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**Submission on Australia's involvement in the Trans-Pacific Partnership Agreement (TPPA):
Concerns regarding the implications of proposed copyright restrictions**

To the Hon Andrew Robb AO MP

I would like to write to express my concern regarding a number of issues surrounding the Intellectual Property (IP) chapter of the TPPA. It is imperative that Australian negotiators re-assess Australia's position in regards to the political gain it stands to make by entering this treaty and the greater public good that may be restricted by it's implementation.

In particular, I would like to highlight the articles on Technology Protection Measures (TPMs), copyright life terms and the narrowed limitations and exceptions. The proposals contained in these articles have immediate ramifications for users of copyright material, both on the Internet and with purchased materials, as well as further-reaching implications in terms of trade policy and its economic benefits and costs. One concern is the extreme secrecy that these negotiations have been conducted within. Further, the IP chapter may not meet the stated goals of the TPPA. In the absence of much other information due to the aforementioned secrecy, one must question whether the TPPA is able to address the larger issues surrounding partnership and freer trade in the Asia-Pacific region.

This submission will recommend that Australia and participating countries re-consider how best to work with pre-existing IP protections provided by the World Trade Organisation (WTO) and that the IP chapter in the TPPA not be ratified, as well as making the negotiations more transparent.

Context

The TPPA was originally the Trans-Pacific Strategic Economic Partnership Agreement; it has been expanded both in terms of the agreement and the countries involved into its current form¹. The countries involved are now Brunei, Chile, Singapore, New Zealand, Vietnam, the USA, Peru, Mexico, Malaysia, Japan, Canada and Australia. According to the Trans-Pacific Strategic Economic Partnership Agreement in 2012, its goals are to strengthen investment and trade by facilitating innovation, economic growth and the development and preservation of jobs among partner countries². Many of the countries involved in these negotiations are significant trading partners for Australia, and as a relatively small player on the global scale, it is important for us to enter into trade deals that are open, rule based and multi-lateral to further promote our interests³. However, this agreement is concerning because it goes beyond traditional measures of trade and has an impact on domestic policy said to support and facilitate trade⁴. This is particularly so as many acknowledge matters of public policy (and IP) as areas that require democratic deliberation and decisions, conditions which do not appear to have been met in TPPA negotiations⁵. Whilst it must be acknowledged that the sensitive nature of trade agreements often restricts public access to these documents, the everyday nature of the activities that the TPPA may affect require more public consultation; this is currently compounded by the restricted public debate on the TPPA in the absence of comprehensive information⁶.

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- 1 Mark Weisbrot, "The Trans-Pacific Partnership Treaty is the Complete Opposite of 'Free Trade'", *The Guardian*, 20 November 2013, <http://www.theguardian.com/commentisfree/2013/nov/19/trans-pacific-partnership-corporate-usurp-congress>
 - 2 "Trans-Pacific Strategic Economic Partnership Agreement" (Trade Agreement, published by the New Zealand Ministry of Foreign Affairs and Trade, 2012), <http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/main-agreement.pdf>
 - 3 Ann Capling, "Submission in Support of Australian Participation in the Trans-Pacific Partnership Agreement", (Submission to the Australian Government, published by Department of Foreign Affairs and Trade [DFAT], 30 October 2008), <https://www.dfat.gov.au/fta/tpp/>
 - 4 Deborah Gleeson, "What You Need to Know about the Trans Pacific Partnership", *The Conversation*, 6 December 2013, <http://theconversation.com/what-you-need-to-know-about-the-trans-pacific-partnership-21168>
 - 5 Patricia Ranald and Harvey Purse, "Second Submission to the Department of Foreign Affairs and Trade on the Trans-Pacific Partnership Agreement on Behalf of the Australian Fair Trade and Investment Network" (Submission to the Australian Government, published by DFAT, May 2010), <https://www.dfat.gov.au/fta/tpp/>
 - 6 Joseph Stiglitz, "Stiglitz Submission" (Submission to the Australian Government, published by DFAT, 6 December 2013), <https://www.dfat.gov.au/fta/tpp/>

