

Statement of Knowledge Ecology International  
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The United States proposal for the intellectual property chapter of the Trans-Pacific Partnership Agreement (TPPA) contains provisions that are harmful to consumers. Some provisions would lock-in U.S. intellectual property norms that may be excessive and harmful not only to consumers, but to furthering innovation and creativity. Others would require changes to U.S. law and reduce the benefits to consumers and users that now exist in the limitations and exceptions to our copyright and patent laws.

From the outset, though, it is important to highlight the lack of transparency in the negotiations. This secrecy is designed to protect the interests of large corporations while disregarding the needs and interests of the public.

The U.S. proposal for the TPPA will of course affect the general public. Why then, does the public not have access to the negotiating texts, and why does the White House undermine the ability of the public to make informed decisions, voice opinions and effectively participate in our democratic society? Only through leaks, an unreliable and sporadic source of information, can the public see proposed texts. Of course, while the general public is excluded and kept in the dark about important norms that will affect them, corporate interests are well represented. Many advisers, often representing special corporate interests, have opportunities to see the texts and comment on them, are offered special briefings on negotiating positions, and can substantially influence the course of the U.S. proposals and positions. The balance of power is weighed heavily in favor of massive corporate interests such as the Motion Pictures Association of America, the Recording Industry Association of America, PhRMA and BIO. This is not even about protecting US industry. The members of these trade associations include many foreign owned companies.

Why do the TPPA proposals ignore the needs and concerns of the general public in favor of big corporate interests? One answer, of course, is the large amount of industry lobbying dollars spent by corporations like the MPAA or PhRMA, essentially purchasing the ability to influence the outcome of important and large scale agreements. Additionally, the negotiators for these trade agreements are often self-interested, thinking not in terms of the best interests of the majority of the general public (whom they are supposed to serve) but instead of their future job prospects. Some of these negotiators do not plan to spend their careers in civil service, but instead set their goals on more lucrative options such as these large corporations. With that in mind, they acquiesce to the demands of industry in order to build better job prospects for themselves alone in the future. For example, the lead negotiator on ACTA for the US copyright office was Steve Tepp. He now works for the Chamber of Commerce, on intellectual property enforcement issues.

Turning to the actual proposals, based on an analysis of leaked text, a number of the U.S. proposals go well beyond international standards. Although some of these standards are replicas of current U.S. laws, by including them in large-scale free trade agreements, the U.S. will be constrained from amending its law, and in some cases, will export only the parts of U.S. Law that benefit copyright and patent owners the most, often without the safeguards for consumers that limit their impact in the US market.

The US proposal in the TPPA for the term of protection for a copyrighted work far exceeds the requirements under the Agreement on TRIPS. The US wants to extend the term of copyright by 20 years when the term is based upon the life of the author, and by 45 years when the term is based upon something other than the life of a natural person. In the TRIPS, the required term of protection for photographs is 25 years. In the TPPA, the required protection is life plus 70 years, or 95 year for works for hire. The TPPA would also extend the required terms for related rights, such as rights associated with performances of copyrighted works.

Many academics have noted the obvious – lengthy terms do not result in added economic benefit or increased incentives to create works, and have called upon the U.S. Congress to reevaluate the current terms of protection. However, by including this provision in the TPPA, this aspect of U.S. law would effectively be locked in and it would be even more difficult for Congress to amend copyright terms, even in the face of evidence that this term of protection hinders rather than promotes the creation of works, and leads to massive barriers to access for older “orphaned” works.

Aside from the replication of U.S. laws, which are not only often inappropriate for those living in poverty in developing countries but also ill-suited even in our domestic context, a number of U.S. proposals are not even consistent with our current laws. These proposals seek to increase the rights of rightowners and increasing liability. The sections on enforcement of intellectual property rights take a wholesale approach in applying injunctions and damages, without regard to the existing exceptions under U.S. law, and often go beyond current U.S. law in a way that heavily favors the rightowners. It is extremely unfortunate that U.S. negotiators would seek to introduce backdoor changes to our laws, particularly given the highly secretive nature of the negotiations that precludes active and informed public participation.

