

OPTIONS FOR INCORPORATION OF LIMITATIONS AND EXCEPTIONS IN THE TRANSPACIFIC PARTNERSHIP AGREEMENT

A balanced copyright regime is essential to promote the public interest.

A copyright regime must foster creativity, promote innovation, protect citizens' ability to access information on fair terms, and protect citizens' fundamental freedoms, such as the freedom of expression. To achieve these goals the system must provide not only effective protections for copyright owners, but also robust limitations and exceptions to exclusive rights. Such limitations and exceptions would benefit both artists and users. Many artists rely on limitations and exceptions in the process of creation. For example, documentary filmmakers rely on limits to copyright to use existing material to create their documentaries. Innovators, such as the consumer electronics companies, rely on copyright limitations and exceptions to make and market their products. Many of these products, such as MP3 players, DVRs, and sling-boxes facilitate legitimate and valuable uses of copyrighted works, and rely on exceptions such as fair use or private copying exceptions. Information consumers ranging from those who read material for information or pleasure to students who engage in a course of study rely on copyright limitations and exceptions to gain access to works on fair terms. For instance, students rely on limitations and exceptions that permit them and their teachers to make copies of excerpts from various publications. Without this ability, the cost of educational material would be extremely high, particularly in developing countries.

Many of these limitations and exceptions are present in copyright laws of the TPP countries. Many spell out, in great detail, the scope of these limitations and exceptions. Many arguments can be made to expand these limitations and exceptions to suit the emerging needs of digital consumers. Such arguments are certainly made in the US. The TPP countries would benefit from the ability to amend and extend these limitations to accommodate changing technologies.

The question before the countries negotiating the TPP is whether the TPP would allow these future changes. Increases in the scope and strength of exclusive rights might not leave sufficient room for amendments to these limitations and exceptions or creation of new ones. The mechanism to preserve this policy space would be to incorporate certain limitations and exceptions within the TPP and expressly reserve room for newer ones.

This presentation provides some options that would preserve the ability of the TPP countries to craft limitations and exceptions within their countries.

Robust limitations and exceptions rely not merely on explicit exceptions of exclusive rights but also on provisions that limit the scope of copyright protection.

Limitations and exceptions relate not only to exceptions to exclusive rights but also limits to scope of copyright protection. Examples of limits to the scope of copyright protection include: 1) provisions that prevent copyright protection from extending to mere ideas as opposed to the expression of those ideas (TRIPS Art. 9(2)); 2) provisions that prevent copyright protection from extending to facts (TRIPS Art. 10(2) preventing the copyright in compilations of data from extending to the data itself); and 3) provisions that limit the

scope of exclusive rights, for example, provisions that limit the scope of the performance right to public performances and carve out private performances as an unprotected area.

If, as apparent from leaked documents, the TPP would incorporate the Berne Convention for Protection of Literary and Artistic Works and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), then some of these limits to the scope of copyright would, arguably, be part of the TPP. However, leaked documents also reveal that in some important respects the TPP would expand the scope of exclusive rights by reversing some of these limiting principles. For instance, Article 4 (2) of the US proposal that leaked on February 2011 would limit the ability of countries to apply exhaustion rules, also known as the first sale doctrine in the US. This provision is in stark contrast to Article 6 of the TRIPS agreement which does not address exhaustion, thereby preserving countries freedom to enact rules on exhaustion. Such expansion in scope of copyright protection is likely to harm consumers by preventing operation of a vibrant secondary market for various copyright protected goods. These goods may range from text-books, movies, and music to consumer articles that have a copyright label affixed to them.

The nature and strength of limitations and exceptions has to relate to the scope of exclusive rights and mechanisms used to protect these rights.

