptureable Internet, available to all New Zealanders. The Society is non-partisan and is an advocate for Internet, and related telecommunications, public and technical policy issues on behalf of the Internet Community in New Zealand - both users and the Industry as a whole.

This paper lays out InternetNZ's position on the Trans Pacific Partnership agreement (TPP).

1.1 Scope

The TPP covers many different areas, with chapters on textiles to telecommunications. While acknowledging this diversity of subject matter, InternetNZ limits its position on the TPP at this time to the content of the intellectual property rights chapter (IPR chapter), particularly the copyright provisions contained therein.

1.2 The Problem

InternetNZ is concerned that New Zealand will submit to US demands for stronger intellectual property laws in order to realise gains elsewhere under the TPP, and that this will be done in the absence of an independently verifiable and comprehensive cost-benefit analysis.

The potential costs of trading away our current IP laws have not been evaluated. This lack of analysis means that the IPR chapter risks becoming the subject of an easy trade – a political decision made at the end of discussions in order to secure a deal.

Furthermore, while leaked US IP texts reflect potentially significant costs to the open Internet, the actual text of the TPP remains shrouded in secrecy. This makes not only hard costs, but the TPP's wider impact upon the Internet community, impossible to evaluate.

1.3 Summary of InternetNZ's Position

InternetNZ will support the TPP if comprehensive and independently verifiable evidence strongly suggests that the agreement, as a whole, will bring net benefit to New Zealand *without prejudicing an open Internet.*

Based on the leaked US draft IPR chapter,[1] the US wants to include copyright provisions in the TPP that would give more power to copyright owners in the digital environment and on the Internet. These powers would go beyond current New Zealand law, beyond the World Intellectual Property Organisation Internet treaties (WIPO Internet treaties) and beyond the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

[1] Draft US Intellectual Property Rights Chapter, 10 February 2011. The chapter is available from Knowledge Economy International (KEI), at http://www.keionline.org/node/1091.

InternetNZ is encouraged by the position of New Zealand in the TPP IP discussions. We support our representatives who, in citing the problems of overprotection for IP in the digital age, have discouraged the notion of going beyond the TRIPS framework in the TPP instead of working within it.

However, driven by the lobbying power of large copyright-dependent industries, the US seeks to extract from its "trading partners" stronger copyright laws that could hobble the open Internet.

InternetNZ is concerned that there has been little or no attempt to quantify the impact on New Zealand of adopting stronger copyright laws such as those advanced in the draft US IPR chapter. New Zealanders deserve to know what the cost of losing an open Internet to stricter IP laws would be, and what gains we can expect as a result of making that sacrifice.

Accordingly, InternetNZ maintains that a good faith attempt to quantify the cost of adopting US-driven intellectual property laws should occur before New Zealand signs the TPP and must occur before we make any changes to our domestic laws. With the protection and promotion of the Internet for New Zealand as its mission, InternetNZ believes that the public should know what is at stake under the IPR chapter, what the costs of adopting it will be, and how it could affect New Zealand's digital future.

2 Background

New Zealand is one of nine countries negotiating the new TPP,[2] which aims to bring states from East Asia, the South Pacific and North America towards greater economic integration. The TPP could require countries to enact stronger intellectual property laws. As explained below, certain of these laws could undermine an efficient and open Internet.

The US has a history of strengthening intellectual property laws in trade agreements by building upon thresholds previously agreed in other fora. This is happening with the TPP.

2.1 The US repeatedly demands stronger IP law

The TPP is the current example of the US campaign to secure greater legal rights for IP owners than it otherwise could at the World Trade Organisation (WTO) or the World Intellectual Property Organisation (WIPO). These are multilateral fora where trade and intellectual property treaties are debated and agreed. Eighty-nine states have signed the WIPO Internet treaties though a greater number participated in the discussions on those treaties. The WIPO Internet treaties were designed to modernise copyright law for the digital era.

[2] The "new" TPP expands upon the 2005 Trans Pacific Strategic Economic Partnership (the P4), both in substance and in number of countries. The P4 is currently in force between New Zealand, Singapore, Chile and Brunei. The TPP would add Australia, Peru, Malaysia, Viet Nam and the United States. Other countries may join the agreement in the future.

New Zealand participated but elected not to sign. We did, however, amend our Copyright Act 1994 to give effect to the core concepts contained in the WIPO Internet treaties. Australia also took this approach, amending its copyright legislation in 2000.

