

Submission on consultation document: *Implementation of the Trans-Pacific Partnership Intellectual Property Chapter*

Your name and organisation

Name	Roderick Aldridge
Organisation	N/A

Responses to consultation document questions

1	<p>Have the overarching objectives been framed correctly for this policy process? If not, what would be more appropriate objectives?</p> <p>No. The objective should be to enable New Zealand to enhance the opportunities to use scientific and technical knowledge for the benefit of New Zealand and the world while enable New Zealand to meet its TPP obligations. If this is not possible to advise not to ratify the TPPA.</p>
Technological protection measures	
2	<p>Do you agree with the exceptions or limitations proposed for TPMs? What would be the impacts of not providing these exceptions? Please be specific in your answers.</p> <p>No. See Other comments</p>
3	<p>Do you agree that the exceptions proposed for TPMs should apply to both prohibitions (i.e. circumventing a TPM and the provision of devices or services that enable circumvention)? Why / why not?</p> <p>No. Any means of circumventing prohibitions can be used for legitimate purposes or otherwise. It is like saying a knife can only be used for benevolent purposes.</p>
4	<p>Do you agree that, if our proposals are implemented, the current exception allowing a qualified person to circumvent a TPM that protects against copyright infringement to exercise a permitted act under Part 3 would no longer be required? Why / why not?</p> <p>No. See Other comments</p>
5	<p>Are there any other exceptions or limitations to the TPM prohibitions that should be included in the Copyright Act? Please explain why any additional exceptions would be necessary.</p> <p>See Other comments</p>
6	<p>Would there be a likely adverse impact on non-infringing uses in general if the exception for any other purpose that does not infringe copyright was not provided for? Please be specific in</p>

	your answers.
	Yes. Particularly non-profit libraries, museums, archives, educational institutions, or public non-commercial broadcasters (non-profit entities)
7	Should there be a regulation-making power to enable the exception for any other purpose that does not infringe copyright to be clarified, and if so, what criteria should be considered?
	Yes. Anything that does not harm the rights holder
Patent term extension for delays in patent grant	
8	Do you agree with the proposals for patent term extensions for unreasonable grant delays? Why / why not?
	No. Will lead to much expensive litigation
9	Do you think that there should be a limit on the maximum length of extension available for grant delays? If so, what should it be?
	Yes
10	Do you consider that third parties should be able to oppose decisions to extend patents on the ground of unreasonable delays in grant?
	Yes
Patent term extension for pharmaceuticals	
11	Do you agree with the proposed definition of “unreasonable curtailment” for pharmaceutical patent term extensions? If not, what other definition should be used?
12	Do you agree that the definition of “unreasonable curtailment” should apply different time periods for small molecule pharmaceuticals and biologics? If so, what could these time periods be? If you consider that only one time period should apply to both, what should this be?
13	Do you agree with the proposed method of calculating the length of extensions for pharmaceutical patents?
14	The proposed method of calculating extensions for pharmaceutical patents includes a maximum extension of two years. Do you agree with this? If not, what do you think the maximum extension should be?
15	Do you agree or disagree that only patents for pharmaceutical substances <i>per se</i> and for biologics should be eligible for extension? Why?

16 Do you think the Australian definition of “pharmaceutical substance” should be adopted? Why / why not?

17 Do you agree that patent rights during the extended term should be limited in the manner proposed?

18 Do you agree that third parties should be able to oppose decisions to extend patents for pharmaceuticals through the Commissioner of Patents? Why / why not?

Performers’ rights

19 Do you agree that a performer’s moral rights should apply to both the aural and visual aspects of their live performance and of any communication of the live performance to the public? Why / why not?

20 Should performers’ moral rights apply to the communication or distribution of any recording (i.e. both sound recordings and films) made from their performances, rather than just sound recordings as required by WPPT? Why / why not?

21 Do you agree or disagree with any of the exceptions or limitations proposed for a performer’s right to be identified? Why?

22 Are there any other exceptions or limitations to a performer’s right to be identified that should be included in the Copyright Act? If so, can you please explain why they would be necessary.

23 Do you agree or disagree with providing for any of the exceptions or limitations proposed for a performer’s right to object to derogatory treatment? Why?

