TPP Negotiations Renew Concerns About Lack of Balance in Copyright Trade Agreements

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1. TPP Negotiations and the Proposed I.P. Chapter

Since 2008, the United States has been negotiating a multilateral free trade agreement called the Trans-Pacific Partnership (TPP) with Australia, Peru, Malaysia, Vietnam, New Zealand, Chile, Singapore, and Brunei. TPP is expected to include a lengthy chapter on intellectual property rights and enforcement. No official working text has been made public, but a leaked U.S. proposal from earlier this year highlights the risk that the I.P. provisions may fail to reflect an appropriate balance that takes account of the variety of interests at stake in copyright policy. The risks are exacerbated by the lack of transparency in the negotiations, as it is unclear whether the full range of interested parties will have an opportunity to review and comment on proposals before they are finalized.

Intellectual property rules and their enforcement are certainly a suitable topic for international agreements. In addition to establishing some baseline elements for countries' legal frameworks, as a variety of instruments including TRIPS and the WIPO Copyright and WIPO Performances and Phonograms Treaties have already done, there is an important role for promoting mutual cooperation in law enforcement. Infringement often involves cross-border activity, especially in the online context. To surmount jurisdictional obstacles to intellectual property enforcement, international cooperation will be essential. The recently negotiated (but not yet approved) Anti-Counterfeiting Trade Agreement (ACTA) contained a number of provisions aimed at cross-border assistance and coordination.

Cooperation among law enforcement authorities, however, is not what the United States proposes for TPP's I.P. chapter. Rather, the draft text calls for signatories to adopt numerous specific provisions based on the existing U.S. legal framework, including major portions of the Digital Millennium Copyright Act (DMCA). This approach, and indeed most of the text of the U.S. proposal, is drawn from the I.P. Chapter of the Korea-U.S. Free Trade Agreement (KORUS FTA), which has been pending since 2007 but which Congress has indicated it may bring to a vote when it reconvenes this September.

U.S. law and the DMCA can provide a useful international model in many respects. Nonetheless, the U.S. proposal for the TPP's I.P. chapter raises several serious concerns:

- *Lack of Balance:* Most important for CDT, the text would export U.S. law on a selective basis. It seeks to require adoption of key U.S. copyright enforcement provisions, but in some cases omits core limiting principles that are established features of the U.S. framework. The end result could be to invite other countries to adopt a skewed and far less balanced version of the U.S. framework they purport to emulate.
- *Role of Intermediaries:* The text calls for "legal incentives" for Internet intermediaries to cooperate with rightsholders on copyright enforcement. There may be some opportunities for useful cooperation among private parties, but there are strong policy reasons to avoid pushing ISPs and other online service providers into new network policing roles.
- *Insufficient Transparency:* The text addresses fundamental copyright questions such as the scope and duration of protection. Such substantive questions of copyright law should be

subject to open and transparent discussion, so that the full range of impacts can be carefully considered. ACTA was able to strike a much better balance once negotiators publicly released a draft text that enabled broader input. TPP negotiators have not yet done that.

The countries negotiating TPP had hoped to finalize the text of an agreement by the time of the Asia-Pacific Economic Cooperation (APEC) forum in November 2011. More recent reports suggest that this goal will not be met, and that negotiators now hope simply to have a full outline of the agreement by that date. Regardless of the precise timing, it will be essential that an official draft of any I.P. chapter be made public in time to allow meaningful public scrutiny and input.

Leaked February 2011 U.S. proposal for TPP I.P. chapter [1]

2. Exporting U.S. Law, Selectively

The text of the United States' proposed I.P. chapter for TPP, following the I.P. chapter included in the 2007 KORUS FTA, includes many provisions that track U.S. law at a fine level of detail. In many cases, however, the text omits U.S. legal provisions or principles that serve as limits or safeguards on the assertion and enforcement of copyright.

The most glaring example concerns limitations and exceptions to copyright, especially fair use. The U.S. copyright regime couples strong enforcement provisions with significant exceptions that limit copyright's reach. Fair use is particularly important to achieving a proper balance. But the proposed TPP text, for all its detailed inclusion of other U.S. statutory provisions on copyright, contains only a bracketed placeholder for a provision on limitations and exceptions. The I.P. chapter of the KORUS FTA, meanwhile, mentions in a footnote that parties *may* adopt limitations and exceptions such as fair use, so long as such exceptions are confined to special cases. Thus, exceptions and limitations are permitted but in no way encouraged or required – in contrast to the agreement's many mandatory provisions aimed at strengthening copyright rights and enforcement.

There are a number of other examples. The U.S. proposal says that copyright protection shall extend to "temporary storage in electronic form," but omits key language from the U.S. statute that limits protection to copies that are fixed "for a period of more than transitory duration." Based on this limitation, the 2008 *Cablevision* case held that ephemeral buffer copies made in the course of streaming digital files did not count as copies that could give rise to infringement. By expressly covering "temporary copies" but omitting any reference to the "transitory duration," limitation, the proposed TPP text arguably invites other countries to treat buffering as actionable reproduction – a result that would give copyright holders a chokehold over digital services devices of all kinds, since buffering is ubiquitous in the digital world.

