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**Submission to the Department of Foreign Affairs and Trade  
On the Trans Pacific Partnership agreement**

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## About Linux Australia

Linux Australia is the peak governing body for Open Technology in Australia. We represent approximately 5000 open source users and developers within Australia. The rise of Open Source software has demonstrated significant benefits to both public and private industry, becoming an increasingly important aspect of large IT projects. The use of open source software and open standards is now a required consideration in government tenders and initiatives such as data.gov.au demonstrate the added value these technologies provide.

This submission was conducted in consultation with Linux Users of Victoria Inc, which represents some 1500 Linux users and developers in the state of Victoria.

Where applicable, parts of this document are based on the submission from Open Source Industry Australia (OSIA) with whom the interests and positions of Linux Australia overlap.

## Overview

Linux Australia does not support the contents of TPP chapters covering copyright, patents & trade marks, nor the inclusion of Investor-State dispute resolution provisions.

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, particularly ones which lock in detailed provisions which we know are not acceptable to important trading (Specifically China, India, and Europe) could significantly interfere with future multilateral negotiations. Consequently, this risks creating unnecessary incompatibilities between copyright, patent and/or trade mark regimes here and abroad in the future, a result that is at odds with the original intent of Australia's participation in existing global treaties.

The Australian Law Reform Commission has recently undertaken an inquiry into *Copyright and the Digital Economy*<sup>1</sup>, the final report for which was submitted to the Attorney-General on 29 November 2013. Entering into any further treaties on copyright before there has been time to properly consider these findings may introduce international obligations that prevent Parliament from acting on its recommendations. Whilst the secret nature of negotiations prevent conclusive evaluation, the leaked text shows inconsistencies with proposals included in the ALRC's Discussion Paper published earlier this year.

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

2. A review of copyright reforms undertaken by Phillips Fox, commissioned by the Commonwealth Attorney-General's Department Lodged 24 Jun 2013

Such pre-emption has occurred in previous trade agreements with negative consequences for Australia. This can be seen in the AUSFTA, which also required Australia to implement a more restrictive copyright regime, and was entered into whilst the Digital Agenda Review was still in progress. Stakeholders may well feel that their efforts and resources expended to engage with public reviews like the ALRC are wasted when the results are pre-empted by far less transparent treaty negotiations. Further, this detracts from the process of open and transparent review itself; a mechanism which is fundamental to a healthy and thriving democracy.

New technologies have created amazing industrial, social, health and personal opportunities. Australia needs a legal framework that enables businesses and individuals to take full advantage of these opportunities and thrive in the new environment. Our copyright regime needs to be adapted to enable domestic growth rather than create bottlenecks that impede use of new technologies and stifle competition.

The traditional publishing model, on which existing copyright regimes are based, is no longer suited to the digital marketplace of today. Attempts to make copyright frameworks even more restrictive or “freeze” them in time as they are today, will become barriers to economic and commercial growth as they try to “shoe-horn” new concepts into an antiquated framework. Such content bottlenecks lack forward thinking and deprive Australian businesses and consumers the opportunity to be competitive in a global market.

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, with increasing urgency, necessitate revisions to copyright legislation to bring it in line with the digital realities of today. Any such revisions would likely move more towards deregulation rather than the more limiting additions made in recent decades and proposed within the TPP. Entering into a (regional) treaty to lock Australia into retaining current, or potentially 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 (including the Australian open source industry). We firmly believe the best way to stimulate productive growth of the digital economy is to encourage competition. More restrictive copyright legislation would have the opposite effect, further cossetting those who fail to adapt or innovate.

Whilst the global patent landscape is well established and almost universally endorsed in relation to traditional patents (on inventions), the more recent introduction of new classes of patents (those which require mere innovation rather than invention) is far less mature

and remains highly controversial. This is demonstrated by Australia currently being only one of five jurisdictions worldwide that permit the patenting of computer software and by recent decisions in the Federal Court having posed questions over the extent to which such patents are permitted. 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 into a contemporary approach in a field of international law and relations that is rapidly evolving. Additionally, it is widely acknowledged that the current patent system is imposing significant costs on innovation, and that patent litigation is increasing in the technology industries. This has become such an issue that the White House has proposed action needing to be taken to ensure that innovative companies are not litigated or threatened out of existence. Australia has not been immune to such issues with the massive, and massively expensive, *Apple v Samsung* patent litigation. Proposals in the TPP which make patents of limited innovation easier to obtain or harder to litigate against, are simply counter to all recent Australian patent and innovation policy.

