



Explanatory Note on NZRise position statement on Trans Pacific Partnership Agreement (TPPA)

6th September 2015

With the WTO Doha Round negotiation having stalled, the USA has pushed other countries to introduce even higher levels of intellectual property (IP) protection – known as ‘TRIPS plus’¹ as part of bilateral and multilateral international trade agreements. In a 2013 press conference, Barack Obama, acknowledged that:

"I've also said that our cooperation with China is not a zero-sum game. There are a lot of areas where the Chinese and us agree. On trade, in particular, though, here is an area where part of what we're trying to do is raise standards for, for example, intellectual property protection, which sometimes is a big problem in China. And if we can get a trade deal with all the other countries in Asia that says you've got to protect people's intellectual property that will help us in our negotiations with China".² _

The TPPA appears to be a geopolitical power struggle between China and the US with the ultimate goal to implement excessive IP standards. Given that IP rights play an important role in facilitating (or inhibiting) innovation, competition, and trade we believe that New Zealand should be able to tailor its IP regime to its domestic economic and public policy needs.

Technological protection measures

Our biggest concerns relate to the overly broad protection for technological protection measures (TPMs). TPMs or digital rights management technologies are essentially digital locks they apply to control access to or copying of it copyright protected materials.

Under New Zealand's copyright law, which was reformed in 2008, the act of circumventing TPMs is not prohibited so long as it is done for a legal purpose such as to undertake encryption research, fixing code errors, or education.

However, Article QQ.G.10 of the leaked TPPA text prohibits any interference with TPMs. If implemented, New Zealand would be required to change its Copyright Act 1994 by introducing liability for the actual use or possession of a TPM circumventing device. The TPPA is set to undo the policy decision that New Zealand made in 2008 as a result of an open and democratic process.

While we believe that IP protection is important, we also think that it is equally important to strike an appropriate balance between the interests of right holders and the interest of users of copyright protected material.

There is a risk that right holders may abuse TPMs to prevent lawful, non-copyright-infringing, use

1 As a member of the WTO, New Zealand ratified the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement in 1994. Together with other international agreements, the TRIPS Agreement sets international minimum standards for intellectual property protection that WTO members must implement in their domestic laws. TRIPS is recognised (but also criticised) as having harmonised intellectual property rules at a high standard worldwide.

2 <https://www.whitehouse.gov/the-press-office/2013/10/08/press-conference-president>

of copyrighted materials. Experience in other jurisdiction has shown that TPMs can be abused for purely anti-competitive purposes. We are especially concerned about the potential chilling effect this may have on our local research into encryption technology, computer security, and open source software.

With the overly broad protection of TPMs under the proposed TPPA, copyright holder may create de facto monopoly by restricting access to their work on their own terms. This may foster discriminatory pricing and anti-competitive behaviour.

For instance, TPMs can be used to prevent competitors from creating interoperable technologies. We believe that a blanket ban on the circumventing TPMs even for legal purposes is out of sync with the rest of our copyright legislation which aims to strike a balance between the competing interests. In our view, TPMs protection should always be directly linked to preventing copyright infringement and should not provide an avenue to further entrench and broaden an already existing monopoly.

As a small market economy, New Zealand risks having no longer access to books, movies, software and other multi media content at affordable prices since right users can use TPMs to prevent parallel importation of such goods. TPMs ought not be used to renounce lawful parallel importing as it is currently provided for in New Zealand's copyright laws.

Enforcement mechanisms

Article QQ.H.4 of the TPPA encourage proposes the implementation of punitive and statutory damages for copyright infringements. Punitive damages 'shall be set in an amount that would be sufficient to compensate the right holder for the harm caused by the infringement, and with a view to deterring future infringement'.

We are deeply concerned about this unbalanced proposal. We consider that the measure of damages should be based on objective criteria and be linked to the actual damage suffered as a result of the copyright infringement. Punitive and statutory damages that are detached from the correcting element of actual harm suffered encourage vexatious litigation and copyright trolling through non-practising entities.

In an open letter to the American president 80 American IP lawyers criticised the non-inclusive negotiation process:

“the public interest that intellectual property law seeks to promote can be furthered only through broad and inclusive processes that allow meaningful input not just from large entertainment and pharmaceutical interests, but also from large and small creators, producers, distributors, intermediaries, consumers and others affected by intellectual property laws”.³

Despite the public interest in the matter, the TPP countries continue to negotiate in secrecy, thereby “amplifying the public distrust and creating an environment conducive to an unbalanced and indefensible final product”.⁴

The open letter further claimed that: “The TPP's intellectual property chapter would restrict Congress's ability to legislate on these key issues, and would do so without public input”.⁵

On the other side of the Pacific, the Australian Productivity Commission has also slammed the

3 <http://infojustice.org/wp-content/uploads/2013/11/Law-Professors-TPP-11142013.pdf>

4 <http://infojustice.org/wp-content/uploads/2013/11/Law-Professors-TPP-11142013.pdf>

5 <http://infojustice.org/wp-content/uploads/2013/11/Law-Professors-TPP-11142013.pdf>

TPPA for its stringent IP measures that encourage anti competitive behaviour.⁶

The economist and Noble laureat Paul Krugmann commented on the TPP by saying that the:

“deal isn’t really about trade. Some already low tariffs would come down, but the main thrust of the proposed deal involves strengthening intellectual property rights — things like drug patents and movie copyrights - and changing the way companies and countries settle disputes”.⁷

Krugman also noted that “there isn’t a compelling case for this deal, from either a global or a national point of view”, and that the “economic case is weak, at best” and “weirdly out of touch with both economic and political reality”.⁸ Joseph Stiglitz, also a Noble laureate, has raised similar concerns.⁹

NZRise represents the interests of NZ-owned digital technology businesses. We are passionate about New Zealand’s digital sector and we believe that it can be a hotbed for innovation and economic growth.

NZRise co-Chairs

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Don Christie

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6 Australian Productivity Commission *Trade & Assistance Review 2013-14* (2015) page 14.

7 Paul Krugmann New York Times “Trade and Trust” (2015) available at:
<http://www.nytimes.com/2015/05/22/opinion/paul-krugman-trade-and-trust.html>

8 Paul Krugmann New York Times “No Big Deal” (2014) available at:
http://www.nytimes.com/2014/02/28/opinion/krugman-no-big-deal.html?ref=opinion&_r=0

9 New York Times Joseph E. Stiglitz “On the Wrong Side of Globalization” (2014).