The proposed text's section on technological protection measures (TPMs) states that circumventing a TPM shall be a completely separate offense from any underlying copyright infringement. While this is consistent with the DMCA – violating the DMCA's anticircumvention provisions constitutes an independent offense, not a copyright violation – U.S. court decisions have generally held that the anticircumvention provisions apply only where the TPM in question is intended to protect a copyright interest. Omitting that limitation would open the door to the same kind of attempted abuses of the anticircumvention provision that were seen in the United States: using TPMs to try to block competition in replacement printer cartridges and garage door openers, to cite two prominent examples. Such abuses could well succeed in other countries, under the framework laid out in the TPP proposal.

Given that the United States is home to a large number of innovative technology companies and users that routinely rely on limitations and exceptions to copyright law, U.S. negotiators should work carefully to ensure that trade agreements on copyright reflect an appropriate balance. Requiring other countries to adopt tough copyright provisions in great detail, while making the corresponding safeguards and limitations merely optional or not mentioning them at all, could result in those countries adopting regimes that are far more skewed and one-sided than the U.S. regime they purport to emulate. Such legal regimes could cater strongly to rights holders at the cost of discouraging a wide range of legitimate speech, commerce, and technology innovation – including the international business activities of U.S. information technology companies. TPP's I.P. chapter

should demand a more balanced approach.

2010 CDT Policy Post on lack of balance in earlier ACTA draft [2]

2007 CDT blog post on economic role of fair use [3]

2007 law professor amicus brief in Cablevision DVR case, explaining "buffer copy" issue [4]

3. The Role of Intermediaries

It is longstanding U.S. policy that Internet intermediaries such as ISPs, user-generated content websites, and hosting services generally are not liable for content created by their users. In recent years, however, the role of intermediaries with respect to infringing or otherwise improper user behavior has been the subject of contentious debate. Some countries, particularly France, have moved in the controversial direction of requiring ISPs to take a much more active role in policing user behavior. By contrast, the United States has preferred to quietly encourage private discussions aimed at finding areas for voluntary cooperation, such as the recent agreement between large ISPs and copyright owners on a system of escalating alerts for suspected peer-to-peer infringers.

The proposed U.S. TPP text provides intermediaries with a "safe harbor" from liability that closely follows the DMCA and its notice-and-takedown provisions. But the text also wades right into the debate on new roles for intermediaries, by copying KORUS FTA language that would require countries to provide "legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage and transmission of copyrighted materials." The demand for "legal incentives" could be interpreted by many countries as an endorsement or even a requirement for new laws regarding intermediary behavior. It also goes significantly further than the corresponding provision in ACTA, which says that signatories "shall endeavor to promote cooperative efforts within the business community" to effectively address infringement. ACTA also included language to ensure that cooperation efforts take account of other considerations, such as "preserving legitimate competition and . . . preserving fundamental principles such as freedom of expression, fair process, and privacy." The U.S. TPP proposal lacks such balancing language.

There are important reasons why the role of intermediaries is a controversial topic. Requiring or pressuring Internet intermediaries to take on affirmative network-policing obligations would carry major implications for online speech, innovation, privacy, and the open character of the Internet. This is an area where TPP, and trade agreements in general, should tread very cautiously.

2010 CDT Policy Post on protections for online intermediaries [5]

4. Transparency

The leaked I.P. chapter draft text suggests that negotiators may be considering proposals that would require substantive changes to many signatories copyright laws – changes that relate to fundamental questions such as the scope and duration of copyright protection, not just enforcement.

In addition, the draft would prescribe DMCA-based commitments at a highly detailed level. In so doing, it arguably would leave little room for either non-U.S. signatories or U.S. lawmakers to learn from the U.S. experience and make reforms or modifications to the existing DMCA framework.

These are issues that warrant open scrutiny and discussion. There is a real danger that the backdoor of trade policy could be used to usher in legal and policy changes that overwhelmingly favor a narrow set of interests, such as rights holders, over other important interests and policy objectives – all while depriving the public of any input in the process.

As CDT noted before ACTA negotiators made a draft text public, copyright laws and policies affect a broad range of businesses and the public. This is particularly true in the online environment. For online businesses, for example, copyright policies can raise serious questions of liability exposure and have a major impact on innovation in digital technologies. For consumers, copyright policy is a significant factor in establishing the parameters of creativity and free expression, and copyright

enforcement tactics can raise serious privacy and due process issues.

In short, the details of TPP’s I.P. chapter may well raise issues of broad concern and impact – possibly much broader than negotiators or drafters may initially anticipate. There is no substitute for a process that allows for careful scrutiny and input by the full range of potentially interested parties, before settling on any particular language or approach.

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