

Rigidity in Global Intellectual Property Norms*

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International agreements can play a significant role in shaping domestic laws in the United States and in other countries. Obviously, multilateral treaties negotiated at the United Nations (“UN”) level create international obligations for parties to these agreements and thus set new global norms. The World Intellectual Property Organization (“WIPO”) administers several intellectual property related treaties and the World Trade Organization (“WTO”) administers perhaps the most well-known and significant international treaty, the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS Agreement”).

These UN-based treaties are negotiated in a system that operates on a consensus basis, meaning that all countries must agree to the language. Because of the large membership in these multilateral institutions and the consensus-based system, the language included in these treaties is generally at a very high level, flexible, and less prescriptive than what may be found in bilateral trade agreements or domestic laws. The 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, for example, sets minimum standards for limitations and exceptions for the creation and distribution of accessible works, including across borders.¹ The historic agreement, the first WIPO treaty to focus on the rights of the user, like other WIPO treaties leaves plenty of space for countries to implement the agreement according to their own domestic context—for example, countries could have detailed requirements, may have a commercial availability provision, could restrict exports to other Marrakesh countries, or could broadly allow for the export of accessible works worldwide.² This flexibility is critical in respecting the sovereignty and vastly different circumstances of countries in different regions, with different legal traditions, and of differing economic statuses.

Yet global norms are not restricted to those treaties negotiated at the multilateral level with the input of all countries. In addition to these multilateral agreements, trade agreements negotiated by two countries or a small, select group of countries

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1. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, art. 5 and art. 9, June 27, 2013, <https://perma.cc/3AB6-LDFL>.

2. *Id.*

can also greatly impact intellectual property norms worldwide. While a bilateral or plurilateral trade agreement binds only those countries party to the agreement, ultimately the provisions agreed to could drive the creation of new international standards or may serve as the basis for text in future trade agreements. For example, the Trans-Pacific Partnership Agreement (“TPP”) is a large, regional trade agreement, which has its origins in four countries: Brunei, Chile, New Zealand, and Singapore.³ Ultimately, the negotiating group expanded to nine countries (with the additions of Australia, Malaysia, Peru, the United States, and Vietnam),⁴ then to eleven (adding Canada and Mexico),⁵ before concluding with twelve (with the final addition of Japan) negotiating parties.⁶ While comprising a relatively small number of countries, the significant membership of particular countries in the agreement results in coverage of approximately forty percent of the world’s GDP.

Although the final outcome of the TPP is questionable given a new administration in the United States, if the TPP were to enter into force, the intellectual property provisions could certainly affect international standards.⁷ Countries that are forced to change their laws on copyright or patents to comply with the rules set forth by the TPP may negotiate future agreements based on what is in their domestic laws, causing a proliferation of TRIPS-plus measures.

One of the significant differences between a multilateral intellectual property treaty and a bilateral or plurilateral trade agreement with an intellectual property chapter is the prescriptiveness of the provisions. The international requirements regarding technological protection measures, for example, require only “adequate legal protection and effective legal remedies against the circumvention of effective technological measures” used to protect author’s rights, whereas some United States trade agreements go into great detail with respect to what these legal protections and remedies are.⁸ As noted above, the language contained in multilateral treaties is

3. “The P4 is the first free trade agreement linking Asia, the Pacific and the Americas,” *Trans-Pacific Strategic Economic Partnership (P4)*, NEW ZEALAND FOREIGN AFFAIRS & TRADE (last visited Feb. 05, 2017), <https://perma.cc/8MH3-265M>.

4. See, e.g., *Outlines of the Trans-Pacific Partnership Agreement*, USTR (Nov. 14, 2011), <https://perma.cc/6QJL-4W3Y> (“On November 12, 2011, the Leaders of the nine Trans-Pacific Partnership countries—Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam, and the United States—announced the achievement of the broad outlines of an ambitious, 21st-century Trans-Pacific Partnership (TPP) agreement that will enhance trade and investment among the TPP partner countries, promote innovation, economic growth and development, and support the creation and retention of jobs.”).

5. *Canada Formally Joins Trans-Pacific Partnership*, Global Affairs Canada (Oct. 9, 2012), <https://perma.cc/46RF-ZCA9>.

