



CENTRE FOR LAW
AND DEMOCRACY

Canada

**A Bad Deal for Freedom of Expression:
Comments on Canada and the Trans-
Pacific Partnership**

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

A Bad Deal for Freedom of Expression: Comments on Canada and the Trans-Pacific Partnership¹

The Trans-Pacific Partnership (TPP) is more than just a trade deal. It is a comprehensive agreement to establish common economic structures among countries which, together, make up 40 percent of the world's Gross Domestic Product and one third of its trade. It is, in the words of the United States Trade Representative, an attempt to “write the rules for global trade”.² Ratification of the TPP will have an enormous impact on a wide range of areas, including digital development, the arts, environmental protection and healthcare. It is crucial that Canadian policy-makers think carefully about the positive and negative ramifications of the agreement, both for Canada and for the rest of the world.

The Centre for Law and Democracy (CLD)³ has prepared these Comments in response to an invitation by Canada's House of Commons Standing Committee on International Trade for Canadians for submissions on whether the TPP, if implemented, would be in the best interests of Canadians. CLD is a non-governmental organisation whose mandate is to promote foundational rights for democracy. As such, our analysis focuses on the potential impact of the TPP on core human rights, particularly freedom of expression.

There is significant cause for concern. The TPP will require Canada to implement highly problematical changes to our copyright framework, and it poses a threat to data protection and global principles of Internet governance. Against these negative impacts, the TPP includes only very weak protections for net neutrality and digital security.

Copyright

The most serious problem is that the TPP requires Canada to extend its copyright term from the current 50 years after the death of the author to 70 years. This is a significant step in the wrong direction. Copyright is important to incentivise and reward the production of creative works. But it is also a restriction on speech; as a result, copyright rules must be carefully calibrated to balance fair compensation for creators against the common good of allowing creative works to be freely enjoyed by all.⁴

There is no evidence that extending copyright terms has any positive impact in terms of promoting additional creative efforts. The overwhelming majority of creative works enjoy only a short period

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² “The Trans-Pacific Partnership”, Office of the United States Trade Representative, available at: ustr.gov/tpp/.

³ The Centre for Law and Democracy (CLD) is a non-profit, non-governmental organisation based in Halifax that works to promote foundational rights for democracy, including freedom of expression, the right to information and digital rights.

⁴ See Centre for Law and Democracy, *Reconceptualising Copyright: Adapting the Rules to Respect Freedom of Expression in the Digital Age* (2013). Available at: <http://www.law-democracy.org/live/wp-content/uploads/2013/07/Final-Copyright-Paper.pdf>.

of high profitability. Extending copyright terms provides little real benefit to artists and instead serves mostly as a giveaway to large and already highly profitable rights holding companies, such as Disney. An assessment by Innovation, Science and Economic Development Canada found that additional incentives produced by extending copyright terms would be trivial at best.⁵

From a global perspective, extending copyright terms also serves as a significant wealth transfer to the United States, which receives a disproportionate amount of global royalty payments. In New Zealand, where the current copyright term is 50 years after the artist's death, the government has estimated that the TPP extension will cost the country around \$55 million per year.⁶ The Innovation, Science and Economic Development Canada assessment estimated that term extensions would also lead to capital outflows from Canada.⁷

Another negative impact of longer copyright terms is that it freezes them out of the public domain. Research in 2013 revealed the remarkable fact that twice as many books printed in the 1850s were available for purchase than books printed in the 1950s.⁸ The reason for this is that the cost and legal hassle associated with obtaining copyright made it unprofitable to publish the more recent books. Longer copyright terms also negatively impact artistic output through derivative works, due not only to the cost of obtaining copyright but also the cost and difficulty of locating right holders.

Another problem is that the TPP seeks to enshrine the United States' flawed "notice-and-takedown" approach as a global standard for dealing with copyright violations. This approach requires intermediaries to remove third party content upon receipt of a complaint to the effect that it violates copyright or take responsibility for that content. As such, it has proven to be ripe for abuse since it incentivises intermediaries to delete information as soon as they receive a complaint, regardless of the validity of that complaint. By contrast, Canada's system, generally referred to as "notice-and-notice", requires intermediaries to forward notifications of copyright infringement to those responsible for the content, leaving removals or sanctions in the hands of courts. The TPP exempts Canada from imposing the "notice-and-takedown" system. However, the borderless nature of the Internet means that it is likely to impact everywhere. For example, Ecuador's President, Rafael Correa, is notorious for using frivolous copyright complaints in the United States to silence his domestic opponents.⁹ Even if Canada maintains its own system, the establishment of notice-and-takedown as a global standard will have significant impacts on Canadians' freedom of speech.

