University of Sydney, Australia

From the SelectedWorks of Kimberlee G Weatherall

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TPP – Section-by-Section Analysis of the Copyright Provisions (August 30 2013 Leaked Text)

Kimberlee G Weatherall, University of Sydney, Australia

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General Comments

1.1 Scope of this analysis

This paper analyses the copyright provisions of the leaked 30 August 2013 text of the TPP IP Chapter from an Australian perspective. It is a companion to an already-published analysis of the enforcement provisions. The goal is to assess the effect of the provisions, their compatibility with other international instruments: including TRIPS, the WCT and WPPT, and an example US FTA (the Australia-US FTA). The review is designed to:

1. To contribute careful analysis to the current international debate on the TPPA IP proposals; and
2. To offer input into the Australian processes considering the TPPA.

The analysis that follows extracts every provision of the leaked, 30 August 2013, IP chapter dealing with copyright: that is, pp49-65. It identifies the extent to which the various proposals are TRIPS-plus, WCT/WPPT-plus and AUSFTA-plus. I have not attempted fully to engage with every single permutation of every country position, but seek to give a broad picture of the amendments and proposed amendments that might matter.

It is a draft for comment (as at 25 November 2013). Feedback is most welcome (kimberlee.weatherall@sydney.edu.au or +61 2 9351 0478). There is undoubtedly much more to say.

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1.2 Summary and commentary

Key parts of the copyright provisions of the TPP have already been highlighted by Sean Flynn, Margot Kaminski, Andre Guadamuz, Angela Daly, and KEI and others. For

* Associate Professor, Sydney Law School, The University of Sydney.
1 available at http://ssrn.com/abstract=2357259
the most part I agree with their analysis. Those commentators have highlighted the following as problematic:

1. The extension of the reproduction right to technical/temporary copies, accompanied by a quite technical and overly-limited draft exception;
2. The extension of copyright terms (which on US proposals would extend beyond TRIPS/Berne and existing US FTA terms);
3. The provision on formalities;
4. The warring proposals on parallel importation including a US proposal to prohibit parallel importation (no similar prohibition exists in any international instrument, including the AUSFTA);
5. The TPM/Anti-circumvention provisions which seek to lock in the US’ inflexible, 16-year-old provisions with their expensive and bureaucratic approach;
6. The extension of criminalisation (dealt with in my paper on the enforcement provisions);
7. The inflexible US proposals on intermediary liability (dealt with in my enforcement paper);
8. The proposal to limit retransmission of program signal via the Internet (internet retransmission) (dealt with in my enforcement paper); and
9. The provisions on injunctions and damages (dealt with in my enforcement paper and discussed more extensively by KEI in their analyses).

There has also been much discussion of the provisions on copyright exceptions. These are discussed in detail below, but I agree with analysis to date that points out that the language which is claimed to extend flexibility may in fact limit the flexibility of countries to introduce exceptions. At present there is no language that affirms or protects the exceptions recently negotiated in the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh, June 27, 2013). Perhaps more importantly there is nothing in this agreement which preserves the flexibility of countries to negotiate further exceptions at an international level: despite the existence of processes to that very end occurring within the World Intellectual Property Organisation.

The provision on formalities is striking. At a time when there is growing international recognition that formalities such as registration systems would assist all parties in copyright to make copyright work in the digital environment it is remarkable indeed that the parties would contemplate locking in a prohibition on formalities for a full extended copyright term.

In my enforcement paper, I noted that the provisions of the TPP draft are written like legislation, not treaty, suggesting a complete lack of good faith and trust on the part of the negotiating countries. I pointed out too that the tendency to tweak language of provisions in each successive international instrument dealing with IP is causing treaty language on IP generally (and copyright in particular) to ossify, multiply, and fragment in ways that are making it exceedingly difficult to determine the full scope of a country’s international obligations. This is harmful to everyone: to countries seeking to comply with international law; to the hapless bureaucrats who later have to try to work out what they can do in terms of reform; to IP owners and to users who will waste untold resources arguing over finer points of differential language in every domestic and international reform process to come.

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7 See below part 10 page 38ff.
8 See below part 6 page 13ff.
This tendency is perhaps most marked in relation to copyright, where detailed multilateral instruments already exist:

- The Berne Convention (on literary, artistic, musical, dramatic works and films)
- The Rome Convention (on performances, broadcasts, and sound recordings)
- The TRIPS Agreement (which incorporates Berne and adds certain elements)
- The WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty (WIPO Internet Treaties) (which update copyright under Berne and Rome for the digital environment)
- The Beijing Treaty on Audiovisual Performances (which updates the rights of performers as recorded in audiovisual form);
- Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh, June 27, 2013).

In light of the detailed obligations in all of these agreements, there is (as KEI notes) little or no reason to include any provisions on copyright in the TPP. Many of the complications in the TPP language arise from attempts to preserve flexibilities and limits incorporated into those treaties. The best way to do so is not to write complicated preservation language into the TPP. It is not to try to override those agreements in the first place by covering the same field. It is difficult to assess the effect of the TPP without seeing a final text but it is not at all clear that the parties have so far successfully preserved exceptions under those agreements, or limitations like the right to apply national treatment regarding copyright in sound recordings.

Aside from other problems highlighted by other commentators, any country that is not presently a party to the WPPT needs to consider the text of the TPP and its impact on performances and sound recordings particularly carefully, since the TPP (whether or not combined with signing the WPPT) could create massive term and right extensions for performers compared to existing obligations in Rome/TRIPS. When Australia signed the AUSFTA Australia introduced an amazingly complex set of provisions for the protection of performers including breathtakingly complex provisions on exceptions and transitional provisions. Other countries may wish to avoid a similar fate. Equally however signing the TPP without signing the WPPT and making reservations could ironically, on current drafts, confine a country's ability to avoid applying national treatment on some rights in sound recordings.

### 1.3 The implications for Australia

What about the position of Australia, and what would the text’s impact here be? Angela Daly has already produced an analysis, the key points of which I agree with. As Angela Daly has noted,

> The positions of the Australian negotiators have been mixed. In relation to some provisions they are acting in accordance with domestic developments, including the recommendations of the IT pricing report on parallel importation and the abusive

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assertion of IP rights; on other issues, such as the extension of the term of copyright and the omission of "fair use," their position is not so strong.\textsuperscript{10}

The first point to note is that the \textbf{approach of the Australian negotiators remains utterly inconsistent with all advice it has received} from the Australian Parliament following the conclusion of the Australia-US Free Trade Agreement and the Anti-Counterfeiting Trade Agreement, as well as independent advice received from the Productivity Commission review into bilateral trade agreements:

- Members of the Australian Parliamentary committees that considered the Australia-US Free Trade Agreement were very concerned about the provisions of the IP chapter of that agreement, recommending a series of measures designed to lessen the impact of the provisions.\textsuperscript{11}
- The House of Representatives Standing Committee on Legal and Constitutional Affairs which conducted an inquiry into anti-circumvention exceptions criticised the text of the AUSFTA, noting that on anti-circumvention exceptions it contained a 'lamentable and inexcusable flaw'.\textsuperscript{12} \textbf{The Australian negotiators are proposing a text containing that same flaw.}
- The Joint Standing Committee on Treaties which considered the Anti-Counterfeiting Trade Agreement was also concerned about the impact of that agreement and, very unusually for that committee, did not recommend ratification of the agreement.\textsuperscript{13}
- The Productivity Commission specifically stated that it was: \textit{not convinced... that the approach adopted by Australia in relation to IP in trade agreements has always been in the best interests of either Australia or (most of) its trading partners.}\textsuperscript{14}


\textsuperscript{14} Australian Productivity Commission, Bilateral and Regional Trade Agreements (Final Report), November 2010, available at http://www.pc.gov.au/projects/study/trade-agreements, page 283. While the Productivity Commission did say that seeking IP provisions in plurilateral agreements was better than in bilateral agreements, the Productivity Commission also said that "any IP provisions that are proposed for a particular agreement should only be included after an economic assessment of the impacts, including on consumers, in Australia and partner countries. To safeguard against the prospect that acceptance of 'negative sum game' proposals, the assessment would need to find that implementing the provisions would likely generate overall net benefits
Despite all of these concerns, DFAT continues to support and propose detailed, prescriptive, and unbalanced text for the AUSFTA. Australia continues to support detailed and prescriptive text even in circumstances where, on my analysis, more open and flexible text proposed by other countries is entirely consistent with Australian law and Australia’s international obligations. I am at a loss to understand what possible justification DFAT has for continuing to propagate an almost universally condemned approach – in the face of opposition from other countries and in circumstances where better options are on the table.

Australia is currently undergoing a large number of reviews which relate to copyright in some way, or and has recently completed other reviews where the recommendations remain potentially on the table. These include at least:

1. The Australian Law Reform Commission review of copyright and the digital economy, focusing on exceptions;
2. The House of Representatives Standing Committee on Infrastructure and Communications Inquiry into IT pricing, which considered legal provisions which contribute to the ability of companies to charge higher prices on Australian consumers and Australian businesses than are charged in markets overseas;
3. The Attorney-General’s Department internal review into exceptions to anti-circumvention laws;
4. The Attorney-General’s Department internal review into the scope of the internet safe harbours in Part V Div 2AA of the Copyright Act 1968 (Cth); and
5. The Convergence Review into media regulation in Australia (which touches on critical copyright issues such as retransmission of television broadcasts).

There are a range of provisions that could considerably complicate any attempt to implement proposals of the ALRC. Although we do not yet have the final text of the ALRC Report available, if we assume that the ALRC may recommend fair use with the possible ‘back-up’ option of a series of more flexible fair dealing exceptions (as in the discussion paper), then

- The general text on exceptions, which affirms the three step test and only weakly encourages the implementation of balancing provisions, could complicate the implementation of ALRC provisions by creating yet another dispute settlement forum in which a dispute could be initiated by the US or some other country;
- The proposals for an exception for technical copies do not appear to be consistent with the approach being contemplated by the ALRC;
- The proposals on internet retransmission could prevent approaches contemplated by the ALRC;
- The proposals on formalities complicate various international proposals for addressing the problem of ‘orphan works’;
- The proposals on anti-circumvention law may not be consistent with the Marrakesh VIP Treaty.

The most obviously constricting provisions on future copyright reform flexibility – that seem inconsistent with international and domestic law reform discussions – are:

- The contemplated exception on technical copies, which could prevent proposals to fix the current proxy caching and other technical copies provisions.
- The internet retransmission provision;

for members of the agreement: in relation to the copyright provisions, this is clearly not the case.
• The anti-circumvention provisions with their limits on exceptions;
• The formalities provisions;
• The parallel importation provisions.

Finally, intellectual property law is of course not the be all and end all. We have to avoid the tendency to think that IP chapters – however bad – will be some kind of deal-breaker in broader trade negotiations.

On the other hand, it seems to me that any IP chapter of the kind being contemplated here is going to be one factor – not the only one, but potentially an important one – that could defeat Australia’s goals for the TPP. Insofar as the TPP was meant to be a framework for a broader regional agreement, provisions of this IP chapter could pose considerable barriers for countries whose law is simply inconsistent with its provisions: for China, which has very different criminal laws on IP; for India whose patent system is quite different too. Without major regional powers, the TPP could end up a pale imitation of what it was meant to be and what it could be. And this would be the worst possible outcome: to end up bound to an incredibly complex, incredibly specific agreement that in the end does little for the overall goal of free trade in the Asia-Pacific Region.
2 Exclusive Rights

2.1 Reproduction

Article QQ.G.1: Copyright and Related Rights/Right of Reproduction

Each Party shall provide that authors, performers, and producers of phonograms have the right to authorize or prohibit all reproductions of their works, performances, and phonograms, in any manner or form, including temporary storage in electronic form. [VN propose: it shall be a matter for national legislation to determine exceptions and limitations under which the right may be exercised].

128 [US/AU/PE/CA/CL/MX/SG/MY/NZ/VN propose: With respect to copyright and related rights in this Chapter, a “performance” means a performance fixed in a phonogram unless otherwise specified.]

129 [VN/BN/CA propose: The reproduction right, as set out in Article 9 of the Berne Convention and articles 7 and 11 of the WPPT, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works, performances and phonograms] in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction with the meaning of the articles referenced in this footnote [CA propose: the articles referenced in this footnote].

130 [CL/NZ/MY/BN/JP propose: It is consistent with this Agreement to provide exceptions and limitations for 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 lawful transmission in a network between third parties by an intermediary; or (b) a lawful use of a work; and which have no independent economic significance.] [Negotiators Note: Discussions indicated no substantive objection to the concept, however, Parties continue to consider whether the footnote is required, where it might best be placed, and how it should be drafted.]

131 [CA/JP propose: It is a matter for each Party's law to determine when a given act constitutes a temporary reproduction for the purposes of copyright and related rights.]