6. William H. Cooper & Mark E. Manyin, *Japan Joins the Trans-Pacific Partnership Agreement: What Are the Implications?*, CONG. RESEARCH SER. (Aug. 13, 2013), <https://perma.cc/DND8-FGB6>.

7. See Rebecca Savransky, *Trump to sign executive order to withdraw from TPP*, THE HILL (Jan. 23, 2017), <https://perma.cc/5R39-BGK4>.

8. *Compare* WIPO Copyright Treaty (WCT), art. 11, Dec. 20, 1996, <https://perma.cc/KR9B-QTRD> (“Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law”) *with* the extensive text contained in the Korea-U.S. Free Trade Agreement (KORUS), art. 18.4.7, Dec. 3, 2010,

<https://perma.cc/M9WP-TVYA> (“7. (a) 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 unauthorized acts in respect of their works, performances, and phonograms, each Party shall provide that any person who: (i) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, phonogram, or other subject matter; or (ii) manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components, or offers to the public or provides services, that: (A) are promoted, advertised, or marketed by that person, or by another person acting in concert with, and with the knowledge of, that person, for the purpose of circumvention of any effective technological measure; (B) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or (C) are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure, shall be liable and subject to the remedies set out in Article 18.10.13.13. Each Party shall provide for criminal procedures and penalties to be applied when any person, other than a nonprofit library, archive, educational institution, or public noncommercial broadcasting entity, is found to have engaged willfully and for purposes of commercial advantage or private financial gain in any of the foregoing activities. Such criminal procedures and penalties shall include the application to such activities of the remedies and authorities listed in subparagraphs (a), (b), and (c) of Article 18.10.27 as applicable to infringements, *mutatis mutandis*. (b) In implementing subparagraph (a), neither 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, so long as the product does not otherwise violate any measures implementing subparagraph (a). (c) Each Party shall provide that a violation of a measure implementing this paragraph is a separate cause of action, independent of any infringement that might occur under the Party’s law on copyright and related rights. (d) Each Party shall confine exceptions and limitations to measures implementing subparagraph (a) to the following activities, which shall be applied to relevant measures in accordance with subparagraph (e): (i) noninfringing reverse engineering activities with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to the person engaged in those activities, for the sole purpose of achieving interoperability of an independently created computer program with other programs; (ii) noninfringing good faith activities, carried out by an appropriately qualified researcher who has lawfully obtained a copy, unfixed performance, or display of a work, performance, or phonogram and who has made a good faith effort to obtain authorization for such activities, to the extent necessary for the sole purpose of research consisting of identifying and analyzing flaws and vulnerabilities of technologies for scrambling and descrambling of information; (iii) the inclusion of a component or part for the sole purpose of preventing the access of minors to inappropriate online content in a technology, product, service, or device that itself is not prohibited under the measures implementing subparagraph (a)(ii); (iv) noninfringing good faith activities that are authorized by the owner of a computer, computer system, or computer network for the sole purpose of testing, investigating, or correcting the security of that computer, computer system, or computer network; (v) noninfringing activities for the sole purpose of identifying and disabling a capability to carry out undisclosed collection or dissemination of personally identifying information reflecting the online activities of a natural person in a way that has no other effect on the ability of any person to gain access to any work; (vi) lawfully authorized activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, essential security, or similar governmental purposes; (vii) access by a nonprofit library, archive, or educational institution to a work, performance, or phonogram not otherwise available to it, for the sole purpose of making acquisition decisions; and (viii) noninfringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms when an actual or likely adverse impact on those noninfringing uses is demonstrated in a legislative or administrative proceeding by substantial evidence, provided that any limitation or exception adopted in reliance on this clause shall have effect for a renewable period of not more than three years from the date the proceeding concludes. (e) The exceptions and limitations to measures implementing subparagraph (a) for the activities set forth in subparagraph (d) may only be applied as follows, and only to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures: (i)

generally at a high level, with plenty of flexibility for individual countries to implement the provision according to their own domestic context. The TRIPS Agreement, for example, includes just a handful of provisions on copyright, in contrast with the extensive copyright section in the TPP.

