



Computer & Communications Industry Association
1972-2012: 40 YEARS OF TECH ADVOCACY

INTERNET INDUSTRY PROPOSALS FOR TPP

The Computer & Communications Industry Association (CCIA) and its members strongly support the speedy completion of a high-quality “21st century” Trans Pacific Partnership Agreement. One important aspect of that agreement is the inclusion of provisions that permit the smooth functioning of the Internet. The Internet visibly is revolutionizing the way businesses—including small and medium enterprises—function. This is particularly important in the broad reach and diverse circumstance of the TPP region, where the Internet permits individuals and businesses in distant places with little or no capital to participate actively in the TPP business supply chains and community. Put another way, without a smoothly functioning Internet, the negotiated provisions of TPP will not yield the desired gains for TPP citizens.

The provisions below are what CCIA considers necessary to make the Internet work in the TPP region. Inclusion of these provisions will permit CCIA and its members companies to support TPP through to passage, and that support may assuage some of the concerns of some civil society groups and individual Internet users that TPP in some way will limit their use of or access to Internet services.

INTELLECTUAL PROPERTY CHAPTER

Copyright Exceptions

A copyright regime can allow technological progress only if it is balanced. Below are exceptions to copyright that must be included in an agreement to encourage innovation. Paragraph 1 includes the “three-step test” that appears in the Berne Convention, the TRIPS Agreement, and free trade agreements among many TPP countries. Paragraph 2, addressing temporary copies, appears in Article 5(1) of the European Union’s Information Society Directive, as well as the Chile-U.S. Free Trade Agreement. Paragraph 3, which provides for the flexibility necessary for courts to allow new technologies and uses, is based upon Article 10 of the Berne Convention; the Universal Declaration of Human Rights; the fair use provisions in copyright laws of Singapore, Malaysia, and the United States; and the fair dealing provisions in the copyright laws of Australia and New Zealand. Paragraph 4, which provides for international exhaustion among the TPP countries, is based upon Article 4(2) of the European Union’s Information Society Directive. It would replace Article 4(2) of the U.S. draft.

Proposed text:

1. Each Party shall provide for limitations or exceptions to rights in special cases which do not conflict with a normal exploitation of the work,¹ performance, or phonogram,² and do not unreasonably prejudice the legitimate interests of the right holder.
2. Such exceptions and limitations shall include temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable (a) a lawful transmission in a network between third parties by an intermediary; or (b) a lawful use of a work or other subject-matter to be made; and which have no independent economic significance, in that the reproductions are of short duration or are not perceptible to the user.³
3. Such exceptions and limitations shall permit the utilization of works and other subject-matter to the extent justified by the purpose⁴ of free expression⁵ (including commentary, criticism, and news reporting⁶),⁷ participation

¹ “[S]pecial cases which do not conflict with a normal exploitation... and do not unreasonably prejudice the legitimate interests...” appears in Berne art. 10, WIPO Copyright Treaty (WCT) art. 10(2), WIPO Performances and Phonograms Treaty (WPPT) art. 16(2), TRIPS art. 13, and FTAs after 2003.

² “Performance or phonogram” appears in WPPT art. 16(2).

³ “[T]emporary acts of reproduction... no independent economic significance” appears in EU Information Society Directive, 2001/29/EC (“EUIDS”), art. 5(1), with the exception of the word “lawful” before “transmission.” Identical language also appears in Chile-U.S. FTA art. 17.7(3) fn. 17, inserting “lawful” before “transmission.” The references to duration and perception have been added to clarify the meaning of independent economic significance. The Chile-U.S. FTA excludes computer programs, presumably because the EUIDS does not apply to computer programs. However, the EU Software Directive art. 5(1) provides the acts of reproduction of a computer program “shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.” Accordingly, paragraph 2 here is consistent with the exceptions that apply to computer programs in the EU. *See also* Malaysia Copyright (Amendment) Act 2012 sec. 9(b), amending section 13(2) by adding an exception for “the making of a transient and incidental electronic copy of a work made available on a network if the making of such copy is required for the viewing, listening, or utilization of the said work;” Singapore Copyright Act sec. 38A (permitting temporary or transient reproductions made in the course of communication); Australia Copyright Act sec. 43A and 43B (permitting temporary reproductions as part of making or receiving a communication or as a necessary part of using a work); and New Zealand Copyright Act sec. 43A (permitting transient or incidental reproductions).

