

The TPP Increases Public Spending for Protecting Private Interests

The draft rules for the Trans-Pacific Partnership (TPP) would dramatically increase the obligations of many governments to enforce intellectual property (IP) with criminal penalties. It would increase punishable acts and penalties, as well as impose on law enforcement official duties to enforce the law on their own, even if rights holders whose IP rights have supposedly been infringed have not made any claims of infringement. This would allow more room for police discrimination, more risk to constitutional rights, and more pressure on public spending to protect an essentially private interest.

International law currently requires countries to punish only the most outrageous forms of intellectual property infringement: willful trademark counterfeiting or copyright piracy on a commercial scale.¹ Other intellectual property infringements may lead to civil actions and remedies, but countries are not required to sanction them criminally. The TPP would change all that by setting forth new rules on criminal enforcement of IP assets.

The TPP would require countries to adopt criminal sanctions against a number of new acts, including: the copying of cinematographic works at movie theaters;² the circumvention of technological measures that restrict the access and use of work and other related acts, even if there is no copyright infringement at all;³ the removal of rights management information from copyrighted content;⁴ the access, use, and disclosure of trade secrets;⁵ and certain forms of use of encrypted programs – carrying satellite signals.⁶

Although in some serious circumstances those acts may qualify as crimes, the criminal penalties outlined in the TPP for punishing certain harmless and not-for-profit infringements are disproportionately severe. For instance, punishing consumers criminally for changing the format of their music files or eluding DVDs' regional codes for their own personal enjoyment of copyrighted material is a ludicrously asymmetrical response.

No international treaty demands criminally punishing those acts, and, therefore, it is up to each country to decide between punishing them criminally or leaving them for civil actions that allow rights holders to sue infringers. In fact, not even the U.S., which has a strong and unbalanced IP regime favoring rights holders, criminally punishes all of these forms of infringement.

The TPP would increase not only the number of IP-related crimes, but also the severity of punishment against infringers. First, unlike current international law, the TPP would require countries to punish not only actual infringers, but also anyone who may aid or abet infringers.⁷ Second, while international law leaves to countries the

¹ TRIPS Agreement, Article 61.

² TPP, Intellectual Property [Rights] Chapter, Article QQ.H.7 (4).

³ TPP, Intellectual Property [Rights] Chapter, Article QQ.G.10.

⁴ TPP, Intellectual Property [Rights] Chapter, Article QQ.G.13.

⁵ TPP, Intellectual Property [Rights] Chapter, Article QQ.H.8.

⁶ TPP, Intellectual Property [Rights] Chapter, Article QQ.H.9.

⁷ TPP, Intellectual Property [Rights] Chapter, Article QQ.H.7 (5).

decision of whether to apply monetary fines or imprisonment to IP infringers, the TPP encourages countries to impose both fines and prison time.⁸ And, third, as if those sanctions were not enough, the TPP requires countries to impose punitive damages on the infringer, a mechanism that has been abused by rights holders in the United States.

In addition to increasing what qualifies as a crime and penalties for IP infringement, the TPP would require countries to grant *ex-officio* power to enforcement officials, which allow them to act on their own.⁹ Current international law does not require the granting of such powers to police and prosecutors, because of the high toll it would take on public resources solely to protect private interests. This would change with the TPP, because police and prosecutors would be required to chase and prosecute IP infringers on their own initiative, without waiting for rights holders' requests.

This new set of obligations imposed by the TPP would increase significantly public spending on enforcing private interests. Expanding what qualifies as a crime and increasing punishment would require greater numbers of police and prosecutors, as well as higher judicial and penitentiary costs. Granting *ex-officio* powers to law enforcement officials also would increase the room for arbitrary discrimination by police and prosecutors.

Increasing criminal enforcement of intellectual property will distract public resources from policing and prosecuting truly serious crimes. Although countries are not required to create special courts for IP, the TPP states clearly that the distribution of enforcement resources will not be an excuse for complying with its rules.¹⁰ In practice, the TPP will deny each country's society the right to set forth its own priorities on criminal enforcement and, instead, prioritize IP protection. Thus, the TPP may achieve greater protections for intellectual property rights holders, but at the expenses of the whole society – all while asking taxpayers to foot the bill for the increased enforcement.

⁸ TPP, Intellectual Property [Rights] Chapter, Article QQ.H.7 (6).

⁹ TPP, Intellectual Property [Rights] Chapter, Article QQ.H.7 (7).

¹⁰ TPP, Intellectual Property [Rights] Chapter, Article QQ.H.1 (4) and (5).