Putting aside for a moment the wisdom of including specific copyright TPP provisions in the agreement, the fact that several highly specific provisions were included in the final text is concerning in itself. Inclusion of these provisions, even when they correspond to current United States law, reflect a shortsighted view. Mandated intellectual property rules should be flexible enough to adapt to the rise of new technologies. While the United States benefits from fair use, which is a flexible limitation and exception that has supported the growth of technologies in the digital age, other countries may not have the same flexibility built into their copyright systems. The rigidity of these provisions effectively locks in current laws for the future, making it extremely difficult to change these laws unless entire trade agreements are renegotiated. Such renegotiation could prove challenging, particularly for a large trade agreement, such as the TPP, which has twelve different parties, each with their own unique interests.

One of the most significantly damaging TRIPS-plus measures included in the TPP, as well as other United States trade agreements, is the inclusion of a lengthy copyright term that goes well beyond the international minimum standards. While the international standard included in multilateral agreements such as the Berne Convention or the TRIPS Agreement, is life of the author plus fifty years,⁹ the TPP mandates a term of life plus seventy years.¹⁰ While this is the current term of protection in the United States, there is no evidence basis to support such a term.

Measures implementing subparagraph (a)(i) may be subject to exceptions and limitations with respect to each activity set forth in subparagraph (d). (ii) Measures implementing subparagraph (a)(ii), as they apply to effective technological measures that control access to a work, performance, or phonogram, may be subject to exceptions and limitations with respect to activities set forth in subparagraph (d)(i), (ii), (iii), (iv), and (vi). (iii) Measures implementing subparagraph (a)(ii), as they apply to effective technological measures that protect any copyright or any rights related to copyright, may be subject to exceptions and limitations with respect to activities set forth in subparagraph (d)(i) and (vi). (f) Effective technological measure means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright or any rights related to copyright.”)

9. TRIPS Agreement, art. 12, <https://perma.cc/FZ2D-NWHT> (“Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.”).

10. Trans-Pacific Partnership Agreement, art. 18.63, <https://perma.cc/NA68-FRGE> (“Each Party shall provide that in cases in which the term of protection of a work, performance or phonogram is to be calculated: (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; 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 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.”) [hereinafter “TPP”].

Longer copyright terms shrink the public domain, limiting reliance on raw materials and therefore reducing the creation of new and derivative works. Longer copyright terms potentially lead to the loss of works and contribute to the orphan works problem, where it is difficult—if not impossible—to find the rights holder. Where the copyright term far exceeds the life of the author, it can be difficult to ascertain who holds the rights for the remaining seventy years of protection as such rights may pass to heirs or be transferred to other persons or corporations, some of which may no longer exist. Ultimately, excessive copyright terms result in an increased cost for access to knowledge.¹¹

In looking at the evidence basis, the independent Hargreaves Report commissioned by the United Kingdom found that the “economic evidence is clear that the likely deadweight loss to the economy exceeds any additional incentivizing effect which might result from extension of copyright term . . . the UK Government’s assessment found it to be economically detrimental. An international study found term extension to have no impact on output.”¹²

Similarly, the Australian Productivity Commission reported that “[p]roviding financial incentives so far into the future has little influence on today’s decision to produce.”¹³ In its draft report, the Commission noted the difficulty in identifying the optimal term, concluding that it was somewhere between fifteen and twenty-five years after creation.¹⁴ In assessing its obligations under free trade agreements, the Commission noted that there is no unilateral ability to alter copyright terms, despite evidence that copyright term extension is not grounded in economic evidence.¹⁵ The Commission concluded, “[t]rade agreements are the primary detriment of Australia’s IP arrangements. These agreements substantially constrain domestic IP policy flexibility.” Australia estimated that its obligations to extend term under the Australia – United States Free Trade Agreement would cost AU\$88 million per year.¹⁶ New Zealand similarly estimated that complying with its term extension obligation under the TPP would cost NZ\$55 million per year.¹⁷

11. See, e.g., Moral Rights, Termination Rights, Resale Royalty and Copyright Term: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary (July 15, 2014) (statement of The Liberty Copyright Alliance), <http://www.librarycopyrightalliance.org/storage/documents/statement-house-copyright-term-14jul2014.pdf>.

12. Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), <https://perma.cc/U68T-NC28>.

13. Austl. Prod. Comm’n, *INTELLECTUAL PROPERTY ARRANGEMENTS: PRODUCTIVITY COMMISSION INQUIRY REPORT* (2016), <https://perma.cc/LR9L-37TQ>.

