



NEW ZEALAND
FOREIGN AFFAIRS & TRADE



TRANS-PACIFIC partnership

INTELLECTUAL PROPERTY

FACT SHEET

➔ Overview

TPP contains an Intellectual property chapter that will establish a common regional framework for intellectual property.

The chapter will harmonise intellectual property standards across the TPP region. Consistent enforcement standards will help New Zealand businesses protect their intellectual property in TPP markets. Rules on 'geographical indications' will also establish processes that should help preserve access for New Zealand exports that use generic names.

Most provisions of the chapter are consistent with New Zealand's existing intellectual property regime. But some provisions require New Zealand to make legislative changes before we can ratify the agreement. To limit the potential impact of many of these changes, New Zealand has negotiated flexible approaches to implementation. Exceptions and limitations have also been included. However, the changes required by the

chapter will still entail some costs for New Zealand. These need to be considered against the benefits of the agreement as a whole.

Objectives and principles

New Zealand is a Party to the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). TPP's Intellectual Property chapter incorporates important objectives and principles from TRIPS. For example, TPP Parties may take measures to protect public health and nutrition, promote the public interest in sectors of vital importance to their socio-economic and technological development, and prevent the abuse of intellectual property rights by right holders.

Copyright

New Zealand law currently protects copyright for 50 years¹. Under TPP, New Zealand would be required to extend the copyright term to 70 years. The extension applies to works that are still within their current 50 year term of protection, but not those that have already fallen into the public domain. New Zealand copyright owners (including authors, musicians, artists and filmmakers) will in some cases benefit from a 70 year copyright term in TPP countries, but the benefits are likely to be modest. Extending the copyright term also means New Zealand consumers and businesses will forego savings they otherwise would have made from books, music and films coming off copyright earlier.

The net cost of extending New Zealand's copyright term from 50 to 70 years will be small to begin with and increase gradually over 20 years, reaching a relatively constant level after that. Over the very long term, including the initial 20-year period, the average annual cost is estimated to be around \$55 million.

TPP will require New Zealand to provide stronger protection to technological protection measures (TPMs) – digital 'locks' that protect copyright works. The main new requirement is to provide civil and criminal remedies against people breaking TPMs. While TPP also includes obligations to prevent selling of devices and services that enable the breaking of TPMs, New Zealand already has rules in this area.

The TPM provisions will not require New Zealand to criminalise uses of copyright works that are currently legitimate under New Zealand law. This is because New Zealand has negotiated an exceptions provision to ensure people can continue to break TPMs for legitimate purposes. These exceptions are not set out in TPP – the Government will determine what they are during implementation.

The Government intends to provide exceptions for situations where use of a copyright work either does not infringe copyright in the first place, or is otherwise permitted because there is a copyright exception under New Zealand law. Examples might include breaking a region-code on a DVD legitimately purchased overseas in order to enable it to be viewed on a New Zealand DVD

player, breaking a TPM to allow reverse engineering of software or interoperability of devices, breaking a TPM to reformat a work to enable access by the print disabled, or breaking a TPM to protect privacy.

A broad and flexible exceptions provision also applies to all the copyright provisions in TPP. This means TPP Parties will retain their current ability to adopt and maintain copyright exceptions under international law. New Zealand's current copyright exception for temporary electronic copies (such as cached or buffered copies of websites and internet data) would not need to be changed.

TPP Parties will also endeavour to achieve balance in their copyright and related rights systems, including through the adoption of new exceptions and limitations. This obligation will help ensure copyright laws remain relevant in light of changing technology.

New Zealand will need to provide new exclusive rights to performers of copyright works such as musicians and actors. This will give performers rights similar to those of other copyright owners. Currently performers have more limited rights than copyright owners.

TPP will not require New Zealand to introduce any major changes to internet service provider (ISP) liability provisions relating to internet copyright infringement. For example, the provisions will not require ISPs to terminate internet accounts or adopt a "three strikes" - style graduated response regime.

Parallel importing

TPP will not require any changes to New Zealand's laws on parallel importing. TPP allows Parties to freely determine international exhaustion of intellectual property rights.

1. This means that copyright in music recordings and films continues for 50 years after they were made. Copyright in books, screenplays, music, lyrics and artistic works continues for 50 years after the death of the author.

Data protection: Biologics, new uses of pharmaceutical drugs, and agricultural chemicals

The TPP outcome on data protection for pharmaceuticals (including biological pharmaceuticals) can be met within New Zealand's current policy settings and practice.

New pharmaceuticals require safety and efficacy approval before entering the New Zealand market. Data protection sets a period of time that generic manufacturers have to wait before they can rely on the data provided by the supplier of a new pharmaceutical product to progress the approval of their own generic version. The length of data protection needs to balance producer and consumer interests by providing an incentive to bring new pharmaceuticals to New Zealand without unreasonably delaying the entry of generics to the market.

New Zealand law provides five years of data protection for small molecule and biological pharmaceuticals (also known as biologics). TPP requires New Zealand to continue to provide five years of data protection for small molecule pharmaceuticals. For biologics, New Zealand will be required to provide the five years of data protection together with further effective market protection through other measures, taking into account local market circumstances. Although these are new obligations for New Zealand, they can be met within existing policy settings and practice.

TPP Parties have also agreed to review the period of market exclusivity provided for biologics after 10 years.

