

ARTICLE 19

Trans Pacific Partnership Agreement: Intellectual Property Chapter

November 2013

Legal analysis

Executive summary

On 13 November, Wikileaks published a full draft of the IP Chapter of the Trans Pacific Partnership Agreement ('TPP'), a multilateral trade agreement negotiated largely in secret by 12 countries in the Asia Pacific region. The draft text, which runs to 95 pages, dates from August 2013 and is the most up-to-date version of a document that has only been made available for public scrutiny through a series of leaks. It gives, for the first time, an insight in the positions of the 12 countries, which are party to the negotiations of the TPP.

In this analysis, ARTICLE 19 reviews specific provisions of the Draft TPP related to copyright for their compliance with international human rights standards

The leaked text confirms many of the concerns that have been expressed by ARTICLE 19 and other civil society groups, namely that the US-led proposals in the Intellectual Property (IP) Chapter – often supported by Australia and Japan – would severely infringe Internet users' rights to freedom of expression, privacy and due process online. If adopted, signatory countries would be compelled to adopt far more restrictive copyright enforcement measures than are currently required under international copyright treaties. Several countries, such as Chile or Canada, could be forced to significantly amend their domestic copyright law in the absence of democratic oversight as the TPP negotiations have been held largely in secret.

At the same time, the leaked text reveals that there are profound disagreements between the negotiating parties, notably concerning copyright terms, intermediary liability, criminalisation of non-commercial copyright infringement and digital locks provisions. In contrast to the US aggressive proposals, countries such as Chile, Canada and New Zealand generally seek to promote more balanced intellectual property policies that better protect Internet users' rights. It is therefore questionable whether the TPP negotiators will achieve their target of concluding the agreement by the end of 2013.

It is clear that secrecy of the TPP negotiations is motivated by attempts to avoid public scrutiny over this document. Hence, as the negotiations draw to a close, ARTICLE 19 calls on the TPP member states to release a complete, up-to-date, draft text of the TPP so as to enable meaningful scrutiny of the agreement by all stakeholders concerned.

We further urge the TPP negotiators to follow our recommendations regarding the protection of fundamental rights in the IP Chapter of the TPP.

Summary of recommendations

1. Given the potential impact of the TPP on human rights, the negotiations should be transparent: the draft texts of the agreement and state positions on it should be made public on regular basis and should include a process for comments by all stakeholders.
2. Member states must subject the TPP to strict scrutiny as part of the ratification process.
3. The TPP should include a provision dealing with "objectives" following the original proposals made by New Zealand, Chile, Peru, Vietnam, Brunei Malaysia, Singapore, Canada and Mexico;
4. General provisions dealing with "objectives", "principles" or "implementation" should make express reference to the importance of protecting the rights to freedom of expression, privacy and due process and more generally make reference to users' "rights".

5. Temporary copies should be a clear exception to copyright protection;
6. Copyright terms should be no longer than necessary so as not to impair the right to freedom of expression. For works created by individuals, this means that copyright protection should last no longer than life of the author;
7. Proposals to extend retroactive IP protection to subject matter already in the public domain should be firmly rejected.
8. Internet intermediaries should benefit from broad immunity from liability. They should not be encouraged to monitor their networks. Nor should they be encouraged to implement “three-strikes” policies. Disconnection from the Internet on copyright grounds should never be permitted.
9. Non-commercial copyright infringement should not be criminalised;
10. The circumvention of TPMs should not be criminalised. At a minimum, any criminalisation of circumvention of TPMS should be linked to actual copyright infringement. Any exceptions to provisions criminalising circumvention of TPMs should be broadly drafted.
11. If statutory damages are available for non-commercial infringement, they should be capped so as not to impose a disproportionate restriction on the right to freedom of expression.
12. Limitations and exceptions to copyright should be broadly drafted and interpreted;
13. Arbitration tribunals should not be used to deal with copyright claims.



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Introduction

On 13 November 2013, Wikileaks published a full draft of the IP Chapter of the Trans Pacific Partnership Agreement (TPP), a multilateral trade agreement negotiated largely in secret by 12 countries in the Asia Pacific region. The draft text, which runs to 95 pages, dates from August 2013 and is the most up-to-date version of a document that has only been made available for public scrutiny through a series of leaks. It gives, for the first time, an insight in the positions of the 12 countries, which are party to the negotiations of the TPP.

Negotiations on a multilateral trade agreement began in 2005 between Chile, Singapore, New Zealand, and Brunei Darussalam. In September 2008, the US Trade Representative announced that the US would take part in the negotiations. Australia, Vietnam and Peru announced that they would join the talks shortly thereafter, followed by Malaysia in 2010, and Canada and Mexico in 2012. Japan was the last country to join in 2013.

TPP negotiators have stated their intention to adopt an ambitious, 21st century trade agreement aimed at promoting innovation, economic growth and supporting job creation between its member states. The TPP thus covers several different areas, including trade, investment, and the protection of intellectual property rights. In particular, the Intellectual Property (IP) chapter addresses issues such as patents and access to medicines, copyright & trademark enforcement online, intermediary liability and anti-counterfeiting measures. While the Obama administration has described the TPP as a modern and forward-looking agreement, it has been dubbed the “new SOPA” or “Hollywood’s wish list” by digital rights and consumer groups. If adopted, the TPP will apply to 792 million people.