Two of Australia's largest trade partners – China and India – are not likely to enter a trade agreement that they did not negotiate and that would dictate significant changes to their legal and regulatory systems. Provisions found in the leaked IP chapter draft are inconsistent with the legal systems and economies of those countries. If the aim of a broad-based plurilateral trade agreement is to expand over time into a more inclusive regional framework, or even a broader multilateral agreement, taking an approach that precludes two of Australia's largest trade partners is counterproductive and contrary to Australia's long term trade interests.

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 each sovereign nation with which we trade). In such an instance, concessions in the World Trade Organization may be in our best interest, however major concessions in a limited region agreement (Such as the TPP) work against us by reducing flexibility. Regional agreement treaties should be confined to free trade alone, or to military co-operation alone (as ANZUS did), with IP agreements being negotiated in the World Intellectual Property Organization.

### **Investor-State Dispute Settlement and its interaction with IP law**

The inclusion of Investor-State dispute resolution provisions in trade agreements (even where otherwise limited to trade alone), is a very real threat to Australia's policy freedom and may create limits on policy freedom that cannot be foreseen today. Few would have predicted that when Australia entered an Investment treaty with Hong Kong, that decades later it would be used to challenge health policy in the form of plain packaging for tobacco products. These issues have been seen globally such as in Canada, who could not have predicted that the signing of NAFTA would lead to challenges of individual patent decisions made by Canadian courts. It is inappropriate and contrary to the long term interests of Australia to potentially undermine the authority of the legislature, the executive and the judiciary in this manner. Investors with concerns about Australian law or policy have numerous avenues for resolution through Australian courts or directly by seeking to make their case for change to the government and parliament of Australia. Providing international parties exclusive rights to challenge Australian policy above and beyond those available to local individuals and companies leaves us vulnerable and places domestic entities at a disadvantage in their own country.

More specifically, the potential for Investor-State Dispute Settlement has wide ranging impacts to IP provisions that may have been concluded in other contexts. AUSFTA contains no Investor-State Dispute Settlement and in that context, disputes over the IP text and implementation of IP law are a matter for government-to-government negotiation. If the same text were to become 'enforceable' by individual companies in non-transparent international arbitration, law reform and innovation policy would become exponentially more difficult. This has the very real possibility of exposing Australia to expensive and detrimental legal outcomes where, win or lose, there is no benefit to the country or our economy.

### **Secrecy**

Linux Australia opposes the negotiation of any treaty in secret, in particular any treaty that touches on and seeks to change matters of domestic policy and regulation. Labeling topics 'trade issues' should not restrict access to matters that would otherwise be the subject of open, domestic debate in which all stakeholders may participate.

The Australian Parliament, and not the Minister alone, has an absolute right to determine Australia's foreign and trade policy and matters of policy concerning the economy, health, innovation, rural and agricultural industries, and services industries. When Australian negotiators agree to secrecy provisions that prevent them from tabling negotiating drafts in Parliament, Parliament has been denied that right and Australians, through their elected

representatives, have been denied their say in the economic future of Australia.

Linux Australia commends DFAT on its attempts to consult with industry under such prohibitive circumstances. However, it is difficult to see how DFAT could possibly form an accurate model of Australian industry views on subject matter which no representative of any Australian industry has formally been permitted to examine. We believe that DFAT should make a strong effort to openly consult with the wider Australian public, so they can balance industry and public interests. We note that US negotiators have engaged a broad set of industry representatives who have been granted full access to draft versions of this text.

Furthermore, these circumstances are entirely avoidable. Linux Australia calls upon DFAT, and on their counterpart ministries in other Negotiating Parties, to require full disclosure of negotiating drafts before the next negotiation 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 reasonable exceptions made for treaties genuinely touching upon matters of national secrecy).

The leaked draft states that one of the objectives of the IP chapter is to “maintain a balance between the rights of intellectual property holders and the legitimate interests of users and the community in subject matter protected by intellectual property.” Linux Australia believes that this chapter, as drafted, does not achieve this balance, and can not without all stakeholders having adequate representation.

### **Specific Issues with the IP Text**

We have read and consulted with legal experts on the Intellectual Property Chapter published on Wikileaks and dated 30 August 2013. We are concerned about a range of specific provisions in the leaked text as set out below.

Generally, we would note that the text is not balanced. Despite some efforts to include more safeguards and balancing provisions than have been seen in previous US FTAs, including AUSFTA, the balancing provisions do not yet match even the basic safeguards included in other trade and international law instruments. We would urge Australia to support more balancing provisions including text in provisions like the objectives and principles clauses.

