Intellectual Property in New Zealand and the TPPA

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Intellectual property law is an important factor in a knowledge economy. It is the legal method through which knowledge can be commodified and traded. There are many ways in which the Trans-Pacific Partnership Agreement negotiations will require New Zealand to increase its intellectual property protections. This may seem a good idea if a short-term view is taken, but if New Zealand is ever to develop into a knowledge economy then trade negotiators need to plan for that possibility.

Too much intellectual property protection can also increase the price of goods, including books, films, electronics and pharmaceuticals. The longer copyright protects a book, for example, the longer its price stays higher. Books that are out of copyright tend to be cheaper because more than one publisher can print the book. If New Zealanders want access to a wide range of goods and services, then there must be a careful balance, within the detail of intellectual property law, to make sure such goods do not become unaffordable for New Zealanders.

**Intellectual Property**

Intellectual property is the collective term given to the legal rights that are separately called copyright, trade marks and patents. As well as these three main areas of intellectual property law, there are related areas of legal protection that include geographical indications and the protection of integrated circuits used in computers and electronic devices.

Intellectual property is a legal construct and is often described as intangible property. Although this sounds like legal jargon, it is in fact a helpful way to understand how intellectual property is different from goods. A book or CD is tangible; you can hold it in your hands. The intellectual property associated with those products is intangible. A person can use the book to read, or even as a doorstop. If you buy a book, you can resell the book. When you buy a book, you do not, however, buy the right to copy the work. That right remains
with the copyright owner and is intangible; you cannot hold it in your hands. In the electronic world, it is not correct to talk about music or film being products that you can physically hold as you can a book. Music and film can be downloaded, but this does not allow the downloader to copy those downloads except for their own use. In a similar way, when you purchase a pharmaceutical or a car, you do not purchase any right to manufacture those same goods. The rights to do that are the patent rights. Intellectual property rights are communicated to the world through the products in which they are manifested (there are also registers of some rights), but the legal notion of an intellectual property right is not the actual product. Rather, it is embodied in the product. The product is a book, for example, and the intellectual property right is copyright. Intellectual property rights have an independent existence from the books, films, music and pharmaceuticals to which they relate, and can be regarded as an entity that has a legal as well as a transactional reality. As a commodity in its own right, intellectual property can be bought and sold, and it can be the major asset of some businesses that do not produce goods or services. Their business might be to generate and sell the intellectual property to others who produce goods and services.

In each country, domestic intellectual property law frames the protection of intellectual property. This is often referred to as the territoriality principle of intellectual property. What it means is that the laws of the United States apply to the protection of intellectual property in the US, the laws of Australia apply to the protection of intellectual property in Australia, the laws of New Zealand apply to the protection of intellectual property in New Zealand, and so on. This territoriality rule even applies where intellectual property works are on the Internet. The relevant law may apply where the alleged infringing material is available on the Internet (and that could be many places) or where the material is uploaded to the Internet, or both.

There are many commonalities between most countries’ intellectual property laws because so many countries are members of the World Trade Organization. One of the WTO’s agreements is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which requires that WTO members all have minimum standards of intellectual property in their domestic laws. The TRIPS Agreement also allows its members to provide a higher level of protection than the TRIPS Agreement requires; that is often called TRIPS-plus protection. In some cases, TRIPS-plus protection is not much more extensive than the TRIPS Agreement; in others it is much greater. The US in many of its free trade agreements has required of its trading partners considerable increases in intellectual property protection. The FTA between the US and Chile, for example, has many TRIPS-plus provisions. The agreement between the US and Australia (AUSFTA) has a very high standard of TRIPS-plus protection, requiring extensive protection of patents and copyright in particular. The AUSFTA also requires protection of certain
things that the TRIPS Agreement does not cover – for example, the protection of domain names used on the Internet.

The FTA between New Zealand, Singapore, Chile and Brunei, known as the Trans-Pacific Strategic Economic Partnership Agreement (P-4), has a fairly limited intellectual property chapter. The existing agreement is, however, in many ways a TRIPS-plus agreement. One way in which it is TRIPS-plus is that it deals with areas on which the TRIPS Agreement is silent. These include, for example, a provision specifying that parties may establish measures to protect traditional knowledge.