⁴ “[T]o the extent justified by the purpose” appears in Berne art 10(2).

⁵ According to the U.S. Supreme Court in *Eldred v. Ashcroft*, fair use is a built-in accommodation between the Copyright Act and the First Amendment, which guarantees free speech.

INTELLECTUAL PROPERTY CHAPTER

in the cultural life of the community,⁸ transformative use,⁹ teaching, research, scholarship,¹⁰ personal use,¹¹ and the functioning of, and innovation in, the digital environment,¹² provided that such utilization is consistent with fair practice.^{13,14}

4. Each party shall provide that the first sale in any of the parties' territories of the original of a work or copies thereof by the right holder or with his/her consent exhausts the right to control resale of that object.¹⁵

Trademark Fair Use

*Exceptions to trademark law are necessary to enable competition and free expression.
The provision below is based on language from free trade agreements and U.S.
trademark law.*

Proposed text:

Each Party shall provide limited exceptions to the rights conferred by a trademark, including but not limited to fair use of descriptive terms, nominative use of trademarks, and other uses to sustain free expression and avoid the creation of barriers to legitimate activity, including electronic commerce and innovation, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.¹⁶

⁶ Berne art. 2(8): "The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information."

⁷ "Criticism, comment, and news reporting" appear in 17 U.S.C. § 107. See also Malaysia Copyright (Amendment) Act 2012 sec. 9(b), amending section 13(2) (fair dealing for criticism, review, or reporting of the news or current events); Singapore Copyright Act secs. 36 and 37 (fair dealing for criticism, review, and reporting of current events) Australia Copyright Act sec. 41 (fair dealing for criticism, review, parody, satire, and reporting news); New Zealand Copyright Act sec. 42 (fair dealing for criticism, review, and news reporting).

⁸ "Participation in the cultural life of the community" appears in Universal Declaration of Human Rights art. 27.

⁹ "Transformative use" is a central concept in U.S. fair use jurisprudence, per the Supreme Court's decision in *Campbell v. Acuff-Rose*.

¹⁰ "Teaching, scholarship, or research" appear in 17 U.S.C. § 107; "teaching" and "scientific research" appear in Rome Convention art. 16(1)(d); *see also* Malaysia Copyright (Amendment) Act 2012 sec. 9(b), amending section 13(2) (fair dealing for research and private study); Singapore Copyright Act sec. 35(1A)(fair dealing for research and study); Australia Copyright Act sec. 40(1)(fair dealing for research or study); New Zealand Copyright Act sec. 43 (fair dealing for research or private study).

¹¹ "Private use" appears in Rome Convention art. 15(1)(a).

¹² Courts in the United States have applied fair use to permit a variety of uses of digital technologies, including "space-shifting," software reverse engineering, the caching and display of images by search engines, and the compilation of databases that detect plagiarism. *See Diamond v. Rio; Sega v. Accolade, Kelly v. Arriba Soft; A.V. v. iParadigm. See also* Singapore Copyright Act secs. 39, 39A-39C (permitting reproductions and adaptations of computer programs); Australia Copyright Act secs. 47B-47H (permitting reproductions and adaptations of computer programs); New Zealand Copyright Act secs. 80A-80D (permitting reproductions and adaptations of computer programs)

¹³ "[P]rovided that such utilization is compatible with fair practice" appears in Berne art. 10(1) and art. 10(2); "compatible with fair practice" also appears in EUISD art. 5(3)(d).

¹⁴ The language of this subparagraph was endorsed in a proposal in relation to ACTA in July 2010 by the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Center for Democracy & Technology, CCIA, the Consumer Electronics Association, the Home Recording Rights Coalition, NetCoalition, Public Knowledge, and the Special Libraries Association.

¹⁵ EUISD art. 4(2); *see also* NAFTA arts. 1705(2)(b) & 1706(1)(c).

¹⁶ "Fair use of descriptive terms" and "provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties" appears in TRIPS art. 17; and U.S. FTAs, including Chile-U.S. FTA art. 17.2.5, and KORUS. Very expansive mandatory language protecting both descriptive and nominative uses, requiring that "each party

INTELLECTUAL PROPERTY CHAPTER

Proportionate Penalties

Disproportionate damages have the ability to discourage investment in the development and deployment of new products and services. The provisions below are based upon language in the Anti-Counterfeiting Trade Agreement (ACTA) and the U.S. Copyright Act.

