



A Strong Fair Use Provision Could Help Balance the TPP's Copyright Rules

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September 30, 2015

Negotiators from the 12 countries of the nearly completed Trans-Pacific Partnership are meeting this week in Atlanta to find agreement on remaining contentious issues. The meeting offers the United States one more opportunity to correct its past mistakes by ensuring the mandatory inclusion of fair use exceptions to copyright protection in the TPP's intellectual property chapter. Doing so would bring the TPP's copyright rules more in line with U.S. law and improve the TPP's core mission of liberalizing trade in a 21st Century economy.

The United States has long insisted on minimum standards for IP protection in trade agreements. Proponents of this policy tout the importance of IP-related industries to U.S. economic growth and the problems they face ensuring the protection of IP rights in foreign markets. The goal, they claim, is to raise foreign IP protections to the same level as the United States.

But critics rightly point out that U.S. trade agreements fail to capture the balance of creator and user interests imbedded in U.S. IP law. Trade agreements have been a one-way street that set a minimum level of protection. Limitations on creators' rights—like fair use—are an important part of U.S. law but don't get included in the agreements alongside things like longer monopoly terms and stricter enforcement.

What this means is that the United States is not actually exporting U.S. copyright law. It is instead merely pushing regulations that look like U.S. copyright law for the benefit of movie studios and record labels. IP rules in trade agreements reflect not what the law really is but what certain industries want it to be.

The result can be trade rules that directly conflict with U.S. law. In 2013 the U.S. Supreme Court ruled that federal copyright law doesn't prohibit the resale in the United States of foreign editions of copyrighted books lawfully purchased abroad. Technically, that ruling places the United States in violation of article 4.11 of the U.S.–Jordan Free Trade Agreement, because U.S. negotiators were wrong about what U.S. law actually requires. Many parts of U.S. law are unclear or in flux, and trade negotiators are not taking that into account.

Imposing minimum requirements for protection through trade agreements also restricts the ability of Congress to reform U.S. copyright law. Copyright reform advocates who believe that current U.S. law needs even more balance in favor user rights worry that trade agreements like the TPP will impede their efforts.

For example, the U.S. Copyright Office has proposed reforms to deal with the growing problem of “orphan works”—works that are protected by copyright but can’t be published because no one knows who owns the copyright. The proposed reforms would limit the damages these phantom copyright owners can claim from infringement after such works are published. That proposal is potentially barred by draft language in the TPP requiring the availability of full damages in every case.

Recently, a group of copyright reform advocates wrote a letter to the U.S. Trade Representative expressing concern over the TPP’s rules on copyright duration, circumvention of digital rights management (DRM) technology, and criminal penalties for infringement. By and large, these groups do not have an anti-globalization or protectionist agenda. They are nevertheless adamantly opposed to the TPP because U.S. trade negotiators are pushing IP policy they disagree with.

Trade agreements really aren’t a good vehicle for setting international IP law. What trade agreements do well is overcome the political barriers to liberalizing trade. They do this by pitting industries that export against rent-seeking protectionists that want to keep markets closed. As long as some trade barriers are lowered, the outcome is likely better than the status quo.

As the lack of balance in copyright rules demonstrates, this model doesn’t make sense for setting IP policy. Pushing the interests of copyright owners by setting strong copyright laws abroad doesn’t benefit foreign consumers the way lower tariffs would. And it disrupts the existing balance in domestic law because those rules apply here too. More cooperative forums like the World Intellectual Property Organization are a better place to debate copyright policy. They have a more open and participatory approach where IP rules don’t get caught up in economic nationalism and industrial policy.

But if policymakers and industry groups really want to use trade agreements to export U.S. copyright law, then they should welcome strong rules on fair use in the TPP. They should also be open to setting maximum levels of protection on copyright duration so that foreign laws don’t unjustly keep works out of the public domain. Balances like fair use and limited duration are essential to making copyright law work, and adding those balances to trade rules would greatly improve the legitimacy of the U.S. agenda.

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