When the scope and strength of exclusive rights increases, newer limitations and exceptions should be crafted to counteract adverse impacts on users. For example, if the TPP were to require that the scope of the reproduction right extend to acts of temporary reproduction, then rights holders would have the ability to control many activities that were previously not subject to their control. Thus, while in the absence of such a right, transmission of works by internet intermediaries might not have implicated exclusive rights, the introduction of a right in temporary copies would expose intermediaries to increased liability. Similarly, educational institutions transmitting works in the course of distance education would be exposed to demands for higher license fees. As the laws of many TPP countries have recognized, often temporary copies do not have independent economic value. However, these new rights allow rights holders to become gate-keepers to socially valuable uses and services. Therefore, they must be exempted from the scope of exclusive rights. Models for such a provision are available in the laws of several countries and some US FTAs. The language below is excerpted from the US Chile FTA:

For works, other than computer software, and other subject-matter, [] exceptions and limitations may include temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable (a) a lawful transmission in a network between third parties by an intermediary; or (b) a lawful use of a work or other subject-matter to be made; and which have no independent economic significance.

US-Chile Free Trade Agreement, footnote 17.

Similarly, if the TPP were to contain provisions that prevented circumvention of technological protection measures (TPMs) even for lawful purposes, limits to operation of TPM provisions would be indispensable. Any robust limitations and exceptions scheme would have to permit circumvention for lawful purposes. This model is followed in laws of some TPP countries, for example in the laws of New Zealand. The TPP should not call for changes to such laws. Rather it must follow their model and tie the ban on TPM circumvention to acts of infringement.

The three-step test must not be the cornerstone of the approach to limitations and exceptions

While the three-step test has been portrayed as the most prominent provision relating to limitations and exceptions in many agreements, the test is not a codification of any particular limitation or exception. Rather it is a mechanism to measure whether limitations and exceptions of countries comply with a particular agreement. The test is controversial and scholars have pointed out that its focus on preserving rights holders' interest has hindered adoption of public interest limitations and exceptions.¹ However, the test also lends itself to interpretations that facilitate beneficial limitations and exception as demonstrated by the Max Planck declaration.² Yet because of the controversy and debate surrounding the test, it does not provide the clarity necessary to promote robust limitations and exceptions. Therefore, the three-step test should not be the cornerstone of any provision on limitations and exceptions.

Rather, a chapter on limitations and exceptions should spell out particular limitations and exceptions. Such an approach would provide greater certainty that many socially beneficial limitations and exceptions will be compatible with the TPP, thereby encouraging states to either adopt them or preserve room to modify existing limitations and exceptions. The European experience demonstrates the utility of such an approach. European Directives codify a catalog of exceptions and this has given member states the confidence to adopt many of these exceptions.³

The Berne Convention provides several examples of codification of specific limitations and exceptions. The convention contains a mandatory exclusion from the scope of copyright (Article 2(8) exempts news of the day from protection) and a mandatory exception for quotations. (Article 10(2)). In addition, the Berne convention contains a number of exceptions. These include exceptions for teaching (Article 10(2)), political speeches (Article 2bis (1)), and publication by press (Articles 2bis(2) and 10bis(1)). These exceptions provide great guidance to countries and are also not subject to the three-step test. Subjecting them to that test would cast doubt on the scope of these exceptions and certainly narrow their scope. The TPP must ensure that it does not jeopardize the ability of countries to rely on these provisions in crafting their limitations and exceptions. It must not subject them to the three-step test.

¹ P. Bernt Hugenholtz and Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, p.17, (March 6, 2008).

² Max Planck institute, *A Balanced Interpretation of the "Three-Step Test" in Copyright Law*, available at: http://www.ip.mpg.de/files/pdf2/declaration_three_step_test_final_english1.pdf.

³ Hugenholtz, *supra* note 1, at 27.

