# Submission to the Commonwealth Joint Standing Committee on Treaties regarding the "Comprehensive & Progressive agreement for Trans Pacific Partnership"


Open Source Industry Australia Ltd

*Amplifying the voice of the Australian open source software industry*

Lodged 20 April 2018

**About OSIA**

OSIA represents & promotes the Australian open source software 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 software 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 Executive summary

OSIA welcomes this opportunity to comment on the "Comprehensive & Progressive agreement for Trans Pacific Partnership" (CPTPP) and we thank the Committee for that opportunity.

We note with dismay that, despite two years having elapsed since our submission to the Committee on the original Trans Pacific Partnership (TPP) and despite the one Party which was pushing the hardest to include a plethora of highly restrictive trade and non-trade measures in TPP having long since withdrawn from the process, CPTPP remains mostly the same treaty as TPP.

As noted in 2016, our members—organisations in the Australian free and open source software (FOSS) industry—tend to be strong supporters of free trade. This is only natural, since the free software movement[1] to which our industry owes its very existence was founded on firm principles of freedom in software, so it follows that we generally support freedom in endeavours such as international trade as well.

Disappointingly, like TPP before it, CPTPP is clearly not a genuine free trade agreement. It does contain some free trade measures, principally in Chapter 2 (National Treatment & Market Access), which we support, but the overwhelming majority of CPTPP's provisions seek instead to proliferate an inordinate number of *restrictions* on trade and indeed restrictions on a raft of endeavours other than trade too.

TPP offered virtually no economic benefit for Australia (forecasts of between 0.00% and 0.05% CAGR in Australia's real GDP over a 10 to 15 year period). Following the US withdrawal from TPP, CPTPP is likely to yield even less (perhaps even negative) economic growth for Australia.

In short, the benefit offered by the deal has gone from bad to worse.

On the cost side, there have been some improvements through the suspension by CPTPP of a small proportion of the troublesome provisions of TPP. However those suspensions do not go anywhere near far enough. This is exacerbated by the TPP-11 Parties' bizarre decision to merely suspend, rather than excise completely, those provisions, whilst providing for them to spring back into existence at any point in the future. That gives rise to an unacceptable degree of uncertainty, which is likely to discourage investment (both domestic and foreign) in the Australian FOSS industry if Parliament ratifies CPTPP.

We note however that even if those provisions which have been suspended had been excised completely from TPP, the deal would remain a poor one as it would still trade away to a substantial degree Australia's sovereignty and public policy flexibility in general, for little if any return.

It concerns us that, despite many calls to do so, not only from ourselves but from numerous other industry & civil society groups, political parties and even the Productivity Commission, the Commonwealth has still failed to commission any independent economic modelling of the impact of CPTPP on Australia's economy.

We have advised to the Committee before about the dangers of taking DFAT's National Interest Analyses (NIAs) at face value—purely on the basis that it is not possible, even with the best of intentions, for the agency which negotiates a treaty on Australia's behalf to undertake an arms-length assessment of its merits.

The propaganda we have seen emanating from the Department this year (principally the ironically titled "Myth Busters: FACTS vs FICTION" document) provides further evidence that the in-house analysis and advice produced on such matters is of little probative value.

We are concerned also that ratifying a treaty that was negotiated entirely in secret would send altogether the wrong message to the Department, to industry and to the world at large: that Australia's industries are not the intended beneficiaries of Australia's trade deals.

We are concerned also that the investor-state dispute settlement (ISDS) provisions of CPTPP remain drafted in such a manner as to turn Australian companies into second class citizens in our own market.

Finally, we are concerned that certain provisions remain in CPTPP (principally in the Electronic Commerce Chapter and the Intellectual Property Chapter) which discriminate against the FOSS industry in favour of our closed-source competitors.

[1] Stallman, R., *What is free software?*, Free Software Foundation. Available at http://www.gnu.org/philosophy/free-sw.en.html

### 1.1 Recommendations

OSIA recommends today regarding CPTPP exactly what we recommended on TPP in 2016:

1. That Parliament should not ratify TPP;
2. That Australia should show strong leadership in the Pacific region by opening fresh and completely transparent negotiations—with any and all former TPP Parties who may be interested in doing so—for a true free trade agreement (one whose sole purpose is to eliminate tariffs and quotas across the board); and
3. That the Commonwealth should institute a policy prohibiting Australian participation in any treated negotiated in secret (other than military treaties in time of war).

## 2 CPTPP's history: a tale of lost opportunities

### 2.1 P4's merits ignored—*never look a gift horse in the mouth*

CPTPP's genesis can be traced back to a treaty known as TSEP-P4 (or just P4 for short), which was concluded in 2005 between New Zealand, Singapore, Chile & Brunei[2]. Although P4 contained provisions to support accession of other nations, no such accession ever occurred.

Whilst P4 was far from perfect, at least it was mostly a genuine free trade agreement, i.e. one that focused on the elimination of tariffs and quotas. Australia and indeed most of the other TPP Parties could easily have joined P4—an arrangement that would likely have been mutually beneficial.

But none of them did. That was the first missed opportunity.

### 2.2 Focus on free trade lost—*if it ain't broke, don't fix it*

For reasons which the Commonwealth never shared with Australian industry, those Parties chose instead to negotiate a new treaty, the TPP, as a Byzantine monstrosity which grew to 30 Chapters, innumerable side-letters and annexes (over 6,000 pages in total) which, rather than seeking to promote free trade as P4 had done, sought for the most part to proliferate a myriad of *restrictions* on trade, together with restrictions on all sorts of fields of endeavour unrelated to trade.

Chapter 2 remained in TPP, providing a small kernel of free trade measures, but those original measures were buried under the weight of the draconian restrictions in the following 28 Chapters of TPP, such that by the time it was signed, TPP was overwhelmingly *not* about free trade.

That was the second missed opportunity. A *genuine* free trade agreement that included all 12 TPP Parties would have been a great boon for trade in the Pacific region indeed.

### 2.3 Industry shut out—*this will hurt us more than it hurts you*

In 11 of the 12 TPP Parties, negotiations took place entirely in secret: the industries of those Parties (who almost by definition should be the intended beneficiaries of any genuine free trade agreement) were not permitted to see the text until the deal had already been signed and there was no opportunity for amendment.

Worse, even the parliaments of the nine democratic nations (including Australia) amongst those 11 Parties were not permitted to debate the treaty until after it had already been signed. For that reason, Bob Katter MP famously described TPP as "the greatest blow to democracy in 300 years"[3].

Things were a little different in the United States: the USA was represented at the negotiating table by the United States Trade Representative (USTR, a non-government organisation built around 28 committees, representing select US industry & government interests).

