



CENTRE FOR LAW
AND DEMOCRACY

*Analysis of the Draft Intellectual
Property Chapter of the Trans-
Pacific Partnership*

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Introduction

Copyright law and the protection of intellectual property are among the most contentious freedom of expression issues in the world today. With the spread of the Internet and the rise of file sharing which has accompanied it, some claim that the exponential rise in piracy poses a mortal threat to the viability and future of creative industries. Others celebrate the expanded access to art and culture, and argue that the rules around intellectual property are an out-dated relic of the pre-digital age.

Regardless of whether you think that intellectual property protections should be weakened or strengthened, there can be no question that the debate over how to reshape them must take place in a transparent and consultative manner. As an issue that will drastically impact the future of the Internet, democracy and public accountability demand that all stakeholders should have a chance to voice their opinions.

In this context, the veil of secrecy that has surrounded negotiations over the *Trans-Pacific Strategic Economic Partnership Agreement* (TPP) is indefensible. Although the precise content of the treaty has never been officially confirmed, there have for some time been indications that it will include important changes to intellectual property law and enforcement, with significant consequences for the future of the Internet.

On 13 November 2013, Wikileaks released what it claimed was a leaked draft of the text of the TPP chapter on intellectual property (draft TTP chapter), as it stood following the conclusion of the 19th round of negotiations in August. Although it is impossible to confirm with absolute certainty the veracity of the document, we have no reason to doubt that it is genuine. If so, there are several aspects of the draft TPP chapter which are extremely problematical from a human rights perspective. Provisions which undermine the protections from liability accorded to online intermediaries, a cardinal requirement for protecting freedom of expression on the Internet, are particularly troubling. The draft TPP chapter also contains provisions criminalising the circumvention of digital locks, which would undermine legitimate reuses of copyrighted material, and it proposes to extend copyright term lengths.

These Comments provide substantive recommendations on how to improve the process of consultation around the TPP and how the major problems with the draft TPP chapter should be resolved to bring it into line with international standards on freedom of expression. These Comments only discuss the ways in which the draft TPP chapter will worsen the current copyright framework. Many stakeholders, including the Centre for Law and Democracy, argue that the current system of

copyright needs to be fundamentally reworked in order to respect freedom of expression in an online context.¹

It has been reported that the negotiating parties aim to finalise the TPP at the next round of negotiations in Singapore on 7-9 December.² The Centre for Law and Democracy calls on the governments negotiating the TPP to open up the process to the public, to be forthright with their citizens about their negotiating positions and aims in relation to the TPP, and to ensure that the final text adequately respects the right to freedom of expression.

1. Secrecy in the TPP Negotiations

The TPP grew out of an earlier trade agreement that was signed between Brunei, Chile, New Zealand and Singapore in 2005. The current negotiations aim to expand the treaty to include Australia, Canada, Japan, Malaysia, Mexico, Peru, the United States and Vietnam. This membership would create a trade group comprising 800 million people and 40% of the global economy. Several other States have expressed some interest in eventually joining, including Colombia, Costa Rica, the Philippines, Taiwan and Thailand. Although the TPP's main focus is on increasing access to markets, it seeks to unify standards around a raft of other issues, including, in addition to intellectual property, agricultural policies, consumer safety, environmental protection and labour standards.

Despite the massive potential impact of the TPP, the negotiations have taken place largely in secret and with very limited public consultation. At the outset, countries participating in the negotiations agreed that all negotiating texts and documents exchanged as a result of the process would be treated as confidential. Specifically, each State agreed that drafts and documents would only be shared with government officials and a limited number of individuals who have been selected to participate in domestic consultation processes, who should be informed about the confidential nature of the documents. Documents must remain confidential until four years after the entry into force of the TPP or, if no agreement is reached, for four years after the last round of negotiations.³

¹ For a more thorough discussion of the problems with copyright and how the rules should be reshaped see Centre for Law and Democracy, *Reconceptualising Copyright: Adapting the Rules to Respect Freedom of Expression in the Digital Age* (Halifax: Centre for Law and Democracy, 2013). Available at: <http://www.law-democracy.org/live/wp-content/uploads/2013/07/Final-Copyright-Paper.pdf>.