The expansion of the P-4 through a TPPA is likely to result in a much greater level of TRIPS-plus intellectual property protection. From New Zealand’s perspective, some of the increases in intellectual property protection are likely to be more problematic than others. Of greatest concern is what New Zealand will concede, or be forced to concede, in the intellectual property field in order to make gains in other fields. Concessions are likely in this area because New Zealand does not have what trade negotiators call an offensive interest in intellectual property. The economy is not dependent on the production, creation and distribution of intellectual property-related products in the way that it is dependent on agriculture. New Zealand does have many businesses that generate and are dependent on intellectual property, but the amount is not a significant portion of GDP in the way that it is for the US economy. Consequently, in the short term, New Zealand concessions in the intellectual property field can look palatable, but the social and economic impact of over-reaching intellectual property laws is too often underestimated.

It is in New Zealand’s interests to have an intellectual property law that is beneficial to New Zealand. Recent legislation relating to copyright and patents states such a goal in its explanatory notes. Intellectual property policy makers and trade negotiators would not disagree with that statement when framed at a broad level. Any disagreement might be in the detail of what does or does not benefit New Zealand. The goal for New Zealand’s intellectual property law should be to ensure that patent law fosters research and development in New Zealand, that copyright encourages New Zealand-based creativity, and that trade marks help New Zealanders do business. If a trade agreement hinders any of those things, then the outcome should not be regarded as a good achievement for New Zealand.

The preamble of the P-4 provides that the parties resolve to:

- FOSTER creativity and innovation, and promote the protection [of] intellectual property rights to encourage trade in goods and services among the Parties.

Although the intellectual property chapter expands on this preamble, with a series of ‘intellectual property principles’, the preamble reveals an undeveloped and under-analysed view about the role and function of intellectual property in
trade. Primarily, it appears not to contemplate that trade in intellectual property occurs independently from goods and services as well as in connection with them. While intellectual property rights can foster creativity and innovation, the P-4 (like many international intellectual property agreements) has no internal mechanism to measure the appropriate level of protection to achieve the goals of the agreement. Rather, intellectual property protection without qualification, other than the general principles, is presumptively the starting point. If the only limits on protections are contained in general principles, this tends to result in the principles taking a back seat in any legal interpretation.²

The remaining sections of this chapter describe some of the main areas of intellectual property protection that are likely to raise issues in the expanded P-4 negotiations.

Copyright
Copyright law is relevant to culture and information. Copyright law protects works described as literary, artistic, musical and dramatic. In New Zealand, artistic works include design drawings and prototype models for industrial products, meaning that copyright is used to protect a myriad of things, including cars.³ Copyright also protects films, sound recordings, broadcasts, cable programmes and communications on the Internet.⁴ Copyright protects all of these things whether they are made in New Zealand or made somewhere else and imported into New Zealand. It is not possible in this chapter to outline all of the ways in which trade agreements may affect copyright law and copyright products, but some key areas are discussed.

Although copyright applies to products of culture, the culture debate discussed in Chapter 12 has largely proceeded independently of the intellectual property debate. That debate has focused on the cultural industries and the tangible products they produce; and whether those industries can receive domestic support in the name of supporting local culture, or whether that support is a kind of protectionism that trade rules might prohibit. Trade negotiations and agreements have treated copyright separately even though it impacts on the same goods and services. The reasons for this can seem justified from a legal perspective, but arguably do not make much sense because the same products are at issue in both legal settings.

The push for the free movement of cultural goods stands in stark contrast to the ways in which intellectual property law territorialises rights and is used to confine some intellectual property products to a particular territory. For example, if the free movement of goods is a priority, then Hollywood movies should be able to be exhibited and sold on DVD or digital download all over the world. This does not mean, however, that once a movie is released in one part of the world anyone can export it to another part of the world. Intellectual property protects the copyright in such movies in each territory independently of any other territory. So that if the movie is released in the US and is not
simultaneously distributed in New Zealand, it will be an infringement of New Zealand copyright law for that same movie to be distributed here without the copyright owner’s permission. The copyright owner can be a foreign entity. A DVD of a movie that was made for distribution elsewhere can be imported into New Zealand, provided nine months has elapsed since the movie was first distributed. This is called parallel importation, which is not permissible in a number of countries including the United States.