[2] https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/p4/

[3] https://www.bobkatter.com.au/media/letters/view/604/tpp-a-blow-to-democracy-just-corporate-colonialism-says-media-releases

So it is hardly surprising that the provisions of TPP ended up highly biased in favour of those select US industry interests who were actually represented at the table (and against the interests of industry in all 11 of the other TPP Parties).

That was the third missed opportunity. If TPP had been negotiated transparently, with industry in all 12 Parties having the opportunity to review and comment on the draft text throughout the negotiating process, it would have been a very different treaty—and one which would most likely have yielded great benefits for all Parties.

## 2.4 A bad deal—*more haste, less speed*

Predictably (given the wildly inappropriate, highly biased negotiating process), the final text of TPP was sorely lacking in genuine benefit to industry at large in 11 of the 12 Parties, and even to most industry in the USA (outside of the few select industry interests represented on the USTR committees).

For those reasons, former NXT Senator Nick Xenophon described TPP as "a dud deal"[4], Greens Senator Peter Whish-Wilson called it "dangerous and undemocratic"[5] and even US President Donald Trump described it as "a terrible deal"[6].

But it wasn't only politicians who were criticising TPP. Independent modelling of TPP conducted by the United States Department of Agriculture (USA)[7] and by the World Bank[8] predicted, respectively, no measurable impact (0.00%) on Australia's real GDP by 2025 and 0.7% growth by 2030 (0.05% CAGR). With such paltry forecasts—well within the margins normally allowed for error—it was obvious even then that TPP would provide no significant economic benefit to Australia.

OSIA too warned of the dangers of TPP, recommending to this Committee in our 2016 submission[9] that Australia should not ratify TPP[10].

## 2.5 TPP trumped—*you can't flog a dead horse to life*

In that same submission we also recommended that "Australia should show strong leadership in the Pacific region by opening fresh and completely transparent negotiations—with any and all former TPP Parties who may be interested in doing so—for a true free trade agreement (one whose sole purpose is to eliminate tariffs and quotas across the board)."[11]

At the time that would be have been a courageous decision to make, but one which our members felt strongly was worth Australia making nevertheless, but as it happens the international political landscape was about to change profoundly.

On his first day in office, President Trump formally withdrew the United States from TPP.

The US withdrawal presented an ideal opportunity for Australia to lead the way back to a focus on genuine free trade in the Pacific region, just as OSIA had recommended 9 months earlier.

Australia (and Japan) did indeed lead the way following the demise of TPP, but in altogether the wrong direction. The TPP-11 insisted on sticking doggedly to the text of TPP, making only a few minor amendments along the way and continuing the anti-democratic practice of negotiating in secret.

That was the fourth missed opportunity. If the TPP-11 had started with a blank canvas and negotiated a genuine free trade agreement, out in the open with industry stakeholders in all 11 nations intimately involved, the result would have been substantially different and may even have brought genuine prospects of economic growth.

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[4] http://www.abc.net.au/news/2015-10-06/pacific-nation-ministers-negotiators-lock-in-tpp-trade-deal/6829368

[5] https://independentaustralia.net/politics/politics-display/secretive-tpp-trades-away-future-says-whish-wilso7172

[6] https://twitter.com/realdonaldtrump/status/651136309029834752?lang=en

[7] Burfisher, M. E., Dyck, J., Meade, B., Mitchell, L., Wainio, J., Zhaniser, S., Arita, S. & Beckman, J., *Agriculture in the Trans-Pacific Partnership*, ERR-176, U.S. Department of Agriculture, Economic Research Service, October 2014, Table 8, p. 21. Available at http://www.ers.usda.gov/media/1692509/err176.pdf

[8] *Potential macroeconomic implications of the Trans-Pacific Partnership*, Chapter 4 in World Bank Group, *Global economic prospects, January 2016: spillover amid weak growth*, World Bank, Washington, 2016, pp. 219–236. Available at http://www.worldbank.org/content/dam/Worldbank/GEP/GEP2016a/Global-Economic-Prospects-January-2016-Spillover-amid-weak-growth.pdf

[9] Burton, J. & Foxworthy, P., *Submission to the Joint Standing Committee on Treaties regarding the Trans Pacific Partnership*, Open Source Industry Australia, 11 March 2016, s. 2.3, p. 4. Available at http://osia.com.au/f/osia_sub_201603_jscot.pdf.

[10] *Ibid.*, rec. 1, p. 3.

[11] *Id.*, rec. 2.

## 2.6 Even less benefit—*what's one third of zero?*

As noted above, overseas independent economic modelling of TPP forecast no economic benefit to Australia at all (USDA) to at best less growth than one would normal allow as a margin for error (0.05% CAGR, World Bank). That was when the deal still included the world's largest economy, the United States.

Without the USA, the scope of TPP shrank from roughly 40% of global trade to only 13.4%.

On a purely linear extrapolation, such a change would suggest CPTPP would yield for Australia's economy a CAGR of somewhere between zero and 0.02%—even more paltry than the TPP forecasts.

But such a naive calculation neglects to take into account that, of the TPP Parties, the USA presented one of the most desirable export markets for Australian industry; whilst Australia presents a highly desirable export market for industry in many of the TPP-11 nations.

Given those two facts, we would not be surprised if entering into a TPP without the USA is likely to yield *negative* economic growth for Australia, although in the absence of any credible, independent economic modelling on CPTPP, the real figure is anybody's guess.

Of course, the USA is not Australia's only large, significant trading partner. If the deal had been structured in such a way as to encourage say China or India to join, the outlook may have been different. But it is difficult to imagine either of those countries joining CPTPP, as both have traditionally been opposed to such broad-ranging and highly restrictive deals with a mere veneer of free trade.

## 2.7 Mere suspension—*the sword of Damocles*

After the US departure, the TPP-11 Parties apparently took issue with 22 provisions of the original TPP. There is some overlap between those provisions and the ones OSIA's members took issue with, but even in the absence of those 22 provisions, two thirds of our prior objections to TPP[12] still stand in relation to CPTPP.

Rather than remove the 22 offending provisions from the text, the TPP-11 Parties opted instead merely to suspend them. Those suspensions apply only "until the Parties agree to end suspension of one or more of these provisions".[13]

This bizarre approach makes CPTPP a ticking time bomb: the possibility of those provisions rising from the dead at some undetermined time is likely to *discourage* investment (both domestic and foreign) by the innovative players of the digital economy, including those in the Australian FOSS industry.

That was the fifth missed opportunity: if the TPP-11 Parties genuinely believed that those provisions were unsuitable, why on earth did they not do the job properly, by excising them from CPTPP altogether?

The only credible answer to that question is that they must *intend* to revive those provisions at some point in the future (presumably if and when some future US administration wants to re-join, to use as a sop for the few select US industry interests who put those provisions in TPP in the first place).

[12] *Ibid.*
[13] CPTPP, Art. 2.