Overall: this is a broad, problematic provision, that seeks to make copyright in the digital context into an unqualified 'access right' that enables copyright owners to take action against every user and every possible intermediary that facilitates or provides technology to users that interacts with any kind of copyright material (which means any text, any image, any sound). For example, in the average internet communication, multiple copies of material will be made: on the originating server; on unrelated servers along the way; on the local ISP’s computer; on the user’s computer. In theory, every one of those copies could, on this text, give rise to an infringement claim: in fact, too, this is far from being theoretical, as the question whether or not temporary copies made as a result of internet browsing were infringement has been litigated in the UK. If enforced

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15 See Public Relations Consultants Association Limited (Appellant) v The Newspaper Licensing Agency Limited and others (Respondents) [2013] UKSC 18. The UK Supreme Court held that the copies were non-infringing under an exception introduced under article 5(1) of the EU’s Copyright and Information Society Directive. For other cases litigating the exception, see Football Association Premier League Ltd v QC Leisure and Karen Murphy v Media Protection Services Ltd [2012] 1 CMLR 29; Infopaq International A/S v. Danske Dagblades Forening (“Infopaq I”) [2010] F.S.R. 26; Infopaq International A/S v.
right across the internet, this clause would bring the internet to a grinding halt. It is also not in fact consistent with US law: the US’ own courts have not uniformly treated temporary copies as covered by the reproduction right,\textsuperscript{16} as well as applying exceptions (like fair use). While most jurisdictions have extended the reproduction right to the digital environment, most jurisdictions have also found ways to exclude at least some temporary copies from the reproduction right. Where jurisdictions recognise copyright in temporary reproductions they have created exceptions.\textsuperscript{17}

The footnotes show a series of proposal to place limits on the extent of the right. It is critical to limit this right. You might think that given a general right to introduce copyright exceptions subject to the three step test, there would be no need to refer specifically to countries’ rights to impose limits here (and indeed the negotiators’ note to footnote 130 suggests that some parties are questioning whether the footnote is required). \textbf{You would be wrong.} Australia had a significant fight with the US when it implemented the AUSFTA, with the US successfully demanding further limits on Australia’s exceptions to the copyright owner’s right to control temporary reproductions.\textsuperscript{18} Those limits have rendered the exceptions incredibly complex and largely useless. Not only academics and civil society, but industry stakeholders have been critical,\textsuperscript{19} and the Australian Law Reform Commission, in its recent Discussion Paper, suggested that issues arising for such exceptions should be dealt with via a fair use exception.\textsuperscript{20}

One potential problem however is exactly how to indicate that the right can be limited. The more specific any stated exceptions are, the more likely this is to give rise to an implication that \textit{no other} exceptions are allowed, or that any other exceptions must be similarly limited. Thus although footnote 130 is probably better text for an exception than some countries might presently have (including Australia), it is far too prescriptive for treaty level text and far too prescriptive in an area where exceptions are critical. Note too that footnote 130 is more limited than the EU Information Society Directive exception from which the language is drawn: the EU exception is not limited to lawful transmissions (and thus protects innocent network intermediaries, focusing instead on the ‘real’ infringers – communicator and recipient).\textsuperscript{21}

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\textit{See CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544 (4th Cir. 2004); Cartoon Network, LP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008). Of course, one possible way to read this is to say that regardless of the text of the provision, it remains within the domestic legislature’s discretion to decide what counts as a reproduction, and what ‘temporary’ means: and arguably this is what was done in Cartoon Network and CoStar Group. It is unfortunately not guaranteed that the US, or an international arbitral body, would accept this argument.}

\textit{See eg Copyright Act 1968 (Cth) ss 43A, 43B, 111A, 111B, 116AB, 200AAA; see also the mandatory exception in the EU’s Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, art 5.1.}


\textit{Australian Law Reform Commission, Discussion Paper: Copyright and the Digital Economy (2013), [8.16]-[8.21]; [8.27]-[8.30]; ibid Proposals 8-1 and 8-2.}

\textit{Some countries have exceptions which \textit{are} this limited, including Australia (see eg Copyright Act 1968 (Aust.) s 43A; Copyright Act 1994 (NZ) s 43A.}
It would be **far, far better**, instead of adopting this restrictive US language, to use the internationally agreed, multilateral text provided by the Agreed Statement to the WIPO Copyright Treaty:\textsuperscript{22}

> The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

This could then be coupled with the agreed statement on exceptions:\textsuperscript{23}

> 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.

> It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

The language proposed by VN is also preferable: leaving exceptions to national legislation.

**Australia:** Australian law already has a very broad understanding of the reproduction right as a result of the AUSFTA (art 17.4.1). Copyright owners have the right to reproduce literary, dramatic, musical and artistic works in material form and to make copies of films, sound recordings, and television broadcasts (ss 31, 85-88). Material form is defined to include ‘any form (whether visible or not) of storage of the work ... (whether or not the work ...can be reproduced)’ (s 10). Footnote 128 is important to avoid changes to Australian copyright law: Australia does not presently provide copyright rights to performers except in relation to their performances as captured in sound recordings (ie not in films).

Regarding exceptions, there must be a real concern that any restrictive delimitation of the kinds of exceptions and limitations that can be put on the reproduction right, such as the language found in footnote 130, might prevent implementation of proposals by the ALRC to address problems with Australia’s current exceptions through introduction of a fair use exception. If this, or a similar fair dealing exception to address ‘non-consumptive use’ were introduced as the ALRC mooted, it is not at all clear how that would sit beside a detailed footnote to article QQ.G.1. Australia should be pushing for much more open-textured language enabling parties to tailor the scope of the right in the digital environment to ensure legitimate user activities are protected and that innocent intermediaries do not get caught in copyright infringement actions.\textsuperscript{24}

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\textsuperscript{22} Agreed Statement concerning article 1(4) of the WIPO Copyright Treaty 1996.

\textsuperscript{23} Agreed Statement concerning article 10 of the WIPO Copyright Treaty 1996.

\textsuperscript{24} And no, an innocent infringer defence is not sufficient to address this concern. Our innocent infringer provisions are of uncertain scope and only protect against monetary remedies, not injunctions which might require changes to technology or the shut down of services innocently established.
2.2 Communication to the public

Article QQ.G.2: {Copyright}

Without prejudice to Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii), and 14bis(1) of the Berne Convention, each Party shall provide to authors the exclusive right to authorize or prohibit the communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.\textsuperscript{132}

\textsuperscript{132} It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Chapter or the Berne Convention. It is further understood that nothing in this Article precludes a Party from applying Article 11bis(2) of the Berne Convention.

Untroubling. The right to communicate works to the public by wire or wireless means is a requirement under art 8 of the WIPO Copyright Treaty, art 17.5 of AUSFTA. The text of the footnote comes form the Agreed Statement concerning article 8 of the WIPO Copyright Treaty. For Australia, this is part of Australian law already under ss 10 (definition), 31, 85-88 of the Copyright Act 1968 (Cth).

2.3 Importation and parallel importation

Article QQ.G.3: {Copyright and Related Rights}

[US/AU/PE/NZ/SG/CL/MX propose; VN/MY/BN/JP oppose: Each Party shall provide to authors, [NZ/MX oppose: performers,] and producers of phonograms the right to authorize or prohibit the importation\textsuperscript{133} into that Party’s territory of copies\textsuperscript{134} of the work [PE oppose: [NZ/MX: oppose: performance,] or phonogram] made without authorization, [PE/AU/NZ/CA/SG/CL/MX/JP oppose: or made outside that Party's territory with the authorization of the author, performer, or producer of the phonogram,\textsuperscript{135}]] \textsuperscript{136}

\textsuperscript{133} [NZ propose: For the purpose of this paragraph importation may exclude importation for private or domestic use.]

\textsuperscript{134} [PE/NZ propose: The expressions “copies” in this paragraph refers exclusively to fixed copies that can be put into circulation as tangible copies]. [Negotiators’ Note: US can support the concept subject to final drafting.] [JP propose: A Party may comply with its obligations under this paragraph by legislating in the Party's law that such importation, for the purpose of distribution, is deemed to be infringement.] Negotiator’s Note: With this footnote, Japan can withdraw its opposition in the first line of QQ.G.3.

\textsuperscript{135} [US: With respect to copies of works and phonograms that have been placed on the market by the relevant right holder, the obligations described in Article [QQ.G.3] apply only to books, journals, sheet music, sound recordings, computer programs, and audio and visual works (i.e., categories of products in which the value of the copyrighted material represents substantially all of the value of the product). Notwithstanding the foregoing, each Party may provide the protection described in Article [QQ.G.3] to a broader range of goods.]

\textsuperscript{136} [Negotiator’s Note: The US is considering the relationship between this provision and other proposals regarding the exhaustion of IP rights, as well as other TPP countries’ legal regimes.]
The majority position here is that copyright owners should have a right to prevent the importation of infringing copies (US/AU/PE/NZ/SG/CL/MX) but that the TPPA should not ban parallel importation (PE/AU/NZ/CA/SG/CL/MX/JP). This is consistent with TRIPS, which explicitly leaves the question of parallel importation to individual countries: TRIPS article 6. The US proposes a provision that would prohibit parallel importation (although this does not appear to be consistent with recent US Supreme Court authority\(^\text{25}\)).

Adoption of a ban on parallel importation would be a significant constraint on countries’ copyright policy. It is not at all unusual for right holders to apply different pricing in different markets, and it is not always the case that that differential pricing is used to ensure affordability in less developed countries with lower income levels.\(^\text{26}\) Australia’s Productivity Commission has produced numerous reports in favour of more parallel importation of copyright works, most recently books. As a small but affluent market, Australia has a history of experiencing higher prices for copyright works than markets such as the US and UK. More recently, the House of Representatives Standing Committee on Infrastructure and Communications in its report on the inquiry into IT pricing entitled *At what cost? IT pricing and the Australia tax* expressed concern that Australian consumers and businesses often pay much more for their IT products than their counterparts in comparable economies, noting that in many cases Australians pay 50 to 100 per cent more for the same product.

Further, it is not just about prices for consumers: it can be about competitiveness and discrimination. The Parliamentary inquiry also noted that high IT prices make it harder for businesses to compete internationally and can be a significant barrier to access and participation for disadvantaged Australians (in particular Australians with a disability). The Inquiry recommended that the parallel importation restrictions still found in the *Copyright Act 1968* (Cth) be lifted. It may also be to the disadvantage of local retailers who may find themselves unable to compete with overseas websites selling at lower prices available in alternative markets.

It is to the benefit of all prospective TPP countries to keep open the possibility of allowing parallel importation, whether for all goods or for particular goods. If nothing else, the possibility that a country will allow parallel importation may provide incentives for businesses to reflect global pricing in their local distribution.

Note that any provision addressing import/export should be made subject to the provisions of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh, June 27, 2013).

**Australia:** Australia prohibits importation of copyright works (ss 37, 102) but has exceptions for software (s 44E), electronic books and music (s 44F), and sound recordings (s 112D) where the product is placed on the market overseas with the consent of the copyright owner in the relevant jurisdiction (ie parallel importation /grey market goods). For all other kinds of copyright material, parallel importation is prohibited. Australia is not, however, at present subject to any international obligation to prohibit parallel importation and given the frequency with which policymakers and


independent advisory groups have made recommendations in favour of allowing parallel importation, including most recently the IT Pricing Inquiry recommendation, Australia needs to keep the freedom to make adjustments.

Note however that the Australian prohibition on importation only applies (a) where the importer knew importation would infringe and (b) where the importation is for commercial distribution (sale, hire etc) or for any other purpose to an extent that will affect prejudicially the owner of the copyright. This would suggest that Australian should support the New Zealand proposal to exclude importation for private or domestic use if the text is to be consistent with Australian law.

2.4 Distribution

Article QQ.G.4: {Right of Distribution}

Each Party shall provide to authors, [NZ/MX oppose: performers,] and producers of phonograms the right to authorize or prohibit the making available to the public of the original and copies\(^{137}\) of their works, [NZ/MX oppose: performances,] and phonograms through sale or other transfer of ownership\(^{138}\).

\(^{137}\) The expressions “copies” and “original and copies” subject to the right of distribution in this paragraph refer exclusively to fixed copies that can be put into circulation as tangible objects [US/CA/SG oppose: , i.e., for this purpose, “copies” means physical copies.]

\(^{138}\) [AU/VN/PE/NZ/BN/MY/SG/CA/CL/MX/JP propose: Nothing in this Agreement shall affect a Party’s right to determine the conditions, if any, under which the exhaustion of this right applies after the first sale or other transfer of ownership of the original or a copy of their works, performances, or phonograms with the authorization of [CA/SG propose: the author, performer or producer] [CA/SG oppose: the right holder].] (Negotiator’s Note: VN prefers this to be in the text as opposed to a footnote).