² "Next big TPP meet set for Dec. 7 to 9", *Japan Times*, 22 October 2013. Available at: <http://www.japantimes.co.jp/news/2013/10/22/business/next-big-tpp-meet-set-for-dec-7-to-9/>.

³ A model version of the letter setting out the agreement can be read at: <http://www.dfat.gov.au/fta/tpp/111221-tpp-confidentiality-letter.html>.

This formula effectively precludes the possibility of serious public engagement with the TPP process. Without being able to review specific drafts that are under discussion, those participating in the public consultations are effectively blindfolded in terms of providing meaningful input on key issues, even in those countries where consultations have continued beyond an initial brainstorming meeting during the early stages of membership talks.

The rules do allow for selected stakeholders to be granted greater access but there is some evidence that this process has been skewed in favour of business interests. The United States Trade Representative's Industry Advisory Committees, whose members receive advance copies of United States proposals, have sixteen representatives advising on intellectual property issues. All of them represent business interests – including key players with an interest in strengthening intellectual property protection, such as pharmaceutical and entertainment companies.⁴

The TPP process has attracted significant criticism from a range of actors for its secrecy and resulting lack of public engagement. In November 2013, 83 law professors in the United States signed a letter demanding the release of draft texts for public comment and sought assurances from the government that subsequent treaty negotiations would be carried out in a more transparent manner.⁵ In June 2012, 132 members of the United States House of Representatives signed a letter demanding that they, their staffs and the public at large be granted access to summaries of the negotiating positions of the United States.⁶ Legislators in Peru and Malaysia have also called for greater transparency around the negotiations.⁷ It is particularly telling that even lawmakers are feeling in the dark about the process. Concerns about a lack of transparency have also been raised prominently in Australia,⁸ Canada,⁹ Japan¹⁰ and New Zealand.¹¹

⁴ See: <http://infojustice.org/archives/21137>.

⁵ Letter available at: <http://infojustice.org/wp-content/uploads/2013/11/Law-Professors-TPP-11142013.pdf>.

⁶ Letter available at: <http://infojustice.org/archives/26456>. Similar letters expressing concern were signed by 174 Members of the United States House of Representatives in November 2013. See Erika Eichelberger, "Will Democrats and Tea Partiers Derail Obama's Secret Trade Deal?", *Mother Jones*, 13 November 2013. Available at: <http://www.motherjones.com/politics/2013/11/fast-track-authority-obama-trans-pacific-partnership>.

⁷ See: <http://infojustice.org/archives/30645> and <http://infojustice.org/archives/30371>.

⁸ Cathy Van Extel, "The secret trade deal that could let multinationals sue states", Australian Broadcasting Corporation, 14 May 2013. Available at: <http://www.abc.net.au/radionational/programs/breakfast/trade-talks/4689004>.

⁹ Curt Petrovich, "Shhh! Let's have an international trade meeting and not tell anyone", Canadian Broadcasting Corporation, 21 June 2013. Available at: <http://www.cbc.ca/news/world/shhh-let-s-have-an-international-trade-meeting-and-not-tell-anyone-1.1388334>. Michael Geist, "Secrecy the standard as Canada enters Trans Pacific Partnership talks", *The Toronto Star*, 9 December 2013. Available at:

The Centre for Law and Democracy recognises that it is reasonable to maintain some degree of confidentiality over the substance of discussions relating to international trade agreements. This may be needed, for example, to ensure that parties do not feel inhibited by the spectre of openness from pursuing their negotiating objectives. This is an interest which is recognised as a legitimate exception (sometimes referred to as the “free and frank advice” exception) to the right to information both under international standards and in most national right to information laws.

At the same time, the almost total veil of secrecy which has been drawn around the TPP negotiations cannot possibly be justified by reference to any interest recognised as legitimate under either international law or national right to information laws. It may be noted that the exception in favour of international relations cannot be relied on this case, since the level and degree of secrecy was collectively negotiated by parties. If it were otherwise, States could remove all information relating to international relations from the scope of right to information legislation, simply by agreeing this with the other involved parties. The need for transparency is particularly important given the vast breadth and potential impact of the TPP, and the consequent enormous public interest in having an opportunity to be engaged in genuine consultations on it as it develops.

