

Foreign Affairs, Defence and Trade Committee  
Department of the Senate  
Parliament House, Canberra ACT 2600

*Via email to: [fadt.sen@aph.gov.au](mailto:fadt.sen@aph.gov.au)*

31<sup>st</sup> October 2016

**Re: *Trans-Pacific Partnership Agreement (TPP)***

Dear Committee Secretary,

Electronic Frontiers Australia (EFA) appreciates the opportunity to provide this submission in relation to this consultation. EFA's submission is contained in the following pages. EFA is happy to provide further information, if required.

**This submission is not confidential and is intended to be made public, in full.**

#### **About EFA**

Established in January 1994, EFA is a national, membership-based non-profit organisation representing Internet users concerned with digital freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of digital communications systems.

Yours sincerely,



Jon Lawrence  
Executive Officer, on behalf of EFA's Policy Team

## Submission regarding the Trans-Pacific Partnership Agreement (TPP)

### 1. General Comments

#### 1.1 Secrecy of negotiations

EFA believes that the secrecy surrounding the negotiations of the Trans-Pacific Partnership (TPP) fundamentally undermines the legitimacy of the agreement. Such an approach is inherently anti-democratic and has led to an outcome that clearly favours the interests of a select group of corporations and industry sectors, who have had privileged access to and input to the negotiating process, at the expense of consumers and society more generally.

#### 1.2 Economic benefits for Australia

As the Productivity Commission has concluded, Bilateral and Regional Trade Agreements (BRTAs) tend to lead to ‘modest’ increases in national income, and that there is “little evidence from business to indicate that bilateral agreements to date have provided substantial commercial benefits.”<sup>i</sup>

In addition, the World Bank has recently concluded that the TPP will lead to an increase of only 0.7% of GDP by 2030.<sup>ii</sup>

EFA is therefore concerned that there is very little net economic benefit for Australia from this treaty, and that any such benefit will be significant outweighed by the potential for serious harm to Australian consumers and Australia’s digital economy, as detailed below.

#### 1.3 Significant changes resulting from final ‘legal scrub’

EFA is also concerned about the significant change to the criminal penalties associated with copyright infringement that appears to have resulted from the final ‘legal scrub’. This apparent change is detailed in an article available on our website.<sup>iii</sup> If this change is what it appears, it represents a very troubling further escalation in unnecessary and unjustified criminalisation of copyright-associated enforcement matters included in this treaty.

### 2. Intellectual Property Chapter

The basis for Copyright law is to provide a limited monopoly to support investment by those seeking to secure such rights and to provide remuneration, and an ongoing incentive for the creation of original works. EFA believes that copyright laws should strike a balance between the interests of rights holders, service providers and public institution use(s) of content. This balance ought to be focused on end-user accessibility and fair pricing of copyright protected works.

The TPP seems to echo EFA’s view of the aim of copyright laws as stated in Articles 18.2 and 18.4, where it is written that the objective of the TPP is to foster “social and economic welfare” and that the underlying public policy considerations of the treaty include the need to:

- (a) “promote innovation and creativity;
- (b) to facilitate the diffusion of information, knowledge, technology, culture and the arts; and
- (c) to foster competition and open and efficient markets.

through the parties' respective intellectual property systems, while respecting the principles of transparency and due process, and taking into account the interests of the relevant stakeholders, including right holders, service providers, users and the public."

Nonetheless EFA believes that the TPP has failed to achieve the above outcomes as detailed below.

### **2.1 Copyright term**

EFA submits that Article 18.63 of the TPP's Intellectual Property Chapter enshrines an extensive term for copyright protection. EFA is aware that this copyright term is already in existence in Australian domestic law but submits that this protection period has been so extended as to bear no resemblance to the original objectives of copyright to provide protection for a limited period before returning materials to the public domain. EFA submits that the harmonisation of the term for protection as (with some exceptions) 70 years after the death of the author continues to promote a disproportionate focus on rights holders. EFA submits that the TPP should reflect a modernised view of copyright with the underpinning value of accessibility which is best achieved through a reduction of the copyright term.