This provision is Berne/TRIPS plus. AUSFTA includes an identically-worded provision (Article 17.4.2), with a qualifying footnote similar to the proposed footnote 138. It is possible that without the qualifying footnote, the provision read literally could impact on second hand sales. The intention and impact of the CA/SG proposal to replace ‘right holder’ with ‘author, performer, or producer’ is unclear. It would seem to mean that an author who did not own copyright (having sold it perhaps) could make a copy of their work available and the copyright owner would not have a right to prevent sale of that copy. This may be the intention, but it would seem a radical alteration to the way copyright works.

Australia: copyright owners have a right to control distribution of (infringing) copies: ss 38, 103, although liability only arises where the person ‘knew, or ought reasonably to have known’ that the article was infringing. Australia also provides a right of first publication.

2.5 Co-existence of rights/no hierarchy

Article QQ.G.5:
Each Party shall provide that in cases where authorization is needed from both the author of a work embodied in a phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required. Likewise, each Party shall provide that in cases where authorization is needed from both the author of a work embodied in a phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the performer or producer does not cease to exist because the authorization of the author is also required.

Untroubling. This general principle in copyright law is embodied in Australian law: s 113. A similarly worded provision exists in the AUSFTA: Article 17.4.3.

3 Duration/Copyright Term

Article QQ.G.6: Copyright Term

[US/AU/PE/SG/CL/MX propose; VN/BN/NZ/MY/CA/JP oppose: Each Party shall provide that, where the term of protection of a work (including a photographic 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 [MX propose: 100] [MX oppose: 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 [US propose; CL oppose: 95] [AU/PE/SG/CL propose: 70] [MX propose: 75] years from the end of the calendar year of the first authorized publication of the work, performance, or phonogram, or

(ii) failing such authorized publication within [US propose; CL oppose: 25] [SG/PE/AU/CL propose: 50] years from the creation of the work, performance, or phonogram, not less than [US propose; CL propose: 120] [AU/PE/SG/CL propose: 70] years from the end of the calendar year of the creation of the work, performance, or phonogram.]

Article QQ.G.7: (Term of Protection for Copyright and Related Rights)

[NZ/BN/MY/VN/CA/JP propose; US/AU/SG/MX oppose: The term of protection of a work, performance or phonogram shall be determined according to each Party’s domestic law and the international agreements to which each Party is a party.]

The NZ/BN/MY/VN/CA/JP proposal should be accepted as granting maximum flexibility. The US proposal for copyright term extension and should be opposed, even by countries that have already extended copyright term.
Lessons can be learned from the Australian experience. Australia extended its terms as a result of the AUSFTA: Article 17.4.4. Both independent analysis commissioned by a Senate Committee from economist Professor Dee at the time the AUSFTA was signed, and more recently the Australian Productivity Commission, have assessed that this extension imposed significant costs on the Australian economy and was against Australia’s interests. Similar analysis has been submitted by Nobel Prize-winning economists in the US in the context of litigation over copyright term extension. A UK Government assessment found copyright term extension to be economically detrimental. In fact, every serious review of the idea of copyright term extension (particularly retrospective extension) that has ever been done, as far as I am aware, has condemned copyright term extension as imposing more costs on society than benefits. It is widely seen as one way that the US FTAs further certain very specific corporate interests over the interests of society and the economy as a whole.

Proposals for copyright term extension also hamper many proposed solutions to the ‘orphan works problem’, for example, proposals to require registration of copyright at the end of the standard Berne term for copyright in order to ensure longer copyright terms only apply to works still being commercially exploited.

Arguments that extension of copyright term will improve efficiencies by harmonising term internationally do not hold water. Many countries calculate copyright term for corporate works by reference to the employee's life, rather than from the date of publication or creation: but the US does not. Inevitably, therefore, different terms will continue to exist.

**Australia**: The US proposal (which Australia opposes) would extend the **Australian copyright term** for films and sound recordings by 25 years (for both producers, and in the case of sound recordings, performers). Australia provides a copyright term:

- For published works: life of the author + 70 years: s 33
- For works (other than artistic works) unpublished at death of author: 70 years from publication: s 33
- For films, sound recordings: 70 years from publication: ss 93, 94
- For TV and sound broadcasts: 50 years from broadcast: s 95.
- For performers: rights in sound recordings of their performances for 70 years from publication.

### 4 Extension of new rights to existing copyright material

**Article QQ.G.8**


**QQ.G.8:**

[CA/JP/Sg/BN/NZ/PE/CL/VN/AU propose: Each Party shall apply, mutatis mutandis, Article 18 of the Berne Convention for the Protection of Literary and Artistic Works (1971) to the rights of authors, performers and producers of phonograms in [Section G]. A Party may
provide for conditions, limitations, exceptions and reservations to the extent permitted in Article 14.6 of the TRIPS Agreement.]

139 [Negotiators’ Note: AU/CA agree in principle but will reflect further on the language.]

140 Negotiators’ Note: AU supports this article ad referendum.

This is the usual approach of Australia: to extend new rights to material existing in copyright. Notably, if copyright term extension is agreed, this will have the effect that films and sound recordings where copyright ought to have expired between 2005 and the implementation of the TPPA would have received two copyright term extensions (one through AUSFTA, one through the TPPA). The wording of the second proposal would appear to be clearer. Some versions of the first proposal are a bit confusing in referring to applying article 14.6 to rights where some of the language of article 14.6 deals with exceptions and limitations.

5 Freedom of contract

**Article QQ.G.9:** Each Party shall provide that for copyright and related rights, any person acquiring or holding any economic right in a work, [SG/BN/NZ/MY/VN/CL oppose: performance,] or phonogram:

(a) may freely and separately transfer that right by contract; and

(b) by virtue of a contract, including contracts of employment underlying the creation of works, [BN/SG/MY/VN/NZ/CL oppose: performances,] and phonograms, shall be able to exercise that right in that person’s own name and enjoy fully the benefits derived from that right.

[CL: (c) Each Party may establish:

(i) which specific contracts underlying the creation of works or phonograms shall, in the absence of a written agreement, result in a transfer of economic rights by operation of law; and

(ii) reasonable limits to the provisions in [paragraph 2(a)] to protect the interests of the original right holders, taking into account the legitimate interests of the transferees.]

141 For greater certainty, this provision does not affect the exercise of moral rights.

This provision would appear to entrench impose a limitation on a country’s ability to adopt new copyright policies aimed at protecting human creators. The provision may be aimed at preventing Parties from introducing unwaivable or unassignable rights of a type found in Europe. It would prevent a Party from prohibiting the outright

27 See the report of the Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3), which in its report on the equivalent provision in chapter 17 of the AUSFTA noted that [Section 17.4.6] safeguards the freedom of contract and ensures that Australian law may not undermine the intent of the parties to such
assignment of copyright (as, for example, is the case in Germany and Austria). In addition, this language is arguably sufficient to prevent the introduction of unwaivable rights to equitable remuneration like those found in the European Union’s Rental Rights Directive. This language might also be treated as excluding the compulsory collective administration of rights – a form of control on the exploitation of copyright that also enjoys some popularity in European copyright policy making circles. Respected international copyright scholars have pointed to the need to protect individual authors, and have pointed to these European provisions as being one way to do so.²⁸ The Chilean proposal goes some way to avoiding that result, and should be supported.

**Australia:** Australia does not have any unwaivable/unassignable rights, and so this provision would not change current Australian law. Australia is already subject to an equivalent provision in the AUSFTA (article 17.4.6). Since the provision potentially takes certain author-centred reforms off the table, it should not be supported by Australia in this round of negotiations, to avoid taking those options off the table forever.

6 Formalities in copyright

**Article QQ.G.X**

No Party may subject the enjoyment and exercise of the rights of authors, performers and producers of phonograms provided for in this Chapter to any formality.

This provision, although consistent with current law, should not be supported.

The potential for ‘reformalising’ copyright is being widely discussed even by stalwarts of the traditional copyright system. WIPO has surveyed voluntary registration systems;²⁹ the UK government has talked about it with some enthusiasm;³⁰ Dr Stef van Gompel – who hails from the continental, rather than the common law tradition – has published an excellent book pointing out that formalities aren’t inconsistent with the droit d’auteur contracts. This has been a controversial issue with the European Union (and some other countries, though not with Australia to date): The US Australia Free Trade Agreement (FTA): The Intellectual Property Provisions. Report of the Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3) 10. For some of the European provisions, see Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Art. 9; Council Directive 92/100/EEC of 19 November 1992 on rental and lending right and on certain rights related to copyright in the field of intellectual property, Art. 4(3), (4); Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, Art. 6(2).

tradition; Jane Ginsburg has noted that registration has its benefits and explored how formalities can be made author-friendly.

The reasons for this renewed interest is not difficult to understand. We have, due to changes in technology, more copyright material being created and published than ever before; and we have longer copyright terms than ever before. This means a lot of material where copyright owners are hard to identify. Formalities such as registration are seen as offering some relief from the attendant difficulties: it could increase certainty regarding ownership and the scope of copyright claims. It could improve rights clearance and reduce the cost of licensing by making it possible to identify and locate owners. It could take material not motivated by copyright incentives out of the system entirely; perhaps avoiding those cases where copyright is brought as a claim that is really about something else.

Agreeing to this provision would make it much more difficult to institute what is increasingly being seen as a desirable potential reform to copyright law.

7 Anti-Circumvention Law

Two models are offered in the text on anti-circumvention law. The first is the inflexible, over-prescriptive approach embodied in previous US FTAs – including all the frequently-identified flaws with that model. The US model is WCT-plus-plus-plus-plus (since the WCT runs to a single provision; the US model runs to several pages). It is also ACTA-plus: ACTA is more detailed on the kinds of measures that must be protected (although not explicit as to any requirement to protect access control measures); ACTA also leaves the framing of exceptions entirely to individual countries.

The other model is a simple provision (proposed by CL/NZ/PE/VN/MY/BN/JP) – which would affirm that countries will have anti-circumvention law but which would not

32 Jane Ginsburg, The US Experience with Mandatory Copyright Formalities: A Love/Hate Relationship (2010) 33 Columbia Journal of Law and the Arts 311. Ginsburg does note the need for caution, based on the US’ history of difficulties with registration and its at times negative impacts on copyright owners; nevertheless, the second half of her article is devoted to considering ideas for author-friendly formalities that might bring some of the benefits without too much cost particularly to individual copyright owners. See also William Landes and Richard Posner, ‘Indefinitely renewable copyright’ (2003) 70 University of Chicago Law Review 471, also arguing for registration and renewal (as part of a possibly perpetual copyright reflecting the particular value of some works).
33 van Gompel at 3-5. van Gompel points to the problems of ex ante definition of copyright claims; uncertainties caused by copyright term and the difficulty of establishing whether copyright has expired. As WIPO notes, uncertainty about copyright claims can act as a disincentive to subsequent creation as it increases the costs of building on what already exists: WIPO, ‘Survey of national legislation on voluntary registration systems for copyright and related rights’, WIPO Doc SCCR/13/2, 9 November 2005, 5.
34 van Gompel at 35 (‘demarcation function’). This would help reduce the costs of litigation: van Gompel at 45.
35 van Gompel at 5-7.
36 van Gompel at 7-8.
37 For example, Sanofi-Aventis Australia Pty Ltd and Apotex Pty Ltd [2011] FCA 846, which concerned copyright in product information documents associated with therapeutic goods administration approval for pharmaceutical products.
prescribe what that law should look like. The CL/NZ/PE/VN/MY/BN/JP proposal is to be preferred. It can be accepted by countries which have adopted stricter regimes already, but allows individual countries to frame their own level of protection.

7.1 Scope of the ban

**Article QQ.G.10: {Copyright and Related Rights / Technological Protection Measures}**

[US/AU/SG/PE/MX propose; MY/VN/BN/JP oppose: (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, [CL oppose: or having reasonable grounds to know], circumvents without [CL propose: authority] any effective technological measure that controls access to a protected work, performance, phonogram, [PE/CA/CL oppose: or other subject matter]; or

(ii) manufactures, imports, distributes, [CL oppose: offers [CA/CL propose: for sale or rental] to the public, provides, or otherwise traffics] devices, products, or components, [CL oppose: or offers to the public] or provides services, that:

(A) are promoted, advertised, or marketed by that person, [PE/SG/CL oppose: or by another person acting in concert with that person and with that person’s knowledge,] 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 [CA oppose: enabling or facilitating] the circumvention of any effective technological measure, shall be liable and subject to the remedies set out in Article [12.12].