At a very minimum, periodic public releases of draft versions of the TTP should be undertaken, indicating which countries support or oppose different proposals. This would allow for substantive public input into the process, without posing a risk to any legitimate secrecy interest. Protection for free and frank debate does not mean that States are entitled to hide their position on key policy issues from their citizens. Furthermore, there is no question of sensitivity of negotiating positions arising in this context since, by definition, all of the other negotiating parties are already aware of each country’s position as expressed in such a document.

Moreover, previous instances of negotiating intellectual property treaties have demonstrated that active public participation does not undermine the negotiation process. On the contrary, it lends that process greater legitimacy. For example, the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* has been praised for the transparent and inclusive nature of its negotiations. The treaty was concluded at a conference in

http://www.thestar.com/business/2012/12/09/secrecy_the_standard_as_canada_enters_trans_pacific_partnership_talks_geist.html.

¹⁰ "Don't sell out Japan in TPP talks", *Japan Times*, 10 October 2013. Available at:

<http://www.japantimes.co.jp/opinion/2013/10/10/editorials/dont-sell-out-japan-in-tpp-talks/>.

¹¹ Calida Smylie, "Calls for Govt to release draft text of TPPA", *The New Zealand Herald*, 1 October 2013. Available at: http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11132757.

The Centre for Law and Democracy is a non-profit human rights organisation working internationally to provide legal expertise on foundational rights for democracy

June 2013 which was streamed live over the Internet, allowing the public to follow the evolution of the treaty's provisions.¹²

It is extremely difficult to avoid the conclusion that the veil of secrecy around the TPP negotiations is precisely designed to avoid negotiating States having to deal with the inevitably difficult public consultations that openness would lead to. However, the Centre for Law and Democracy believes that even from the perspective of avoiding confrontation, the negotiators do themselves a disservice by maintaining such a high degree of secrecy around their discussions. The contents of the TPP will inevitably be made public at some point, even if this is only after it has been finalised. At this point, the collective weight of both disagreement with the actual substance of the treaty and unhappiness with the (exclusionary) process of negotiating it can be expected to generate a more hostile and confrontational response than would have come out through a more democratic process of developing the treaty.

In practice, even within the confines of what is possible given the initial agreement on secrecy of the TPP process, the degree of public consultation has varied significantly from country to country. In Canada, the government solicited public comments on acceding to the TPP over a six-week period in January and February 2012.¹³ However, neither the public submissions nor even a summary of them have been posted online; instead, the government merely announcing that the comments "indicated broad support for Canada's entry into the negotiations".¹⁴ Australia's government maintains a website for submissions about Australia's participation, all of which are posted publicly.¹⁵ The United States also publishes all of the comments it has received online,¹⁶ and has conducted consultations with several hundred invited stakeholders throughout the course of the negotiations.¹⁷ New Zealand has held running consultations throughout the process, as well as structured stakeholder meetings.¹⁸ Malaysia's government also reports having carried out

¹² Videos of the conference are available at: <http://www.wipo.int/dc2013/en/>.

¹³ "Consultations on Potential Free Trade Agreement Negotiations with Trans-Pacific Partnership Members" (2011) 145:53 *Canada Gazette*. Available at: <http://canadagazette.gc.ca/rp-pr/p1/2011/2011-12-31/html/notice-avis-eng.html#d106>.

¹⁴ "Trans-Pacific Partnership Free Trade Agreement Negotiations", Department of Foreign Affairs, Trade and Development Canada, October 2013. Available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/index.aspx>.

¹⁵ "Trans-Pacific Partnership Agreement negotiations", Australia Department of Foreign Affairs and Trade. Available at: <http://www.dfat.gov.au/fta/tpp/>.

¹⁶ See: <http://www.ustr.gov/tpp>.

¹⁷ "Fact Sheet: Transparency and the Trans-Pacific Partnership", Office of the United States Trade Representative, June 2012. Available at: <http://www.ustr.gov/about-us/press-office/fact-sheets/2012/june/transparency-and-the-tpp>.