Intellectual property also means that the owner of copyright can prevent copies of the movie being made anywhere else in the world. In sum, intellectual property is a barrier to reproducing goods and in some countries also to importing them. This trade barrier is treated as acceptable because it is designed to prevent piracy, and the opportunities for piracy theoretically increase in the global market. This is because there are more goods to imitate as more goods that embody intellectual property are made available around the world. Full coverage of the debate over the extent of protection needed to achieve this ‘anti-piracy’ goal is beyond the scope of this chapter, but broadly it can be stated that TRIPS-plus intellectual property rights may well be in excess of what is needed to prevent piracy and more about enhancing a comparative advantage in cultural, scientific and technological industries. To be sure, the prevention of piracy or counterfeiting is part of protecting that comparative advantage, but TRIPS-plus protection goes beyond the anti-piracy and anti-counterfeiting function.

Parallel Importation of Copyright Products
The P-4 provides that the parties may ‘provide for international exhaustion of intellectual property rights’. This allows its members to parallel import products protected by intellectual property. A parallel import is a legitimate good that is not pirated, but is made for a different market. New Zealand allows for the parallel importation of copyright goods and trade-marked goods. This permits the importation not only of cultural products but also of many consumer goods from nail polish to cheap Japanese cars and electronic goods. Singapore allows these sorts of parallel imports and also parallel imports of patented goods. US domestic and trade policy aims to prevent all parallel imports. Under the AUSFTA, patented products cannot be parallel imported. The Australian Federal government recently reviewed whether it should allow parallel imports of books, and concluded that it should not. One of the reasons given was support for the local publishing industry. It is not at all clear that preventing parallel importation achieves that goal. Rather, preventing parallel importing allows major players in the cultural industries and others, such as pharmaceutical industries and car manufacturers, to divide world markets and to keep retail prices high in so-called developed countries such as New Zealand.

The TRIPS Agreement does not prevent countries from parallel importing
goods. The decision to allow parallel imports, or not, is a matter of domestic policy. The benefits to consumers are reasons to retain New Zealand’s copyright and related trade-marks parallel-importation regime.

**Term of Protection for Copyright Works**
The US, Chile, Singapore and Australia have a longer term of copyright protection than New Zealand. The US–Chile FTA and the AUSFTA specify a term based on the life of the author plus seventy years, or seventy years from the creation of the copyright work. Similar terms apply also in the European Union. The expanded P-4 negotiations will almost certainly require that New Zealand extend its copyright term to the equivalent of those countries. The current term in New Zealand, which is the TRIPS Agreement minimum term, is the life of the author plus fifty years, or fifty years from the creation of the work where life is not the basis of the calculation.\(^5\) Arguably New Zealand potentially gains little from not extending the term; the shorter term of protection does not enable New Zealand to import goods any cheaper from overseas where they are still protected by copyright. A potential gain from having a shorter term is that New Zealand-based creators and businesses could use and reproduce copyright works in New Zealand because they are out of copyright, even though they would still be in copyright elsewhere. This has the potential for local businesses to reproduce works more cheaply for local consumption than the cost of importing the copyright works. Is there evidence of such uses and businesses developing in New Zealand? Maybe it is impractical for such businesses to be established?

Much of the current debate about copyright is about remix culture. Remix culture is where music and video, for example, are digitally rearranged to make new music or video or a combination of both. Such activities often infringe copyright, and some argue that such activity should be permissible and not be a copyright infringement. That remix can be creative in its own right should not be denied. Equally, the value of copyright for authors should not be underestimated. Copyright is not just used by major industries: it is also what provides many authors of all kinds of copyright works with their livelihood. The balance between copyright protection and remixes of copyright is too large a topic for this chapter. However, as the term of copyright is long, in any event, the calls for greater uses of copyright works to be permissible in the online world is equally strong where the fifty-year term applies; one could therefore say that extension to seventy years, while in principle not desirable, makes little difference to the real issue.

The extension of copyright term has been widely criticised and even challenged as unconstitutional in the US on the basis that it conflicts with the constitutional clause to encourage the arts, from which US copyright law stems.\(^6\) That challenge failed and worldwide pressures to extend the term even further continue. A recent example was a proposal by the European
Commission to extend the term of copyright in sound recordings to ninety-five years. This proposal is not proceeding because the European Parliament did not agree to it. If New Zealand kept the shorter term, it would be taking a stance against longer term arrangements, but such a stance may be more a matter of principle than one with actual advantages.