According to a leaked table of country positions from the Salt Lake negotiations, Australia appears to reject some of the more narrow proposals in the IP chapter around Internet Service Provider (ISP) responsibilities and parallel importation⁷, which is in line with statements from Department of Foreign Affairs and Trade (DFAT) stating that we are “seeking provisions...that maintain our existing flexibilities on copyright limitations and exceptions”⁸. However, I am writing this submission as I believe that our participation draws us unnecessarily close to negotiating on, and agreeing to, restrictive IP conditions that may not be in the best interests of the Australian public. In the first instance, it may be noted that even though we are seeking the above provisions in the IP chapter, Mr Robb, you have also made the statement that you are “prepared” to put most things “on the table”⁹ in these negotiations. This has led to radical changes in Australia's position, a recent example being that of accepting the Investor State Dispute Settlement (ISDS) provision¹⁰. There is legitimate reason to believe that your latter statement may be the one that sets precedent, as the leaked documents have demonstrated that we are one of the largest supporters of the America's negotiating positions in this agreement¹¹. This is cause for concern as America is strongly pushing for proposals that are industry-friendly and anti-consumer¹². As this agreement is so secret, there is no way to understand the directions that the TPPA is taking. Thus, whilst I am writing today about three specific articles that provide cause for concern, I use them as examples to delve deeper in the political implications of this agreement and urge you to act in Australia's best interests, and consider the negative implications that may flow from the entirety of the TPPA.

TPMs – A Restrictive Vision

Section G of the leaked 2013 IP chapter of the TPPA has many concerned that the TPPA represents a threat to civil liberties; it does not benefit Australian users in terms of their Internet access, their privacy, freedom of expression or the digital economy¹³. This concern stems from a loss of

7 “TPP Salt Lake Positions”, (Trade position document from the TPP, published by WikiLeaks, 9 December 2013) <https://wikileaks.org/Second-release-of-secret-Trans.html?update>

8 “FAQ”, *The Australian Government: DFAT*, <https://www.dfat.gov.au/fta/tpp/faq.html>

9 Peter Martin, “Robb to Tackle Trans Pacific Partnership”, *The Sydney Morning Herald*, 6 December 2013, <http://www.smh.com.au/business/robb-to-tackle-trans-pacific-partnership-20131205-2yttu.html>

10 Deborah Gleeson, “Update From the Latest Trans Pacific Partnership Meeting”, *The Conversation*, 12 December 2013, <http://theconversation.com/update-from-the-latest-trans-pacific-partnership-meeting-21416>

11 Julian Assange and research staff, “US, Australia isolated in TPP negotiations”, *WikiLeaks*, 15 November 2013, <https://wikileaks.org/US-Australia-isolated-in-TPP.html>

12 Parker Higgins and Maira Sutton, “TPP Leak Confirms the Worst: US Negotiators Still Trying to Trade Away Internet Freedoms”, *Electronic Frontier Foundation*, 13 November 2013, <https://www.eff.org/deeplinks/2013/11/tpp-leak-confirms-worst-us-negotiators-still-trying-trade-away-internet-freedoms>

13 Matthew Rimmer, “A Mercurial Treaty: The Trans-Pacific Partnership and the United States”, *The Conversation*, 15

flexibility associated with copyright items online and off-line.

The first article of concern from the leaked chapter is that of QQ.G.10 (copyright and related measures/technological protection measures)¹⁴. TPM (and related Digital Rights Management [DRM]) are technologies that are installed on hardware and within media to control what consumers are able to do with them once purchased¹⁵. These technologies are created to stop people interfering with a particular technology, or using it create something new, however, they also have negative repercussions for consumers; they stop them 'unlocking' their smartphones or block transferring media files onto different devices, even if these transfers are for personal use.