One area where copyright holders will gain more rights is through the provisions on technological protection measures (TPM). Although unsettled under U.S. law, the proposed TPPA text would create a separate cause of action for the violation of a TPM even where no underlying copyright infringement exists. Thus, even where a person has not violated copyright, he can still be liable for damages for circumventing a TPM. Although the U.S. proposal does provide for some limitations and exceptions to liability for circumventing a TPM, they are more narrowly drawn than current U.S. law and it will be harder for those pursuing an exception to receive them. Another area, also unsettled under current law, would provide copyright owners with the exclusive right to ban parallel importation of works, even those that have been lawfully purchased or acquired.

The structure of the U.S. proposal on remedies provides for aggressive enforcement measures and shifts the balance in favor of the rightholder at the expensive of users. For example, authorities would be required to take account the suggested retail price of an infringed good despite the fact that the right owner often does not receive such an amount through normal sale of the product. The general provisions in U.S. copyright law refer to either statutory or “actual damages,” while the general rule for damages in U.S. patent law uses the term “damages adequate to compensate for the infringement.”

Not only does the U.S. proposal conceive of higher damages than current U.S. law, but the proposal also fails to recognize the numerous existing limitations on remedies for infringement. In some cases of “innocent infringements,” the infringer does not incur liability or the damages are limited to only a reasonable royalty, such as the case for innocent purchasers of semiconductor chips. Damages are similarly limited for “innocent violations” of circumventing technological protection measures. Certain

secondary transmissions by satellite carriers of infringing material are also limited to zero damages.

Attorneys' fees are presumed for both trademark and copyright cases under the U.S. proposal, increasing the likelihood that they will be assessed than under current U.S. law.

Another enforcement mechanism concerns the grant of injunctions. If the U.S. seeks the enforcement of injunctions in all cases of infringement, there are numerous areas which would be inconsistent with U.S. law. Several exceptions exist to exclude certain categories from injunctions because they were considered inappropriate ways to enforce intellectual property rights. These include innocent infringement by printers and publishers, or infringing semiconductor chip products, the limitations of liability by internet service providers, the limitations on injunctions for certain important cases involving biologic or pharmaceutical drugs, and limits on injunctions for nuclear energy patents, to mention a few.

Consider, for example, the U.S. limitations on the enforcement of surgical method patents, which highlights the need to have exceptions to both injunctions and damages. In the U.S., a patent owner cannot obtain damages or injunctions against medical practitioners who infringe patents when performing medical or surgical procedures. When the U.S. did not have this important limitation on enforcement, surgeons were sued by patent owners thus leading to serious ethical problems and endangering the care of patients where surgeons feared lawsuits in the face of applying the most recent surgical advances. One lawsuit was brought against, for example, surgeons who used a patented method of making self-sealing incisions during eye surgery. In light of the ethical issues affecting surgeons and health care issues affecting patients, Congress created exceptions to the availability of remedies for infringement of such patents. This one example highlights just one area where high levels of enforcement are clearly inappropriate. These limitations result from known defects in the enforcement of intellectual property rights. To ignore these known problems and ratchet up damages or require injunctions will cause mistakes to be repeated and the public interest to be continually harmed. More recently, the US Congress has consider limitations on injunctions and damages in connection with infringement of "orphaned" copyrighted works. While this legislation has not yet passed the Congress, it is an important proposal that may move forward when issues are resolved about the treatment of photographs.

The U.S. proposal focuses on giving greater rights to rightowners, without regard to the consumers. Even though the U.S. law contains numerous limitations and exceptions to these rights, these consumer-positive proposals are nowhere to be found in the TPPA proposals. Instead, U.S. negotiators seek to only to favor rightowners by ratcheting up protections and damages ignoring the positive proposals that could be introduced.

One key example would benefit persons who are visually impaired or have other disabilities. The U.S. has a copyright exception permitting the creation of accessible format works for the benefit of persons who are visually impaired without the permission of the copyright owner. This exception is so important to the human rights of persons who are blind or visually impaired that a World Intellectual Property Organization (WIPO) on this subject is being considered. Although the U.S. could seek to introduce a provision that would help persons who are visually impaired gain access to copyrighted materials through a copyright exception or a provision permitting the cross-border sharing of these works, such provisions were not included in the U.S. proposal. This is just one example where the U.S. could seek a more balanced approach that would include positive proposals for consumers rather than

ones that only seek to limit access.