**Digital Copyright Issues**

All of copyright law allows some uses of works to occur that might otherwise be infringements. In the US, this is called ‘fair use’. In New Zealand, following the British tradition, the terminology is ‘permitted acts’. Permitted acts include, for example, certain uses for research and private study, for criticism and review, and for education. In the digital world, copyright works are often protected by technology that prevents copying. Such technological protections can make it hard even to use those works for some permitted acts. In New Zealand, copyright law allows libraries designated under the Copyright Act to circumvent such devices in order to exercise some permitted acts.

The P-4 affirms that its parties may establish provisions to facilitate the exercise of permitted acts where technological measures have been applied. It is possible that the TPPA negotiations will require more stringent protections of digital copyright works and more confined exceptions to those protections than the New Zealand law provides. New Zealand law was amended in 2008 to provide greater protection of copyright works in the digital and online world, but that law was modelled for New Zealand and is not the same as either US or Australian law.

The US has more extensive protections of technological protection mechanisms, digital rights management and other digital protections. Broadly, however, it has more extensive fair use provisions. The AUSFTA makes all reproductions of copyright works, even those transient in nature, a copyright infringement. New Zealand law does not make the creation of transient copies that allow the Internet to function a copyright infringement. This is important because it means that people cannot be sued for simply using the Internet and looking at things online.

New Zealand’s digital copyright laws are unique. Although their enactment has in part been controversial, the digital copyright laws were largely designed for New Zealand rather than being a wholesale adoption of foreign law. Will a trade agreement claw back the position to be more similar to the US approach to digital copyright protection? At the very least, New Zealand negotiators should aim to ensure that the TPPA obligations are no greater than US domestic law digital copyright protections, and that New Zealanders have the same chance to exercise permitted acts as fair use permits in the United States. The very different nature of fair use and permitted acts arguably tends to make the exercise of permitted acts in New Zealand narrower.
Internationally, there is a considerable debate over the scope of patent protection. The TRIPS Agreement requires that patents are available for inventions ‘in all fields of technology’, but that does not mean that everything must be patented. For an invention to be patentable, it must be novel, involve an inventive step, and be useful. These are terms of art and there is much case law about their scope. No definition of the terms is found in the TRIPS Agreement, so each member of the WTO has discretion to define the scope in their national laws. This results in many differences between the patent laws of WTO members, despite there being some minimum standards that the WTO members’ laws must incorporate under the TRIPS Agreement.

One example of such a difference is found in the laws of developing countries like India and Brazil compared to the laws of the United States. India does not protect certain sorts of inventions because, under its law, the inventions lack an inventive step; thus patents are not granted where inventive activity is deemed to be so incremental that the inventive step is missing. The rationale behind India’s law is that patents for incremental advances can hinder economic development. The US, by contrast, already has substantive patent-based industries, and therefore an economic interest in allowing incremental advances (often called ‘incremental innovation’ in the developed world) to be patented. A new use of a known pharmaceutical, where the new use is not based on a new compound but uses the same compound, is a type of incremental innovation. An example is aspirin, which had a first-known use as a painkiller and a subsequent use as a blood thinner. Aspirin sold as pain relief can also be used for the new use. In countries such as India, incremental new uses of this kind will often not be patentable, whereas the same new uses will probably be patentable in the US (and also Australia and New Zealand) on the basis that such new uses involve an inventive step.

This area of the law is complex and cannot be fully described here. Whether patents should be granted over new dosages of known pharmaceuticals raises significant issues. When a pharmaceutical compound has been patented at least once, and possibly more than once for the treatment of different conditions, these sorts of patents increase the costs of pharmaceuticals and consequently increase the costs of health care. Those seeking such patents argue they are necessary to stimulate research and development, and corresponding investment in pharmaceutical innovation. As the compound has already been patented, many doubt whether the further patenting is necessary. Even if such patents are necessary to stimulate research for new uses, very little or any of that research takes place in New Zealand. So one might ask why New Zealand needs such patents. The answer is likely to be that it does not, and there is no international agreement that requires New Zealand to provide such patents.

The opportunity for making informed policy decisions on patents for new
uses of known products, particularly pharmaceuticals, is important because not all economies are the same and, therefore, patents that are appropriate for one economy may not be economically appropriate in another economy. This is why Indian law is different from US law. Whether such new use patents are in the interests of New Zealand should be determined through policy analysis, not through trade negotiations.