¹⁸ "Trans-Pacific Partnership (TPP) Negotiations", New Zealand Ministry of Foreign Affairs and Trade, 15 October 2013. Available at: <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/>.

consultations with various civil society groups and commercial interests.¹⁹ At the very least, feedback from consultations should be made publicly available, along with a report summarising the findings and the lessons learned by the government as a result of the discussions.

Recommendations:

- An officially sanctioned version of the draft TPP should be released publicly as soon as possible, and well before negotiations around it are concluded. This should indicate clearly all agreed positions as well as all remaining areas of discussion and, in relation to the latter, the various competing proposals and which States support and oppose them.
- Negotiating States should engage in robust domestic consultations around their own negotiating positions on remaining issues, and ensure that these consultations are transparent, including by publishing all submissions they receive, and engage a range of different stakeholders.

2. Intermediary Liability

Limitations on liability, whereby Internet intermediaries such as Google and Facebook are not held responsible for actions taken by their users, are a cardinal pillar underlying the functionality of the Internet. Without this type of protection, Internet giants such as Google, YouTube or Facebook would be sued into bankruptcy, as would any other service provider that enables user-generated content.

Although the draft TPP text recognises the principle of protecting intermediaries from liability in Article QQ.I.1, Australia, Brunei, Mexico, New Zealand, Peru, Singapore and the United States support language which makes this protection explicitly dependent on service providers implementing anti-piracy measures. Canada, Chile and Vietnam, while resisting that language, nonetheless support forcing ISPs to enact certain anti-piracy provisions.

The anti-piracy measures spelled out in Section I call for the putting in place of procedures for notification and the removal of offending material. The precise modalities of this are left up to individual States but we note that in many countries

¹⁹ "Brief on the Trans-Pacific Partnership (TPP)", Ministry of International Trade and Industry.

Available at:

http://www.miti.gov.my/storage/documents/c94/com.tms.cms.document.Document_62357eea-c0a8156f-2c11008e-9a1ecbed/1/TPP%20-%20Briefing%20Notes.pdf.

these systems fail to provide adequate protection to freedom of expression since intermediaries are essentially left to determine whether material is infringing, something they are neither qualified to do nor interested in doing properly.

Controversially, the draft TPP includes a proposal that makes protection from liability for service providers contingent on their putting in place policies to terminate service to repeat infringers (QQ.I.1.1.B.VI). It is unclear which specific States support this approach, since the leaked text only mentions that New Zealand and Malaysia oppose them.

The Internet is a key practical mechanism for realising the right to freedom of expression and rules which require access to the Internet to be suspended, which would be the effect where the service in question was providing access to the Internet, are, as a result, a serious interference with this fundamental right. The international human rights community is increasingly recognising that access to the Internet should itself be considered a human right.²⁰ As the four special international mandates on freedom of expression²¹ stated in their 2011 Joint Declaration:

Denying individuals the right to access the Internet as a punishment is an extreme measure, which could be justified only where less restrictive measures are not available and where ordered by a court, taking into account the impact of this measure on the enjoyment of human rights.²²

Termination schemes which are overseen by service providers, without judicial supervision, clearly violate this standard.

Termination schemes have proven extremely problematical in countries that have implemented them. France and the United Kingdom passed laws to cut off Internet access to users that violated copyright, and both countries were forced to back down before they could be fully implemented. A similar law in South Korea has been broadly criticised and that country is also considering abandoning the practice.²³

²⁰ See, for example, Centre for Law and Democracy, *A Truly World-Wide Web: Assessing the Internet from the Perspective of Human Rights* (Halifax: Centre for Law and Democracy, 2012). Available at: <http://www.law-democracy.org/wp-content/uploads/2010/07/final-Internet.pdf>.

²¹ The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.

²² Adopted 1 June 2011, clause 6(c). Available at: <http://www.osce.org/fom/78309>.

²³ See the Centre for Law and Democracy's full Analysis of the Korean Copyright Act at: <http://www.law-democracy.org/live/wp-content/uploads/2013/06/Korea.Copyright.pdf>.

Another provision, QQ.I.1.1.B.VII, also opposed by New Zealand and Malaysia, opens the door to forcing service providers to monitor their users' Internet behaviour "to the extent consistent with such technical measures". While the meaning of this phrase is unclear, it would at least appear to require service providers to put in place available automated monitoring tools. If so, this is precisely the sort of scheme that the rules on protection against liability are designed to avoid. Imposing such requirements effectively requires service providers to act as copyright policemen over their users, albeit without any of the protections that apply in democracies to prevent abuse of power by law enforcement authorities.