### 2.8 Propaganda—*you can put lipstick on a pig, but it's still a pig*

Since the release of CPTPP, DFAT (and their counterparts in other CPTPP Parties) have been promoting CPTPP aggressively.

To a certain extent this is natural and expected (although it's also a key reason why one should never trust the National Interest Analyses—clearly the same agency cannot be expected both to promote a deal and to analyse and report on it impartially: the conflict is obvious and inevitable).

But this time around the extent to which that promotion has taken the form of outright propaganda has both surprised and outraged us.

The most brazen example is the DFAT "Myth Busters: FACTS vs FICTION" document[14] which, whilst not quite a work of fiction itself, does stray dangerously close to becoming so. OSIA have commented publicly on the misleading and deceptive statements in that document on three occasions, in relation to economic impact[15], ISDS[16] and secrecy[17].

That was the sixth missed opportunity. Industry in Australia—and to a certain extent also the Australian public at large—tend not to respond well to propaganda. We tend to see that sort of approach as a clear admission that what is being sold to us has no value or negative value, since if it had any real value it could be sold on its own merits, without resort to misleading, deceptive or exaggerated statements.

### 2.9 The future—*hope springs eternal*

There lies before the Commonwealth now a seventh and final opportunity to save Australia in general—and the Australian FOSS industry in particular—from this misguided and damaging treaty full of unnecessary restrictions, many of which have nothing to do with trade.

We urge the Committee to seize that opportunity, by recommending against ratifying CPTPP and by recommending that the Commonwealth show true leadership in the Pacific region by opening fresh and completely transparent negotiations for a genuine free trade agreement—one whose sole purpose is the reciprocal elimination of all tariffs and quotas.

## 3 Observations on suspensions in CPTPP

### 3.1 Certainty and risk

One of the main aspects for a "good law" is certainty in its operation. If CPTPP is ratified as it currently stands then it will be in violation of this fundamental aspect.

The suspended provisions may or may not be "unsuspended" at some future date. Should our members, as Australian businesses, take into account these suspended provisions in medium to long term planning and evaluation of investment options or should we wait until they are "unsuspended"?

If the suspended provisions are enabled in the future, will they apply from the date the original treaty came into force or only from some future date? What is the likelihood that the suspended provisions will be revived at all?

This level of uncertainty makes it extremely difficult to determine a valid level of future business risk. This risk alone constitutes sufficient cause for the suspended provisions to be removed altogether.

### 3.2 Retrospectivity is very rarely acceptable

The suspension of TPP Art 18.37(2) removes the requirement to make patentable information that is already in the public domain. That is the suspension removes the requirement to grant patents on inventions that have already been passed into the public domain.[18]

[14] http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Documents/tpp-11-myth-busters.pdf
[15] http://osia.com.au/f/osia_cptpp_pr2a.pdf
[16] http://osia.com.au/f/osia_cptpp_pr2b.pdf
[17] http://osia.com.au/f/osia_cptpp_pr2c.pdf
[18] Burton & Foxworthy, *op. cit.*, s. 6.7, p. 13.

Patent law exists to provide a mechanism whereby patent holders make an income from their invention, with understanding that after the patent expires the intellectual property then enters into the public domain. It is this mechanism that professes innovation into the future. Taking something out of the public domain and making it again private is the antithesis of the original purpose of patent law.

So leaving aside that the ability to make old technology re-patentable is in itself retrospective[19], if intellectual property does not remain in the public domain once placed there, would our members, as Australian businesses who today may legitimately use unencumbered any invention the patent on which has expired, suddenly be in breach of patent law sometime in the future? Again, how are our members supposed to factor these potentially resurrected provisions into a quantifiable risk in order to ensure that our businesses remain viable going forward? Leaving those provisions as merely suspended adds a high level of unquantifiable risk to any business making investment decisions based on Australia's current intellectual property law regimes.

This is yet another example of why the suspended articles should be completely removed, not merely suspended.

# 4 General observations on CPTPP

## 4.1 CPTPP is still not about free trade

Free trade enables stronger global competition across all industries. It broadens export markets and provides greater freedom of choice. The aim of free trade is to eliminate tariffs and quotas on the international trade in goods and service. It would have been excellent if the CPTPP had the same ambition.

Chapter 2, the chapter on national treatment and market access is the only chapter with significant credos in free trade. The remaining chapters, to one degree or another, seem to support a wide ranging set of restrictions on trade in general or limiting Australia's independence in domestic trade to the point where Australia's parliamentary sovereignty would be significantly reduced in terms of enacting legislation for the benefit of future Australian citizens. For example, provisions on intellectual property should not be included in trade agreements as such.[20] [21]

The CPTPP as such is not then a free trade agreement but rather an agreement to entrench specific industry practices to the detriment of Australian industry & citizens.

## 4.2 CPTPP still undermines parliamentary sovereignty

The CPTPP discriminates against Australian companies in that it grants new rights to foreign investors in Australia, but the Investment Chapter in TPP explicitly forbids the Commonwealth from granting those same rights to Australian companies.[22] See also Section 5.2.1.

This provision alone effectively turns Australian companies into a second class citizen within our own state. A change that affects the profit margins of a foreign investor may seek retribution for changes to domestic policy, while an otherwise identical Australian company cannot make the same claim.

Foreign investors have supremacy in obtaining retribution over local companies in domestic policy changes.

[19] The only retrospective law that seems to stand up under within the Australian Supreme Court is that legislation introduced to address an already existing "wrong". For example: *Tax and Superannuation Laws Amendment (2013 Measures No. 2) Act 2013* (Cth), to limit the types of films that are allowed. That amendment was to address the amount of Australian content needed in a film to attract tax concessions: *EME Productions No 1 Pty Ltd v. Screen Australia* [2011] AATA 439, *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013* (Cth) to address issues associated with artificial or contrived tax avoidance schemes.

[20] Burton, J. & Foxworthy, P., *Final submission to the Productivity Commission's Inquiry into Intellectual Property Arrangements*, Open Source Industry Australia, 3 Jun 2016, s. 2.15, pp. 19–20.

[21] *Bilateral and Regional Trade Agreements,* Research Report, Productivity Commission, 2010, rec. 4(b) & 4(c), p. 285

[22] Burton & Foxworthy, *Submission to the Commonwealth Joint Standing Committee on Treaties regarding the Trans Pacific Partnership*, *op. cit.*, s. 3.1, p. 6

## 4.3 CPTPP still provides no significant benefit to Australia

It is disappointing that the Commonwealth Government has failed to commission any independent economic modelling of the impact ratifying CPTPP would have on Australia's economy. We have repeatedly called for this analysis[23] and we agree with the comments made by the ACCC [24].

Foreign governments have carried out this economic modelling [25]. Similarly, modelling by the World Bank[26], whilst somewhat more optimistic than the USDA model, still found that, by 2030 TPP will on average raise member country GDP by only 1.1 percent (which equates to a compound annual growth rate (CAGR) of only 0.08%).