14. Austl. Gov’t Prod. Comm’n, *INTELLECTUAL PROPERTY ARRANGEMENTS: PRODUCTIVITY COMMISSION DRAFT REPORT* (2016), “Draft Finding 4.2” at 29, 117, <https://perma.cc/9REN-F423>.

15. *Id.* at 117.

16. Austl. Gov’t Prod. Comm’n, *INTELLECTUAL PROPERTY ARRANGEMENTS: PRODUCTIVITY COMMISSION INQUIRY REPORT* 78 (2016), at 129, <https://perma.cc/LR9L-37TQ>.

17. N.Z. Foreign Affairs and Trade, *TRANS-PACIFIC PARTNERSHIP: OVERVIEW* (2015) at 4, https://tpp.mfat.govt.nz/assets/docs/TPP_factsheet_Overview-v15.pdf (“Extending copyright from 50 to 70 years would delay when works enter the public domain, with a cost to consumers and businesses that increases gradually over 20 years and averages around NZ\$55 million a year over the very long term.”).

Despite the growing concerns that current copyright terms are excessive, the United States has continued to push for these longer terms in trade agreements like the TPP. In an era where the creation of new works happens at an unprecedented rate, with the growth of social media, blogs and platforms like YouTube for user-generated content, policymakers should carefully reconsider the appropriate length for copyright term. However, by pushing for longer copyright terms in the TPP and other free trade agreements, the United States has effectively locked in a term of life plus seventy years and would be unable to unilaterally change these terms without violating its obligations under free trade agreements that have already entered into force. Because free trade agreements are enforceable through investor-state dispute settlement processes, where an individual rights holder can sue a country for violations of the trade agreement, it is highly unlikely that the United States would be willing to revisit copyright terms without renegotiating all of its agreements.

In a leaked version of the TPP negotiating text from October 2014, the text revealed that parties had agreed to text banning formalities.¹⁸ However, this language was potentially problematic for countries wanting to require formalities as a prerequisite for protections beyond minimum international standards. The former Register of Copyrights, Maria Pallante, had proposed a reintroduction of formalities during the last twenty years of copyright protection in the United States, but this would have violated the TPP if the ban on formalities survived to the final text.¹⁹ Despite the fact that this text was unbracketed in the leaked version, thereby signaling agreement, the ban on formalities was absent from the final TPP text. Whether the leaked text and subsequent criticisms of this language resulted in the removal of the provision is not known, but the controversy highlights the dangers of locking in specific language on copyright. With detailed and comprehensive provisions on intellectual property, copyright laws would essentially be frozen in time and difficult to adapt to new evidence, wisdom, or changing circumstances.

Similarly, language on technological protection measures in past United States free trade agreements reveals overly prescriptive language that could hamper Congress' ability to adapt to new technological advances. In past bilateral free trade agreements, such as the Korea-U.S. Trade Agreement, the final language on anti-circumvention of technological protection measures was clearly modeled on the Section 1201 of the United States' Digital Millennium Copyright Act ("DMCA").²⁰ The language included a closed-list set of exceptions to the anti-circumvention provisions based on those allowed under current United States law, despite the fact that many of those exceptions are extremely narrowly drawn—thereby limiting their usefulness—and outdated. Additional exceptions may be added, but are subject to rulemaking processes that must be revisited every three or four years.²¹ In other

18. Krista Cox, *New WikiLeaks of the Trans-Pacific Partnership Agreement Intellectual Property Chapter—Analysis of Copyright Provisions*, ARL POLICY NOTES (Oct. 16, 2014), <http://policynotes.arl.org/?p=15>.

19. Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 337 (2013).

20. *Compare* Korea-U.S. Free Trade Agreement (KORUS), *supra* note 8, with Digital Millennium Copyright Act of 1998, 17 U.S.C. § 1201.

21. Digital Millennium Copyright Act of 1998, 17 U.S.C. § 1201.

words, the anti-circumvention provisions may be read as prohibiting the creation of new permanent exemptions.