The leaked text confirms many concerns of civil society groups, including ARTICLE 19, that the US-led proposals in the Intellectual Property (IP) Chapter – often supported by Australia and Japan– would severely infringe human rights of Internet users, in particular the rights to freedom of expression, privacy and due process online.

If adopted, signatory countries would be compelled to adopt far more restrictive copyright enforcement measures than is currently required under international copyright treaties. Several countries, such as Chile or Canada, could be forced to significantly amend their domestic copyright law in the absence of democratic oversight as the TPP negotiations have been held largely in secret.

At the same time, the leaked text reveals that there are profound disagreements between the negotiating parties, notably concerning copyright terms, intermediary liability, the criminalisation of non-commercial copyright infringement and digital locks provisions. In contrast to the US aggressive proposals, countries such as Chile, Canada and New Zealand generally seek to promote more balanced intellectual property policies that better protect Internet users’ rights.

In this legal analysis, ARTICLE 19 examines the compatibility of key proposals contained in the TPP with international standards on freedom of expression. Our analysis is divided into three parts. Part I examines the lack of transparency and democratic deficit which have been the hallmarks of this trade agreement. Part II sets out relevant international human rights standards on freedom of expression and intellectual property. Part III outlines our key concerns in relation to the IP Chapter of the TPP, including: temporary copies, copyright term, intermediary liability, civil and criminal enforcement procedures and digital locks provisions. Provisions dealing with patents and trademarks are not covered. We make recommendations to remedy the most problematic aspects of some the proposals contained in the IP Chapter of the TPP throughout this analysis.

Lack of transparency and accountability

Despite its far-reaching implications for human rights, especially the right to freedom of expression, the **TPP has been negotiated almost entirely in secret**. No complete draft text of the TPP has ever been released publicly even though those who have viewed draft versions of the agreement have confirmed that “there is no national security purpose in keeping this text secret.”¹

Any public scrutiny that has taken place has occurred only as a result of leaks (e.g. Wikileaks) or as a consequence of public outcry, e.g. following the exclusion of Australian journalists from a TPP public briefing in October 2013.²

Members of Parliament in the US, Chile and Peru have expressed their profound discontent at the lack of transparency of the TPP negotiations, including:

- a group of members of the Peruvian legislature, the *Parlamentario Acción Popular-Frente Amplio*, tabled a motion seeking “a public, political, and technical debate on the proposals of the Trans-pacific Partnership Agreement;”³
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- Senator Elizabeth Warren sent a letter to the Obama administration in August 2013 stating, “[w]ithout transparency, the benefit from robust democratic participation — an open marketplace of ideas — is considerably reduced;”⁴
- Chilean senators have asked the President to open a public debate on the TPP.⁵

Only **the most limited participation has been afforded to civil society groups** and there have been no opportunities for meaningful input in important policy discussions and decisions.⁶ By contrast, **corporate interest groups are reported to have been extensively involved in negotiations.**⁷ In particular, concerns have been raised that the TPP prioritises corporate and commercial interests above human rights.

In short, the lack of transparency in the TPP negotiations means that the agreement has largely escaped any meaningful scrutiny by most relevant stakeholders in civil society. In ARTICLE 19’s view, this is both unacceptable and incompatible with principles of transparency and public participation of *all* stakeholders concerned.⁸

¹ Techdirt, *Rep. Alan Grayson: I’ve Seen the Details and There is No Reason to Keep TPP Secret*, 24 June 2013: <http://www.techdirt.com/articles/20130622/01545623580/rep-alan-grayson-ive-seen-details-there-is-no-reason-to-keep-tpp-secret.shtml>

² Guardian, *Why can’t Australians read the Tans-Pacific Partnership Agreement?*, 30 October 2013: <http://www.theguardian.com/commentisfree/2013/oct/30/trans-pacific-partnership-tpp-dfat>

³ The motion is available at: <http://infojustice.org/wp-content/uploads/2013/09/Moción-TPP.pdf>

⁴ The letter is available at: <http://www.pdamerica.org/issues/era-3-state-strategy/item/1892-will-obama-fast-track-the-trans-pacific-partnership>

⁵ Infojustice, *Chilean Senators Formally Request Public Debate on TransPacific Partnership*, 14 August 2013: <http://infojustice.org/archives/30448>

⁶ US Civil Society Letter of 18 October 2011 to Hon. Ron Kirk, US Trade Representative: <http://www.citizen.org/documents/us-transparency-letter-2011.pdf>

⁷ Huffington Post, *How the Transpacific Partnership Empowers Corporations – and Disempowers US*, 30 August 2013; available at: http://www.huffingtonpost.ca/mark-taliano/tpp-empowers-corporations_b_3846251.html

⁸ Human Rights Council, *Guiding principles on human rights impact assessments of trade and investment agreements*, A/HRC/19/59/Add.5, requiring that “decisions on trade-offs are subject to adequate consultation (through a participatory, inclusive and transparent process), comport with the principles of equality and non-discrimination, and do not result in retrogression;” available at http://www.srfood.org/images/stories/pdf/officialreports/20120306_hria_en.pdf. See also, ARTICLE 19, *The Right*

ARTICLE 19 is also disappointed that the negotiating parties to the TPP have failed to learn the lessons from the Anti-Counterfeiting Trade Agreement (ACTA) debacle in July 2012. ACTA was a similar multilateral Free Trade Agreement that was negotiated in secret. The European Parliament ultimately rejected it after a strong public backlash against the lack of transparency in negotiations and its fundamental incompatibility with human rights standards⁹ ARTICLE 19 therefore urges states parties to the TPP to open up the entire agreement to public scrutiny rather than preserving a secrecy that only fuels scepticism and distrust.

