pirateparty australia

Presentation to Trans-Pacific Partnership Agreement Stakeholders Meeting in Melbourne

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Pirate Party Australia, like many other attendees at the intellectual property section of this Agreement negotiation, first became aware of the proposed intellectual property provisions of the Trans-Pacific Partnership Agreement when the United States negotiating position was leaked last year.[1]

Much of the content of the leak is a wish-list for old media corporations who refuse to adapt to the Internet and instead pay massive "donations" to their government in order to push their legislative agenda against the interests of modern society. This wish-list echoes that of the intellectual property segments of the Stop Online Piracy Act – known as SOPA – and the Anti-Counterfeiting Trade Agreement – known as ACTA. The US TPPA provisions have been nicknamed “the son of ACTA”. The proposed solutions to online file-sharing will fundamentally change the operation of the Internet, to its detriment.

The extreme position of the leaked United States' Intellectual Property chapter is highlighted by the unprecedented request for the negotiating texts to remain secret for four years after the agreement is signed. This secrecy is a perversion of democracy. The public would not be given a chance to oppose such a draconian attack on both the Internet and the civil liberties of citizens in all of the signatory countries. All of this to protect the corporate interests of a small sector of one industry? What about the cost to our democratic rights?

Considering the widespread international opposition to ACTA and SOPA, any secrecy around this agreement will discredit the TPPA in the eyes of many. We demand that a draft agreement be released before the treaty is finalised and signed to ensure our rights are adequately protected from marauding United States media conglomerates.

Transparency is the only way the Agreement will have any legitimacy. It is the 21st century and the time for secret negotiations on behalf of cashed up special interests has passed. The technology exists for governments to carry out these negotiations with complete transparency and it is time for citizens to have the right to know what is being carried out in their names. Our representatives cannot represent us if we are blind to their choices.

The secrecy surrounding the content of the negotiations makes discussing the Agreement extremely difficult. We are not exactly sure what we are arguing against. Our only verifiable guide is a leaked position paper provided to the citizens of the world by a non-profit whistle-blowing website – the same whistle-blowing website that is under constant attack by the United States for obeying the letter of the law and shedding light where corruption and greed have cast their sinister shadow. We would be able to provide a much clearer argument about what the Agreement should and should not include if we knew what was on the table. If negotiations were transparent, and if access to information was properly provided, the contributions from stakeholders & delegates at this consultation would be vastly improved.

In Australia, we have seen the harm that tighter intellectual property restrictions can cause through the Australia–US Free Trade Agreement. The Productivity Commission, a body that investigates the economic benefit or hindrance of various Australian economic policies, warned that agreeing to

intellectual property provisions in free trade agreements needs to be subjected to a rigorous cost/benefit analysis.

The Australia–US Free Trade Agreement is believed to cost the Australian economy between 88 million and 763 million dollars a year in copyright enforcement alone. This is wealth being directly transferred from Australia to the United States – there is no net benefit to Australia derived from the tighter restrictions.[2]

If the US delegation gets its way, that and more will be forced upon your people and local economy, to what benefit? We urge delegates to reject the inclusion of any intellectual property provisions in your own national interests as they WILL harm your economies.

The intellectual property section of the Agreement as pushed for by the US in our leaked copy, will force Internet Service Providers along with large online content service providers such as Facebook, Google and other similar companies, to be liable for what their users access using their services. As an example, this in itself will make it impossible for Facebook to exist in its current form, as each photograph posted by every single user will need to be moderated to weed out copyright infringement before Facebook can host it. The same is true of YouTube, a Google owned service, in regard to video content. Their servers receive user content well in excess of an entire days worth of footage, every 60 seconds.

What is being proposed will not only harm the interests of the vast majority of countries at the negotiations, it will harm the interests of many companies in the United States. SOPA was opposed by the likes of Google and Facebook precisely because such a regime will make it difficult for these companies to maintain their current business models.

I will now proceed with an examination of the individual articles and paragraphs we have objection to.

Article 4.2 grants rights holders the right to control their products entry into each countries' markets. Essentially this bans parallel imports, which is a direct attack on free trade. Australian consumers already suffer at the hands of unfair pricing of goods, services and cultural artifacts. Without some ability to access goods from other countries, the rights holders can dictate pricing on a country-by-country basis, being able to milk maximum profit from each customer.

