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CDT'S VIEWS AND CONCERNS REGARDING THE INTELLECTUAL PROPERTY CHAPTER OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT

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CDT's big-picture concern is that the intellectual property chapter of the TPP may fail to reflect the full range of interests at stake in copyright policy. Copyright law affects not just rights holders, but also the public at large and a wide range of businesses and technologies. To the extent the specific obligations contained in TPP are nearly all focused on increasing enforcement to serve the interests of rights holders, TPP may encourage skewed and one-sided copyright regimes to the detriment of Internet innovators and the public.

CDT's specific concerns, based on draft negotiating texts that have leaked to the public, are set forth below.

The leaked text on Limitations and Exceptions (L&E) (Article QQ.G.16)

TPP needs to include provisions calling for appropriate limitations and exceptions to copyright. Without strong L&E language, TPP would effectively promote a one-sided vision of copyright law – one in which strong enforcement laws are mandatory but equally fundamental L&Es are weak and optional. The US proposal on L&Es is a step in the right direction but should be improved.

- *Savings Clause:* Some have interpreted paragraph 1 as *narrowing* the scope of permissible L&Es. TPP needs to clarify that this is not the intent. There needs to be a savings clause clarifying that TPP in no way limits a Party's ability to adopt L&Es that are otherwise consistent with its obligations under TRIPS and the WIPO copyright treaties.
- *Making an Affirmative Commitment:* It is unclear to what extent paragraph 2 is intended to *require* Parties to adopt L&Es; "due consideration" sounds highly discretionary. To achieve appropriate balance, L&Es should be put on the same footing as enforcement provisions, so that TPP sends a clear signal that L&Es are as much a core part of a sound copyright regime as strong enforcement. Assuming that TPP's enforcement provisions will be mandatory, the adoption of L&Es should be too – while still leaving Parties discretion to determine the precise scope their individual L&Es.
- *Temporary/Buffer Copies:* The current L&E language does not mention temporary or buffer copies (also sometimes called "incidental" copies). Temporary/buffer copies are ubiquitous in digital technology; subjecting them to copyright law is unworkable and would be disastrous for innovation. TPP's L&E provisions should encourage Parties to address this crucial issue directly, via their L&Es, rather than foster uncertainty by leaving it to the courts.

The leaked text of the February 2011 US proposal for the IPR Chapter

CDT has several concerns about the text of the US proposal that was leaked back in February 2011. We would welcome the opportunity to comment on a more up-to-date proposal, but none has been made public.

- *Temporary/Buffer Copies:* The US proposal says that copyright protection shall extend to “temporary storage in electronic form,” but omits key language from US law that limits protection to copies that are fixed “for a period of more than transitory duration.” By excluding the “transitory duration” limitation, the proposal effectively invites Parties to treat buffering as actionable copying. That would give copyright holders undue control over digital services and devices of all kinds, since buffering is fundamental to the Internet and ubiquitous in the digital world.
- *Role of Intermediaries:* The US proposal would require Parties to adopt “legal incentives for service providers to cooperate with copyright owners in deterring” infringement. But requiring or pressuring Internet intermediaries to take on affirmative network-policing obligations carries major implications for online speech, innovation, privacy, and the open character of the Internet. This is part of what sparked the Internet uprising over the SOPA/PIPA legislation and the European protests against ACTA earlier this year. Moreover, the TPP proposal goes much farther than the corresponding provision in ACTA, which says that Parties “shall endeavor to promote cooperative efforts within the business community” to address infringement. The ACTA language does not specify legal incentives and adds balancing language regarding free expression, due process, and privacy.
- *Relation of TPM Provisions to Copyright:* The proposed text states that circumventing a technological protection measure (TPM) shall be a completely separate offense from any underlying copyright infringement. While this is consistent with the text of the US DMCA, it fails to reflect important US court decisions holding that anticircumvention provisions apply only where the TPM is intended to protect a *copyright interest*. Omitting this key limitation invites the same kind of abuses that were attempted in the US prior to these court decisions – businesses using TPMs to try to block competition for things like replacement printer cartridges and garage door openers.

About CDT

The Center for Democracy & Technology (CDT) is a nonprofit public interest group that seeks to promote free expression, privacy, and innovation on the open, decentralized Internet. On copyright matters, CDT advocates balanced policies that provide appropriate protections to creators without curtailing the unique ability of the Internet to empower users, speakers, and innovators.

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