The TPPA carries a particularly restrictive clause, proposed by America, worded as “separate cause of action, independent of any” which lawfully prevents the bypassing of TPMs for uses that are *not* infringing copyright, such as the personal uses mentioned above. Already American users in this space suffer from the inflexibilities that restrictive DRMs bring¹⁶. Further, this has the potential to impact heavily on those with reading disabilities, who may need to convert their texts to braille or another format to read; under QQ.G.10, this transformation often counts as breaking DRM, making it much harder for those who are vulnerable to access many copyrighted materials¹⁷. In this way, the TPPA would restrict users rights in favour of increasing the rights of those who hold copyright to find these users liable in even the most basic of circumstances¹⁸. This is furthered by America's proposal to require “substantial evidence” to be provided for limitations to and exceptions from TPMs. This places a burden of proof on users (already operating in extremely narrow provisions with regard to TPMs) and actually goes beyond current American law and evidence that such measures are required to prevent abuse of copyright has not been substantiated¹⁹. What this demonstrates is an expansion of the rights of those holding copyright at the expense of the end-user.

The Domain Of DRMs – Meeting The TPPA's Goals?

One of the reasons for copyright measures is to provide incentives for creators to invest their time

June 2012, <http://theconversation.com/a-mercurial-treaty-the-trans-pacific-partnership-and-the-united-states-7471>

14 “Secret TPP treaty: Advanced Intellectual Property chapter for all 12 nations with negotiating positions”, (IP chapter from the TPP, published by WikiLeaks, 30 August 2013), <https://wikileaks.org/tpp/>

15 “DRM”, *Electronic Frontiers Foundation*, accessed 26 April 2014, <https://www.eff.org/issues/drm>

16 Higgins and Sutton, “TPP Leak Confirms the Worst.”

17 Rimmer, “A Mercurial Treaty.”

18 James Love, Krista Cox and Manon Anne Ress, “Regarding Copyright Provisions in the TPPA”, (Submission to the Office of the United States Trade Representative, published by Knowledge Ecology International, 26 June 2012).

19 Love, Cox and Ress, “Regarding Copyright Provisions.”

and effort into making intellectual works, such as films and music. Ostensibly, one of the goals of the TPPA is strongly aligned with this; the TPPA exists to create multilateral standards to enhance the ability for creators to make their work and share it, whilst being compensated at the appropriate level²⁰. Currently, America is concerned that the ability for countries to domestically judge how these copyright laws are applied under the much less rigid Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), with fears that it is easy to abuse the system²¹. This then harms America's exports, as 75% of these exports are driven by IP intensive industry. Thus, the potential abuse of copyright through domestically implemented TRIPS does not facilitate trade between America and other countries in the Asia-Pacific and needs to be addressed to promote the best outcome for all involved²². However, there are some mitigating factors that should be considered before concluding that the TPPA is the best way to address these concerns.

The first assumption is that the owners of copyright who benefit from the deal then efficiently contribute to the economy of the country they are operating in. One would expect this outcome to be enhanced for all participating in this agreement. However, Australia must stop to consider *who* the owners of copyright are. Many artists now sell their copyright to corporations in order to facilitate the wider creation and sharing of these works²³. There are issues in this system for artists, however, as there is no clear standard regarding their rights to their own material. Article QQ.G.9 of the TPPA takes this one step further, appearing to restrict artists' ability to maintain their termination rights, potentially placing the benefits of copyright permanently in the hands of recording companies or other corporations²⁴. Whilst a goal of free trade, and of the TPPA is to add to the economy of the participating countries, the reality may be that the economic benefits flow only into large corporations, which do not necessarily efficiently return these contributions to their respective countries²⁵. These corporations appear to be the main benefactors of the this treaty, which is not in line with the stated goals of the TPPA. Some reports indicate that gains from the TPPA in America alone would actually see median income fall, whilst seeing an increase for only the top 10% of workers²⁶.

