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

Your name and organisation

	David Smith, Legal Counsel
Organisation	Trade Me Limited

Responses to consultation document questions

1	Have the overarching objectives been framed correctly for this policy process? If not, what would be more appropriate objectives?
Tech	nological protection measures
2	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.
	Trade Me is generally supportive of the exceptions proposed by the Ministry in its targeted consultation document (" Consultation Document ").
	In our submission to the Foreign Affairs, Defence and Trade Committee (" Committee "), which is examining the Trans-Pacific Partnership Agreement (" TPP ") text, we noted that liability for breaking technological protection mechanisms (" TPMs ") should, in principle, only follow where there is a copyright infringing act or purpose.
	As evidenced by the Consultation Document, a broad range of exceptions are necessary to ensure legitimate uses are not caught.
	We address the proposed exceptions below:
	To allow access to computer programmes that are embodied in a machine or device and restrict the use of goods (other than the work) or services in relation to the machine or device:
	We support this exception.
	Without such an exception, individuals would be penalised if they bought a phone or other device overseas, and sought to unlock it for use in local conditions.
	Additionally, new motor vehicles are largely operated by software. Vehicle technicians may need to access these computer programmes in order to 'fix' or repair the vehicle. As more and more physical goods are becoming connected to the

internet, and therefore, contain computer programing, we'd want to ensure the legislation doesn't inadvertently catch legitimate access to these copyright works, and that the exceptions allow for such access.

To enable circumvention of a TPM to the extent that it controls geographic market segmentation by preventing the playback of legitimate physical copies of a film, sound recording, or computer game in New Zealand:

We support such an exception. We noted its importance in paragraph 8 of our submission to the Committee:

The absence of meaningful exceptions could have a real commercial impact. For example, approximately 570,000 DVDs are listed on Trade Me each month. Almost a fifth of these are not specifically region zoned for New Zealand (not all such DVDs will be locked). Without appropriate exceptions, sellers' revenue may be affected, and consumer choice reduced.

Further below we discuss why such an exception should be expanded to permit circumvention of a TPM that controls geographic market segmentation in relation to content streaming services that are non-infringing and otherwise legitimate.

To enable interoperability of an independently created computer programme with the original programme or other programme:

From the information available, it is not clear to us how this exception is intended to work.

We have technical experts in this area, who would be happy to discuss with the Ministry how this exception would work in practice.

To enable encryption research:

We support such an exception on the basis that this allows the continuing development of appropriate encryption technology. However, the scope of "encryption research" is highly ambiguous, and we would expect this to be clarified with the introduction of legislation.

To enable good-faith security research:

We support good-faith security research, but the scope of the exception will need to be clarified. We'd expect third party software used for legitimate penetration testing (as is used by tech businesses) to be covered by the exception.

To enable online privacy:

In principle we are highly supportive of an exception that would ensure personal information is protected and rights under the Privacy Act 1993 upheld (for example, where an individual is unable to effectively prevent the collection of information about themselves unless a device or software is interfered with). However, we'd like to see more detail around the scope of this exception.

To enable law enforcement and national security:

Our support for such an exception would depend significantly on the precise wording

of the relevant provision.

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For example, while Trade Me accepts that in certain circumstances a properly authorised warrant will permit law enforcement access to a device and information contained within it, the producer of a TPM that protects the device or information within it should not be able to be compelled to circumvent the TPM.

Any such exception should also provide proportionate safeguards for the protection of personal information of individuals (for example, where such information is beyond the scope of the warrant or relates to another individual).

To enable individual play by gamers of legitimate video games for which outside server support has been discontinued:

Trade Me supports this exception, given the limited usability of a product once support is discontinued.

For any other purpose that does not infringe copyright:

We consider non-infringing conduct should not, in principle, be subject to civil or criminal liability, and therefore support an open-ended exception (on the basis discussed below).

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?

The above exceptions should be applicable to a person who circumvents a TPM. That protects users who have legitimate reasons for breaking a TPM.

It is less clear how the exceptions should apply to conduct for the provision of services or devices that circumvent TPMs. The key considerations will be intention and knowledge. We suggest that liability should be drafted in a manner similar to that currently found in s 226A of the Copyright Act 1994 ("Act"), with the following amendments to take account of the permitted exceptions:

- (1) A person (A) must not make, import, sell, distribute, let for hire, offer or expose for sale or hire, or advertise for sale or hire, a TPM circumvention device that applies to a technological protection measure if A knows or has reason to believe that it will, or is likely to, be used for a purpose to which a permitted exception does not apply. to infringe copyright in a TPM work.
- (2) A person (A) must not provide a service to another person (B) if-
 - (a) A intends the service to enable or assist B to circumvent a technological protection measure; and
 - (b) A knows or has reason to believe that the service will, or is likely to, be used <u>for</u> <u>a purpose to which a permitted exception does not apply</u> to infringe copyright in a TPM work.
- (3) A person (A) must not publish information enabling or assisting another person to circumvent a technological protection measure if A intends that the information will be used <u>for a purpose to which a permitted exception does not apply to infringe copyright in</u>

a TPM work.

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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?

We understand that, under the proposal, a person would not be liable if they either circumvented, or helped provide services or devices that allow circumvention, for a permitted act found in Part 3 of the Act.

That is more appropriate than the existing regime (under ss 226D and 226E of the Act), which provides that only a "qualified person" is free from liability in relation to conduct enabling the circumvention of a TPM for a Part 3 permitted act. We support the flexibility provided by the proposal, given that a range of persons may have technical expertise to help enable or actually circumvent a TPM.