If a foreign government and the World Bank can carry out these analysis, why can't the Commonwealth? These external forecasts raise considerable questions as to why the Australian Government signed a treaty with little to no economic benefit to Australia but which gives rise to serious issues with our domestic business being cast as second class citizens and compromising Australia's sovereignty in general.

## 4.4 CPTPP was still negotiated through a biased, anti-democratic process

The TPP was negotiated in secrecy for a period of approximately 5 years. Although Australian industry was invited to submit comments, they were mostly relying on the occasional leaked documents from overseas. Australian Industry had no real input to the formation of the original document. So while industry representatives in Australia, along with ten of the other member countries, were denied any meaningful participation in the process, select representatives of US Industry were right at its core.

TPP was negotiated on behalf of the USA by the United States Trade Representative, in consultation with its 28 Advisory Committees, many of which consist of representatives from US industry. Those US industry representatives not only had access to the text, but were intimately involved with its negotiation.

This secrecy was widely criticised [27] by a wide range of Americans, and they had the most input into writing the treaty.

The United States of America decided to not sign the treaty. Rather than revisit or better still delete altogether the contentious articles in the treaty, the member states decided to suspend them. Fundamentally this suggests that the government of the United States of America, in secrecy, introduced into a treaty, fundamental articles that benefited themselves and only themselves.

So how can a treaty written in secrecy to benefit a foreign government be beneficial to Australian interests?

[23] Burton, J., Holden, C. & Christie, D., *Submission to the Commonwealth Department of Foreign Affairs & Trade on the Trans-Pacific Partnership*, Open Source Industry Australia, 4 Oct 2013, p. 7, available at: http://osia.com.au/f/osia_trans_pacific_partnership_submission_0.pdf; Forsstrom, A. & Burton, J., *Submission to the Productivity Commission's Inquiry into Intellectual Property Arrangements*, Open Source Industry Australia, 30 Nov 2015, pp. 10–11, available at http://osia.com.au/f/productivitycommisionreport.pdf; Burton, J. & Foxworthy, JSCOT/TPP *op. cit.*, p. 4; and in our prior evidence before the Committee: C'th, *Proof Committee Hansard, Joint Standing Committee on Treaties, Trans-Pacific Partnership Agreement (public)*, 7 Oct 2016, Melbourne, pp. 26 & 30.

[24] *ACCC submission to the Productivity Commission Inquiry into Intellectual Property Arrangements in Australia*, Australian Competition & Consumer Commission, November 2015, p. 18.

[25] Economic modelling conducted by the USDA found that the elimination by TPP of tariffs and tariff-rate quotas (TRQs) would have no measurable impact (0.00%) on Australia's real GDP in 2025: Burfisher et al., *op. cit.*, Table 8, p. 21. The USDA report is particularly interesting because its model takes into account only the positive elements of TPP—the elimination of tariffs and TRQs—and still finds no real benefit for Australia.

[26] *Potential Macroeconomic Implications of the Trans-Pacific Partnership*, Chapter 4 in World Bank Group, *Global Economic Prospects, January 2016: Spillover amid Weak Growth*, World Bank, Washington, 2016, pp. 219–236.

[27] McDermott, P. & Manna, E., *Secrecy, democracy and the TPP: trade transparency is what the public wants—and needs*, http://thehill.com/blogs/congress-blog/economy-budget/295365-secrecy-democracy-and-the-tpp-trade-transparency-is-what; Malcolm, J. & Sutton, M., *Release of the Full TPP Text After Five Years of Secrecy Confirms Threats to Users' Rights*, https://www.eff.org/deeplinks/2015/11/release-full-tpp-text-after-five-years-secrecy-confirms-threats-users-rights; Dovere, E. I., *Extreme secrecy eroding support for Obama's trade pact*, https://www.politico.com/story/2015/05/secrecy-eroding-support-for-trade-pact-critics-say-117581

# 5 Observations on the Investment Chapter

## 5.1 What's changed?

### 5.1.1 Definition of "investment agreement" (Art. 9.1)

CPTPP's proponents have made a big deal about "investment agreements" no longer being in the text. The CPTPP suspensions do indeed remove (at least temporarily) all reference to investment agreements, but to be frank that makes little if any difference from OSIA's perspective.

Nothing that would have been covered by paragraphs (a) or (c) would ever relate to our industry; nor would anything covered by paragraph (b) except perhaps for "telecommunications or other similar services", but given that paragraph (b) was about supplying services to the public *on behalf of government*, it seems unlikely that any foreign investor seeking an investment agreement under paragraph (b) would have been a direct competitor to any of our members. So investment agreements were not something that was ever of great concern to OSIA in the first place.

From our industry's perspective, the controversy around ISDS lay with "investments" in general, not with with extra provisions relating to formal "investment agreements".

So, whilst we certainly do not object to the suspension of provisions on investment agreements, that suspension does not alter OSIA's views on the Investment Chapter at all.

### 5.1.2 Definition of "investment authorisation" (Art. 9.1)

These changes relate to investments subject to foreign investment review.

Our industry is not one which is regulated in that manner, so we take no view either way on merits of this suspension.

### 5.1.3 Other suspensions

The suspensions of various parts of Art. 9.19 (Claims of arbitration), Art. 9.22(5) (Selection of Arbitrator), Art. 9.25(2) (Governing Law) and the entirety of Annex L (Investment agreements) merely bring the rest of the Chapter in line with the result of the two suspended definitions—see our comments in Sections 5.1.1 & 5.1.2.

## 5.2 Issues not addressed at all by the suspensions

The CPTPP suspensions to the Investment Chapter of TPP have had no substantive effect on OSIA's view of the Investment Chapter in general, nor of the ISDS provisions in particular.

The three issues we raised with the Committee in 2016[28] all still remain, as noted below. In addition two further issues have emerged, although we stress that those are not due to any changes in the text: we simply didn't notice them during our 2016 analysis of the text (such oversights appear inevitable in a treaty that is almost five times the length of Tolstoy's *War and Peace*; we note also that ISDS provisions in general tend to be notoriously impenetrable, in no small part because by their very nature they tend to turn contractual and regulatory relationships inside-out).

### 5.2.1 CPTPP still turns Australian companies into second class citizens

CPTPP's ISDS provisions in particular remain highly problematic.

As OSIA has brought to the Committee's attention before[29], those provisions grant a new right of action against the Commonwealth to foreign investors, whilst explicitly prohibiting the grant of that same right to domestic investors.

This will turn Australian companies into second-class citizens in our own market.

Our members have no objection to creating a level playing field for genuine competition between domestic and foreign players—after all, the FOSS sector is well known to thrive on competition.

