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JOINT STANDING COMMITTEE ON TREATIES

**THE TRANS-PACIFIC PARTNERSHIP:
COPYRIGHT LAW, THE CREATIVE INDUSTRIES,
AND INTERNET FREEDOM**



DR MATTHEW RIMMER
PROFESSOR OF INTELLECTUAL PROPERTY AND INNOVATION LAW
FACULTY OF LAW
QUEENSLAND UNIVERSITY OF TECHNOLOGY

Queensland University of Technology

Executive Summary

This submission provides a critical analysis of the copyright sections of Chapter 18 of the *Trans-Pacific Partnership* on intellectual property.

In National Interest Analysis, the Australian Government asserts that the *Trans-Pacific Partnership* is a merely recapitulation of existing agreements:

The TPP Intellectual Property Chapter is consistent with Australia's existing intellectual property regime and will not require any changes to Australia's legislation. Minor regulatory changes relating to encoded broadcasts will be required to extend to Malaysia, Singapore, Brunei Darussalam and New Zealand the benefits in Part VAA of the Copyright Act 1968 that Australia already extends to parties to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961 (the Rome Convention).

The TPP does not require an increase in the term of copyright protection in Australia, nor any other changes to Australia's copyright regime, including with respect to technological protection measures. The TPP standard with respect to ISPs is consistent with Australia's existing ISP liability regime and will not require ISPs to monitor, report or penalise copyright infringement.

However, such an assertion is not well-founded. A close examination of the Trans-Pacific Partnership reveals that the agreement has obligations above and beyond existing agreements – such as the *TRIPS Agreement* 1994 and the *Australia-United States Free Trade Agreement* 2004.

Recommendation 1

The *Trans-Pacific Partnership* distorts the aims, objectives, and principles of copyright law. The agreement privileges a corporatist view of copyright law, and seeks to enhance the rights and remedies of copyright owners. The trade agreement is unbalanced. There is a failure to properly represent the traditional objectives of copyright law in promoting learning, access to knowledge, and scientific progress. Moreover, the *Trans-Pacific Partnership* does not promote copyright goals – such as creativity, innovation, competition, and access to goods and services.

Recommendation 2

The copyright term extension in the *Trans-Pacific Partnership* will have significant economic, cultural, and innovation costs for Australia and other countries in the Pacific Rim. The Productivity Commission rightly highlights public policy problems in respect of long copyright terms and orphan works. Australia needs to develop law reform solutions for such problems.

Recommendation 3

The *Trans-Pacific Partnership* has vague, ambiguous and complex language on copyright exceptions and limitations. While the United States enjoys a broad and flexible defence of fair use, many other Pacific Rim countries lack such expansive copyright exceptions. The Productivity Commission makes a strong case about

why Australia should adopt a defence of fair use to promote innovation, competition, and consumer welfare.

Recommendation 4

The *Trans-Pacific Partnership* has detailed, prescriptive text on intermediary liability and copyright law. It is questionable whether this anachronistic model is appropriate and well-adapted for Australia in the digital age.

Recommendation 5

The *Trans-Pacific Partnership* seeks to lock in United States-style provisions in respect of technological protection measures. This is unwise – given concerns about the efficacy of the regime; the collateral impact of uber-copyright on a range of other public policy interests; and the current constitutional challenge to the technological protection measures regime in the *Digital Millennium Copyright Act 1998* (US).

Recommendation 6

The *Trans-Pacific Partnership* also seeks to embed a United States-style regime in relation to electronic rights management information. Again, such an approach is questionable – given that such measures have proven to have little utility.

Recommendation 7

The *Trans-Pacific Partnership* provides for an arsenal of copyright enforcement measures – relating to civil remedies, criminal offences, border measures, government computer software, satellite piracy, and law enforcement co-operation. There has been significant about whether such measures are balanced and proportionate. Moreover, there have been larger concerns about the impact of the *Trans-Pacific Partnership* upon due process, privacy, civil liberties, freedom of speech, and human rights.

Recommendation 8

Other Chapters of the *Trans-Pacific Partnership* – dealing with Investment, and Electronic Commerce – reinforce and exacerbate a number of the problems with the Intellectual Property Chapter. Providing copyright owners with a super-remedy of Investor-State Dispute Settlement is a startling, radical new power.

Biography

Dr Matthew Rimmer is a Professor in Intellectual Property and Innovation Law at the Faculty of Law, at the Queensland University of Technology (QUT). He is a leader of the QUT Intellectual Property and Innovation Law research program, and a member of the QUT Digital Media Research Centre (QUT DMRC) the QUT Australian Centre for Health Law Research (QUT ACHLR), and the QUT International Law and Global Governance Research Program. Rimmer has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, plain packaging of tobacco products, intellectual property and climate change, and Indigenous Intellectual Property. He is currently working on research on intellectual property, the creative industries, and 3D printing; intellectual property and public health; and intellectual property and trade, looking at the *Trans-Pacific Partnership*, the *Trans-Atlantic Trade and Investment Partnership*, and the *Trade in Services Agreement*. His work is archived at SSRN Abstracts and Bepress Selected Works.

Dr Matthew Rimmer holds a BA (Hons) and a University Medal in literature (1995), and a LLB (Hons) (1997) from the Australian National University. He received a PhD in law from the University of New South Wales for his dissertation on *The Pirate Bazaar: The Social Life of Copyright Law* (1998-2001). Dr Matthew Rimmer was a lecturer, senior lecturer, and an associate professor at the ANU College of Law, and a research fellow and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA) (2001 to 2015). He was an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change from 2011 to 2015. He was a member of the ANU Climate Change Institute.

Rimmer is the author of *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007). With a focus on recent US copyright law, the book charts the consumer rebellion against the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Digital Millennium Copyright Act* 1998 (US). Rimmer explores the significance of key judicial rulings and considers legal controversies over new technologies, such as the iPod, TiVo, Sony Playstation II, Google Book Search, and peer-to-peer networks. The book also highlights cultural developments, such as the emergence of digital sampling and mash-ups, the construction of the BBC Creative Archive, and the evolution of the Creative Commons. Rimmer has also participated in a number of policy debates over Film Directors' copyright, the *Australia-United States Free Trade Agreement* 2004, the *Copyright Amendment Act* 2006 (Cth), the *Anti-Counterfeiting Trade Agreement* 2011, and the *Trans-Pacific Partnership*. He has been an advocate for Fair IT Pricing in Australia.

Rimmer is the author of *Intellectual Property and Biotechnology: Biological Inventions* (Edward Elgar, 2008). This book documents and evaluates the dramatic expansion of intellectual property law to accommodate various forms of biotechnology from micro-organisms, plants, and animals to human genes and stem cells. It makes a unique theoretical contribution to the controversial public debate over the commercialisation of biological inventions. Rimmer also edited the thematic issue of *Law in Context*, entitled *Patent Law and Biological Inventions* (Federation Press, 2006). Rimmer was also a chief investigator in an Australian Research Council Discovery Project, "Gene Patents In Australia: Options For Reform" (2003-2005), an Australian Research Council Linkage Grant, "The Protection of Botanical Inventions" (2003), and an Australian Research Council Discovery Project, "Promoting Plant Innovation in Australia" (2009-2011). Rimmer has participated in inquiries into plant breeders' rights, gene patents, and access to genetic resources.

Rimmer is a co-editor of a collection on access to medicines entitled *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge University Press, 2010) with Professor Kim Rubenstein and Professor Thomas Pogge. The work considers the intersection between international law, public law, and intellectual property law, and highlights a number of new policy alternatives – such as medical innovation prizes, the Health Impact Fund, patent pools, open source drug discovery, and the philanthropic work of the (Red) Campaign, the Gates Foundation, and the Clinton Foundation. Rimmer is also a co-editor of *Intellectual Property and Emerging Technologies: The New Biology* (Edward Elgar, 2012).

Rimmer is a researcher and commentator on the topic of intellectual property, public health, and tobacco control. He has undertaken research on trade mark law and the plain packaging of tobacco products, and given evidence to an Australian parliamentary inquiry on the topic.

Rimmer is the author of a monograph, *Intellectual Property and Climate Change: Inventing Clean Technologies* (Edward Elgar, September 2011). This book charts the patent landscapes and legal conflicts emerging in a range of fields of innovation – including renewable forms of energy, such as solar power, wind power, and geothermal energy; as well as biofuels, green chemistry, green vehicles, energy efficiency, and smart grids. As well as reviewing key international treaties, this book provides a detailed analysis of current trends in patent policy and administration in key nation states, and offers clear recommendations for law reform. It considers such options as technology transfer, compulsory licensing, public sector licensing, and patent pools; and analyses the development of Climate Innovation Centres, the Eco-Patent Commons, and environmental prizes, such as the L-Prize, the H-Prize, and the X-

Prizes. Rimmer is currently working on a manuscript, looking at green branding, trade mark law, and environmental activism.

Rimmer has also a research interest in intellectual property and traditional knowledge. He has written about the misappropriation of Indigenous art, the right of resale, Indigenous performers' rights, authenticity marks, biopiracy, and population genetics. Rimmer is the editor of the collection, *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015).

Rimmer has supervised four students who have completed Higher Degree Research on the topics, *Secret Business and Business Secrets: The Hindmarsh Island Affair, Information Law, and the Public Sphere* (2007); *Intellectual Property and Applied Philosophy* (2010); *The Pharmacy of the Developing World: Indian Patent Law and Access to Essential Medicines* (2012); and *Marine Bioprospecting: International Law, Indonesia and Sustainable Development* (2014). He has also supervised sixty-seven Honours students, Summer Research Scholars, and Interns, and two graduate research unit Masters students.

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Abstract

The *Trans-Pacific Partnership* (TPP) is a highly secretive trade agreement being negotiated between the US and eleven Pacific Rim countries, including Australia. Having obtained a fast-track authority from the United States Congress, US President Barack Obama is keen to finalise the deal. A number of chapters will affect the creative industries and internet freedom – including the intellectual property chapter, the investment chapter, and the electronic commerce chapter. Legacy copyright industries have pushed for longer and stronger copyright protection throughout the Pacific Rim.

A draft of the intellectual property chapter of the TPP was leaked by WikiLeaks in November 2013. Julian Assange warned: ‘If instituted, the TPP’s IP regime would trample over individual rights and free expression, as well as ride roughshod over the intellectual and creative commons.’ There have been subsequent leaks by WikiLeaks and Knowledge Ecology International. There have been concerns about how the regime will affect creative artists – like Brett Gaylor, the documentary film-maker of *Rip! A Remix Manifesto*. In addition, there has also been much controversy over the inclusion of an Investor-State Dispute Settlement (ISDS) mechanism in the TPP.

Copyright owners and Big IT could deploy investor clauses to challenge progressive law reforms – such as the adoption of a defence of fair use and meaningful IT Pricing reforms in Australia. There has also been concern about the electronic commerce chapter of the TPP. Big IT companies – like Google, Apple, Facebook, and Microsoft – have been willing to support the TPP in return for a harmonisation of electronic commerce rules throughout the Pacific Rim. There has been concern that the regime will undermine consumer rights, privacy,

* Dr Matthew Rimmer (BA/LLB ANU, Phd UNSW) is a Professor in Intellectual Property and Innovation Law at the Faculty of Law in the Queensland University of Technology (QUT). He is a leader of the QUT Intellectual Property and Innovation Law research program, and a member of the QUT Digital Media Research Centre (QUT DMRC) the QUT Australian Centre for Health Law Research (QUT ACHLR), and the QUT International Law and Global Governance Research Program (QUT IL GG).

network neutrality, and open source standards. If passed, the TPP will be transformative for Australia's creative artists, cultural industries, and digital media.

Introduction

The *Trans-Pacific Partnership* seeks to provide for longer and stronger copyright protection for transnational corporations across the Pacific Rim.¹ The agreement builds upon intellectual property agreements – such as the *TRIPS Agreement* 1994 and the *WIPO Internet Treaties* 1996.² Moreover, the *Trans-Pacific Partnership* draws inspiration from domestic United States copyright laws – such as the *Digital Millennium Copyright Act* 1998 and the *Sonny Bono Copyright Term Extension Act* 1998.³ Furthermore, the *Trans-Pacific Partnership* builds upon TRIPS+ bilateral agreements – such as the *Australia-United States Free Trade Agreement* 2004 and the *Singapore-United States Free Trade Agreement*.⁴ The agreement recycles many of the provisions found in the failed TRIPS++ Agreement, the *Anti-Counterfeiting Trade Agreement* 2011.⁵ Accordingly, the *Trans-Pacific Partnership* could be described as a TRIPS++ Agreement. Rather radically, in addition to an extensive intellectual

¹ The *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

² *TRIP S Agreement* 1994 1869 UNTS 299; 33 ILM 1197 (1994), *WIPO Copyright Treaty* 1996 S. Treaty Doc. No. 105-17 (1997); 36 ILM 65(1997); and *WIPO Performances and Phonograms Treaty* 1996 S. Treaty Doc. No. 105-17, 36 ILM 76 (1997)

³ The *Digital Millennium Copyright Act* 1998 (US) Pub. L. 105-304 and the *Sonny Bono Copyright Term Extension* 1998 (US) Pub.L. 105–298

⁴ *Australia-United States Free Trade Agreement (AUSFTA)*, signed 18 May 2004 (entered into force 1 January 2005); and *Singapore-United States Free Trade Agreement*, signed 6 May 2003 (entered into force 1 January 2003).

⁵ *Anti-Counterfeiting Trade Agreement* 2011, [2011] ATNIF 22, not yet in force.

property chapter, the *Trans-Pacific Partnership* also includes an investor-state dispute settlement regime – like the *North American Free Trade Agreement 1994*.⁶ There has been worry that the Intellectual Property Chapter of the *Trans-Pacific Partnership* will ‘contribute to, rather than help to control, the increasing fragmentation of international IP lawmaking.’⁷

The *Trans-Pacific Partnership* has featured a raging debate over copyright law, policy, and practice. The controversy has not necessarily followed the patterns of past copyright controversies over the *Stop Online Piracy Act* and the *Anti-Counterfeiting Trade Agreement 2011*.⁸ It has been noticeable that the information technologies who protested against past copyright industry proposals have relented in their criticism in the debate over the *Trans-Pacific Partnership*. It has been striking that the Obama administration was able to obtain support for the *Trans-Pacific Partnership* from both copyright content industries in publishing, music, and film, as well as members of the digital economy. Civil society groups, though, have banded together to resist the adoption and implementation of the trade agreement.

The United States Chamber of Commerce has been a key architect of the *Trans-Pacific Partnership*. The United States Chamber of Commerce has aggressively pushed for high standards in Intellectual Property Chapter of the *Trans-Pacific Partnership*: ‘Given that the

⁶ *North American Free Trade Agreement 1993* 32 ILM 289, 605 (1993)

⁷ Kimberlee Weatherall, ‘The TPP as a Case Study of Changing Dynamics for International Intellectual Property Negotiations’, in Tania Voon (ed.), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2013, 50-74 at 74.

⁸ *Stop Online Piracy Act* HR 3261; and *Anti-Counterfeiting Trade Agreement 2011*, [2011] ATNIF 22, not yet in force.

TPP is intended to serve as a model for future Asia-Pacific-U.S. trade agreements, it is critical that the TPP Agreement incorporates robust intellectual property (IP) protections.’⁹

The United States Chamber of Commerce maintains: ‘Pursuing comprehensive and commercially meaningful IP obligations will not only benefit U.S. interests, but will also help bring investment, innovation, and jobs to all TPP economies.’¹⁰ The United States Chamber of Commerce has been hostile to the inclusion of intellectual property flexibilities in the *Trans-Pacific Partnership*.¹¹

The Motion Picture Association of America has boasted that the *Trans-Pacific Partnership* will foster digital trade and grow the economy. Anissa Brennan, the Senior Vice President for International Affairs for the Motion Picture Association of America, was enthusiastic about the agreement.¹² She maintained that the agreement ‘will foster the growth of online distribution with its market opening disciplines and robust protections for copyright.’¹³ Brennan argued that ‘the TPP harmonizes copyright protections, which will facilitate global trade in creative works, including online.’¹⁴ However, the film industry itself has much more

⁹ United States Chamber of Commerce, ‘Global Intellectual Property Center’, <http://www.theglobalipcenter.com/initiatives/trade/tpp/>

¹⁰ Ibid.

¹¹ Mark Elliot of the United States Chamber of Commerce, ‘NAFTA at Twenty: Accomplishments, Challenges, and the Way Forward on Intellectual Property’, United States House Committee on Foreign Affairs, Subcommittee on the Western Hemisphere, 15 January 2014, http://www.theglobalipcenter.com/wp-content/uploads/2013/01/MTE-NAFTA-Testimony-for-submission_FINAL-1-15-14.pdf

¹² Anissa Brennan, ‘The TPP will Foster Digital Trade and Grow Our Economy’, The Motion Picture Association of America, 18 February 2016, <http://www.mpa.org/the-tpp-will-foster-digital-trade-grow-our-economy/>

¹³ Ibid.

¹⁴ Ibid.

mixed interests in the field of copyright law. As Ted Johnson said, ‘While Hollywood’s interests often lie in protecting intellectual property, independent filmmakers and documentary producers depend heavily on U.S. copyright law’s concept of “fair use,” or the use of material without authorization of the owner.’¹⁵

The Recording Industry Association of America (RIAA) was disappointed by the collapse of the *Anti-Counterfeiting Trade Agreement*.¹⁶ The music industry has sought to promote a similar copyright maximalist agenda in the *Trans-Pacific Partnership*. Chairman and CEO of the RIAA, Cary Sherman, was delighted by the conclusion of the Pacific Rim trade agreement:

We congratulate Ambassador Froman and the other TPP negotiators for reaching an agreement designed, at least in part, to create the legal and enforcement infrastructure to facilitate digital trade. Music is increasingly a global phenomenon and the modern music business derives the vast majority of its revenues from an extensive array of digital platforms. It is critical to the well-being of America’s creative communities and to American competitiveness to eliminate barriers to growth in the digital economy.¹⁷

¹⁵ Ted Johnson, ‘How the Trans-Pacific Partnership Could Impact Hollywood’, *Variety*, 5 October 2015, <http://variety.com/2015/biz/news/trans-pacific-partnership-hollywood-mpaa-copyright-1201610649/>

¹⁶ Pedro Roffe and Xavier Seuber (ed.), *The ACTA and The Plurilateral Enforcement Agenda: Genesis and Aftermath*, Geneva: International Centre for Trade and Sustainable Development, and Cambridge: Cambridge University Press, 2014.

¹⁷ Recording Industry Association of America, ‘RIAA Comment on Conclusion of TPP Negotiations’, Press Release, 5 October 2015, <http://www.riaa.com/riaa-comment-on-conclusion-of-tpp-negotiations/>

Neil Turkewitz of the RIAA maintained that the *Trans-Pacific Partnership* was ‘critical to sustaining America’s creative sector.’¹⁸ He insisted: ‘While the TPP may not provide a precise roadmap for realizing the potential of Internet commerce, it certainly moves us in the right direction’.¹⁹ There has been disquiet, though, as to whether the trade agreement will privilege the interests of the music industry above those of creative artists.²⁰

The Computer and Communications Industry Association (CCIA) has supported the *Trans-Pacific Partnership*.²¹ Its members include a broad section of the information technology industry - including Amazon, eBay, Facebook, Google, Microsoft, Netflix, PayPal, Pinterest, Samsung, TiVo, and Yahoo! The Association spans a wide spectrum of positions in the copyright public policy debate. While computer software companies like Microsoft have been copyright maximalists, a number of the search engines and social media companies have been worried about copyright exceptions and intermediary liability issues surrounding safe harbours. The Executive Officer Ed Black has maintained that the *Trans-Pacific Partnership* promotes a balanced approach to copyright law: ‘As digital trade takes a rising role in U.S. exports and the Internet becomes an increasingly crucial tool for traditional businesses, trade agreement language such as balanced copyright provisions will be crucial — not just to the

¹⁸ Dan Rys, ‘RIAA Calls Trans-Pacific Partnership “Critical to Sustaining America’s Creative Sector”’, *Billboard*, 6 November 2015, <http://www.billboard.com/articles/business/6754024/riaa-calls-trans-pacific-partnership-critical-to-sustaining-americas>

¹⁹ Ibid.

²⁰ Parker Higgins and Sarah Jeong, ‘The TPP’s Attack on Artists’ Termination Rights’, *Electronic Frontier Foundation*, 16 December 2013, <https://www.eff.org/deeplinks/2013/12/tpps-attack-artists-termination-rights>

²¹ Computer and Communications Industry Association, ‘Trans-Pacific Partnership’, <http://www.ccianet.org/issues/trade/trans-pacific-partnership/>

digital economy but the growth of our overall economy.’²² This seems a contentious claim – given that, in a number of respects, the intellectual property chapter is quite unbalanced and distorted towards the rights of copyright owners. The communications companies seem to be willing to suffer the risks of the Intellectual Property Chapter in return for the perceived benefits of the Electronic Commerce Chapter of the *Trans-Pacific Partnership*.

The Internet Association has expressed support for the *Trans-Pacific Partnership*.²³ While harbouring some reservations about the intellectual property measures in the agreement, the Big Information Technology companies in the Internet Association were attracted by the Electronic Commerce.