There are differences in the patentability criteria (novelty, inventive step and usefulness) and how they are applied between Australia, New Zealand and the US. However, these differences are not as stark as those between the US and developing countries such as Brazil and India. Perhaps because of these international differences, the US approach to FTAs is to require that patents be available for certain types of incremental innovation. The AUSFTA and the US–Chile FTA, for example, provide that ‘patents shall be available for any new uses or methods of using a known product’. This includes a patent for a new use of a known pharmaceutical, even if the new use does not involve a new compound but uses the same compound. If the TPPA required this, there would be a significant change to New Zealand’s patent law. Even though many new uses of known products are patentable in New Zealand, it is not clear that all new uses of known products must or should be patentable.

Whether a country like New Zealand chooses to patent new uses of known products is a balancing issue. The factors in the balance include what is economically and socially beneficial for New Zealand, such as keeping the cost of health care affordable, and what is required under international obligations, such as the TRIPS Agreement. In the area of pharmaceuticals, the issue is whether protecting new uses of known pharmaceuticals is beneficial. New Zealand needs to weigh up whether providing that protection for pharmaceuticals is worthwhile because it may increase the cost of pharmaceuticals. If the new use can be treated with the same compound and the same compound can be purchased in a form marketed for the first known use, such as aspirin discussed above, then protecting the new use may only serve to increase the price of the pharmaceutical. On the other hand, unless the new use is protected, pharmaceutical companies may make new medicine unavailable in New Zealand. The adoption in the TPPA of a blanket provision to protect new uses of know products would foreclose any evidenced-based discussion of the above issues and policy decisions about whether certain new uses of known substances should be patentable in New Zealand.

Patent Term for Pharmaceuticals
Under the TRIPS Agreement, a patent must be granted for a period of not less than twenty years. A US-driven text for the TPPA will increase the term of pharmaceutical patents in many ways. If pharmaceuticals receive second and subsequent-use patents, as discussed above, based on the requirement
that new uses of known products are patentable, this would mean that a pharmaceutical product would be protected for more than twenty years. The granting of patents for new uses of known products has been termed the evergreening of patents.

Other extensions of patent term that the US and Australia might wish to see introduced into New Zealand’s law relate to extension of patents because of the time taken to obtain approval for the sale of pharmaceuticals.14

Pharmaceuticals cannot be sold in New Zealand, or in many places, until they pass regulatory approval processes, primarily relating to safety.15 In both the US and Australia, when a patented pharmaceutical product is subject to this regulatory approval process, the patentee can apply to extend the period of term of the patent. This extension period is designed to compensate for the period of time that the patented product could not be marketed because it was subject to regulatory review. This extension of term for pharmaceutical patents also occurs in the European Union.16 In New Zealand, there is no extension of term for patents. Historically, some term extensions were granted in New Zealand, but this was when patent law provided for a shorter patent term of fourteen years, rather than the twenty-year term that the TRIPS Agreement currently mandates.

A Ministry of Economic Development discussion paper considered whether to allow extension of patent term under a twenty-year patent term regime, but that paper appears to have been rejected by the Labour cabinet at the time because an increased patent term results in a higher cost of medicines.17

In many jurisdictions, including the US and New Zealand, there is an exception to patent infringement that is related to the regulatory approval process. The exception is that a patent is not infringed if, during the term of the patented product, a third party makes the patented product in order to obtain regulatory approval of a potential generic pharmaceutical. This exception is to allow a competitor to enter the market when the patent expires, rather than the patentee having a longer patent term because the competitor’s products are still tied up in the regulatory review process. In the US and Australia, the ‘pay-off’ to the patentee for this exception is the extension of term discussed above. New Zealand’s position is different from that of the US and Australia because, while the law allows for third-party regulatory review of patented products, it does not provide the ‘pay-off’ of patent-term extension. This is arguably appropriate for New Zealand’s economic circumstances because it imports most of its medicines. There is likely to be pressure in the expanded TPPA negotiations to allow patent-term extension for pharmaceuticals.

At the time of writing, there is a Patents Bill before Parliament18 that has some key differences from the US and Australian laws. Whatever the outcome of that process, the TPPA negotiations may mean that there will be further patent reform.
**Data Exclusivity**
Under the TRIPS Agreement, if WTO members require marketing approval for pharmaceutical or agricultural chemical products, and that approval process required the submission of data to the regulatory authority, then that data shall be protected against ‘unfair commercial use’. This obligation affects, for example, when generic pharmaceuticals that compete with patented pharmaceuticals may enter the market. These generic pharmaceuticals also require regulatory approval before they can be sold. The data exclusivity provisions prevent generic manufacturers, during the exclusivity period, from relying on the data field in relation to a patented pharmaceutical in order to obtain regulatory approval. Generic pharmaceuticals must, in many places including New Zealand, be approved on their own merits. However, data exclusivity prevents the regulating authority from relying on that data to assess the safety or efficacy of any generic pharmaceuticals during the exclusivity period. Data exclusivity can act as a patent-term extension even if the intention is to protect the data.