Similarly, we urge countries that require parliamentary approval as part of their ratification process, such as the US and Mexico, to follow a procedure that allows for meaningful scrutiny of the agreement. We are especially concerned by reports that the US plans to introduce fast-track legislation in order to forego any significant review of the TPP by Congress.¹⁰ Any such proposals should be rejected as further entrenching the democratic deficit of this highly controversial agreement.

Recommendations:

- Given the potential impact of the TPP on human rights, the negotiations should be transparent: the draft texts of the agreement and state positions on it should be made public on regular basis and should include a process for comments by all stakeholders;
- Member states should subject the TPP to strict scrutiny as part of the ratification process.

to Share: Principles on Freedom of Expression and Copyright in the Digital Age (Right to Share Principles); available at <http://www.article19.org/data/files/medialibrary/3716/13-04-23-right-to-share-EN.pdf>.

⁹ Techdirt, *European Parliament Declares its Independence from the European Commission with a Mass Rejection of ACTA. Now What?*, 4 July 2012: <http://www.techdirt.com/articles/20120704/07533019579/european-parliament-declares-its-independence-european-commission-with-massive-rejection-acta-now-what.shtml>

¹⁰ For example, EFF, *Congress Must Not Fast Track TPP to Ratification*; available at <https://www.eff.org/deeplinks/2013/10/congress-must-not-fast-track-tpp-ratification>

International human rights standards on freedom of expression and copyright

The protection of freedom of expression under international law

The *International Covenant on Civil and Political Rights* (ICCPR) elaborates upon and gives legal force to many of the rights articulated in the Universal Declaration on Human Rights, including the right to freedom of expression. The ICCPR binds its 167 states party to respect its provisions and implement its framework at the national level.¹¹ Article 19 of the ICCPR protect the right to freedom of expression as follows:

1. Everyone shall have the right to freedom of opinion
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

In September 2011, the UN Human Rights Committee ('HRC'), the treaty monitoring body for the ICCPR, issued General Comment No 34, which constitutes an authoritative interpretation of the minimum standards guaranteed by Article 19 ICCPR.¹² Importantly, General Comment No 34 states that Article 19 ICCPR protects all forms of expression and the means of their dissemination, including all forms of electronic and Internet-based modes of expression.¹³ In other words, the protection of freedom of expression applies online in the same way as it applies offline.

The protection of intellectual property rights (IPR) under international law

With the sole exception of Article 17 (2) of the EU Charter of Fundamental Rights, intellectual property rights are protected only indirectly under international human rights law. In *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, 11 January 2007, for example, the European Court of Human Rights recognised that intellectual property rights fell within the scope of Article 1 of Protocol No. 1 to the ECHR (protection of property).

At the same time, the value of a diverse array of ideas and information has been recognised under international law. For example, Article 15 of the ICESCR guarantees the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its application, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.¹⁴

¹¹ Article 2 of the ICCPR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967)

¹² CCPR/C/GC/3 available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

¹³ UN Human Rights Committee General Comment No.34, para. 12.

¹⁴ The Committee on Economic, Social and Cultural Rights has published General Comment nos. 17 and 21 in respect of Article 15 ICESCR. The Committee's General Comments provide authoritative guidance on the meaning of Article 15; available at: <http://www2.ohchr.org/english/bodies/cescr/comments.htm>. See also Article 27 of the

In addition, intellectual works are extensively protected by a number of international treaties that are administered by the World Intellectual Property Office (WIPO), including the Berne Convention for the Protection of Literary and Artistic Works, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations and the WIPO Copyright Treaty.¹⁵

Balancing freedom of expression and copyright in the digital environment

The conflict between freedom of expression and IPR has been brought into sharp relief with the advent of the Internet. With its ability to produce digital copies of identical quality to the original at virtually no cost and to distribute them instantaneously and universally, the Internet poses a significant challenge for copyright holders. In particular, peer-to-peer (P2P) networks that enable Internet users to share content on an unprecedented scale have been at the heart of the “war on piracy”.

In response to this challenge, copyright holders have sought the adoption of various measures with a view to enforcing copyright in the digital environment. These include, but are not limited to, website blocking and filtering and content removal via notice-and-takedown procedures. It is those measures taken to protect and enforce IP rights that pose the most immediate threat to Internet freedom and freedom of expression generally.

However, like other restrictions on freedom of expression, any such measure can only be justified if they comply with the three-part test, namely: (i) legality; (ii) legitimacy; and (iii) proportionality. In the vast majority of cases, online copyright enforcement measures fail the first and third limb of this test.

ARTICLE 19 together with international experts from around the world has developed international principles – the Right to Share Principles – on how to balance the right to freedom of expression and copyright in the digital age.¹⁶ The principles are based on international standards on freedom of expression and best practice in this area. In particular, it addresses the following issues: copyright terms and the public domain, intermediary liability, digital locks and the use of the criminal law to deal with non-commercial infringement.

Universal Declaration on Human Rights which is drafted in very similar terms to Article 15 ICESCR.