### **Reproduction of text and provisions from multilateral treaties**

Repeating the language of TRIPS or other multilateral agreements in the TPP is undesirable. It introduces needless difficulties for Australia negotiating future global IP treaties and creates obstacles to multilateral processes to revise TRIPS. Parts of the text repeat TRIPS text while leaving out crucial qualifications or protections, leading to confusion as to whether those qualifications or protections continue to apply. If Investor-State Dispute Settlement provisions are included, the language of TRIPS becomes 'enforceable' in non-transparent international arbitration processes. This would create opportunities for 'forum shopping' and for companies and countries to instigate multiple disputes in multiple forums (as we are already seeing in the context of the tobacco plain packaging dispute).

### **Parallel importation (QQ.E.X and QQ.G.4)**

Restrictions on parallel importation are counter to the core principles of free trade and ought never be included in an agreement that purports to lift barriers to trade. As concluded in the recently tabled IT Pricing Inquiry, restrictions on parallel importation contribute to making Australian business less competitive. If Australian businesses cannot buy software or other technology at the same prices available overseas, they are at a disadvantage in any global marketplace. Such restrictions therefore reduce Australia's competitiveness. Many of our members are in small business and experience these issues directly. Restrictions on parallel importation also mean higher prices for Australian consumers, unequal access to content and technology for people with visual or other disabilities, and, where equal access is not provided to content, encourage infringement.

The IT pricing Inquiry recommended that restrictions on parallel importation should be lifted and this position is shared by Linux Australia. We therefore strongly oppose article QQ.E.X and QQ.G.4, which propose to restrict parallel importation.

### **Patent**

The open source community has long had concerns with current patent law, which in both local experience and in the US, has become a tool for creating barriers to innovation and commercialisation without providing significant incentives for investment. We are advocates for reform in Australia alongside the increasing calls for patent reform in the US. Introducing *any* restrictions on domestic policy flexibility in patent law, even if consistent with current law, in a regional trade agreement may prevent necessary domestic reforms, as well as creating the risk of incompatibility with or barriers to future multilateral negotiations.

#### Patentable Subject Matter (article QQ.E.1)

We are concerned about Australia's apparent support for text which would require the



patenting of new uses for known products. Allowing such patents is not a global position, and, is the subject of some controversy in Australia including in a current case being heard before the High Court (*Apotex v Sanofi-Aventis*). Agreeing to treaty text on a topic that is managed through the development of the common law can lead to conflicting and ambiguous scenarios. Should Australian common law evolve on this question, it could put Australia in breach of agreed treaties. We also note that issues and concerns persist around patent evergreening, as discussed by the Pharmaceutical Patents Review in its 2013 Draft Report. Australia needs to retain maximum policy flexibility to amend its law to address these concerns over the long term.

Linux Australia welcomes Australia's opposition to the US and Japan proposal that "a Party may not deny a patent solely on the basis that the product did not result in enhanced efficacy of the known product when the applicant has set forth distinguishing features establishing that the invention is new, involves an inventive step, and is capable of industrial application." We do not see how any possible public good can come of granting a patent in that case.

Linux Australia and the open source community in Australia are very concerned about the economic impact of software patents. In our day to day, practical experience, the patents that the US in particular has been granting relating to software and business methods are a massive burden on innovation in the digital economy: indeed, many software companies say as much, calling for the abolition or reform of such patents even as they spend billions on accumulating piles of patents for defensive purposes. Linux Australia welcomes the recent action by New Zealand to exclude software from patentability. In our view, Australia should follow New Zealand in excluding algorithms, computational ideas and software as such from the patent system since such patents impose burdens on innovation with no proven incentive effect for investment or innovation, and all the research we have seen suggests that the costs of patents in this area significantly outweigh the benefits.

In the context of the TPP, we believe that Australia should support the language proposed by Mexico, allowing countries to exclude mathematical methods and software. This language does no more than reflect well-established exclusions in international patent law found in many domestic patent systems. We would encourage the addition of computational ideas to the explicit exclusion. Computational ideas are the algorithms behind software and as such are mathematical methods and ought to be excluded alongside mathematical methods. An explicit exception around this would ensure consistency of treatment between mathematical methods and software algorithms.