Recommendations:

- The TPP should require strong and effective protection against liability for intermediaries and such protection should not be dependent on service providers establishing anti-piracy systems other than reasonable notice-and-takedown regimes.
- The provisions requiring Internet access service providers to terminate access services to users found to be infringing copyright should be removed.
- Service providers should not be required to monitor users' Internet behaviour or to actively police their users in any way.

3. Digital Rights Management

Rights holding organisations have implemented a number of technological measures aimed at protecting intellectual property rights. These tools, which are collectively known as digital rights management (DRM) measures, generally consist of electronic "locks" or other protection measures which are designed to make it impossible to copy files or otherwise use digital content in a manner that breaches intellectual property rights. However, these measures are never foolproof and a range of programs or codes have been developed which circumvent or neutralise them. In response, rights holding organisations have pushed for legislation to criminalise both the circumvention of DRM measures and the production or distribution of technology which facilitates such circumvention.

There are several reasons why DRM measures, and legislation that would criminalise their circumvention, are problematical. The most important is that DRM protections do not discriminate between infringing and non-infringing uses. For example, a teacher who wanted to copy a short excerpt from an e-book for classroom use (an activity which would be classified as fair use or fair dealing in many countries) would run into the same roadblocks as an infringing user. DRM

measures have also been criticised for being anti-competitive and for stifling interoperability among different systems.²⁴

The draft TPP text contains provisions aimed at bolstering the efficacy of DRM systems. Article QQ.G.10 – which is supported by Australia, Mexico, Peru, Singapore and the United States and opposed by Brunei, Japan, Malaysia and Vietnam – requires States to enforce sanctions against anyone who circumvents a DRM measure or manufactures or distributes devices which are either promoted as being for the purpose of circumventing DRM technologies, have only a limited commercially significant purpose other than circumventing DRM technologies, or are primarily designed for circumventing DRM technologies. The draft TPP text states that these sanctions should be criminal in nature if the activity is carried out for commercial advantage. There are several proposed exceptions to this rule. One category is for reverse-engineering activities aimed to ensure interoperability while another permits disabling the collection of personal information. The most important exception is found in Article QQ.G.10.D.VIII, which allows States to exempt activities which facilitate non-infringing uses from the sanctions otherwise imposed on DRM circumventing activities. There are competing versions of this provision, but most place an onus on States which rely on the exception to justify it. This must be done via a credible legislative or administrative investigation which finds substantial evidence that DRM circumventing sanctions are having an actual or likely adverse impact on non-infringing uses, which then need to be protected via the exception. The investigation would need to be repeated every three or four years, to see whether the exceptions are still justified.

A competing version of this package of measures is found in Article QQ.G.12, which is supported by Brunei, Chile, Japan, Malaysia, New Zealand, Peru and Vietnam and opposed by Australia and the United States. This proposal requires States to impose sanctions for circumventing DRM measures only where this is for the specific purpose of violating copyright. This proposal allows States some flexibility to create legal frameworks that ensure that the regimes of sanctions and legal remedies for circumventing DRM measures do not hinder legitimate uses.

Although Peru supports both Article QQ.G.10 and Article QQ.G.12, they are presumably mutually exclusive. Article QQ.G.12 is significantly preferable from a freedom of expression perspective. Although Article QQ.G.10 allows for exceptions to the ban on DRM circumvention for legitimate uses, and these exceptions can be applied to circumvention technologies, it is impossible to design a circumvention technology which will only, or even primarily, be used for legitimate purposes. Any program or device capable of circumventing a DRM measure for legitimate purposes

²⁴ Fred Von Lohmann, "FairPlay: Another Anticompetitive Use of DRM", Electronic Frontier Foundation, 25 May 2004. Available at: <https://www.eff.org/deeplinks/2004/05/fairplay-another-anticompetitive-use-drm>.

can just as easily be applied to infringing purposes, which would mean it likely falls outside the scope of the Article QQ.G.10.D.VIII exception. This renders the specific exceptions to the anti-circumvention provisions largely meaningless.