142 Negotiators' Note: Article QQ.H.4.15 should be discussed after discussions on this issue.
143 Negotiator’s Note: MX supports this provision in principle.
144 Negotiator’s Note: CA supports this provision in principle pending outcome of discussions on exceptions.
145 Negotiator’s Note: CL is considering pending the outcome of the language of this proposal.
146 Negotiator’s Note: NZ reserves its position on article QQ.G.10 pending the outcome of exceptions and limitations on TPMs protection. JP is considering a possibility of producing its proposal on Technological Protection Measures.
147 Negotiator’s Note: CA reserves its position pending the clarification of the meaning of “rights”.
148 Negotiator’s Note: CA pending clarification of criminal remedies.
149 Negotiator’s Note: CA reserves its position pending clarification of “traffics”.
150 Negotiator’s Note: CA reserves its position pending clarification of the terms “promoted” and “advertised.”
151 Negotiator’s Note: CA reserves its position pending clarification of “any”.
152 Negotiator’s Note: CA seeks clarification as to whether article “12.12” is meant to refer to article QQ.H.4(15).
153 Negotiator’s Note: CA reserves its position pending outcome of discussion of provision QQ.H.4(15).
This provision is TRIPS plus (TRIPS does not deal with anti-circumvention law at all) and WCT-plus (the WIPO Copyright Treaty states only a high-level obligation to ‘provide adequate legal protection and effective legal remedies against’ circumvention of technological protections.

The provision is also ACTA-plus: ACTA article 27.6:

- Makes prohibitions on the act of circumvention optional;
- Makes prohibiting the marketing of a device or service as a means of circumvention optional;
- With respect to circumvention devices and services, covers the acts of manufacture, importation and distribution only; and
- With regard to devices, targets only those devices that are:
  - Primarily designed or produced for the purpose of circumvention; or
  - Have only a limited commercial significant purpose other than circumvention.

The text here retreats somewhat from US proposals which would have applied liability against circumventing access controls even in the absence of knowledge.\(^38\)

With some of the qualifications in (ii)(A) limiting the effect of third party marketing, this provision is actually less strict than AUSFTA article 17.4.7.\(^39\)

### 7.2 Criminal liability and remedies

| Each Party shall provide for criminal procedures and penalties to be applied when any person... is found to have engaged [CA oppose: willfully and for purposes of commercial advantage [CL oppose: or private financial gain]] [CA propose: knowingly and for commercial purposes] in any of the foregoing activities. [SG/AU/PE/CL\(^{155}\) oppose: Such criminal procedures and penalties shall include the application to such activities of the remedies and authorities listed in subparagraphs (a), (b), and (f) of Article [15.5]\(^{156}\) as applicable to infringements, mutatis mutandis. [\(^{157}\)] |

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155 Negotiator’s Note: CA seeks clarification of the intention of this sentence.
156 Negotiator’s Note: CA seeks clarification as to whether article “15.15” is meant to refer to article QQ.H.7(7). CA reserves position pending clarification of QQ.H.7(7).
157 [US/AU: For purposes of greater certainty, no Party is required to impose liability under Articles [9 and 10] for actions taken by that Party or a third party acting with the authorization or consent of that Party.] [Negotiator’s Note: CA seeks clarification of this footnote.]

The inclusion of criminal remedies is WCT-plus and ACTA-plus, neither of which require criminal liability for anti-circumvention breaches. Inclusion of the concept of private financial gain should be strongly opposed, since it would make ordinary consumer activities potentially criminal, including, for example, ripping a DVD to a computer\(^40\) (since it would involve the ‘financial gain’ inherent in not purchasing a new copy of a movie specifically for use on the computer).

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38 The original proposal would have gone beyond AUSFTA article 17.4.7(a)(i) and would have required a change to Australian law as embodied in s 116AN(1)(c).
39 Although Australia implemented AUSFTA in the more limited way envisaged in the TPP text: see s 116AO(2)).
40
Regarding remedies for circumvention, note that the enforcement section of the TPP draft includes civil remedies – including a controversial proposal for pre-established damages. See my separate analysis of the enforcement chapter.

Footnote 157 is difficult to interpret, but if it is intended to give government a general ‘out’ from liability, it would appear to be hypocritical (what's good enough for the rest of the country is not good enough for the State). Further, it can be problematic because provisions of this kind tend to insulate government from being aware of the challenges posed to ordinary activity by IP law (and hence understanding in any way shape or form what companies dealing with IP must deal with). It also tends to give the US government something of an advantage internationally because it is more willing, perhaps, than the generally law-abiding Australian government, to make use of this kind of general ‘out’. Instituting similar rules in Australia might be seen as inconsistent with principles of competitive neutrality. It is also not clear how it is consistent with the way the exceptions are drafted, which seem to assume government officials need exceptions at least for certain (law enforcement related) purposes.

**Australia:** AUSFTA already requires Australia to provide for criminal penalties. Australia has implemented this: ss 132APC-132APE. The reference to specific penalties however is new. Nevertheless Australian law already provides for:
- imprisonment (up to five yrs per offence) and fines (up to $93,500 per offence for an individual (550 penalty units) or $467,500 per offence for a corporation);
- seizure of circumvention devices, implements and infringing copies (s 133);
- Seizure of documentary evidence: *Crimes Act 1914* (Cth), Part 1AA;
- Freezing of assets: *Proceeds of Crime Act 2002* ss 15B; 17;
- forfeiture of assets traceable to infringing activity, even in the absence of conviction: *Proceeds of Crime Act 2002* (Cth) ss 48-49.

Present Australian criminal penalties are only applied for circumvention for commercial advantage or profit. An expansion to activities done for ‘private financial gain’ would require an extremely controversial change to Australian law.

### 7.3 General exemptions for Libraries, Archives and Educational Institutions

[CL propose: If the conduct is carried out in good faith without knowledge that the conduct is prohibited, a Party may exempt acts prohibited under this subparagraph that are carried out in connection with a nonprofit library, archive or educational institution] … Each Party shall provide for criminal procedures and penalties to be applied when any person, other than a nonprofit library, [CA/CL propose: museum] archive, educational institution, or [CA/CL oppose: public noncommercial broadcasting entity] [CA propose: any other nonprofit entity as determined by a Party’s law]

This is WCT and ACTA-consistent. The Chilean proposal contained in the first sentence is a narrow, albeit helpful, additional exemption to the anti-circumvention prohibition for innocent activities of certain public institutions. The exemption from criminal liability for these public institutions is appropriate, since the risk of criminal liability is

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41 Corporations are subject to penalties up to 5 times the penalties applied to individuals: *Crimes Act 1914* (Cth) s 4B(3).
likely to create a very significant chilling effect on the socially beneficial activities of these entities. Since civil liability remains, any argument that this would create too big a loophole is groundless.

7.4 No compulsory device response to TPMs

(b) In implementing subparagraph (a), 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, so long as the product does not otherwise violate any measures implementing subparagraph (a).

This is a beneficial provision, in that it clarifies that hardware companies are not legally required to respond to certain technological protection measures. It should be noted, however, that the provision is not particularly effective, as contract is used in place of public law to achieve the same basic end (ie, getting devices to comply with copyright owner preferences/demands). In many cases, electronic copies of copyright material are provided in encrypted form. For a device to gain access to the unencrypted version, a key is required – getting access to the key requires a manufacturer to agree to meet certain requirements (eg, not allowing copying). This method has had some effect in relation to DVDs

Australia: Australia is subject to an identically worded provision in AUSFTA 17.4.7(c).

7.5 Relationship with copyright infringement

[CL oppose: (c) Each Party shall provide that a violation of a measure implementing this paragraph is independent of any infringement that might occur under the Party's law on copyright and related rights.]

This provision (cf the contrasting proposal of CL/NZ/PE/VN/MY/BN/JP, QQ.G.12 p58) turns copyright into an 'access right' in the digital environment. It reflects a big divide in thinking on the anti-circumvention provisions and their appropriate scope. On the one side there are countries who have taken the view that anti-circumvention law exists to supplement, rather than extend, copyright enforcement. Consistent with the WIPO Copyright Treaties,42 these countries only impose penalties on TPM circumvention where that circumvention is associated with some breach of copyright law. For examples of this approach, see the New Zealand Copyright Act 1994, which defines technological protection measure only to include mechanisms that, in the normal course of their operation, prevent or inhibit infringement of copyright.43 New Zealand’s prohibition in s 226A only prohibits acts that will, or are likely to, lead to infringement of copyright.44 The Indian Copyright Act 1957 also only prohibits circumvention ‘with

42 Which require protection in general terms for technological measures ‘that are used by authors in connection with the exercise of their rights ... and that restrict acts ... which are not authorized by the authors concerned or permitted by law’: WCT article 11.
43 Copyright Act 1994 (NZ) s 226. The definition goes on specifically to provide that measures that only control access are not TPMs.
44 Copyright Act 1994 (NZ) s 226A. The text above is a paraphrase.
the intention of infringing' copyright. Prior to amending its law in response to the Australia-US Free Trade Agreement, Australia had adopted a similar result by only protecting technological protection measures which ‘prevent or inhibit infringement of copyright’. A bipartisan Parliamentary Committee in 2006 in Australia recommended that the link with infringement be retained – albeit to no avail.

On the other side are countries which have created a broader quasi-copyright 'access right' – by protecting access control measures and prohibiting any circumvention of access control measures regardless of whether the circumvention involves infringement of copyright. The TPP IP text locks in this latter position. Subject to exceptions (as to which see below) it has the impact of creating liability even for a person who circumvents a measure for the purposes of exercising rights under an exception (like fair dealing). It also has the impact of preventing circumvention of controls to get access to public domain material, assuming that the same technological measure also protects copyright material.

The provision is WCT-plus and ACTA-plus. The ACTA final text provides (article 27.8) that:

... The obligations [regarding anti-circumvention law] are without prejudice to the rights, limitations, exceptions, or defences to copyright or related rights infringement under a Party’s law.

Australia: Australia is subject to a similarly-worded provision in AUSFTA Article 17.4.7(d). That of course does not mean we should be trying to impose our system on the rest of the world.

7.6 Anti-circumvention exceptions

7.6.1 The US/AU/SG overall model

(d) Each Party shall confine exceptions and limitations to measures implementing subparagraph (a) [CL oppose: to the following activities,] [CL propose: certain special cases that do not impair the adequacy of legal protection of the effectiveness of legal remedies against the circumvention of effective technological measures] [CL oppose: which shall be applied to relevant measures in accordance with subparagraph (e)]:

[details as extracted and discussed below]

(e) The exceptions and limitations to measures implementing subparagraph (a) for the activities set forth in subparagraph [4.9(d)] may [CL oppose: only] be applied as follows[CL oppose: , 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]:

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45 Copyright Act 1957 (In) s 65A, as inserted by the Copyright (Amendment) Act 2012. Note that the Indian prohibition is a criminal prohibition only and does not give rise to a civil cause of action.
(i) Measures implementing subparagraph (a)(i) may be subject to exceptions and
limitations with respect to each [CL propose: situations and] 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).

Negotiator’s Note: CA is considering paragraph (e) pending the outcome on discussions
on limitations and exceptions.

The model here is WCT-plus (the WCT does not address exceptions to anti-
circumvention laws specifically, requiring only that the protection for technological
measures be adequate). The model is also ACTA-plus: although at early stages in the
ACTA negotiations the US proposed this model, the final text of ACTA leaves anti-
circumvention exceptions to the parties, providing instead (article 27.8) in general
terms that:

\begin{quote}
    a Party may adopt or maintain appropriate limitations or exceptions to [anti-
circumvention law]. The obligations [regarding anti-circumvention law] are
without prejudice to the rights, limitations, exceptions, or defences to copyright or
related rights infringement under a Party’s law.
\end{quote}

The US/AU/SG model locks in specific exceptions with extremely limited flexibility to
introduce new exceptions as circumstances, technology, or markets change. In essence,
the system proposed works as follows:

- In relation to the ban on circumventing access controls:
  - There are up to 10 specified exceptions which a Party may adopt, for
    such purposes as security testing, encryption research, and for the
    creation of interoperable computer programs;
  - A Party may, in the future, create new exceptions, but only subject to the
    limitations set out in (d)(viii) (discussed below).

- In relation to the ban on distribution of circumvention devices and providing
circumvention services:
  - There is a shorter list of specified exceptions (ie, some of the exceptions
    in Article 17.4.7(e) apply only to use); and
  - There is no capacity to create new exceptions under the triennial
    process set out in Article (d)(viii).

Several consequences of this system should be noted. First, the list of specified
exceptions largely mirrors that in the Digital Millennium Copyright Act 1998 in the
United States (with a couple of additions). They were written 16 years ago. They
reflect lobbying processes and issues that happened to be live in 1997 and reflect a
peculiarly domestic ‘settlement’ in the US. Such a ‘settlement’ is not appropriate for
elevation to an international level. Numerous new issues have arisen since that list was
drafted in 1997: some of which made it into the Australian law in this area; others of
which have been recognised in repeated Copyright Office proceedings in the US. Areas where exceptions have been recognised include:  

- Circumvention for malfunctioning TPMs (for example, where there is old/abandoned technology);
- Circumvention of TPMs that interfere with or damage a product in which they are installed (an exception introduced in Australia to address the Sony Rootkit debacle);
- Mobile phone unlocking;
- Circumvention for media/film studies researchers and the like to critique, or teach, films;
- Circumvention for TPMs on e-readers where the TPM prevents read-aloud features or otherwise interferes with technology used by visually impaired people;

Note also that there is no provision for an exception which would allow circumvention to avoid anti-competitive conduct on the part of copyright owners.