Somewhat even more surprisingly, the Consumer Electronics Association has lent its support to the *Trans-Pacific Partnership*.²⁴ Historically, the Consumer Electronics Association has been a champion of consumer rights in respect of copyright law.²⁵ Indeed, the Consumer Electronics Association has argued for a broad reading of the Sony Betamax decision, calling

²² Heather Greenfield, ‘CCIA Hails TPA Provisions on Digital Trade; Applauds Congressional Committees’ Commitment to Balanced Copyright in Trade Promotion Reports’, the Computer and Communications Industry Association, 14 May 2015, <http://www.ccianet.org/2015/05/ccia-hails-tpa-provisions-on-digital-trade-applauds-congressional-committees-commitment-to-balanced-copyright-in-trade-promotion-reports/>

²³ Internet Association, ‘Statement in Support of the Trans-Pacific Partnership’, Press Release, 30 March 2016, <https://internetassociation.org/033016tpp/>

²⁴ Consumer Electronics Association, ‘CEA Applauds U.S., 11 Other Nations for Trans-Pacific Partnership Deal’, Press Release, 5 October 2015, <https://www.cta.tech/News/Press-Releases/2015/October/CEA-Aplauds-U-S,-11-Other-Nations-for-Trans-Paci.aspx>

²⁵ Matthew Rimmer, *Digital Copyright and the Consumer Revolution: Hands off my iPod*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, July 2007.

the decision as ‘the Magna Carta of our Industry’.²⁶ The organisation has promoted time-shifting, space-shifting, and place-shifting technologies. In this context, it was striking that Gary Shapiro, president and CEO of the Consumer Electronics Association, expressed his support for the deal: ‘With continued expansion of the digital economy and global supply chain, international trade is a driving force of revenue for U.S. businesses large and small.’²⁷ He maintained: ‘CEA has long supported trade deals that reflect balanced copyright principles and the realities of the 21st Century, including the growing role of the Internet and digital economy’.²⁸ Shapiro argued: ‘By removing trade barriers and promoting innovation and sustainable growth across the Asia-Pacific region, the TPP stands to benefit American businesses and workers through increased exports, greater contributions to the U.S. economy and the creation of new, high-paying jobs.’²⁹ However, the content of the Intellectual Property Chapter does seem to undercut and undermine the Consumer Electronics Association’s long-standing efforts to promote consumer rights in copyright law.

While Big IT has supported the trade agreement, a number of other smaller players have shown reservations about the deal. Cory Doctorow, the co-editor of *Boing Boing*, has complained: ‘There is only one reason to negotiate an Internet treaty in secret: because you

²⁶ Gary Shapiro, ‘Testimony on Behalf of the Consumer Electronics Association and the Home Recording Rights Coalition in the United States Senate Committee on the Judiciary’, 28 September 2005, http://www.judiciary.senate.gov/imo/media/doc/shapiro_testimony_09_28_05.pdf

²⁷ Consumer Electronics Association, ‘CEA Applauds U.S., 11 Other Nations for Trans-Pacific Partnership Deal’, Press Release, 5 October 2015, <https://www.cta.tech/News/Press-Releases/2015/October/CEA-Applauts-U-S,-11-Other-Nations-for-Trans-Paci.aspx>

²⁸ Ibid.

²⁹ Ibid.

want to break the Internet.’³⁰ On the 20th March 2014, twenty-five leading technology companies wrote to the United States Congress, asking its representatives to oppose any form of fast-track authority for trade agreements like the *Trans-Pacific Partnership*.³¹ The signatories included reddit, Automattic (the company behind WordPress), Imgur, DuckDuckGo, CREDO Mobile, BoingBoing, Thoughtworks, Namecheap, and Cheezburger. The letter emphasizes that massive trade deals like the *Trans-Pacific Partnership* are an ‘emerging front in the battle to defend the free Internet.’³² The technology companies warn: ‘These highly secretive, supranational agreements are reported to include provisions that vastly expand on any reasonable definition of ‘trade,’ including provisions that impact patents, copyright, and privacy in ways that constrain legitimate online activity and innovation’³³ The letter is concerned that ‘None of the usual justifications for trade negotiation exclusivity apply to recent agreements like the *Trans-Pacific Partnership*’.³⁴ The technology companies comment: ‘Even assuming that it is legitimate to shield the discussions

³⁰ Common Dreams, ‘New Campaign Launched: “10 Days to Stop Fast Track” Brings Together Diverse Network of Labor, Internet, and Environmental Activists’, *Common Dreams*, 23 January 2014, <http://www.commondreams.org/newswire/2014/01/23/new-campaign-launched-10-days-stop-fast-track-brings-together-diverse-network>

³¹ Parker Higgins and Maira Sutton, ‘Tech Companies Urge Senator Wyden to Reject Fast Track and Bring Transparency to TPP’, Electronic Frontier Foundation, 20 March 2014, <https://www.eff.org/deeplinks/2014/03/tech-companies-urge-senator-wyden-reject-fast-track-and-bring-transparency-tpp>

³² Technology Companies, ‘Letter to Senator Ron Wyden’, 20 March 2014, <https://www.eff.org/files/2014/03/20/tech-companies-wyden-letter-20140320.pdf>

³³ Ibid.

³⁴ Ibid.

of certain trade barriers—like import tariffs—from political interference, the provisions in these new trade agreements go far beyond such traditional trade issues.’³⁵

The technology companies are concerned that the trade deal, with its intellectual property chapter, and its investment chapter, will frustrate domestic law reform: ‘In light of these needed revisions, the U.S. system cannot be crystallized as the international norm and should not be imposed on other nations.’³⁶ The technology companies stress: ‘It is crucial that we maintain the flexibility to re-evaluate and reform our legal framework in response to new technological realities.’³⁷ The technology companies emphasized: ‘Ceding national sovereignty over critical issues like copyright is not in the best interest of any of the potential signatories of this treaty.’³⁸ The technology companies stressed: ‘Our industry, and the users that we serve, need to be at the table from the beginning to design policies that serve more than the narrow commercial interests of the few large corporations who have been invited to participate.’³⁹

A number of civil society groups have been concerned about how the trade agreement will impact upon digital rights, freedom of speech, privacy, and an open internet. WikiLeaks played a key role in revealing drafts of the secret negotiations in respect of intellectual property. With a release of an early draft of the Intellectual Property Chapter in 2013, Julian Assange, the editor of WikiLeaks, warned:

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

If instituted, the TPP's IP regime would trample over individual rights and free expression, as well as ride roughshod over the intellectual and creative commons. If you read, write, publish, think, listen, dance, sing or invent; if you farm or consume food; if you're ill now or might one day be ill, the TPP has you in its crosshairs.⁴⁰

Knowledge Ecology International has been critical of how the secret negotiations in the *Trans-Pacific Partnership* have compromised multilateral efforts on development, education, and access to knowledge.⁴¹ The Creative Commons movement has been critical about the *Trans-Pacific Partnership*, maintaining that it would harm user rights and the commons.⁴² The Wikimedia Foundation – which represents Wikipedia – has been worried about the implications of the copyright term extension for a free and open culture.⁴³ Open Media has been concerned that the *Trans-Pacific Partnership* will result in the censorship of the Internet.⁴⁴ Privacy organisations such as the Australian Privacy Foundation have protested about the privacy outcomes of the *Trans-Pacific Partnership*.⁴⁵ A study commissioned by the

⁴⁰ WikiLeaks, 'Secret Trans-Pacific Partnership Agreement (TPP) – IP Chapter', Press Release, 13 November 2013, <https://wikileaks.org/tpp/pressrelease.html>

⁴¹ James Love, 'Knowledge Ecology International analysis of TPP IPR Text, from August 30, 2013', Knowledge Ecology International, 13 November 2013, <http://keionline.org/node/1825>

⁴² Creative Commons, 'The Trans-Pacific Partnership Would Harm User Rights and the Commons', 16 November 2015, <https://creativecommons.org/about/program-areas/policy-advocacy-copyright-reform/stop-the-tpp/trans-pacific-partnership-would-harm-user-rights-and-the-commons/>

⁴³ Wikimedia, 'What's the TPP? The Problematic Partnership', *Medium*, 3 February 2016, <https://medium.com/wikimedia-policy/what-s-tpp-the-problematic-partnership-6751951872cc#ipq3263o9>

⁴⁴ Open Media, 'The TPP Was Just Signed – Now the Final Battle Begins', <https://act.openmedia.org/finalbattle>

⁴⁵ Australian Privacy Foundation, 'Re: Trans-Pacific Partnership Agreement', Joint Standing Committee on Treaties, 10 March 2016, <https://www.privacy.org.au/Papers/Parlt-TPP-160310.pdf>

Law Foundation New Zealand and Internet NZ has raised questions about the impact of the intellectual property regime upon information technology.⁴⁶

A number of creative artists – including Tom Morello, Talib Kweli, Evangeline Lilly, Anti-Glag, Jolie Holland, the Downtown Boys, and Sihasin – have participated in a series of concerts ‘Rock against the TPP’ to raise awareness and opposition to the *Trans-Pacific Partnership*.⁴⁷ The event was organised by Tom Morello’s label, Firebrand Records and the digital rights group Fight for the Future.⁴⁸ The press release for the tour said: ‘The TPP has little to do with trade, but would provide multinational corporations with new rights and powers that threaten good paying jobs, Internet freedom, the environment, access to medicine, and food safety.’⁴⁹

There have also been concerns about how the regional trade agreement will affect developing countries – such as Vietnam – which have pressing imperatives for education, access to

⁴⁶ James Ting-Edwards, Melanie Johnson, Judge David Harvey, Debbie Monahan, Kate McHaffie, and Jo Shaw, ‘TPPA: Intellectual Property and Information Technology’, The Law Foundation New Zealand and Internet NZ, February 2016, <https://tpplegal.files.wordpress.com/2015/12/tpp-ip-it.pdf>

⁴⁷ Rock Against the TPP, <https://www.rockagainsthettpp.org/>

⁴⁸ Fight for the Future, ‘Rock Against the TPP: Tom Morello and Actress Evangeline Lilly to Headline Kick-off Event For Nationwide Concert Tour Opposing the Trans-Pacific Partnership’, 15 June 2016, <https://www.fightforthefuture.org/news/2016-06-15-rock-against-the-tpp-tom-morello-and-actress/> William Maudlin, ‘Anti-TPP Concerts Put a Spotlight on a Hollywood Trade Divide’, *The Wall Street Journal*, 20 July 2016, <http://blogs.wsj.com/economics/2016/07/20/anti-tpp-concerts-put-a-spotlight-on-a-hollywood-trade-divide/> and Mazin Sidahmed, ‘Tom Morello and Talib Kweli Protest against TPP as Fellow Stars Stay Quiet’, *The Guardian*, 2 August 2016, <https://www.theguardian.com/us-news/2016/aug/01/musicians-election-2016-tpp-tom-morello-talib-kweli>

⁴⁹ Ibid.

knowledge, and development.⁵⁰ The *Trans-Pacific Partnership* undercuts and undermines the *WIPO Development Agenda*.

Drawing upon research into intellectual property and trade, this piece of work provides a critical evaluation of the copyright regime proposed by the *Trans-Pacific Partnership*. The argument of the piece is that the regime will have a negative impact upon creativity, innovation, and competition in the Pacific Rim. Part 1 considers the objectives of copyright law and policy under the *Trans-Pacific Partnership*. Part 2 focuses upon the impact of the copyright term extension and the treatment of orphan works. Part 3 examines the nature and scope of copyright exceptions under the *Trans-Pacific Partnership*. Part 4 focuses upon intermediary liability. Part 5 examines technological protection measures – especially in light of a constitutional challenge to the *Digital Millennium Copyright Act 1998 (US)*. Part 6 looks at electronic rights management. Part 7 focuses upon the suite of civil remedies, criminal offences, and border measures introduced under the *Trans-Pacific Partnership*. The conclusion flags the interaction between copyright law and investor-state dispute settlement regime. It also notes the strong interactions between the regime in respect of copyright law and the chapter on electronic commerce.

1. Objectives of Copyright Law

There has long been a philosophical debate over the aims, objectives, and purposes of copyright law.⁵¹

⁵⁰ Krista Cox, ‘The Intellectual Property Chapter of the Trans-Pacific Partnership Agreement and Investment in Developing Nations’ (2014) 35 (4) *University of Pennsylvania Journal of International Law* 1045-1059.

The *TRIPS Agreement* 1994 highlights the regulatory autonomy of nations in fashioning intellectual property regimes, which are appropriate and adapted for their development.⁵²

Superior courts across the Pacific Rim have emphasized that copyright law is designed to serve higher public purposes. The legal regime is not merely an instrument of private profit.

The Supreme Court of the United States has discussed the nature, role, and function of copyright law in a number of precedents. There has often been a great deal of philosophical debate between the judges on the bench as to the higher purposes served by copyright law. In *Harper & Row v. Nation Enterprises*, O'Connor J of the Supreme Court of the United States observed: 'The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.'⁵³ In *Feist Publications Inc. v. Rural Telephone Service Company, Inc.*, O'Connor J of the Supreme Court of the United States emphasizes the higher purposes served by copyright law in the United States constitutional system:

The primary objective of copyright is not to reward the labor of authors, but "to promote the Progress of Science and useful Arts." Art. I, § 8, cl. 8. To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. *Harper & Row*, 471 U.S., at 556-557, 105 S.Ct., at 2228-2229. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and

⁵¹ Peter Drahos, *A Philosophy of Intellectual Property*, Aldershot: Ashgate, 1996.

⁵² Alison Slade, 'The "Objectives" and "Principles" of the WTO TRIPS Agreement: A Detailed Anatomy' (2016) 53 (3) *Osgoode Hall Law Journal*
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2781664

⁵³ *Harper & Row v. Nation Enterprises* 471 U.S. 539 (1985)

arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.⁵⁴

In *Campbell v Acuff-Rose Music Inc.*, Souter J stressed: ‘From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, "[t]o promote the Progress of Science and useful Arts" U. S. Const., Art. I, § 8, cl. 8. [n.5]’⁵⁵ There has also been much debate about the competing objectives of copyright law in disputes over copyright term,⁵⁶ peer-to-peer networks,⁵⁷ internet television,⁵⁸ and trade.⁵⁹ The Supreme Court of the United States, though, has sometimes been rather unpredictable in terms of its jurisprudence.

The Supreme Court of Canada has articulated a sophisticated vision the nature and role of copyright law in a string of cases. In *Théberge v. Galerie d'Art du Petit Champlain Inc.*, Binnie J of the Supreme Court of Canada discussed the purpose of copyright law in Canada:

The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)... The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly

⁵⁴ *Feist Publications Inc. v. Rural Telephone Service Company, Inc.* (1991) 499 U.S. 340 111 S.Ct. 1282, 113 L.Ed.2d 358.

⁵⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994).

⁵⁶ *Eldred v. Ashcroft* 537 U.S. 186 (2003); and *Golan v. Holder* 609 F. 3d 1076 (2012).

⁵⁷ *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)

⁵⁸ *American Broadcasting Cos. v. Aereo* 134 S. Ct. 2498 (2014).

⁵⁹ *Kirtsaeng v. John Wiley & Sons Inc.* (2013) 133 S. Ct 1351.

economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.

Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain in traditional ways such as fair dealing for the purpose of criticism or review and to add new protections to reflect new technology, such as limited computer program reproduction and “ephemeral recordings” in connection with live performances.⁶⁰

In the case of *CCH Canadian Ltd. v. Law Society of Upper Canada*, McLachlan CJ noted that, in the *Théberge* case, ‘this Court stated that the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.’⁶¹ The Supreme Court of Canada has further elaborated this philosophical position in the ‘Pentalogy’ of copyright cases.⁶² Abraham Drassinower has considered the philosophical underpinnings of this approach to

⁶⁰ *Théberge v. Galerie d’Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, [2002 SCC 34 \(CanLII\)](#).

⁶¹ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13 (CanLII)

⁶² *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 (July 12, 2012); *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 (July 12, 2012); *Re: Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38 (July 12, 2012); *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 (July 12, 2012); and *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 (July 12, 2012).

copyright law by the Supreme Court of Canada in his book, *What's Wrong with Copying*.⁶³

There has also been further consideration by Canadian researchers over these landmark decisions.⁶⁴

The High Court of Australia has discussed the nature, role, and function of copyright law in a number of cases. In the 2009 *IceTV* case, French CJ, Crennan and Kiefel JJ discussed the social contract behind Australian copyright law:

Copyright legislation strikes a balance of competing interests and competing policy considerations. Relevantly, it is concerned with rewarding authors of original literary works with commercial benefits having regard to the fact that literary works in turn benefit the reading public.

In both its title and opening recitals, the Statute of Anne of 1709 echoed explicitly the emphasis on the practical or utilitarian importance that certain seventeenth century philosophers attached to knowledge and its encouragement in the scheme of human progress. The "social contract" envisaged by the Statute of Anne, and still underlying the present Act, was that an author could obtain a monopoly, limited in time, in return for making a work available to the reading public.

Whilst judicial and academic writers may differ on the precise nature of the balance struck in copyright legislation in different places, there can be no doubt that copyright is given in respect of "the particular form of expression in which an author convey[s] ideas or information to the world".⁶⁵

⁶³ Abraham Drassinower, *What's Wrong with Copying*, Cambridge, Massachusetts: Harvard University Press, 2015.

⁶⁴ Carys Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2011. Michael Geist (Ed.), *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright*, Ottawa: the University of Ottawa Press, 2013.

⁶⁵ *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14 239 CLR 458; 83 ALJR 585; 254 ALR 386

The judges held: ‘Copyright, being an exception to the law's general abhorrence of monopolies, does not confer a monopoly on facts or information because to do so would impede the reading public's access to and use of facts and information.’⁶⁶

In the 2012 case of *Phonographic Performance Company of Australia Limited v Commonwealth of Australia*, the High Court of Australia rejected a constitutional challenge to compulsory licensing provisions.⁶⁷ Crennan and Kiefel JJ held that the ‘recurrent legislative balancing of the competing interests of copyright owners and the public does not support absolute propositions such as that copyright is an inherently unstable right, or that reductions in the exclusive rights to do acts within a copyright are always permissible adjustments under s 51(xviii) of the Constitution which do not attract the guarantee under s 51(xxxi).’⁶⁸ The judges observed: ‘Exceptions to infringement, which include fair dealings or fair uses and compulsory licence provisions, constitute qualifications of or limitations upon a copyright owner's exclusive rights to do acts within the copyright, during the term of a copyright’.⁶⁹ The judges stressed: ‘In each case, such provisions reflect a specific public interest in obtaining access to the subject matter of copyright on some reasonable basis.’⁷⁰

⁶⁶ *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14 239 CLR 458; 83 ALJR 585; 254 ALR 386

⁶⁷ *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* [2012] HCA 8 246 CLR 561; 86 ALJR 335; 286 ALR 61

⁶⁸ *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* [2012] HCA 8 246 CLR 561; 86 ALJR 335; 286 ALR 61

⁶⁹ *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* [2012] HCA 8 246 CLR 561; 86 ALJR 335; 286 ALR 61

⁷⁰ *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* [2012] HCA 8 246 CLR 561; 86 ALJR 335; 286 ALR 61

The High Court of Australia has also considered the relative equilibrium of Australian copyright law in a number of other cases.⁷¹

It has been striking that such values articulated by superior courts have not been evident in the drafts or the final text of the *Trans-Pacific Partnership*. The Intellectual Property Chapter of the *Trans-Pacific Partnership* seeks to provide for longer and stronger copyright protection for transnational corporations. It is underpinned by a corporatist vision of copyright law. The key objective seems to be protect the investment of multinational copyright aggregators in the fields of music, film, and publishing. The proposed regime does not seem particularly advantageous for creative artists (particularly in light of the lack of comprehensive moral rights protection). Likewise, there is little in the Intellectual Property Chapter of the *Trans-Pacific Partnership* which boosts the public domain and the intellectual commons.

WikiLeaks published a draft Intellectual Property Chapter of the *Trans-Pacific Partnership* in November 2013.⁷²

In the light of day, the *Trans-Pacific Partnership* appears to be a monster. The Intellectual Property chapter is long, complex, prescriptive, bellicose and diabolical.

⁷¹ *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14 218 CLR 273; 78 ALJR 585; 205 ALR 1; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 221 ALR 448; 79 ALJR 1850; 224 CLR 193; *Burge v Swarbrick* [2007] HCA 17 232 CLR 336; 81 ALJR 950; 234 ALR 204; and *Roadshow Films Pty Ltd v iiNet Limited* [2012] HCA 16 248 CLR 42; 86 ALJR 494; 286 ALR 466

⁷² WikiLeaks, ‘Advanced Intellectual Property Chapter for All 12 Nations with Negotiating Positions (30 August 2013 consolidated bracketed negotiating text)’ <https://wikileaks.org/tpp/>

What's missing, as the Electronic Frontier Foundation observed is any recognition of the public interests to be served by copyright law:

The leaked text, from August 2013, confirms long-standing suspicions about the harm the agreement could do to users' rights and a free and open Internet. From locking in excessive copyright term limits to further entrenching failed policies that give legal teeth to Digital Rights Management (DRM) tools, the TPP text we've seen today reflects a terrible but unsurprising truth: an agreement negotiated in near-total secrecy, including corporations but excluding the public, comes out as an anti-user wish list of industry-friendly policies.⁷³

Instead of promoting the progress of science and the useful arts, the *Trans-Pacific Partnership* transforms intellectual property into a means to protect and secure the investment of transnational corporations.

Professor Michael Geist of the University of Ottawa said that there was a debate over the philosophical goals of intellectual property:

[Other nations have argued for] balance, promotion of the public domain, protection of public health, and measures to ensure that IP rights themselves do not become barriers to trade. The opposition to these objective[s] by the US and Japan (Australia has not taken a position) speaks volumes about their goals for the TPP.⁷⁴

⁷³ Parker Higgins and Maira Sutton, 'TPP Leak Confirms the Worst: US Negotiators Still Trying to Trade Away Internet Freedoms', Electronic Frontier Foundation, 13 November 2013, <https://www.eff.org/deeplinks/2013/11/tpp-leak-confirms-worst-us-negotiators-still-trying-trade-away-internet-freedoms>

⁷⁴ Michael Geist, 'The Trans-Pacific Partnership IP Chapter Leaks: Canada Pushing Back against Draconian U.S. Demands', the University of Ottawa, 13 November 2013, <http://www.michaelgeist.ca/content/view/6994/125/>

It is particularly disappointing that Australia has been such a passive partner to the United States in the Pacific Rim negotiations, showing little inclination to stand up for the public interest.

Article 18.2 of the *Trans-Pacific Partnership* discusses the objectives of the agreement in respect of intellectual property: ‘The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.’⁷⁵ This language echoes the language on Objectives in Article 7 of the *TRIPS Agreement* 1994.

Article 18.3 (1) of the *Trans-Pacific Partnership* considers the relationship between intellectual property and development: ‘A Party may, in formulating or amending its laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Chapter.’⁷⁶ Article 18.3 (2) of the *Trans-Pacific Partnership* considers intellectual property and competition policy: ‘Appropriate measures, provided that they are consistent with the provisions of this Chapter, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely

⁷⁵ Article 18.2 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

⁷⁶ Article 18.3 (1) of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

affect the international transfer of technology'.⁷⁷ Such measures mirror Article 8 of the *TRIPS Agreement* 1994.