In software, code reuse is considered to be the best and appropriate practice, taught



from the most basic and introductory programming classes. Programming is primarily about the implementation of ideas, but if the ideas themselves are patented, software cannot develop efficiently. Software developers, working on their own code, can find themselves paralysed if they wish to be attentive to the existing patent system, or liable if they are not. In either case, innovation suffers.

Because any major piece of software contains hundreds, if not thousands, of software ideas, it is impractical, damaging, and anti-innovative (especially for small and medium enterprises) to ensure that they have not breached any existing patents in their development. This does not count the time and costs required for negotiating patent licenses, and even this avenue has been of little assistance to developers of Free and Open-Source Software (FOSS).

Regardless of explicit exemptions, QQ.E.1 must preserve as much flexibility as possible for countries to exclude certain technologies or ideas from the patent system, so that patent reform can continue to occur in the future. We therefore oppose, in the strongest possible terms, the demand of the US that patents should extend to the areas outlined in QQ.E.1.3.

Concern must also be raised around the need for patents where *“the exploitation is prohibited by [national] law”* to be patentable (Article QQ.E.1.2). Requiring patents to be granted in these areas leads to disputes such as that currently seen over trade marks and plain packaging of tobacco products. If we allow property rights but do not allow their exploitation (or prohibit their exploitation), claims for the expropriation of property or alleging the failure to accord investors ‘fair and equitable treatment’ may arise in ways that we cannot presently predict.

#### Patent opposition

Linux Australia supports the proposal that *“Each Party shall provide a procedure for third persons to oppose the grant of a patent, either before or after the grant of a patent, or both.”* Patent examiners are not always aware of developments at the cutting edge of technology, and allowing oppositions can help reduce the number of bad patents granted by enabling the participation of experts and businesses without the expense of full-blown patent litigation. We understand that the US no longer supports the removal of patent opposition and if so welcome this necessary change.

#### Experimental use

We support the right for experimental use of a patented invention, and are pleased that Australia recently introduced experimental use in s 119C of the Commonwealth *Patents*

*Act 1990*. Software developers need protection so that they can examine how software functions and consider how it may be improved. Such protection for legitimate, innovative activity should be available everywhere, and Australia should advocate this flexibility in the TPP.

## Copyright

Linux Australia does not agree with the inclusion of copyright controls within the detailed text. All TPP negotiating parties are already members of the WTO, which oversees copyright obligations on its members, in particular the TRIPS agreement which adds software to the scope of copyrightable works. We believe that this is appropriate and that to duplicate copyright provisions in a trade agreement undermines established practices.

### Copyright term (QQ.G.6)

According to evidence considered in the US and recent copyright reviews in the UK and Australia when AUSFTA concluded<sup>1</sup>, copyright terms are already too long and provide little additional incentive in return for the significant administrative burdens they create. Copyright term extension is contrary to Australia's economic interests and negatively impact both consumers and IP producers in this country. Linux Australia strongly opposes any attempt to extend copyright terms.

### Criminalisation (QQ.H.7)

We are opposed to the criminal provisions of the TPP draft, both the language Australia opposes (which would criminalise everyday behaviour of Australian citizens and consumers) and the language Australia supports, criminalising single infringements for 'commercial advantage'.

Due to ambiguity in current law, it is easy to infringe copyright through ordinary everyday activities.<sup>2</sup> Ordinary Australian businesses and individuals should not be subject to the threat of prison and criminal records for everyday activities. These kinds of infringements can and should be dealt with through civil law with the right of copyright owners to seek damages for harm suffered through infringement being sufficient. Criminal penalties, if included in IP law, should be reserved for intentional, commercial infringement that has a significant and direct economic impact by 'stealing' the markets of copyright owners.

Australia should oppose the language of QQ.H.7.2, in order to retain the maximum potential flexibility for future policy developments.

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<sup>1</sup> <http://www.crsi.mq.edu.au/public/download.jsp?id=10580>

<sup>2</sup> David Lindsay, *PROTECTION OF COMPILATIONS AND DATABASES AFTER ICETV: AUTHORSHIP, ORIGINALITY AND THE TRANSFORMATION OF AUSTRALIAN COPYRIGHT LAW (2012)*

### Reproduction right and Copyright Exceptions (QQ.G.1 footnote 130 and QQ.G.Z)

We are very concerned about the language on the reproduction right and the exceptions to that right proposed in the text, which we think will create significant barriers to innovation in the digital environment and barriers to sensible copyright reform.