[28] Burton & Foxworthy, *op. cit.*, s. 3, p. 6.
[29] *Ibid.*, s. 3.1, p. 6

But we do object in the strongest possible terms to any arrangement that grants to foreign investors rights denied to Australian companies. Such an arrangement could never be in Australia's best interest and frankly strikes us as the *opposite* of free trade.

### 5.2.2 CPTPP is still inherently discriminatory

We noted previously[30] that TPP had a long list of non-confirming measures (NCMs) in the Annexes and side-letters in relation to the Investment Chapter. There seems little point in having an Investment Chapter in CPTPP if so many NCMs are to be allowed.

Australia has sought only one such measure, in relation to the tobacco industry.

It is clearly discriminatory (and indeed quite bizarre, given the Commonwealth's professed dislike of that industry) that under CPTPP the tobacco industry will end up as the only industry in which domestic and foreign investors are on equal footing with one another, whilst in every other industry (including of course the software industry), Australian companies will be disadvantaged by new rights of action being granted exclusively to their foreign competitors.

### 5.2.3 CPTPP still mischaracterises investment

The definition of investment (also in Art. 9.1) remains far too broad in CPTPP. It still includes:

> "...(f) intellectual property rights;
> (g) licences, authorisations, permits and similar rights conferred pursuant to the Party's law; and
> (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledged."

OSIA has raised TPP's mischaracterisation of "investment" for ISDS purposes with the Committee before[31]. Disappointingly, it has not been fixed in CPTPP.

As we pointed out then, our members enter into copyright licensing arrangements with overseas parties (both as licensors and as licensees) on a daily basis—it is quite absurd to characterise those agreements as "investments".

But it is not our own members' licensing arrangements that concern us here. Rather, we are concerned that the threat of ISDS claims by our members' closed-source overseas competitors may prevent the Commonwealth from enacting sensible reforms to the *Copyright Act 1968* & to the the *Patents Act 1990* and/or from instituting sensible reforms in the field of public software procurement.

### 5.2.4 CPTPP grants new rights retrospectively

The definition of "covered investment" (in Art. 9.1) includes not just investments made after CPTPP comes into force, but also investments "in existence as of the date of entry into force of this Agreement".

That's retrospective action—an aggrieved investor could make an ISDS claim under CPTPP in relation to a new policy change affecting his investment, even if that investment predates TPP (perhaps even by a century or more...).

Retrospective provisions should be avoided in general. In our view, the Committee should apply the same test to retrospective provisions in treaties (other than in treaties entered into for the purpose of ending specific wars, for obvious reasons) that the High Court established for retrospective provisions in legislation: namely that a presumption against retrospectivity should apply whenever the provision in question confers or divests substantive rights (as opposed to being merely procedural in nature).[32]

The ISDS provisions of TPP clearly confer new rights on foreign investors, In our view the retrospective application of those new rights should constitute sufficient cause for the Committee to recommend against ratifying CPTPP.

[30] *Ibid.*, s. 3.2, p. 6.
[31] *Ibid.*, s. 3.3, p. 6.
[32] *Yrttiaho v. Public Curator (Queensland)* (1971) 125 CLR 228.

### 5.2.5 CPTPP discourages technology transfer

Art. 9.10(1) ("Performance requirements, technology transfer & preference") provides that:

> "1. No Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impost or enforce any requirement, or enforce any commitment or undertaking:
> ...
> (f) to transfer a particular technology, a production process or other proprietary knowledge to a person in its territory;
> ...
> (h) (i) to purchase, use or accord a preference to, in its territory, technology of the Party or of a person of the Party; or
> (ii) that prevents the purchase or use of, or the according of a preference to, in its territory, a particular technology; ..."

We realise that, although much of the above is couched in the same language as used for procurement policy, none of the above applies to government procurement, by virtue of Art. 9.10(3)(f). Rather, our concerns here revolve around what happens when domestic policy changes in Australia to the detriment of an investment of a foreign investor.

As an aside, we note also the rather incongruous "...or of a non-Party..." towards the beginning of that provision. We suspect that may be yet another drafting mistake, as it appears to apply Art. 9.10 to investments made by investors from non-TPP countries too, which makes no sense at all in a preferential trade agreement.

Now, knowing that an "investment" by CPTPP's bizarre definition can mean mere IP, or even just a licence, and knowing that "transfer a particular technology ... or other proprietary knowledge" could well apply to the source code of computer programs, it strikes us that the existence of Art. 9.10(1)(f) might encourage certain Commonwealth agencies to dismiss any future proposals of regulating the software market that might be of benefit to the Australian FOSS sector with a blanket "no, because of CPTPP" excuse.

The wording comes across as quite dangerous, especially when read in conjunction with the domestic content provisions of Art. 9.10(4), which state that the above shall not prevent a Party from "imposing or enforcing a requirement, or enforcing a commitment or undertaking, to employ or train workers in its territory provided that the employment or training does not require the transfer of a particular technology, production process or other proprietary knowledge to a person in its territory".

The message we get from that is effectively "buy our technology and we'll let you hire locals to use it, so long as none of them ever try to understand it...".

We can understand why the USTR might have drafted such provisions, as whilst the USA remained a Party they would indeed have given an unfair advantage to certain sectors of US industry. But we cannot understand why, after the US withdrew from TPP, the TPP-11 Parties did not remove (or at the very least "suspend") those harmful provisions from CPTPP.

Whilst it is true that Art 9.10(3)(b)(i) provides that Art. 9.10(1)(f), 9.10(1)(h) & 9.10(1)(i) will not apply to use of IP in accordance with TRIPS Art. 31 (allowable patent exceptions) or disclosure of proprietary information within the scope of TRIPS Art. 39 (protection of undisclosed information) and Art. 9.10(3)(b)(ii) contains a competition policy exception, those are drafted as very narrow exceptions indeed, which fall well short of the mark.

One must ask what possible reasons there can be for retaining those highly US-centric provisions in CPTPP now that the USA is no longer a Party?

# 6 Observations on the Electronic Commerce Chapter

This section doesn't have a "what's changed?" heading, simply because nothing has changed at all. The suspensions in the CPTPP Annex do not apply to any of the provisions of the Electronic Commerce Chapter.

In 2016 OSIA brought to the Committee's attention two issues with TPP Art. 14.17[33] which were of concern to our members in the Australia FOSS industry. The latter issue was also raised with the Committee by Linux Australia[34] as of great concern to Australian FOSS community. Both issues remain outstanding with CPTPP.

Art. 14.17 relates to the transfer of software source code—a matter of great importance to the Australian FOSS industry and indeed to all users and developers of FOSS everywhere. Art. 14.17(1) provides:

> 1. No Party shall require the transfer of, or access to, source code of software owned by a person of another Party, as a condition for the import, sale or use of such software, or of products containing such software, in its territory.

As such Art. 14.17 attempts to override legitimate international copyright licensing agreements.