20 Trans-Pacific Strategic Economic Partnership Agreement, 2012

21 Douglas E. Schoen, "Democrats' Trans-Pacific Partnership Tightrope", *Politico*, 17 August 2012, <http://www.politico.com/news/stories/0812/79818.html>

22 Schoen, "Democrat's Tightrope."

23 Parker Higgins and Sarah Jeong, "The TPP's Attack on Artists' Termination Rights", Electronic Frontier Foundation, 16 December 2013, <https://www.eff.org/deeplinks/2013/12/tpps-attack-artists-termination-rights>

24 Higgins and Jeong, "TPP's Attack on Termination Rights."

25 Bill Pritchard, "Japan-Australia deal leaves beef trade in the 20th century", *The Conversation*, 17 April 2014, <https://theconversation.com/japan-australia-deal-leaves-beef-trade-in-the-20th-century-25369>

26 Jared Genser, "Trans-Pacific Partnership Must Safeguard Human Rights", *The Diplomat*, 31 March 2014, <http://thediplomat.com/2014/03/trans-pacific-partnership-must-safeguard-human-rights/>

If there are such large potential repercussions in terms of unequal wealth distribution in America (the country *pushing* for many of the restrictive IP proposals) and outcomes that are seemingly contrary to the goals of the TPPA in job creation and economic growth, what potential gains actually exist for Australia? The Productivity Commission report in 2012 on 'Bilateral and Regional Trade Agreements' suggests that as Australia is a net importer of copyrighted works and that agreements like the TPPA would actually impose a net *cost* on Australian operations. Even taking into account the potential benefits that Australian copyright holders would gain from an agreement like this, the Productivity Commission found that it was not in Australia's best interests to enter into an agreement that would bring these restrictions forth²⁷.

Thus, Mr Robb, even here, where only one article of the TPP has been examined, it has far-reaching consequences, potentially affecting not only a wide array of consumers, but also some of our most vulnerable (those with limited ability to consume) in their use of copyright works. Further, it extends the rights of copyright holders, generally large corporations, which does not align with free trade and TPPA goals. These corporations do not appear to benefit our economy efficiently enough to justify this, a conclusion supported by the Productivity Commission's finding that restrictive copyright trade agreements will come at a net cost for Australians.

Copyright Life Terms and Limited Exceptions

So far, this submission has considered *who* the treaty may affect and some of the economic concerns it raises as well as some of the domestic economic concerns for Australia. However, the negative implications stemming from the restrictive copyright limitations that may potentially arise from this treaty are not limited to these areas. Another two specific articles highlight further concerns: articles QQ.G.6 (copyright life terms) and QQ.G.16 (limitations and exceptions). Examination of these articles demonstrates the potential girth of the negative implications of the TPPA and questions the sense of this in light of the TRIPS agreement and the WTO's general mandates.

Articles QQ.G.6 and QQ.G.16 have created the most concern in regards to the freedom of speech

²⁷ Productivity Commission 2010, "Bilateral and Regional Trade Agreements" (Research report, Canberra, November 2010.)

and creativity on the Internet. Article QQ.G.6 in particular severely impacts and slows innovation, as it delays creative materials reaching the public and thus becoming available to fuel new creative works²⁸. Whilst the value brought by creative work cannot be undersold, both the extended lifetime value of copyright and the restrictions of limitations and exceptions slow the exchange of information and ideas on the Internet, arguably one of the most valuable facets of our globalised world²⁹. Further, the combination of both articles will negatively impact on the use of materials for educational purposes, for constructive criticism of materials and for the general sharing of ideas³⁰. This impacts a huge audience, ranging from students to everyday citizens to artists to friends who simply want to share inspiring articles with each other. It has been noted that it is exactly this diffuse nature of those who have the potential to be affected by the TPPA that has limited their representation in negotiations³¹. This treaty, which would also place an onus on ISPs to enforce all of the multitude of extra copyright measures, has the potential to radically alter how we use the Internet³². (The articles regarding ISPs are also of great concern, however please refer to the chapter on the “Public Interest Analysis of the US TPP Proposal for an IP” by Flynn et al 2013 for a thorough analysis of these concerns, as they go beyond the extent of this submission³³.)