TPP would also require New Zealand to provide five years data protection to new pharmaceutical products that contain a new and a previously approved active ingredient. This is consistent with New Zealand's current law.

New Zealand will also need to provide 10 years of data protection for new agricultural chemicals. Protection of five years is already provided in New Zealand.

Patent term extension to compensate for unreasonable delays

New Zealand will be required to extend the term of a patent to compensate for any unreasonable delays in the patent examination process.

Similarly, New Zealand would need to extend the term of a patented pharmaceutical product if there were unreasonable delays in the safety and efficacy approval process run by Medsafe.

Very few unreasonable delays are expected to occur in New Zealand, and only in exceptional circumstances, given the efficiency of patent grant and regulatory approval by the Intellectual Property Office of New Zealand (IPONZ) and Medsafe respectively. This is because the agreement requires an extension of the patent only for certain types of delay:

- Patent office delays will only be counted if the patent has not been granted within five years of its filing date, or three years from the time the patent applicant requests its examination.
- Delays attributable to actions of applicants and third parties do not require an extension, for both patent office delays and delays in Medsafe's regulatory approval process.

Patent linkage

New Zealand will need to provide for 'patent linkage' but will not need to adopt the patent linkage models found in some other TPP countries. Patent linkage under TPP will require the Government to put in place a system that enables a pharmaceutical patent holder to be notified that a generic version of their product has been submitted to Medsafe for regulatory approval. New Zealand will also need to ensure there is sufficient time and opportunity for a patent owner to seek preliminary injunctions to resolve patent disputes prior to a generic version of its patented medicine entering the market. New Zealand's current law and practice is sufficient in this area. Medsafe will not be required directly to prevent a competitor placing a generic on the market until the patent expires, or resolve patent disputes. That will remain a matter for New Zealand Courts.

Regulatory review exception

TPP will require each Party to provide an exception to patent rights that allows the use of a patented pharmaceutical to produce information required to seek regulatory approval of a generic version of the pharmaceutical product.

This exception is important as it will help enable pharmaceutical manufacturers to seek regulatory approval for a generic pharmaceutical product without infringing any patents. This exception is already provided for under New Zealand law.

TPP does not prevent Parties from allowing pharmaceutical manufacturers to export generic pharmaceuticals in order to seek regulatory approval in other countries. Exporting for this purpose is currently permitted under New Zealand law.

Grace period

New Zealand will need to adopt a 12 month “grace period” for patent applicants. This means that if inventors make their inventions public, they will not lose their ability to be granted a patent in New Zealand if a patent application is filed within 12 months of the disclosure.

Geographical indications

A geographical indication is a sign or name used in relation to goods that have a specific geographical origin and qualities attributable to that origin, like champagne. The provisions on geographical indications (GIs) in TPP will ensure that Parties to the agreement follow due process when protecting the majority of GIs under domestic laws and regulation. These include considering whether a term is a generic name in that market, and providing procedures to oppose and cancel GIs.

Separate due process standards will also apply where TPP Parties agree to protect GIs through trade agreements. While these provisions are more flexible, they will ensure exporters in the TPP region have a sufficient opportunity to make comments on the terms that Parties are considering protecting through trade agreements. The provisions also safeguard against terms remaining protected where they are no longer legitimate GIs. It will benefit New Zealand exporters who use common names to market their goods overseas.

Additional damages for trade marks

New Zealand will need to give New Zealand courts discretion to award additional damages for trade mark infringement, on top of the compensatory damages already provided for under New Zealand law. This would align damages for infringement of trade marks with those for copyright infringement in New Zealand.

Enforcement of copyright and trade marks at the border

New Zealand would also need to provide the New Zealand Customs Service with further *ex officio* powers, to allow Customs to act on its own initiative to temporarily detain suspected infringing goods. Rights owners could then provide a notice requesting that Customs undertake the usual customs process in relation to such goods.

Additional treaties: New Zealand accession

The chapter contains a list of multilateral intellectual property treaties that the Parties have committed to join if they are not already members. Within three years of TPP entering into force, New Zealand will need to join the following:

- World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT).
- WIPO Performances and Phonograms Treaty (WPPT).
- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure.

New Zealand law is generally consistent with the WCT. While New Zealand law would be generally consistent with the WPPT some minor technical changes might be necessary, particularly in respect to the rights of performers.

UPOV 91 and traditional knowledge

TPP also includes a requirement for New Zealand to, within three years of entry into force of TPP, either accede to the most recent 1991 version of the International Convention for the Protection of New Varieties of Plants (UPOV 91), or alternatively, under a New Zealand specific approach, implement a plant variety rights system that gives effect to UPOV 91.

When implementing this obligation, New Zealand is able to adopt any measure that it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi (and this is not subject to the dispute settlement provisions in TPP).

This gives the Government flexibility to decide, in consultation with relevant stakeholders, how to best meet the obligations in respect of UPOV 91, while taking into account the recommendations in Waitangi Tribunal report Ko Aotearoa Tenei (WAI 262).

TPP also includes a number of provisions aimed at improving the treatment of traditional knowledge in intellectual property systems. These encourage information sharing between intellectual property offices on their practices for dealing with traditional knowledge, and require Parties to endeavour to ensure that quality patent examination practices are applied when applications for patents relate to traditional knowledge.

TPP also permits a Party to take measures to preserve, promote and respect traditional knowledge and traditional cultural expressions in a manner consistent with that Party's international obligations.