Article 18.4 of the *Trans-Pacific Partnership* is a novelty, discussing 'Understandings in Respect of this Chapter'.⁷⁸ This long-winded provision stipulates: 'Having regard to the underlying public policy objectives of national systems, the Parties recognise the need to: (a) promote innovation and creativity; (b) facilitate the diffusion of information, knowledge, technology, culture and the arts; and (c) foster competition and open and efficient markets, through their respective intellectual property systems, while respecting the principles of transparency and due process, and taking into account the interests of relevant stakeholders, including right holders, service providers, users and the public.'⁷⁹ In earlier drafts of this provision, there had been mention of the importance of the public domain. However, the United States and Japan blocked mention of the public domain in this particular article of the agreement.

Instead, in the final text, there is a displaced discussion of the public domain in Article 18.15 of the *Trans-Pacific Partnership*.⁸⁰ Article 18.15 (1) provides that 'the Parties recognise the

⁷⁷ Article 18.3 (2) of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

⁷⁸ Article 18.4 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

⁷⁹ Article 18.4 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

⁸⁰ Article 18.15 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

importance of a rich and accessible public domain.’⁸¹ Article 18.15 (2) observes that ‘the Parties also acknowledge the importance of informational materials, such as publicly accessible databases of registered intellectual property rights that assist in the identification of subject matter that has fallen into the public domain.’⁸² For all their rhetorical force, the provisions on the public domain seem rather hollow and empty. There does not seem to be any obligations placed upon nation states in the Pacific Rim in preserving, conserving, or expanding ‘a rich and accessible public domain.’

The Creative Commons movement has been particularly concerned about the treatment of the public interest in access to knowledge.⁸³ Discussing Article 18.15, the Creative Commons observed that the mention of the public domain is ‘lip service’ at best: ‘The inclusion of this text might otherwise have been viewed as a welcome addition, but taken in context of the rest of the document—for example in the extension of copyright terms—it does not seem that the negotiating parties care much about promoting access to and expansion of the public domain.’⁸⁴ The Creative Commons movement observed: ‘In prior leaked drafts of the IP chapter the substance and placement of mentions of the public domain were more prominent

⁸¹ Article 18.15 (1) of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

⁸² Article 18.15 (2) of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

⁸³ Creative Commons, ‘The Trans-Pacific Partnership Would Harm User Rights and the Commons’, 16 November 2015, <https://creativecommons.org/about/program-areas/policy-advocacy-copyright-reform/stop-the-tpp/trans-pacific-partnership-would-harm-user-rights-and-the-commons/>

⁸⁴ Ibid.

and supportive of the public interest.’⁸⁵ The Creative Commons highlighted the excision of such terminology: ‘These are no longer reflected in the text.’⁸⁶

The *Trans-Pacific Partnership* privileges corporate values in respect of its aims, objectives, and purposes for copyright law. More, traditional objectives in respect of copyright law – such as promoting learning, access to knowledge, and education – have been sublimated and suppressed.

2. Copyright Term Extension

The *Trans-Pacific Partnership* has sought to extend the term of copyright across the Pacific Rim. The extended copyright term could impoverish the number and variety of works in the public domain with outrageous demands for copyright.

A. The *Trans-Pacific Partnership*

The WikiLeaks texts revealed the variations in the negotiating positions of the member states.⁸⁷ In the negotiations, the United States, Australia, Peru, Singapore and Chile proposed a term of life plus 70 years for natural persons. Mexico wanted copyright protection for life plus 100 years.⁸⁸ New Zealand, Canada and other countries who followed the Berne Convention norm, particularly stand to suffer, given they only have a copyright term of life plus 50 years. For corporate owned works, the United States has proposed 95 years of

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Haggart

protection, while Australia, Peru, Singapore and Chile are pushing for 70. The United States Trade Representative's proposals in respect of copyright term extension in the *Trans-Pacific Partnership* would be a form of corporate welfare. Such windfalls would be money for jam. A copyright term extension throughout the Pacific Rim would have an adverse impact upon cultural heritage, innovation, competition, and freedom of speech.

Article 18.63 of the *Trans-Pacific Partnership* deals with the term of protection for copyright and related rights:

Each Party shall provide that in cases in which the term of protection of a work, performance or phonogram is to be calculated:[73]

(a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death:[74] and

(b) on a basis other than the life of a natural person, the term shall be:

(i) not less than 70 years from the end of the calendar year of the first authorised publication[75] of the work, performance or phonogram; or

(ii) failing such authorised publication within 25 years from the creation of the work, performance or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance or phonogram.[76]⁸⁹

Footnote 73 provides: 'For greater certainty, in implementing this Article, nothing prevents a Party from promoting certainty for the legitimate use and exploitation of a work, performance or phonogram during its term of protection, consistent with Article 18.65 (Limitations and

⁸⁹ Article 18.63 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

Exceptions) and that Party's international obligations.'⁹⁰ Footnote 74 stipulates: 'The Parties understand that if a Party provides its nationals a term of copyright protection that exceeds life of the author plus 70 years, nothing in this Article or Article 18.8 (National Treatment) shall preclude that Party from applying Article 7.8 of the Berne Convention with respect to the term in excess of the term provided in this subparagraph of protection for works of another Party.'⁹¹ Footnote 75 explains: 'For greater certainty, for the purposes of subparagraph (b), if a Party's law provides for the calculation of term from fixation rather than from the first authorised publication, that Party may continue to calculate the term from fixation.'⁹² Footnote 76 stresses: 'For greater certainty, a Party may calculate a term of protection for an anonymous or pseudonymous work or a work of joint authorship in accordance with Article 7(3) or Article 7bis of the Berne Convention, provided that the Party implements the corresponding numerical term of protection required under this Article.'⁹³

In the end, the final text of the agreement provides a number of provisions in respect of the copyright term and the *Trans-Pacific Partnership*:

Hollywood has been a prime mover behind the push for a copyright term extension. Anissa Brennan, a Senior Vice President of the Motion Picture Association of America, has

⁹⁰ Article 18.63 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

⁹¹ Article 18.63 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

⁹² Article 18.63 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

⁹³ Article 18.63 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

explained the film industry's objectives in the *Trans-Pacific Partnership*.⁹⁴ She emphasized that 'the TPP harmonizes the term of protection for copyrighted works to the global minimum standard.'⁹⁵ Brennan maintained: 'The TPP is a significant accomplishment with equally significant potential to foster legitimate global trade in creative works by opening foreign markets and protecting creative rights.'⁹⁶ She insisted that 'This will strengthen U.S. competitiveness and allow creativity and innovation to continue to thrive in the digital age.'⁹⁷

Disney are famous for lobbying for a copyright term extension both in the United States and elsewhere throughout the Pacific Rim. The heavy-handed involvement of Disney in the trade negotiations were revealed by its own leader in a candid letter to his employees. The Disney Chief Executive Officer Bob Iger boasted to his employees about his company's success in including a range of intellectual property measures in the *Trans-Pacific Partnership*.⁹⁸ He asked his employees to contribute to the company's political action committee, DisneyPAC. The 2015 letter stressed that Disney had been influential in trade negotiations in the United States:

We played a major role in ensuring that the "Trade Promotion Authority" legislation set high standards for intellectual property (IP) provisions in our trade negotiations, and we helped get that bill through

⁹⁴ Anissa Brennan, 'The TPP will foster Digital Trade and Grow Our Economy', Motion Picture Association of America, 18 February 2016, <http://www.mpa.org/the-tpp-will-foster-digital-trade-grow-our-economy/>

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Joe Mullin, 'Disney CEO Asks Employees to Chip In To Pay Copyright Lobbyists', *ArsTechnica*, 26 February 2016, <http://arstechnica.com/tech-policy/2016/02/disney-ceo-asks-employees-to-chip-in-to-pay-copyright-lobbyists/>

Congress. We used the language in TPA to advocate successfully for a strong IP chapter in the Trans-Pacific Partnership (TPP) trade negotiations. We also pushed for provisions to promote digital trade and to reduce barriers in media and entertainment sectors. TPP will establish a strong baseline of protection for intellectual property while breaking down trade barriers in the Asia Pacific region. In both TPA and TPP we had to overcome significant efforts to weaken respect for IP, pushed not only by foreign governments but also from within our own Congress and the Administration.⁹⁹

Bob Iger observed that ‘in the coming year, we expect Congress and the Administration to be active on copyright regime issues, efforts to enact legislation to approve and implement the *Trans-Pacific Partnership* trade agreement, tax reform, and more proposals to weaken retransmission consent, to name a few.’¹⁰⁰ He hoped that Disney would build upon its trade achievements in other areas: ‘2016 should see significant activity in negotiations between the US and China over a Bilateral Investment Treaty (BIT), continued negotiations with the European Union over the proposed *Transatlantic Trade and Investment Partnership* agreement, the 50-country *Trade in Services Agreement* negotiations, and efforts by the US Government to raise IP standards and break down trade barriers through a variety of means.’¹⁰¹ This letter reveals how Disney is seeking to use a combination of trade agreements to secure its objectives in respect of intellectual property rights and enforcement.

B. United States of America

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

The copyright term extension in the United States was highly controversial, and the subject of a number of constitutional challenges.¹⁰² In the 2003 case of *Eldred v Ashcroft*, the Supreme Court of the United States by a majority of seven to two upheld the constitutionality of the *Sonny Bono Copyright Term Extension Act 1998* (US).¹⁰³ For the majority, Ginsburg J held: ‘As we read the Framers’ instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.’¹⁰⁴ Breyer J dissented:

The economic effect of this 20-year extension-the longest blanket extension since the Nation's founding-is to make the copyright term not limited, but virtually perpetual. Its primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors. And most importantly, its practical effect is not to promote, but to inhibit, the progress of "Science"-by which word the Framers meant learning or knowledge.¹⁰⁵

Stevens J dissented that ‘the requirement that those exclusive grants be for "limited Times" serves the ultimate purpose of promoting the "Progress of Science and useful Arts" by guaranteeing that those innovations will enter the public domain as soon as the period of exclusivity expires.’¹⁰⁶

¹⁰² Steven Seidenberg, ‘US Perspectives: TPP’s Copyright Term Benefits US, Burdens Others’, *Intellectual Property Watch*, 23 March 2015, <http://www.ip-watch.org/2015/03/23/tpps-copyright-term-benefits-us-burdens-others/>

¹⁰³ *Eldred v. Ashcroft* 537 U.S. 186 (2003).

¹⁰⁴ *Eldred v. Ashcroft* 537 U.S. 186 (2003).

¹⁰⁵ *Eldred v. Ashcroft* 537 U.S. 186 (2003).

¹⁰⁶ *Eldred v. Ashcroft* 537 U.S. 186 (2003).

In 2012, in the case of *Golan v Holder*, the Supreme Court of the United States rejected a challenge to the restoration of copyright in foreign works.¹⁰⁷ For the majority, Ginsburg J concluded ‘that §514 does not transgress constitutional limitations on Congress’ authority’.¹⁰⁸ Her Honour found: ‘Neither the Copyright and Patent Clause nor the First Amendment, we hold, makes the public domain, in any and all cases, a territory that works may never exit.’¹⁰⁹ Breyer J – with whom Alito J joined - dissented:

The statute before us, however, does not encourage anyone to produce a single new work. By definition, it bestows monetary rewards only on owners of old works—works that have already been created and already are in the American public domain. At the same time, the statute inhibits the dissemination of those works, foreign works published abroad after 1923, of which there are many millions, including films, works of art, innumerable photographs, and, of course, books—books that (in the absence of the statute) would assume their rightful places in computer-accessible databases, spreading knowledge throughout the world. In my view, the Copyright Clause does not authorize Congress to enact this statute.¹¹⁰

Breyer J concluded: ‘The fact that, by withdrawing material from the public domain, the statute inhibits an important preexisting flow of information is sufficient, when combined with the other features of the statute that I have discussed, to convince me that the Copyright Clause, interpreted in the light of the First Amendment, does not authorize Congress to enact this statute.’¹¹¹

¹⁰⁷ *Golan v. Holder* 609 F. 3d 1076 (2012).

¹⁰⁸ *Golan v. Holder* 609 F. 3d 1076 (2012).

¹⁰⁹ *Golan v. Holder* 609 F. 3d 1076 (2012).

¹¹⁰ *Golan v. Holder* 609 F. 3d 1076 (2012).

¹¹¹ *Golan v. Holder* 609 F. 3d 1076 (2012).

Brewster Kahle of the Internet Archive brought a constitutional challenge in respect of copyright term extension, the removal of copyright registration, and the problem of orphan works.¹¹² The United States Court of Appeals for the Ninth Circuit rejected the challenge, finding that the matter had been previously dealt with in the case of *Eldred v. Ashcroft*.¹¹³ Farris J said: ‘Despite Plaintiffs’ attempt to frame the issue in terms of the change from an opt-in to an opt-out system rather than in terms of extension, they make essentially the same argument, in different form, that the Supreme Court rejected in *Eldred*.’¹¹⁴

Although the United States Copyright Office has raised the problem of orphan works,¹¹⁵ the United States Congress has failed to legislate for effective remedies in respect of the problem of orphan works.¹¹⁶

In the United States, there have been battles over copyright term and the public domain in respect of famous works such as the ‘Happy Birthday’ song.¹¹⁷ In this matter, there was a class action seeking to have a purported copyright covering the lyrics to ‘Happy Birthday’ declared invalid.¹¹⁸ In the end, there was a settlement, which recognised that the work was in

¹¹² *Kahle v. Gonzales* 487 F. 3d 697 (9th Cir. 2007).

¹¹³ *Eldred v. Ashcroft* 537 U.S. 186 (2003).

¹¹⁴ *Eldred v. Ashcroft* 537 U.S. 186 (2003).

¹¹⁵ United States Copyright Office, *Orphan Works and Mass Digitization: A Report of the Register of Copyrights*, Washington DC: United States Copyright Office, June 2015, <http://www.copyright.gov/orphan/reports/orphan-works2015.pdf>

¹¹⁶ The *Shawn Bentley Orphan Works Act* of 2008 (US) proposed a limitation on remedies in respect of orphan works. However, the United States Congress failed to pass the measure.

¹¹⁷ *Marya v. Warner/ Chappell Music, Inc.* 131 F. Supp. 3d 975 (2015).

¹¹⁸ *Marya v. Warner/ Chappell Music, Inc.* 131 F. Supp. 3d 975 (2015).

the public domain.¹¹⁹ Jenn Nelson has explained her campaign to liberate the ‘Happy Birthday’ song and ensure that it joined the public domain.¹²⁰ There has been a concerted new effort to challenge the copyright asserted in respect of ‘We Shall Overcome’ and ‘This Land is Your Land.’¹²¹

There have also been significant conflicts over copyright law and the Sherlock Holmes canon.¹²² In his appeal judgment, Posner J expressed concerns about the efforts of the Conan Doyle Estate to extend the term of copyright protection:

With the net effect on creativity of extending the copyright protection of literary characters to the extraordinary lengths urged by the estate so uncertain, and no legal grounds suggested for extending copyright protection beyond the limits fixed by Congress, the estate's appeal borders on the quixotic. The spectre of perpetual, or at least nearly perpetual, copyright (perpetual copyright would violate the copyright clause of the Constitution, Art. I, § 8, cl. 8, which authorizes copyright protection only for

¹¹⁹ Jess Denham, “‘Happy Birthday’ Song Now in the Public Domain after Judge Approves Settlement”, *Independent*, 28 June 2016, <http://www.independent.co.uk/arts-entertainment/music/news/happy-birthday-song-now-in-the-public-domain-after-judge-approves-settlement-a7107586.html>

¹²⁰ Jenn Nelson, ‘Happy Birthday: My Campaign to Liberate the People’s Song’, *The Guardian*, 1 July 2016, <https://www.theguardian.com/news/video/2016/jul/01/happy-birthday-song-campaign-song-jenn-nelson-warner-chappell-video?platform=hootsuite>

¹²¹ Ben Sisariom ‘A Fight to Make “We Shall Overcome” and “This Land is Your Land” Copyright Free’, *The New York Times*, 12 July 2016, <http://www.nytimes.com/2016/07/13/business/media/happy-birthday-is-free-at-last-how-about-we-shall-overcome.html>

¹²² *Klinger v. Conan Doyle Estate Ltd.* 988 F. Supp. 2d. 879; Matthew Rimmer, ‘Free Sherlock Holmes: The Copyright Battle of Baker Street’, *The Conversation*, 30 September 2013, <https://theconversation.com/free-sherlock-holmes-the-copyright-battle-of-baker-street-18544> and *Business Review Weekly*, 30 September 2013, <http://www.brw.com.au/p/professions/free-sherlock-holmes-the-copyright-yTBz05XWbu1TxHdE9IralQ> and *Klinger v. Conan Doyle Estate Ltd.* 755 F 3d. 496 (2014).

“limited Times”) looms, once one realizes that the Doyle estate is seeking 135 years (1887–2022) of copyright protection for the character of Sherlock Holmes as depicted in the first Sherlock Holmes story.¹²³

His Honour highlighted the importance of the public domain in his judgment: ‘Once the copyright on a work expires, the work becomes a part of the public domain and can be copied and sold without need to obtain a license from the holder of the expired copyright.’¹²⁴

C. Canada

In Canada, previous efforts to extend the copyright term have been rebuffed by an active civil society and intellectual property community.

Professor David Lametti – now the Parliamentary Secretary for Trade in Justin Trudeau’s Government – has made an academic argument for shorter copyright terms, in light of the commercial life of copyright works.¹²⁵ He also maintains that should be able to vary the terms of copyright according to the subject matter. Moreover, Lametti has made the case for a registration system in respect of copyright works.

¹²³ *Klinger v. Conan Doyle Estate Ltd.* 755 F 3d. 496 at 503 (2014).

¹²⁴ *Klinger v. Conan Doyle Estate Ltd.* 755 F 3d. 496 at 497 (2014).

¹²⁵ David Lametti, ‘Coming to Terms with Copyright’, in Michael Geist (ed.), *In The Public Interest: The Future of Canadian Copyright Law*, Toronto: Irwin Law, 2005, 480-516.

Professor Michael Geist of the University of Ottawa laments that in domestic politics Canada has resisted a copyright term extension.¹²⁶ Moreover, the copyright term extension in the *Trans-Pacific Partnership* goes against repeated rejections of a copyright term extension in Canadian politics:

From a Canadian perspective, the issue of extending the term of copyright was raised on several prior occasions and consistently rejected by governments and trade negotiators. For example, term extension was discussed during the 2009 national copyright consultation, but the Canadian government wisely decided against it. Further, the European Union initially demanded that Canada extend the term of copyright in the Canada-EU Trade Agreement, but that too was effectively rebuffed with the issue of term removed from the final text.

From a policy perspective, the decision to maintain the international standard of life plus 50 years is consistent with the evidence that term extension creates harms by leaving Canadians with 20 years of no new works entering the public domain with virtually no gains in terms of new creativity. In other words, in a policy world in which copyright strives to balance creativity and access, term extension does not enhance creativity but it does restrict access.¹²⁷

Geist warned that ‘the damage caused by the term extension involves more than just higher costs to consumers and educational institutions.’¹²⁸ He emphasized that the decision also creates ‘a massive blow to access to Canadian heritage.’¹²⁹ Geist observed: ‘Canadian publishers such as Broadview Press, an independent academic publisher that has been a vocal proponent of copyright, warned about the dangers of the term extension to its business and

¹²⁶ Michael Geist, ‘The Trouble with the TPP: Copyright Term Extension’, the University of Ottawa, 6 January 2016, <http://www.michaelgeist.ca/2016/01/the-trouble-with-the-tpp-day-3-copyright-term-extension/>

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

the academic community last fall.’¹³⁰ He commented that the copyright term extension would mean that work by leading Canadian authors – such as Margaret Laurence, Gabrielle Roy, Marian Engel, Marshall McLuhan, and Donald Creighton – would not fall into the public domain for decades. Moreover, he observed: ‘In addition to Canadian authors, there many well-known international figures that will be kept out of the public domain such as John Steinbeck, Martin Luther King, Andy Warhol, Woody Guthrie, and Elvis Presley.’¹³¹

D. Australia

In 2004, the Australian Government controversially agreed to a copyright term extension as part of the *Australia-United States Free Trade Agreement*.¹³²

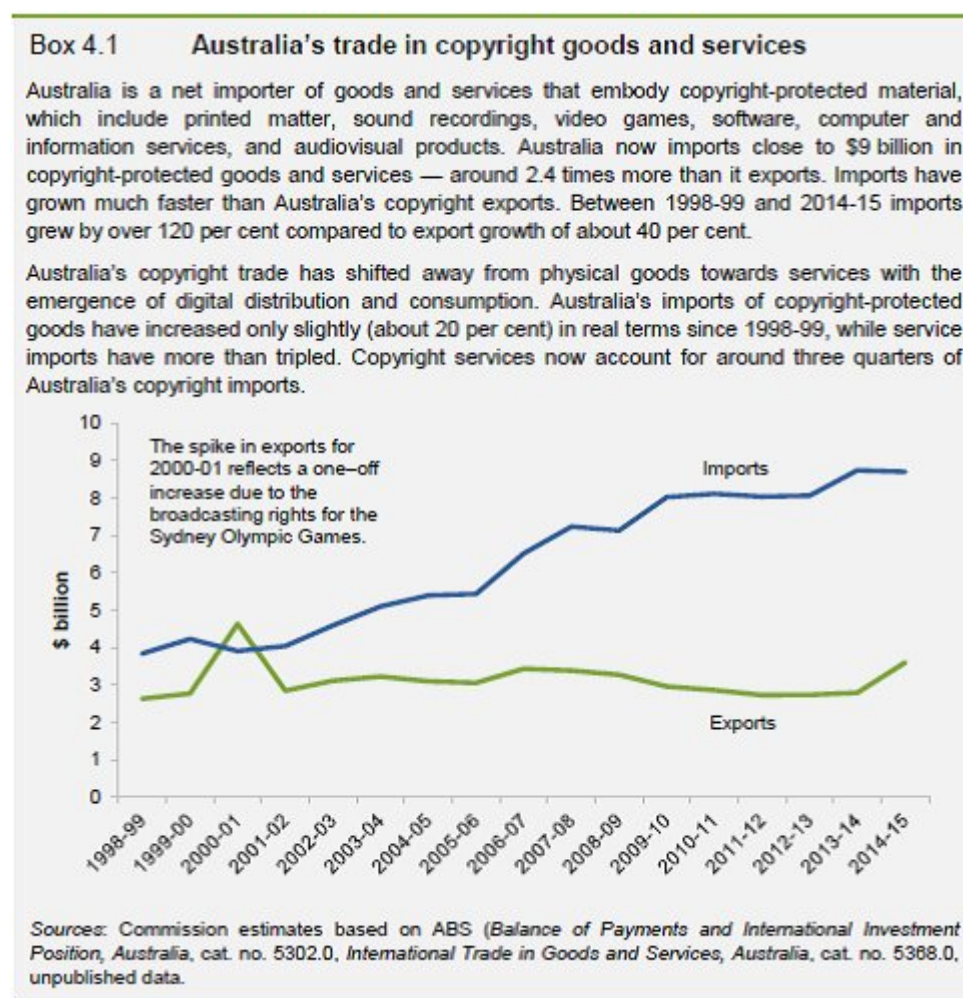
The Australian Productivity Commission has considered a number of the problems with an extended copyright term in its Draft Report on Intellectual Property arrangements in 2016.¹³³

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² For broader commentary on the Australia–United States Free Trade Agreement, see: Jock Given *America’s Pie: Trade and Culture After 9/11*. Sydney: University of New South Wales Press, 2003; Linda Weiss, Elizabeth Thurbon and John Mathews, 2004. *How To Kill A Country: Australia’s Devastating Trade Deal with the United States*. Sydney: Allen & Unwin; Ann Capling, *All The Way With The USA: Australia, The US and Free Trade*. Sydney: University of New South Wales Press, 2005; Christopher Arup, “The United States–Australia Free Trade Agreement — The Intellectual Property Chapter,” (2004) 15 (4) *Australian Intellectual Property Journal* 205; and, Christopher Moore, “Creative Choices: Changes to Australian Copyright Law and the Future of the Public Domain,” (2005) 114 *Media International Australia* 71; and Matthew Rimmer, ‘Robbery Under Arms: Copyright Law and the Australia-United States Free Trade Agreement’ (2006) 11 (3) *First Monday* URL: http://www.firstmonday.org/issues/issue11_3/rimmer/index.html

The Productivity Commission highlights that Australia is a net importer of copyright works.