The really ridiculous aspect of this model is that in some cases, there is an exception for the user wanting to circumvent access controls, but no exception which will allow someone else to supply them with the necessary device to implement their exception. This is a nonsense, and was described, by an Australian parliamentary inquiry, as:

‘a lamentable and inexcusable flaw in the text ... that verges on absurdity. The effect is to make [the article] work against itself, for it creates the potential scenario of those with permitted exceptions to circumvent ... being denied the very tools to perform this circumvention. In this light, these exceptions appear to be little more than empty promises.’

In theory, the whole model means that an individual will only be able to use the defence if they can make the circumvention device themselves. In reality, circumvention devices can be obtained from overseas locations like Russia. However, it does mean that local (legitimate, trustworthy) providers are not able to assist users, thus potentially exposing consumers to unknown and possibly heightened levels of risk in the digital environment – something that governments constantly express concern about.

7.6.2 US/AU/SG model: specific exceptions

Reverse engineering

(i) [CA oppose: 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

For lists, see the Australian regulations creating new exceptions in Schedule 10A to the Copyright Regulations 1969 (Cth) (available at http://www.austlii.edu.au/au/legis/cth/consol_reg/cr1969242/sch10a.html), or the US Copyright Office's most recent rulemaking creating new exceptions under US law: https://www.federalregister.gov/articles/2012/10/26/2012-26308/exemption-to-prohibition-on-circumvention-of-copyright-protection-systems-for-access-control

engaged in those activities \[159\], for the sole purpose of achieving interoperability of an independently created computer program with other programs\[160\] [CA propose: reverse engineering activities with regard to a lawfully obtained copy of a computer program, for the sole purpose of achieving interoperability of the program or any other program];

\[159\] [CL propose: For greater certainty, elements of a computer program are not readily available to a person seeking to engage in non-infringing reverse engineering when they cannot be obtained from literature on the subject, from the copyright holder, or from sources in the public domain.]

\[160\] [CL propose: Such activity occurring in the course of research and development is not excluded in this exception.]

Important exception that matches the language of AUSFTA 17.4.7(e)(i); similar protection for reverse engineering is provided throughout the world, in order to protect competitive activities.

Margot Kaminski has pointed out (with credit to Jonathan Band) that the exception as drafted in the TPP is narrower than the exception as set out in US law (17 USC §1201(f)).\[50\] The US provision in domestic law is explicit in allowing:

- The circumvention of technological access control measures for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs;
- developing and employing technological means to circumvent a technological measure, or to circumvent protection afforded by a technological measure, in order to enable such identification and analysis, or for the purpose of enabling interoperability of an independently created computer program with other programs; and
- providing other people with the information or means solely for the purpose of enabling interoperability of an independently created computer program with other programs.

The TPP drafting (which is similar to past US FTAs) does not refer explicitly to anything but ‘reverse engineering activities ... for the sole purpose of achieving interoperability of an independently created computer program with other programs’: so it does not explicitly refer to the acts of providing information or circumvention means to others.\[51\] It is at least arguable that the language of the TPP drafting is broad enough to enable both circumvention for analysis and circulation of information thus obtained and/or circumvention devices where necessary to enable interoperability. There is some danger however that it won’t be interpreted that way, or implemented that way in individual countries.\[52\]


\[51\] It is notable that the EU, article 6 (on decompilation) also refers both to analysing computer software and providing others with information thus obtained where necessary for the interoperability of independently created computer programs).

\[52\] There is an argument, for example, that the Australian exception – enacted following similar language in the Australia-US FTA – does not cover circulation of circumvention devices: Copyright Act 1968 (Cth) s 116AO(3).
Encryption research

(ii) [CA oppose: noninfringing good faith activities, carried out by an appropriately qualified researcher who has lawfully obtained a copy, [CL oppose: 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 [CL propose: encryption technologies] [CL oppose: for scrambling and descrambling of information] [CA propose: activities with regard to a lawfully obtained copy of a work, performance, or phonogram for the sole purpose of encryption research];

161 [CL propose: Such activity occurring in the course of research and development is not excluded from this exception.]

Important exception that matches the language of AUSFTA art 17.4.7(ii), although query why a researcher should have to seek permission to engage in research: Canadian language is to be preferred.

Won’t someone think of the children

(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)162;

162 Negotiator’s Note: CA reserves its position.

This exception would seem to cater to peculiarly American concerns. Matches AUSFTA article 17.4.7(e)(iii) but seen as irrelevant in Australia and not actually implemented in Australian copyright law.

Security testing

(iv) [CA oppose: 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] [CA propose: security testing activities that are authorized by the owner or administrator 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];

Important exception that matches the language of AUSFTA 17.4.7(e)(iv); similar protection for security testing is provided throughout the world, in order to protect competitive activities. Probably too narrow in current economic circumstances: query whether it is still sufficient to assume that computer systems will be owned in a context where computer systems may be outsourced or leased.
Privacy

(v) [CA oppose: 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] [CA propose: activities for the sole purpose of identifying or disabling a capacity to carry out collection or dissemination of personally identifying information];

An exception so narrow as to be practically pointless:
- You can only circumvent if there is undisclosed collection or dissemination of personal data: so you can circumvent if you don’t know about the capability? What about undesired and/or unjustified monitoring of online activity?
- You can only circumvent where the data being collected reflects ‘online activities’: what if the information being harvested is, for example, bank account or health details?
- You can only circumvent if it will not affect in any way your ability to gain access to any work. Given that all text and all pictures and all software are protected by copyright, the idea that it is even physically possible to circumvent technology in such a way as to avoid getting any access to any copyright material seems far-fetched.

Law enforcement

(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.\(^{163}\)

\(^{163}\) Negotiator’s Note: CA needs to reflect further on this paragraph.

From a governmental perspective, query whether this exception is sufficient to carry out any necessary circumvention activities: it is confined to law enforcement and national security, and does not include ordinary public administration. The language matches the language of AUSFTA article 17.4.7(e)(vi).\(^{53}\)

Libraries etc

(vii) access by a nonprofit library, [CA propose: museum,] archive, or educational institution to a work, performance, or phonogram not otherwise available to it, for the sole purpose of making acquisition decisions; and

Another exception so narrow as to be practically pointless. The idea that a library or non-profit organisation would need to circumvent in order to make an acquisition decision – ie that any relevant copyright owners would not in fact offer temporary or trial access in order for such institutions to make acquisition decisions – seems ridiculous. The access such institutions actually need is much more likely to relate to reproduction or communication for the purposes of providing legitimate/lawful access to material for patrons (eg for interlibrary loans), or for the purposes of preservation,

\(^{53}\) Although see above part 7.2 page 14 and the discussion there of footnote 157.
especially in circumstances where the relevant technological measures are out of date or will no longer work with technology used by the library or archive.

**Visually impaired**

[CA propose: (viii) activities for the sole purpose of making a work, performance or phonogram perceptible to a person with a perceptual disability.]

An exception for the assistance of the visually impaired is important, as both the US and Australia have recognised in their own internal exception-creating processes. The US Copyright Office in its most recent rule-making created an exception for:

Literary works, distributed electronically, that are protected by technological measures which either prevent the enabling of read-aloud functionality or interfere with screen readers or other applications or assistive technologies, (i) when a copy of such a work is lawfully obtained by a blind or other person with a disability, as such a person is defined in 17 U.S.C. 121; provided, however, the rights owner is remunerated, as appropriate, for the price of the mainstream copy of the work as made available to the general public through customary channels; or (ii) when such work is a nondramatic literary work, lawfully obtained and used by an authorized entity pursuant to 17 U.S.C. 121.

Australia also created a relevant exception to its prohibition on circumvention to allow for:

The reproduction or communication by an institution assisting persons with a print disability for provision of assistance to those persons of copyright material of a kind, and in the circumstances, mentioned in Division 3 of Part VB of the Act.

The idea of having an exception here is also consistent with the recently-concluded Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled, article 7:

Contracting Parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.

Arguably, a TPP treaty which does not include an exception along the lines proposed by Canada is inconsistent with the Marrakesh Treaty. Requiring institutions assisting the visually impaired, and the visually impaired themselves, to apply anew for an exception every three years (as presently occurs in the US) is arguably not sufficient, not least because in the absence of an application by some person sufficiently engaged with copyright law and the process for an appropriate exception, there would be no exception and in those circumstances, the State would not be ensuring that anti-

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54 See [https://www.federalregister.gov/articles/2012/10/26/2012-26308/exemption-to-prohibition-on-circumvention-of-copyright-protection-systems-for-access-control#h-15](https://www.federalregister.gov/articles/2012/10/26/2012-26308/exemption-to-prohibition-on-circumvention-of-copyright-protection-systems-for-access-control#h-15) for the full explanation.

55 Part VB div 3 provides for a statutory licence to allow institutions assisting persons with a print disability to reproduce and communicate published literary and dramatic works.
circumvention law ‘does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty’.

Ephemeral copies

(ix) activities for the sole purpose of making an ephemeral reproduction of a work, performance or phonogram,

Unclear. No similar exception exists at present in Australia or the US.

Radio

(x) circumvention of a technological measure on a radio apparatus for the sole purpose of gaining or facilitating access to a telecommunication service by means of the radio apparatus

Unclear. No similar exception exists at present in Australia or the US.

Process for establishing additional exceptions

(viii) [CA oppose: noninfringing uses [SG oppose: of a work, performance, or phonogram] in a particular class of works, [SG oppose: performances, or phonograms] when an actual or likely adverse impact on those noninfringing uses [CL propose: or exceptions or limitations to copyright or related rights with respect to users] is [PE oppose: credibly demonstrated] [PE propose: found] [CL propose: demonstrated or recognized] in a legislative or administrative review or proceeding [SG oppose: by substantial evidence]; provided that [AU/PE oppose: any limitation or exception adopted in reliance upon this clause shall have effect for a renewable period of not more than three [SG propose: four] years] [AU/PE propose: any such review or proceeding is conducted at least once every four years] from the date of conclusion of such review or proceeding.]

[CA propose: (xi) Each Party may provide further exceptions and limitations to measures implementing subparagraph (a) in relation to non infringing uses as determined through a legislative, regulatory, judicial, or administrative process in accordance with the Party's law, following due consideration of the actual or potential adverse impact on those non infringing uses.]

The text allows countries to create new exceptions to the anti-circumvention provisions beyond those specifically listed only if an “actual or likely adverse impact” is “credibly demonstrated” by “substantial evidence” in “a legislative or administrative review or proceeding”, which must be held at least once every four years, with exceptions apparently required to expire (ie they are renewable).

The first thing to note is that the text proposed by the US represents the most restrictive ‘form’ of this article from the US FTAs. Some of the US FTAs include a less restrictively-drafted provision, including Australia, where:

- There is no requirement for ‘substantial evidence’
- The review is required every four years, rather than every three years; and
While the review must be held every four years, there is no explicit requirement that exceptions must expire.\textsuperscript{56}

On its face there are problems with this text. Requiring parties to credibly demonstrate through substantial evidence that they suffer harm by not being allowed to something that is currently illegal is hard: it is hard, for example, to prove demand for the ability to do something when doing that act is illegal.

The procedural issues with this approach can be demonstrated through the experience of the US in particular, and to some extent, Australia. The provision is modelled on the processes used in the United States, where reviews under the DMCA are held by the Register of Copyrights every 3 years.\textsuperscript{57} In the United States, the following problems have been experienced:

- Consumers find the process inaccessible without legal representation, owing to its complexity and the burdens of proof applied;
- The process is costly and time-consuming: this effect is most likely to impact on the non profit sector, who are likely to be those most in need of exceptions to stringent copyright laws and copyright protection;
- A high burden of proof has been applied, which has made it extremely difficult to obtain an exception: this in an area where it is notoriously hard to provide actual evidence of harm arising from copyright. Historically, copyright owners have constantly complained of the difficulties of proving damage resulting from infringements, and have been given procedural advantages to mitigate that difficulty. Users are likely to experience, under the quadrennial review process, as many problems (if not more), and yet the reference to “credible” demonstration of adverse effect suggests a high burden;
- The vast costs of the procedure are likely to outweigh its meagre benefits: this can be demonstrated by the US experience. In the 2000 rulemaking, 235 initial comments were received, and 129 reply comments. 34 witnesses representing 50 groups testified at 5 days of hearings, and 28 post-hearing comments were subsequently filed. Two exemptions were ultimately granted. In the 2003 rulemaking, 51 initial comments requesting exemptions were filed, and 337 reply comments were filed, of which 254 were by consumers in support of a consumer exemption request filed by two public interest non-profit organisations (the Electronic Frontier Foundation and Public Knowledge). 44 witnesses representing 60 groups testified at 6 days of hearing, and 24 post-hearing comments were later filed. Four limited exemptions were ultimately granted.
- By the time the process is complete, involved groups seeking exceptions generally have only about 18 months’ ‘breathing space’ before the whole (expensive) process starts again.