24 Are there any other exceptions or limitations to a performer’s right to object to derogatory treatment that should be included in the Copyright Act? If so, please explain why they would be necessary.

25 Should the new property rights for performers be extended to apply to the recording of visual

	performances in films? Why / why not? (Please set out the likely impacts on performers and producers, and any others involved in the creation, use or consumption of films.)
26	Do you agree or disagree with any of the exceptions or limitations proposed above? Why?
27	Are there any other exceptions or limitations to the new performers' property rights that should be included in the Copyright Act? If so, can you please explain why they would be necessary.
28	Do you agree or disagree with any of the proposals above? Why?
29	Are there any other amendments that need to be made to the Copyright Act, and in particular to Part 9, to clarify the new performers' property rights? If so, can you please explain why they would be necessary.
Border protection measures	
30	Do agree that Article 4 of European Union Council Regulation (EC) No 3295/94 is an appropriate model for implementing <i>ex officio</i> powers into the border protection measures set out in the Copyright Act 1994 and Trade Marks Act 2001? If not, please explain why not and outline an alternative approach to implementing <i>ex officio</i> powers.
31	Do you agree that the detention period of three business days following notification to the rights holder is appropriate? Can you outline the impact on both the right holders and any importer/exporter where you consider the period should be shorter or longer than three business days?

Other comments

The main problem with the IP provisions of the TPPA are the same as with the TPPA as a whole: The rights of investors and copyrights holders are apply generally and are able to be enforced but the rights of users (people) are restricted to those specifically documented in the copyright agreement or the exceptions. Investors' and copyright holders' rights are enforced by sanctions including punitive damages and criminal penalties, while users have only basic civil rights. Any means of bypassing copyright is illegal. This means that if the the negotiators have not specified a desirable user right, there is no legal way for users to exercise it. This applies even if the use was intended to be provided for, but the exception was wrongly worded or if changing technology or other circumstances creates a new legitimate use nobody thought of.

An example of the kind of legitimate use is a website that shares multilingual subtitle files for movies. Although a technical copyright infringement, there are many legitimate uses for these files; for example, they allow you to lawfully purchase a foreign movie that isn't available in your own country, and then to add subtitles to view the film in your own language. The sale of such subtitle files is as good an example as any of a niche service that copyright owners have never bothered to commercially fill, and probably never will, particularly for less commonly spoken languages. Even if the rights holder suffered no loss the owner of the website would still be liable for breach of copyright including its draconian provisions.

Such uses should be provided for by exceptions under Part 3 of the Act (Section 48 of the discussion document). However a subtle change in the wording of the TPPA provisions in the “legal scrub up” dictating the kinds of penalties that should be available in cases of copyright infringement negates the provision.

Amongst those provisions, the following footnote allowed countries some flexibility in applying criminal procedures and penalties to cases of wilful copyright infringement on a commercial scale:

“With regard to copyright and related rights piracy provided for under paragraph 1, a Party may limit application of this **paragraph** to the cases in which there is an impact on the right holder’s ability to exploit the work, performance or phonogram in the market.”

However the word paragraph was changed to **subparagraph**. This means that the only criminal provision that a country is exempted from applying in those circumstances is the one to which the footnote is attached—namely, the *ex officio* action provision. Which means, under this amendment, all of the other criminal procedures and penalties must be available even if the infringement has absolutely no impact on the right holder's ability to exploit their work in the market. The only enforcement provision that countries have the flexibility to withhold in such cases is the authority of state officials to take legal action into their own hands.

Under the TPP's original terms, a country could limit the exposure of the owner of such a website to prison time, or to the seizure and possible destruction of their server, on the grounds that by definition their infringement didn't cause any lost sales to the copyright owner. (Note that they would be liable for civil damages to the copyright owner in any case.) for details of this change see: Sneaky Change to the TPP Drastically Extends Criminal Penalties
<https://www.eff.org/deeplinks/2016/02/sneaky-change-tpp-drastically-extends-criminal-penalties>

This is just one example of the way the TPPA IP provisions will stifle useful legitimate use of intellectual property and copyright. Non-profit libraries, museums, archives, educational institutions, or public non-commercial broadcasters (non-profit entities) are particularly vulnerable to the chilling effects of these provisions.