Some of the US free trade agreements include provisions that require data exclusivity that relates to patented products, particularly pharmaceutical and agro-chemical products. Under the US–Singapore FTA and the AUSFTA, data exclusivity is for five years for pharmaceuticals and ten years for agro-chemical products. The US–Chile FTA has a five-year exclusivity provision for both. Data exclusivity under US domestic law is for five years for new chemical entities and three years for other pharmaceutical products.

Currently, under New Zealand law, there is a requirement for data exclusivity for five years for both innovative agro-chemical compounds and for innovative medicine applications. An innovative medicine application is one that involves a medicine where an active ingredient has not previously been approved as an active ingredient of a medicine. The data exclusivity provisions do not apply in certain circumstances, including where disclosure is necessary to protect the health and safety of the public.

The TPPA negotiations may very well require New Zealand to broaden its application beyond so-called innovative agro-chemical or medicine applications.

**Exceptions to Patentability**
The Patent Bill before Parliament at the time of writing includes some exceptions to patentability because these things should not be the exclusive property of anyone. These include patents for:

- human beings, and biological processes for their generation;
- an invention for a method of treatment of human beings by surgery or therapy;
• an invention of a method of diagnosis practised on human beings; and
• a computer program.

Listing express exceptions is broadly based on the European approach. The TPPA may require some winding back of these exceptions, should they become law; equally, they may be left alone. Possibly, some exceptions may attract more attention than others. For example, the exclusion of computer programmes from patent protection is the exact opposite of US law, and US businesses with subsidiaries in New Zealand may wish to see that removed.

The New Zealand courts have upheld the exceptions relating to treatments by surgery or therapy and diagnosis, and the Bill codifies that exception.24 Neither the US nor Australian laws have this exception. The arguments some make for the removal of the exception can be seen in the case law and in the submissions to Parliament over the Patent Bill. One firm of patent attorneys suggested:

United States patent law contains a provision preventing a medical practitioner from being sued for infringing a patent in the course of performing a medical or surgical procedure. The introduction of a similar provision into the Bill would achieve the same goal as the exclusion from patentability, but without the difficulties in claiming protection for a new medical use of a known composition.25

The codification of the exception shows the Parliamentary intent to retain that exception, but the trade negotiations may bring pressure to remove it from New Zealand law. Such pressures should be resisted because the removal of the exception will only serve to increase the costs of health care.

Other Intellectual Property Rights

Expansion of the Reach of Trade Mark
The expanded TPPA seems unlikely to make a significant difference to New Zealand trade-mark law. Although the AUSFTA has TRIPS-plus provisions, such as requiring the parties to provide protection of sound and smell trade marks, New Zealand law provides this protection already. Also, the AUSFTA requires certain protection of domain names and related dispute-resolution processes. New Zealand law already has these standards.

Geographical Indications
Geographical indication law protects a name that is associated with the geographical origin of goods. Famous examples are champagne and Roquefort. New Zealand examples might be Marlborough or Hawkes Bay wines. The law of geographical indications (GIs) prevents others from using these names, even in the form of sayings like ‘roquefort-style cheese’ or ‘methode champagnoise’ that apparently acknowledge the original origins of these products.
In intellectual property law, geographical indications are different from trade marks that protect marks that distinguish one trader’s goods or services from those of another. Geographical indications protect any number of traders who can claim legitimately to use the geographical indication because they make products in the particular region and usually by a particular method of production.

The European Union is seeking to extend GI protection, particularly in the area of wines and spirits. It has publicly stated that GIs are a necessary protection in exchange for reducing agricultural subsidies in Europe. In other words, without the subsidies, the local populations need a new way to make money. In the TRIPS Council, developing countries also support GI protection as a way to improve their economic situation. India, for example, would use GIs to protect worldwide the use of ‘basmati’ in conjunction with rice.

