

GISWatch
10th Edition

GLOBAL INFORMATION SOCIETY WATCH 2016

*Economic, social and cultural rights
and the internet*



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)
AND INTERNATIONAL DEVELOPMENT RESEARCH CENTRE (IDRC)

Global Information Society Watch

2016



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This work was carried out with the aid of a grant from the International Development Research Centre (IDRC), Ottawa, Canada, as part of the APC project “A rights based approach to internet policy and governance for the advancement of economic, social and cultural rights”.

More information at: <https://www.apc.org/en/projects/internet-rights-are-economic-social-cultural-rights>



APC would like to thank the Swedish International Development Cooperation Agency (Sida) for its support for Global Information Society Watch 2016.



Published by APC and IDRC
2016

Printed in USA

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Global Information Society Watch 2016 web and e-book
ISBN 978-92-95102-70-5
APC-201611-CIPP-R-EN-DIGITAL-260

The impact of free trade agreements for ESCRs on the internet

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International agreements: From human rights to corporate rights

Much of the strength of the international human rights system as a political tool derives from its acceptance as a standard for all humanity. Although there is disagreement about the specifics of its implementation, especially regarding the duties of states under the economic, social and cultural rights (ESCR) international instruments, there is still consensus on the high-level standards represented by the Universal Declaration of Human Rights and other documents.

One of the key elements in the notion of the universality of human rights is the underlying idea of the system as an agreement between nations, as a consensus which governments are obliged to uphold, regardless of the kinds of enforcement mechanisms they impose. This consensus on fundamental rights has dwindled in past decades in favour of a different form of accord between nations on fundamental rights, one that is premised on the interests of governments and heads of state, rather than the global rights system. The result of this new form of consensus is not only a different way to address concerns regarding the development of the internet, but the way internet policy itself is developed. We argue that this new framework for policy making gives low priority to human rights, and high priority to incumbent corporate interests that may prevent the realisation of such rights.

The growing scope of international trade agreements

International trade agreements, both bilateral and multilateral, have greatly expanded their scope and detail in recent decades. Now they are not just focused on traditional issues related to trade such as customs or duty, but include a vast array of issues. The economic prevalence of the internet and intellectual property industry during the last decades means that these deals also include regulation

related to electronic commerce, content control and others as a new priority for those instruments.

The fact that the internet has over the years not only resulted in new and creative forms of entrepreneurship, but also in new ways to exercise freedom of expression and other fundamental rights, has created regulatory tension between the need to protect private interests and the realisation of fundamental rights online. Assuming that the internet is a means to progressively realise ESCRs, policies regarding the internet, from access and deployment to content regulation, will necessarily impact on the realisation of rights. Accordingly, rules that affect issues like work, basic services (pursuant to an adequate standard of living) or education may also impact on the use of the internet.

However, one of the areas in which the relationship between policies that affect the internet and simultaneously impact on several ESCRs is most evident is content regulation – especially where these regulations imply restrictions on the dissemination of content in fields such as culture and education. Regulations on intellectual property usually work against the best interest of the public, as well as against the potential of the internet to enable the rights to education, culture and economic participation.

Intellectual property (IP) has been the subject of treaties since the 19th century; however, provisions on IP have moved into bilateral and multilateral trade agreements only in recent decades,¹ and, in doing so, away from parliamentary discussion and meaningful civil society participation. Along with this shift, the ways for the private sector to participate in trade negotiations has increased – the closed processes that result in the agreements are only closed to public oversight, not to the involvement of private companies. Therefore, the interests of copyright holders have become the starting point of any trade negotiation, to the general exclusion of

1 Rossini, C. (2012, 21 December). The Unsettling Trend of Forum Shifting in International Intellectual Property. *Electronic Frontier Foundation*. <https://www.eff.org/deeplinks/2012/12/iip-forum-shifting-trend>

meaningful and substantive provisions respecting the public interest.²

Free trade agreements are increasingly seen as examples of negotiations that include internet policy directives, without public deliberation. The implications are worsened when one considers that the new phase of trade agreements that we are currently witnessing are not just bilateral agreements, but multilateral agreements including both developed and developing countries, and in some cases even countries from different geographic and political contexts. The Trans-Pacific Partnership (TPP) agreement is a good example of this. The TPP is an agreement driven mostly (though not initially) by the United States (US) and signed by 12 countries: the US, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. According to *The New York Times*,³ this diverse group collectively has an annual gross domestic product of nearly USD 28 trillion, representing roughly 40% of the global GDP, which arguably makes the TPP the largest trade agreement in modern history.