Allowing parallel imports keeps prices down because retailers and consumers can find the lowest price for a product. The right to find the cheapest price for a good is one of the fundamental tenets of free trade, and the emerging global economy.

Another issue relating to parallel imports regards globalised communications – particularly the use of social media – and the need for people in 'foreign' markets to have access to content as soon as possible. One of the biggest motivations for people to share content online is the artificial and unnecessary delay of release times on a country-by-country basis.

As an aside, it makes sense for media companies to adopt synchronised global release dates, because any social media buzz, which will be global whether you like it or not, will help promote the product globally. Staggered release dates weaken any benefit from social media, and people denied access for living in the 'wrong' geographical region will be coerced by social pressures and advertisement displayed on globally available websites to access the material in the only way available to them – through online file-sharing.

Article 4.5 of the draft US intellectual property chapter extends copyright terms across the TPPA countries. For most countries involved in the negotiations, plans to extend copyright terms will directly harm your economies. As discussed earlier, these provisions in the Australia–US Free Trade Agreement had a negative impact on the Australian economy and will on all signatory countries except the US.

Article 4.9 proposes that circumventing copy protection on any media would be a criminal act. There are currently fair use exemptions for a range of reasons, from software experiment and study, to fair use for parody or comment and so on. Using a work for any reason other than as stated in the licence would risk criminal charges, even if the use is considered legal under current arrangements. This directly assaults the rights currently enjoyed by citizens in signatory countries to use media they have purchased how they wish. Rights could be locked up and sold once for each device, requiring consumers to purchase multiple licences to any media they wish to access. If they purchase a new iPod for example, they can no longer access their music collection on their new device and would need to re-licence all of their music.

Article 6 discusses fair use. There is currently a fair use exception for the transient copying of a file, which is removed from the US proposal. This is one of the most ill thought-through changes to the current system. All media streamed online is temporarily cached on the users' computer so the video software can play it. This would become not only illegal, but criminal. More broadly the US draft intellectual property chapter removes many of the current fair use exceptions to copyright. This would harm peoples' ability to interact with culture, which needs to be resisted.

Article 10.2 states that there must be a presumption that the rights holders' claims to the right is valid, unless evidence to the contrary is produced. Aside from turning "innocent until proven guilty" on it's head, this policy gives credence to various versions of "graduated response," where a user has themselves removed from the Internet via cancellation of their Internet service based on a predetermined number of accusations, not proven violations of copyright.

In terms of patent law, this presumption is extremely problematic, as many granted patents have no actual basis for the claim. The effects of these policies can be witnessed primarily in the US, where there is a plethora of frivolous lawsuits around patents relating to computer software. Companies known broadly as 'patent trolls,' apply for patents on broad, obvious and fundamental ideas, violating the principle that a patent should be granted for only original and innovative developments. Recently a company called Eolas Holdings attempted to claim ownership of a patent for "any program that allowed access to the interactive web".[3] This means that basically any program that

uses the Internet would be required to pay Eolas Holdings a licencing fee to be able to distribute their products.

Thankfully they lost the case, yet it highlights the danger and cost of dealing with a presumption in favor of the organisation claiming the rights. A claim like this would need to be fought in court because the burden of proof would fall on the defendant to show the patent is invalid.

A similar trend can be found in copyright law. YouTube has an automated take-down system that allows rights holders to remove material that they hold copyright for. In the last week, a company called Rumblefish had a YouTube video taken down for breaching copyright on a 'sound recording'. The closest thing to a recording in the video was a real bird call, which according to copyright law cannot be copyrighted as it occurs in nature.

This is precisely the sort of thing that will eventuate from the assumption in favour of rights holders, as proposed. Ordinary people who post videos for friends and acquaintances are not in a financial position to challenge such claims. Wrongful claims are a way for old media to directly obliterate the competition. As this is already happening, any claim that the TPPA would not cause such problems is patently (excuse the pun) ludicrous. This would just export the problem to all signatory countries.