In its overview of the topic, the Productivity Commission highlights that the copyright term in Australia is excessive and imposes costs:

Copyright protects literary, musical, dramatic and artistic works for the duration of the creator's life plus 70 years. Following publication, sound recordings and films are protected for 70 years, television and sound broadcasts for 50 years, and published editions for 25 years. To provide a concrete example,

¹³³ Productivity Commission, *Intellectual Property Arrangements – Draft Report*, Melbourne: Productivity Commission, 2016, <http://www.pc.gov.au/inquiries/current/intellectual-property/draft/intellectual-property-draft.pdf>

a new work produced in 2016 by a 35 year old author who lives until 85 years will be subject to protection until 2136.

The evidence (and indeed logic) suggests that the duration of copyright protection is far more than is needed. Few, if any, creators are motivated by the promise of financial returns long after death, particularly when the commercial life of most works is less than 5 years.

Overly long copyright terms impose costs on the community. Empirical work focussing on Australia's extension of copyright protection from life plus 50 years to life plus 70 years (a requirement introduced as part of the Australia–United States Free Trade Agreement) estimated that an additional 20 years protection would result in net transfers from Australian consumers to foreign rights holders of around \$88 million per year. But these are likely to be a fraction of the full costs of excessive copyright protection. The retrospective application of term extension exacerbates the cost to the community, providing windfall gains to copyright holders with no corresponding benefit.¹³⁴

The Productivity Commission highlights the transaction costs involved with extended copyright terms: 'Long periods of copyright protection, coupled with automatic application and no registration requirements, results in many works being 'orphaned' — protected by copyright but unusable by libraries, archives and consumers because the rights holder cannot be identified.'¹³⁵ Moreover, the Productivity Commission observes: 'Many other works are also unavailable to consumers once outside of their window of commercial exploitation.'¹³⁶ The Productivity Commission comments that 'A number of studies have attempted to estimate a duration of protection where the benefits to holders are matched by the costs to users'.¹³⁷ The Productivity Commission summarizes such work: 'These studies find that a term of around 25 years enables rights holders to generate revenue comparable to what they

¹³⁴ Ibid., 17.

¹³⁵ Ibid., 17.

¹³⁶ Ibid., 17.

¹³⁷ Ibid., 17.

would receive in perpetuity (in present value terms), without imposing onerous costs on consumers.’¹³⁸

The Productivity Commission reviewed a variety of studies, which have attempted to estimate the ‘optimal’ duration of copyright protection.¹³⁹ The Productivity Commission considers the work of leading law and economics specialists:

Landes and Posner (2002) argue a term of around 25 years enables rights holders to generate revenue comparable to what they would receive in perpetuity (in present value terms), without imposing onerous costs on consumers and suggests that a term of around 25 years is sufficient to incentivise creative effort. However, this is only an indicative period because the lower the discount rate used, the greater the term should be, and the authors used a relatively high real discount rate. In addition, any estimate of optimal term duration must make assumptions about the pattern of demand for the works over time — a difficult task. The truly ‘optimal’ period may accordingly be more or less than 25 years after creation but it is completely implausible it could ever be 70 years after death.¹⁴⁰

The Productivity Commission also notes the work of Pollock (2007) who uses an alternative methodology to estimate the optimal length of copyright protection: ‘His work suggests a copyright term around 15 years after creation balances the benefits and costs of the system.’¹⁴¹ The Productivity Commission concluded ‘Australia has no unilateral capacity to alter copyright terms, but can negotiate internationally to lower the copyright term.’¹⁴²

¹³⁸ Ibid., 17.

¹³⁹ Ibid., 116.

¹⁴⁰ Ibid., 116.

¹⁴¹ Ibid., 117.

¹⁴² Ibid. 117.

Draft Finding 4.1 lamented that ‘Australia’s copyright system has expanded over time, often with no transparent, evidence based policy analysis demonstrating the need for, or quantum of, new rights.’¹⁴³ Draft Finding 4.2 observed: ‘While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death.’¹⁴⁴ Draft Recommendation 4.1 was that ‘The Australian Government should amend the Copyright Act 1968 (Cth) so the current terms of copyright protection apply to unpublished works.’¹⁴⁵

Copyright owners – particularly from the publishing industry - rather wilfully misinterpreted the work of the Productivity Commission, suggesting that the body had called for a reduction in the copyright term.¹⁴⁶ For instance, award-winning author Richard Flanagan alleged that the Productivity Commission wanted to reduce the term of copyright to 15 to 25 years.¹⁴⁷ He maintained:

So Mem Fox has no rights in *Possum Magic*. Stephanie Alexander has no rights in *A Cook’s Companion*. Elizabeth Harrower has no rights in *The Watch Tower*. John Coetzee has no rights in his

¹⁴³ Ibid., 29.

¹⁴⁴ Ibid., 29

¹⁴⁵ Ibid., 30.

¹⁴⁶ Steph Harmon and Lucy Clark, ‘Magda Szubanski May Leave Australia if Changes to Book Industry Go Ahead’, *The Guardian*, 20 May 2016, <https://www.theguardian.com/books/2016/may/20/authors-condemn-book-copyright-and-import-proposal-as-massive-own-goal>

¹⁴⁷ Simon Thomsen, ‘Australia’s Greatest Author Went Berserk over Copyright Changes, Saying Malcolm Turnbull Wants to Destroy the Book Industry’, *Business Insider*, 20 May 2016, <http://www.businessinsider.com.au/australias-greatest-author-went-berserk-over-copyright-changes-saying-malcolm-turnbull-wants-to-destroy-the-book-industry-2016-5>

Booker winning *Life and Times of Michael K.* Nor Peter Carey to *The Kelly Gang*, nor Tim Winton to *Cloudstreet*. Anyone can make money from these books except the one who wrote it.¹⁴⁸

Such an allegation is deeply misleading. Quite clearly, the Draft Report of the Productivity Commission makes no such recommendation regarding the copyright term. Likewise, the Coalition Government under Malcolm Turnbull had articulated no proposal to abridge the copyright term.

Economist Peter Martin commented that the Productivity Commission was aware that Australia was locked into extended copyright terms by successive trade agreements.¹⁴⁹ He commented upon the discussion of the inquiry:

What it wanted to do was to wind back Australia's 120 years plus copyright terms. It reckons 15 to 25 years is all that's needed. It says the average commercial life of a book is 1.4 to 5 years. Beyond that, the harm copyright does by locking things up outweighs any conceivable benefit to the authors in extra income. But it couldn't. Australia's trade agreement with the US prevents Australia backsliding, as do the new agreements with Korea and Singapore and the upcoming Trans-Pacific Partnership. It says the Australian government shouldn't have made the commitments on copyright without first assessing the costs and benefits. It wants Australia to try and unpick those deals, something it acknowledges is next to impossible.¹⁵⁰

¹⁴⁸ Ibid.

¹⁴⁹ Peter Martin, 'The Productivity Commission's Hands Were Tied on Copyright', *The Sydney Morning Herald*, 29 April 2016, <http://www.smh.com.au/federal-politics/political-opinion/the-productivity-commissions-hands-were-tied-on-copyright-20160429-goi0lx.html>

¹⁵⁰ Ibid.

Peter Martin observed that the inquiry had highlighted the high economic costs of copyright term extensions.

The Productivity Commission reiterated its concern about the copyright term extension in the Trade and Assistance Review for 2014-2015.¹⁵¹

E. New Zealand

In 2009 in New Zealand, the Ministry of Economic Development commissioned a study by Concept Economics and Henry Ergas about the costs and benefits to New Zealand of the copyright proposals in the *Trans-Pacific Partnership*.¹⁵² The study made the following estimates in respect of the costs of the copyright term extension:

The study estimated the total cost for New Zealand of copyright term extension for books and recorded music in terms net present value (i.e. the equivalent amount of money that, if invested today, would cover all future costs for every year). The study considered a time period of 70 years for recorded music (the extended copyright term, which is generally calculated from time of production) and 110 years for books. The study estimated a net present value of \$208-239 million for recorded music and \$263-300 million for books.

Based on these net present value results, the Government has estimated the equivalent average annual cost of copyright term extension, over the total period that the extension would take to come

¹⁵¹ Productivity Commission, *Trade and Assistance Review 2014-2015*, Melbourne: Productivity Commission, 2016, 50, <http://www.pc.gov.au/research/ongoing/trade-assistance/2014-15/trade-assistance-review-2014-15.pdf>

¹⁵² 'Economic Modelling on Estimated Effect of Copyright Term Extension on New Zealand Economy', <https://www.tpp.mfat.govt.nz/assets/docs/TPP%20-%20Analysis%20of%20Copyright%20term%20extension,%20explanatory%20cover%20note.pdf>

into effect. (A discount rate of 7.5% was used to generate this average real value from the report's net present value results.) This included an additional estimate for the cost of extending copyright on film and television, which Concept Economics did not model, by assuming film and television would incur the same net cost as recorded music. The average cost to New Zealand per year from copyright period changes under TPP was estimated as \$55 million. This was the mid-point of the range of results reported by the study, which was equivalent to \$51-59 million per year.¹⁵³

There has been significant debate in New Zealand about the impact of the copyright term extension.¹⁵⁴

A study commissioned by the Law Foundation New Zealand and Internet NZ expressed concerns about the costs of the copyright term extension for a jurisdiction such as New Zealand.¹⁵⁵ The report observed:

Extending copyright terms increases profits for holders of existing valuable works. It does not provide a significant incentive to create new works. The difference between a 50-year and a 70-year term occurs decades after the act of creation, offering a much delayed and highly uncertain financial return for creators. In contrast, holders of existing valuable rights gain a windfall of 20 extra years of sales, with no extra creative output.¹⁵⁶

¹⁵³ Ibid.

¹⁵⁴ Sharon Brett Kelly, 'Who Wins From TPP's Copyright Rules?', *Radio New Zealand*, 7 October 2015, <http://www.radionz.co.nz/news/national/286273/who-wins-from-tpp-s-copyright-rules>

¹⁵⁵ James Ting-Edwards, Melanie Johnson, Judge David Harvey, Debbie Monahan, Kate McHaffie, and Jo Shaw, 'TPPA: Intellectual Property and Information Technology', The Law Foundation New Zealand and Internet NZ, February 2016, <https://tpplegal.files.wordpress.com/2015/12/tpp-ip-it.pdf>

¹⁵⁶ Ibid., 10.

InternetNZ's chief executive Jordan Carter said one of the biggest winners was Disney with its Mickey Mouse character. He said the extension meant consumers would have to pay for longer and New Zealand artists would miss out:

A lot of what people do today in the creative sector is remix or reuse. They take old concepts, they reinterpret them for the current day and when something's in the public domain, when it's hit the end of its copyright term, there's no uncertainty about your ability to do that.¹⁵⁷

Carter commented: 'But when it's still in copyright, you have to try and find out who the owner is, you have to try and find out how much you need to pay, there's less raw material out there for people to riff off and be creative.'¹⁵⁸

F. Mexico

Mexico, of course, pushed for even longer copyright terms in the debate in the *Trans-Pacific Partnership*. Comparative copyright scholar Blayne Haggart has provided a useful account of the position in Mexico.¹⁵⁹ He emphasized that the super-extended copyright term in Mexico was the product of lobbying by copyright industries. Nonetheless, Haggart makes the point that the law on the books does not necessarily translate to the law in action. He comments that Mexico does not necessarily have strong formal or informal compliance with the copyright regime.

¹⁵⁷ Sharon Brett Kelly, 'Who Wins From TPP's Copyright Rules?', *Radio New Zealand*, 7 October 2015, <http://www.radionz.co.nz/news/national/286273/who-wins-from-tpp's-copyright-rules>

¹⁵⁸ Ibid.

¹⁵⁹ Blayne Haggart, *Copyright: The Global Politics of Digital Copyright Reform*, Toronto: the University of Toronto Press, 2014.

G. Civil Society

The Association of Research Libraries and various other knowledge-based organisations expressed concerns in 2013 about the impact of a copyright term extension.¹⁶⁰ The organisations commented

There is no benefit to society of extending copyright beyond the 50 years mandated by the WTO. While some TPP countries, like the United States, Mexico, Peru, Chile, Singapore or Australia, already have life + 70 (or longer) copyright terms, there is growing recognition that such terms were a mistake, and should be shortened, or modified by requiring formalities for the extended periods. The primary harm from the life + 70 copyright term is the loss of access to countless books, newspapers, pamphlets, photographs, films, sound recordings and other works that are “owned” but largely not commercialized, forgotten, and lost. The extended terms are also costly to consumers and performers, while benefiting persons and corporate owners that had nothing to do with the creation of the work.¹⁶¹

The submission concluded: ‘Life + 70 is a mistake, and it will be an embarrassment to enshrine this mistake into the largest regional trade agreement ever negotiated.’¹⁶²

In 2012, the Electronic Frontier Foundation highlighted that a major concern was that the ‘TPP seeks to propagate the excessive copyright terms currently found in American copyright legislation, and will become yet another tool of the [second enclosure movement](#): “the

¹⁶⁰ <http://www.arl.org/storage/documents/publications/ltr-opposing-tpp-copyright-extension-6dec2013.pdf>

¹⁶¹ Ibid.

¹⁶² Ibid.

enclosure of the intangible commons of the mind.”¹⁶³ The group warned that ‘these terms are detrimental to creativity and innovation and only serve to benefit the major record and movie production companies who lobbied for them in the U.S.’¹⁶⁴ The digital rights organisation stressed: ‘Now starting with the Pacific region, these exorbitant counterproductive terms could be imposed on countries with more progressive copyright laws through the force of the TPP.’¹⁶⁵ The group feared that such trade measures were designed to circumvent the usual scrutiny associated with copyright law reform in national parliaments: ‘Making these terms part of trade agreements is part of a general move towards “[forum shifting](#)” and “[policy laundering](#)” of the IP policy discussion away from places where there is at least some requirement for public input and transparency, such as Congress.’¹⁶⁶

Libraries, public archives, and educational institutions have been concerned about the high cost of the copyright term extension.¹⁶⁷ They warned: ‘This transfer of welfare in favour of large corporate copyright owners will come at the cost of those who depend upon access to copyright works that would otherwise be in the public domain— libraries, students, artists writers, and millions of other people.’¹⁶⁸

¹⁶³ Carolina Rossini and Yana Welinder, ‘All Nations Lose with TPP’s Expansion of Copyright Terms’, Electronic Frontier Foundation, 8 August 2012, <https://www.eff.org/deeplinks/2012/08/all-nations-lose-tpps-expansion-copyright-terms>

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Association for Progressive Communications, and others ‘Copyright Term Letter’, 9 July 2014 https://www.eff.org/files/2014/07/08/copyrightterm_tppletter_print-fnl.pdf

¹⁶⁸ Ibid.

The Creative Commons movement has been distressed about the copyright term extension, calling the measure ‘unnecessary and unwarranted.’¹⁶⁹ The Creative Commons observed:

There is no logical reason to increase the term of copyright: an extension would create a tiny private benefit at a great cost to the public. We already mentioned that any increase in the term of copyright will undermine the potential of the commons and needlessly limit the potential for new creativity. All creativity and knowledge owes something to what came before it—every creator builds on the ideas of their predecessors.

The ratification of the TPP would limit the size and diversity of materials that are available for everyone to build on, from art, music and other expressive cultural creations, to education resources to scientific research. It will also exacerbate the problem of orphan works, because those works would have entered into the public domain because their copyrights had expired. Instead, they’ll remain restricted by copyright for additional decades even though no ownership claim has been made, and no owner located to exercise the exclusive rights that copyright grants.¹⁷⁰

Moreover, the Creative Commons movement maintains that the copyright term extension would cost the public hundreds of millions of dollars each year.

Wikimedia – the policy body in charge of Wikipedia – has expressed its concerns about the impact of the copyright term extension upon the public domain across the Pacific Rim:

Wikipedia and its power for the creation and sharing of free knowledge are directly driven by a strong and healthy public domain. Unfortunately, TPP would extend copyright terms at a minimum of the

¹⁶⁹ Creative Commons, ‘The Trans-Pacific Partnership Would Harm User Rights and the Commons’, 16 November 2015, <https://creativecommons.org/about/program-areas/policy-advocacy-copyright-reform/stop-the-tpp/trans-pacific-partnership-would-harm-user-rights-and-the-commons/>

¹⁷⁰ Ibid.

author's life plus 70 years, eating into the public domain. This cements a lengthy copyright term in countries where it already exists like Australia, the US, and Chile. But it's especially worrisome for the public domain in countries like Japan, New Zealand, and Canada that now have shorter copyright terms because it means that a great number of works will not be free to use, remix, and share for another 20 years.¹⁷¹

The group stressed: 'At the Wikimedia Foundation, we believe that shorter copyright terms make it possible for more people to create and share free knowledge.'¹⁷² Wikimedia observed that Wikipedia benefitted from having millions of artistic works with public domain images, which could be shared without copyright restrictions. Wikimedia commented: 'TPP is a problematic treaty because it harms the public domain and our ability to create and share free knowledge.'¹⁷³

Knowledge Ecology International has expressed concerns about the impact of the copyright term extension of the *Trans-Pacific Partnership* upon the public domain and the intellectual commons.¹⁷⁴ The group has also been concerned about the problem of orphan works – where authorship cannot be determined, because the author is lost, missing, or deceased. There was initially concerned that the *Trans-Pacific Partnership* the policy flexibilities available to address the problem of orphan works – by placing limitations on statutory remedies.¹⁷⁵ The

¹⁷¹ Wikimedia, 'What's the TPP? The Problematic Partnership', *Medium*, 3 February 2016, <https://medium.com/wikimedia-policy/what-s-tpp-the-problematic-partnership-6751951872cc#ipq3263o9>

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Knowledge Ecology International, 'Copyright Issues in the TPP', 22 July 2015, <http://keionline.org/sites/default/files/KEI-TPP-Copyright-22July2015.pdf>

¹⁷⁵ Knowledge Ecology International, 'US Copyright Office Proposes Limits on Damages, Injunctions, for Orphan Works, Contradicting TPP Language', 4 June 2015, <http://keionline.org/node/2240>

final text does nothing in the way of addressing the risks of orphan works through a copyright term extension across the Pacific Rim.

3. Copyright Exceptions and Limitations

The *Washington Declaration on Intellectual Property and the Public Interest* 2011 highlighted the importance of copyright defences, exceptions, and limitations in terms of promoting the wider public interest in access to copyright works:

Limitations and exceptions are positive enabling doctrines that function to ensure that intellectual property law fulfills its ultimate purpose of promoting essential aspects of the public interest. By limiting the private right, limitations and exceptions enable the public to engage in a wide range of socially beneficial uses of information otherwise covered by intellectual property rights — which in turn contribute directly to new innovation and economic development. Limitations and exceptions are woven into the fabric of intellectual property law not only as specific exceptional doctrines (‘fair use’ or ‘fair dealing,’ ‘specific exemptions,’ etc.), but also as structural restrictions on the scope of rights, such as provisions for compulsory licensing of patents for needed medicines.¹⁷⁶

The statement noted: ‘Despite their importance in countering expansive trends in intellectual property, limitations and exceptions are under threat, especially from efforts to recast international law as a constraint on the exercise of flexibilities in domestic legislation.’¹⁷⁷ The *Washington Declaration* 2011 called for ‘efforts to assure that international law is interpreted

¹⁷⁶ The *Washington Declaration on Intellectual Property and the Public Interest* 2011
<http://infojustice.org/washington-declaration-html>

¹⁷⁷ Ibid.

in ways that give States the greatest possible flexibility in adopting limitations and exceptions that are appropriate to their cultural and economic circumstances.¹⁷⁸

A. The *Trans-Pacific Partnership*

In this context, there have been ongoing concerns about how the Trans-Pacific Partnership addresses copyright exceptions in the Pacific Rim. In 2012, Knowledge Ecology International flagged its concerns about the approach of the United States Trade Representative to copyright limitations and exceptions in the *Trans-Pacific Partnership*.¹⁷⁹ In 2012, Carolina Rossini of the Electronic Frontier Foundation flagged concerns that the draft text of the *Trans-Pacific Partnership* put fair use and other copyright exceptions and limitations at risk.¹⁸⁰ Peter Jaszi, Michael Carroll and Sean Flynn from the American University Washington College of Law observed that the United States Trade Representative missed an opportunity to strengthen copyright limitations and exceptions further.¹⁸¹

In 2015, with the release of the text, the United States Trade Representative insisted that the copyright sections of the TPP are balanced. The United States Trade Representative contends

¹⁷⁸ Ibid.

