

TPP and the Arts:

Recommendation Against Ratification

A response from the Artist-Run, Media Arts and Arts Service Sectors, representing members of Independent Media Arts Alliance (IMAA-AAMI); the The Artist-Run Centres and Collectives Conference (ARCA), National Indigenous Media Arts Coalition (NIMAC); Conseil québécois des arts médiatiques (CQAM); and Media Arts Network of Ontario (MANO-RAMO);

One voice, many opinions

The coalition of contributors to this document represent over 400 arts organizations and, in a conservative estimate, over 10,000 artists and cultural workers across Canada*. Much of this statement concerns art and copyright. However, it does not claim nor represent a unified perspective on principles of copyright and associated Canadian laws, but acknowledges and celebrates diverse points of view among its constituencies. In so doing it upholds that copyright law is an evolving tool that must balance, on the one hand: the needs of owners and managers of the rights to artists' works to be recognized and paid (including artists and their professional representatives); and on the other hand: the needs of artists and other participants in cultural production, such as critics, journalists, libraries and archives, schools and non-professional creators, to access and make use of the creativity of others, in order to recognize, understand and contribute to evolving cultural forms and heritage.

Summary

The TPP represents an international extension of US-led regulatory policy, comprising extraordinary modifications to intellectual property laws and Investor-State arbitration mechanisms present in other international trade deals. These changes enable severe restrictions to accessing artworks in the public domain and to freedom of expression, by extending copyright terms, by limiting means of copying artworks, even if for legally sanctioned 'fair dealing', and by according rights holders unfair powers of censorship over the sharing of legitimate reference works online. Furthermore, the TPP's expansion and modification of Investor-State arbitration mechanisms not only creates conditions to discourage governments from revising national laws and regulations toward legislative outcomes that might trigger arbitration by multinational corporations, but it also leaves current laws vulnerable to corporate-centred change under such pressure. In addition to copyright law, this latter point is especially pertinent regarding action on climate change, for which every citizen, organization and sector is accountable. To protect Canadian civil freedoms, to promote access to Canadian cultural heritage, and to strengthen Canadian national sovereignty in the ongoing formation and revision of legal policy regarding both copyright and climate change regulation, it is the recommendation of organizations collaborating in this response that the TPP should not be ratified by Canada.

*MDR Burgess Consultants, *The Distinct Role of Artist-Run Centres in the Canadian Visual Arts Ecology*, 2011

Scope

This response addresses changes that the Trans Pacific Partnership, if ratified, will make to Canadian standards and laws regarding copyright terms, access to and use of digital copyright materials for purposes of fair dealing, and governmental autonomy in re-assessing and revising copyright laws. Furthermore, it is the position of contributors to this statement that addressing and limiting human causes of climate change is the responsibility of all citizens, organizations and industrial sectors. The impact of the TPP on national capacities for regulation in this regard is also salient to this response. These concerns relate to rules specified in the TPP chapters on Intellectual Property (Chapter 18) and Investment (Chapter 9), regarding:

- **Copyright term extension (18.63)**
- **Technological Protection Measures (18.68)**
- **Internet copyright takedowns (18, Section J)**
- **Investor-State Dispute Settlements (9, Section B)**

Copyright term extension:

Under the previous Conservative government, Canada extended the copyright term for sound recordings from the international standard of 'life plus 50 years' established by the Berne Convention, to the American standard of 'life plus 70 years' – without public consultation. This action responded to US government pressure, informed by corporate lobby groups, in order to gain a seat at the TPP negotiating table. This decision currently may be reversed following the mandatory review of copyright law due in Canada in 2017. Ratification of the TPP will extend copyright for all art forms from Berne's international standard to the American standard, regardless of what that review might recommend. There is no direct economic benefit to artists by extending copyright from 50 years after their death to 70 years, and while artist's estates and family heirs may derive extended benefit, overwhelmingly the key beneficiaries will be the multinational corporate rights holders central in lobbying for these changes.

