

Issue Brief:

Archivists and the Trans-Pacific Partnership Trade Agreement

This issue brief was drafted by the Society of American Archivists' Intellectual Property Working Group, was reviewed by the SAA Committee on Advocacy and Public Policy, and was approved by the SAA Council on September 28, 2015.

SAA POSITION

The Society of American Archivists (SAA) opposes secret negotiations conducted without public consultation or debate that affect access to information. SAA opposes the following provisions of the Trans-Pacific Partnership (TPP) trade agreement:

- Any further extension of copyright terms.
- Lack of recognition of the importance of the public domain.
- Imposition of statutory damages.
- Extension of anti-circumvention rules without exceptions for fair use and non-infringing uses.
- Lack of penalty for the misuse of copyright enforcement powers.

SAA Will:

- To the extent possible, monitor the progress of TPP negotiations;
- Work with other organizations concerned about the negative impact of the TPP; and
- Advocate against TPP provisions that impede or undermine the archival mission.

THE ISSUES

The Trans-Pacific Partnership is a proposed trade agreement among twelve Pacific Rim countries. Implementation of the TPP is one of the primary goals of the Obama administration's trade agenda. One objective of the TPP is to establish a common framework for intellectual property. However, a number of aspects of this initiative are potentially damaging for archivists and researchers and therefore must be opposed. Once negotiations are complete, the agreement will be presented to Congress as a package. At that stage there will be no opportunity to amend particular provisions that may be highly objectionable. Any attempts to influence the outcome must occur before the TPP is finalized. The following points set out the problematic aspects of the proposed agreement.

Negotiations have occurred in secret, without public consultation or debate. The text of the agreement has not been made public, which makes it difficult to discuss the specifics of the agreement. However, early drafts have been leaked, sparking protests by health professionals, Internet freedom activists, environmentalists, organized labor, and advocacy groups representing creators and consumers who object to the secrecy of negotiations, the agreement's expansive scope, and controversial provisions. As Senator Bernie Sanders (I-VT) has said, "If TPP was

such a good deal for America, the administration should have the courage to show the American people exactly what is in this deal, instead of keeping the content of the TPP a secret.”

The following elements in the leaked version of May 11, 2015, are of particular concern to archivists.

Term of Copyright: The potential for excessively long copyright terms that far exceed international standards is one of the greatest flaws in the May 11, 2015, draft of the agreement. Proposals for copyright term include life of the author plus 50, 70, or 100 years. For corporate works there are four proposed terms for published works (50, 70, 75, or 95 years from first publication) and four proposed terms for unpublished works (50, 70, 100, or 120 years from creation). Longer copyright terms exacerbate the orphan works problem¹ and diminish the public domain, and there is no evidence that longer terms serve as an incentive for the creation of new works. In 2013 SAA was among those opposing the TPP’s extension of copyright term to life of the author plus 70, and SAA continues to resist any extension of copyright term. In the interests of timely entry of works into the public domain, SAA advocates for only the shortest of the proposed terms in each case.

Importance of the Public Domain: A robust public domain is essential in fostering new creativity and advancing knowledge. It provides a storehouse of raw materials from which individuals can draw to learn and create new ideas or works. The TPP contains a provision that emphasizes the importance of taking into account the interests of rights holders, service providers, users, and the public. The U.S. and Japan oppose proposed additional language to acknowledge “the importance of preserving the public domain.”

Statutory Damages: The TPP would require all countries to include some form of statutory damages in their laws. The absence of statutory damages on unregistered works has been an important protection for U.S. archives. Absurdly high statutory damages do little to curb infringement but only breed contempt for the copyright system. Damages – especially for the users of nonprofit archives and libraries – should be limited to actual harm.

Anti-Circumvention Rules: The TPP seeks to export objectionable aspects of the U.S. Digital Millennium Copyright Act (DMCA) to its Pacific Rim trading partners. Although it would be legitimate to penalize users who circumvent Technological Protection Measures (TPMs) in order to infringe copyright, the TPP allows punishing users who circumvent a TPM regardless of whether the intended use is or is not infringing. Consequently one could, for example, engage in a criminal act by circumventing a TPM on a public domain work. The impact of anti-circumvention rules on archives is mitigated somewhat because criminal penalties against them can be waived. Nevertheless, the provision as a whole may decrease the number of anti-circumvention tools, making it harder for archives to access and preserve material given to them that is protected by a TPM.

