

Submission
to the Commonwealth Department of Foreign Affairs & Trade
on the Trans-Pacific Partnership



Open Source Industry Australia Ltd

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About OSIA

OSIA represents & promotes the Australian open source industry by:

- Ensuring that the Australian business, government and education sectors derive sustainable financial and competitive advantage through the adoption of open source and open standards;
- Helping Australian Governments to achieve world leadership in providing a policy framework supportive of open standards and of the growth and success of the Australian open source industry; and
- Ensuring Australia's global standing as the preferred location from which to procure open source services & products.

OSIA's members are organisations in Australia who invest in or build their future on the unique advantages of open source software.

For further information, see the OSIA website at <http://osia.com.au>.

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1 General

OSIA supports Australia entering into further treaties to promote free trade, both in the Pacific region and globally.

Treaties that promote free trade enable stronger global competition across all industries, both facilitating entry into broader export markets for vendors and enabling greater freedom of choice for purchasers.

It is of concern however, that what little of TPP we've seen (in the form of various leaked negotiating drafts) does not appear to be such a treaty. Rather, it seeks to broaden the scope of the subject matter to which limited monopolies are granted by way of copyright, patent or trade mark, largely, it would seem, to the benefit of a small cohort of related industry sectors in one Party, at the expense of others.

Whilst we understand and do not dispute the validity of the original justifications for the introduction of copyright, patent and trade mark law, OSIA notes with some dismay that a treaty which broadens the scope for granting monopolies – especially when favourable mostly to a single Party – could not in all honesty be regarded as one that promotes free trade.

1.1 Transparency

OSIA opposes the negotiation of any treaty in secret.

The Australian Parliament (not just the Minister responsible) has an absolute right to determine Australia's foreign and trade policy. By agreeing to secrecy provisions that prevent DFAT from tabling negotiating drafts in Parliament, Parliament has been denied that right.

By extension, Australian citizens ought to have the opportunity to inspect and comment on those negotiating drafts. When citizens are kept in the dark on what is on the negotiating table, they cannot form informed opinions on it. Therefore Members of Parliament cannot credibly represent their constituencies, as consulting with one's constituents on an issue they have been artificially prevented from forming informed opinions on would serve no useful purpose.

OSIA commends DFAT on its attempts to consult with industry under such prohibitive circumstances. However, it is difficult to see how DFAT could possibly divine an even vaguely accurate model of Australian industry views on subject matter which no representative of any Australian industry has been permitted to examine.

Furthermore, those circumstances are entirely avoidable. OSIA calls upon DFAT, and on their counterpart ministries in other Negotiating Parties, to require full disclosure of negotiating drafts before the next negotiating round, and maintain that transparency throughout the remainder of the negotiations.

Transparency in negotiation has long been, and should remain, the default position for all treaties (with the sole conceivable exception being military treaties in time of war).

There is ample precedent for this — for example, WTO and APEC both conduct negotiations transparently.

1.2 Scope

OSIA does not support Australia entering into treaties ostensibly presented as trade agreements which address in their provisions matters other than trade.

In particular, OSIA does not support the inclusion of a Chapter on copyright, patents & trade marks (often lumped together under the nebulous term “Intellectual Property”), nor the inclusion of Investor-State dispute resolution provisions. We take this position for the following reasons:

1. Australia is already a party to numerous treaties on copyright, patents and trade marks, many of which have achieved near-global adoption. To pursue a parallel set of regional treaties on copyright, patents and/or trade marks could potentially prevent Australia from entering into further iterations of those global treaties, and as a result create unnecessary incompatibilities between copyright, patent and/or trademark regimes here and abroad in the future, thereby defeating the purpose of Australia’s participation in existing global treaties.
2. The Australian Law Reform Commission is undertaking the *Copyright Inquiry*¹ at present, which is not due to report until 30 November 2013. Entering into any further treaties on copyright whilst the Inquiry is still underway would pre-empt its findings, and may introduce international obligations which prevent Parliament from acting on its recommendations. Such pre-emption has happened before, to Australia’s disadvantage. For example, AUSFTA, which also required Australia to implement a more restrictive copyright regime, was entered into whilst the *Digital Agenda Review*² was still in progress. One must wonder why any organisation would expend resources on lodging a submission with similar reviews in future, given the emerging pattern of public reviews’ recommendations being rendered moot by supervening treaties, negotiated in secret.
3. Whilst the last century has seen a global trend towards more restrictive copyright legislation, the era of global e-commerce and the digital economy that it has enabled, has introduced a wide raft of new opportunities for authors, publishers and consumers alike. The old publishing model, on which existing copyright regimes are based, is no longer suited to the digital marketplace of today. Attempts to make copyright regimes even more restrictive, or indeed to “freeze” them in time as they are today, try to “shoe-horn” the digital marketplace into an analogue of the old economy, thus severely limiting the economic and public good gains to be derived from the digital economy, purely to preserve the interests of those organisations whose business models are rooted firmly in the exploitation of the old publishing model. The future does not have to be so bleak. In order for industry and consumers alike to realise the full range of benefits offered by the digital economy, publishers need to adapt, and adopt business models consistent with the digital economy of today and the future. This will, now or at some point in the near future, necessitate revisions to copyright legislation to bring it in line with the digital realities of today. Those revisions are likely to need to be in the opposite “direction” to many of the revisions of the last century or so, and so entering into a (regional-only) treaty to lock Australia into retaining current (or potentially introducing even more restrictive) copyright legislation would be detrimental both to Australian consumers and to those Australian publishers who embrace the opportunities presented by the digital economy and tailor their business models to suit (including the Australian open source software industry). In essence, the best way to stimulate productive growth of the digital economy is to provide for more competition. More restrictive copyright legislation would have the opposite effect: further cossetting of those who fail to adapt or innovate.
4. Whilst the global patent landscape is fairly well established, and almost universally endorsed in relation to traditional patents (on inventions), the introduction in recent times of new classes of patents (those which require mere innovation rather than invention) is far less settled and remains highly controversial. For example, today Australia is one of only five jurisdictions worldwide which permit the patenting of computer software. Entering into a (regional only) treaty on patents (other than traditional patents on inventions), regardless of whether that treaty requires new provisions or merely mirrors existing Australian legislation, would lock Australia in to a contemporary approach to a field of international relations which is far from settled.

¹<http://www.alrc.gov.au/inquiries/copyright-and-digital-economy>

²A review of copyright reforms undertaken by Phillips Fox, commissioned by the Commonwealth Attorney-General’s Department

5. Two of Australia's largest trade partners – China and India – have already indicated their unwillingness to enter into trade agreements that cover anything other than trade^{3,4,5}. If the aim of a broad-based plurilateral trade agreement is to proliferate over time into a near-global agreement, taking an approach which would preclude two of our largest trade partners from joining would not seem prudent.
6. Entering into treaties which prescribe aspects of domestic law outside of prohibitions on tariffs & local preference, even where no change to current Australian law is required, leads to a “locking” of Australian Law into its current state for the duration of the treaty (which presumably is intended to be indefinite). This undermines Australian sovereignty, the ability of the Parliament to discharge its legislative mandate, and by implication the very foundations of Australian democracy itself. That is acceptable only when the treaty is likely to be near-global (i.e. the concessions made by Australia are made also by almost every other sovereign nation in existence). Such treaties should also be relatively limited in their scope (even if that means that multiple treaties are entered into simultaneously), as any potential future secession from a treaty on one particular area of international law (e.g. patents) must not cause secession from a treaty on a substantially different area of international law (e.g. human rights). Regional treaties, on the other hand, should confine themselves to free trade alone (as we believe TPP should), or to military co-operation alone (as ANZUS did).
7. The inclusion of Investor-State dispute resolution provisions in trade agreements (even where otherwise limited to trade alone), likewise undermines Australian sovereignty, and the authority of both the legislature and the judiciary in Australia (and to a certain extent also the executive, but not substantially more than as provided for under Australia's existing regime of administrative law).

OSIA welcomes the Commonwealth Government's position on Investor-State dispute resolution provisions, which we understand is that such provisions should be removed from TPP.

OSIA calls on DFAT to extend that position to apply also to provisions on copyright, patents and trade marks.

The remainder of this document describes how OSIA believes the provisions of the IP Chapter (and in one case the Services Chapter) might best be recast, in the event that the necessary diplomatic efforts to drop this totally incongruous Chapter may fail.