The process by which new exemptions are granted under the United States process has been criticized as inefficient and time-consuming.²² As a result of the controversies over the process and system, Congress has considered bills to streamline the process,²³ to create new permanent exemptions—such as for cell phone unlocking—or to permit the circumvention of technological protection measures for lawful purposes,²⁴ such as where fair use would apply. Yet new permanent exemptions, or a broad allowance of circumvention for lawful purposes, would likely violate current United States trade obligations in its bilateral agreements, although a section-by-section summary of one bill noted:

Several international trade agreements to which the U.S. is a party mirror (or are more narrow than) existing U.S. law. Some of these trade agreements contain identical or similar language to 17 U.S.C. § 1201, which The Unlocking Technology Act would change. *See* Article 18.4(7)(a) of the Korea-U.S. Free Trade Agreement. However, Congress is not barred from enacting legislation that differs from free trade agreements.²⁵

While Congress may not itself be barred from enacting such legislation, such changes would subject the United States to lawsuits for violation of its trade obligations. If the Unlocking Technology Act or a similar bill were to pass Congress, it would require renegotiation of these trade agreements or open the United States up to potentially enormous liability under the investor-state dispute settlement process. Inclusion of such rigid laws in our trade agreements clearly hampers Congress' ability to adapt to a new era of digital technology.

By contrast, the TPP recognized the need for greater flexibility with respect to provisions affecting the digital age. Although according to leaked text the United States was once again proposing language based on the DMCA—a closed list of exceptions plus a three-year rulemaking process²⁶—this language was not agreed to in the final text. While the DMCA was restrictive when it was adopted in 1998, it looks even more outdated in light of the changes in technology and a world in which everyone has a cell phone and embedded software exists in everything from printers to tractors to coffee machines. The wisdom of including highly prescriptive rules on the digital environment that were written in 1998 seems questionable. Ultimately, the final text of the TPP revealed that the negotiating parties rejected this highly

22. *See, e.g.*, Library Copyright Alliance, BEFORE THE UNITED STATES COPYRIGHT OFFICE: COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE ON SECTION 1201 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT (Mar. 3, 2016), <https://perma.cc/L95R-AJFW>.

23. Breaking Down Barriers to Innovation Act of 2015, S. 990, H.R. 1883, 114th Cong. (1st Sess. 2015).

24. Unlocking Technology Act of 2015, H.R. 1587, 114th Cong. (1st Sess. 2015).

25. Rep. Zoe Lofgren, THE UNLOCKING TECHNOLOGY ACT OF 2015: SECTION-BY-SECTION SUMMARY (Mar. 23, 2015), <https://perma.cc/DG3X-ZXMC>.

26. For leaked text of the proposed language, *see* Draft Trans-Pacific Partnership Agreement, Intellectual Property Rights Chapter, Feb. 10, 2011, <https://perma.cc/93YY-SWSW>, amended by Trans-Pacific Partnership Agreement, ch. 18, Feb. 4, 2016.

prescriptive model and instead agreed to flexible language that would accommodate the United States' system but also allow for the creation of permanent exemptions. The final text removed the closed list of limitations and exceptions as well as the rulemaking process, and instead allows parties to provide for limitations and exceptions and to use the legislative, regulatory or administrative processes to create exceptions.²⁷ The final language would permit the creation of new permanent limitations and exceptions or allow a streamlined rulemaking process. This approach allows countries to try other approaches when it is apparent that the current system is not working efficiently or when current laws do not adapt to the new technologies.²⁸

Ultimately, trade agreements have been used to proliferate more specific copyright provisions that go well beyond what is required by multilateral treaties. Unfortunately, these specific provisions effectively lock in current copyright systems and make it very difficult for parties to these trade agreements to experiment with their copyright laws and find ways to improve the copyright system. The rigidity created by including these provisions in trade agreements hampers changes that are necessary as a result of changes in the digital environment. If intellectual property provisions are to be included in trade agreements at all, countries should take care to ensure greater flexibility in the final text of the agreements and to preserve the ability to progress in light of new technology.

27. TPP, art. 18.68.4, Feb. 4, 2016:

4. 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; (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 beneficiaries⁹³ and does not authorise the making available of devices, products, components, or services beyond those intended beneficiaries; 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.

28. Similarly, the final text of the TPP includes language on limitations and exceptions, requiring parties to seek to achieve a balance. However, the final TPP text does not mandate the exact parameters of these exceptions and provides considerable flexibility for countries to determine how to implement this provision.