¹⁷⁹ James Love, 'Copyright Limitations and Exceptions: What does the Secret TPPA Text Say?', Knowledge Ecology International, 3 July 2012, <http://keionline.org/node/1451>

¹⁸⁰ Carolina Rossini, 'New Leaked TPP Text Puts Fair Use at Risk', the Electronic Frontier Foundation, 3 August 2012,

<https://www.eff.org/deeplinks/2012/08/new-leaked-tpp-puts-fair-use-risk>

¹⁸¹ Peter Jaszi, Michael Carroll, and Sean Flynn, 'Public Statement on the U.S. Proposal for a Limitations and Exceptions Clause in the Trans-Pacific Partnership', Program on Information Justice and Intellectual Property, American University Washington College of Law, 2 August 2012, <http://infojustice.org/archives/26799>

that ‘the chapter also includes an obligation to promote balance in copyright systems through exceptions and limitations to copyright for legitimate purposes, such as criticism, comment, news reporting, teaching, scholarship, and research.’¹⁸²

There remain concerns about the defence of fair use and copyright exceptions being confined by the operation of mega-regional trade agreements. Article 18.65 deals with copyright limitations and exceptions. Article 18.65 (1) of the *Trans-Pacific Partnership* provides: ‘With respect to this Section, each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.’ Article 18.65 (2) stipulates: ‘This Article does not reduce or extend the scope of applicability of the limitations and exceptions permitted by the *TRIPS Agreement*, the *Berne Convention*, the WCT or the WPPT.’ Article 18.66 discusses rather vaguely ‘Balance in Copyright and Related Rights Systems’:

Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.

¹⁸² The United States Trade Representative, ‘Chapter Summary - Chapter 18 of the *Trans-Pacific Partnership* 2015: Intellectual Property’, <https://medium.com/the-trans-pacific-partnership/intellectual-property-3479efdc7adf#i.yktxkxkw>

Surprisingly, the Internet Alliance has supported the passage of the *Trans-Pacific Partnership*.¹⁸³ In spite of the Google Books litigation, Google has provided an endorsement of the Pacific Rim trade agreement.¹⁸⁴ Kent Walker of Google said: ‘We hope that the TPP can be a positive force and an important counterweight to restrictive Internet policies around the world.’¹⁸⁵ There has been much disquiet, though, about Google’s support for the mega-regional agreement.¹⁸⁶ The Electronic Frontier Foundation has been concerned about the impact of the *Trans-Pacific Partnership* upon the nature and scope of copyright exceptions.¹⁸⁷ It remains problematic that many members of the Pacific Rim trade agreement do not enjoy a broad, flexible defence of fair use like the United States.

Article 18.65 address copyright limitations and exceptions.¹⁸⁸ Article 18.65 (1) provides: ‘With respect to this Section, each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the

¹⁸³ Internet Association, ‘Statement in Support of the Trans-Pacific Partnership’, 30 March 2016, <https://internetassociation.org/033016tpp/>

¹⁸⁴ Kent Walker, ‘The Trans-Pacific Partnership: A Step Forward for the Internet’, Google Public Policy Blog, 10 June 2016, <https://publicpolicy.googleblog.com/2016/06/the-trans-pacific-partnership-step.html>

¹⁸⁵ Ibid.

¹⁸⁶ Mike Masnick, ‘Google Comes Down on the Wrong Side of the TPP’, *TechDirt*, 10 June 2016, <https://www.techdirt.com/articles/20160610/15124434685/google-comes-down-wrong-side-tpp.shtml>

¹⁸⁷ Maira Sutton, ‘The Murky Waters of International Copyright Law: Protecting Fair Use from the Trans-Pacific Partnership’, Electronic Frontier Foundation, 25 February 2016, <https://www.eff.org/deeplinks/2016/02/murky-waters-international-copyright-law>

¹⁸⁸ The United States Trade Representative, ‘Chapter 18 of the *Trans-Pacific Partnership* 2015: Intellectual Property’, <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>

right holder.’¹⁸⁹ Article 18.65.2 provides: ‘This Article does not reduce or extend the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne Convention, the WCT or the WPPT.’¹⁹⁰

Article 18.66 of the TPP considers ‘Balance in Copyright and Related Rights Systems’.¹⁹¹ This rambling clause provides: ‘Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.’¹⁹²

There are a couple of explanatory footnotes associated with this text. Footnote 78 provides: ‘As recognised by *the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, done at Marrakesh, June 27, 2013 (Marrakesh Treaty)*’.¹⁹³ Footnote 78 elaborates: ‘The Parties recognise that some Parties

¹⁸⁹ The United States Trade Representative, ‘Chapter 18 of the *Trans-Pacific Partnership* 2015: Intellectual Property’, <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>

¹⁹⁰ The United States Trade Representative, ‘Chapter 18 of the *Trans-Pacific Partnership* 2015: Intellectual Property’, <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>

¹⁹¹ The United States Trade Representative, ‘Chapter 18 of the *Trans-Pacific Partnership* 2015: Intellectual Property’, <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>

¹⁹² The United States Trade Representative, ‘Chapter 18 of the *Trans-Pacific Partnership* 2015: Intellectual Property’, <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>

¹⁹³ The United States Trade Representative, ‘Chapter 18 of the *Trans-Pacific Partnership* 2015: Intellectual Property’, <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>

facilitate the availability of works in accessible formats for beneficiaries beyond the requirements of the *Marrakesh Treaty*.’¹⁹⁴ Footnote 79 stipulates: ‘For greater certainty, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under Article 18.65 (Limitations and Exceptions).’¹⁹⁵

Jonathan Band from Policybandwith was enthusiastic about the final text on copyright exceptions and limitations.¹⁹⁶ He argues that nation states must ‘achieve this balance on an ongoing basis in response to evolving technologies and market conditions.’¹⁹⁷

The Wikimedia Foundation has also expressed concerns about the language in respect of copyright exceptions in the TPP.¹⁹⁸ The group observed:

In some countries, the lengthy copyright term is mitigated by strong and broad exceptions from copyright. But TPP makes this sort of balance optional. It only contains a non-binding exception for education, criticism, news reporting, and accessibility, like fair use in the US, that countries can choose not to enact in their national laws.¹⁹⁹

¹⁹⁴ The United States Trade Representative, ‘Chapter 18 of the *Trans-Pacific Partnership* 2015: Intellectual Property’, <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>

¹⁹⁵ The United States Trade Representative, ‘Chapter 18 of the *Trans-Pacific Partnership* 2015: Intellectual Property’, <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>

¹⁹⁶ Jonathan Band, ‘Evolution of the Copyright Exceptions and Limitations Provision in the Trans-Pacific Partnership Agreement’, Policybandwith, 11 November 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2689251

¹⁹⁷ Ibid.

¹⁹⁸ The Wikimedia Foundation, ‘What’s the TPP? The Problematic Partnership’, *Medium*, 3 February 2016, <https://medium.com/wikimedia-policy/what-s-tpp-the-problematic-partnership-6751951872cc#.ipq3263o9>

¹⁹⁹ Ibid.

While the United States has a broad and flexible defence of fair use, many other countries across the Pacific Rim do not have a defence.

The Creative Commons movement laments that, while enforcement provisions are mandatory, copyright exceptions and limitations are optional:

Almost all of the provisions having to do with copyright in the TPP are about prioritizing the interests of rightsholders over the rights of the public. A coalition of organizations—including Creative Commons—has emphasized how critical it is that the TPP protect and promote exceptions and limitations to copyright in ways that are fit for the 21st century. We said, “flexible exceptions and limitations language must be mandatory, not merely encouraged, to better enable each TPP country to achieve balance in its copyright rules.” The final text does not support these requirements.²⁰⁰

While observing that the final text is better than earlier iterations, the final text remains harmful to the public interest: ‘Even though the *Trans-Pacific Partnership* does not make exceptions and limitations mandatory, the text requires that nations seek a better balance between the rights of authors and the public.’²⁰¹

The *Trans-Pacific Partnership* also limits the policy space for governments to craft copyright exceptions. This is disturbing, especially given that the Australian Law Reform Commission

²⁰⁰ Creative Commons, ‘The Trans-Pacific Partnership Would Harm User Rights and the Commons’, 16 November 2015, <https://creativecommons.org/about/program-areas/policy-advocacy-copyright-reform/stop-the-tpp/trans-pacific-partnership-would-harm-user-rights-and-the-commons/>

²⁰¹ Ibid.

recommended that Australia should adopt a defence for fair use. James Love of Knowledge Ecology International observed:

One set of technically complex but profoundly important provisions are those that define the overall space that governments have to create exceptions to exclusive rights ... In its current form, the TPP space for exceptions is less robust than the space provided in the 2012 WIPO Beijing treaty or the 2013 WIPO Marrakesh treaty, and far worse than the *TRIPS Agreement*.²⁰²

Maira Sutton and Patrick Higgins of the Electronic Frontier Foundation said that ‘Given the important role that flexibility in copyright has played in enabling innovation and free speech, it’s a terrible idea to restrict that flexibility in a trade agreement.’²⁰³

B. United States

The United States has taken a broad and open-ended approach to copyright exceptions – with the defence of fair use. The defence is long-standing. In the 1841 case of *Folsom v. Marsh*, Justice Joseph Story laid down the foundation to the United States doctrine of fair use in United States copyright law.²⁰⁴ The doctrine of fair use was codified in the United States copyright regime with section 107 of the *Copyright Act 1976* (Cth). Drawing upon the work of Justice Leval, the Supreme Court of the United States handed down its landmark decision

²⁰² James Love, ‘KEI Analysis of WikiLeaks Leak of TPP IPR Text, from August 30, 2013’, Knowledge Ecology International, 13 November 2013, <http://keionline.org/node/1825>

²⁰³ Parker Higgins and Maira Sutton, ‘TPP Leak Confirms the Worst: US Negotiators Still Trying to Trade Away Internet Freedoms’, Electronic Frontier Foundation, 13 November 2013, <https://www.eff.org/deeplinks/2013/11/tpp-leak-confirms-worst-us-negotiators-still-trying-trade-away-internet-freedoms>

²⁰⁴ *Folsom v. Marsh* 9 F.Cas. 342 at 344 (1841).

on copyright law and the defence of fair use in the ‘Pretty Woman’ case, *Campbell v. Acuff Rose Music*.²⁰⁵ Souter J developed a doctrine of transformative use. His Honour stressed that ‘the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.’²⁰⁶ Justice Souter observed: ‘Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.’²⁰⁷ This ruling has opened the way for further developments in respect of the doctrine of fair use.²⁰⁸ Since that time, the doctrine of fair use has been applied in a wide array of cultural contexts and technological environments.²⁰⁹ There has been a great academic and scholarly interest in the operation of the defence of fair use in practice in the United States.

The defence of fair use has been particularly important in respect of innovation in the United States. In the 2015 case of *The Authors Guild v. Google, Inc.*, the United States Court of Appeals for the Second Circuit considered the history of copyright law and the defence of fair use in the context of Google Books – the large-scale digitisation project of Google Inc.²¹⁰ In his leading judgment, Leval J considers the underlying purpose of copyright law in the United States:

²⁰⁵ *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 575, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994).

²⁰⁶ *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 575, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994).

²⁰⁷ *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 575, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994).

²⁰⁸ Pamela Samuelson, ‘Possible Futures of Fair Use’, (2015) *Washington Law Review* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2584180

²⁰⁹ Pamela Samuelson, ‘Unbundling Fair Uses’, (2009) 77 *Fordham Law Review* 2537 at 2539.

²¹⁰ *The Authors Guild v. Google Inc.* 804 F. 3d 202 (2015) United States Court of Appeals, Second Circuit.

The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption. This objective is clearly reflected in the Constitution’s empowerment of Congress “*To promote the Progress of Science ... by securing for limited Times to Authors ... the exclusive Right to their respective Writings.*” U.S. Const., Art. I, § 8, cl. 8 (emphasis added).¹¹ Thus, while authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship.²¹¹

The judges emphasizes that the role of copyright law is to promote the higher constitutional objective of the ‘Progress of Science and the Useful Arts.’

In this context, the defence of fair use in United States copyright law provides broad protection for a wide array of cultural activities and technological developments.

C. Canada

While it does not have a defence of fair use, Canada does have a defence of fair dealing, which interpreted broadly and flexibly by the courts to support the larger public interest.²¹²

McLachlin CJ has stressed in the landmark in 2004 *CCH* decision:

²¹¹ *The Authors Guild v. Google Inc.* 804 F. 3d 202 at 212 (2015) United States Court of Appeals for the Second Circuit.

²¹² *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13 (CanLII).

The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, *supra*, has explained, at p. 171: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."²¹³

Abella J of the Supreme Court of Canada applied the ruling in 2012 in another case of fair dealing, finding: "Since "research" and "private study" both qualify as fair dealing purposes under s. 29, we should not interpret the term "research" more restrictively than "private study".²¹⁴

D. Australia

There has been much concern that Australia has adopted features of United States copyright law – such as aspects of the *Sonny Copyright Term Extension Act* 1998 (US) and the *Digital Millennium Copyright Act* 1998 (US) – without the countervailing benefits of a flexible defence of fair use. Under its current formulation, Australian copyright law does not provide for a general defence of fair use. Instead, Australian copyright law has purpose-specific defences of fair dealing for criticism and review, research and study, reporting the news, use in judicial proceedings, and parody and satire.

²¹³ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13 (CanLII).

²¹⁴ *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 (July 12, 2012).

In February 2014, the Australian Law Reform Commission led by Professor Jill McKeough released its landmark report on *Copyright and the Digital Economy*.²¹⁵ The report concluded that ‘The *Copyright Act 1968* (Cth) should provide an exception for fair use.’ The Commission emphasized:

Fair use also facilitates the public interest in accessing material, encouraging new productive uses, and stimulating competition and innovation. Fair use can be applied to a greater range of new technologies and uses than Australia’s existing exceptions. A technology-neutral open standard such as fair use has the agility to respond to future and unanticipated technologies and business and consumer practices. With fair use, businesses and consumers will develop an understanding of what sort of uses are fair and therefore permissible, and will not need to wait for the legislature to determine the appropriate scope of copyright exceptions.²¹⁶

The Commission suggested that the report would make Australia attractive to entrepreneurs, inventors, and start-up companies working in the field of information technology. In particular, a defence of fair use would be of benefit and assistance to search engines, social networks, cloud computing, and 3D printing. Creative artists could also benefit from a defence of fair use. The Kookaburra case has highlighted limitations of current Australia copyright law – where Men at Work’s quotation of a Girl Guides song was considered to be a copyright infringement.²¹⁷ The Australian Law Reform Commission ‘considers reforms that

²¹⁵ Australian Law Reform Commission. *Copyright and the Digital Economy (ALRC Report 122)*, Sydney: The Australian Law Reform Commission, 13 February 2014, <http://www.alrc.gov.au/publications/copyright-report-122>

²¹⁶ Ibid.

²¹⁷ Matthew Rimmer, 'An Elegy for Greg Ham: Copyright Law, the Kookaburra Case, and Remix Culture' (2012) 17 (2) *Deakin Law Review* 385-423; and Trevor Conomy, *The Tune, The Times, The Tragedy*, Melbourne: Affirm Press, 2015.

would facilitate the use of orphan works to enable their beneficial uses to be captured in the digital economy, without creating harm to the copyright holder.’²¹⁸

In 2015, the Harper Review reiterated many of the concerns about Australia’s copyright regime favouring existing monopolies over new market entrants and end-users.²¹⁹

In 2016, the Productivity Commission supported the adoption of a defence of fair use in Australian copyright law.²²⁰ The Productivity Commission commented:

In the Commission’s view, legal uncertainty is not a compelling reason to eschew a fair use exception in Australia, nor is legal certainty desirable in and of itself. Courts interpret the application of legislative principles to new cases all the time, updating case law when the circumstances warrant doing so.

To reduce uncertainty, the Commission is recommending Australia’s fair use exception contain a non-exhaustive list of illustrative uses, which provides strong guidance to rights holders and users. Existing Australian and foreign case law, particularly from the United States where fair use has operated for some time, will provide further guidance on what constitutes fair use.²²¹

²¹⁸ Australian Law Reform Commission. *Copyright and the Digital Economy (ALRC Report 122)*, Sydney: The Australian Law Reform Commission, 13 February 2014, <http://www.alrc.gov.au/publications/copyright-report-122>

²¹⁹ Ian Harper, Peter Anderson, Sue McCluskey and Michael O’Byran, *Competition Policy Review: Final Report*, Canberra: the Australian Government, March 2015, http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf

²²⁰ Productivity Commission, *Intellectual Property Arrangements – Draft Report*, Melbourne: Productivity Commission, 2016, <http://www.pc.gov.au/inquiries/current/intellectual-property/draft/intellectual-property-draft.pdf>

²²¹ Ibid., 18.

The Productivity Commission noted that ‘most new works consumed in Australia are sourced from overseas and their creation is unlikely to be responsive to changes in Australia’s fair use exceptions.’²²² The Productivity Commission stressed: ‘In the Commission’s view, enacting a fair use provision would deliver net benefits to Australian consumers, schools, libraries, cultural institutions and the broader community.’²²³

The Intellectual Property Advisory Group of the United States Trade Representative noted that the various industry members disagree as to what constitutes ‘balance’ in the copyright provisions in the *Trans-Pacific Partnership*:

Reflecting the diversity of ITAC 15’s membership there were differing views on aspects of the TPP Agreement, including in particular with regard to the value of including specific language calling for “balance” in copyright systems. All ITAC-15 members believe that copyright systems should be balanced, but different sectors have different views on how that balance should be struck. Apart from the concept of balance in the abstract, there is disagreement over whether inclusion of specific language on this issue in a trade agreement advances or prejudices US economic interests, particularly in light of the state of intellectual property systems in many of our trading partners. Notwithstanding any disagreement on this point, as well as the sensitivities and differing viewpoints on issues such as proportionality of remedies, all ITAC-15 members involved in the copyright space endorse the TPP IP Chapter as a whole and commend the negotiators for doing their best to navigate complicated waters.²²⁴

²²² Ibid., 19.

²²³ Ibid., 19.

²²⁴ The United States Trade Representative, ‘Intellectual Property Rights Industry-Advisory Committee Report on the Trans-Pacific Partnership’, 2015, 21, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/advisory-group-reports-TPP> and <https://ustr.gov/sites/default/files/ITAC-15-Intellectual-Property.pdf>

It is hardly comforting to know that the various corporate copyright stakeholders cannot agree on the nature of the balance that has been struck in the *Trans-Pacific Partnership*.

There will be complex challenges facing developing countries like Vietnam, trying to make flexible use of copyright use and exceptions.²²⁵

4. Intermediary Liability

In respect of early drafts of the *Trans-Pacific Partnership*, Kurt Opsahl and Carolina Rossini of the Electronic Frontier Foundation flagged concerns about intermediary liability regime in respect of the agreement.²²⁶ They stressed: ‘By enabling free or low-cost platforms that enable anyone to reach an audience of millions, ISPs have democratized media and enabled innovative ideas to spread quickly—without the gatekeepers of traditional media.’²²⁷ The Electronic Frontier Foundation warned in 2012: ‘The TPP wants service providers to undertake the financial and administrative burdens of becoming copyright cops, serving a copyright maximalist agenda while disregarding the consequences for Internet freedom and innovation.’²²⁸ They feared that the regime of internet service provider liability would go beyond the *US Digital Millennium Copyright Act* 1998 and the rejected framework in the

²²⁵ Nhan Dinh, *Promoting Innovation and Development by Rethinking the Role of Copyright Limitations and Exceptions in Vietnam*, Faculty of Law, Queensland University of Technology, 2016, https://eprints.qut.edu.au/92606/1/Thi%20Thanh%20Nhan_Dinh_Thesis.pdf

²²⁶ Kurt Opsahl and Carolina Rossini, ‘TPP Creates Legal Incentives for ISPs to Police the Internet, What is at Risk? Your Rights’, The Electronic Frontier Foundation, 24 August 2012, <https://www.eff.org/deeplinks/2012/08/tpp-creates-liabilities-isps-and-put-your-rights-risk>

²²⁷ Ibid.

²²⁸ Ibid.

Anti-Counterfeiting Trade Agreement. The pair were concerned that such a regime would imperil both procedural and substantive standards in respect of due process, fair use, privacy, and free speech.

The United States Trade Representative has been enthusiastic about the final text on copyright law, safe harbours, and intermediary liability:

The Intellectual Property chapter requires Parties to establish copyright safe harbors for Internet Service Providers (ISPs). In the United States, safe harbors allow legitimate ISPs to develop their business, while also helping to address Internet copyright infringement in an effective manner. Safe harbors have contributed to the flourishing of the most vibrant Internet, entertainment and e-commerce industries in the world. TPP does not include any obligations on these ISPs to monitor content on their networks or systems. TPP also provides for safeguards against abuse of such safe harbor regimes.²²⁹

The United States Trade Representative maintains that the model of the regime will be beneficial for the digital economy in the Pacific Rim.