## 6.1 CPTPP may still hinder enforcement of FOSS licences

The exception in Art. 14.17(3), which allows "the inclusion or implementation of terms and conditions related to the provision of source code in commercially negotiated contracts" appears to have been drafted to prevent the bizarre Art. 14.17 from prohibiting FOSS licences altogether—an aim we certainly support, since if such licences were ever prohibited, our entire industry would cease to exist.

However, by listing only "inclusion or implementation" without any reference to "enforcement", this rather sloppily drafted exception leaves open the question as to whether specific performance of a term requiring transfer of or access to source code could still be available as a remedy for copyright infringement in a case where the licence that was infringed carried terms requiring such transfer or access.

"Copyleft" licences are a class of FOSS licence which require licensees who distribute derivative works to provide their downstream licensees with access to all source code. The most widely used such licence is the GNU GPL[35], which for example is used by the Linux kernel (as found in every Android phone and tablet), the Drupal content management system (which runs the Commonwealth's *GovCMS* platform) and of course the GNU operating system itself, amongst tens of thousands of other free & open source programs.

When licensors of such software bring copyright infringement actions, they almost always seek specific performance, since the utility of a copyleft licence is directly dependent on compliance with its terms.

If the Courts interpret Art. 14.17 as prohibiting them from making orders for specific performance in cases where a copyleft licence has been infringed, a large section of the Australian FOSS industry will be disadvantaged.

[33] Burton & Foxworthy, *op. cit.*, s. 5, pp. 7–8.

[34] Blemings, H. & Stewart, J., *Submission to the Joint Standing Committee on Treaties – Trans-Pacific Partnership Agreement (TPP)*, Linux Australia, 10 Mar 2016. Available at https://www.aph.gov.au/DocumentStore.ashx?id=38187468-9761-4e05-84f1-281ba68e65a8&subId=410396

[35] Free Software Foundation, *GNU General Public License*, Version 3, 29 June 2007. http://www.gnu.org/licenses/gpl-3.0.en.html

## 6.2 CPTPP still blocks future domestic policy reform

Art. 14.17(1) also limits the Commonwealth's scope to institute sensible domestic reforms to copyright law.[36] Whilst exceptions are provided for government procurement[37] and for critical infrastructure software[38] and the definition of "covered person" excludes financial institutions[39], those exceptions are far too narrow to deliver much solace.

One must ask what possible public policy purpose Art. 14.17(1) could serve?

We live today in a world where the privacy and security of individuals, corporations and governments alike is under constant attack. The recent public revelations about Cambridge Analytica, Facebook et al.[40] are still fresh in everyone's minds. But online service providers are not the only vector for such attacks.

For example, the current release of the world's most common desktop operating system exfiltrates user data by default[41]. In that case the vendor in question admitted (rather belatedly) the offending feature and eventually (only after investigations into it were launched by multiple regulators in Europe) agreed to remove some (but by no means all) of the built-in spyware. But many other closed source software vendors who are not of sufficient scale to attract so much attention continue to ship similar privacy-destroying software.

End user trust in software vendors (whether of traditional on-premise software or of cloud services) is rapidly—and quite understandably—declining. The time may soon come when governments will start looking for regulatory solutions to this problem.

To those of us in the FOSS sector, the answer is obvious: a user should not (indeed cannot) trust any software that does not come with the right to inspect and modify its source code (either directly, or by engaging a suitably capable information security firm to do so). All FOSS comes with that right, by definition[42].

In other words, in computer software, access to source code is a necessary pre-requisite for trust. Unfortunately, Art. 14.17 will prevent governments from taking any meaningful steps to act on that realisation for the benefit of their citizens.

By allowing Art. 14.17 to stand, the Commonwealth will be preventing itself from taking steps to address that attack vector—something which is going to become very important in the near future to the security of computing systems for the public sector (including in some military applications), for Australian industry and indeed for the general public. An inability to audit at a sufficiently deep level the hardware and software comprising third party systems exacerbates the risk of malware remaining undiscovered (whether introduced knowingly or unknowingly) in those systems.

[36] For an example of one such reform which Art. 14.17 would block, see Burton & Foxworthy, *op. cit.*, s. 5.2, p. 8; for several others, see Blemings & Stewart, *op. cit.*.

[37] Art. 14.2(3)(a).

[38] Art. 14.17(2).

[39] Art. 14.1.

[40] http://www.abc.net.au/news/2018-04-18/cambridge-analytica-employee-testifies-before-uk-committee/9670192

[41] See for example, https://www.zdnet.com/article/windows-10-privacy-youre-happy-for-us-to-collect-your-data-says-mi https://www.gnu.org/proprietary/malware-microsoft.en.html#surveillance and https://www.forbes.com/sites/gordonkelly/2015/11/02/microsoft-confirms-unstoppable-windows-10-tracking/

[42] Perens, B., *Open Source Definition*, Open Source Initiative, 1998, criteria 2 & 3. Available at http://opensource.org/osd

# 7 Observations on the Intellectual Property Chapter

OSIA previously raised with the Committee[43] no fewer than fifteen serious issues arising from TPP's Intellectual Property (IP) Chapter—by far the most egregious of any Chapter in TPP.

Of those, only eight have been addressed temporarily by the suspensions in the Annex to CPTPP (as described in Section 7.1). Half-hearted attempts to address a further three of those issues have fallen well short of the mark (as described in Section 7.2 and the TPP-11 Parties have failed to address any of the other four (as described in Section 7.3 at all.

## 7.1 Issues addressed temporarily by suspensions

The suspensions provided for in the Annex to CPTPP address eight of the issues with IP Chapter which OSIA raised with the Committee in 2016. At first glance, that may appear to be a relatively favourable outcome for the Australian FOSS industry.

However, as discussed in Section 2.7 & Section 3, those suspensions carry none of the certainty that a complete removal of the offending provisions would have: if the Commonwealth ratifies CPTPP, the spectre of the original provisions returning when "the Parties agree to end suspension of one of more of these provisions"[44] will hang over the heads of our industry like the sword of Damocles.

Nevertheless, the CPTPP suspensions have achieved some incremental improvements—albeit only for the short term—and we address those in the remainder of this section.

### 7.1.1 CPTPP will not extend Crown copyright, yet

As OSIA pointed out to the Committee in 2016[45], TPP Art. 18.63(b)(i) threatened to extend the term of Crown copyright by twenty years[46] Since the purpose of copyright is to encourage the creation and broader dissemination of more and better works and since the Crown clearly does not need to encourage *itself* to do so, that change would have delivered no public policy benefit at all, whilst unnecessarily delaying the entry into the public domain of works published by the government for a further twenty years.

CPTPP suspends Art. 18.63 in its entirety, so the travesty described above will be avoided for the time being.