Proposed text:

1. Each Party shall take into account the need for proportionality between the seriousness of the infringement, the interests of third parties, and the applicable measures, remedies and penalties.¹⁷
2. At least in the case of nonprofit educational institutions, libraries, archives, or public noncommercial broadcasting entities, a Party shall not make pre-established damages available under this paragraph against an entity that believed or had reasonable grounds for believing that a use of the copyrighted work was subject to an exception under that Party's laws.¹⁸

Copyright Safe Harbors for Online Service Providers

The safe harbors from copyright liability provided by the Digital Millennium Copyright Act have been critical to the growth on the Internet economy in the United States. Article 16 of the U.S. draft is based upon section 512 of the U.S. Digital Millennium Copyright Act, and appears in U.S. free trade agreements with many TPP countries, including Singapore, Australia, Chile, and Peru. CCIA supports inclusion in TPP of article 16 of the U.S. draft.

shall provide... for the fair use in the course of trade” appears in the EU-Colombia-Peru FTA art. 206 (“Exceptions to the rights conferred by a trademark”). Additionally, 15 U.S.C. § 1125(c)(3) provides that the following are not actionable as trademark dilution:

- (A) Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person’s own goods or services, including use in connection with—
 - (i) advertising or promotion that permits consumers to compare goods or services; or
 - (ii) identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.
- (B) All forms of news reporting and news commentary.
- (C) Any noncommercial use of a mark.

¹⁷ This paragraph is identical to Anti-Counterfeiting Trade Agreement (ACTA) art. 6(3).

¹⁸ 17 U.S.C. § 504(c)(2) allows a court to remit statutory damages in cases of innocent infringement by libraries, archives, educational institutions, and public broadcasters.

ELECTRONIC COMMERCE CHAPTER

Unimpeded Electronic Information Flows

Given the Internet's rapid growth over the last two decades and the explosion of Internet trade in both goods and services, including information services, a true 21st century trade agreement must address online information and data flows. The TPP should limit the regulation of online information to only truly necessary instances, because such regulations invariably distort the market for Internet-provided goods and services. When such regulation is necessary, Internet commerce should be afforded the same treatment as other commerce in the international trade arena. With that principle in mind, the regulation of online information flows should be justifiable, transparent, distort trade as little as possible and should functionally treat foreign and domestic websites and services the same. Mandates to store and process information domestically should also be avoided. Such rules can interfere with global supply chains, and place high burdens on businesses – especially small and medium sized enterprises – that conduct business in foreign markets. As a result, they function as an impediment to market access for both online businesses or businesses that use the Internet to market or sell their products.

Liability of Providers of Internet Information Services

Just as limiting the liability of providers of online service is essential in the IP context, limitations on services' liability for third party conduct are essential outside of the IP context. The Organisation of Economic Cooperation and Development (OECD) recently issued policy-making principles on intermediary liability that recognized the need for such limitations. Paragraph 1 below is based on Article 12 of the EU E-Commerce Directive as well Section 230 of the U.S. Communications Decency Act. Paragraphs 2 and 3 are based on Article 15 of the EU E-Commerce Directive.

Proposed text:

1. Except with the respect to the enforcement of intellectual property rights and criminal laws, each Party shall ensure that no provider of Internet information services shall be held liable on account of any electronic information flows on its system, to the extent that: i) the electronic information is provided by another person;¹⁹ ii) the provider of the Internet information services does not modify the electronic information;²⁰ and iii) the provider of the Internet information services does not select the receiver of the electronic information.²¹
2. No party shall impose a general obligation on providers of Internet information services to monitor the electronic information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.²²
3. A Party may establish obligations for providers of Internet information services promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their services with whom they have storage agreements.²³

¹⁹ Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c)(1), provides that “no provider or user of an interactive computer service shall be treated as the publisher of any information provided by another information content provider.” This limitation does not apply to criminal law or Federal intellectual property law. 47 U.S.C. §§ 230(e)(1) & (2).

²⁰ This requirement appears in EUECD art. 12(1)(a).

²¹ This requirement appears in EUECD art. 12(1)(b).

²² This paragraph is almost identical to EUECD art. 15(1).

²³ This paragraph is almost identical to EUECD art. 15(2).