Article 12.8 gives rights holders the right to demand personal information about customers of Internet Service Providers – or other service providers – on a mere accusation. This is a fundamental attack on the privacy of the citizens of all signatory countries. There is nothing to stop rights holders going on extensive fishing expeditions, searching through millions of users, looking for people to sue. This power is not granted to law enforcement without due process. Handing such powers to corporations without any requirement to show a breach has occurred is an attack upon the process of law. We have a right to not be placed under surveillance by companies based upon their word that illegal activity has occurred.

Article 14 contains border enforcement provisions which grant customs authorities the right to seize and destroy goods at borders, where they suspect the goods are infringing copyright, trademark or patent law. There is significant risk for goods to be wrongfully seized in transit, posing significant risk for any company engaged in global trade. This further exacerbates the situation of generic medicines, where seizures can negatively impact the health of citizens of signatory countries and beyond.

The agreement will result in funnelling vital health money out of developing countries, directly into the coffers of US pharmaceutical companies. There is no benefit in adopting any of these provisions for any participant country *except* for the United States. It will have serious negative impacts on the health of many millions of people around the world, not just the countries in this agreement.

This has been shown through the experience of many participants in the TRIPS Plus agreements. A case in point is the US free trade agreement with Jordan. According to a study produced by Oxfam, the cost of medicine in Jordan has risen by an average of 20% as a result of the agreement. It is also threatening the viability of many government health programs in the country.[4]

Medicine Sans Frontier are deeply concerned with the impact this agreement will have upon their health programs. Over 80% of all medicine used by MSF is generic. Losing access to this source of medicine will result in literally millions of deaths. As an example, the introduction of generic medicines for AIDS patients reduced the cost of medicine by approximately 99%.[5] We must ask the delegates: “can your country afford such a drastic increase in health costs with no benefit in return?”

Just as the copyright section transfers value directly from each countries' economy to the United States, the attacks on cheap medicine will result in much higher health costs in all signatory countries, with the extra costs being poured into the coffers of rich US pharmaceutical companies. For the good health of your citizens, we urge the delegates here to reject any attempt to crack down on generic medicines.

Article 15 is fraught with issues regarding what activities are to be considered criminal under the agreement.

Article 15.1 sets out criminal liability provisions that include criminal provisions for people engaged in copyright, trademark or patent violations on a "commercial scale". Commercial scale includes: "significant willful copyright or related rights infringements that have no direct or indirect motivation of financial gain;" in other words, people not engaged in any sort of commercial activity at all. This is essentially to criminalise non-commercial file-sharing by stealth. This could lead to people being held criminally liable for copying a CD for a friend. Sharing should never be considered a criminal act.

Article 15.3 criminalises the use of camcorders in cinemas, regardless of intended use of said video, whether for personal or private use. There are already a raft of agreements and laws that cover this issue, and such a proposal would complicate an already confusing aspect of law.

Article 15.4 criminalises "aiding and abetting" intellectual property crimes (sic). There is no definition of what this means, and is so broad that it could mean anything from imposing liability upon intermediaries, such as Facebook and Google, to prosecuting the owners of a compromised wireless Internet hotspot that has been used to download copyrighted content. This poses a serious risk of inadvertently criminalising a significant portion of the population.

Trade negotiations are meant to provide mutual benefits to all signatory countries. The US draft intellectual property chapter will only benefit a few companies in the United States and will have a negative impact upon the culture and health of all signatory countries. As the primary exporters of intellectual property, the United States of America has the most to gain from the intellectual property segments of this agreement. All other members of this agreement are primarily importers of intellectual property. We urge all participating delegations to reject every aspect of the draft US intellectual property chapter as it will directly harm your economies and the well-being of your citizens.

[1] http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf
[2] http://www.pc.gov.au/__data/assets/pdf_file/0010/104203/trade-agreements-report.pdf pp xxxii & 166
[3] http://www.forbes.com/sites/erikkain/2012/02/10/texas-jury-strikes-down-patent-trolls-claim-in-clear-victory-for-patent-reform/
[4] http://www.oxfam.org/sites/www.oxfam.org/files/all%20costs,%20no%20benefits.pdf
[5] http://www.doctorswithoutborders.org/press/2011/MSF-TPP-Issue-Brief.pdf

Other sources and further reading

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