Market Access And The WTO

Again, one must bring these potential ramifications back to the aim of the TPPA; if it can achieve substantial political and economic advantages through trade, for instance extending Australia's share of the US\$ 27 750³⁴ billion GDP in trade that the partnership covers, it may be worth reconsidering how the IP chapter could be best amended to benefit the negotiating countries, rather than abandoning it all together.

One of the primary benefits listed by DFAT is the wider market access that Australia could gain from joining the TPPA³⁵. In particular, when Australia accepted the ISDS proposal, it was justified

28 Angela Daly, “The Trans-Pacific Partnership: a Knockout Blow for Innovation?”, *The Conversation*, 24 April 2013, <http://theconversation.com/the-trans-pacific-partnership-a-knockout-blow-for-innovation-14262>

29 Daly, “The Trans-Pacific Partnership.”

30 Daly, “The Trans-Pacific Partnership.”; Rimmer, “A Mercurial Treaty.”

31 Sean M. Flynn, Brook Baker, Margot Kaminski and Jimmy Koo, “The US Proposal for an Intellectual Property Chapter in the Trans-Pacific Agreement”, *American University International Law Review* 105, (2013): 121.

32 Rimmer, “A Mercurial Treaty.”

33 Sean M. Flynn, Margot Kaminski, Brook Baker and Jimmy Koo, “Public Interest Analysis of the US TPP Proposal for an IP Chapter”, *PIJIP Research Paper Series*, Paper 21. (2011): 13.

34 “Trans Pacific Partnership Agreement negotiations”, *Australian Government: DFAT*, accessed 18 April 2014, <https://www.dfat.gov.au/fta/tpp/>

35 “Trans Pacific Partnership Agreement negotiations”, DFAT.

due to the market access that would open in, among other countries, America, that were previously closed through other avenues of negotiation³⁶. However, it has been questioned whether Australia will gain any significant market access from this agreement, as we already have bilateral free trade agreements with four of the participating countries (DFAT notes that our top 5 trade associated governments are included in negotiations) and we also have a free trade agreement with the Association of South-East Asian Nations (ASEAN) which, if taken as a single entity, counts as the eight largest economy in the world³⁷. A picture arises of two differing markets that Australia stands to enter through this agreement; the American market and that of our closer South-East Asian trading partners. This market access does not appear to be facilitated by the TPPA, even though this is one of its main goals. For the former, a theme that has pervaded trade negotiations between America and Australia has been one of weak economic gains for our country, in a trade-off for the strategic and political support of America³⁸. Most recently this was observed with the Australia-United States Free Trade Agreement (AUSFTA) that came into agreement in January 2005. Economic data demonstrates that America actually gained more market access to Australia than the other way around, whilst Australia's trading deficit with America increased and their overall importance as a trading partner declined in the face of rising trade with Asian countries³⁹. Thus, previous trade agreements with America have not delivered the economic gains that they have promised they would. Likewise, the impact of the IP restrictions on economically weaker South-Eastern Asia trading partners (such as Vietnam) has the potential to limit the growth of their markets, and thus their overall growth and ability to trade, in IP areas with these countries⁴⁰. For the restrictive IP proposals, and the TPPA in general, the gains appear to be mainly political, and their benefits seem weak in the obvious absence of economic benefits and the small amount of 'winners' that may arise from this scenario.