In trade negotiations, the US uses the WIPO Internet treaties and TRIPS as a minimum baseline, or floor, for IP requirements. As a condition of entering into a Free Trade Agreement (FTA) with the US, for example, Australia had to sign the WIPO Internet treaties and adopt "TRIPS Plus" IP requirements. To comply with its FTA, Australia extended the duration of copyright beyond the international norm stated in TRIPS.

This has come at a significant cost to Australia. A report by the Australian Government's Productivity Commission revealed that the "extension in the duration of copyright required by [the Australia-US Free Trade Agreement] imposed a net cost on Australia".[3]

Furthermore, the Australian Senate observed that Australia's adoption of the WIPO Internet treaties is "likely to have created net costs". [4] New Zealand has disagreed with the suggestion that TPP parties must sign the WIPO Internet treaties, a position InternetNZ fully supports.

The US has a sustained drive in ratcheting up intellectual property standards. The TPP is the next rung on the ladder, not the end game. As one scholar said about TRIPS, "While many countries believed that they were negotiating a ceiling on intellectual property rules, they quickly discovered that they actually had negotiated only a floor."[5]

2.2 The TPP text remains secret

We know that the US has a proven history of augmenting its IP expectations in international agreements, so we can expect the IP requirements in the TPP to be stronger than they were in the Anti-Counterfeiting Trade Agreement (ACTA) and the WIPO Internet treaties. But we do not know what these requirements could be. The negotiators are directed to keep the TPP text hidden from the public throughout the process.

The draft text of ACTA was similarly guarded closely by negotiators. During the Wellington round of ACTA negotiations in April 2010, however, InternetNZ organised the Public ACTA event. From this event was issued the Wellington Declaration, which, amongst other things, called for greater transparency in the process. The negotiating parties decided to release the draft text following the Wellington Round, a decision welcomed by InternetNZ.

[3] Australian Government Productivity Commission, Bilateral and Regional Trade Agreements: Research Report, 13 December 2010, at 166, 167. Note that the leaked US IPR chapter is based on the US FTAs.
[4] Ibid.
[5] Susan Sell, Professor of Political Science and International Affairs at George Washington University "TRIPS was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP" (2011) 18 J Intell Prop L 447.

Despite requests by many, the draft text of the TPP has not been released. The extent to which the public gets to know about the TPP is dependent upon whether someone involved in the negotiations leaks a draft on the Internet. Last February, this occurred with the draft US IPR chapter.

Taking into consideration: 1) the draft US IPR chapter; 2) the lobbying power of pro-IP interests; and 3) New Zealand's status as a net importer of IP and exporter of agricultural products, InternetNZ believes that the TPP poses a credible threat to an efficient and open Internet in New Zealand. The next section explains why an open Internet is worth protecting and how it is threatened under the TPP.

3 The Importance of an Open Internet; Threats Posed by the TPP

The manifold uses of the Internet for economic, social, cultural and political activity have not only endeared the Internet to society, they have made it indispensable. As explained by Frank La Rue, Special Rapporteur to the Human Rights Council of the United Nations, the Internet enables "individuals to exchange information and ideas instantaneously and inexpensively across national borders, [allowing] access to information and knowledge that was previously unattainable. This, in turn, contributes to the discovery of the truth and progress of society as a whole." [6] An open Internet best suits and encourages this progress.

An open Internet is one where users can send and receive the content of their choice, subject to narrow and well-defined exceptions, with a device of their choice. An open Internet cultivates new business models and allows innovation to flourish. Open standards allow anyone to create new applications and networks. Vint Cerf, a founder of the Internet, once told the US Senate that,[7]

"The Internet's open, neutral architecture has proven to be an enormous engine for market innovation, economic growth, social discourse, and the free flow of ideas. The remarkable success of the Internet can be traced to a few simple network principles – end-to-end design, layered architecture, and open standards – which together give consumers choice and control over their online activities."

The end-to-end principle, one of the most powerful architectural concepts embedded in the original TCP/IP protocols, supports an open Internet. That principle is a notion of absence, that the network not be encumbered with unnecessary, time consuming or costly processes and procedures. Thus an open Internet is also characterised by the absence of direct regulation, whether that regulation come from government, as we saw with the Arab Spring, or at the behest of copyright owners, as we see with "3 Strikes" laws that are appearing amidst controversy in countries including New Zealand.