³J. Murphy & A. Mitchell, *Pacific trade deal risks new China rift*, in *Australian Financial Review*, 16 July 2012, p. 1. Available at: http://www.afr.com/p/national/pacific_trade_deal_risks_new_china_Wtd88FwKDxN4hjUxEjURTJ

⁴A. Panagariya, *An India-China Free Trade Area?*, in *Economic Times*, 20 April 2005. Available at: http://www.columbia.edu/~ap2231/ET/et77_April20_05.htm

⁵EUbusiness Ltd, *India hopes to seal EU free trade deal by April*, 14 February 2013. Available at: <http://www.eubusiness.com/news-eu/india-france-trade.mdm>

2 IP Chapter – core issues for the Australian open source software sector

2.1 Copyright – technological protection measures (TPMs)

OSIA views the reported proposals around TPMs with concern. Experience with anti-TPM-circumvention measures in jurisdictions such as the USA is that they have prevented fair competition and in particular have placed a check on the ability of free and open source software vendors from providing users with the fully featured systems they would expect.

TPMs are being used not only to protect content but to prevent widely used open source operating systems, such as GNU/Linux, from being installed on modern hardware. This anti-competitive practice stifles innovation and prevents consumer choice.

In particular we are concerned about a broad legal ban on the manufacture and distribuion of certain tools, technologies and devices that can be used to circumvent any TPMs, including access control TPMs and copy control TPMs – Article 4(9)(a)(ii) of the leaked USTR draft and the definition of “effective technological measure” in Article 4(9)(f).

2.1.1 Technical circumvention

If TPM circumvention is to be prohibited at all, a distinction needs to be drawn between circumvention for the specific purpose of copyright infringement (where there may exist valid public policy arguments for prohibition) and circumvention for non-infringing purposes (known as “technical circumvention” – which there is no valid public policy reason to prohibit). Most concerning of all are prohibitions on the manufacture & distribution of TPM circumvention tools (including computer software) – which would effectively prevent ordinary Australians from circumventing TPMs for non-infringing purposes even in the absence of a prohibition on technical circumvention.

TPMs are not simply a measure to ensure that only legally purchased content is viewable to a consumer. It allows technology platforms to be controlled through the simple expedience of content providers colluding with hardware and software manufacturers. This creates an anti-competitive market place, preventing the entry of new devices, software and internet services.

There are multiple legitimate reasons why circumvention of TPMs should be allowed:

- To allow common consumer hardware and software products, such as PCs, tablets, smartphones, media players and web browsers to function “normally” and without third party controls;
- To restore consumers choice in electronic devices and software;
- To allow software and hardware engineers to develop new products;
- To prevent control of legitimate consumer activities (such as browsing the web, or playing your DVD collection) falling into the hands of a few licensors; and
- To allow free and open source software to be used in both consumer and enterprise contexts.

Real world scenario

Millions of personal computers, laptops and netbooks are sold every year. Due to OEM agreements between Microsoft and hardware manufacturers nearly all of these devices come with the Windows operating system pre-installed.

Despite this there are millions of consumers who prefer to use other operating systems, such as those based on Linux (Red Hat, Ubuntu, Android, ChromeOS and FirefoxOS to name a few). Whilst many open source companies offer support for these platforms they usually have to be able to remove Windows and install their preferred operating system.

Microsoft has now launched its “secure boot” initiative. This is effectively a TPM that prevents anything other than Microsoft approved software running on the sort of hardware described above. Without TPM circumvention users of non-Windows operating systems and developers have very limited choice about how they can use hardware they have legitimately procured.

OSIA is aware of at least one anti-trust complaint that has been made about this technology, to the European Commission^{6,7}.

The Android operating system used on the majority of smartphones and tablet computers in Australia and the world, is based on the Linux kernel. It was originally developed by a small open source company prior to being bought by Google. OSIA is concerned that similar initiatives by Australian open source companies would be severely hampered by the inclusion of anti-TPM-circumvention provisions in TPP.

2.1.2 Economic impact

OSIA note that the Commonwealth Government has not published any economic justification for a restrictive anti-TPM-circumvention regime, or even for covering TPMs in TPP at all.