The finalised text was signed on 4 February 2016, after seven years of secret negotiations. With the alleged purpose of “protecting sensitive trade talks”, citizens were banned from knowing and debating the content of the negotiations, which was released for public scrutiny by WikiLeaks. According to the Office of the United States Trade Representative (USTR), the TPP includes 30 chapters “covering trade and trade-related issues”, including trade in goods, customs, technical barriers to trade, remedies, investment, electronic commerce, intellectual property, labour and environment.⁴ Although many of these subjects were covered in trade agreements prior to the TPP, its scope in terms of the global landscape shows the ambition of treaties of this scale when it comes to the future of international trade.⁵ The ongoing talks on a similar agreement between the US and the European Union (EU), the Transatlantic Trade and Investment Partnership (TTIP), and the sweeping scope of the Trade in Services Agreement (TiSA, much closer to conclusion),

show the unwavering ambition of large-scale trade agreements to set future standards for trade and related policies – including, in special provisions, strong rules concerning IP rights on the internet.

Human rights concerns

This sweeping scope is precisely one source of pre-occupation for human rights and consumer rights organisations regarding trade agreements. The TPP is a fine example of the tension between human rights implementation and the international trade agenda as a norm-setting forum above national policy-making processes: out of 30 chapters, only six deal with standard trade issues, and the rest go from government procurement to environmental protection, with many interests beyond trade represented in the text.⁶

A recent World Bank study seems to support the idea that the TPP is only partly about trade, as it suggests that the agreement might not entail big economic advantages for its signatories. The study analysed the potential macroeconomic implications of the agreement in model simulations, and suggested that by 2030 the TPP would raise member countries’ GDP on average 1.1%.⁷ This impact would be less for North American Free Trade Agreement (NAFTA) members (such as Mexico, Canada or the US) – about a 0.6% increase. In the face of such a marginal effect on economic growth, the question can be asked: why is the scope of the agreement so broad, and impacting on areas not directly related to trade?

This concern is amplified when considering the impact on human rights in policies determined through these agreements. In June 2015, a group of 10 United Nations Special Rapporteurs and Independent Experts released a statement expressing their concern over how the TPP would impact human rights:

While trade and investment agreements can create new economic opportunities, we draw attention to the potential detrimental impact these treaties and agreements may have on the enjoyment of human rights as enshrined in legally binding instruments, whether civil, cultural, economic, political or social. Our concerns relate to the rights to life, food, water and sanitation, health, housing, education, science and

2 Menezes, H.Z. (2015). A Estratégia Norte-Americana de Forum Shifting para Negociação de Acordos TRIPS-Plus com Países da América Latina. *Contexto Internacional*, 37(2), 435-468. <https://dx.doi.org/10.1590/S0102-85292015000200004>

3 Granville, K. (2016, 20 August). The Trans-Pacific Partnership, Explained. *The New York Times*. www.nytimes.com/interactive/2016/business/tpp-explained-what-is-trans-pacific-partnership.html

4 <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership>

5 Organisations opposed to the treaty, such as Public Citizen, have said that even though it is called a “trade” agreement, the TPP is not mainly about trade. See: <https://www.citizen.org/TPP>

6 For Public Citizen, the TPP “comes from 500 official U.S. trade advisors representing corporate interests involved in years of closed-door negotiations.” <https://www.citizen.org/TPP>