¹⁵ A full list of the treaties and other international agreements administered by the WIPO is available at: <http://www.wipo.int/treaties/en/>

¹⁶ The principles are available here: <http://www.article19.org/data/files/medialibrary/3716/13-04-23-right-to-share-EN.pdf>

Analysis of selected provisions of the Draft TPP

While the official draft text of the TPP has not been published, the leaked draft TPP IP Rights Chapter of November 2013 suggests several areas of concern for human rights protection of Internet users.

Failure to consider protection of human rights of Internet users as a legitimate policy objective

The draft leaked text reveals the nakedly mercantile approach of the US and Japan to intellectual property policy. In particular, the US and Japan are the only countries to resist proposals to include objectives that would “*maintain a balance between the rights of intellectual property holders and the legitimate interests of users and the community*” and “*protect the ability of Parties to identify, promote access to and preserve the public domain*”.¹⁷

ARTICLE 19 strongly opposes the US and Japan’s stance in this area. The ACTA debate has clearly shown that the aggressive protection of intellectual property at the expense of Internet users’ rights is profoundly misguided and out-of-kilter with the changed relationship between individuals and information in the modern electronic age. For this reason, clear policy objectives of the kind suggested by the other negotiating parties to the TPP are sorely needed.

We therefore call on the US and Japan to follow the lead of New Zealand, Chile, Peru, Vietnam, Brunei, Malaysia, Singapore, Canada and Mexico in their efforts to promote more balanced intellectual property policies that better protect Internet users’ rights.

We further believe that the draft text could include stronger language so that reference is made not only to the “legitimate interests of users” but rather to “users’ fundamental rights” or alternatively “users’ human rights”. In our view, there is no reason in principle why copyright holders should be referred to as having intellectual property “rights” and everyone else as merely having “interests.”

More generally, we consider that general provisions dealing with “objectives,” “principles” or “implementation” should make express reference to human rights, namely the right to freedom of expression, the right to privacy and due process, all of which are at the heart of intellectual property policy.¹⁸ For instance, we note that New Zealand, Canada, Singapore, Chile and Malaysia’s proposal to introduce an article dealing with “principles” refers to the adoption of measures to “*prevent abuse of intellectual property rights by rights holders*” or “*the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology*”. While this and similar proposals are welcome, we believe that they could be further improved by making it clear that Member States should adopt measures that *do not unduly restrict the rights of users to free expression, privacy and due process*.

Recommendations:

- The TPP should include a provision dealing with “objectives” following the original proposals made by New Zealand, Chile, Peru, Vietnam, Brunei Malaysia, Singapore, Canada and Mexico;

¹⁷ Article QQ.A.2 of the draft.

¹⁸ Especially Articles QQ.A.2, QQ.A.2bis and QQ.A.9 respectively.

- General provisions dealing with “objectives”, “principles” or “implementation” should make express reference to the importance of protecting the rights to freedom of expression, privacy and due process and more generally make reference to users’ “rights”.

Unwarranted regulation of temporary copies by copyright

The draft provisions of the TPP dealing with the protection of copyright and related rights show that previous US attempts at making temporary copies subject to copyright authorisation are gaining the upper hand with only Vietnam, Canada and New Zealand opposing such proposal.¹⁹

ARTICLE believes that making temporary copies subject to copyright authorisation would be a grossly disproportionate restriction on the right to freedom of expression online.

The ordinary use of the Internet, such as browsing, involves the creation of temporary copies at several stages. If temporary copies become subject to authorisation by the copyright holder, unauthorised viewing or reading of copyrighted material online would be considered an infringement. This would be both profoundly at loggerheads with the way in which the Internet works and would lead to the unacceptable result that millions of Internet users could be held liable for copyright infringement for merely browsing webpages containing copyright material. In the UK, for instance, the Supreme Court concluded that EU law allows an exception for temporary copies generated by the Internet user as a necessary part of the technical process supporting the browsing experience.²⁰

ARTICLE 19 therefore strongly urges the TPP negotiating parties to resist proposals that would make temporary copies subject to copyright regulation.

Recommendations:

- Temporary copies should be a clear exception to copyright protection. Any proposal to the contrary should be rejected.

Attacks on the Public Domain

Unduly extending copyright terms

The leaked IP Chapter further reveals that TPP negotiating parties are deeply divided when it comes to the extension of copyright terms.²¹ In particular:

- the US, Australia, Peru, Singapore and Chile support a minimum copyright term of life of the author + 70 years, and + 100 years in the case of Mexico, consistent with their respective domestic law.
- By contrast, Vietnam, Brunei, New Zealand, Malaysia, Canada and Japan oppose such proposals since this would amount to a re-write of their domestic law that currently only provides for copyright protection of life +50 years for works created by individuals.
- For corporate owned works, the US proposes the longest copyright terms extensions with 95 years after publication or 120 years after creation of such works, whilst other negotiating parties such as Singapore and Chile suggest 70 years.²²

¹⁹ Article QQ.G.2

²⁰ UK: Browsing is a Legitimate Exception to Copyright, 19 April 2013; available at: <http://www.article19.org/resources.php/resource/3707/en/>

²¹ Article QQ.G.6

²² That the extension of copyright terms is an important objective for the US, Australia, Singapore and Mexico is made clear by the fact that they reject proposals that copyright term extensions should be determined by domestic law: see Article QQ.G.7

ARTICLE 19 believes that the US-led proposals would not only force several negotiating countries to amend their domestic law but also create copyright terms that go well beyond the periods laid down in the Berne Convention and the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and other best practices in this area.²³ We note, in particular, that:

- Long copyright protection terms prevent works from falling in the public domain, making it more difficult to use those works for creative purposes, for instance if a creator does not have the financial resources necessary to pay for their use.
- Another side effect of the extension of copyright terms worldwide is the growing number of orphan works - works whose access is locked because their author cannot be traced. In short, the inexorable extension of copyright terms has damaging consequences for free expression as an engine of creativity.