The TPP could entrench the model of intermediary liability in the *Digital Millennium Copyright Act* 1998 (US) across the Pacific Rim.²³⁰ The regime favours the interests of legacy

²²⁹ The United States Trade Representative, 'Chapter Summary - Chapter 18 of the *Trans-Pacific Partnership* 2015: Intellectual Property', <https://medium.com/the-trans-pacific-partnership/intellectual-property-3479efdc7adf#iyktxkxkw>

²³⁰ The United States Trade Representative, 'Chapter 18 of the *Trans-Pacific Partnership* 2015: Intellectual Property', <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>

copyright industries.²³¹ Annemarie Bridy has provided an analysis of Section J of the Intellectual Property Chapter of the TPP.²³² She observed: ‘Section J of the TPP’s IP chapter, on ISP safe harbors, looks a lot like Section 512 of the DMCA, but the two frameworks differ in some important respects that could negatively impact the global environment for user speech online’.²³³ Bridy provides a comparison of Section J and Section 512 with a ‘focus on the rights of users and the status of user expression in the TPP’s intermediary safe harbor provisions’.²³⁴ Bridy observed: ‘The TPP’s safe harbor provisions differ from the DMCA’s, however, in important ways that make the notice and takedown protocol it contemplates structurally less speech-protective and more prone to over-enforcement and abuse’.²³⁵ She warned that ‘the TPP makes it optional for member states to include a counter-notice and put-back protocol in their safe harbor frameworks.’²³⁶ She also observed: ‘Another important difference between the TPP and the DMCA is that the TPP has more relaxed requirements for the contents of a takedown notice.’²³⁷

²³¹ Matthew Rimmer, ‘The Trans-Pacific Partnership Deal Protects Old Companies at the Expense of the New’, ABC, The Drum, 6 October 2015, <http://www.abc.net.au/news/2015-10-06/rimmer-tpp-favours-old-ip-industries/6830884>

²³² Annemarie Bridy, ‘A User-Focused Commentary on the Trans-Pacific Partnership ISP Safe Harbors’, *InfoJustice*, 23 November 2015, <http://infojustice.org/archives/35402>

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Ibid.

The Wikimedia Foundation had mixed views about the inclusion of the safe harbours regime, and the takedown and notice scheme in the TPP.²³⁸ The group commented:

TPP isn't all bad. It states that countries should not require the hosts of sites like Wikipedia to monitor their content for copyright infringement and provides for [safe harbors from intermediary liability](#). Sites can rely on a notice and takedown system, where they remove infringing material once they get alerted by copyright holders. Yet, TPP doesn't get this balance right either. It lacks a process for counter notices, so that users can push back when a site receives an invalid request to remove content. It also allows rightsholders to demand identifying information about users when they allege there is copyright infringements. The vague standards in TPP leave this notice and takedown process open for abuse that can chill speech.²³⁹

There has been significant opposition in the Internet community to the proposed TPP – with the Electronic Frontier Foundation and Cory Doctorow vowing to ‘kill the TPP.’²⁴⁰

In the United States, it has been striking that there has been significant dissatisfaction in respect of the safe harbours regime for the DMCA. Copyright owners have complained the United States Copyright Office in submissions on s 512 of the DMCA.

²³⁸ The Wikimedia Foundation, ‘What’s the TPP? The Problematic Partnership’, *Medium*, 3 February 2016, <https://medium.com/wikimedia-policy/what-s-tpp-the-problematic-partnership-6751951872cc#.ipq3263o9>

²³⁹ Ibid.

²⁴⁰ Maira Sutton, ‘The TPP State of Play: How We Defeat the Largest Trade Deal in History’, *Electronic Frontier Foundation*, 1 December 2015, <https://www.eff.org/deeplinks/2015/12/tpp-current-state-play-how-we-defeat-largest-trade-deal> Cory Doctorow, ‘A Roadmap for Killing TPP: The Next SOPA Uprising’, *Boing Boing*, 1 December 2015, <http://boingboing.net/2015/12/01/a-roadmap-for-killing-tpp-the.html>

In the wake of defeats in litigation over Google Books²⁴¹ and YouTube,²⁴² the copyright industries lobbied for a revision of the *Digital Millennium Copyright Act 1998* (US) rules in respect of intermediary liability. Entertainment celebrities such Taylor Swift, Paul McCartney, and Kings of Leon have led a petition for digital copyright reform.²⁴³ The high profile stars argue that the *Digital Millennium Copyright Act 1998* (US) ‘has allowed major tech companies to grow and generate huge profits by creating ease of use for consumers to carry almost every recorded song in history in their pocket via a smartphone, while songwriters' and artists' earnings continue to diminish.’²⁴⁴ The copyright industries – and their high profile stars – hope to encourage the United States Copyright Office and the United States Congress to revise the norms of the *Digital Millennium Copyright Act 1998* (US).²⁴⁵

²⁴¹ *The Authors Guild v. Google Inc.* 804 F. 3d 202 (2015) United States Court of Appeals, Second Circuit. *The Authors Guild v. Google, Inc.*, 282 F.R.D. 384 (S.D.N.Y. 2012). *The Authors Guild v. Google, Inc.*, 721 F.3d 132, 134 (2d Cir. 2013). *The Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011). *The Authors Guild, Inc. v. Google Inc.*, 954 F.Supp.2d 282 (S.D.N.Y.2013), and *The Authors Guild v. Google Inc.*, (2016) No. 15-849, <http://www.scotusblog.com/case-files/cases/authors-guild-v-google-inc/>

²⁴² *Viacom International Inc. and others v. YouTube, Inc.* 718 F. Supp. 2d 514 (2010); and *Viacom International Inc. and others v. YouTube, Inc.* 940 F. Supp. 2d 110 (2013). See also *Stephanie Lenz v. Universal Music Corporation* 2015 WL 5315388 (C.A.9 (Cal.)).

²⁴³ Daniel Kreps, ‘Taylor Swift, McCartney Sign Petition for Digital Copyright Reform’, *Rolling Stone*, 20 June 2016, <http://www.rollingstone.com/music/news/taylor-swift-mccartney-sign-petition-for-digital-copyright-reform-20160620>

²⁴⁴ Ibid.

²⁴⁵ Mike Snider, ‘Taylor Swift Sets Sights on YouTube as 180 Music Artists Lobby for Copyright Reform’, *The Sydney Morning Herald*, 22 June 2016, <http://www.smh.com.au/entertainment/music/taylor-swift-sets-sights-on-youtube-as-180-music-artists-lobby-for-copyright-reform-20160622-gppixx.html>

In this context of this controversy over whether the deal will be updated, it is most peculiar that the TPP is seeking

Major empirical research on the DMCA takedown and notice system by Jennifer Urban and her colleagues highlights the need for reform.²⁴⁶ Urban and her colleagues are concerned by the rise of automated, ‘bot’ based systems to address copyright infringement, which leave little room for human judgment and assessment. The study reveals a disturbingly high number of take-down requests of dubious validity. The research raises concerns about the effects of copyright takedown abuse on online free expression.²⁴⁷ There is pressure upon the United States Congress and the Copyright Office to reform the system.²⁴⁸

In policy circles, there has been a call for better legal frameworks to address copyright law and intermediary liability.²⁴⁹ The Manila Principles on Intermediary Liability have sought to

²⁴⁶ Jennifer Urban, Joe Karaganis, and Brianna Schofield, ‘Notice and Takedown in Everyday Practice’ SSRN, 29 March 2016. <http://ssrn.com/abstract=2755628>

²⁴⁷ Cory Doctorow, ‘Landmark Study on the Effects of Copyright Takedown Abuse on Online Free Expression’, *Boing Boing*, 30 March 2016, <http://boingboing.net/2016/03/30/landmark-study-on-the-effects.html>

²⁴⁸ Mike Masnick, ‘DMCA’s Notice and Takedown Procedure is a Total Mess, and It’s Mainly Because of Bogus Automated Takedowns’, *TechDirt*, 30 March 2016) <https://www.techdirt.com/articles/20160330/01583234053/dmcas-notice-takedown-procedure-is-total-mess-mainly-because-bogus-automated-takedowns.shtml>

²⁴⁹ Kylie Pappalardo, ‘Duty and Control in Intermediary Copyright Liability: An Australian Perspective’ (2014) 4(1) *IP Theory* 9; and Dan Hunter and Nicolas Suzor, ‘Claiming the Moral High Ground in the Copyright Wars’ in Phillipa McGuinness (ed), *Copyright: Firing Up Conversation about Copyright* (University of New South Wales Press, 2015).

provide a best practice model for dealing with such questions surrounding the liability of intermediaries in respect of communication on the internet.²⁵⁰

Cory Doctorow observed that not every country made the same mistakes as the United States in respect of intermediary liability. He noted that ‘Countries like Chile, Japan and Canada created versions of the DMCA that have checks and balances – review by experts, court orders, or the right to rebut claims before material is taken down.’²⁵¹ Doctorow lamented: ‘The secretive *Trans Pacific Partnership*, pushed by the US trade representative and negotiated between 12 countries says that signatories musn't change their copyright system to match the Japanese, Canadian or Chilean models: any future copyright reform must bring rules in line with the US system - to race with America straight to the bottom of the Internet regulation heap, the lawless land of unfettered and unaccountable censorship.’²⁵² He argued that the template of the *Digital Millennium Copyright Act 1998* is a poor model to emulate for other countries in the Pacific Rim.

Given the raging policy debate over the *Digital Millennium Copyright Act 1998* (US), it is most peculiar that such a model should be used as a template for the *Trans-Pacific Partnership*. As Jeremy Malcolm comments, the *Trans-Pacific Partnership* perpetuates the mistakes of the *Digital Millennium Copyright 1998* (US).²⁵³

²⁵⁰ See *Manila Principles on Intermediary Liability*, www.manilaprinciples.org/.

²⁵¹ Cory Doctorow, ‘Some Countries Learned from America’s Copyright Mistakes: TPP Will Undo That’, *Boing Boing*, 17 December 2015, <http://boingboing.net/2015/12/17/some-countries-learned-from-am.html>

²⁵² Ibid.

²⁵³ Jeremy Malcolm, ‘How the TPP Perpetuates the Mistakes of the DMCA’, Electronic Frontier Foundation, 17 December 2015, <https://www.eff.org/deeplinks/2015/12/how-tpp-perpetuates-mistakes-dmca>

Innovative companies have been concerned about how the agreement will affect their operations. Erik Martin, the general manager of reddit, said: ‘We oppose Fast Track for the TPP because it’s an undemocratic agreement that threatens the open Internet,’ said Erik Martin, general manager of reddit.’²⁵⁴

5. Technological Protection Measures

The United States Trade Representative has sought to promote highly complex, prescriptive provisions on technological protection measures and electronic rights management in the *Trans-Pacific Partnership*. The *Digital Millennium Copyright Act* 1998 is the template for the regime. As Timothy Lee noted: ‘The treaty includes a long section, proposed by the United States, requiring the creation of legal penalties for circumventing copy-protection schemes such as those that prevent copying of DVDs and Kindle books.’²⁵⁵

Anissa Brennan, the Senior Vice President for International Affairs for the Motion Picture Association of America, was delighted by the provisions on technological protection measures: ‘Specifically, the TPP includes protections for technological protection measures (TPMs), which allow creators to control access to their works and, in so doing, enable the

²⁵⁴ Common Dreams, ‘New Campaign Launched: “10 Days to Stop Fast Track” Brings Together Diverse Network of Labor, Internet, and Environmental Activists’, *Common Dreams*, 23 January 2014, <http://www.commondreams.org/newswire/2014/01/23/new-campaign-launched-10-days-stop-fast-track-brings-together-diverse-network>

²⁵⁵ Timothy Lee, ‘Leaked Treaty is a Hollywood Wish List. Could It Derail Obama’s Trade Agenda?’, *The Washington Post*, 13 November 2013, <https://www.washingtonpost.com/news/the-switch/wp/2013/11/13/leaked-treaty-is-a-hollywood-wish-list-could-it-derail-obamas-trade-agenda/>

functionality of online business models, contributing to the expansion of digital offerings for viewing movies and TV shows'.²⁵⁶

Article 18.68 of the *Trans-Pacific Partnership* addresses the topic of technological protection measures.²⁵⁷ Article 18.68.1 provides an expansive approach to technological protection measures:

1. In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorised acts in respect of their works, performances, and phonograms, each Party shall provide that any person that:
 - (a) knowingly, or having reasonable grounds to know,[82] circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram;[83] or
 - (b) manufactures, imports, distributes,[84] offers for sale or rental to the public, or otherwise provides devices, products, or components, or offers to the public or provides services, that:
 - (i) are promoted, advertised, or otherwise marketed by that person[85] for the purpose of circumventing any effective technological measure;
 - (ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure;[86] or
 - (iii) are primarily designed, produced, or performed for the purpose of circumventing any effective technological measure,

²⁵⁶ Anissa Brennan, 'The TPP will Foster Digital Trade and Grow Our Economy', The Motion Picture Association of America, 18 February 2016, <http://www.mpa.org/the-tpp-will-foster-digital-trade-grow-our-economy/>

²⁵⁷ Article 18.68 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

is liable and subject to the remedies provided for in Article 18.74 (Civil and Administrative Procedures and Remedies).

Each Party shall provide for criminal procedures and penalties to be applied if any person is found to have engaged wilfully^[87] and for the purposes of commercial advantage or financial gain^[88] in any of the above activities.^[89]

A Party may provide that the criminal procedures and penalties do not apply to a non-profit library, museum, archive, educational institution, or public non-commercial broadcasting entity. A Party may also provide that the remedies provided for in Article 18.74 (Civil and Administrative Procedures and Remedies) do not apply to any of the same entities provided that the above activities are carried out in good faith without knowledge that the conduct is prohibited.²⁵⁸

Article 18.68.2 provides: ‘In implementing paragraph 1, no Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, provided that the product does not otherwise violate a measure implementing paragraph 1.’²⁵⁹

Article 18.68.3 provides: ‘Each Party shall provide that a violation of a measure implementing this Article is independent of any infringement that might occur under the Party’s law on copyright and related rights.’^[90]²⁶⁰

²⁵⁸ Article 18.68.1 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

²⁵⁹ Article 18.68.2 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

²⁶⁰ Article 18.68.3 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

Article 18.68.4 of the *Trans-Pacific Partnership* describes the limited exceptions available for technological protection measures:

‘With regard to measures implementing paragraph 1: (a) a Party may provide certain limitations and exceptions to the measures implementing paragraph 1(a) or paragraph 1(b) in order to enable non-infringing uses if there is an actual or likely adverse impact of those measures on those non-infringing uses, as determined through a legislative, regulatory, or administrative process in accordance with the Party’s law, giving due consideration to evidence when presented in that process, including with respect to whether appropriate and effective measures have been taken by rights holders to enable the beneficiaries to enjoy the limitations and exceptions to copyright and related rights under that Party’s law;^[91]

(b) any limitations or exceptions to a measure that implements paragraph 1(b) shall be permitted only to enable the legitimate use of a limitation or exception permissible under this Article by its intended beneficiaries^[92] and does not authorise the making available of devices, products, components, or services beyond those intended beneficiaries;^[93] and

(c) a Party shall not, by providing limitations and exceptions under paragraph 4(a) and paragraph 4(b), undermine the adequacy of that Party’s legal system for the protection of effective technological measures, or the effectiveness of legal remedies against the circumvention of such measures, that authors, performers, or producers of phonograms use in connection with the exercise of their rights, or that restrict unauthorised acts in respect of their works, performances or phonograms, as provided for in this Chapter.’²⁶¹

Article 16.68.5 provides a definition that an ‘**effective technological measure** means any effective^[94] technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, or phonogram, or protects copyright or

²⁶¹ Article 18.68.4 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

related rights related to a work, performance or phonogram.’²⁶² This is a broad, expansive definition. This may prevent courts from seeking to delimit the definition of technological protection measures – like the High Court of Australia in *Stevens v. Sony*.²⁶³

There have been significant conflicts in respect of original equipment manufacturers seeking to block competitors from entering into the marketplaces – in respect of products such as printer cartridges,²⁶⁴ garage openers,²⁶⁵ tape cartridge libraries,²⁶⁶ and prepaid phone cards.²⁶⁷ There have even been controversies over the agricultural machinery John Deere trying to invoke digital rights management and technological protection measures in respect of its products.²⁶⁸

²⁶² Article 18.68.5 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

²⁶³ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58.

²⁶⁴ *Lexmark International, Inc. v. Static Control Components*, 387 F.3d 522 (6th Cir. 2005).

²⁶⁵ *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004).

²⁶⁶ *Storage Technology Corporation v. Custom Hardware Engineering & Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005).

²⁶⁷ *Tracfone Wireless, Inc. v. Anadisk LLC*, 685 F. Supp.2d 1304 (S.D. Fla. 2010).

²⁶⁸ John Deere, ‘Long Comment Regarding a Proposed Exemption Under 17 U.S.C. 1201’, [http://copyright.gov/1201/2015/comments-032715/class%2021/John Deere Class21 1201 2014.pdf](http://copyright.gov/1201/2015/comments-032715/class%2021/John%20Deere%20Class21%201201%202014.pdf)

Kyle Wiens, ‘We Can’t Let John Deere Destroy the Very Idea of Ownership’, *Wired Magazine*, 21 April 2015, <http://www.wired.com/2015/04/dmca-ownership-john-deere/>

Laura Sydell, ‘DIY Tractor Repair Runs Afoul of Copyright Law’, *NPR*, 17 August 2015, <http://www.npr.org/sections/alltechconsidered/2015/08/17/432601480/diy-tractor-repair-runs-afoul-of-copyright-law> and Kyle Wiens, ‘John Deere Responds to Copyright Mess It Made’, *iFixit News*,

13 May 2015, <http://ifixit.org/blog/7192/john-deere-mess/>

The *Trans-Pacific Partnership* will also undermine domestic Australian policy initiatives. It will lock nation states into a defective and anachronistic regime for technological protection measures. As Timothy Lee said:

The treaty includes a long section, proposed by the United States, requiring the creation of legal penalties for circumventing copy-protection schemes such as those that prevent copying of DVDs and Kindle books.²⁶⁹

Economist Peter Martin lamented that the *Trans-Pacific Partnership* undermined the Australian inquiry into IT Pricing. ‘Australia backs the US at every turn against its own consumers,’ he wrote.²⁷⁰ Greens Senator Scott Ludlam concurred. ‘The current *Trans-Pacific Partnership* text also entrenches the disadvantages Australians experience in being ripped off with unfair IT pricing,’ he said.²⁷¹

The *Trans-Pacific Partnership* will seemingly be beneficial to some of the companies most criticised in the IT Pricing inquiry: Adobe, Microsoft, and Apple. It also limits the policy space for governments to craft copyright exceptions. This is disturbing, especially given that

²⁶⁹ Timothy Lee, ‘Leaked Treaty is a Hollywood Wish List. Could it Derail Obama’s Trade Agenda?’, *The Washington Post*, 13 November 2013, <http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/13/leaked-treaty-is-a-hollywood-wish-list-could-it-derail-obamas-trade-agenda/>

²⁷⁰ Peter Martin, ‘Australia backs the US at every turn against its Own Consumers’, *The Sydney Morning Herald*, 14 November 2013, <http://www.smh.com.au/federal-politics/political-news/australia-backs-the-us-at-every-turn-against-its-own-consumers-20131113-2xh0p.html>

²⁷¹ Senator Scott Ludlam, ‘Greens act to expose threats to Australians after damning leak of secret trade deal document’, Press Release, 14 November 2013, <http://scott-ludlam.greensmps.org.au/content/media-releases/greens-act-expose-threats-australians-after-damning-leak-secret-trade-deal-do>

the Australian Law Reform Commission is considering whether Australia should adopt a defence for fair use. James Love of Knowledge Ecology International [observed](#):

One set of technically complex but profoundly important provisions are those that define the overall space that governments have to create exceptions to exclusive rights ... In its current form, the TPP space for exceptions is less robust than the space provided in the 2012 WIPO Beijing treaty or the 2013 WIPO Marrakesh treaty, and far worse than the TRIPS Agreement.²⁷²

Maira Sutton and Patrick Higgins of the Electronic Frontier Foundation said that ‘Given the important role that flexibility in copyright has played in enabling innovation and free speech, it’s a terrible idea to restrict that flexibility in a trade agreement.’²⁷³ Only Vietnam sought to put forward positive positions in respect of copyright exceptions in the agreement, noted Sean Rintel of Electronic Frontiers Australia.²⁷⁴

Australia stands to be left in a woeful position. We will be burdened with heavy commitments in respect of copyright protection, without the flexibility of the United States regime, with its defence of fair use and first amendment protection for freedom of speech.

²⁷² James Love, ‘Knowledge Ecology International analysis of TPP IPR Text, from August 30, 2013’, Knowledge Ecology International, 13 November 2013, <http://keionline.org/node/1825>

²⁷³ Parker Higgins and Maira Sutton, ‘TPP Leak Confirms the Worst: US Negotiators Still Trying to Trade Away Internet Freedoms’, Electronic Frontier Foundation, 13 November 2013, <https://www.eff.org/deeplinks/2013/11/tpp-leak-confirms-worst-us-negotiators-still-trying-trade-away-internet-freedoms>

²⁷⁴

From a Canadian perspective, Michael Geist has been concerned about the narrow, limited nature of exceptions for technological protection measures.²⁷⁵ He lamented:

The TPP does not include an exception for private purposes circumvention. Rather as noted above, it requires either statutory damages or additional damages. Statutory damages are not available in this case and the additional damages available in Canada are not as broad as those required by the TPP. This would suggest that the Canadian private purposes circumvention rule could be challenged with demands that Canada implement new damages requirements for individuals who circumvent a digital lock, even for personal purposes.²⁷⁶

In his view, the regime was insufficiently flexible to accommodate consumer rights under copyright law.

In the Apollo 1201 project, Cory Doctorow has joined with the Electronic Frontier Foundation to eradicate digital rights management systems.²⁷⁷ Parker Higgins has expressed concern about how the regime will ‘have profound chilling effects on hackers, makers, and tinkerers.’²⁷⁸ He warns of the dangers posed by technological protection measures:

²⁷⁵ Michael Geist, ‘The Trouble with the TPP: Damages for Breaking Digital Locks for Personal Purposes’, the University of Ottawa, 24 February 2016, <http://www.michaelgeist.ca/2016/02/the-trouble-with-the-tpp-day-37-damages-for-breaking-digital-locks-for-personal-purposes/>

²⁷⁶ Ibid.