Exceptions and Limitations: The TPP contains language that supports but does not require an appropriate balance between copyright owners and users through exceptions for a list of purposes such as criticism, comment, news reporting, teaching, scholarship, research, and the

¹ See <http://www2.archivists.org/statements/issue-brief-orphan-works>.

like. It is far from clear whether the exceptions and limitations allowed by the agreement would expand or constrict rights that users currently have under U.S. law. Furthermore, other provisions of the TPP undermine copyright's fundamental balance. Users could not exploit archives for new scholarship and economic growth without a robust system of exceptions and limitations on the monopoly rights of copyright owners. Instead of merely "endeavoring" to achieve an appropriate balance, SAA advocates for stronger language that would make a balance mandatory.

Copyright Misuse and Abuse: Only the U.S. opposes a provision that allows for compensation where a rights holder has abused the enforcement powers. The principle of balance in copyright requires that rights owners and infringers be equally accountable for their inappropriate actions.

Investor-State Dispute Settlement: TPP proposes new mechanisms for settling disputes between investors and government entities. Many archives are part of state institutions and agencies and thus have substantial protection from legal actions under the 11th Amendment. It is unclear at this point whether foreign copyright claimants may use the international tribunals established by TPP to bypass American courts and American laws.

In sum, the TPP trade agreement contains a number of provisions that seriously upset the balance that is fundamental to effective copyright law and thereby threatens the archival mission in the U.S. and in other Pacific Rim countries. As James Love of Knowledge Ecology International (KEI) warns, "In many sections of the text, the TPP would change global norms, restrict access to knowledge, create significant financial risks for persons using and sharing information, and, in some cases, impose new costs on persons producing new knowledge goods" (Love, 2015). The TPP must be opposed before irrevocable damage is done.

BACKGROUND

The Trans-Pacific Partnership (TPP) is a proposed trade agreement among a number of Pacific Rim countries. Among other things, the TPP seeks to lower trade barriers, establish a common framework for intellectual property, enforce standards for labor law and environmental law, and establish an investor-state dispute settlement mechanism. TPP is considered by the United States government as the companion agreement to the Transatlantic Trade and Investment Partnership (TTIP), a broadly similar agreement between the United States and the European Union. Implementation of the TPP is one of the primary goals of the Obama administration's trade agenda.

Beginning in 2008, twelve countries have been at the TPP negotiating table: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. Although the plan was to conclude negotiations in 2012, such contentious issues as agriculture, intellectual property, and services and investments have prolonged negotiations. The latest round of negotiations in July 2015 ended with a number of issues still unresolved.

ADDITIONAL RESOURCES

Cox, Krista L. "Analysis of August 2015 Leaked TPP Text on Copyright, ISP and General Provisions," ARL Policy Notes, 5 August 2015, <http://policynotes.arl.org/?p=1146>.

Cox, Krista L. “29 Organizations and More than 70 Individuals Sign Letter Opposing Life Plus Seventy Year Copyright Term in TPP,” 9 December 2013, <http://keionline.org/node/1849>.

Electronic Frontier Foundation, “Trans-Pacific Partnership Agreement,” <https://www.eff.org/issues/tpp>.

Ikenson, Daniel J., “A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement,” Cato Institute, Free Trade Bulletin, no. 57 (4 March 2014), <http://object.cato.org/sites/cato.org/files/pubs/pdf/ftb57.pdf>.

Knowledge Ecology International (KEI). “May 11, 2015 consolidated text of Intellectual Property Chapter for TPP,” <http://keionline.org/tpp/11may2015-ip-text>.

Love, James. “Knowledge Ecology International Leaks Copyright Provisions in Trans-Pacific Partnership.” (5 August 2015), <http://www.keionline.org/node/2309>.

Rimmer, Matthew. “The Trans-Pacific Partnership: Copyright Law, the Creative Industries, and Internet Freedom,” (25 August 2015), <http://infojustice.org/archives/34913>.

Sanders, Bernie, “The Trans Pacific Trade TPP Agreement must be defeated,” (2014) <http://www.sanders.senate.gov/download/the-trans-pacific-trade-tpp-agreement-must-be-defeated?inline=file>.