### **2.2 Unauthorised copying**

EFA rejects the assertion that unauthorised copying of copyrighted content represents a serious threat to the continued profitability of content creators and owners, thereby threatening the ongoing investment in new content creation and distribution. On the contrary, there is strong evidence that the content industries remain strongly profitable, despite the significant changes in technological and market conditions over the last 10-15 years, and EFA believes that promoting greater legitimate access to content will lead to increased revenue for the content industries. In the alternative, EFA recommends that the TPP should be ratified in a way that expressly recognises the importance of fair pricing and accessibility of content.

### **2.3 Fair Use**

Article 18.65 confines any limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of a work and do not unreasonably prejudice the legitimate interests of the right holder. It also does not extend the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne Convention, the WCT or the WPPT. This has been traditionally called the "three-step test".

The three-step-test negates the balance between exclusivity and access that should be in any mature copyright system. Its focus, as with the entire structure of minimum rights, is geared towards protecting rights of authors or, in the case of TRIPS, "right holders," over the interests of society and the general public. EFA is of the opinion that cumulative application of the three steps, as its wording requires, heavily tilts the balance in favour of the right holders. Finally, the test fails to take into account the justified needs of developing nations. EFA is concerned that that the three-step test provision in trade agreements, such as the TPP, will actually restrict fair use and other copyright exceptions and limitations crucial for the progress and access of culture, science, education, and innovation.

EFA is of the opinion that a broad, technology neutral fair use provision(s) is not only in the best interests of users but also content owners because it will bring more certainty into economic

transactions and also allow users to legitimately share content for non-commercial purposes, which provides additional beneficial exposure for content owners. EFA additionally submits that a broad fair use exception should be complemented by clear policy and judicial guidelines regarding the scope, purpose and application of fair use exceptions (in more expansive terms than the current ‘fair dealing’ exceptions under Australian copyright law). EFA makes this submission as it is important that consumers and rights holders alike are able to use works with certainty without the need for (expensive and lengthy) litigation.

EFA reiterates that a broad and technology neutral fair use exception with clear policy and judicial guidelines is fundamental to achieving a balance between consumers’ and rights holders’ rights. This may include penalties against rights holders that pursue frivolous take down notices and options for consumers to defend themselves against take down notices without having to resort to legal action.

## 2.4 Enforcement

The TPP feebly promotes user rights in Article 18.3 subsection 2 where it states that appropriate measures may be needed to prevent the abuse of intellectual property rights by rights holders. However, it then goes on to state that these measures are only appropriate as long as they are consistent with the provisions of the TPP and do not unreasonably restrain trade or adversely affect the international transfer of technology.

The qualification included in Article 18.3 ensures that any protection against abusive enforcement tactics afforded to users is severely watered down by requiring any protections to be TPP compliant and not *harmful to trade*. By continuously including a requirement for the TPP to be trade friendly, the TPP ensures that the objectives in Article 18.2 to foster social *and* economic welfare are not met as the economic outcomes and the content of the TPP are prioritised at every turn.

In making this assertion, EFA would like to draw special attention to the recent Federal Court Decision in *Dallas Buyers Club LLC*<sup>v</sup> which demonstrates that content owners are likely to abuse onerous enforcement mechanisms in order to maximise their economic return.<sup>v</sup> Users will not be adequately protected against such enforcement mechanisms if economic considerations are at the forefront of this debate.

Furthermore, aggressive enforcement actions and inflexibility in the face of changing technological and market conditions, particularly within the music and movie industries, have led to the discrediting of the entire copyright regime in the eyes of many Australians, particularly younger generations. The complexity of the present regime and references to out-dated technologies, increases disregard for copyright law as being “out of touch” with current realities. The implications of the discrediting of this area of law should not be underestimated as it feeds into a wider disenchantment with the legal system and a general lack of political engagement that has the potential for negative effects on the operation of Australian democracy.

EFA believes that there is clear evidence that the vast majority of Australian consumers are very willing to consume content legally, where it is available at a fair price, and in a convenient and timely manner. EFA therefore believes that the balance of Australia’s copyright regime should be adjusted significantly to ensure that the rights of consumers and other content users to access content

according to the principles of fairness and accessibility are greatly enhanced. EFA believes that this approach will be beneficial to all parties, including rights holders.