Moreover, Article QQ.G places a heavy and ongoing burden on States to justify such an exception before it can be employed. This type of reverse-onus, which effectively means that users have to justify the legitimacy of their uses and the adverse impact that DRM measures are having on them through the investigations that States must conduct, is wholly inappropriate. In particular, it effectively creates a legal presumption that all uses, including those which are legal, which for the most part reflect an attempt to protect freedom of expression interests, are illegal until proven otherwise. The QQ.G.12 proposal, by allowing States to ensure that their legal frameworks do not restrict legitimate uses, correctly starts by protecting legitimate uses and allowing States to craft restrictions as narrowly as possible in line with international human rights standards.

Recommendation:

- The system of promotion of DRM measures in Article QQ.G.12 should be endorsed rather than that set out in Article QQ.G.10.

4. Term Length

When the Berne Convention was signed in 1886, it set the length of copyright protection for most works at fifty years after the death of the creator. Over the past few decades, several countries have extended their copyright terms. Among the TPP participants, Australia, Chile, Peru, Singapore and the United States have extended their copyright terms to seventy years after the death of the creator for most works, while Mexico allows copyright to run one hundred years after the death of the creator for most works. The remaining countries – namely Brunei, Canada, Japan, Malaysia, New Zealand and Vietnam – have more or less maintained the Berne standard.

According to Article QQ.G.6 of the draft TPP, Australia, Chile, Mexico, Peru, Singapore and the United States have proposed standardising copyright protection terms length to match their domestic standards (one hundred years after the death of the creator according to the Mexican proposal and seventy years after the death of the creator according to a proposal supported by Australia, Chile Peru, Singapore and the United States). These proposals are opposed by Brunei, Canada, Japan,

Malaysia, New Zealand and Vietnam, who have proposed leaving copyright term length to be settled according to domestic law.

The core rationale for copyright has always been to incentivise the production of creative works and to allow for the maintenance of a class of professional authors. In recent years, this has come to be confused with the notion that copyright is about protecting somehow already existing property interests, which does not make sense because it is only by virtue of copyright rules that such interests exist (and those interests are similarly bounded by those rules).

Based on this rationale, the aim of copyright rules is to balance the advantages of allowing creators a limited monopoly over the use of their work to incentivise expressive output with the common good of placing material in the public domain, where it can be freely enjoyed by all. From this perspective, there is clearly no justification for extending copyright beyond the Berne standard; indeed, CLD and others have argued strongly that the Berne standard is already far too long.²⁵

There are good reasons why extending copyright protection for an additional twenty or fifty years beyond the Berne standard of fifty years after their creators' deaths will not encourage any additional creation. Obviously retroactive extension along these lines cannot incentivise additional creative output from artists who have already died. Regarding living or future artists, the overwhelming majority of creative works enjoy only a short period of high profitability, and keeping them copyright protected beyond this period simply freezes them out of the public domain limited benefits to the copyright holder. Almost by definition, the vast majority of those works that enjoy enduring profitability are already highly profitable (i.e. successful) works, which have already generated more than enough commercial benefits to compensate their authors for their efforts.

CLD can, of course, understand the interest copyright holders, who for the most profitable works are often large companies, have in extending term length, since this directly increases their profit. But this interest in further profits should not be allowed to override the wider interest in achieving an appropriate balance between the two key public interests at play with copyright, namely incentivising production and placing material in the public domain.

There are serious 'collateral' problems with unduly long copyright terms. They not only reduce the amount of material which is available for free in the public domain, they can also lead to works not being available at all. A 2013 study found that the number of books for sale that were printed in the 1850s was double the number

²⁵ See *Reconceptualising Copyright: Adapting the Rules to Respect Freedom of Expression in the Digital Age*, note 1, and ARTICLE 19, *The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age*, available at: <http://www.article19.org/resources.php/resource/3716/en/>.

that were printed in the 1950s.²⁶ For many of the latter works, there is simply not enough of a market to commercially publish them after obtaining copyright, while copyright restrictions prevent them from being freely available. In some jurisdictions, longer copyright terms also leads to the phenomenon of orphan works where the original creator (or his or her descendants) cannot be tracked down but the fact that the work is still under copyright protection precludes the reuse or rerelease of the work. It may be noted that analogous problems have been widely recognised in relation to publicly copyrighted materials, giving rise to the open data movements whereby governments around the world are moving to make public works available for reuse immediately and for free.