### 7.1.2 CPTPP will not lock Australia into contemporary terms, yet

The suspension of Art. 18.63 also temporarily avoids locking Australia into its contemporary regime of copyright term lengths in general, which for most works is already 20 years in excess of the global agreed minimum set by TRIPS and clearly long overdue for a downward revision, as noted both by OSIA[47] [48] and by the Productivity Commission[49].

### 7.1.3 CPTPP will not make old technology repatentable, yet

TPP Art. 18.3(2) required Parties to make patents available for "new uses of a known product, new methods of using a known product,or new processes of using a known product", which would have served to stifle innovation in Australia greatly[50].

CPTPP suspends Art. 18.3(2), thus avoiding this problem in the short term.

[43] Burton & Foxworthy, *op. cit.*, s. 6, pp. 9–17.
[44] CPTPP Art. 2.
[45] Burton & Foxworthy, *op. cit.*, s. 6.4, p. 11.
[46] Australia already has a "life plus 70 years" copyright term for works published in the private sector, but maintains the slightly more reasonable "publication plus 50 years" term for works published by the Crown. TPP's IP Chapter failed to include any exceptions for Crown copyright so would have forced an unwanted 20 year term extension into the *Copyright Act 1968* (C'th).
[47] Burton & Foxworthy, JSCOT/TPP *op. cit.*, s. 6.5, p. 11.
[48] Burton & Foxworthy, PC/IP *op. cit.*, s. 3.2, p. 22 & s. 4.1, p. 25.
[49] Productivity Commission, *Intellectual Property Arrangements*, Inquiry Report No. 78, Canberra, 2016, s. 4.4, pp. 127–133.
[50] For more detail, see Burton & Foxworthy, JSCOT/TPP *op. cit.*, s. 6.7, p. 13.

#### 7.1.4 CPTPP will not mandate pointless prohibitions, yet

TPP Art. 18.68 required Parties to maintain draconian prohibitions on circumvention of technological protection measures (TPMs), even when the circumvention is undertaken for purposes other than copyright infringement.

Such prohibitions are already present in the *Copyright Act 1968* (C'th), as a result of the disastrous Australia-United States Free Trade Agreement (which, despite its name, also had very little to do with free trade) and OSIA has argued consistently since 2005 for the repeal or mitigation of these anti-user provisions[51] which serve no useful public policy purpose (since circumvention is by definition only a incidental act—it is only the infringement itself, where present, that requires prohibition).

CPTPP suspends Art. 18.68 in its entirety, again temporarily avoiding locking Australia in to this inappropriate overreach of related rights beyond copyright itself.

#### 7.1.5 CPTPP will not discriminate against end users, yet

TPP Art. 18.82(3) & Footnote 154(a) would have seen Parties constitute "stakeholder organisations" (quasi-judicial non-government bodies) with membership that must include rights-holders and ISPs, but with no requirement for end-user representation and therefore a designed-in bias against copyright consumers.

CPTPP suspends Art. 18.82 in its entirety, along with Footnotes 149–159, which avoids this particular travesty for the time being.

#### 7.1.6 CPTPP will not reverse the presumption of innocence, yet

The suspension of Art. 18.82 and its related footnotes also temporarily avoids the reversal of the presumption of innocence inherent in TPP's ISP enforcement provisions, which is fortunate since no civilised country should ever be forced to legislate that a mere accusation should give rise to a presumption of guilt.

#### 7.1.7 CPTPP will not fail to protect against automated fraud, yet

In our previous submission to the Committee[52] OSIA raised the problem of the automated issuance of fraudulent notices alleging copyright infringement (by so-called "DMCA bots", which have become quite prevalent in the United States since the introduction of the *Digital Millennium Copyright Act 1998* (USA), after which much of the TPP text on ISP enforcement appears to be modelled), against which TPP's IP Chapter failed to guard at all.

The suspension of Art. 18.82 avoids the need for Australia to consider how best to prevent such malicious use of automation by a minority of unscrupulous rights-holders, at least for the time being.

#### 7.1.8 CPTPP will not discriminate against end users again, yet

Also avoided temporarily by the suspension of Art. 18.82 is the sloppily drafted Art. 18.82(7), which requires ISPs to comply with user identification requirements that in many cases simply are not possible.

### 7.2 Issues insufficiently addressed by suspensions

The suspensions provided for in the Annex to CPTPP reduce to some extent but do not address satisfactorily three of the issues with TPP's IP Chapter which OSIA had raised with the Committee previously.

Even the partial amelioration provided by these suspensions is once again (just like their counterparts described in Section 7.1) only temporary and uncertain, due to the non-committal nature of the suspension process (see Section 3).

[51] See Burton & Foxworthy, JSCOT/TPP *op. cit.*, s. 6.8, p. 13 and all the references in footnotes 41 & 42 on that page.
[52] Burton & Foxworthy, JSCOT *op. cit.*, s. 6.14, p. 16.

### 7.2.1 Trade agreements should not contain IP provisions

Whilst CPTPP suspends a wide range of IP provisions (roughly half the provisions suspended by CPTPP were from the IP Chapter), the fact remains that the presence of a Chapter on IP—a field of law which by definition involves the bestowing of limited monopolies—at all in a treaty which ostensibly claims (see Section 2.2 & Section 4.1) to be about free trade is totally incongruous.

Even leaving aside that incongruousness, deliberately partitioning the market for IP-related services & goods by setting different standards in bilateral or regional "trade" treaties than those set in the global or near-global treaties on copyright or patents runs directly counter both to the purpose of copyright & patent law (to promote the creation and broad dissemination of useful works & inventions) and to the espoused goal of free trade.

OSIA has pointed this inconsistency out on multiple occasions[53] as has the Productivity Commission[54].

### 7.2.2 The IP Chapter still contradicts its own stated purpose

If one were to read only the purposive provisions[55] of the IP Chapter, ignoring altogether its substantive provisions, one would get a far rosier picture of what the Chapter seeks to achieve. It almost seems as if those purposive provisions were drafted as marketing copy, to divert public attention away from the highly restrictive (and as a result, generally unpopular) substantive provisions in the rest of the Chapter.

As noted previously[56], the espoused need to "foster competition and open and effective markets" is conspicuously absent from the Chapter's provisions on patents.

Likewise, the "importance of a rich and accessible public domain" is ignored completely by the provisions on retrospectivity and on Government use of software.

Admittedly, the hypocrisy of the benevolent-sounding motherhood statements in the Chapter's purposive provisions was far greater before the original provisions on copyright (including TPMs) and ISP enforcement were suspended. Nevertheless, even whilst those especially egregious provisions remain suspended, the remainder of the Chapter still exhibits a profound lack of the "balance" called for by Art. 18.2, 18.4 & 18.66.

### 7.2.3 CPTPP still extends existing monopolies for no gain

TPP Art. 18.10(1) provides that the IP Chapter shall apply retrospectively. Whilst there is a very narrow exception in Art. 18.10(2), for the most part it seems reasonable to interpret the entire Chapter as applying retrospectively, by virtue of Art. 18.10(1).