It is difficult to see this process as efficient. Perhaps some of the worst problems can be avoided in implementation (Australia’s process is quite different, although it too has its problems, not least that some requests for exemptions have been sitting in the offices of the public service for a period of years).

\textsuperscript{56} For Australia, inclusion of these additional restrictive aspects of language might close down certain interpretations presently open on the text of AUSFTA article 17.4.7(e)(viii), such as an interpretation which does not require the need for an exception to be demonstrated anew every time a review is held.

\textsuperscript{57} 17 U.S.C. §1201(a)(1)(C)
Compare the Canadian proposed language, which can accommodate a range of different processes for determining exceptions (including the processes currently adopted in Australia, Singapore, Chile etc as a result of US FTAs).

7.6.3  **US Model: Technological protection measure: definition**

**(f) 165 Effective technological measure** means any [CA propose: effective] technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, [PE/CL/CA oppose: or other protected subject matter,] or protects [CA oppose: any copyright or any rights related to copyright] [CA propose: rights related to a work, performance or phonogram].][CL propose: and cannot, in a usual case be circumvented accidentally.]

165 Negotiator's Note: CA is considering paragraph (f).

The definition is WCT-plus: there is debate over the extent to which the WCT requires protection of access controls. Broadly the coverage of access and copy controls is consistent with most international trends, although it is by no means universal: see the New Zealand Copyright Act 1994, which defines technological protection measure only to include mechanisms that, in the normal course of their operation, prevent or inhibit infringement of copyright.58

ACTA adopts language which does not specifically mention access controls:59

**technological measures** means any technology, device, or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works, performances, or phonograms, which are not authorized by authors, performers or producers of phonograms, as provided for by a Party's law. Without prejudice to the scope of copyright or related rights contained in a Party's law, technological measures shall be deemed effective where the use of protected works, performances, or phonograms is controlled by authors, performers or producers of phonograms through the application of a relevant access control or protection process, such as encryption or scrambling, or a copy control mechanism, which achieves the objective of protection.

7.6.4  **The Region-coding provision**

**Article QQ.G.11**: [SG/CL propose166: Nothing in this agreement shall require any Party to restrict the importation or domestic sale of a device that does not render effective a technological measure the sole purpose of which is to control market segmentation for legitimate copies of cinematographic film or computer program, and is not otherwise a violation of law.]

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58  Copyright Act 1994 (NZ) s 226. The definition goes on specifically to provide that measures that only control access are not TPMs.

59  ACTA article 27.5, footnote 14.
Technologies that are used to limit use of content to particular geographical regions have long been a concern. The main concerns with geo-blocking and ‘region-coding’ and the like are that such measures:

- Limit access to material not made available particularly in smaller markets;
- Are used to impose higher (in some cases, significantly higher) prices in some markets,\(^6\) thus impacting on consumers forced to pay a higher price as well as business which may suffer competitive disadvantage from having higher costs for technology;
- Can impact on the visually impaired by limiting access to technology to facilitate access to works for the visually impaired.

Back in 2006, when Australia implemented its FTA with the US, one of the concerns was the region-coding of DVDs and electronic games and the impact such coding had on the availability of content in Australia as well as the price of content. More recently, the Inquiry into IT Pricing has examined concerns about technologies used to limit content – including streamed content as well as items like copies of software or films – to particular regions or locations.

Assuming that countries want some freedom to address concerns about geo-coding or region-coding, the question is whether this drafting will ‘do the job’. The answer to that question is – probably not, because it is specific to old technology. The provision seems entirely aimed at enabling companies to import, or sell, ‘region-free’ consoles and DVD players. This will not address concerns about the use of geo-blocking technologies on streamed content, nor will it address any use of region-coding on general purpose computers (including laptops, tablets, and/or mobile phones) since it refers only to devices that ‘do not respond’ to region-coding, and not to software that has the same effect. Nor, in fact, does the drafting seem to address the practice of ‘modding’ consoles or DVD players so that they no longer recognise region-coding. It is also limited only to films and computer programs, which does not exhaust the list of copyright content that might be region-coded or geo-blocked.

Compare this to the drafting of current Australian legislation, which states that a measure (whether device, product, technology, component, or computer program) is not an access control technological protection measure:

\[
\text{To the extent that it ... (c) if the work or other subject-matter is a cinematograph film or computer program (including a computer game)–controls geographic market segmentation by preventing the playback in Australia of a non-infringing copy of the work or other subject-matter acquired outside Australia;}
\]

Although it is likely that this provision ensures that region-free DVD players and modding DVD players is legal in Australia, it is unclear whether, as a result of this specific provision or the more general definition of technological protection measure, it is presently legal to circumvent technologies used to limit access to online content to

specific geographic regions. But certainly it is more open on this drafting to argue that circumventing geo-blocking is legitimate than on the TPP IP chapter drafting.

It seems likely to prove extremely difficult to draft an effective exemption which will address present and future technologies that may be used to limit copyright content to particular geographical regions and which may impact on international competitiveness, costs for consumers and access for the visually or otherwise impaired. It would be better not to try. The preferable approach would be to allow for a general ability of governments to exclude certain technologies from being considered technological protection measures in response to new policy issues, as well as to include a general provision allowing for whatever exceptions are deemed necessary following review which duly respects the rights and interests of both copyright owners and users.

### 7.7 The CL/NZ/PE/VN/MY/BN/JP TPM Model

<table>
<thead>
<tr>
<th>Article QQ.G.12</th>
<th>{Technological Protection Measures}</th>
</tr>
</thead>
<tbody>
<tr>
<td>[CL/NZ/PE/VN/MY/BN/JP propose; AU/US oppose:</td>
<td></td>
</tr>
<tr>
<td>1. [PE/SG oppose: Each Party [VN propose: may] [VN oppose: shall] provide legal protections and remedies against the circumvention of effective technological protection measures in their domestic copyright laws where circumvention is for purposes of infringing the exclusive rights of copyright [NZ oppose: or related rights] owners.]</td>
<td></td>
</tr>
<tr>
<td>2. Each Party may provide that such protections and remedies shall not hinder or prevent uses of copyright or related rights protected material that are permitted under exceptions or limitations to the exclusive rights of copyright [NZ oppose: and related rights] owners, or the use of materials that are in the public domain.</td>
<td></td>
</tr>
<tr>
<td>[PE/SG: It is understood that nothing in this Article prevents a Party from adopting effective and necessary measures to ensure that a beneficiary may enjoy limitations and exceptions provided in that Party's national law, in accordance with Article QQQ16, where technological measures have been applied to a work, performance or phonogram, and the beneficiary has legal access to that work, performance or phonogram particularly in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that work, performance or phonogram to enable the beneficiary to enjoy the limitations and exceptions under that Party's national law.</td>
<td></td>
</tr>
<tr>
<td>3. Subject to each Party's international obligations, the Parties affirm that they may establish provisions to facilitate the exercise of permitted acts where technological measures have been applied.]</td>
<td></td>
</tr>
<tr>
<td>167 Negotiator's note: SG/CA/MX is willing to consider a more flexible approach to TPM provisions</td>
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</tbody>
</table>

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This is a simple, flexible provision that would seem to ensure (subject to VN's intervention) that parties will adopt anti-circumvention law but without specifying what exactly those laws should look like. There is nothing in the provision that would prevent a party having a more restrictive/copyright-protective regime. For countries like Singapore and Australia, which have more stringent laws as a result of their FTAs with the US, there is nothing in this proposal that would be inconsistent with their law, especially since para 3 is expressly made subject to other international obligations.

The language of the PE/SG proposal appears to be taken directly from an Agreed Statement concerning article 15 of the Beijing. A similar model is used in the EU Information Society Directive article 6(4).

8 Electronic Rights Management Information

Article QQ.G.13: {Copyright and Related Rights / Rights Management Information}

In order to provide adequate and effective legal remedies to protect rights management information:

(a) each Party [VN oppose: shall] [VN: may] provide [VN oppose: that] [VN: legal remedies against] any person who without authority, and knowing, or, with respect to civil remedies, having reasonable grounds to know, that it would induce, enable, facilitate, or conceal an infringement of [CA propose: any] [CA propose: the] copyright or related right [VN oppose: ;] [VN: :]

(i) knowingly removes or alters any [CA/JP propose: electronic] rights management information;

(ii) [MY/BN/VN/CA/JP oppose: distributes or imports for distribution rights management information knowing that the rights management information has been altered without authority; or]

(iii) [CA propose: knowingly] distributes, imports for distribution, broadcasts, communicates or makes available to the public copies of works, [CL/NZ/MY/SG/VN oppose: performances,] or phonograms, knowing that [CA/JP propose: electronic] rights management information has been removed or altered without authority [VN oppose: ;] [VN: .]

[VN oppose: shall be liable and subject to the remedies set out in Article [QQ.H.4(15)] Each Party [CA/MX/JP propose: may] [CA/MX oppose: shall] provide for criminal procedures and penalties to be applied when any person, other than a nonprofit library, archive, [CA propose: museum,] [MY: or] educational institution [MY/CA oppose: , or [CL oppose: public noncommercial] broadcasting entity] [CA propose: any other non-profit entity as determined by a Party's law.] [CL: established without a profitmaking purpose], is found to have engaged [CA oppose: willfully and for purposes of commercial advantage or private financial gain] [CA
propose: knowingly and for commercial purposes] in any of the foregoing activities.
[MY/CA propose: Each Party may provide that these criminal procedures and penalties do not apply to any other nonprofit entity as determined by a Party’s law.]
[AU/SG/PE/CL/MY/NZ/BN/CA/MX/JP oppose: Such criminal procedures and penalties shall include the application to such activities of the remedies and authorities listed in subparagraphs (a), (b) and (f) of Article [15.5] as applicable to infringements, *mutatis mutandis*.]]

[SG/NZ/CL/MY/BN/VN/CA/JP oppose: (b) each Party shall confine exceptions and limitations to measures implementing subparagraph (a) to lawfully authorized activities carried out by [MX propose: the] government [MX oppose: employees, agents, or contractors] for the purpose of law enforcement, intelligence, essential security, or similar governmental purposes.]

(c) Rights management information means:

(i) [AU/MY/CA/JP propose: electronic] information that identifies a work, [NZ/MY oppose: performance,] or phonogram, the author of the work, [NZ/MY oppose: the performer of the performance,] or the producer of the phonogram; or the owner of any right in the work, [NZ/MY oppose: performance,] or phonogram;

(ii) [AU/MY/CA/JP: electronic] information about the terms and conditions of the use of the work, [NZ/MY oppose: performance,] or phonogram; or

(iii) any [AU/MY/CA/JP: electronic] numbers or codes that represent such information, when any of these items [CA propose: of information] is attached to a copy of the work, [NZ/MY oppose: performance,] or phonogram or appears in connection with the communication or making available of a work, [NZ/MY oppose: performance] or phonogram, to the public.

(d) For greater certainty, nothing in this paragraph shall obligate a Party to require the owner of any right in the work, performance, or phonogram to attach rights management information to copies of the work, performance, or phonogram, or to cause rights management information to appear in connection with a communication of the work, performance, or phonogram to the public.

169 Negotiator’s Note: CL/MY/NZ/BN/JP positions pending outcome of this provision.

170 Negotiator’s Note: NZ/JP is considering the scope of obligations under this paragraph.

This provision is WCT-plus and ACTA-plus in that neither agreement:

- Deals with (ii) (distributing RMI) or
- Requires criminal liability;
- Both treaties do not limit the kinds of exceptions that may be created:
  - The WCT gives parties a general freedom ‘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’
  - ACTA allows parties to ‘adopt or maintain appropriate limitations or exceptions’ to these measures, and specifically provides too that protection for RMI is ‘without prejudice to the rights, limitations,
exceptions or defences to copyright or related rights infringement under a Party's law.

The provision should be limited to electronic rights management information in order to avoid overlap with other forms of liability including provisions regarding trafficking in counterfeit labels and certificates of authenticity (dealt with in the enforcement provisions of the TPP and discussed in my other paper on the enforcement provisions). The problem with this expansion is likely to be in the multiplication of offences that a person commits in the act of infringement. Multiplying the wrongful acts has the potential to lead to over-charging of defendants in the criminal context, and increases in the extent of civil liability.

This provision is relatively limited in the sense that it imposes liability only in circumstances where a person knows or has reason to know that their acts would induce, enable, facilitate, or conceal an infringement of copyright. It could legitimately be said that (ii) in particular is overkill (how common is the 'distribution' or communication of electronic rights management information?).

