



TELSTRA CORPORATION LIMITED

Further Submission to the Department of Foreign Affairs and Trade

On

IP Chapter of the

Trans-Pacific Partnership Agreement

29 June 2012

Introduction

Telstra Corporation Limited (Telstra) welcomes the opportunity to make a further submission to the Department of Foreign Affairs and Trade (DFAT) on the Intellectual Property Chapter of the Trans-Pacific Partnership Agreement (TPP).

As Australia's leading telecommunications and information service company, Telstra provides customers with an integrated experience across fixed line, mobiles, broadband, information, transaction, search and pay TV. Telstra BigPond is Australia's leading Internet Service Provider offering retail internet access nationally, along with a range of online and mobile content and value added services.

Telstra has an extensive intellectual property (IP) portfolio, including trade mark and patent rights in Australian and overseas. Telstra is also a licensor and a licensee of intellectual property, including a licensee of online and digital content.

This submission is further to Telstra's earlier submission on the IP Chapter of the TPP dated 25 August 2010, a copy of which is attached as Annexure 1 to this submission.

Submission

Transparency & Consultation

Telstra remains concerned by the ongoing lack of transparency in the TPP negotiations. In particular, the failure of the negotiating parties to facilitate open public discussion about the specific issues being negotiated, or to release the draft text for public review and comment. Without knowing or understanding the issues, or more importantly understanding how those issues are dealt with in the text, it's very difficult for stakeholders to assess the potential commercial impacts of the TPP, or to make meaningful submissions. Similar concerns were expressed by many stakeholders, including Telstra, in the context of the Anti-Counterfeiting Trade Agreement (ACTA). It was only *after* the draft ACTA text was finally released for public comment, that stakeholders were able to make detailed submissions about the specific issues of concern to them and importantly, how those issues were dealt with in the text.

Telstra respectfully requests that DFAT take a lead role in encouraging the negotiating parties to release the draft TPP text for public review and comment as soon as possible.

Copyright Enforcement

Telstra understands that the IP Chapter of the TPP will address copyright issues and in particular, online copyright enforcement.

Telstra welcomes assurances from DFAT that Australia does not support a TPP and in particular, an IP Chapter, that goes beyond Australian regimes or requires any changes to Australian domestic law. In that context, Telstra draws DFAT's attention to the High Court of Australia's decision in *Roadshow Films Pty Ltd & Ors v iiNet Ltd [2012] HCA 16 (20 April 2012)*, which is a welcome clarification of Australian law on authorisation of copyright infringement.

Consistent with the High Court's decision and DFAT's assurances, Telstra submits that DFAT should not agree to text in the TPP, in the context of copyright

enforcement, which would seek to impose any enforcement obligations on Internet Intermediaries, including obligations to:

- monitor customers communications;
- implement any scheme (including a customer notice scheme) to facilitate copyright enforcement; or
- implement any scheme to issue warnings, suspend, terminate or otherwise sanction or disrupt their customer's Internet access.

Further, Telstra believes that the following matters are also relevant to the issue of online copyright enforcement. Telstra submits that DFAT should ensure that any TPP text addressing online copyright enforcement takes the following into account:

- Copyright is a private property right that generates a royalty to the benefit of the copyright owner.
- Enforcement of a copyright owner's rights must be proportional, fair and equitable for all parties and in particular, must reflect a balance between the interests of owners, users and intermediaries.
 - Copyright laws have been carefully crafted over a long period of time to ensure that there is a *balance* between the creative interest of rights holders, the rights of users to access and use information and more recently, the rights of intermediaries who distribute and facilitate access to information.
 - Any consideration of copyright enforcement must include an analysis of whether this delicate balance should be disturbed and if so, how and the justification for doing so in any particular medium.
- Enforcement mechanisms must not impact individual rights to privacy and natural justice. In particular, copyright (and other IP) enforcement must include judicial or independent oversight.
- Enforcement should not unreasonably impact the Internet as an effective platform for communication, education and commerce. Any consideration of online copyright enforcement must include an analysis of the growth and importance of the Internet and the likely impacts to Internet communications of any proposed reforms.
- Appropriate safe harbour regimes must be included to protect the legitimate activities of 'Internet Intermediaries'.
 - The scope of 'Internet Intermediaries' should not be confined to Internet Service Providers (ISPs), but should include a range of potential intermediaries, including web hosts, search engines and e-commerce intermediaries.
- Any consideration of copyright enforcement must also address how access to authorised content is being improved by rights holders, via distribution and monetisation models that meet the needs of emerging technologies and consumer expectations.