Extending copyright term length cannot be justified. It would reduce the public availability of creative material while providing no tangible public benefit beyond generating even greater profits for individuals and companies who have already reaped significant rewards from their works.

Recommendation:

- Article QQ.G.6, which proposes a unified system of longer copyright term lengths, should be removed.

5. Sanctions for Copyright Infringement

With the rise in global piracy, sanctions for copyright infringement have emerged as one of the most controversial issues for intellectual property law. Although the frequency of digital copyright infringement makes calls for tougher penalties understandable from the perspective of rights holders, it is a broadly recognised principle of international human rights law that the imposition of disproportionately harsh sanctions imposed pursuant to otherwise legitimate restrictions on expressive activity by themselves violate the right to freedom of expression.²⁷ This is because of the potential chilling effect of such harsh sanctions due to people steering well clear of potentially illegal activity, with the result that much legitimate speech is also affected.

²⁶ Paul J. Heald, "How Copyright Makes Books and Music Disappear (and How Secondary Liability Rules Help Resurrect Old Songs)" (2013) No. 13-54 Illinois Public Law Research Paper. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290181.

²⁷ See, for example, *Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995, Application No. 18139/91 (European Court of Human Rights).

Among the troubling provisions of the draft TPP text is Article QQ.H.7.1, which requires all parties to put in place and enforce criminal sanctions for breach of copyright “on a commercial scale.” According to Article QQ.H.7.7, these sanctions must include the possibility of imprisonment.

While in some extreme cases it may be appropriate to apply criminal sanctions against pirates, such as where copyright infringement is underlying a major commercial enterprise, the provision does not adequately define what downloading on a ‘commercial scale’ entails. The only guidance in this regard is found in a provision proposed by Australia, Peru, Singapore and the United States and opposed by Brunei, Canada, Chile, Malaysia, Mexico, New Zealand and Vietnam, which states that:

Willful copyright or related rights piracy on a commercial scale includes:

- (a) significant willful copyright or related rights infringements that have no direct or indirect motivation of financial gain; and
- (b) willful infringements for purposes of commercial advantage or [AU/SG/PE/JP oppose: private] financial gain.

The text proposed by the United States goes on to define “financial gain” for purposes of this Article includes the receipt or expectation of anything of value. While the purpose of this provision is likely to ensure that operators of major file sharing websites who do not receive profits from their activities can be covered, the language establishes a very low threshold which could cover even a single instance of illegally downloading a song.

As of January 2012, it was estimated that BitTorrent Inc., creator of one of the most popular protocols for file sharing, had 150 million monthly active users worldwide.²⁸ Studies have calculated that the percentage of BitTorrent files being shared in violation of copyright is about 99 percent of all traffic.²⁹ It is clearly not appropriate to treat all of these users as criminals. If criminal penalties are to be applied for copyright infringement, this should be reserved for the cases of large-scale infringement carried out as part of a major commercial enterprise, the scope of which is clearly defined in law.

²⁸ “BitTorrent and µTorrent Software Surpass 150 Million User Milestone; Announce New Consumer Electronics Partnerships”, 9 January 2012. Available at:

http://www.bittorrent.com/intl/es/company/about/ces_2012_150m_users.

²⁹ See Jacqui Cheng, “Only 0.3 percent of files on BitTorrent confirmed to be legal”, Ars Technica, 24 July 2010. Available at: <http://arstechnica.com/tech-policy/2010/07/only-03-of-files-on-bit-torrent-confirmed-to-be-legal/> and Jacqui Cheng, “BitTorrent census: about 99 percent of files copyright infringing”, Ars Technica, 30 January 2010. Available at:

<http://arstechnica.com/business/2010/01/bittorrent-census-about-99-of-files-copyright-infringing/>.

Recommendation:

- Article QQ.H.7.1, which calls for the imposition of criminal sanctions for copyright infringement on a commercial scale should either be removed or limited in scope to cases of large-scale infringement as part of a commercial enterprise.