Retroactive IP Protection to Subject Matter Already in the Public Domain

ARTICLE 19 further notes that the public domain comes under attack elsewhere in the draft with the US proposing that TPP obligations (including any agreed copyright term extensions) should apply to subject matter that “*meets or comes subsequently to meet the criteria for protection*”.²⁴

This effectively means that works that have already fallen in the public domain could be made subject to copyright retroactively. In ARTICLE 19’s view, this would be an utterly disproportionate restriction on freedom of expression and would go far beyond the provisions of the Berne Convention and TRIPS agreements. ARTICLE 19 urges the other TPP negotiating countries to strongly resist such dangerous proposals.

ARTICLE 19 believes that as the net sum of all information and cultural goods that can be used and exchanged by the public at large free from copyright restrictions, the public domain should be strongly protected. In this regard, we appreciate Chile and Vietnam’s efforts to introduce provisions in the IP Chapter that seek to preserve the public domain, including by seeking to identify the subject matter that has fallen in the public domain.²⁵

At the same time, it is not entirely clear how these proposals could be implemented in practice. To the extent that implementation may include the development of public databases of registered rights, it is vital that the availability of such databases should not be used to hamper the public’s ability to access information freely available on the Internet. We therefore invite Chile and Vietnam to further reflect on the implications of their proposals for the protection of the public domain.

Recommendations:

- Copyright terms should be no longer than necessary so as not to impair the right to freedom of expression. For works created by individuals, this means that copyright protection should last no longer than life of the author;
- Proposals to extend retroactive IP protection to subject matter already in the public domain should be firmly rejected.

Privatised enforcement of copyright

The intermediary liability provisions are clearly among the most problematic in the TPP.

²³ For example, The Right to Share Principles, *op.cit.*, which provide that which provide that copyright protection beyond the life of the author should be considered a disproportionate restriction on the right to freedom of expression.

²⁴ Article QQ.A.11.

²⁵ Article QQ.A.13

The US appears to be particularly isolated in making draconian demands, including Internet disconnection, content blocking and even monitoring in certain circumstances. By contrast, Canada and Chile emerge as driving forces towards more balanced proposals for intermediary liability.

The US draconian demands

The US proposals are not significantly different from what they were in 2011. They would entrench the privatisation of copyright enforcement. Signatory countries would be compelled to create “legal incentives” for service providers “to cooperate with copyright owners in deterring the unauthorized storage and transmission of copyrighted materials.” Contracting parties would be further required to ensure the provision of expeditious remedies to prevent infringement as well as remedies, which constitute a *deterrent* to further infringement. Although intermediaries would not be required to monitor their networks in order to benefit from immunity from liability, monitoring would not be explicitly prohibited. Moreover, the nature of the measures makes it much more likely that intermediaries would undertake voluntary monitoring for the sake of efficient deterrence.

ARTICLE 19 is especially concerned that some of the US proposals would make immunity from liability subject to the adoption and implementation of “three-strikes”- type of measures by Internet Intermediaries. This would effectively encourage ISPs to disconnect repetitive infringers from the Internet under their contractual terms & conditions. In other words, Internet users could be disconnected outside any legal process. In our view, this would be in breach of international standards on free expression, including the Right to Share Principles and the recommendations of the UN Special Rapporteur on Freedom of Expression.²⁶

Other provisions dealing with intermediary liability mirror the safe harbour provisions of the DMCA, notably the notice-and-takedown procedure whose chilling effect on freedom of expression is well documented. ARTICLE 19 has previously highlighted the flaws inherent in this model, which encourages intermediaries to remove content upon simple notice in order to avoid the risk of liability. If these or similar provisions are adopted, the Chilean court-based takedown procedure and the Canadian notice-and-notice model would have to be abandoned despite the fact that these have been hailed as being more respectful of Internet users’ rights. Moreover, such provisions would make it substantially more difficult for the US to review the DMCA in future so as to better protect freedom of expression.

ARTICLE 19 is further worried that some intermediary liability provisions championed by the US would undermine the protection of the right to privacy of Internet users. For instance, it is unclear whether legal incentives to “cooperate” would encourage intermediaries to disclose the identity of their customers upon request from copyright holders in the absence of a court order. Reference is also made to administrative procedures as a possible avenue for obtaining information identifying alleged infringers. In our view, this would water down the safeguards elsewhere in the document that refer to judicial procedures in order to obtain that kind of information.

