The Trans-Pacific Partnership: a knockout blow for innovation?

Free trade: it sounds good for innovation, doesn’t it? Well, not necessarily - and here’s why.

The Trans-Pacific Partnership (TPP) is a free trade agreement under negotiation among various Pacific Rim countries, including Australia. The negotiations, which started in 2010 and are currently underway in Peru, have been controversial because they have taken place in secret, away from the public.

While the proposed TPP text has been circulated to corporate lobbyists including the Motion Picture Association of America (MPAA), civil society organisations have mostly been locked out of the negotiations.

Despite this, a version of the Intellectual Property Chapter of the TPP was leaked in 2011, with some updated negotiations leaked last summer. Concerns about the health implications of the TPP have already been raised.

Yet the TPP also contains bad news for Australian innovators and internet users.

How copyright can go wrong

The first concern about the TPP is its Article 4, on “Copyright and Related Rights”.

It extends the terms of protection of these rights to the life of the author, plus 70 years. Although this is already part of Australia’s law since 2006, it goes beyond the life plus 50 years from the Berne Convention and will bring all the signatory countries in line with US law.

Copyright extensions have been criticised as being “bad for innovation, bad for the economy and bad for our culture”. This is because extending copyright protection delays creative material going into the public domain and restricts the re-use and remix of older material into something new and innovative.

It also benefits established artists and corporate rightsholders who have bought the rights from the original innovators, at the expense of emerging creators.

Article 4 also prohibits the circumvention of technical measures which are used to protect copyrights. These measures include the restrictions on music files which prohibit the user making copies, on DVDs which prevent the DVD being played in a different region, and on e-books which stop them being read aloud by the computer.

There are some very limited exceptions to this rule, such as for researchers who are trying to ensure the interoperability of computer programs and to investigate security flaws.

Although technical protection measures can protect against copyright infringements, they can also stop plenty of perfectly legal uses of protected material. The circumvention of technical protection measures can be done for legitimate reasons, such as for promoting competition and facilitating innovation.

Yet this is not included in the TPP’s text, and currently the breaking of a technical protection measure will be prohibited, even if it does not constitute a copyright infringement.
A similar provision has been part of Australian law since 2006. However, the Attorney-General is currently reviewing technical protection measures exemptions. If Australia signs up to the TPP, this could cause a conflict with any new exemptions that the review recommends, such as for format-shifting (taking content from a CD or DVD and putting it on a hard drive), and backing up legally-bought digital content.

Browser cache … or cake. Rakka

A new aspect of Article 4 for Australia is that it prohibits making temporary copies of copyrighted material, including temporary storage in electronic form.

Yet web browsers make these temporary copies, called “caches”, in their normal functioning. Surfing the web would be impossible without the ability to make temporary copies. The UK Supreme Court recently decided that temporarily stored web pages which contained copyrighted material were not an infringement of these rights. Otherwise, millions of ordinary people would be infringing copyright every time they browsed the web, which would be an “unacceptable result”.

No fair use exception? Fair go!

It follows that there is no “fair use” exception spelled out in this part of Article 4, so it is unclear whether these technical protection measures can be circumvented for that purpose too.

Fair use is an exception to the exclusive right granted in US copyright law which allows limited uses of the copyrighted material without having to ask the owner’s permission. These uses include, but are not limited to: criticism, comment, news reporting, teaching, scholarship and research.

The Australian Law Reform Commission may well be recommending a “fair use” exception here later this month, but this may not be of much benefit to Australian users in practice if it is not included in the TPP.

In the US, similar measures prohibiting the circumvention of technical protection measures (contained in the Digital Millennium Copyright Act) have, in practice, restricted fair use and been harmful for citizens. For instance, it is currently illegal to unlock your mobile phone in the US, or “jailbreak” your tablet computer since to do so you have to circumvent technical protection measures.

Furthermore, the leaked negotiations from last year seem to show that Australia actually supported the US in trying to restrict the application of these “national” exceptions to copyright infringement.

As well as entrenching longer copyright terms, prohibiting the circumvention of technical protection measures and extending the scope of copyright infringements, the TPP also applies to the enforcement of copyright.

the justified sinner

Article 16 of the leaked text introduces a private system of copyright enforcement online by involving service providers such as Internet Service Providers (ISPs) or online cloud operators in the policing of copyright infringement by their users, terminating the accounts of users who are “repeat infringers” and passing on personal information about their users to copyright owners.

This would appear to mandate a massive filtering and surveillance programme of internet users, similar to that abandoned last year by the Australian Federal Government.

In 2011, the Court of Justice of the European Union struck down a similar scheme in Belgium which involved the total monitoring of internet users, for not striking the right balance between internet users’ rights to privacy and free expression, and intellectual property rights.

So what do we do?

From what we know of the TPP, it seems that it will introduce a very restrictive regime regarding copyrighted material and its enforcement, and not be in the best interests of Australian users in terms of their internet access,
privacy, free expression, and potential “fair use” exception that might be introduced with domestic law reform.

The Fair Deal coalition, which includes Electronic Frontiers Australia (of which I am a board member), is campaigning against these aspects of the TPP and the influence of large corporations and industry bodies in the negotiations of this treaty.

Let’s hope it pays off so innovators and internet users can breathe freely again and we have common sense laws for the digital age!