Recommendation

OSIA believes that circumvention of TPMs should be legal unless the particular use is for copyright infringement.

OSIA notes that several TPP countries, including Australia and the USA, have announced or are undertaking reviews of copyright and other IP legislation. TPP would pre-empt these reviews and restrict the scope and completeness of any outcomes⁸.

OSIA believes that Australia should determine the copyright regime that suits its own economic and social imperatives. OSIA welcomes DFAT’s public statement to that effect.

Copyright holders should be encouraged to make their content available at a fair price and in a timely manner to consumers, not to restrict the opportunities other sectors are seeking to exploit through innovation with technology.

OSIA calls upon the Commonwealth Government to commission independent analysis of the economic impact to date of the prohibition of TPM circumvention for non-infringing purposes in Australia, including economic modelling of a future in which TPP would lock Australia into a restrictive anti-TPM-circumvention regime permanently.

⁶See <http://www.zdnet.com/microsoft-hit-with-competition-complaint-over-windows-8-uefi-secure-boot-7000013140/>

⁷*Hispalinux, Association of Spanish Linux Users v. Microsoft Corporation* (pending, before European Commission Directorate-General for Competition). Text of complaint available at: http://www.nouefi.com/index.php/File:HISPALINUX_V_MICROSOFT_ANTITRUST1.pdf

⁸see for example http://judiciary.house.gov/news/2013/04242013_2.html

2.2 Patents

OSIA makes no substantive comment on Articles 8(2)⁹, 8(5), 8(6)(c), 8(6)(d) or 8(6)(e) of the leaked USTR draft, as the provisions of those paragraphs have no direct bearing on the Australian open source software industry. Other organisations, in particular those representing the Australian pharmaceutical industry, will be better placed than OSIA to assess the merits of those provisions. Further, we make no specific comments on Articles 8(8) through 8(13) nor the remainder of Article 8(6), which would seem broadly reasonable in a global patent treaty, but like the rest of the IP Chapter remain completely incongruous in a regional free trade agreement.

2.2.1 Patentable subject matter

Art. 8(1) in its first sentence closely follows Art. 27(1) of TRIPS. There has been much debate globally about the correct interpretation of TRIPS Art. 27 in relation to whether or not computer software constitutes patentable subject matter. The debate centres around whether software could ever be regarded as an invention, or indeed as technology. OSIA's position is that it is neither. The second sentence of Art. 8(1) goes well beyond TRIPS by providing that "patents shall be available for any new forms, uses, or methods of using a known product; and a new form, use or method of using a known product may satisfy the criteria for patentability, even if such invention does not result in the enhancement of the known efficacy of that product".

Software as "technology" The proposition of computer software being "technology" is at best tenuous. "Technology" has two distinct meanings: "the application of scientific knowledge for practical purposes, especially in industry"; and "machinery and devices developed from scientific knowledge"¹⁰. Whilst computer software clearly falls within the former definition, so does the entire field of applied science, and it would be absurd in the extreme to suggest that all applied science would constitute patentable subject matter. So the latter definition must apply, and it is quite clear that computer software does not constitute "machinery and devices".

Software as "invention" Furthermore, since computer software is, in essence, nothing more than a set of algorithms, it is clear that software ought never be regarded as an invention.

Second-tier patent regimes In a small number of jurisdictions, including Australia, patents on computer software are granted under "second-tier" patent regimes (in Australia, "innovation patents"), in order to avoid this inconvenient fact. It is abundantly clear to any observer that Australia's innovation patent regime has been an unmitigated failure. The Commonwealth Government itself published a paper in 2012 which pointed out that innovation patents allowed "even clearly obvious enhancements to be patented. This leaves the current system open to inappropriate use."¹¹ and raised concern about their potential to facilitate evergreening and the creation of "patent thickets". We acknowledge that the TPP process is not a suitable forum in which to discuss substantive matters of domestic patent reform. However, we mention here the clear failure of the innovation patent regime in order to underscore the importance of ensuring that TPP is not used to lock Australia in to its current patent regime in perpetuity (as it seems highly probable that future reviews of the innovation patent regime in Australia may recommend its removal).