7 World Bank. (2016). *Potential Macroeconomic Implications of the Trans-Pacific Partnership*. www.worldbank.org/content/dam/Worldbank/GEP/GE2016a/Global-Economic-Prospect-2016-Implications-Trans-Pacific-Partnership-Agreement.pdf

culture, improved labour standards, an independent judiciary, a clean environment and the right not to be subjected to forced resettlement.⁸

On the eve of the signing of the agreement, Alfred de Zayas, the United Nations Independent Expert on the promotion of a democratic and equitable international order, called on governments not to sign the treaty: “The TPP is fundamentally flawed and should not be signed or ratified unless provision is made to guarantee the regulatory space of States.” He called for a new generation of trade agreements for the 21st century, which would incorporate human rights issues, and stressed that “the TPP is based on an old model of trade agreements that is out of step with today’s international human rights regime.”⁹

Human rights concerns extend to ESCRs in a special way. Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) have a legal obligation to respect, protect and fulfil economic, social and cultural rights and are expected to take “progressive action” towards their fulfilment. In the language of the Covenant, each state party must “take steps, individually and through international assistance and co-operation, (...) to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised (...)”¹⁰

First, related to the “availability of resources”, it is recognised that a lack of resources (financial or otherwise) can be an obstacle to the realisation of these rights, and that this could be achieved only over a period of time.¹¹ Still, states are obliged to “take steps” and make constant efforts to improve their enjoyment.¹² While the full realisation of these rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time.

Secondly, if progress must be made within the limitation of resources, the obligation also implies

the prohibition of “retrogressive measures”.¹³ According to the High Commissioner for Human Rights, a retrogressive measure is one that “directly or indirectly, leads to backward steps being taken with respect to the rights recognised in the Covenant.”¹⁴ In other words, once a certain set of protections have been achieved, states should not allow them to deteriorate. The prohibition applies to any measure taken consciously that reduces the enjoyment of ESCRs, whether or not the regression was an intended and wanted consequence of the measure.¹⁵ States are expected to act with care and deliberation in taking action that might violate human rights, directly or indirectly.

Regarding the TPP, the idea of “progressive realisation” is especially important, as some of the provisions in the IP and e-commerce chapters will not only affect the right to participate in cultural life, but also free speech and privacy, and the way that states approach these concerns when faced with conflict. The trade agreement itself represents a set of norms that can imply the *retrogressive measures* prohibited by Articles 2 and 15 of the ICESCR. But it also presents challenges for the way in which national policies concerning ESCRs are created and enforced, challenging the way in which states are able to fulfil their duties in the progressive realisation of these rights online.

Impacts on human rights online

One of the key elements of the IP system, copyright, famously dates back to the Statute of Anne in 1710, the first law to provide “the right to make copies” to authors that were limited in doing so by the Stationers’ Company, a guild of printers given the exclusive power to print – and the responsibility to censor – all kinds of literary works.¹⁶ The logic of the Statute responded to a particular historical and technological context after the invention of the printing press and the development of a printing industry.

The evolution of that industry pushed forward most of the development of the copyright system after the Statute of Anne. Although commitments in line with the interest of creators were explicit in later instruments, including the Berne Convention in the late 19th century, pressures for the expansion of

8 OHCHR. (2015, 2 June). UN experts voice concern over adverse impact of free trade and investment agreements on human rights. www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031

9 UNOG. (2016, 2 February). UN expert urges Pacific Rim countries not to sign the TPP without committing to human rights and development. www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/CB37BD3625EFC1DBC1257F4D003ACBBE?OpenDocument

10 Article 2.1, ICESCR. www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

11 CESCR. (1990). General Comment 3: The nature of States parties obligations (Art. 2, para. 1). <https://www.eschr-net.org/resources/general-comment-3>

12 www.ohchr.org/EN/Issues/ESCR/Pages/WhataretheobligationsofStatesonESCR.aspx

13 CESCR. (1990). Op. cit.

14 OHCHR. (2005). *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*. www.ohchr.org/Documents/Publications/training12en.pdf

15 OHCHR. (n/d). *Frequently Asked Questions on Economic, Social and Cultural Rights*. www.ohchr.org/Documents/Issues/ESCR/FAQ%20on%20ESCR-en.pdf