The Canadian model – a more balanced approach to liability

Canada, with support from Chile, Brunei, Malaysia, Vietnam, Singapore, New Zealand and Mexico, proposes intermediary liability provisions that are largely modelled on its own notice-and-notice system for dealing with allegations of copyright infringement. This includes a general obligation to limit the liability of intermediaries for copyright infringement taking place on their networks; the creation of a notification process – with Canada, Chile and Mexico opposing text that would make it possible for infringing material to be removed or access to it being disabled following

²⁶ Report of 16 May 2011, A/HRC/17/27.

notification by a right holder; and “*legal incentives*” to comply with the procedures. In addition, the Canadian proposal contains a provision making clear that eligibility for immunity from liability is not conditioned on the intermediary monitoring its service and a reminder that defences, limitations and exceptions to copyright infringement remain available under a Party’s domestic law.

ARTICLE 19 generally supports the Canadian approach to intermediary liability.²⁷ However, some aspects of the Canadian proposal could be further clarified. It is particularly vital for the liability provisions to make clear that notification by a right holder shall not lead to automatic removal or disabling of access to allegedly infringing material. “Disabling access to infringing material” is a measure that should only be applied following a court order. The absence of a clear provision to that effect in the draft text is regrettable. Furthermore, the term “legal incentives” should be clarified, for instance by providing that failure to comply with the notification process might lead to damages capped to a reasonable amount.

We are also disappointed that the Canadian text fails to provide that intermediaries should never be ordered to *prevent* future copyright infringement since this would almost inevitably involve pervasive filtering and surveillance of communication networks contrary to international standards of freedom of expression in this area.²⁸ On the contrary, the Canada proposal leaves this option open to the domestic law of the negotiating parties.

Recommendations:

- Internet intermediaries should benefit from broad immunity from liability. They should not be encouraged to monitor their networks. Nor should they be encouraged to implement “three-strikes” policies. Disconnection from the Internet on copyright grounds should never be permitted.
- The Canadian proposals should generally be preferred subject to our more specific recommendations outlined above. The US draconian proposals should be strongly rejected.

Criminal sanctions for non-commercial copyright infringement

The leaked draft TPP text discloses widely differing views as to what constitutes appropriate criminal enforcement measures. The US clearly emerges as the champion of the most restrictive proposals.

In particular, the US promotes measures whereby signatory countries would be required to impose criminal sanctions for minor copyright infringement with no financial motivation. Specifically, states would be required to “at least” provide criminal penalties in cases of willful copyright or related rights “piracy” on “a commercial scale”, including: (i) significant willful copyright or related rights infringements that have no direct or indirect motivation of financial gain; and (ii) willful infringements for purposes of commercial advantage or private financial gain. In other words, innocuous consumer behavior such as downloading infringing content online could be criminalised if ‘commercial scale’ is taken to mean significant copyright infringement without economic motivation.

In ARTICLE 19’s view, this would be both disproportionate and in breach of the requirement of legal certainty under international human rights law. It is precisely for this reason that the European Parliament rejected similar proposals under ACTA, which would have criminalised

²⁷ ARTICLE 19, *Internet Intermediaries: Dilemma of Liability*, August 2013, available at: http://www.article19.org/data/files/Intermediaries_ENGLISH.pdf

²⁸ See in particular Court of Justice of the European Union, *Scarlet Extended SA v SABAM*, 24 November 2011: <http://www.article19.org/resources.php/resource/2872/en/landmark-digital-free-speech-ruling-at-european-court-of-justice>

copyright infringement carried out for “direct or indirect economic or commercial advantage”. In this instance, the US proposals go even further since no economic motivation would have to be proven. In particular, it is wholly unclear how a provision aimed at criminalizing *commercial* scale copyright infringement can at the same time seek to criminalise copyright infringement without economic motivation. To interpret “commercial” activities to include patently non-commercial sharing is a contradiction in terms. In this regard, it is disappointing that none of the TPP negotiating parties seem to have noticed the glaring inconsistency of this provision.

ARTICLE 19 is further concerned that, as a result of the above provisions, non-commercial copyright infringement could be punished with imprisonment or monetary fines “sufficiently high to provide a deterrent to future acts of infringement.” ARTICLE 19 strongly opposes the criminalization of non-commercial copyright infringement. In our view, this has a chilling effect on freedom of expression. In any event, it is unclear what level of custodial or financial penalties would have the desired “deterrent effect”. Deterrence is an inherently inexact science, especially when one considers the social acceptability of copyright infringement and the relatively small likelihood of infringements being detected. In any event, it is unlikely that one could achieve this “deterrent” effect while also complying with the proportionality principle in relation to non-commercial infringement.

Finally, we are troubled that, under Article QQ.H.7, signatory countries would be required to provide criminal penalties for “aiding and abetting” copyright infringement on a “commercial scale”. “Aiding and abetting” is a low threshold that fails to take into account the question whether the party at issue has knowledge of the infringement or whether it “materially contributed” to the infringing activity. Similarly, it does not include a requirement to show intent to induce copyright infringement or that it was committed for financial gain. In other words, such proposals would provide a basis for imposing strict criminal liability on Internet intermediaries.

Again, it is disturbing that none of the negotiating parties seem to have noticed the potential impact of this provision. In particular, it could have devastating consequences for freedom of expression and the right to privacy, as ISPs would effectively be encouraged to monitor Internet traffic in order to avoid liability. In fact, it is hard to see how the US-sponsored criminal provisions against “commercial-scale” copyright infringement could be enforced without sanctioning mass surveillance of all online data sharing at the same time. Not only would this raise significant privacy concerns but would also have a chilling-effect on *all* digital expression.

Recommendations:

- Non-commercial copyright infringement should not be criminalised.