OSIA welcomes the action recently by the New Zealand Government to exclude software from patentability. Whilst not yet passed into Law, the outcome seems clear – in the words of NZ Commerce Minister Craig Foss, "These changes ensure the Bill is consistent with the intention of the Commerce Select Committee recommendation that computer programs should not be patentable"¹². OSIA sees substantial benefit in Australia following New Zealand's lead in this matter. Whilst again we acknowledge that the TPP process is not a suitable forum in which to decide substantive matters of domestic patent reform, OSIA recommends that Australia retains the flexibility to take similar action in due course, and welcome DFAT's public statement to that effect.

⁹It should be noted however that Art. 8(2) of the leaked USTR draft seeks directly to reverse Art. 27(3) of TRIPS. The subject matter of Art. 8(2) is not of direct relevance to the Australian open source software sector, so we will not discuss its merits, if any, but feel compelled to warn once more against the dangers of partitioning the global market by entering into regional treaties on patents which are incompatible with global treaties on patents.

¹⁰<http://oxforddictionaries.com/definition/english/technology>

¹¹IP Australia, *Innovation Patents – Raising The Step Consultation Paper*, 2012, (http://www.ipaustralia.gov.au/pdfs/Innovation_Patent_System_Consultation.doc), p. 4.

¹²<http://www.beehive.govt.nz/release/minister-supports-nz-software-innovation>

Incompatibility with global treaties Introducing more restrictive provisions like these in a regional treaty undermines the purpose of Australia’s participation in global treaties on patents. Doing so introduces a risk that incompatible patent treaties will lead to a partitioning of the global market – an outcome diametrically opposed to the aim of free trade.

Non-enhancement OSIA disputes that any public good whatsoever could result from the patentability of “a new form, use, or method of using a known product” that “does not result in the enhancement of the known efficacy of that product”. This goes far beyond the scope of patents of addition under Chapter 7 of the *Patents Act 1990* (Cth), which apply only to improvements/modifications claimed by the original patent holder.

Art. 8(3) follows Art. 27(2) of TRIPS word-for-word, but for the addition of the qualifier “only”.

Limiting qualifier The addition of the word “only” (“Each Party may only exclude...” cf. in TRIPS “Members may exclude...”) would seem ill-advised. It is clear from its wording that Art. 27(2) of TRIPS intends to define a generic exception, without limiting the scope for other potential exceptions to patentability. Introducing the qualifier “only” substantially alters the meaning, removing the possibility of any potential exceptions to patentability beyond those provided for by Art. 8(3). Such a step would actively prevent patent regimes from adapting to suit future advances in technology, an outcome diametrically opposed to the purpose of patents.

Patentability of illegal inventions OSIA disputes that any public good whatsoever could arise from the patentability of inventions “the exploitation of which is prohibited by law”. Whilst we recognise that the TPP process is not a suitable forum to discuss potential future revisions to TRIPS, we mention this rather odd provision here once again to underscore the importance of ensuring that TPP cannot be used to lock Australia in to its current patent treaty obligations in perpetuity.

2.2.2 Limitations on exclusivity

Art. 8(4) of the leaked USTR draft follows Art. 30 of TRIPS word-for-word. It allows limited exceptions to exclusivity if they “do not unreasonably conflict with the normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties”. OSIA questions what use such a vastly limited exception could ever be and therefore opposes entering into any regional treaty which would prevent Australia acceding to any future revision of TRIPS in which this provision might be improved.

2.2.3 Opposition to patents

Art. 8(7) of the leaked USTR draft goes far beyond TRIPS and far beyond the *Patents Act 1990* (Cth), by requiring that “Where a Party provides proceedings that permit a third party to oppose the grant of a patent, a Party shall not make such proceedings available before the grant of the patent”. It is difficult to see any merit whatsoever in such a restriction, but easy to see the potential for damage: clearly such a restriction would serve only to encourage the practice of lodging bogus patent applications.

2.2.4 Conclusions

Re-iterating any part of TRIPS in TPP would prevent or at the very least unreasonably delay Australia’s accession to any future revisions to TRIPS and hamper Australia’s participation in the negotiation of any other future global patent treaty. Additionally, re-iterating Art. 27 of TRIPS in TPP would serve to perpetuate the uncertainties caused by its imprecise wording.