In the international arena, the US has not been a fan of GIs. Perhaps ironically, the United States’ main argument against GIs is that they are protectionist, rather than meeting the trade-mark reputation-based standard. The US has had several disputes, including a WTO dispute, with the EU over GI protection. It therefore seems unlikely that the US would seek to extend GI protection in the TPPA, although that may be an issue in some of New Zealand’s other FTA negotiations – for example, with India.

The existing P-4 allows for parties to list their claimed GIs. New Zealand has not listed its GIs, whereas Chile has a list incorporated into the agreement. Will the US resist New Zealand listing GIs in the future? This is potentially a problem, particularly for Māori names, cultural artefacts and concepts.

**Treaty of Waitangi Clause and Traditional Knowledge Protection**

The extent to which New Zealand protects traditional knowledge is yet to be decided. The existing TPPA provides that members may establish appropriate measures to protect traditional knowledge. This flexibility should be retained in the new TPPA.

**Conclusion**

New Zealand has historically adopted British intellectual property laws. More recently, New Zealand has started to create intellectual property laws that consider its domestic and particular interests in the policy debate leading up to the legislation. The interests of New Zealand are about more than agreeing to high standards of intellectual property protection in exchange for other trade gains, and include making sure that intellectual property does not interfere with New Zealand’s ability to develop more proficiently as a knowledge-based economy. It is also crucial for the welfare and health of the nation that intellectual property products, including pharmaceuticals, are available and affordable in New Zealand.
11. INTELLECTUAL PROPERTY IN NEW ZEALAND AND THE TPPA

1. The word ‘of’ does not appear in the text of the agreement.


3. In other countries, these sorts of products may be protected by copyright, but such industrial products are often protected by other intellectual property rights including design rights and some patents.

4. In New Zealand’s copyright law, these are called communication works, which is intended to be technologically neutral. ‘Communication work’ is not a worldwide term, and what it covers is protected in other jurisdictions under other terminology.

5. The rules for calculating term vary in detail from country to country, but the rules stated above are the broad rules.


8. In many copyright laws, including New Zealand’s, acts permitted for such purposes are circumscribed and defined in much statutory detail as to what amounts to research, criticism, review, education and so on.

9. Copyright law even goes so far as to protect those technological protection mechanisms as copyright works.

10. The law is also different from British law on which most New Zealand copyright law has been based.

11. TRIPS Agreement, Article 27:1.

12. In the United States, an inventive step is called non-obviousness. The same terminology is used in New Zealand, but the Patents Bill uses the phrase ‘inventive step’. Under the TRIPS Agreement, the terms are treated as having the same meaning and are interchangeable. See TRIPS Agreement, Article 27:1, footnote 5.

13. An example is what is known as the Swiss claim patent, which is a patent for the manufacture of a pharmaceutical that is for a new use, even though the pharmaceutical compound was known. See Pharmaceutical Management Agency v Commissioner of Patents [2000] 2 NZLR 529 (CA).

14. In New Zealand, pharmaceuticals cannot be sold to the public until they have approval under the Medicines Act. Similar regularity requirements are found in many countries.

15. In New Zealand, this requires approval under the Medicines Act 1981.

16. The European Union, United States and Australia each have different methods of calculating the extension of term.


19. TRIPS Agreement, Article 39:3.

20. There are other aspects of these provisions that effect the availability and price of pharmaceuticals; they are discussed in Chapter 10.


22. The provisions are found in the Medicines Act 1981, Section 23B and Section 23C, with relevant definitions in Section 23A. Data exclusivity provisions relating to agricultural chemicals and other products are also found in the Agricultural Compounds and Veterinary Medicines Act 1997, Sections 70–72, and in the Hazardous Substances and New Organisms Act 1996.

23. Patents Bill, above n. 18, clause 15.

362 (CA).
26 At the time of writing, the report in what is known as the WAI 262 claim is not yet published. The WAI 262 claim is a claim brought by some Māori against the Crown. The claim has been heard by the Waitangi Tribunal and includes several claims relating to intellectual property law. The statement of issues that are the subject of the WAI 262 claim is online at http://www.waitangi-tribunal.govt.nz/doclibrary/public/wai262/SOI/Wai262SOI(doc2.314)small.pdf. For a discussion of Māori and intellectual property, see Susy Frankel and Geoff McLay, Intellectual Property in New Zealand, Butterworths, Lexis Nexis, 2002, Chapter 3.