Sweeping anti-circumvention measures

Technological Protection Measures (TPMs) – also known as Digital Rights Management (“DRM”) – essentially allow producers of electronic content to control how that information is used, even where that electronic content has been legitimately purchased. While these measures may be targeted at preventing large-scale infringements of copyright, they also prevent individuals from engaging in innocuous conduct, such as reading a book an unlimited number of times or storing content on multiple devices. For this reason, it is vital for exceptions to anti-circumvention measures to be broadly drafted.

The leaked TPP IP Chapter reveals profoundly different approaches to TPMs between negotiating parties. In particular, US-led proposals – followed by Australia, Singapore, Peru and Mexico – promote the adoption of highly restrictive measures that would effectively force signatory countries to ban circumvention of TPMs. By contrast, Asian countries clearly favour a more relaxed approach. Although New Zealand and Chile have reserved their position, they generally lean

towards the more Internet user-friendly position of their Asian counterparts. In particular, Chile opposes some of the most restrictive US-led proposals, including liability without copyright infringement (see below). Meanwhile, Canada broadly supports US-led proposals but suggests less restrictive language in several places, especially as regards limitations and exceptions to TPMs.²⁹

Some of the most negative anti-circumvention measures proposed by the US and its allies include:

- *Incredibly narrowly crafted exceptions and limitations:* Article QQ.G. 10 (d) lays down an exhaustive list of ten permitted exceptions to anti-circumvention measures. Each exception is couched in remarkably restrictive language. For instance, cracking digital locks for research purposes could be permitted but subject to very strict conditions, including: the research activity is “non-infringing” and carried out in “good faith” by an “appropriately qualified” researcher, who has “lawfully obtained” a copy of a work and who has made “good faith efforts to obtain authorisation for such activities”.
- *Mandatory criminal penalties:* under Article QQ.G.10 (a), a broad range of activities, including the trafficking of goods and services designed to “enable or facilitate” the circumvention of TPMs, would be criminalised and punished by imprisonment as well as monetary penalties. This would go significantly further than what is currently provided by the domestic law of several negotiating parties, including the US.³⁰
- *Liability in the absence of copyright infringement:* under Article QQ.G.10 (c), signatory countries would be compelled to treat violation of the TPM as a separate offence independently from any copyright infringement. In other words, individual users who have lawfully purchased electronic content could be found criminally liable for storing that content on multiple devices in violation of TPMs.

In ARTICLE 19’s view, US-led proposals constitute an unnecessary and disproportionate restriction on the right to freedom of expression. In line with the Right to Share Principles, we believe that the circumvention of digital rights management software should not be criminalized. In this regard, we find proposals to decouple liability from actual copyright infringement particularly alarming. In any event, we consider that providing redress to rights holders for circumvention of technological measures is redundant given that they may seek adequate redress for the IP infringement itself.

To the extent that the adoption of anti-circumvention measures may be unavoidable, however, we strongly encourage the negotiating parties to adopt broad exceptions and limitations consistent with the proposals made by Chile, New Zealand, Vietnam, Malaysia, Brunei, Japan and Peru under Article QQ.G. 12.

Recommendations:

- The circumvention of TPMs should not be criminalised as an unjustified restriction on freedom of expression.
- At a minimum, the criminalisation of circumvention of TPMS should be linked to actual copyright infringement.
- Any exceptions to provisions criminalising circumvention of TPMs should be broadly drafted.

²⁹ Article QQ.G.10 (d) (ix).

³⁰ Public Knowledge, *TPP Deep Dive, Copyright and Digital Locks*, available at: <http://publicknowledge.org/blog/tpp-deep-dive-copyright-and-digital-locks>

Civil enforcement proceedings

The leaked draft TPP text reveals close similarities with the US proposals published in 2011. It also discloses broad consensus between TPP negotiating countries despite several shortcomings from the perspective of international human rights law. In particular, the draft provisions dealing with civil enforcement create several procedural advantages for copyright holders at the expense of users' fundamental rights.

Presumptions

Article QQ.H.2 creates several presumptions in favour of copyright holders. In particular copyright would be presumed to subsist in the work at issue.³¹ This would be problematic, for instance, in the context of notice-and-takedown procedures where content failing to meet minimum standards of originality – and therefore unqualified for copyright protection – could be removed upon notice. In other words, users' right to freedom of expression would be unduly violated on the basis of unmeritorious copyright claims.

Damages

ARTICLE 19 is especially concerned that the provisions concerning the award of damages are heavily weighted in favour of copyright holders, including the following:

- Article QQ.H.4 provides that judicial authorities may order damages, including against infringers “with reasonable grounds to know” that they engaged in infringing activity. In other words, damages could be imposed against individuals who engage in copyright infringement accidentally. This provision therefore creates an incredibly broad remedy for copyright holders. ARTICLE 19 believes that this could also lead to unfair results, especially as copyright holders have shown themselves prone to avail themselves of any remedies at their disposal to extract money from infringers regardless of their circumstances. For this reason, it is particularly disappointing that Peru and, to some extent Canada, are seemingly the only countries to question this proposal.
- Under Article QQ.H.4.X, contracting states would be required to provide for pre-established (or statutory damages) that are set sufficiently high to constitute a ‘deterrent’ to future infringement and to compensate fully the right holder for the harm caused by the infringement. Pre-established damages would be available upon the election of the right holder. Additional damages, including exemplary or punitive damages, would also be available. Pre-established damages are problematic because they allow successful claimants to recover substantial monetary damages *without proof* of actual harm or lost profits. In short, copyright holders could recover astronomical sums of money for minor copyright infringement, including against innocent infringers. In ARTICLE 19's view, this would be both unfair and arbitrary as well as a breach of the right to freedom of expression. In line with the Right to Share Principles, we believe that only actual damages suffered by copyright holders should be recoverable. Again, it is worrying that Vietnam seems to be the only country to dispute deterrence as the most appropriate criterion for establishing the level of pre-established damages rather than actual harm.