Since copyright and patent law exist for the explicit purposes of motivating authors & inventors to produce more or better works & inventions and achieving the broadest feasible dissemination of those works & inventions, it makes no sense at all to apply any IP provision retrospectively—since, in the absence of time travel, it is quite impossible to motivate anybody to do an act *after the act has already been done*.

Admittedly the breadth & depth of damage that Art. 18.10(1) could do has reduced substantially following the suspension of the provisions on copyright term.

Nevertheless, we contend that it is never acceptable for any form of IP provision to be applied retrospectively. What possible public policy benefit could doing so provide?

## 7.3 Issues not addressed at all by suspensions

OSIA and our members remain concerned about the four issues arising from the IP Chapter previously identified which the TPP-11 Parties have made no attempt whatsoever to resolve. The remainder of this sections addresses those issues.

[53] Burton, Holden & Christie, *op. cit.*, s. 1.2, pp. 4–5; Forsstrom & Burton, *op. cit.*, pp. 9–10; Burton & Foxworthy, JSCOT/TPP *op. cit.*, s. 6.1, p. 9; and Burton & Foxworthy, PC/IP *op. cit.*, s. 2.15, pp. 19–20 & s. 4.9, p. 32.

[54] *Bilateral and Regional Trade Agreements, Research Report*, Productivity Commission, 2010, rec. 4, p. 285. Available at http://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf

[55] Art. 18.2, 18.3(2), 18.4, 18.15(1) & 18.66.

[56] Burton & Foxworthy, JSCOT *op. cit.*, s. 6.2, p. 10.

### 7.3.1 CPTPP may still perpetuate the double regulation of software

Software more closely resembles literary works than physical objects or a physical process requiring human intervention; thus it is more suited to copyright than patents.

In the US, a court case found "claims directed to software implemented on a generic computer are categorically not eligible for patents" and that software patents are a "deadweight loss on the nation's economy"[57]. In Australia at present a "computer-implemented invention" can be considered patentable subject matter in certain circumstances[58], whilst computer software at a higher level of generality is not.[59]

Art. 18.37(1) requires that Parties make patents available "in all fields of technology". Thus we have an ambiguity as to whether software can be subject to patents.

It is this "double regulation" that has a profound detrimental effect on progress in the software field due to this ambiguity that allows software to be considered as both patentable and subject to copyright, regardless of the original purposes of both copyright and patent law and the fundamental distinction between the two. Entering into an treaty where the definitions are not clear cut can only lead to further confusion.

### 7.3.2 CPTPP still needlessly restricts judicial discretion

Article 18.71(5) calls for "proportionality between the seriousness of the infringement of the intellectual property right and the applicable remedies and penalties". Yet Art. 18.74(4) & 18.75(5) seek to prescribe what damages should be applied using measures invented by a complainant. It must be remembered in this case that these measures have been influenced by the industry bodies within the United States of America. These self same bodies have already failed at introducing large damages for illegal downloading in Australia due to the judicial discretion. In Australia, while there are legislative upper limits on civil damages, the compensation must fit the degree of damage incurred. These articles remove any pretence at having to justify a complainant's actual damages.

For this reason alone judicial discretion must not be compromised! Only judges should determine a penalty case by case, without undue influence from any other party. Art. 18.74(4), 18.74(5) 18.74(6) & 18.77(6)(a) are hostile to good legal practice and should be removed.

### 7.3.3 CPTPP still expands misuse of criminal law

There is a very strong distinction between civil and criminal law. The goal of criminal law is to protect society at large from destructive acts against social order. Clearly breaches of intellectual property laws protecting patents, trademarks and copyright are a civil matter. They are not an affront to society.

Intellectual property is mostly a social mechanism in order to reward innovation and design. Breaches against a social mechanism are not criminal and should never be classed as criminal. Clearly, when copyright is infringed, the principal damage is suffered by the author, so the need for authors to have access to civil remedies for this copyright infringement under dispute. As such it is the claimant that may or may not, at their discretion, proceed to make a claim for damages.

Thus it is not apparent what, if any, damage the State, rather than the individual, suffers as a result of copyright infringement. So it is difficult to see how the associated criminal offences can be justified. Further by relegating Intellectual Property infringement to being a criminal violation, it then becomes necessary for the state to monitor and prosecute what is essential a civil complaint rather than the complainant.

[57] *Intellectual Ventures v. Symantec Corp* 838 F.3d 1307, (Fed. Cir. 2016)
[58] *International Business Machines Corporation's Application* [1980] FSR 564.
[59] *Commissioner of Patents v. RPL Central Pty Ltd* [2015] FCAFC 177.

### 7.3.4 CPTPP still prohibits government use of public domain software

Art. 18.80(2) provides that:

> "Each party shall adopt or maintain laws, regulations, policies, orders, government-issued guidelines, or administrative or executive decrees that provide that its central government agencies use only non-infringing computer software protected by copyright and related rights, and, if applicable, only use that computer software in a manner authorised by the relevant licence. These measures shall apply to the acquisition and management of the software for government use."

That provisions contains a serious drafting error, which OSIA have brought to the Committee's attention before[60]: software that is already in the public domain (either by virtue of its copyright having expired or, more commonly, by explicit declaration of its author) by definition is *not* "protected by copyright". So, by requiring that Parties permit their governments to "use only ... computer software protected by copyright", Art. 18.80(2) serves to prohibit governments from using software that is already in the public domain—an utterly ridiculous outcome.

In fact, everything after the word "software" in the first sentence of Art. 18.80(2) is either superfluous or counter-productive. A far better way to draft Art. 18.80(2) would be:

> "Each party shall adopt or maintain laws, regulations, policies, orders, government-issued guidelines, or administrative or executive decrees that provide that its central government agencies use only computer software without infringing its copyright. These measures shall apply to the acquisition and maintenance of the software for government use."

Note that, in addition to removing the offending clause we have also changed "management" to "maintenance" (since the former is insufficient to cover infringement of copyleft terms where the agency opts to modify & redistribute the software).

If the TPP Parties had taken the far more sensible approach of involving industry bodies throughout the negotiating process, right down to the drafting level, no doubt OSIA or an equivalent from another TPP nation would have suggested something along similar lines.

Thus Art. 18.80(2) in its own right provides two compelling reasons why the Commonwealth should not ratify CPTPP: firstly, it is clearly unacceptable to prohibit the government from using software that is already in the public domain; and secondly Art. 18.80(2) provides a textbook example of why the Australian Government should *never* negotiate a treaty that's supposedly about trade without providing all interested industry bodies with the opportunity to review, comment on and suggest improvements to the draft text, as it is being negotiated.

[60] Burton & Foxworthy, JSCOT/TPP *op. cit.*