16 Deazley, R., Kretschmer, M., & Bently, L. (2010). *Privilege and Property: Essays on the History of Copyright*. klangable.com/uploads/books/Privilege&Property-Deazley.pdf

the system came mostly from copyright holders different from authors, such as publishers and estates. Naturally, the interests represented in each push for reform were those that allowed for an increasingly complex and strict system where permission to reuse a copyrighted work would become the norm, regardless of the purpose, if the use fell outside a limited set of “exceptions” and “limitations” to copyright. In other words, copyright reforms increased restriction on access to knowledge and cultural goods, even when technology moved in the opposite direction. As James Boyle states, “We have locked up most of twentieth-century culture and done it in a particularly inefficient and senseless way, creating vast costs in order to convey proportionally tiny benefits. Worst of all, we have turned the system on its head. Copyright, intended to be the servant of creativity, a means of promoting access to information, is becoming an obstacle to both.”¹⁷ The old logic underlying the protection of intellectual property rights does not respond to technological development, and the social advances that have been enabled by the internet.

Although this appears as a tension that has permeated public debates on intellectual property on the eve of the 21st century, we face an evolution of the threat of unlimited restrictions on intellectual goods: the privatisation of knowledge pushed by international trade agreements. That has been the case with the recent Anti-Counterfeiting Trade Agreement (ACTA) and the failed Stop Online Piracy Act (SOPA) in the US, and now the TPP.

The IP provisions have been among the most debated and controversial within the TPP example. This also has to do with the fact that it was one of the only chapters that was leaked by WikiLeaks before the signing of the treaty, which gave scholars and citizens enough time to discuss it before it was finalised.

By establishing a detailed regulation for pharmaceutical products, the TPP has the effect of restricting the production of generic medicines and biological drugs to treat certain illnesses. The TPP blocks the availability of trial data for biological drugs for up to eight years (articles 18.50 and 18.52).¹⁸ This pushes for long-term monopolies on life-saving biological medicines, which could be a death sentence for people around the globe that

cannot afford the pricey patent drugs.¹⁹ First of all, the right to health, enshrined in Article 12 of the ICESCR, is affected: the TPP not only fails at avoiding retrogressive measures, but blatantly encourages them. But beyond that, the lack of access to this crucial information goes against the right to “enjoy the benefits of scientific progress and its applications” (Article 15.1.b of the ICESCR), as well as the requirement for states to take the steps “necessary for the conservation, the development and the diffusion of science and culture” (Article 15.2). It is a restriction that may benefit some industries, but hardly expresses a path towards the realisation of the rights of all people.

Second, the IP provisions of the TPP (and many of the bilateral agreements that preceded it) severely restrict the dissemination of knowledge, limiting the right to participate in cultural life. The provisions do not comply with the human rights standard that seeks balance between the protection of authors and the collective interest of society. It is very common for international trade treaties promoted or signed by the US to echo the interests of the content-producing industry in that country. In other words, the protection of copyright goes well beyond what has been established in international forums like the World Intellectual Property Organization (WIPO). It is not only the level of detail that is striking in the TPP, but also the evident lack of balance between protected interests and human rights.²⁰

A human rights approach sets specific standards to be applied to IP law. The type and level of protection offered by any IP regime must “directly facilitate and promote scientific progress and its applications and do so in a manner that will broadly benefit members of society on an individual, as well as collective level.”²¹

The traditional rationale that drove IP regimes in terms of providing incentives to researchers and authors to create has been replaced by a new emphasis on the protection of investment.²² This implies consequences not only in the content of fundamental rights affected by the rules set in the agreements, but also in how such rights are recognised and configured by democratic states.

17 Boyle, J. (2008). *The Public Domain: Enclosing the Commons of the Mind*. www.thepublicdomain.org/wp-content/uploads/2009/02/thepublicdomain.html

18 Public Citizen. (n/d). *The Trans-Pacific Partnership: Restricting Access to Affordable Medicines*. <https://www.citizen.org/ppp-public-health>

19 www.tppkills.org

20 As a side note, the lack of ratification of the ICESCR by the United States may thus impact internal policies in countries where it is valid.