Creating temporary copies is necessary for ordinary use of the internet and digital technology. Viewing copyrighted material online should not infringe copyright, Nor should running private internet hosts, providing network services or caching for more efficient provision of internet services. If temporary copies are in the reproduction right, these commonplace activities will become infringements. This is of critical concern to our members who need the ability to create new innovations in software and hardware without the constant fear that industry standard use of digital environment is going to expose them to damages awards or potentially criminal liability. Such issues are not purely theoretical concerns. Copyright cases alleging that simple browsing is an act requiring specific copyright owner permission have been brought in the UK in addition to numerous disputes over transient copies in Europe. Similar arguments were made in a Copyright Tribunal proceeding in Australia between the Copyright Agency Ltd and the Schools.

We recognise that the negotiators have set out various proposals for an exception (in footnotes 128-130 and in QQ.G.Z). The more specific versions of the exception however are much too narrow. If confined to 'lawful' transmissions, for example, they repeat exactly the problems in current Australian law that were criticised by stakeholders in submissions accepted by the ALRC Inquiry into Copyright and the Digital Economy. We are very concerned that putting such language in the agreement will be interpreted as precluding broader exceptions considered by the ALRC and bind Australia to utterly impracticable copyright laws.

Australia must support the most flexible possible language which leaves the definition of the reproduction right in copyright to domestic law. This could be achieved by replacing the text with the proposal in footnote 128, which embodies the globally negotiated, internationally accepted standard on the reproduction right in the digital environment from the WIPO Internet Treaties.

### The Public Domain

The public domain - materials not protected or no longer protected by copyright - is an essential resource for people to engage with culture (for example, through access to works more cheaply) and to use to create new material. Positive protections for and promotion of the public domain is good policy for the support of creativity and access to

knowledge and culture. Linux Australia therefore:

- Believe that QQ.A.11.2 should be amended to make explicit that a Party shall not restore protection to subject matter that has passed into the public domain. If protection is restored, it places derivative works and legitimate activities in legal limbo
- Believe that QQ.G.12 should be actively supported in order to ensure that technological protection measures do not limit access to material in the public domain
- Support QQ.A.2.d (an objective stating that the chapter is intended to protect the ability of Parties to identify, promote access to and support the public domain)
- Support QQ.A.13 because it establishes support for and cooperation to identify and promote access to the public domain

#### Damages (QQ.H.4.2ter)

The threat of significant damages awards imposes chilling effects on innovation and has the effect of preventing industry from offering new technologies to Australians.

We dispute the assertion that infringement on IP directly results in lost sales. For example, the number of copies of a piece of software illegally copied is not the same as the number of lost sales due to that copying. Nor is a party's loss best measured by reference to the stated or recommended retail price of goods. It is frequently the case that parties do not sell material at the 'recommended retail price' (instead offering extensive discounts) and in many countries the retail price is set at a level that precludes access for all but a very small proportion of the population<sup>1</sup>. Measures of damages are a matter that needs to continue to be dealt with through local civil procedure and remedial law, consistent with the approach adopted in other areas of domestic law. It is entirely inappropriate to bind certain measures of damages exclusively for IP and we believe Australia should oppose any such language.

#### Anti-circumvention law (DRM/TPMs)

Linux Australia strongly opposes all additional legal protections that seek to 'enforce' Technological Protection Measures (TPMs).

There are a wide range of valid cases where legitimate businesses may need to innovate around or avoid TPMs or Digital Rights Management (DRM) measures, including in contexts that do not involve copyright infringement:

- TPMs are used in anti-competitive and anti-consumer ways with the intent of stifling innovation. This has been seen in technology such as printer cartridges,

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<sup>1</sup> Joe Karanagis (ed), *Media Piracy in Emerging Economies* (2011) - <http://www.ssrc.org/features/view/media-piracy-in-emerging-economies>

garage door openers and increasingly in cars to prevent people from purchasing add-ons, replacement parts or cartridges provided by 3rd parties. This prevents companies from competing to provide parts and services for commonly available technology, limiting competition and restricting consumer freedom

- TPMs are used to 'lock' content to particular software or hardware environments, preventing users from utilising the software and hardware of their choice. This is of critical concern to our members due to DRM systems commonly being withheld from interoperating with open source software. Such DRM privileges certain software providers and prevents our members from competing on a level playing field.

When DRM is used to lock businesses and consumers in to certain hardware or software, our members cannot compete on a level playing field. This is bad for our members, particularly those with Australian small businesses, and it is for other Australian businesses and consumers who suffer higher prices and more limited features as a result. Enforcement of TPMs/DRMs in this manner has been shown to be less concerned with preventing copyright infringement and more focussed on limiting competition in information technology.