The limit on exceptions in this provision is extremely strict, and although this partly reflects the narrow compass of the liability created, it is not at all clear that it is appropriate to entirely restrict any space for new exceptions in a treaty (as opposed to putting in place principles by which exceptions are to be judged, eg, stating that any exceptions must not unduly impair the legal protection for RMI).

The drafting seems very over-complicated: it is not at all clear why the much simpler drafting of ACTA would not be adequate, even if supplemented to impose criminal liability in some limited circumstances.

From an Australian perspective, the provision largely matches AUSFTA article 17.4.8 – with one important qualification: the US proposal – which it seems Australia supports – would extend liability to circumstances involving private financial gain – thus raising all those issues about the possible risks for consumers and individuals.

9 Related Rights Provisions

9.1 Performances, Sound Recordings and National Treatment

Article QQ.G.14: (Related Rights)

1. Each Party shall accord the rights provided for in this Chapter with respect to [NZ/BN/MY oppose: performers and] producers of phonograms to the [NZ/BN/MY oppose: performers and] producers of phonograms who are nationals\(^{171}\) of another Party and to [NZ/BN/MY oppose: performances or] phonograms first published or first fixed in the territory of another Party\(^{172}\). A [NZ/BN/MY oppose: performance or] phonogram shall be considered first published in the territory of a Party in which it is published within 30 days of its original publication.\(^{173}\)\(^{174}\)

\(^{171}\) Negotiator's Note: CA reserves its position pending the outcome of FN10 (Art. QQ.A.7).
For greater certainty, in this paragraph with respect to performances or phonograms first published or first fixed in the territory of a Party, a Party may apply the criterion of publication, or alternatively, the criterion of fixation, or both.

For purposes of this Article, fixation means the finalization of the master tape or its equivalent.

JP propose: A Party may comply with its obligations under this paragraph by legislating that performers and producers of phonograms are protected to the extent provided for in Article 3 of WPPT and/or Paragraph 3 of Article 1 of the TRIPS Agreement.

This provision requires national treatment in relation to performers and producers of sound recordings.

Care should be taken with this provision to ensure that countries do not unwittingly commit to providing better rights to US sound recording copyright owners, in particular, than the US recognises at home. Neither the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms nor TRIPS requires member countries to recognise performing or broadcasting rights in recordings. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (“Rome Convention”) of 1961 and the WIPO Performances and Phonograms Treaty of 1996 both allow countries to make a reservation and an exception to national treatment to the extent of any such reservation entered. The US only recognises rights in relation to broadcasting/communication of sound recordings. The right of countries to apply national treatment and deny rights to US sound recording owners depends upon the inclusion of a footnote like that found in 176 to a Canadian proposal: it is not clear however whether that footnote is part of all of the proposals.

9.2 Performers’ rights in their unfixed performances (anti-bootlegging)

2. Each Party shall provide to performers the right to authorize or prohibit:

(a) broadcasting and communication to the public of their unfixed performances, except where the performance is already a broadcast performance; and

(b) fixation of their unfixed performances.

62 According to the US reservation to the WPPT, “the United States will apply the provisions of Article 15(1) of the WIPO Performances and Phonograms Treaty [that is, the broadcasting and communication rights for sound recordings] only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under the United States law.” In other words, there are not rights (even to remuneration) for use of sound recordings in broadcasting generally – only for digital subscription broadcasting (and online sales/downloads of sound recordings).

63 Australia provides protection for performing/broadcasting of sound recordings but does not accord this protection to American recordings, because the US does not itself recognise such rights: Copyright (International Protection) Regulations 1969 (Cth), regs 6 and 7, and Sch 3.
These ‘anti-bootlegging’ rights are found in the *Rome Convention* and in article 6 of the WPPT. Similar concepts are also found in TRIPS, but the TRIPS provision is expressed differently, requiring only that performers have the ‘possibility to prevent’ equivalent acts (recognising perhaps that in some countries, ‘anti-bootlegging’ laws have been part of the criminal law rather than an economic or civil right of the performer.\textsuperscript{64} Many countries would have such rights, but one thing to be wary of is the extent to which including these rights in the TPP IP chapter will interact with issues like exceptions, duration of rights, and remedies. Unless remedies and duration are qualified, it could be that the full extended duration (discussed above) and the full suite of remedies (discussed in my separate paper on enforcement) will apply to these rights, which, under the WPPT, extend for 50 years post fixation (and under the *Rome Convention* last 20 years from the date of the performance).

**Australia:** Australia is subject to an identical provision in AUSFTA Article 17.6.2. Australia has provided such rights in the *Copyright Act 1968* Part XIA.

### 9.3 Related rights and communication to the public

3. [US/AU/PE/NZ/MY/BN/VN/CL/MX/SG propose ; CA oppose:](a) Each Party shall provide to [NZ oppose: performers and] producers of phonograms the right to authorize or prohibit [BN oppose: the broadcasting or] any communication to the public of their [NZ oppose: performances or] phonograms, by wire or wireless means, including the making available to the public of those [NZ oppose: performances and] phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them.\]

[US/CL/PE/MX/SG/MY/NZ/AU/VN/BN propose: (b) Notwithstanding subparagraph (a) and Article [QQ.G.16.1] [exceptions and limitations – 3 step test], the application of this right to analog transmissions and [SG/VN/BN oppose: non-interactive], free over-the-air [CL/PE/MX oppose: analog and digital] broadcasts, and exceptions or limitations to this right for such activity, shall be a matter of each Party's law.]

[US/AU/SG/CL/PE/VN/MY propose: (c) Each Party may adopt limitations to this right in respect of other noninteractive transmissions in accordance with Article [QQ.G.16.1] [exceptions and limitations – 3 step test], provided that the limitations do not [CL/PE oppose: unreasonably] prejudice the right of the performer or producer of phonograms to obtain equitable remuneration].

[CA propose: Each Party shall provide to performers and producers of phonograms the rights to authorize or prohibit:]

(c) the broadcasting or any communication to the public of their performances or phonograms; and

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(d) the making available to the public, by wire or wireless means, of their performances and phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them.

Where, upon the data of signature of this Agreement, the right in subparagraph (a) has not been implemented by a Party, the requirement may be satisfied by providing a right to a single equitable remuneration for the direct or indirect use of phonograms published\(^{175}\) for commercial purposes for broadcasting or for any communication to the public.\(^{176}\)

\(^ {175}\) The term “published” in this paragraph includes phonograms that are made available in accordance with Article 15(4) of the WPPT.

\(^ {176}\) Where a Party has availed itself of the option contained in Article 15(3) of the World Intellectual Property Organization Performances and Phonograms Treaty (WPPT), the obligation contained in [QQ.A.X – national treatment] does not apply to the extent that a Party makes use of a reservation taken under that Article.”

Similar rights are provided for in the WPPT articles 10, 14 and 15. This kind of provision is common to the US FTAs.\(^ {65}\)

Paragraph (b) of the US proposal reflects the US’ desire to maintain its highly idiosyncratic rules relating to the broadcast/communication of sound recordings, including the absence of any right of performance to the public in relation to sound recordings (unless the performance is via digital audio transmission: 17 USC §§106, 114). The US’ limited rights for producers of sound recordings means that there is no remuneration for broadcasts there. As noted above, this makes it important that footnote 176 or something like it is included somewhere to limit national treatment and ensure other countries do not end up committing to pay US sound recording owners where their own sound recording owners receive no payment in the US. Note too that to the extent that any country were to sign up to the WPPT as a result of joining the TPP, it will need to enter a reservation to article 15(3) if it proposes to take advantage of the right to give more restricted rights to sound recording owners.

Note too that paragraph (c) puts a limit on the right of countries, under article 15(1) of the WPPT, to confine the rights of performers and sound recording copyright owners to equitable remuneration for ‘the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public’. Under the TPP drafting, equitable remuneration can only be applied to non-interactive communications (pre-programmed streaming, webcasting) but not interactive (ie download; ‘program your own streaming’) services. The drafting seems to suggest that introducing equitable remuneration for interactive communications would breach the three step test.

**Australia:** is already subject to a similar provision in AUSFTA article 17.6.3.

**9.4 Definitions**

**Article QQ.G.15:**

\(^ {65}\) See eg AUSFTA article 17.6.3.
For purposes of this [Article QQ.G.1 and Article QQ.G.3 – 18], the following definitions apply with respect to performers and producers of phonograms:

(a) **broadcasting** means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

(b) **communication to the public** of a performance or a phonogram means the transmission to the public by any medium, other than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of paragraph [3], “communication to the public” includes making the sounds or representations of sounds fixed in a phonogram audible to the public;

(c) **fixation** means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced, or communicated through a device;

(d) **performers** means actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;

(e) **phonogram** means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;

(f) **producer of a phonogram** means the person who, or the legal entity which, takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds; and

(g) [CA propose:]

**publication of a performance or a phonogram** means the offering of copies of the performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity.

177 [US/SG propose ; CA/MX/CL/MY/VN/BN/CL oppose: For greater certainty, “broadcasting” does not include transmissions over computer networks or any transmissions where the time and place of reception may be individually chosen by members of the public.]

178 Negotiator’s Note; CA is considering the need for a deeming provision similar to article 15 (4) of WPPT.

These definitions broadly match the definitions in the WPPT. This includes the reference to paragraph 3 and the inclusion of ‘performances in public’ as ‘communications to the public’ (which strikes me as odd, since I would have expected that most countries treat these two as separate rights). It seems strange to create a right to cause a sound recording/fixed performance to be heard in public by a definition, rather than treat it as a separate right – but that is what the WPPT does.
10  Exceptions and Limitations

**Article QQ.G.X**

1. With respect to Section G, 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.

2. Article QQ.G.X.1 neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, Berne Convention [VN propose: Rome Convention,] the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty. 180

180 Negotiators’ Note: Delegations are considering the relationship between Article QQ.G.X.2 and new multilateral agreements concluded under the auspices of WIPO and the agreements listed in Article QQ.G.X.2. Delegations will work to resolve this issue in Article QQ.A.6 (General Provisions – relationship to other agreements) or elsewhere

The drafting of this provision and the next (QQ.G.Y) is complex and their impact is somewhat uncertain. It is also, as KEI notes,66 profoundly important. These provisions seek to ‘define the overall space that governments have to create exceptions to exclusive rights’.67

The idea of including positive language on exceptions in copyright is a welcome development. Past US FTAs have tended to include extremely detailed provisions creating ever-more-detailed exclusive rights and enforcement tools for IP owners, while including few or none of the balancing provisions that are found in legal systems around the world. Inclusion of a good provision on exceptions can achieve multiple positive goals: it can affirm and strengthen countries’ rights to include balancing provisions in IP law; it can improve the ‘optics’ of the agreement by making it appear more balanced; and it can have an interpretive effect: by making explicit the need for balance in IP systems such provisions can (in conjunction with other provisions, such as a preamble of the kind currently proposed by some countries for the TPP) support an interpretation of the purposes of the agreement as a whole that reinforces the need for balance and does not interpret the agreement as solely about strengthening IP rights.

However, care must be taken that provisions said to promote balance in IP systems does not end up imposing a chokehold or excessive constraint on domestic discretion to include balancing provisions. The context for this concern relates to the ‘three step test’. In past international agreements such as Berne and TRIPS, the three step test is part of the general picture on exceptions, but both agreements recognise a range of exceptions that are not subject to the test.68 In recent years, copyright owner lobbies have sought to

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67 Ibid.
68 As noted by Knowledge Ecology International, “[T]he Berne Convention established a system combining “particular” exceptions for the most common and important topics such as quotations, news of the day, public affairs, speeches, uses of musical compositions, and education, and a general purpose exception to the reproduction right that could be implemented in any other case not covered by the particular exception. Any exception not spelled out as a particular exception was subject to a very restrictive three step test. When
elevate the 3-step test to a high level filter to limit all copyright exceptions, including the so called “particular” Berne exceptions, as well as anything else that limits exclusive rights.

This has been of concern to user interests, because the three step test found in article 9(2) of the Berne Convention and article 13 of TRIPS has been interpreted narrowly at an international level (in only one, non-precedential and arguably anomalous WTO Dispute Settlement Body decision, but also in some domestic decisions in some jurisdictions that have imported the test into domestic law). Although there is a significant body of academic literature which challenges this restrictive interpretation as simply inconsistent with the origins of the three step test, for so long as there is a possibility that the three-step-test may continue to be interpreted restrictively, proponents of balance in the IP system will view it warily and will prefer to avoid any extension of its applicability.