On a more positive note, ARTICLE 19 notes a number of proposals aimed at discouraging vexatious litigation or compensating the victims of the same. We strongly encourage other negotiating parties, including the US, Australia and Japan, to support such proposals.

Recommendations:

³¹ See Article QQ.H.2

- If statutory damages are available for non-commercial infringement, they should be capped so as not to impose a disproportionate restriction on the right to freedom of expression.

Other concerns

Limitations and exceptions to copyright

The leaked draft TPP text confirms the intention of the negotiating parties to include a provision dealing with limitations and exceptions.³² In particular, Article QQ.G.X introduces the language of the ‘three-step test’ in the TPP whilst Article QQ.G.Y encourages Member States to achieve a balance in their copyright system by means of limitations and exceptions “including those for the digital environment” and “giving due consideration to legitimate purposes such as, but not limited to, for the purposes of criticism, comment news reporting, teaching, scholarship, research as well as facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled”.

Limitations and exceptions to copyright are the internal mechanism through which free speech concerns are taken into account under copyright law. By contrast, the three-step test has largely been used as a legal device to preserve copyright holders’ interests and narrow the scope of these exceptions and limitations.

ARTICLE 19 notes that the new text seems less restrictive than previous iterations of the proposal. In particular, Article QQ.G.X.1 specifies that the three-step test language “neither reduces nor extends” the scope of the limitations permitted by the TRIPs Agreement, Berne Convention and WIPO treaties. A non-exhaustive list of legitimate purposes is also mentioned. At the same time, we are surprised that Article QQ.G.Y does not expressly refer to fair use as a legitimate purpose, given its prominence in US law and the recent recommendation of the Australian Law Reform Commission to implement it in domestic law. We also note that the language concerning limitations and exceptions to copyright could be drafted less restrictively, following the Canadian proposal under Article QQ.A.6.³³ ARTICLE 19 reiterates that limitations and exceptions should be interpreted broadly so as to give greater protection to the right to freedom of expression.

Ratifying 10 Other Intellectual Property Agreements

ARTICLE 19 notes that both the US and Australia demand that TPP Member States ratify or accede to 10 other intellectual property agreements including the Berne Convention for the protection of Literary and Artistic Works (1971) as well as the WIPO Copyright Treaty (1996) and WIPO Performances and Phonograms Treaty. While negotiating parties may be party to some of these agreements, they are not party to all of them. For instance, New Zealand is not a party to the WIPO Performances and Phonograms Treaty, hence its opposition to the inclusion of the term “performances” in various places dealing with copyright protection.³⁴

ARTICLE 19 is concerned that the ratification of the 10 intellectual property treaties would force several negotiating countries to adopt more restrictive domestic intellectual property laws that would further restrict the free flow of information and ideas.

³² Article QQ.G.16.

³³ The Canadian proposal reads, in its relevant parts, as follows “1. Except as otherwise provided in this Chapter, nothing in this Chapter shall be construed as a limitation to the flexibilities, exceptions and limitations set out on the TRIPs Agreement and any other agreement relating to intellectual property to which they are a party.”

³⁴ See for instance, Article QQ.G.1.

Arbitration tribunals

ARTICLE 19 is further concerned by reports that provisions in the TPP would allow companies to sue governments in international arbitration tribunals through a mechanism known as investor-state dispute settlement ('ISDS').³⁵ ISDS mechanisms were originally designed to provide an effective form of redress to foreign investors whose investments in developing countries were expropriated by rogue governments. However, these dispute settlement mechanisms present several well-known procedural flaws: members of tribunal are appointed and paid by the parties themselves, meaning that their independence is at best questionable, hearings are held subject to the parties' consent, and the costs of proceedings are extremely high. Moreover, foreign investors can claim compensation for laws that restrict their expected future profits without conferring any meaningful avenues of appeal. The amount of damages that can be awarded are therefore highly substantial. ARTICLE 19 is concerned that, faced with the prospect of very substantial damages and high court costs, signatory states would err on the side of caution and adopt legislation that is more protective of copyright holders' interests rather than consumers' rights.

Recommendations:

- Limitations and exceptions to copyright should be broadly drafted and interpreted;
- Arbitration tribunals should not be used to deal with copyright claims.

³⁵ EFF, *Another Reason to Hate the TPP: It Gives Big Content New Tools to Undermine Sane Digital Rights Policies*, 24 October 2013; available at: <https://www.eff.org/deeplinks/2013/10/another-reason-hate-tpp-it-gives-big-content-new-tools-undermine-sane-digital>

About the Article 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at <http://www.article19.org/resources.php/legal/>.

If you would like to discuss this analysis further, please contact Gabrielle Guillemin, Legal Officer at gabrielle@article19.org. Additionally, if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org or call us at +44 20 7324 2500.

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