Additionally: 'Term extension to life plus 70' will result in a definite cost in access to Canada's historical cultural materials. No new works will enter the public domain for 20 years from the year such an extension passes into law. Contrary to provisions in Article 18.3 of Principles which states that a "Party may... adopt measures... to promote the public interest in sectors of vital importance to their socio-economic and technological development," and to Article 18.15 where the "Parties recognize the importance of a rich and accessible public domain", the TPP weakens the public interest by robbing the public domain of embellishment for 20 years. There is no latitude in the TPP to allow a Party to limit the term of copyright protection to the Berne Convention's life plus 50 years and thus provide for a rich and accessible public domain. The fact that life plus 70 would halt the entry of new works into the public domain for 20 years renders meaningless Articles 18.3 and 18.15.' (The Canadian Libraries response to Chapter 18 of the TPP <http://cla.ca/canadian-libraries-response-to-chapter-18-of-the-trans%E2%80%9090pacific-partnership-agreement>)

Digital lock rules:

TPP Article 18.68 concerns legal protections for Rights Management Information rules and Technological Protection Measures (known as 'digital locks'), which restrict access to artworks on digital media and criminalize their circumvention. This article presents a US interpretation of the digital lock requirements of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), which far exceeds the minimum requirements of either of those treaties for creating circumvention exceptions and specifying criminal liability requirements. Although amendments to Canadian copyright law in 2012 established mechanisms to create exceptions to Treaty rules on circumventing digital locks, creating the possibility of a positive requirement on right holders to unlock their content, TPP provisions do not provide adequate regulatory protection to allow such exceptions, as a result of which it will be difficult for Canadians to obtain content for the practice of fair dealing (a right repeatedly upheld and supported by the Supreme Court of Canada). This constitutes a significant barrier to free speech, where fair dealing is used to support creative and critical investigation and expression. Digital lock rules will also restrict access to copyright works for people with perceptual disabilities, as well as creating a barrier for libraries, archives and museums seeking preserve in-copyright works for fair dealing purposes.

Internet copyright takedowns:

TPP Chapter 18 Section J impacts substantially on the openness of the internet and the possibility of sharing non-infringing artistic content digitally. Rights holders may wish to contest the legitimacy of content appearing online that copies, quotes or transforms elements of their creations. Likewise, internet users responsible for posting such content may wish to defend its legitimacy as fair dealing. Canada's 'Notice and Notice' system for addressing and appealing such allegations of copyright infringement is an exception afforded in the TPP and differs from the US 'Notice and Takedown' model, to which other signatory countries must subscribe if alternative domestic policies were not already in place by October 2015. The US model is weighted strongly in favour of rights holders, offering Internet Service Providers freedom from liability for wrongdoing when taking down content, and thus creating an incentive to err on the side of rights holders, rather than free speech. This differs from the more balanced Canadian system in having neither courtroom oversight, nor mandatory counter-notice system that allow users to challenge claims of infringement and argue fair dealing (or 'fair use' in US legal terms). While Canada and Chile are granted exception from the TPP's US model, ratification of the agreement will endorse the use of the US Notice and Takedown approach in 10 other countries, creating conditions for potentially widespread restrictions on freedom of speech by rights holders. Considering that the vast majority of digitized content is hosted outside of Canada, the protections afforded by the preservation of the Canadian Notice and Notice regime would be limited, at best.

Investor-State Dispute Settlements

Investor-State Dispute Settlements are tools for the protection of foreign investors from discriminatory governmental practices, such as expropriation of assets or preferential treatment of national investors. They are international tribunals conducted in secret by appointed lawyers

representing governments and foreign investors/multinational corporations. The process is asymmetrical as governments may not sue investors. TPP Chapter 9 expands the scope of ISDS rules, with some purported benefits, including easing the process of dismissing frivolous claims and enacting rules preventing conflicts of interest among attorneys who hear cases. The TPP introduces new regulatory policy with respect to Intellectual Property, as an asset that can be subject to the ISDS process. A strong concern among critics of the TPP is how this latter capacity may deter governments from developing or revising laws and regulations that leave them open to being sued by corporations over policies that impact negatively on potential future returns derived from Intellectual Property.