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.

The exception allowing for circumvention of a TPM in relation to geographic market segmentation for films, sound recordings and video games should be expanded to include geographically restricted content streaming services ("**CSS**") over the internet. Such an exception would permit circumvention of a TPM via a virtual private network or proxy ("**VPN**"), provided that access to the CSS was non-infringing and otherwise legitimate.

We support such an exception for the following reasons:

- Freedom of contract: CSS providers already have a means of preserving geographic market segmentation: their conditions of service can stipulate that the CSS is only accessible from within particular jurisdictions, or they can otherwise prohibit access to the CSS through a VPN or proxy. If a person breaches those conditions, the CSS provider can sue for breach of contract. We disagree that a VPN exception "requires" a CSS provider to make its content available to unwanted markets, restricting its freedom of contract (that is preserved, as described above). Further, if a consumer uses a VPN to access validly purchased CSS (ie, such access is not prohibited under the contract), there is no commercial benefit to the consumer and we fail to see any direct loss to the CSS provider.
- Parallel importing analogy: Trade Me supports the concept of parallel importing, given the significant benefit to New Zealand consumers from increased choice and competition. VPNs allow competition in the streaming market in a way broadly analogous to the introduction of parallel importing: a VPN provider (like an importer) is able to offer the same or similar services (legitimately sourced from another jurisdiction) at a price competitive with those who have exclusive arrangements for New Zealand. Given CSS providers can still impose contractual restraints, there is no need to foreclose the potential benefits of increased competition.
- Access to content: The intangible nature of CSS makes any prohibition on VPN access potentially significant. Unlike a tangible product (such as a DVD) which may be

imported, or brought back by an individual for personal use from overseas, a TPM can ensure that some content is entirely unavailable in New Zealand (unless tangible copies are available or persons resort to obtaining illegitimate copies). That could lead to reduced choice for consumers.

- Effect on VPN services: Lastly, without an appropriate exception, there would be significant risk to VPN providers. VPNs are used for a range of purposes many of which are not aimed at circumvention of a TPM - the law would need to be drafted so as to avoid catching VPN providers outright. Moreover, even for those VPN providers who offer a service that allows circumvention of a TPM, we consider the focus should be on the end user:
 - If the end user accesses content under a legitimate agreement, neither the end user nor the VPN provider should be liable.
 - If an end user accesses content illegitimately, or otherwise infringes copyright through such access, the VPN provider should not be liable (unless it is put on notice and fails to take action - we note s 92C of the Act already provides a notice and take down approach for storage of infringing material). In this scenario, the CSS provider has remedies against the end user and does not need to involve the VPN provider.

Without a clear exception, there is a danger that VPN providers who allow circumvention of a TPM are criminalised (as their business will logically be aimed at commercial gain), even if their end users access content legitimately (ie, the first situation), or the VPN provider is unaware of illegitimate or infringing behaviour (the second situation).

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 your answers.

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In our experience, the pace of technological change can make it hard for the law to keep up with legitimate business and consumer practices. For that reason, a general exception (on the grounds discussed below) is important to ensure otherwise legitimate practices are not adversely affected

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?

Trade Me supports legislation which (in addition to the specified exceptions above) retains a general and open-ended exception for other non-infringing purposes. That would allow flexibility in the face of technological change.

Such an open ended exception could be complemented by a regulation making power, allowing Cabinet to specify particular exceptions over time.

In exercising such a power, we'd support criteria that promotes a flexible copyright regime balancing:

• freedom of expression (including access to information for the purposes of education

	and innovation);
	consumer benefit; and
	the legitimate business interests of rights holders.
	We'd encourage a process for amendment of the regulations allowing interested parties to make submissions and consult with the Ministry, with the expectation that such feedback would be taken into account in recommendations made to Cabinet.
Pate	nt 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?
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?
10	Do you consider that third parties should be able to oppose decisions to extend patents on the ground of unreasonable delays in grant?
Pate	nt 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?
Dorf	ormers' rights
Perio	
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?
	Do you agree or disagree with any of the exceptions or limitations proposed for a performer's
21	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.
Bord	er 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.
	In principle we support the proposals in the Consultation Document. Trade Me's Trust and
	Safety Team works actively with rights holders to protect against counterfeit goods being sold on our website. We support increased powers for Customs to take action to protect the intellectual property of rights holders.
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As many rights holders are not based in the New Zealand jurisdiction, without an existing application lodged with Customs, such a system will be heavily reliant on Customs having an understanding of "known" issues.

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?

Provided proper criteria are developed, and the risks above mitigated, we are comfortable that three days is sufficient.

Other comments

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Trade Me provides New Zealand's largest online marketplace, where transactions are made directly between buyers and sellers based in New Zealand and internationally. Over 840,000 New Zealanders use Trade Me's site every day. Our business intersects with a range of areas covered in the TPP, including electronic commerce, intellectual property rights, privacy and data, and consumer protection.

Over the past 17 years of operating online, we've found that laws work best when they are:

- straightforward and easy for consumers to understand and apply;
- practical for businesses to operationalise and enforce with clear definitions;
- implemented in a pragmatic way;
- consistent online and offline; and
- sufficiently technology neutral to withstand the test of time.

Trade Me thanks the Ministry for the opportunity to provide feedback on its Consultation Document. We would be very happy to discuss our submission in person, should it be of assistance. Please do not hesitate to contact Trade Me, should you wish to discuss any of the points raised.