



Linux Australia

ABN: 56 987 117 479

GPO Box 4788 Sydney NSW 2001 Australia

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**Intellectual Property Arrangements**

Productivity Commission

GPO Box 1428

Canberra City ACT 2601

**Subject:** Submission to the Productivity Commission – Intellectual Property Arrangements

To the Commission,

This submission is made in response to a *Call for Submissions* by the Productivity Committee on Intellectual Property Arrangements in Australia

Linux Australia is the peak governing body for Open Technology in Australia, including the rapidly growing Open Source Software and Hardware industries. We represent the thousands of Open Source users and developers within Australia.

The rise of Open Source software has demonstrated significant benefits to both public and private industry, becoming an increasingly critical aspect of large IT projects. The use of Open Source Software and Open Standards is now a required consideration in government tenders, and initiatives such as data.gov.au demonstrate the added value these technologies provide for innovation - a flagship of the government's future policy agenda.

**Intellectual property and Open Source**

Intellectual Property, in particular copyright, is something that is critically important to open industries, though there remains a common misconception that this is not the case and that open source is the same as the Public Domain. Indeed, the Commission's draft report contains the following (Page 244 - Section 8.3 'Are patents for business methods and software effective and efficient?'):



*“In the case of software developments, many owners do not protect their content at all. Indeed, rather than seek protection some developers share their code and encourage third parties to copy and contribute to the development of their software. This approach, referred to as open source...”*

Whilst it is true that some software developers choose to release their products in this manner (i.e. in the Public Domain), the vast majority of open source software is released under enforceable copyright licenses (E.g. the GNU General Public License aka GPL) in much the same way as closed-source software. In the case of open source software however, these licenses allow for the use of the software and code in ways that are not generally permitted under a closed source arrangement, provided that certain conditions are met. Not only does the developer retain and protect full copyright ownership of the work, but they allow (by license) the use of this content under terms that specifically promote its shared use and continued development.

Critically it is these license requirements that allow open source to grow in the way it has. Without them, many of the benefits that have arisen from open industries would not have been possible. Such licenses, like any intellectual property license, rely upon the laws of a country to be of any value. Whilst we support the Commission’s comments acknowledging the societal and economic benefits of open source intellectual property, we believe it is important that the above paragraph from the Draft report be altered to more accurately reflect how copyright functions with open source licenses.

### **Patent Considerations**

Increasingly, the use of patents to cover software-only concepts has posed a growing threat to the open source industry, something the Commission acknowledges on Page 246:

*“developers of Open Source Software are relatively vulnerable to patent infringement claims, particularly in respect of ‘trivial’ patents”*

Whilst Australia has to date been more restrictive when it comes to granting software patents than other countries, Linux Australia is concerned that this may not remain the case. We therefore strongly support the Commission’s conclusion that software continue to be considered a non-patentable subject matter.



## Copyright Terms

The Commission's Draft report provides an excellent analysis of the benefits and impacts related to copyright terms and how they are applied. Linux Australia supports the contention that current Australian Copyright law is outdated and fails to adequately protect the rapidly evolving world of digital content, particularly as it relates to open source. As the nature of copyrighted content has evolved, the way copyright itself is used has also changed. The rise of enforceable open licenses (sometimes referred to as 'Copyleft' licenses) shows a usage of copyright laws very different from any original intent, namely to promote (and indeed require) continued open use. We note as an example of this the Commission's choice to make this draft report available under a Creative Commons license, encouraging its distribution.

Such uses of copyright law in new and innovative ways should be recognised and considered in any proposed changes.

## International Context

Linux Australia has made submissions to both the Department Foreign Affairs and Trading (DFAT)<sup>1</sup> and the Joint Standing Committee on Treaties (JSCOT)<sup>2</sup> that have focussed largely on the potential impact of the Trans Pacific Partnership (TPP) on Australian IP laws. Most recently in our submission to the JSCOT, we highlighted several concerns with the wording of the TPP text.

**Concern 1** - Wording in the TPP will likely prevent governments from being able to enforce their own copyrights should they choose to release software under an open source license. Given the growing importance of open data and open gov. movements, this is a significant concern that has not been adequately addressed.

**Concern 2** - Should the TPP be ratified, Australian governments would likely be unable to enforce any laws that require companies to release source code. As software becomes an increasingly important component our lives (E.g. Vehicle safety/emissions etc), transparency laws that require source code being made available may be beneficial. Under the TPPs IP restrictions however, this would not be possible.

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<sup>1</sup> [http://dfat.gov.au/trade/agreements/tpp/negotiations/Documents/tpp\\_sub\\_linux.pdf](http://dfat.gov.au/trade/agreements/tpp/negotiations/Documents/tpp_sub_linux.pdf)

<sup>2</sup> [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties/9\\_February\\_2016/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016/Submissions) (Submission number 128)



We urge the Commission to read Linux Australia's submissions for further detail and analysis of these scenarios.

Fundamentally, Linux Australia is opposed to Australian IP laws being made, restricted or mandated by international treaties. We believe that Australian governments should be free to research and enact changes to these laws as they see fit and in the best interests of the country, unencumbered by restrictive trade agreements.

As digital technology continues to disrupt and influence all facets of our lives, our regulatory models and mechanisms must also evolve. Overall, Linux Australia commends the Productivity Commission on its Draft report. In addition to the points addressed previously in this submission, we support the Commission's conclusions and recommendations around shorter copyright term lengths, a broader 'fair use' classification, open access policies for government funded research and the expansion of existing 'safe harbour' laws.

We thank the Commission for the opportunity to make this submission.

Sincerely

Hugh Blemings, President

On behalf of the Linux Australia Council