²⁷⁷ Electronic Frontier Foundation, ‘Cory Doctorow Rejoins EFF to Eradicate DRM Everywhere’, Press Release, 20 January 2015, <https://www.eff.org/press/releases/cory-doctorow-rejoins-eff-eradicate-drm-everywhere>

²⁷⁸ Parker Higgins, ‘Hackers, Makers, and Tinkerers: Here’s How TPP Would Hurt You’, Electronic Frontier Foundation, 10 May 2013, <https://www.eff.org/deeplinks/2013/05/hackers-makers-and-tinkerers-heres-how-tpp-would-hurt-you>

The problems for hackers and makers stem from the so-called "anti-circumvention" rules that have appeared in leaked drafts of the agreement. That language reflects a controversial clause of U.S. copyright law that makes it illegal to bypass technical measures that are put in place to restrict copyrighted content — such as measures that limit the number of devices on which you can play a video you legally purchased.²⁷⁹

Higgins fears: ‘Even if you are bypassing those restrictions for reasons that don't violate copyright law — say you're remixing a segment of a video under fair use rules, or trying to read an ebook on a different platform — you could still get caught in the anti-circumvention net.’²⁸⁰ He concluded: ‘The TPP would make the situation worse by locking anti-circumvention rules in place in the countries that already have them, and expanding them to the ones that don't.’²⁸¹ In his view, the ‘TPP would be a disaster for the Internet and innovation, and continue a terrible trend of secrecy in negotiations.’²⁸²

In July 2016, a constitutional challenge was launched by Matthew Green, Andrew ‘Bunnie’ Huang, and Alphamax LLC against the technological protection measures regime in the *Digital Millennium Copyright Act 1998* (US).²⁸³ The challenge was brought by the digital rights defenders, the Electronic Frontier Foundation. The complaint explains the nature of the challenge:

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Complaint for Declaratory and Injunctive Relief in *Green, Huang and Alphamax LLC v Lynch, Hayden, and Pallente* (2016) <https://www.eff.org/document/1201-complaint> and https://www.eff.org/files/2016/07/21/1201_complaint.pdf

This lawsuit challenges the “anti-circumvention” and “anti-trafficking” provisions of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. §§ 1201(a), 1203, and 1204 (collectively “the DMCA Anti-Circumvention Provisions”). Enacted in 1998, these provisions broadly restrict the public’s ability to access, speak about, and use copyrighted materials, without the traditional safeguards—such as the fair use doctrine—that are necessary to protect free speech and allow copyright law to coexist with the First Amendment. The threat of enforcement of these provisions chills protected and noninfringing speech that relies on copyrighted works, including independent technical research into computer security systems and the discussion of that research, and accessing copyrighted works in order to shift the content to a different format, space, or time. The triennial rulemaking process by which the public may seek exemptions pursuant to 17 U.S.C. § 1201(a)(1)(C) does not alleviate these problems. To the contrary, the rulemaking is itself an unconstitutional speech-licensing regime.²⁸⁴

Andrew ‘Bunnie’ Huang explained his motivations behind the lawsuit.²⁸⁵ He lamented that Section 1201 of the *Digital Millennium Copyright Act* was problematic: ‘Section 1201 means that you can be sued or prosecuted for accessing, speaking about, and tinkering with digital media and technologies that you have paid for.’²⁸⁶ He observed: ‘This violates our First Amendment rights, and I am asking the court to order the federal government to stop enforcing Section 1201.’²⁸⁷ Huang complained that the regime of technological protection measures had a chilling effect on innovation and creativity: ‘Especially now that cryptography pervades every aspect of modern life, every creative spark is likewise dampened by the chill of

²⁸⁴ Complaint for Declaratory and Injunctive Relief in *Green, Huang and Alphamax LLC v Lynch, Hayden, and Pallente* (2016),1, <https://www.eff.org/document/1201-complaint> and https://www.eff.org/files/2016/07/21/1201_complaint.pdf

²⁸⁵ Andrew ‘Bunnie’ Huang, ‘Why I’m Suing the US Government’, Bunnie: Studios, 21 July 2016, <https://www.bunniestudios.com/blog/?p=4782>

²⁸⁶ Ibid.

²⁸⁷ Ibid.

Section 1201.’²⁸⁸ He lamented that ‘The act of creation is no longer spontaneous.’²⁸⁹ Huang elaborated upon his concerns:

Our recent generation of Makers, hackers, and entrepreneurs have developed under the shadow of Section 1201. Like the parable of the frog in the well, their creativity has been confined to a small patch, not realizing how big and blue the sky could be if they could step outside that well. Nascent 1201-free ecosystems outside the US are leading indicators of how far behind the next generation of Americans will be if we keep with the status quo. Our children deserve better.²⁹⁰

Huang commented: ‘I was born into a 1201-free world, and our future generations deserve that same freedom of thought and expression’.²⁹¹ He observed: ‘I am but one instrument in a large orchestra performing the symphony for freedom, but I hope my small part can remind us that once upon a time, there was a world free of such artificial barriers, and that creativity and expression go hand in hand with the ability to share without fear’.²⁹²

Kit Walsh of the Electronic Frontier Foundation has discussed the constitutional issues associated with technological protection measures.²⁹³ He comments: ‘Section 1201 of the Digital Millennium Copyright Act forbids a wide range of speech, from remix videos that rely upon circumvention, to academic security research, to publication of software that can help

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Kit Walsh, ‘Section 1201 of the DMCA Cannot Pass Constitutional Security’, Electronic Frontier Foundation, 21 July 2016, <https://www.eff.org/deeplinks/2016/07/section-1201-dmca-cannot-pass-constitutional-scrutiny>

repair your car or back up your favorite show.’²⁹⁴ Parker Higgins observes that the regime ‘potentially implicates the entire range of speech that relies on access to copyrighted works or describes flaws in access controls—even where that speech is clearly noninfringing.’²⁹⁵ He comments about the conflict between technological protection measures and

Section 1201 was billed as a tool to prevent infringement by punishing those who interfered with technological restrictions on copyrighted works. After the DMCA was passed, the Supreme Court was asked to evaluate other overreaching copyright laws, and offered new guidance on the balance between copyright protections and free speech. It found that copyright rules can be consistent with the First Amendment so long as they adhere to copyright’s “traditional contours.” These contours include fair use and the idea/expression dichotomy.

The dominant interpretation of Section 1201, however, can’t be squared with these First Amendment accommodations. As long as circumvention in furtherance of fair use risks civil damages or criminal penalties, Section 1201’s barrier to noninfringing uses of copyrighted works oversteps the boundary set by the Supreme Court.²⁹⁶

Parker Higgins argues: ‘In First Amendment terms, the law is facially overbroad and therefore unconstitutional.’²⁹⁷ He observes: ‘By preventing valuable and noninfringing speech, it goes far beyond any restriction that might be justified by the purposes of copyright law.’²⁹⁸ In his view, the rule-making regime in respect of technological protection measures has been proven to only provide limited and narrow exceptions in respect of technological protection measures. Parker Higgins comments: ‘Section 1201 is a draconian and unnecessary restriction on speech

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Ibid.

and the time has come to set it aside’.²⁹⁹ He concludes that ‘the future of cultural participation and software-related research depends on it.’³⁰⁰

Parker Higgins of the Electronic Frontier Foundation has detailed a number of the other dimensions of technological protection measures.³⁰¹ He commented: ‘Some day, your life may depend on the work of a security researcher’.³⁰² Parker Higgins observed: ‘Whether it’s a simple malfunction in a piece of computerized medical equipment or a malicious compromise of your networked car, it’s critically important that people working in security can find and fix the problem before the worst happens.’³⁰³ He lamented: ‘Section 1201 means that you can be sued or even jailed if you bypass digital locks on copyrighted works—from DVDs to software in your car—even if you are doing so for an otherwise lawful reason, like security testing.’³⁰⁴ Parker Higgins also notes that such measures also impact upon education, creative arts, and remix culture:

It gets worse: Section 1201’s speech restrictions also apply to scholars, artists, and activists that are seeking to comment on culture or make it more accessible. The tools to make engaging remixes, annotations, or interactive commentaries are in the hands of more and more people, but the law has created a “gotcha” situation: while using that source material is legal, getting access to it might run afoul of these additional legal hurdles.³⁰⁵

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Parker Higgins, ‘Research and Remixes the Law Won’t Allow’, Electronic Frontier Foundation, 21 July 2016, <https://www.eff.org/deeplinks/2016/07/research-and-remixes-law-wont-allow>

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

Parker Higgins noted: ‘When Congress passed Section 1201, the hot-button copyright debates were about the terms under which people could copy and consume music, movies, and books’.³⁰⁶ He observed that ‘copyright law shouldn’t be casting a legal shadow over activities as basic as popping the hood of your own car, offering commentary on a shared piece of culture (and helping others do so), and testing security infrastructure.’³⁰⁷ Parker Higgins stressed: ‘It’s time for the courts to revisit Section 1201, and fix Congress’s constitutional mistake.’³⁰⁸

Digital rights activist Cory Doctorow has detailed the constitutional challenge in *The Guardian*, and discussed the international implications of the dispute.³⁰⁹ He highlights how the challenge is not only important for the United States, but for other countries, which have been forced to adopt such a regime: ‘If they succeed, one of America’s most controversial technology laws will be struck down, and countries all over the world who have been pressured by the US trade representative to adopt this American rule will have to figure out whether they’ll still enforce it, even after the US has given up on it.’³¹⁰ That would apply to countries like Australia and Singapore, which were required to adopt a technological protection measures regime as part of bilateral agreements with the United States. The

³⁰⁶ Ibid.

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ Cory Doctorow, ‘America’s Broken Digital Copyright Law is about to be challenged in Court’, *The Guardian*, 21 July 2016, https://www.theguardian.com/technology/2016/jul/21/digital-millennium-copyright-act-eff-supreme-court?CMP=share_btn_tw

³¹⁰ Ibid.

participants involved in the *Trans-Pacific Partnership* would be required to adopt the draconian regime for technological protection measures as well.

While sympathetic to the case, Mike Masnick wonders how the constitutional challenge will fare, given the past approach of the Supreme Court of the United States to intellectual property and the First Amendment:

1201 has all sorts of problems, but no one has tested this First Amendment argument before. Unfortunately, our courts have been incredibly (and unfortunately) reluctant to seriously consider constitutional challenges to copyright law. The cases that have made it up through the court system have ended unfortunately badly - cases like the *Eldred* case challenging copyright term extension, for example. I hope that this one turns out differently, and it may become a case to watch. Again, the arguments are quite compelling to me, but I'm unfortunately skeptical that the judicial system will agree.³¹¹

There are some important statements in constitutional cases – like *Eldred* – about the importance of safety-valve clauses, like the ideas/ expression dichotomy and the defence of fair use, in the doctrine of copyright law. There has been a long tradition of academic writing, which raises concerns about the impact of the *Digital Millennium Copyright Act* 1998 upon freedom of speech and expression.

In this context, it is concerning that the *Trans-Pacific Partnership* embeds the constitutionally dubious technological protection measures into the agreement.

³¹¹ Mike Masnick, 'EFF Lawsuit Challenges DMCA's Digital Locks Provision as First Amendment Violation', *TechDirt*, 21 July 2016, <https://www.techdirt.com/articles/20160721/10223135031/eff-lawsuit-challenges-dmca-digital-locks-provision-as-first-amendment-violation.shtml>

The privacy company, NordVPN, has raised concerns about the impact of the *Trans-Pacific Partnership* for internet freedom and privacy.³¹² Obviously, the company has been worried about how private virtual networks will be treated in such a regime.

6. Electronic Rights Management Information

Article 18.69 of the *Trans-Pacific Partnership* addresses Electronic Rights Management Information (RMI) – sometimes also known as copyright management information. Article 18.69 (1) provides:

In order to provide adequate and effective legal remedies to protect RMI:

(a) each Party shall provide that any person that, without authority, and knowing, or having reasonable grounds to know, that it would induce, enable, facilitate or conceal an infringement of the copyright or related right of authors, performers or producers of phonograms:

(i) knowingly removes or alters any RMI;

(ii) knowingly distributes or imports for distribution RMI knowing that the RMI has been altered without authority; or

(iii) knowingly distributes, imports for distribution, broadcasts, communicates or makes available to the public copies of works, performances or phonograms, knowing that RMI has been removed or altered without authority,

is liable and subject to the remedies set out in Article 18.74(Civil and Administrative Procedures and Remedies).³¹³

³¹² NordVPN, 'TPP Agreement: Implications on Internet Freedom and Reasons to Stop It From Passing', Press Release, 17 June 2016, <https://nordvpn436.newswire.com/news/tpp-agreement-implications-on-internet-freedom-and-reasons-to-stop-it-12059906>

³¹³ Article 18.69.1 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

Moreover, ‘Each Party shall provide for criminal procedures and penalties to be applied if any person is found to have engaged wilfully and for purposes of commercial advantage or financial gain in any of the activities described in subparagraph (a).’³¹⁴ Furthermore, ‘A Party may provide that the criminal procedures and penalties referred to in paragraph 1(b) do not apply to a non-profit library, museum, archive, educational institution or public non-commercial broadcasting entity.’³¹⁵

Article 18.69 (2) of the *Trans-Pacific Partnership* provides: ‘For greater certainty, nothing prevents a Party from excluding from a measure that implements paragraph 1 a lawfully authorised activity that is carried out for the purpose of law enforcement, essential security interests or other related governmental purposes, such as the performance of a statutory function.’³¹⁶

Article 18.69 (3) of the *Trans-Pacific Partnership* suggests: ‘For greater certainty, nothing in this Article shall obligate a Party to require a right holder in a work, performance or phonogram to attach RMI to copies of the work, performance or phonogram, or to cause RMI to appear in connection with a communication of the work, performance or phonogram to the public.’³¹⁷

³¹⁴ Article 18.69.1 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

³¹⁵ Article 18.69.1 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

³¹⁶ Article 18.69.2 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

³¹⁷ Article 18.69.3 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

Article 18.69 (4) of the *Trans-Pacific Partnership* provides a broad definition of rights management information: ‘**RMI** means: (a) information that identifies a work, performance or phonogram, the author of the work, the performer of the performance or the producer of the phonogram; or the owner of any right in the work, performance or phonogram; (b) information about the terms and conditions of the use of the work, performance or phonogram; or (c) any numbers or codes that represent the information referred to in subparagraphs (a) and (b), if any of these items is attached to a copy of the work, performance or phonogram or appears in connection with the communication or making available of a work, performance or phonogram to the public.’³¹⁸

The model for this regime seems to be the *Digital Millennium Copyright Act* 1998. There has been a ruling that the provision covers non-digital attribution.³¹⁹ There has been legal debate as to whether copyright management information applies to works in non-digital form.³²⁰

It is worth noting that the *Trans-Pacific Partnership* fails to provide for comprehensive recognition of moral rights in the Pacific Rim – such as the moral right of attribution, the moral right against false attribution, and the moral right of integrity. The United States

³¹⁸ Article 18.69.4 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

³¹⁹ *Murphy v. Millenium Radio Group, LLC*, 650 F.3d 295 (3rd Cir. 2011).

³²⁰ *Textile Secrets International, Inc. v. Yay-Ya Brand Inc.*, 24 F. Supp.2d 1184 (C.D. Cal. 2007); *IQ Group, Ltd. v. Wiesner Publishing, LLC*, 409 F.Supp.2d 587 (D.N.J.2006); *McClatchey v. The Associated Press*, 2007 WL 776103 (W.D.Pa. March 9, 2007); and *Fox v. Hildebrand*, 2009 WL 1977996 (C.D. Cal. July 1, 2009).

provides only for limited, minimalist recognition of moral rights for visual artists, and has resisted the recognition of broader moral rights.

7. Copyright Enforcement

The *Trans-Pacific Partnership* is like the notorious *Stop Online Piracy Act* (SOPA) or *Anti-Counterfeiting Trade Agreement* (ACTA) in certain respects. It seeks to increase the range of civil remedies, criminal penalties, and border measures. Section I of Chapter 18 of the *Trans-Pacific Partnership* focuses upon intellectual property enforcement. In its Special 301 report, the United States Trade Representative was pleased by the arsenal of intellectual property measures included in the trade agreement:

TPP Parties are obligated to provide mechanisms—including civil and administrative procedures and remedies, provisional measures, border measures, and criminal enforcement—to address many of the challenges of counterfeiting and piracy described in this Report, including digital IP theft and supply chains for the manufacture and distribution of counterfeit goods. The TPP requires Parties to adopt measures to address cable and satellite signal piracy and the unauthorized camcording of movies in theaters. Enforcement provisions are also designed to close loopholes exploited by counterfeiters in many countries and to target counterfeit products that pose threats to consumer health and safety. The TPP also ensures that border officials and enforcement authorities may act on their own initiative (ex officio) to identify and seize imported and exported counterfeit and pirated goods. Additionally, the TPP is the first trade agreement to clarify that Parties must subject state-owned enterprises (SOEs) to IP enforcement rules, subject to certain disciplines in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).³²¹

³²¹ United States Trade Representative, *Special 301 Report*, April 2016, 13, <https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf>

Such rules, standards and obligations go well above and beyond what is provided for in the *TRIPS Agreement* 1994, and preferential trade agreements, such as the *Australia-United States Free Trade Agreement* 2004.

An alliance of small-to-medium information technology companies expressed concerns about the intellectual property enforcement regime in the *Trans-Pacific Partnership*:

Dozens of digital rights organizations and tens of thousands of individuals have raised alarm over provisions that would bind treaty signatories to inflexible digital regulations that undermine free speech. Based on the fate of recent similar measures, it is virtually certain that such proposals would face serious scrutiny if proposed at the domestic level or via a more transparent process. Anticipated elements such as harsher criminal penalties for minor, non-commercial copyright infringements, a 'take-down and ask questions later' approach to pages and content alleged to breach copyright, and the possibility of Internet providers having to disclose personal information to authorities without safeguards for privacy will chill innovation and significantly restrict users' freedoms online.³²²

The regime is tilted towards the interests of copyright owners in respect of disputes with such players.

There has also been concern about how the agreement will affect due process, fairness, proportionality, deterrence, and arbitrary detention. There have also been larger concerns

³²² Technology Companies, 'Letter to Senator Ron Wyden', 20 March 2014, <https://www.eff.org/files/2014/03/20/tech-companies-wyden-letter-20140320.pdf>

about the impact of this trade agreement upon human rights, privacy, freedom of speech, and civil liberties.³²³ Senator Scott Ludlam of the Australian Greens has warned:

The TPPA text still forces internet providers to police Australian internet users and enables the US to place us under surveillance, justified as a US-led crackdown on internet piracy ... It's clear this secret deal, driven by foreign interests to benefit some of the largest multinationals, will still censor internet content, impose harsh criminal penalties for non-commercial copyright infringements, and force Australian internet service providers to police users and hand information over to law enforcement.³²⁴

In this context, there have been larger concerns about the need to keep a free and open Internet in terms of its architecture.³²⁵

Michael Carrier has expressed concerns that the rules on copyright liability are vague and far-reaching.³²⁶ He has been concerned that such measures would harm innovations, frighten

³²³ Sandra Fulton, 'The Biggest Threat to Free Speech and Intellectual Property That You've Never Heard Of', American Civil Liberties Union, 29 April 2012, <https://www.aclu.org/blog/biggest-threat-free-speech-and-intellectual-property-youve-never-heard>

³²⁴ Senator Scott Ludlam, 'Greens act to expose threats to Australians after damning leak of secret trade deal document', Press Release, 14 November 2013, <http://scott-ludlam.greensmps.org.au/content/media-releases/greens-act-expose-threats-australians-after-damning-leak-secret-trade-deal-do>

³²⁵ Klint Finley, 'The Inventors of the Internet are Trying to Build a Truly Permanent Web', *Wired*, 20 June 2016, <http://www.wired.com/2016/06/inventors-internet-trying-build-truly-permanent-web/>

³²⁶ Michael Carrier, 'SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements' (2013)11 (2) *Northwestern Journal of Technology and Intellectual Property*, <http://ssrn.com/abstract=2213034>

venture capitalists, and stifle innovation. As such, the Trans-Pacific Partnership will undermine national innovation policies – like Australia’s ‘Ideas Boom’.³²⁷

A. Civil Remedies

Article 18.74 of the *Trans-Pacific Partnership* looks at civil and administrative procedures and remedies.³²⁸ Article 18.74.1 focuses upon civil judicial procedures concerning intellectual property enforcement. Article 18.74.2 looks at injunctive relief. Article 18.74.3 focuses upon damages. Article 18.74.4 stresses that judicial authorities should consider the value of infringed goods or services. Article 18.74.5 looks at account of profits. Article 18.74.6 calls for pre-established damages or additional damages in copyright infringement matters. Article 18.74.10 looks at court costs. Article 18.74.11 considers costs of expert witnesses. Article 18.74.12 provides for destruction of pirated copyright goods.

Article 18.74.13 deals with information gathering:

Without prejudice to its law governing privilege, the protection of confidentiality of information sources or the processing of personal data, each Party shall provide that, in civil judicial proceedings concerning the enforcement of an intellectual property right, its judicial authorities have the authority, on a justified request of the right holder, to order the infringer or, in the alternative, the alleged infringer to provide to the right holder or to the judicial authorities, at least for the purpose of collecting evidence, relevant information as provided for in its applicable laws and regulations that the infringer

³²⁷ Matthew Rimmer, ‘The Trans-Pacific Partnership Protects Old Companies at the Expense of the New’, *ABC The Drum*, 6 October 2015, <http://www.abc.net.au/news/2015-10-06/rimmer-tpp-favours-old-ip-industries/6830884>

³²⁸ Article 18.74 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

or alleged infringer possesses or controls. The information may include information regarding any person involved in any aspect of the infringement or alleged infringement and the means of production or the channels of distribution of the infringing or allegedly infringing goods or services, including the identification of third persons alleged to be involved in the production and distribution of the goods or services and of their channels of distribution.³²⁹

Article 18.74.14 deals with sanctions for violation of judicial orders concerning the protection of confidential information.

There has been significant civil litigation in respect of the film *The Dallas Buyers Club* across the Pacific Rim – with actions in Canada, the United States, and Singapore.³³⁰ In Australia, the courts took care to provide strong management of the copyright owners' demands.³³¹ The *Dallas Buyers Club* was defeated.³³² The action was abandoned in 2016.³³³

³²⁹ Article 18.74.13 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

³³⁰ See, for instance, in the United States, Lisa Parker, 'Movie Studio Targets Consumers for Illegal Downloads', NBC Chicago, 2 May 2014, <http://www.nbcchicago.com/investigations/Movie-Studio-Targets-Consumers-For-Illegal-Downloads-257608961.html>; in Singapore, Irene Tham, 'Pay \$5K For Illegal Download of Movie', *The Straits Times*, 8 August 2015, <http://www.straitstimes.com/singapore/courts-crime/pay-5k-for-illegal-download-of-movie>; and, in Canada, Michael Geist, 'How a File-Sharing Lawsuit against Rogers threatens your Internet Privacy', *The Toronto Star*, 27 June 2016, <https://www.thestar.com/business/2016/06/27/how-a-file-sharing-lawsuit-against-rogers-threatens-your-internet-privacy-geist.html>

³³¹ *Dallas Buyers Club LLC v iiNet Limited* [2015] FCA 317.