Taking this analysis one step further, all of the negotiating countries in the TPPA are also members of the WTO which already sets minimum standards for IP regulation under TRIPS. The first concern arising from negotiations on the TPPA in this context is whether it has the potential to negatively impact on the WTO. Advocates for the TPPA suggest that it will provide a template for further 21st century free trade agreements and that it actually enhances the WTO's work, as it promotes free trade and may actually encourage other countries to join, so as to remain competitive

36 Gleeson, "Update."

37 Ranald and Purse, "Second Submission."

38 Shiro Armstrong, "Australia and the Future of the Trans-Pacific Partnership Agreement", *EABER Working Paper Series*, paper No. 23135, <http://ideas.repec.org/p/eab/tradew/23135.html>

39 Patricia Ranald, "The Trans-Pacific Partnership Agreement: Contradictions in Australia and in the Asia Pacific Region." *The Economic and Labour Relations Review* 22, no. 1 (2011): 82

40 Amitendu Palit, "TPP and Intellectual Property: Growing Concerns." *Foreign Trade Review* 48, no. 1 (2013): 154.

in the global market⁴¹. However, with the concerns raised above, the validity of the TPPA as a template for creating better free trade outcomes is questionable, especially in light of the issues raised by those who think agreements such as the TPPA actually stand to harm the work of the WTO by diverting the efforts of its work and by simply adding extra diplomatic clutter in terms of the rules and regulations that the TPPA may impose⁴². IP rights are an extremely contentious area for trade negotiators to work within; the 1994 TRIPS agreement was very controversial, and still hasn't completely settled in later trade negotiation rounds⁴³. This, combined with arduous journey of the WTO in promoting and adjudicating free trade suggests that any countries working in this area should not partake in deals that may undermine the authority of this organisation. The TPPA goes beyond TRIPS' basic IP coverage of software, performers and producers of sound recordings and broad casting organisations and actually weakens many of the consumer safeguards that it provides⁴⁴. Critics have recognised that a strength of TRIPS is that it allows participating countries the flexibility to implement IP regulations as they see fit; there is no one-size-fits-all approach that appreciates the economic and structural differences between countries⁴⁵. Therefore, not only does the TPPA have the potential to negatively impact on the processes of the WTO, it undermines TRIPS, which already exists to regulate IP and does so in a more balanced way⁴⁶.

Recommendations

Mr Robb, not only do specific articles in the leaked TPPA IP chapter have potentially strong negative ramifications for the greater Australian public, but it does not seem to serve any of the free trade goals that it aims to achieve. Instead, the secrecy surrounding the negotiations provides cause for concern because these negotiations cover areas that traditionally fall under public policy and it appears that the due consultation has not been undertaken. These factors are compounded by the potentially negative implications it may have for trade processes occurring through the WTO.

In light of these considerations this submission recommends:

1. That trade negotiation for the TPPA become more transparent, including processes for due public consultation and the removal of the block for the production of documents pertaining

41 Ian F. Fergusson, William H. Cooper, Remy Jurenas, and Brock R. Williams. "The Trans-Pacific Partnership Negotiations and Issues for Congress," *Washington, DC: Congressional Research Service*, (2013). http://digitalcommons.ilr.cornell.edu/key_workplace/1154/

42 Fergusson et al, "The Trans-Pacific Partnership."

43 "Public Health-Innovation and Intellectual Property Rights: Report of the Commission on Intellectual Property Rights, Innovation and Public Health." (Research report, published by the World Health Organisation, 2006.)

44 James Love, "KEI analysis of Wikileaks leak of TPP IPR text" *Knowledge Economy International*, 13 November 2013, <http://keionline.org/node/1825>.

45 Flynn et al., "The US Proposal for an Intellectual Property Chapter."

46 Flynn et al., "Public Interest Analysis."

to the treaty in the Australian Senate⁴⁷

2. That Australian negotiators reconsider the need for the inclusion of Chapter G in the TPPA in light of the potentially negative economic and trade policy ramifications and the alternatives of working more strongly with the regulations provided by the WTO with TRIPS.

47 Gleeson, "Update."