⁵ Innovation, Science and Economic Development Canada, "Assessing Economic Impacts of Copyright Reform on Selected users and Consumers", 19 October 2011. Available at: https://www.ic.gc.ca/eic/site/ippd-dppi.nsf/eng/ip01185.html#h3_1_a.

⁶ Ministry of Economic Development, "Economic Modelling on Estimated Effect of Copyright Term Extension on New Zealand Economy", 2009. Available at: www.tpp.mfat.govt.nz/assets/docs/TPP%20-%20Analysis%20of%20Copyright%20term%20extension,%20explanatory%20cover%20note.pdf.

⁷ Assessing Economic Impacts of Copyright Reform on Selected users and Consumers", note 5. See also Michael Geist, "Canadian Officials Admit TPP IP Policy Runs Counter To Preferred National Strategy", 26 April 2016. Available at: www.michaelgeist.ca/2016/04/canadian-officials-admit-tpp-ip-policy-runs-counter-to-preferred-national-strategy/.

⁸ 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.

⁹ Alexandra Ellerbeck, "How U.S. copyright law is being used to take down Correa's critics in Ecuador", 21 January 2016. Available at: cpj.org/blog/2016/01/how-us-copyright-law-is-being-used-to-take-down-co.php.

Data Localisation

Another concern is that the TPP bans governments from imposing restrictions on cross-border information transfers. Data localisation rules may be inefficient from an economic perspective, but they are among the few tools that countries can deploy to protect their citizens against pervasive online surveillance. In 2015, the Court of Justice of the European Union (CJEU) invalidated data transfer agreements between the EU and the US, finding that the US had insufficient safeguards in place to protect EU users' privacy.¹⁰ Similar concerns may arise in the Canadian context, creating either a social or even legal demand for data localisation. The CJEU ruling led to some additional safeguards for EU citizens. However, if the EU and the US are ultimately unable to reach an agreement on privacy protection, the TPP's prohibition on data localisation rules might lead to the EU restricting data transfers with Canada as well, given how intertwined many of our networks are with those of the US.¹¹

Domain Name Databases

The TPP requires members to establish an online public access database containing contact information for anyone who registers a domain name under a country-code top-level domain (such as .ca or .jp). Domain name privacy is a contentious issue globally. Although the Canadian Internet Regulatory Authority (CIRA) already has a public database in place which meets the TPP requirements, the inclusion of such a contentious Internet governance issue in the TPP raises concerns that the multi-stakeholder decision-making model, which our government has championed, is being undermined.¹² Furthermore, this could put CIRA in a difficult position if, as part of a multi-stakeholder process it was overseeing, Canadians expressed a desire to change the rules in a manner which did not meet the TPP's requirements.

Absence of Protections

At the same time, the TPP's language in support of freedom of expression principles is conspicuously weak and, in most cases, non-binding. For example, the net neutrality provision in Article 14.10 only expresses support for this idea in the most general terms and contains no concrete obligations. Annex 8-B, which protects the integrity of encryption, contains a blanket exception for law enforcement demands (meaning that it provides no protection against mandated backdoors, by far the biggest challenge to encryption).

It is clear that, on balance, the TPP would have a negative impact on Canadians' expressive rights and interests. We are aware that concluding trade treaties involves compromises. However, we urge Canada's policy-makers to think carefully about whether the harms to core constitutional rights are worth the gains that the TPP may provide.

¹⁰ *Maximillian Schrems v Data Protection Commissioner*, Case C-362/14. Available at: curia.europa.eu/juris/documents.jsf?num=C-362/14.

¹¹ Michael Geist, "Why Canada could get caught in a global privacy battle: Geist", 18 January 2016, *Toronto Star*. Available at: www.thestar.com/business/tech_news/2016/01/18/why-canada-could-get-caught-in-a-global-privacy-battle-geist.html.

¹² See, for example: Michael Walma, "Contribution from the Government of Canada to the Global Multi-Stakeholder Meeting on the Future of Internet Governance/NETmundial", 23 April 2014, Global Affairs Canada. Available at: content.netmundial.br/contribution/contribution-from-the-government-of-canada-to-the-global-multi-stakeholder-meeting-on-the-future-of-internet-governance-netmundial/247.