

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, reviewed by the SAA Committee on Advocacy and Public Policy, and approved by the SAA Council on September 28, 2015. It has been updated to reflect the Trans Pacific Partnership Trade Agreement text released on November 5, 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 trade agreement (TPP):

- Extension of copyright terms in any jurisdiction.
- Imposition of statutory damages.
- Extension of anti-circumvention rules without exceptions for fair use and non-infringing uses.
- Measures that undermine copyright's fundamental balance, particularly the failure to require exceptions and limitations and the absence of penalty for the misuse of copyright enforcement powers.

SAA Will:

- Monitor the progress of TPP ratification and
- Work with other organizations to oppose ratification of the TPP if the provisions related to copyright are not changed.

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. Sometime in 2016, the agreement will be presented to Congress as an unalterable package. At that stage there will be no opportunity to amend particular provisions that may be highly objectionable. The following points set out the problematic aspects of the proposed agreement.

The full text of the TPP was released by the parties to the agreement on November 5, 2015. The agreement is still subject to a legal review for accuracy, clarity, and consistency. The following elements in the Intellectual Property chapter are of particular concern to archivists.

Term of Copyright: The duration of copyright protection in the U.S. will not change as a result of the TPP. The agreement would, however, make it harder to roll back existing U.S. copyright terms, as many (including the Copyright Office) have suggested may be desirable. Further, the TPP requires half of the other signatories (Canada, New Zealand, Japan, Vietnam, Malaysia, and Brunei) to extend their respective terms of copyright protection beyond the current international

standards. 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 1994 and 1997-98 SAA opposed extension of term to life of the author plus 70 years as bad for U.S. law, and SAA believes it is bad for other countries as well, especially as archivists work in an increasingly globalized environment.

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. Potentially high statutory damages do little to curb infringement but only generate disrespect 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 provides both civil and criminal penalties for those who circumvent, manufacture, or otherwise provide means to circumvent Technological Protection Measures (TPMs). Although the impact of anti-circumvention rules on archives may be mitigated somewhat because criminal penalties against them can be waived, the provision as a whole may decrease the number of anti-circumvention tools, making it harder for archives to access and preserve material that is protected by a TPM. However, signatories may provide exceptions that would permit circumvention of a TPM for non-infringing uses. Given that exceptions to the anti-circumvention rules are optional rather than mandatory, including civil and criminal penalties in the TPP opens the door to serious complications for archival work in the digital age. SAA advocates for mandatory exceptions that would incur no penalty should an archives circumvent a TPM on a public domain work. SAA also opposes the provision that makes circumvention and infringement separate causes of action.

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 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. Further, other provisions of the TPP undermine copyright's fundamental balance. Users cannot exploit archives for new scholarship and economic growth without a robust system of exceptions and limitations on the monopoly rights of copyright owners. SAA finds the text—that the Parties merely “endeavor” to achieve an appropriate balance in their copyright regimes—unacceptable. . At the same time that the TPP makes expansion of monopoly rights mandatory, it fails to provide balance because it treats exceptions and limitations as optional.

Copyright Misuse and Abuse: The TPP includes a provision that appropriate measures may be needed to prevent the abuse of intellectual property rights by rights holders. The principle of balance in copyright requires that rights owners and infringers be equally accountable for their inappropriate actions. Because the agreement lacks stronger language that would make such measures obligatory, SAA finds this provision to be unacceptable.

Investor-State Dispute Settlement: The Investment chapter of the TPP proposes dispute settlement mechanisms that permit investors to take legal action against 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 time whether foreign copyright claimants may use the international tribunals established by TPP and thus bypass American courts and American laws, leaving archivists without the kinds of defenses and

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

protections, such as fair use, that are currently available to them.

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. Because provisions by which TPP enhances the rights of copyright owners are mandatory whereas provisions addressing archivists' and users' interests are not, ratification of the TPP must be opposed to prevent irrevocable damage.

BACKGROUND

The Trans-Pacific Partnership trade agreement (TPP) is a proposed 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 original plan was to conclude negotiations in 2012, such contentious issues as agriculture, intellectual property, and services and investments have prolonged negotiations. Negotiations were successfully concluded in October 2015. However, the TPP comes into force only after the parties have ratified it in accordance with their respective domestic procedures.

Ratification of the TPP by the U.S. is subject to the "fast track" procedures agreed to in June 2015. Congress will be able to approve or reject the agreement in a straight up-down vote, meaning that it cannot amend the agreement. Due to the timing required by the process, a vote will not occur until 2016.

ADDITIONAL RESOURCES

Cox, Krista L. "Analysis of the Final Trans-Pacific Partnership Agreement (Leaked) Text on Intellectual Property: Mixed Results," <http://www.arl.org/storage/documents/TPP-Analysis.pdf>

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>.

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

Text of the Trans-Pacific Partnership, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.