[6] Frank La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 16 May 2011.
[7] Vint Cerf, Vice President and Chief Internet Evangelist, Google Inc "Prepared Statement" (US Senate Committee on Commerce, Science, and Transportation Hearing on 'Network Neutrality", Washington DC, 7 February 2006).

The above statement of Mr. Cerf shows that an open Internet derives great value for the many (including copyright holders). The antithesis of this would be a closed Internet that directs limited value to the few.

In this vein, a handful of powerful actors are threatening to constrict the open Internet by pushing for more restrictive IP laws in the TPP. They carry great sway, holding vast copyright portfolios that they will protect at significant cost, both to themselves and to the Internet community.

New Zealanders know full well the capabilities of these actors and the influence they wield over lawmakers. We have just witnessed the first infringement notices issued under the "3 Strikes" law.[8] These notices were for songs by some of the most successful musicians in the American music scene,[9] not for infringement of the work of members of "New Zealand's creative industries".[10]

The interests that pushed for the 3 Strikes law – namely the film and music industries – have built their business on a copyright-dependant model that preceded digital technology and the Internet. Having long avoided the challenge of adapting to the online environment, they are now trying to harness the Internet – attempting to vertically integrate aspects of the Internet into its own distribution mechanism. In so doing, they threaten to raise the cost of the Internet for everyone, decrease its efficiency and constrain our online experiences.

Provisions in the draft US IPR chapter that these rights holders have undoubtedly inspired could have serious unintended consequences, for example preventing Internet users from publishing instructions on how to remove spyware from a computer – spyware secretly installed by a copyrighted product – if it requires circumventing that product's TPM.[11]

Other provisions could potentially cripple basic Internet functions. For example, one provision in the draft IPR chapter would empower rights holders to "authorize or prohibit" streaming, buffering and caching if any of those functions involve copyrighted works.[12] Caching is fundamental function of the Internet, and of computing. Nearly everything on a webpage is copyrightable. If rights holders can authorise or prohibit caching of their material, that means that they can demand a license fee for caching. This is stands directly in opposition to the principle of an open Internet.

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[8] Copyright (Infringing File Sharing) Amendment Act 2011.

[9] See Alex Walls "Orcon, Vodafone, Telecom, TelstraClear receive infringement notices" (1 November 2011) National Business Reviewhttp://www.nbr.co.nz/article/orcon-receives-first-infringement-notices-aw-103536. Artists include Rihanna, Taio Cruz and Lady Gaga.

[10] Office of the Minister of Commerce, Cabinet Economic Growth and Infrastructure Committee "Illegal Peer-to-Peer File Sharing" at [14] www.med.govt.nz/upload/77275/p2p.pdf ("The objective of section 92A is intended to provide a framework for the development of a fair and effective system for dealing with behaviour which clearly infringes copyright recognising that this behaviour can be costly for New Zealand's creative industries.").

[11] US Draft IPR Chapter, Articles 4.9(a)(ii)(C), 4.9(d)(v), 4.9(e)(ii), (iii).

[12] US Draft IPR Chapter, Article 4.1 (granting rightsholders the "right to authorize or prohibit all reproductions of their works, performances and phonograms in any manner or form…including temporary storage in electronic form".) Note that Article 16.3(b)(iv) of the draft offers ISPs limited liability for copyright infringement, but that "safe harbour" is subject to a host of conditions.

Caching is important to Internet users in New Zealand, where our requests for off-shore data must travel over greater distance and at relatively high cost. Our Internet works significantly faster and at lower cost because of the ability to cache material in New Zealand. If New Zealand were required to recognise a broad copyright power over caching, this could noticeably cripple New Zealanders' use of the Internet. In the case this right is recognised, we should be able to maintain the important exceptions and limitations around transient copies that exist currently under our copyright law.[13]

4 Principles for Preserving an Open Internet Under the TPP

Introducing the optimal amount of IP rights in the digital environment is a challenge. Nevertheless, this law must be shaped carefully, duly considering its impact on all parties. The following basic principles should inform any transposition of the TPP into New Zealand domestic law.

Protection of the open Internet should be imperative for New Zealand policymakers. The interests of the New Zealand public are best served by ensuring that the Internet remains an open and innovative platform for growth, as well as communication.