21 Chapman, A. (1998). *A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science*. www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_5.pdf

22 Ibid.

If the human rights framework “imposes conditions on the recognition of intellectual property rights,” these must go well beyond a simple economic calculus to be compliant with Article 27 of the UDHR. The TPP, however, rather than promoting public interest and access to knowledge and culture, frames IP rights with a strong vision of a way to protect private commodities.

In essence, a human rights approach to IP implies a balance between the rights of inventors and creators and the interests of society at large,²³ including individual and collective rights, and including different ways of exercising these rights (such as the internet). This balance between the protection of authors and the interest of society to access knowledge is explicit in international law but not necessarily in national regulation that, at least in the developing world, is heavily driven by the trade agenda.

For Farida Shaheed, Special Rapporteur in the field of cultural rights at the UN: “The right to protection of moral and material interests cannot be used to defend patent laws that inadequately respect the rights to participate in cultural life, to enjoy the benefits of scientific progress and its applications, to scientific freedoms, to food and health and the rights of indigenous peoples and local communities.”²⁴

One example of an imbalance in regulation that affects rights such as cultural participation and benefiting from scientific progress is the extension of copyright protection to up to 70 years after the death of authors. This has been a part of bilateral trade agreements with the US, and is included in the TPP. This term exceeds what was established by the Berne Convention and practically means that most of the signatories to the TPP should increase their protection terms. The extension, which entails that explicit permission is required for certain uses of a copyrighted work, means that monopolies on access to these works can exist well beyond the death of their creators. It exclusively benefits the copyright holder. There is no other evidence of the need of such an extension, neither as an incentive for creativity, nor as a system requirement for international trade, and certainly not in terms of social benefits.

Trade agreements like the TPP also include – in line with US law – obligations for states to protect digital rights management (DRM) tools. These tools are “digital locks” that are used to control access to, the use of, and the modification and distribution of

copyrighted works.²⁵ In other words, they are used to deter access or prevent copies not authorised by the copyright holder. Far from constituting a balance in terms of IP, the DRM requirements in agreements such as the TPP are excessive and hamper the rights that we have as users regarding our technology: unblocking our devices, copying or sharing music, books or movies, even if we bought them legitimately and are doing so for personal use, or even if the work itself may have become part of the public domain.

The TPP, along with several bilateral agreements with the US, impacts directly on national internet policy by requiring the establishment of a system for intermediary liability similar to the Digital Millennium Copyright Act (DMCA) in the US. Such a regime compels companies like YouTube and Facebook to remove content that infringes copyright as soon as they have knowledge of it.²⁶ If they do not do so, they could face punitive legal action along with the infringer. With no judicial safeguards, the automatic removal of content in line with the DMCA system has opened the door for censorship against legitimate expressions. Politicians in places like Mexico and Ecuador have used these mechanisms to silence dissidents, infringing on freedom of expression.²⁷ Countless forms of legitimate artistic and cultural expression – key manifestations of the right to participate in cultural life – are taken down each day from internet platforms based on copyright claims or as the result of automated content restriction systems. Trade agreements promote this form of content restriction regardless of its value to society, and regardless of the implications for cultural life on the internet.

As a consequence, smaller negotiating parties in sweeping trade agreements must comply with their provisions, even those concerning internal policies, and regardless of national interests, in order to be a part of international trade in the age of globalisation. Otherwise, a big partner the size of the United States may refuse to provide new trade conditions; or big corporations may bring a government before an international panel if national policies, even those in favour of the population,

25 CBC News. (2009, 7 August). The pros, cons and future of DRM. *CBC*. www.cbc.ca/news/technology/the-pros-cons-and-future-of-drm-1.785237

26 This knowledge is obtained through a notice that in the US is sent by the copyright holder and does not require the intervention of any official body before producing its effects.