Introducing patent measures even more restrictive than TRIPS in TPP carries a risk of partitioning the global market, which is not in the interests of free trade.

Recommendation Article 8 should be removed from the IP Chapter.

3 Services Chapter – core issues for the Australian open source software sector

3.1 Technical specifications (license choice in government procurement)

At a stakeholder briefing in Sydney on 29 May 2013, DFAT confirmed that under provisions being negotiated for inclusion in the TPP Services Chapter, governments of TPP Parties would no longer be able to express a preference for technology that uses open source software licences¹³.

In particular technical specifications would not be allowed to specify licensing models or a description of their characteristics.

This is a concern as many OECD governments have recognised that standard procurement practice actually discriminates *against* open source software. They have also recognised that there is a clear business and economic benefit through mandating the use of open source.

For example, in March 2013 the British Government mandated a preference for open source software¹⁴. This mandate does not exclude any supplier of services or any nation's businesses from doing business with the UK Government.

We also note that this issue applies to cloud computing where both the licence terms covering the use of a cloud service *and* the data are critical points when considering technical design and interoperability.

Recommendation TPP should not include any restriction on the governments of TPP Parties specifying what rights must be granted under license when they procure software. OSIA recommends allowing governments to retain the flexibility to chose licence models that suit the needs of their nation and of individual public sector projects and scenarios.

4 IP Chapter – broader issues

4.1 Restrospective application

Article 1(10) of the leaked USTR proposed text for an IP Chapter (10 Feb 2011 version) provides that the Chapter “gives rise to obligations in respect of all subject matter existing at the date of entry into force of the Agreement” that would otherwise be covered by the Chapter if that subject matter came into existence after TPP came into force.

There has long been a presumption against retrospectivity in the jurisprudence of Great Britain and her former colonies: *lex prospicit non respicit*.

The test established by the High Court of Australia in *Yrttiah v. Public Curator (Queensland)*¹⁵ as to whether that presumption should apply is whether the new law confers or divests substantive rights (in which case the presumption should apply) or whether it is merely procedural in nature. It is quite clear that the leaked USTR proposal, if implemented in Australia, would indeed both confer new rights and divest existing ones.

Even if one ignores those authorities, the public policy purposes of copyright and patent law are to encourage the production of useful works and to encourage invention, respectively. Conferring additional rights on the copyright or patent holders of existing works or inventions (including extending the terms of already-granted copyrights and patents) does nothing to serve that purpose – as the works have already been produced and the inventions invented.

Recommendation Article 1(10) should be removed from TPP.

4.2 Trade marks

OSIA favours a strong trade mark regime. We recognise the importance of protecting the integrity, uniqueness and value of trade marks across all industries.

In general terms, most of the trade mark provisions contained in the leaked USTR proposal for the IP Chapter of TPP are fairly innocuous, from the perspective of the Australian open source software industry of today. Of course, there is no guarantee that those provisions will be fit for the economy of the future, which is why they should be excised from TPP. But if Australia is forced for diplomatic

¹³See <http://opensource.org/>

¹⁴See <http://www.computerweekly.com/news/2240179643/Government-mandates-preference-for-open-source>

¹⁵(1971) 125 CLR 228

reasons to accept the inclusion of this incongruous Chapter, the trade mark provisions in it are not likely to cause adverse effects in the immediate to short term, with some notable exceptions:

4.2.1 Application of trade mark exclusivity to dissimilar goods or services

Article 2(7) of the USTR proposal seeks to change substantially the meaning of Article 6*bis* of the *Paris Convention for the Protection of Industrial Property* (1967), removing the ability for a trade mark to be registerable by multiple owners for dissimilar purposes where no confusion arises for doing so. This text comes straight out of TRIPS – Art. 16(3).

In Australia, the *Trade Marks Act 1995 (Cth)* – specifically, ss. 44(1) & 60 – initially followed the Paris Convention, then was amended by the introduction of s. 120(3) following Australia’s accession to TRIPS.

The introduction of s. 120(3) has significantly limited the pool of registerable trade marks in Australia, creating an un-necessary barrier to entry into the domestic market for Australian start-up ventures, and done nothing to increase the legitimate protection of trade marks.