Finally, many limitations and exceptions in the TPP must be mandatory obligations. The benefits of such an approach are several: 1) mandatory limitations and exceptions would permit effective implementation and reduce pressures to only implement exclusive rights while ignoring limitations and exceptions. The recent experience with copyright reform in Columbia illustrates the dangers of not following this approach. The Columbian legislature had recently proposed to adopt copyright reforms in order to update its laws to comply with the US-Columbia FTA. In its haste to implement the FTA, the Columbian legislature only provided for protections to proprietary rights and failed to incorporate balancing limitations and exceptions. Second, mandatory limitations and exceptions would prevent a patchwork of disharmonious limitations and exceptions that would hamper free movement of goods and services. For example, digital music services could be offered easily across national borders when limitations and exceptions are harmonious. Accessible works for the disabled could be also distributed across national borders when limitations and exceptions are harmonized.

A suggested structure for provisions on limitations and exceptions

This section provides a few options for limitations and exceptions that should be part of the TPP. A majority of the provisions suggested here are drawn from various existing international instruments.

1. Statements of Purpose

The TPP's provisions on limitations and exceptions must contain statements of purpose that clarify the objectives that limitations and exceptions must seek to achieve. Such statements would frame the IP chapter and signal to countries that the purpose of the agreement is not merely to protect proprietary interests but also to seek broader social benefits. They would also aid in the interpretation of the agreement. Articles 7 and 8 of the TRIPS agreement and Agreed statement 10 of the WIPO Copyright Treaty provide great examples. These provisions are excerpted below.

Article 7 of the TRIPS Agreement:

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

Article 8 of the TRIPS Agreement:

1. Members may, in formulating or amending their 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 Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, 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 affect the international transfer of technology.

Agreed Statement 10 of the WIPO Copyright Treaty:

Agreed statement concerning Article 10: It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment

2. *Preserve fair use and fair dealing provisions*

The TPP's provisions must explicitly recognize the importance of fair use and fair dealing provisions that are part of the laws of many TPP countries. These provisions offer robust user protections and, particularly in the case of the US, have facilitated tremendous innovation, and cultural participation. Furthermore, these provisions by their terms incorporate sufficient protections for the interests of copyright owners and users. They must not be subjected to further limitations in the TPP, such as subjecting them to the three-step test.

3. *Preserving and promoting competition*

The TPP must also leave countries free to craft rules that would prevent the use of intellectual property for anti-competitive purposes. The Transpacific Strategic Economic Partnership Agreement, also called the P4, contains language to this effect in Article 10.3 of the chapter on Intellectual Property. That language is excerpted below:

Nothing in this Chapter shall prevent a Party from adopting appropriate measures to prevent the abuse of intellectual property rights by right holders or the resort to practices that unreasonably restrain trade or adversely affect the international transfer of technology, provided that such measures are consistent with this Agreement. In particular, nothing in this Chapter shall prevent a Party from adopting measures necessary to prevent anti-competitive practices that may result from the abuse of intellectual property rights.

4. Mandatory provisions on limitations and exceptions

The TPP must contain certain mandatory provisions on limitations and exceptions that would oblige countries to secure various public interest benefits. These limitations and exceptions must aim to promote education, library preservation and lending, and use of works by the disabled. They must also prevent the use of contracts or TPMs from frustrating users' ability to rely on limitations and exceptions.

With respect to promoting education, promoting library preservation and lending, and use of works by the disabled, the following language could be incorporated into the agreement:

Each party shall provide for limitations and exceptions to the rights granted in Articles [mention relevant articles that grant exclusive rights] in order to:

- a. facilitate preservation of works by libraries, museums, and archives and provision of copies of works, performances, and phonograms by libraries to their patrons in digital formats;
- b. promote educational uses of works including by transmission over wired or wireless networks;
- c. promote uses of works by people with disabilities.

With respect to provisions that would prevent the erosion of limitations and exceptions by technological protection measures, the TPP could incorporate Article 11 of the WIPO Copyright Treaty. This article calls for effective measures to prevent circumvention on the one hand, but also permits circumvention for lawful purposes on the other. The language is excerpted below:

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.

National laws of some TPP countries incorporate this approach by tying the act of circumvention to infringement. The TPP must not require changes to these approaches.

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