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Ms Tegan Brink
Assistant Secretary
Goods and Investment Branch
Department of Foreign Affairs and Trade
RG Casey Building
John McEwen Crescent
Barton, ACT 0221

Dear Ms Brink

Re: Intellectual Property and the Trans-Pacific Partnership (TPP) Agreement

I am writing to advise you of the ACCC's views regarding the TPP's potential implications for reform of domestic intellectual property laws.

When providing its submission to the Productivity Commission inquiry into Australia's intellectual property system in November 2015, government had recently published the text of the TPP along with advice that the TPP would not require changes to Australia's existing intellectual property laws. However government had not provided a view as to whether reform of these laws could be made more difficult by the TPP becoming binding.

As part of its submission to the PC inquiry, the ACCC expressed concern that the TPP appears to impose IP restrictions beyond existing international treaties, and this may tilt the balance in favour of IP rights holders to the detriment of competition and consumers.

An example of such a provision is Article 18.66 (Balance in Copyright and Related Systems), which does not appear to have a direct parallel in the other international trade agreements to which Australia is a party.

Article 18.66: Balance in Copyright and Related Rights Systems

Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.

The ACCC submission further stated that the investor-state dispute settlement (ISDS) provisions could operate in conjunction with such provisions to further impede domestic reforms in the public interest.¹

¹ ACCC submission to the Productivity Commission Inquiry into Intellectual Property Arrangements in Australia, 30 November 2015, pp. 18-19

Our specific concern was that government could be discouraged from pursuing reform of Australia's IP laws that would facilitate innovative business models that potentially disrupt markets and boost competition, such as the introduction of a fair use exception or similar in Australia's copyright law. In addition, there was potential that rights holders would seek IP laws to be changed should innovative firms enter Australian markets, on the basis that the laws no longer struck an appropriate balance.

Information since received

More recently, the Department of Foreign Affairs and Trade (DFAT), as the policy department leading negotiations on the TPP, has provided us with additional information on the TPP's Intellectual Property Chapter and the potential operation of the ISDS provisions in connection with intellectual property rights. In this regard, DFAT has advised us that

- The TPP does not generally provide for more extensive obligations than many of Australia's existing intellectual property commitments under international treaties.
- Article 18.66 (Balance in Copyright and Related Systems) complements the balancing provisions of the TPP set out in Articles 18.2, 18.3, 18.4 and 18.5. DFAT does not understand the balancing provisions in the TPP to alter Australia's existing international obligations relating to IP protections, but rather to confirm Australia's ability to introduce limitations or exceptions to copyright protections which reflect an appropriate balance between the rights of owners and users of copyright content.
- Fair use exceptions exist in a number of TPP jurisdictions, such as the United States, Canada, the Philippines and Korea and are broadly understood to fall within the Limitations and Exceptions provisions in international intellectual property law (e.g. Article 13 of the TRIPS Agreement, the WIPO Copyright Treaty, the WIPO Performers and Phonograms Treaty and many FTAs). The TPP provision is contained in Article 18.65 and is not materially different from TRIPS. Underpinning this provision is a "three-step test" for considering whether a limitation or exception is permissible. These steps require that limitations or exceptions must be confined to: (1) special cases; (2) that do not conflict with the normal exploitation of the copyright material; and (3) do not unreasonably prejudice the legitimate interests of the rights holder.
- While the specific details of any fair use exception would need to be reviewed in light of these commitments, DFAT's view is that any fair use exception developed in Australia is likely to meet the "three-step test". DFAT further notes that the Australian Law Reform Commission shares this perspective.
- ISDS provisions, while not provided for in the Australia – US Free Trade Agreement, are a feature in a number of other trade agreements to which Australia is a party. Under the TPP, an ISDS claim can be brought only in relation to commitments in the Investment Chapter and a limited number of commitments in the Financial Services Chapter, including obligations:
 - to provide non-discriminatory treatment to foreign investors;
 - to facilitate investment-related capital transfers;
 - to provide minimum standards of treatment, such as due process in court proceedings and police protection for physical assets; and
 - to ensure prompt, adequate and effective compensation if an investor's property is expropriated.

- It is difficult to see how a fair use exception to copyright could be considered an expropriation. The standard for expropriation is clearly defined in the TPP in the Annex on Expropriation, which reflects the customary international law standard. For a government measure to be considered an expropriation, there has to be a substantial deprivation of a property right.
- Further, a key factor considered by a tribunal in determining whether there is an expropriation is the extent to which the measure impacts distinct, reasonable, investment-backed expectations (e.g. written assurances). In the case of fair use, where reforms have been actively discussed for some time, there could be no expectation whatsoever that would meet this standard. In addition, the tribunal would also look to the nature and purpose of the measure, in particular, whether it is non-discriminatory and non-protectionist.
- While the IP Chapter is not directly relevant to the interpretation of the Investment Chapter of the TPP, it would provide relevant context within the meaning of Article 31 of the Vienna Convention on the Law of Treaties. The fact that a fair use exception would be consistent with the TPP's IP Chapter would provide strong contextual support for its consistency with the Investment Chapter.

Lastly, DFAT provided additional information on whether removing restrictions on the parallel importation of books would be consistent with the TPP. DFAT has stated that the TPP does not prohibit parallel importation and explicitly leaves TPP parties policy flexibility to allow for parallel imports of intellectual property-protected goods, including for books.

Conclusion

Having considered this additional information, the ACCC has no present reason to believe the TPP will be an impediment to a number of potential pro-competitive reforms of Australia's intellectual property laws.

I would like to thank you for the information and assistance that the department has provided to the ACCC on this matter.

I will provide a copy of this letter to the Productivity Commission so that it is aware of the further information that the ACCC has received and the conclusion that it has drawn based upon that information. Please feel free to provide a copy of this letter to other parties as you consider appropriate.

If you or your staff have any further queries regarding this letter, please contact:

- Bruce Cooper, General Manager—Strategy, Intelligence, International and Advocacy,
- Sean Riordan, General Manager—Industry Structure and Compliance,

Yours sincerely

Michael Cosgrave
Executive General Manager
Industry Regulation Division