Given the strength and influence of powerful US corporate lobby groups, such as the International Intellectual Property Alliance and the Motion Picture Association of America, representing the interests of multinational corporate rights-holders for music and film, the TPP's ISDS provisions may strongly discourage revisions to Canadian law that seek to strengthen the public domain and fair dealing law rather than rights holder interests. They may even bring about a change in existing fair dealing laws which permit copyright exemption for purposes of education, research, parody and satire, as the TPP will expose these as sources of impact on profits derived from copyright material. In addition, and arguably of paramount importance, the TPP's extended ISDS measures expand governmental exposure to corporate litigation over regulation for environmental protections, potentially discouraging essential action on climate change.

Conclusion

Principles of copyright are shaped by an evolving dialogue between artists, audiences, multiple sectors, and changing technological capacities. Copyright law evolves as culture becomes expressed and circulated through changing technological means, and maintaining a balance between artists' rights and the rights of others to re-use copyright material is a vital and ongoing dialogue, open to revision in Canadian law by regular periodic assessments. Bill C-11 Copyright Reform Act (2011) was the outcome of one such assessment, with mixed progressive and restrictive outcomes that require reconsideration, and another mandatory assessment of Canadian copyright law is due in 2017. The TPP imposes a US-led regulatory framework for intellectual property law that goes far beyond standards for copyright protection established by The Berne Convention for the Protection of Literary and Artistic Works (1886), and entrenches problematic restrictions to accessing copyright material, passed in Bill C-11. While potential renegotiation of provisions for Canada may address the above concerns, TPP is effectively a US export model for new regulatory policy that sets new international standards in key areas that enable the impoverishment of the public domain, suppression of free speech and the pressurization of governmental policy by corporate interests. **For this reason, the recommendation is not for amendments to the TPP, but a rejection of ratification in favour of future trade agreements that include public and sectoral consultation in the negotiation process, not after agreements, informed by large-scale corporate lobbying, have been reached without thorough public consultation.**

Sources

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Notes

The Independent Media Arts Alliance (IMAA) is a member-driven non-profit national organization working to advance and strengthen the media arts community in Canada. IMAA represents a membership of over 90 independent film, video, audio, and new media production, distribution, and exhibition organizations in all ten provinces and all but one territory.

<http://www.imaa.ca/>

The Artist-Run Centres and Collectives Conference (ARCA) is a Canadian organization that represents – by way of the nine artist-run centres' associations that form its membership – over 180 artist-run centres and collectives in cities and towns across the country. Artist-run centres' associations – are the recognized non-profit geography, identity and discipline-based artist-run associations which subscribe to the objects of the Corporation and represent its membership.

<http://www.arccc-cccaa.org/>

NIMAC is a permanent region within the structure of the Independent Media Arts Alliance (IMAA) – a non-profit national organization working to advance the media arts community in Canada and representing 80+ independent media arts organizations across the country. NIMAC acts as the Indigenous arm of the IMAA. NIMAC also operates as a distinct organization, delivering arts activities as an incorporated, not-for-profit arts organization with its own membership.

<http://www.nationalimac.org/ABOUT-NIMAC>

CQAM

The Conseil québécois des arts médiatiques or CQAM was founded on June 19th 1998. Recognized by the Quebec Council for Arts and Letters (CALQ) as the dedicated media arts national service organisation in Quebec since 2003, CQAM is the only media arts advocacy organisation in Quebec welcoming professional independent artists, cultural workers, emerging artists and artist-run centres devoted to media arts as members.

<http://www.cqam.org/>

MANO/RAMO was created in 2009 for the express purpose of providing a unified and responsive voice for Ontario's media arts sector. The media arts sector has had a rapid and continued evolution that has been innovative and responsive to new and emerging technologies and formats over the last two decades. The time has come for the sector to communicate its abundant achievements, pursue funding parity with more traditional disciplines, and pursue increased opportunities for its artists. In the coming years, MANO/RAMO will play an important role in spearheading advocacy, professional development, networking and communications that further the profile of the media arts sector in communities across the province.

<http://mano-ramo.ca/about-manoramo/>

Recommendation researched and prepared by Cineworks Independent Filmmakers Society

For inquiries relating to this document, please contact:

Jem Noble
Director of Programs
Cineworks Independent Filmmakers Society
300-1131 Howe Street, Vancouver, BC, V6Z 2L7
604-685-3841 | programs@cineworks.ca