Additionally, there are broader social reasons for circumventing TPMs/DRM:

- to allow the blind and vision impaired to use screen readers on all ebooks, including those that come with TPMs preventing the use of screen readers – a key requirement for educational institutions under the 1992 Commonwealth Disability and Discrimination Act – again highlighting inconsistency with existing legislation;
- to get access to public domain material;
- for teaching and education;
- to ensure access to material locked up in obsolete or faulty technology systems, and hence to preserve 21st century culture and history;
- in some cases (believe it or not) just to allow legitimately purchased software to *run*: some popular video games even require 'phoning home' to a server to run. Modifications to remove this restriction are not necessarily issued when the server is taken down.

The distribution of tools that can circumvent TPMs are necessary to allow these benefits to be realised. Our members want to provide services and tools to enable these socially beneficial activities, but face the threat of civil (and potentially criminal) liability for activities that have nothing to do with protecting content owners' rights to sell their work. We are disappointed to see Australia apparently supporting restrictive language on anti-circumvention law in the TPP, language that was criticised by stakeholders and by members of Parliament from both sides when these laws were considered in 2005-2006.

We note that there are flexible alternative forms of language propose by other countries. In our view all anti-circumvention provisions should be removed and the development and reform of law in this area should be a matter for domestic policy, within the broad, permissive framework found in the WIPO Copyright Treaty. Australia should be supporting more flexible text that will be more adaptable for the long term and that will allow Australia to introduce the reforms needed to ensure competition in information technology is allowed.

### ISPs

We oppose online service provider liability for their users actions. Such liabilities are not applied to other information carriers (Eg Australia Post) where infringers alone are responsible for their own actions. The Australian High Court unanimously supported this sentiment in the recent *iiNet* litigation, holding that under entirely conventional, traditional copyright law, ISPs are not liable when their users engage in copyright infringement. Turning ISPs into copyright police means imposing significant costs on one industry solely for the benefit of another industry that has other legal remedies available to it. Such actions do little but place additional costs back on consumers and businesses.

We are opposed to the removal of online material without court order. Such takedowns lack judicial oversight and enable copyright owners to the abuse the system in order to seek removal of critical or undesirable legal material. Such actions have impacted organisations as large as NASA, who experienced the removal of their own Mars landing video removed from their youtube channel for copyright infringement<sup>1</sup>.

We strongly oppose rights holders being able to directly request personal information from ISPs with little or no evidence of infringement. This provision is susceptible to non-trivial abuse (and we believe has been abused through court cases in the UK which expose people to the threat of public humiliation for their online activities), and is a serious breach of privacy. Any such suspicions of infringement should be to the judicial system who can provide the required oversight in requesting personal information if they found merit to the claims.

For each of these points, we are very concerned to see Australia apparently supporting the most restrictive possible language on ISP liability as proposed by the US. We are surprised to see that Australia would support language that would entirely preclude any reform of copyright law in this area without negotiating with 12 other countries first. According to the views of legal experts we have consulted, if Australia is not willing to leave such questions out of the TPP entirely (as we would prefer), Australia could easily

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<sup>1</sup> <http://arstechnica.com/tech-policy/2012/08/as-curiosity-touches-down-on-mars-video-is-taken-down-from-youtube/>

and consistently with its current law and international obligations, support more open options put on the table by Canada and other countries. We would urge that Australia take this course so as not to commit ourselves to laws drafted for the internet as it existed well over a decade ago.

### **Services chapter**

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 licenses.

In particular, technical specifications would not be allowed to specify licensing models or a description of their characteristics, despite this being a critical factor in a fully informed decision.

This is a concern to many OECD governments who have recognised that there is a clear business and economic benefit to mandating the use of open source. There is acknowledgement that traditional procurement practices can favour license models which advocate lock in and limit future expansion.

In March 2013 the British Government mandated a preference for open source software. 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 license terms covering the use of a cloud service and the data are critical points when considering technical design and interoperability.

The 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 choose license models that suit the needs of their nation and of individual public sector projects and scenarios.

### **Conclusion**

Linux Australia and Linux Users of Victoria strongly urge that the TPP and future trade agreements be negotiated in an open and transparent manner. Leaked chapters of the TPP have raised serious concerns that threaten Australian growth and innovation, but that have been held behind closed doors with limited consultation.

Linux Australia and Linux Users of Victoria are willing to meet with the Department of Foreign Affairs and Trade to further discuss our concerns.



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## Sources

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