27 Sin Embargo. (2015, 29 April). Presidencia baja de Youtube el video donde EPN confunde León y Lagos de Moreno con estados. www.sinembargo.mx/29-04-2015/1329513 and Ellerbeck, A. (2016, 21 January). How U.S. copyright law is being used to take down Correa's critics in Ecuador. *Committee to Protect Journalists*. <https://cpj.org/blog/2016/01/how-us-copyright-law-is-being-used-to-take-down-co.php>

23 Ibid.

24 Shaheed, F. (2015, 26 October). Statement by Ms. Farida Shaheed, Special Rapporteur in the field of cultural rights at the 70th session of the General Assembly. www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16788&LangID=E

have an impact on their investments. This has, even just theoretically, a great impact on the scope of action of a state, even when fulfilling a mandate, and even when its action is framed within its duties for the realisation of ESCRs.

Conclusions and the way forward

The international trade agenda should be seen as one of the most important forums establishing new regulatory standards in all aspects related directly or indirectly to international trade. This includes not just the traditional elements of commerce, but also more sophisticated regulatory pieces often related to the internet and new technologies, such as IP, privacy and others that affect ESCRs.

Over the last few decades, the trade negotiations framework has not included substantial elements or provisions towards the full realisation of human rights, especially when applied online. Negotiations are often closed, with limited access for actors that are not the actual negotiators, even within the government, and of course with limited or no access for the general public. That means the trade agenda is – especially for developing countries where their power of negotiation with larger economies is yet to be seen – a vicarious way to set regulatory standards at a national level, without any of the public oversight or checks and balances corresponding to a constitutional democracy.

This scenario, both at an international and a national level, is unfriendly to the exercise of ESCRs, and to the action of states and governments

in allowing their progressive realisation. We have (briefly, superficially) examined the example of IP rights as an instance where it is possible to see that human rights considerations are totally off the negotiation table. Issues such as education, participation in culture and access to knowledge, or even development, are only included in these agreements – in the few cases where they are considered – as non-binding general considerations. They are not considered the starting point for an international agreement which will necessarily affect human rights just by the sheer scope of its ambition.

At the national level, in most developing countries, trade agreements with developed nations are still seen as normal trade negotiations that need no special public input. This means the only group allowed to participate and remain informed is the group of official negotiators, drawn from trade departments of the ministries of commerce or foreign affairs (and not parliament, the judiciary, or the general public). This is generally the case until the moment the agreement has been sealed.

However, treaties such as the TPP are in fact wide-ranging international instruments guiding future public policies beyond traditional economic and trade considerations. In such an environment, it is highly unlikely that development goals can be separated from economic indicators and focused instead on the realisation of ESCRs. When those economic goals see the digital economy as an opportunity for financial gain, social empowerment seems more like a side effect than an objective.

Economic, social and cultural rights and the internet

The 45 country reports gathered here illustrate the link between the internet and economic, social and cultural rights (ESCRs). Some of the topics will be familiar to information and communications technology for development (ICT4D) activists: the right to health, education and culture; the socioeconomic empowerment of women using the internet; the inclusion of rural and indigenous communities in the information society; and the use of ICT to combat the marginalisation of local languages. Others deal with relatively new areas of exploration, such as using 3D printing technology to preserve cultural heritage, creating participatory community networks to capture an “inventory of things” that enables socioeconomic rights, crowdfunding rights, or the negative impact of algorithms on calculating social benefits. Workers’ rights receive some attention, as does the use of the internet during natural disasters.

Ten thematic reports frame the country reports. These deal both with overarching concerns when it comes to ESCRs and the internet – such as institutional frameworks and policy considerations – as well as more specific issues that impact on our rights: the legal justification for online education resources, the plight of migrant domestic workers, the use of digital databases to protect traditional knowledge from biopiracy, digital archiving, and the impact of multilateral trade deals on the international human rights framework.

The reports highlight the institutional and country-level possibilities and challenges that civil society faces in using the internet to enable ESCRs. They also suggest that in a number of instances, individuals, groups and communities are using the internet to enact their socioeconomic and cultural rights in the face of disinterest, inaction or censure by the state.

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