To support this assertion, EFA emphasises that recent decreases in content piracy<sup>vi</sup> are not to be attributed to the success of the current copyright scheme as much as they are a testament to its failure in finding adequate deterrents to piracy. Reports by both Spotify and consumer advocacy group Choice have shown that, following the introduction of low cost streaming services, such as Spotify, Netflix and Stan, piracy rates have dropped by up to 20%.

Corporations may remain capable of bearing the increased cost of our copyright system, in part because they have ways to recoup those costs through an ability to effectively exploit markets. Individuals, increasingly in the possession of tools that facilitate the use and reuse of existing materials, cannot as easily shoulder the burden on creativity that copyright creates.<sup>vii</sup>

EFA submits that Australia's copyright regime should only be adapted to place a greater emphasis on ensuring that the rights of end-users and consumers are clearly safeguarded by the principles of fairness and accessibility.

## **2.5 Criminal liability**

EFA disagrees that criminal sanctions should be applicable to the activities listed in Articles 18.68 and 18.69.

EFA believes that criminal penalties ought not to apply to copyright disputes. Criminal sanctions will only increase the imbalance between right holders and consumers. .

EFA submits that compliance should be incentivised through greater availability of fairly priced and easily accessible content.

## **2.6 Digital Rights Management**

Enforcement tools like Digital Rights Management disproportionately advantage rights holders as they restrict consumers from interacting with copyrighted works in a manner that historically would have been permissible and has become expected, such as loaning a book to a friend or the conversion of files for legitimate purposes.

EFA opposes that circumvention of Digital Rights Management mechanisms is punishable by default even if no copyright infringement occurs. This provision is blatantly disregarding the objectives of the TPP which is a balanced copyright system between multiple stakeholders including users (and members of democratic society).

## **3. Electronic Commerce and Telecommunications Chapters**

The TPP's Electronic Commerce and Telecommunications Chapters establish only the weakest baseline for the protection of users' private data—even enforcing self-regulation by the companies that profit from user data is enough. Furthermore, stronger privacy laws are outlawed if they amount to an “arbitrary or unjustifiable discrimination or a disguised restriction on trade.”

EFA believes that this blatantly disregards user rights and interests and. EFA recommends comprehensive and technology neutral privacy legislation that prioritizes user rights and privacy

irrespective of the effect any restricted exploitation of data may have on trade. EFA recommends this because EFA is of the opinion that in a democratic society, a user's rights to privacy and free speech are paramount to all other private interests.

#### 4. Conclusion

EFA submits that the TPP has failed to internationalise a balanced and modern copyright regime and is instead a reflection of controversial concepts and ideas which negatively impact users and have not been proven to increase innovation and creativity so as to justify this invasion of user rights.

These issues, combined with the illegitimacy inherent in the negotiating process, EFA firmly believes that the TPP will cause harm to Australian consumers and to the Australian economy, particularly in the digital context.

EFA therefore recommends that Australia should not ratify the Trans-Pacific Partnership Agreement.

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<sup>i</sup> See: <http://www.pc.gov.au/inquiries/completed/trade-agreements/report>

<sup>ii</sup> See: <http://pubdocs.worldbank.org/pubdocs/publicdoc/2016/1/847071452034669879/Global-Economic-Prospect-2016-January-2016-Implications-Trans-Pacific-Partnership-Agreement.pdf>

<sup>iii</sup> See: <https://www.efa.org.au/2016/02/20/sneaky-change-tpp/>

<sup>iv</sup> *Dallas Buyers Club LLC v iiNet Limited* [2015] FCA 317.

<sup>v</sup> See: <http://www.zdnet.com/article/dallas-buyers-club-decision-federal-court-mans-slucice-gates-to-hold-back-excessive-damages/>

<sup>vi</sup> See: <https://torrentfreak.com/spotify-music-piracy-down-australia-140910/> and <http://mashable.com/2015/09/04/piracy-levels-australia/>

<sup>vii</sup> Lydia Pallas Loren, 'Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright' (2007) 14 Geo. Mason L. Rev. 271, 273.