Whilst the presence of the proposed Article 2(7) in TPP would do nothing to harm Australian industry at present, it would preclude an improvement of the *Trade Marks Act* should a future incarnation of TRIPS be drafted more sensibly, without the existing Art. 16(3). Such a change seems inevitable in the long term, since as the global market continues to grow, exhaustion of the pool of registrable marks will occur far sooner if the scope of trade mark protection remains so broad as to include dissimilar goods and services.

Recommendation Article 2(7) should be removed from TPP. Similarly, the proposed Article 2(8), if included in TPP, should be amended to limit the requirement for such refusals or cancellations to applications in which the two marks concerned relate to identical or similar goods or services.

4.3 Geographical Indications

4.3.1 Implementation

OSIA supports protection for geographical indications (GIs) in their own right. However, trade marks are not a suitable vehicle for protection of GIs – industry would be far better served by the implementation of a protection scheme for GIs independent of trade marks.

GI protection using trade mark law in Australia would clearly need to be implemented using collective trade marks, within the meaning of Part 15 of the *Trade Marks Act 1995 (Cth)*. Rights to collective trade marks are granted under that Part to members of the registering association (s. 162). To treat GIs in this manner would prohibit other traders located in the region to which the GI related from using that GI unless they joined the association, thereby creating an artificial barrier to entry.

Recommendation

If protection for geographic indicators is to be included in the IP Chapter, it should be as an Article separate from the Trade Marks Article. A more appropriate implementation would follow a similar path to that taken by the European Union.

*European Council Regulation No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs*¹⁶ provides a good model on which to base text for any provisions on geographic indicators in TPP, if suitably extended to cover all goods and services.

As an added benefit, TPP provisions based on the above would bring the TPP Parties in line with the EU, facilitating the opportunity for potential future negotiating of a global treaty on geographic indicators.

However, OSIA opposes any implementation of such protection which legitimises the defrauding of consumers.

4.3.2 Potential for consumer deception

Article 2(22) permits the registration of GIs for services or products (other than wine or spirits) that reference a geographical area that is not the true place of origin of the services or products. Whilst Art.

¹⁶<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R0510:EN:HTML>

2(22)(a) limits that to circumstances where the GI “is used in a manner that does not mislead the public as to the geographical origin on the goods or services”, it is not clear that such circumstances could ever exist. Since GIs, by their very nature, are intended to indicate place of origin, surely any use of a GI in relation to goods or services not from within the referenced region will be misleading.

OSIA sees no benefit whatsoever in such an arrangement, but rather sees the potential for legal apparatus to enshrine and protect the ability of manufacturers, primary producers and their downstream resellers to mislead consumers as to the origin of goods offered for sale.

At the stakeholder events annexed to the 11th round of negotiations (Melbourne, February 2012), we were horrified to hear that this might even go as far as allowing a Party to designate a region of another Party as having the right to produce and market goods labelled as having originated in the first Party’s territory.

The open source software sectors in Australia, New Zealand and Canada all have very good reputations as markets from which to procure services and products relating to the sector. To allow the open source software sectors in other Parties’ territories to benefit from the global goodwill built up by the sector in Australia, New Zealand and Canada would be severely damaging to the sector in those three countries.

Even disregarding the damage such provisions would do to industry, from a public good perspective, OSIA sees the misleading of consumers as unconscionable under any circumstances.

Furthermore, the introduction of such a fundamentally flawed system of protecting geographic indicators is likely to hamper trade between Parties and non-Parties, especially in the key European market.

Recommendation Again, the European model would seem the most prudent to follow. Article 2(22) should be removed from TPP.

4.4 Domain names on the Internet

OSIA recognises the need for globally consistent methods of resolving domain name disputes.

However, OSIA does not support adopting the Uniform Domain Name Dispute Resolution Policy (UDRP) as that standard. Arbitration under the UDRP is conducted in a subjective manner, on a case-by-case basis. UDRP arbitrators are not required to follow detailed sets of regulations, nor are they bound by (nor even encouraged to follow) precedent.

Until such time as ICANN institutes a more robust replacement for the UDRP, it is not appropriate to enshrine it in a treaty. If and when that time comes, any treaty in which UDRP’s replacement may be enshrined should be: (a) global, or near-global in its application; and (b) separate from any trade treaty.

Recommendation Article 3 should be removed from TPP.