Stronger protection of intellectual property rights should be based upon robust, independent, empirical evidence. Rights holders routinely advance the destructive effect of infringement as justification for stronger IP rights. Yet the impact of digital piracy on their revenues is widely disputed. This is mainly due to a lack of empirical evidence and the use of questionable assumptions by rights holders.[14] As a result there are increasing calls to ensure that the "development of the IP System is driven as far as possible by objective evidence."[15] The scope and duration of IPRs must be supported by evidence, not anecdote.

Furthermore, we should quantify the projected cost of the negotiated IPR chapter, or the cost of increasing domestic IP protection to meet the requirements of the TPP. *We must understand the worth of our current domestic IP law before we trade it away.*

Intellectual property rights should have adequate corresponding exceptions and limitations. Intellectual property law is purported to balance the rights of creators with the public interest. Proper exceptions and limitations to these exclusive legal rights are fundamental to achieving this balance. If greater copyright

[13] Copyright Act 1994, s 43A, Transient reproduction of work, provides an exception to copyright infringement liability for temporary copies that have "no independent economic significance" and are part of a technical process for "making or receiving a communication that does not infringe copyright; or enabling the lawful use of, or lawful dealing in, the work." The draft US IPR chapter has no such general exception.

[14] See, for example, United States Government Accountability Office "Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods" (Report to Congressional Committees, April 2010) ("[A]ccording to experts and government officials, industry associations do not always disclose their proprietary data sources and methods, making it difficult to verify their estimates." "Because of the lack of data on illicit trade, methods for calculating estimate of economic losses must involve certain assumptions, and the resulting economic loss estimates are highly sensitive to the assumptions used.").

[15] Ian Hargraves *Digital Opportunity: A Review of Intellectual Property and Growth* (review commissioned by UK, May 2011), http://www.ipo.gov.uk/ipreview-finalreport.pdf , at 20; "Much of the data needed to develop empirical evidence on copyright and designs in privately held. It enters the public domain chiefly in the form of "evidence" supporting the arguments of lobbyists ("lobbynomics") rather than as independently verified research conclusions." Id, at 18.

law is granted then it should have exceptions and limitations that are appropriate for the digital environment.

5 Conclusion

Based upon the principles outlined in this document, InternetNZ's position on the TPP is the following:

The costs of trading away our current IP law must be understood. We do not support a TPP that requires New Zealand to reverse its long-held position of not signing the WIPO Internet treaties. Nor do we support a TPP that includes commitments that go beyond our TRIPS obligations. New Zealand should not commit to IP requirements that exceed those it currently recognises unless ample evidence is provided to show that doing so would be in the country's economic and social best interests. We should ask ourselves, our representatives, the following: what exactly is the gold standard? What we will gain from the TPP? Is it worth it? How do we know?

We will support a TPP that contains adequate exceptions and limitations to intellectual property rights. These exceptions and limitations are especially important in the digital environment, encompassing issues in areas from universal access to the Internet to security research. The P4 agreement allows Parties to develop important "new exceptions and limitations that are appropriate in the digital environment."[16] It also allows countries to adopt "appropriate measures to prevent the abuse of intellectual property rights by right holders or…to prevent anti-competitive practices that may result from the abuse of intellectual property rights".[17] InternetNZ finds these provisions reasonable and would hope that the TPP contains similar language.

We will support a TPP that will bring net benefit to New Zealand and that itself supports an open Internet and, by extension, the greater Internet Community. InternetNZ works to protect and promote the Internet for New Zealand. To this end, we advocate for an Internet that is open and uncaptureable. As explained in this paper, there are manifold benefits of an open Internet, which today is used by 83% of New Zealand's population.[18] The economic and social opportunities an open Internet presents must remain available to all Kiwis.

Copyright law is about balance – balancing the private economic rights granted to creators with the public's use of copyrighted works. When the private economic right is too strong, and IP law is unbalanced, it impinges upon the public good. InternetNZ maintains that the costs to New Zealand society of greater copyright law – to New Zealand's digital future – needs to be fully understood and appropriately valued before our country is bound under the TPP.

For further information please contact:
Susan Chalmers, Policy Lead
+64 4 495 2339, susan@internetnz.net.nz

[16] See above, n 3. Trans-Pacific Strategic Economic Partnership Agreement, Article 10.3(3).
[17] Trans-Pacific Strategic Economic Partnership Agreement, Article 10.3(2).
[18] World Internet Project New Zealand, 2009 Survey. ("Five sixths of New Zealanders use the Internet").