³³² David Swan, 'iiNet Loses Dallas Buyers Club Landmark Piracy Case', *The Business Spectator*, 7 April 2015, <https://www.businessspectator.com.au/news/2015/4/7/technology/iinet-loses-dallas-buyers-club-landmark-piracy-case> Ben Grubb and Michaela Whitbourn, 'Pirates Beware: Hollywood is Coming After You', *The Sydney Morning Herald*, 8 April 2015, <http://www.smh.com.au/digital-life/digital-life->

There has also been the threat of legal action over The Dallas Buyers Club in New Zealand.³³⁴ There have been further conflicts over ownership of the movie.³³⁵ The Dallas Buyers Club litigation has raised concerns about the use of speculative invoicing in relation to copyright matters. Such disputes raised issues about the inter-relationship between copyright law, privacy, and consumer rights. The *Trans-Pacific Partnership* does not adequately address the question of the abuse of copyright.

The proposal for an industry copyright code governing the relationship between copyright owners, internet service providers, and end users in Australia seems to have collapsed.³³⁶

[news/pirates-beware-hollywood-is-coming-after-you-20150407-1mg2ui.html](http://www.techradar.com/au/news/internet/policies-protocols/the-consequences-for-not-buying-the-dallas-buyers-club-1290593) Joel Burgess, 'The Consequences for Not Buying the Dallas Buyers Club', *Tech Radar*, 9 April 2015, <http://www.techradar.com/au/news/internet/policies-protocols/the-consequences-for-not-buying-the-dallas-buyers-club-1290593> Michaela Whitbourn, 'Dallas Buyers Club Judgment: The Trans-Pacific Partnership Could be Worse News for Online Pirates', *The Sydney Morning Herald*, 12 April 2015, <http://www.smh.com.au/digital-life/digital-life-news/dallas-buyers-club-judgment-transpacific-partnership-could-be-worse-news-for-online-pirates-20150411-1mh6td.html?stb=tw> *The Age* 12 April 2015; and Ry Crozier, 'Dallas Buyers Club Pirates Could be Told to Name a Price', *IT News*, 13 April 2015, <http://www.itnews.com.au/News/402624,dallas-buyers-club-pirates-could-be-told-to-name-a-price.aspx>

³³³ Felicity Sheppard, 'The Dallas Buyers Club Case Has Been Abandoned But Illegal Downloaders May Still Face Trouble', *ABC News*, 12 February 2016, <http://www.abc.net.au/news/2016-02-12/dallas-buyers-club-case-abandoned-illegal-downloads-pirate/7162180>

³³⁴ Tom Pullar-Strecker, 'US Movie Studio Threatens Kiwi Film Pirates', *Business Day*, 9 April 2015, <http://www.stuff.co.nz/business/67657478/us-movie-studio-threatens-kiwi-film-pirates>

³³⁵ Ernesto, 'Accused "Pirate" Questions Dallas Buyers Club's Copyright Claim', *Torrent Freak*, 18 July 2016, <https://torrentfreak.com/accused-pirate-questions-dallas-buyers-clubs-copyright-claim-160718/>

³³⁶ Hannah Francis, "'Three Strikes' Scheme for Aussie Pirates Scrapped: Report', *The Sydney Morning Herald*, 18 February 2016, <http://www.smh.com.au/technology/technology-news/three-strikes-scheme-for-aussie-pirates-scrapped-report-20160218-gmxie1.html>

Some countries have already passed ahead with measures above and beyond what is providing for by the *Trans-Pacific Partnership*. Famously, in the United States, the *Stop Online Piracy Act* was rejected because of concerns about its impact on internet freedom.³³⁷ One of the most controversial features of the bill was the foreign site-blocking power. Despite this setback, copyright owners have lobbied other jurisdictions for site-blocking powers. Under the leadership of Tony Abbott, the Australian Parliament passed the *Copyright Amendment (Online Infringement) Act 2015 (Cth)*.³³⁸ This legislation provides the extraordinary power of enabling copyright owners to ask the Australian Courts for the remedy of site-blocking. There has been concern about the political lobbying for the power by copyright owners such as Roadshow and Foxtel.³³⁹ The design of the legislative regime raises larger questions about the impact of such a power upon an open and free Internet.³⁴⁰ There have already been a couple of test cases brought by copyright owners in respect of site-blocking – one has focused upon SolarMovie, and the other has looked at Kickass

³³⁷ Edward Black, 'Internet Users, Free Speech Experts, Petition Against SOPA', *The Huffington Post*, 13 December 2011, http://www.huffingtonpost.com/edward-j-black/stop-online-piracy-act-vote_b_1145949.html and David Moon, Patrick Ruffini, and David Segal (ed), *Hacking Politics: How Geeks, Progressives, The Tea Party, Gamers, Anarchists and Suits Teamed up to Defeat SOPA and Save the Internet*, OR Books, 2013.

³³⁸ *Copyright Amendment (Online Infringement) Act 2015 (Cth)*, Parliamentary Debate, Committee Report, and Submissions http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5446

³³⁹ Allie Coyne, 'Village Roadshow Boosts Donations Amidst Copyright Crackdown', IT News, 2 February 2015, <http://www.itnews.com.au/news/village-roadshow-boosts-donations-amidst-copyright-crackdown-399933>

³⁴⁰ Dan Hunter, 'Blocking Piracy Websites is Bad for Australia's Digital Future', SBS, 25 November 2014, <http://www.sbs.com.au/news/article/2014/11/25/blocking-piracy-websites-bad-australias-digital-future>

Torrents.³⁴¹ The film industry and the music industry would like other jurisdictions in the Pacific Rim to provide for site-blocking powers.

B. Criminal Offences

The United States Trade Representative argued that ‘The Asia-Pacific also presents critical challenges from an IP policy perspective’.³⁴² In particular, the authorities warned that ‘Regional piracy rates remain high.’³⁴³ In its Special 301 report, the United States Trade Representative expressed particular concern about ‘digital piracy’, ‘piracy online’, and ‘broadcast piracy’:

The increased availability of broadband Internet connections around the world, combined with increasingly accessible and sophisticated mobile technology, is generating significant benefits, ranging from economic activity based on new business models to greater access to information. However, these technological developments have also made the Internet an extremely efficient vehicle for disseminating infringing content and for supplanting legitimate opportunities for copyright holders and online platforms that deliver licensed content... Piracy facilitated by Internet-based services present unique enforcement challenges for right holders in countries where copyright laws have not been able to adapt or keep pace with these innovations in piracy.³⁴⁴

³⁴¹ Max Mason, ‘Village Roadshow, Hollywood Studios Move to Block Piracy Website SolarMovie’, *Australian Financial Review*, 18 February 2016, <http://www.afr.com/business/media-and-marketing/village-roadshow-hollywood-to-block-solarmovie-20160217-gmwoay>

³⁴² The United States Trade Representative, ‘Overview. Intellectual Property Chapter of the Trans-Pacific Partnership’, <https://medium.com/the-trans-pacific-partnership/intellectual-property-3479efdc7adf#.lcowp4odl>

³⁴³ Ibid.

³⁴⁴ United States Trade Representative, *Special 301 Report*, April 2016, 19-20, <https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf>

There is a long history of intellectual property owners and governments using rhetoric about ‘piracy’ in order to push stronger intellectual property standards and norms.

Article 18.77 of the *Trans-Pacific Partnership* focuses upon criminal procedures and penalties.³⁴⁵

Maira Sutton of the Electronic Frontier Foundation has expressed a number of concerns about the criminal offences.³⁴⁶ She worries that the broad definition of criminal violation of copyright law could cover commercial and non-commercial uses. Sutton also highlights the high penalties, property seizure and asset forfeiture, and criminal offences associated with uber-copyright measures like technological protection measures and electronic rights management information. Maira Sutton warns:

These excessive criminal copyright rules are what we get when Big Content has access to powerful, secretive rule-making institutions. We get rules that would send users to prison, force them to pay debilitating fines, or have their property seized or destroyed in the name of copyright enforcement. This is yet another reason why we need to stop the TPP—to put an end to this seemingly endless progression towards ever more chilling copyright restrictions and enforcement.³⁴⁷

³⁴⁵ Article 18.77 of the *Trans-Pacific Partnership* <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

³⁴⁶ Maira Sutton, ‘Go to Prison for File Sharing? That’s What Hollywood Wants in the Secret TPP Deal’, Electronic Frontier Foundation, 12 February 2015, <https://www.eff.org/deeplinks/2015/02/go-prison-sharing-files-thats-what-hollywood-wants-secret-tpp-deal>

³⁴⁷ Ibid.

She warned that ‘the TPP is the latest step in this trend of increasingly draconian copyright rules passing through opaque, corporate-captured processes.’³⁴⁸

Jeremy Malcolm has expressed concerns about subtle changes in the language on criminal offences in the scrubbing process.³⁴⁹ Professor Michael Geist of the University of Ottawa has expressed concern about the quiet expansion of the criminal copyright provisions.³⁵⁰

C. Border Measures

The United States Trade Representative boasts: ‘The chapter ensures that border officials may act on their own initiative to identify and seize imported and exported counterfeit trademark and pirated copyright goods.’³⁵¹

Article 18.76 of *Trans-Pacific Partnership* focuses upon special requirements related to border measures.³⁵²

³⁴⁸ Ibid.

³⁴⁹ Jeremy Malcolm, ‘Sneaky Change to the TPP Drastically Extends Criminal Penalties’, Electronic Frontier Foundation, 17 February 2016, <https://www.eff.org/deeplinks/2016/02/sneaky-change-tpp-drastically-extends-criminal-penalties>

³⁵⁰ Michael Geist, ‘The Trouble with the TPP: Quiet Expansion of Criminal Copyright Provisions’, the University of Ottawa, 26 February 2016, <http://www.michaelgeist.ca/2016/02/the-trouble-with-the-tpp-day-39-quiet-expansion/>

³⁵¹ The United States Trade Representative, ‘Overview. Intellectual Property Chapter of the Trans-Pacific Partnership’, <https://medium.com/the-trans-pacific-partnership/intellectual-property-3479efdc7adf#.lcowp4odl>

³⁵² Article 18.76 of *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

Professor Michael Geist is concerned about the ‘expansion of border measures provisions without court oversight, which could lead to customs officials being asked to make difficult legal assessments on whether to detain goods entering the country.’³⁵³ He noted: ‘Without mandated safeguards, Canadian exporters face the prospect of unbalanced border measures when they sell IP-related products into the rest of the TPP.’³⁵⁴

D. Camcording in Movie Theatres

Article 18.77.4 provides special protection in respect of camcording in movie theatres: ‘Recognising the need to address the unauthorised copying of a cinematographic work from a performance in a movie theatre that causes significant harm to a right holder in the market for that work, and recognising the need to deter such harm, each Party shall adopt or maintain measures, which shall at a minimum include, but need not be limited to, appropriate criminal procedures and penalties.’³⁵⁵ It is most peculiar and curious that there should be such a particular technology-specific offence included in the *Trans-Pacific Partnership*.

E. Satellite and Cable Signals

³⁵³ Michael Geist, ‘The Trouble with the TPP: Missing Balance on IP Border Measures’, the University of Ottawa, 4 February 2016, <http://www.michaelgeist.ca/2016/02/the-trouble-with-the-tpp-day-24-missing-balance-on-ip-border-measures/>

³⁵⁴ Ibid.

³⁵⁵ Article 18.77.4 of *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

Article 18.79 of the *Trans-Pacific Partnership* considers the protection of encrypted program-carrying satellite and cable signals.³⁵⁶ The article provides for criminal offences in respect of a range of activities involved in decoding an encrypted program-carrying satellite signal without the authorisation of the lawful distributor of such signal. Moreover, there is scope for civil remedies in respect of a person that holds an interest in an encrypted program-carrying satellite signal.

There has been a concern that such a measure would target online cable services. The *Aereo* dispute, which went all the way up to the Supreme Court of the United States, has been mentioned in this context.³⁵⁷ There is litigation in the United States Court of Appeals over whether the online cable service FilmOn should be able to qualify for the same statutory copyright licenses as traditional cable systems.³⁵⁸

The Australian Law Reform Commission considered the retransmission of free-to-air broadcasts in its report.³⁵⁹ The Commission concluded that the Australian Government should consider the repeal of the retransmission scheme for free-to-air broadcasts. However,

³⁵⁶ Article 18.79 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

³⁵⁷ *American Broadcasting Cos. v. Aereo* 134 S. Ct. 2498 (2014).

³⁵⁸ Shiva Stella, 'Public Knowledge Supports Consumer Choice in FilmOn Case', Public Knowledge, 26 July 2016, <https://www.publicknowledge.org/press-release/public-knowledge-supports-consumer-choice-in-filmon-case>

³⁵⁹ Australian Law Reform Commission. *Copyright and the Digital Economy (ALRC Report 122)*, Sydney: The Australian Law Reform Commission, 13 February 2014, <http://www.alrc.gov.au/publications/copyright-report-122>

the Commission made no recommendation on whether reform should also involve the imposition of must carry obligations on subscription television service providers.

F. Government Software

Article 18.80 deals with ‘government use of software’.³⁶⁰ Article 18.80.1 provides: ‘Each Party recognises the importance of promoting the adoption of measures to enhance government awareness of respect for intellectual property rights and of the detrimental effects of the infringement of intellectual property rights.’³⁶¹ Article 18.80.2 states: ‘Each Party shall adopt or maintain appropriate laws, regulations, policies, orders, government-issued guidelines, or administrative or executive decrees that provide that its central government agencies use only non-infringing computer software protected by copyright and related rights, and, if applicable, only use that computer software in a manner authorised by the relevant licence. These measures shall apply to the acquisition and management of the software for government use.’³⁶² Such provisions seem particularly directed at benefitting computer software companies – such as Microsoft.

G. Co-operation/ Extradition

³⁶⁰ Article 18.80 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

³⁶¹ Article 18.80.1 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

³⁶² Article 18.80.2 of the *Trans-Pacific Partnership* 2015 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

The *Trans-Pacific Partnership* may also play an important role in respect of co-operation between law enforcement authorities – particularly in matters of criminal copyright law.

The United States Department of Justice has used extradition powers under on a number of occasions in copyright matters. In Australia, a Warez operator called Hew Raymond Griffiths was arrested, extradited, and jailed.³⁶³ The United Nations Human Rights Committee has raised concerns about this process.³⁶⁴ The Australian Government has defended its position.³⁶⁵

The messy, complicated case of Kim Dotcom and Megaupload in New Zealand has attracted much attention.³⁶⁶ The United States Government has sought to extradite Kim Dotcom to the United States on copyright charges. Professor Lawrence Lessig has expressed qualms about

³⁶³ *United States of America v Griffiths, Griffiths v United States of America*, Special leave High Court of Australia

³⁶⁴ Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (112th session) concerning Communication No. 1973/2010 http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_112_D_1973_2010_2282_1_E.doc

³⁶⁵ Response to the Views of the Human Rights Committee in Communication No. 1973/2010 <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/ICCPR-Griffiths-v-Australia-AustralianGovernmentResponse2July2015.DOCX>

³⁶⁶ *Twentieth Century Fox Film Corporation v. Dotcom* [2015] NZHC 3349 <http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZHC/2015/3349.html>; and Reuters and AAP, ‘Kim Dotcom’s Extradition to US Cleared by New Zealand Judge’, *The Guardian*, 23 December 2015, https://www.theguardian.com/technology/2015/dec/23/kim-dotcoms-extradition-to-us-cleared-by-new-zealand-judge?CMP=tw_t_gu

the extradition.³⁶⁷ At the time of writing, the New Zealand district court had approved the extradition of Kim Dotcom. Kim Dotcom was appealing against this decision.

The action versus Artem Vaulin, the administrator of Kickass Torrents in 2016, is the latest example of the United States Government deploying criminal copyright law in conjunction with extradition requests.³⁶⁸

There have also been concerns about the use of extradition in information technology matters – such as in the Gary McKinnon and Lauri Love cases.³⁶⁹

Conclusion

The *Trans-Pacific Partnership* provides for an extensive catalogue of obligations and prescriptions in respect of copyright law in the Pacific Rim. The international treaty is a

³⁶⁷ Lawrence Lessig, 'Expert Opinion in the Kim Dotcom Extradition Case', 16 September 2015, <http://www.techfirm.com/professor-lessig-opinion-in-ki/>

³⁶⁸ Mike Masnick, 'Kickass Torrents Gets the Megaupload Treatment: Site Seized, Owner Arrested and Charged with Criminal Infringement', *TechDirt*, 21 July 2016, https://www.techdirt.com/articles/20160720/16162535023/kickass-torrents-gets-megaupload-treatment-site-seized-owner-arrested-charged-with-criminal-infringement.shtml?utm_source=feedburner&utm_medium=twitter&utm_campaign=Feed%3A+techdirt%2Ffeed+%28Techdirt%29

³⁶⁹ Timothy Lee, 'UK Halts Extradition of Accused Hacker over Suicide Concerns', *Ars Technica*, 17 October 2012, <http://arstechnica.com/tech-policy/2012/10/uk-halts-extradition-of-accused-hacker-over-suicide-concerns/> and Jennifer Baker, 'Lauri Love Still Doesn't Know if He'll Be Extradited to the US For Alleged Hacking', *ArsTechnica UK*, 30 July 2016, <http://arstechnica.co.uk/tech-policy/2016/06/lauri-love-us-extradition-hearing/>

TRIPS++ Agreement – which has more extensive obligations than the *TRIPS Agreement* 1994, or TRIPS+ Agreements, like the *Australia-United States Free Trade Agreement* 2004. The agreement is quite revolutionary in terms of its approach to the aims, objectives, and purposes of copyright law. As a result of heavy lobbying by Hollywood, the record industry, and publishers, the *Trans-Pacific Partnership* seeks to extend the term of copyright across the Pacific Rim. Moreover, there has been much debate about how the agreement will affect existing and future copyright exceptions. The *Trans-Pacific Partnership* seeks to lay down rules on intermediary liability across the Pacific Rim. The *Trans-Pacific Partnership* entrenches the dubious regime for technological protection measures set down in the *Digital Millennium Copyright Act* 1998. Moreover, there are also extensive provisions on electronic rights management information. The *Trans-Pacific Partnership* contains a battery of provisions on copyright enforcement – looking at civil remedies, criminal offences, and border measures. Importantly, the Intellectual Property Chapter of the *Trans-Pacific Partnership* is reinforced by the Investment Chapter and the Electronic Commerce Chapter.

Disturbingly, the investment chapter in the *Trans-Pacific Partnership* defines investment broadly – including intellectual property rights. The treaty transforms intellectual property rights from privileges designed to promote the ‘progress of science and the useful arts’ into instrumental tools for foreign investment. This means companies could challenge, frustrate and even block intellectual property reforms under the investment chapter of the *Trans-Pacific Partnership*. The linkage between intellectual property and investment also raises issues in respect of copyright law, IT Pricing, and the Digital Economy. The investment chapter may frustrate any efforts by parliaments in the Pacific Rim to engage in progressive reform in respect of intellectual property. An investor-state dispute resolution mechanism could be deployed by foreign investors to challenge intellectual property reforms.

Corynne McSherry and Maira Sutton from the Electronic Frontier Foundation have considered the impact of investor state dispute settlement upon copyright law reform under the *Trans-Pacific Partnership* and the *Trans-Atlantic Trade and Investment Partnership*.³⁷⁰ The writers observed that Big Content companies could use investment clauses to undermine copyright law reform and other digital regulation:

Let's say a country adopts a new flexible copyright law. For instance, one that gives users a blanket right to remix songs or videos for noncommercial purpose and post them online, or one that ensures greater user protections for everyone including educational institutions, libraries, or people with visual or learning disabilities. Companies could bring an investor-state case, alleging that the policy undermines their copyright protections, and therefore, their profits. Or, more likely, it could use the threat of such a lawsuit to stop that law from getting passed in the first place. Indeed, given the perverse nature of investor-state powers, even if all the other harmful provisions are taken out of the TPP, corporations could still have the ability to attack and potentially unravel virtually any pro-user digital regulation.³⁷¹

McSherry and Sutton noted: ‘The investor–state provision is just one of many problems in the *Trans-Pacific Partnership*.’³⁷² The Electronic Frontier Foundation attorneys said: ‘At the root of all of this, however, is that the secret trade negotiation process is a vehicle for multinational corporations to lobby for provisions that will impact how users interact, share, and develop technological tools and content — without any opportunity for those users to

³⁷⁰ Corynne McSherry and Maira Sutton, ‘Another Reason to Hate TPP: It Gives Big Content New Tools to Undermine Sane Digital Rights Policies’, the Electronic Frontier Foundation, 24 October 2013, <https://www.eff.org/deeplinks/2013/10/another-reason-hate-tpp-it-gives-big-content-new-tools-undermine-sane-digital>

³⁷¹ Ibid.

³⁷² Ibid.

know about, much less comment on, those provisions.’³⁷³ The tobacco industry has already used investor clauses to question Uruguay’s graphic health warnings, and Australia’s regime for the plain packaging of tobacco products.³⁷⁴ Eli Lilly has challenged Canada’s patent laws under an investment clause in the *North American Free Trade Agreement* 1994.³⁷⁵ Copyright reforms could similarly be challenged by copyright industries under an investment clause in the *Trans-Pacific Partnership*.³⁷⁶

For their part, multinational information technology companies are attracted to the Electronic Commerce chapter of the *Trans-Pacific Partnership*.

³⁷³ Ibid.

³⁷⁴ *Philip Morris v. Uruguay* <http://www.italaw.com/cases/460> and *Philip Morris v. The Commonwealth of Australia*, <http://www.italaw.com/cases/851>

³⁷⁵ *Eli Lilly and Company v. Government of Canada* <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/eli.aspx?lang=eng>

³⁷⁶ Technology Companies, ‘Letter to Senator Ron Wyden’, 20 March 2014, <https://www.eff.org/files/2014/03/20/tech-companies-wyden-letter-20140320.pdf>