Telstra is mindful that any impacts flowing from the TPP in the context of copyright enforcement will be entirely dependent on how the text addresses these issues. Until Telstra can review the draft TPP text, we're unable to assess its impact, or the

veracity of DFAT's assurances that no changes to Australian domestic laws will be required if Australia cedes to the Treaty.

If you have any queries in relation to this submission, please do not hesitate to contact Jane Perrier, General Counsel Intellectual Property, Telstra Corporation Limited.

ANNEXURE 1



TELSTRA CORPORATION LIMITED

Submission to the Department of Foreign Affairs and Trade

On

**IP Chapter of the
Trans-Pacific Partnership Agreement**

25 August 2010

Introduction

Telstra Corporation Limited ('Telstra') welcomes the opportunity to make a submission to the Department of Foreign Affairs and Trade ('DFAT') on the intellectual property ('IP') Chapter of the Trans-Pacific Partnership Agreement ('TPPA').

As Australia's leading telecommunications and information service company, Telstra provides customers with an integrated experience across fixed line, mobiles, broadband, information, transaction, search and pay TV. Telstra BigPond is Australia's leading Internet Service Provider offering retail internet access nationally, along with a range of online and mobile content and value added services.

Telstra has an extensive intellectual property portfolio, including trade mark and patent rights in Australian and overseas. Telstra is also a licensor and a licensee of intellectual property, including a licensee of online and digital content.

Submission

Telstra supports a strong and robust intellectual property system that:

- increases legal certainties as to the grant and enforcement of rights; and
- reduces transaction costs, duplication and administrative actions through appropriate harmonisation and IP standards.

Specifically in the context of online and digital content, Telstra supports an intellectual property system that:

- maintains the delicate balance between the interest of rights holders, the rights of users to access and use information and the rights of intermediaries; and
- recognises the Internet as a vital communications, education, social and economic platform.

Consistent with this, Telstra broadly supports the Australian Government's efforts to assist the TPAA participants to understand IP issues generally and to adopt TRIPs standards. However in doing so, Telstra cautions against the TPAA seeking to impose legal remedies to commercial issues, particularly those which may be the result of market failures.

While many IP issues relate to reasonably settled areas of Australian law (for example, the grant and enforcement of trade marks and patents), the increasing popularity of online and digital content is giving rise to a complex set of new issues, which are not settled under Australian or international laws (for example, secondary liability for copyright infringement). These matters are resulting in novel and untested interactions between IP laws and other laws, such as privacy, censorship and free expression. They are complex and controversial and impact Australian businesses and consumers in different ways.

Telstra submits that any IP Chapter in the TPPA should not include matters which are not settled under Australian law.

Specifically in the context of secondary liability for copyright infringement, there is no agreed international solution to the issue, including no agreed solution in Australia where the matter is currently before the Full Federal Court of Australia. It would therefore be inconsistent for Australia to negotiate and agree clauses on these types of issues in the TPPA before they are settled under Australian law.

Further, transparency and consultation with all stakeholders during the negotiation process is extremely important, to ensure that all interested parties are afforded an opportunity to assess potential impacts and to raise issues and concerns. In particular (again in the context of secondary liability for copyright infringement) Telstra submits that consultations must include Australian ISPs (and other service providers) and Internet users, and must take into account the benefits and detriment to all parties, including cost implications.

If you have any queries in relation to this submission, please do not hesitate to contact Jane Perrier, General Counsel Intellectual Property.