



Written by [Michael Tennant](#) on February 23, 2016

## One-word Change to TPP Represents Massive Power Grab, Says Watchdog

Although there are many reasons to oppose the Trans-Pacific Partnership (TPP), as *The New American* has [amply documented](#), a new cause for opposition has recently been unearthed by the [Electronic Frontier Foundation \(EFF\)](#). In what EFF calls “an underhanded attempt to renegotiate the [TPP] before its ink is even dry,” a one-word change to a footnote has the potential to impose significant criminal penalties on individuals and entities caught violating copyright laws even if those violations cause no harm to the copyright holders.



The supposed final text of the TPP released in November, as found on the [U.S. Trade Representative's website](#), includes provisions mandating certain types of penalties for copyright infringement. EFF, a nonprofit defending civil rights in the digital realm, summarizes those provisions thus:

- sentences of imprisonment as well as deterrent-level monetary fines;
- higher penalties in more serious circumstances, such as threats to public health or safety;
- seizure of suspected infringing items, the materials and implements used to produce them, and documentary evidence relating to them;
- the release of those items, materials, implements and evidence for use in civil proceedings;
- forfeiture or destruction of those items, materials and implements;
- forfeiture of any assets (such as money) derived from the infringement; and
- the ability for officials to take legal action against the alleged infringer on their own initiative, without requiring a complaint from the rights holder (this is called “*ex officio* action”).

A footnote associated with these penalties states: “With regard to copyright and related rights piracy provided for under paragraph 1, a Party may limit application of this paragraph to the cases in which there is an impact on the right holder’s ability to exploit the work, performance or phonogram in the market.” (A phonogram is defined as “the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audio-visual work.”) In other words, under the original wording, a party to the TPP would have the option to waive the penalties when copyright infringement inflicts no harm on the copyright holder.

Since November, the TPP has been undergoing “legal scrubbing,” which EFF describes as “a process in which lawyers, trade ministry staff, and translators, go over the deal word-by-word, to ensure that it is legally consistent and free of unintended errors or loopholes.” That process is meant to clarify, not to modify, the terms of the treaty.

It appears, however, that the treaty has been substantively modified — by adding a prefix to a single



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word of the above-referenced footnote. In the latest version of the document, posted on the [website of New Zealand](#), the official host of the TPP, the footnote now reads: “With regard to copyright and related rights piracy provided for under paragraph 1, a Party may limit application of this *subparagraph* to the cases in which there is an impact on the right holder’s ability to exploit the work, performance or phonogram in the market.” (Emphasis added.)

EFF explains the impact of this seemingly minor change:

In its revised form, the only criminal provision that a country is exempted from applying in those circumstances [i.e., when a copyright holder is unharmed] is the one to which the footnote is attached — namely, the *ex officio* action provision. Which means, under this amendment, all of the other criminal procedures and penalties must be available even if the infringement has absolutely no impact on the right holder’s ability to exploit their work in the market. The only enforcement provision that countries have the flexibility to withhold in such cases is the authority of state officials to take legal action into their own hands.

In short, a country that ratifies the TPP may choose not to take action on its own against a copyright infringer, but it must take action if the copyright holder files a complaint — even if the copyright holder cannot show that he has been injured by the infringement. This leaves millions of people open to criminal penalties for doing perfectly innocuous things with copyrighted material.

EFF cites one example of a harmless copyright infringement that could be prosecuted under the TPP. There are websites that sell multilingual subtitles for movies, allowing individuals to add subtitles in their own languages to foreign movies that they have legally purchased, which technically qualifies as copyright infringement. “The sale of such subtitle files is as good an example as any of a niche service that copyright owners have never bothered to commercially fill, and probably never will, particularly for less commonly spoken languages,” writes EFF. Such sales most likely benefit the copyright holders by increasing the sales of their movies; but that would be of no consequence under the latest version of the TPP.

“Under the TPP’s original terms,” explains EFF,

a country could limit the exposure of the owner of such a website to prison time, or to the seizure and possible destruction of their server, on the grounds that by definition their infringement didn’t cause any lost sales to the copyright owner. (Note that they would be liable for civil damages to the copyright owner in any case.)

Although a country still has the option to limit criminal penalties to “commercial scale” infringements (which is so broadly defined that it could catch even a non-profit subtitles website), the new language compels TPP signatories to make these penalties available even where those infringements cause absolutely no impact on the copyright holder’s ability to profit from the work. This is a massive extension of the provision’s already expansive scope.

The legal-scrubbing process is only supposed to clarify the text and correct errors, yet the original footnote did not seem to be in error. It made eminent sense to permit signatories to exempt their citizens from penalties for actions that had caused no harm regardless of whether the state or the copyright holder wished to initiate legal action against them. If the original text was in error, observes EFF, “then the parties were only in error in agreeing to a proposal that was complete nonsense to begin with.”

EFF believes the footnote alteration is a deliberate attempt to renegotiate the TPP when no one is



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looking — or so the globalist elites in charge of the TPP thought. “In an agreement that was an undemocratic power grab from the outset, this devious move marks the lowest point to which the negotiators have yet sunk,” declares EFF. “It gives us all even more reason, as if any were needed, to demand that our representatives refuse to ratify this dreadful agreement.”

Amen.



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