A further challenge in understanding the limits on a country’s freedom in this area is posed by the proliferation of texts and approaches on exceptions: we now have the three step test or versions of it in:

- The Berne Convention article 9(2), applying to the reproduction right and referring to the legitimate rights of authors;
- TRIPS article 13, referring to exclusive rights and the legitimate interests of the right holder;
- the WIPO Copyright Treaty article 10, referring to the rights granted under the WCT and the legitimate interests of the author, and including an agreed statement that ‘[i]t is understood that [article 10] permit[s] 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.’
- the WIPO Performances and Phonograms Treaty, referring to the rights granted under the WPPT and the legitimate interests of the performer and producer (and which includes a similar agreed statement);

More recent agreements – in particular, the Beijing Audiovisual Performances Treaty and the Marrakesh VIP Treaty have more complex language that seeks affirmatively to preserve any exceptions allowed under previous agreements such as Berne (see Appendix page 48 below). Countries subject to a US FTA generally have an obligation akin to the three step test referring to the copyright-related provisions in the FTA and the legitimate interests of the right holder (eg AUSFTA article 17.4.10).
What of the TPP language then? Draft article QQ.G.X, although better than the original US proposal on exceptions,\textsuperscript{71} still appears to be less exception-friendly in certain significant respects than other recent multilateral efforts to draft general language on exceptions:

- it refers to the legitimate interests of the right holder, not the author, performer, or producer: cf WCT, WPPT, Beijing. Given the focus of the second ‘step’ on economic considerations likely to be of importance to right holders, it would be better for the third step to focus on the interests of human creators (raising issues such as moral rights, attribution etc);\textsuperscript{72}
- it does not include an equivalent to the WCT/WPPT agreed statement affirming the right of parties to carry forward and appropriately extend existing exceptions into the digital environment and to create new exceptions suitable to the digital environment (the language in QQ.G.Y, which refers to the digital environment, is stated in weaker language as discussed below);
- it states that existing exceptions under TRIPS, Berne, the WCT and WPPT are not reduced, but it also states that they are not extended. This tends to suggest that insofar as the TPP creates any new or additional rights (which for some countries may well be true, particularly in relation to performers\textsuperscript{73}) the more restrictive language of the QQ.G.X will apply to those rights.
- It does not refer to other recent multilateral conventions in particular Beijing and Marrakesh (although the negotiator’s note suggests that this may have already been addressed).

KEI’s initial analysis is that QQ.G.X is more restrictive than other recent multilateral drafting on exceptions and limitations. I agree. In my view, it would be better to avoid any doubt, and better too to avoid the proliferation of different limiting language, by adopting the most general of the existing drafting forms. In short, the parties should stop trying to draft new language on the three step test and how that three step test relates to rights and exceptions to other conventions. The language of the Marrakesh VIP Treaty offers the most recent and most comprehensive language in this respect.

In order to protect the need for balance in copyright treaties and preserve flexibility for the future, the TPP should:

- explicitly incorporate all the exceptions recognised in Marrakesh;
- explicitly affirm all the exceptions in existing treaties using language similar to that used in Marrakesh; and

If there is any new language that would be useful, it would be language that explicitly recognises that countries may negotiate further exceptions multilaterally, or, better still, language that obliges countries to negotiate further exceptions in good faith in multilateral fora (thus allowing for or even encouraging current multilateral efforts to negotiate a treaty on libraries and others).

\textsuperscript{71} For a comparison, see Appendix 1, page 47 below.

\textsuperscript{72} Actually it is probably not clear which formulation is more ‘user-friendly’, but the author/performer/producer formulation is more ‘copyright principle friendly’ in the sense that it recognizes and focuses on the creator-oriented goals of copyright and not just on economic/market interests.

\textsuperscript{73} This may interact to some extent with earlier provisions regarding ratification of other treaties. If parties ratify the WCT and WPPT as a result of the TPP, then presumably that means the rights and exceptions under the WCT and WPPT apply including the less restrictive language of the WPPT preserved through QQ.G.X.
Alternatively, simpler drafting would be something along the lines of an original proposal from NZ/CL/MY/BN/VN:

1. Each party may provide for limitations and exceptions to copyrights, related rights, and legal protections for technological protection measures and rights management information included in this Chapter, in accordance with its domestic laws and relevant international treaties that each are party to.

This proposal avoids the danger of making existing, well-established exceptions subject to further limits under the three step test. This proposal would allow exceptions without including the three step test as a requirement. Parties to the TPPA would still be bound by any existing international obligations, including the TRIPS Agreement, and hence in practice the three step test would frequently apply. However, compliance with the three step test would not be able to be raised in disputes brought in the TPPA framework, but would have to be brought in, for example, the WTO Dispute Settlement process (or any relevant bilateral process, such as that under AUSFTA). This would reduce parties’ exposure to retaliation for the introduction of new copyright exceptions. It would also reduce the ability of Parties to ‘forum shop’ for the most favourable forum for a dispute, or, perhaps, bring disputes in more than one forum. Thus the proposal would increase flexibility to introduce exceptions and reduce the uncertainty that might arise from the possibility of multiple disputes in a plethora of fora.

### Article QQ.G.Y

Each Party shall endeavor to achieve an appropriate balance in its copyright and related rights system, inter alia by means of limitations or exceptions that are consistent with Article QQ.G.X, 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 [CL/MY propose\(^{181}\): education,] [CL propose: and persons with disabilities] [US/MX propose: , as well as facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled]\(^{182}\).

\(^{181}\) Negotiator’s Note: SG/CA/PE/BN/NZ/AU is flexible on the inclusion of the word ‘education’ as the notion is already significantly covered by teaching, scholarship and research. US/MX believe the word ‘education’ is covered by teaching, scholarship and research, but is considering further.

\(^{182}\) FN: For purposes of greater clarity, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under Article QQ.G.Y.

\(^{183}\) Negotiator’s Note: NZ/AU is flexible on either options referring to persons with disabilities.

As noted immediately above, the idea of including positive language on exceptions in copyright is a welcome development. Inclusion of a good positive provision on exceptions could achieve multiple positive goals: it could affirm and strengthen countries’ rights to include balancing provisions in IP law; it can improve the ‘optics’ of the agreement by making it appear more balanced; and it can have an interpretive effect: supporting an interpretation of the agreement as being concerned with balance, not just strengthening IP rights.
Is this language adequate? On the positive side, the proposal contains open-ended language which does not limit the kinds of legitimate purposes for which exceptions may be created. Also positive are the purposes mentioned which are consistent with exceptions well-established around the world. In my view it would be helpful to include education, perhaps to avoid an argument that the article only contemplates exceptions for direct acts of a teacher or researcher (and not institutional acts that support pedagogy or research). It has improved since the original US proposal (see Appendix below).

However there are a number of criticisms:

- QQ.G.Y requires that exceptions be ‘consistent with QQ.G.X’. Although it no longer (as originally proposed) uses the language that it is ‘subject to’ QQ.G.X, this limiting language might nevertheless be taken to suggest that even exceptions created matching the language in QQ.G.Y will be able to be challenged under the three step test. In particular, it could be taken to suggest that the purposes outlined in QQ.G.Y may not be ‘certain special cases’ as required by that test, and that exceptions introduced into domestic law must be more specific than the language of paragraph 2 (even though that would be inconsistent with domestic law in many TPP countries, such as the US and Australia);

- the language of the proposal is relatively weak, especially when compared to the strong limiting language of QQ.G.X. The proposal only creates an obligation to ‘endeavour to achieve’ balance: language that, in practice, would in practice be unenforceable were people or businesses (such as the media) to encounter barriers in TPP countries owing the non-existence of exceptions. The language only requires parties to ‘give due consideration to’ even internationally well-established copyright exceptions such as criticism, comment, news reporting, teaching, scholarship and research. Are there any TPP countries where exceptions for these activities are not recognized? If not, would it not be appropriate to affirm that there will be exceptions for such purposes?

- As a result of the weak language, it would be entirely consistent with this provision for a country to adopt a very narrow and specific set of copyright exceptions: even a set of exceptions that did not recognize exceptions for the situations actually mentioned in the provision.

For an example of an attempt to draft a positive provision for IP exceptions, see the proposals of Annette Kur and Mariann Levin for an additional article 8A for inclusion in the TRIPS agreement:

74 (1) Members shall take due account of the objectives and principles set out in Articles 7 and 8 when formulating or amending their laws and regulations. In doing so, they shall ensure that the protection granted reflects a fair balance between private economic interests and the larger public interest as well as the interests of third parties.

(2) Members shall ensure that users may, without the consent of the right holder, use protected subject matter, provided that such use does not unreasonably prejudice the legitimate interests of the right holder, taking into due consideration the normal exploitation of the right.

Article QQ.G.2

[CL/NZ/MY propose:184 It is consistent with this Agreement to provide exceptions and limitations for 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; and which have no independent economic significance.]

184 Negotiator’s Note: Delegations are considering the appropriate placement of this issue under right of reproduction or L & E. There continue to be discussions regarding this issue and delegations have diverging views

This is similar language to the footnotes to the reproduction right, discussed above in part 2.1 page 7. In short, while it is entirely appropriate to deal with the inevitability of technical copies in the digital environment, either by excluding some such copies from the reproduction right, or by having exceptions, an exception drafted in terms this narrow and technical (and which seems to desire to make innocent intermediaries who neither initiate, nor are the end point, for communications liable for copyright infringement) may not be desirable, in that it may suggest that broader exceptions for technical copies are not permissible or conflict with the three step test (despite the fact that broader exceptions exist in some countries, including countries in Europe, which has a broader, compulsory exception in the Copyright and the Information Society directive).

For Australia, an exception this narrow could interfere with some of the proposals being made by the Australian Law Reform Commission to address the narrow and inadequate nature of Australia’s current exceptions for technical copies.

11 International Exhaustion

Article QQ.G.17: {International Exhaustion of Rights}

[CL/NZ/SG/MY/BN/VN/PE/MX propose; AU/US oppose: The Parties are encouraged to establish international exhaustion of rights.]

[CA propose: Nothing in this Chapter shall affect the freedom of the Parties to determine whether and under what conditions the exhaustion of copyright and related rights applies.]

185 Negotiators’ Note: CA reserves its position pending the outcome of discussions elsewhere in this Chapter.

This provision is designed to promote parallel importation. Basically, a majority of countries support a provision in favour of (but not requiring) international exhaustion
(ie favouring allowing parallel importation of goods legitimately made in other
countries). It is not clear why Australia would oppose this provision: it is not
inconsistent with Australian law in that it does not require a blanket position allowing
parallel importation.\footnote{It is also entirely consistent with Australia's other international
obligations, since Australia is not currently bound by any international obligation that
forbids parallel importation (there is no such provision in AUSFTA).}

Note that any provision addressing import/export should perhaps mention the
provisions of the Marrakesh Treaty to Facilitate Access to Published Works for Persons
Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh, June 27,
2013).

\begin{tcolorbox}
\textbf{Article QQ.G.18: \{Collective Management\}}

The Parties recognize the important role of collective management societies for copyright
and related rights in collecting and distributing royalties\footnote{For greater certainty, royalties may include equitable remuneration} based on practices that are fair,
efficient, transparent and accountable, and which may include appropriate record keeping
and reporting mechanisms.

This provision would not appear to be problematic: it imposes no real obligations on a
country either to allow or prohibit collective administration, which is commonly used
throughout the world.
\end{tcolorbox}

\footnote{Australia's actual position on parallel importation is discussed above in section 2.3, page 5.
Australia allows parallel importation of some subject matters and forbids it in relation to
other subject matter.}
### Appendix 1: Exceptions and Limitations Texts

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<thead>
<tr>
<th>Proposal from 2012</th>
<th>August 30 2013 Draft Text</th>
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<tr>
<td><strong>Confining Exceptions</strong></td>
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<tr>
<td>1. With respect to Section G, 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.</td>
<td>[US/AU: With respect to this Article [(Article 4 on copyright) and Article 5 and 6 (which deal with copyright and related rights section and the related rights 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.]</td>
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<tr>
<td>2. Article QQ.G.X.1 neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, Berne Convention [VN propose: Rome Convention,] the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.</td>
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<tr>
<td>Negotiators' Note: Delegations are considering the relationship between Article QQ.G.X.2 and new multilateral agreements concluded under the auspices of WIPO and the agreements listed in Article QQ.G.X.2. Delegations will work to resolve this issue in Article QQ.A.6 (General Provisions – relationship to other agreements) or elsewhere.</td>
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| **Positive Provision** | |
|------------------------| |
| Each Party shall endeavor to achieve an appropriate balance in its copyright and related rights system, inter alia by means of limitations or exceptions that are consistent with Article QQ.G.X, 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 [CL/MY propose: education,] [CL propose: and persons with disabilities] [US/MY/SG/CA/PE/BN/MX/VN propose:] as well as facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled. | 2. Subject to and consistent with paragraph (1), each Party shall seek to achieve an appropriate balance in providing limitations or 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 and research. FN92: [US: For purposes of greater clarity, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under paragraph 2] |
| 181 Negotiator's Note: SG/CA/PE/BN/NZ/AU is flexible on the inclusion of the word 'education' as the notion is already significantly covered by teaching, scholarship | |
| 182 183 | |
and research. US/MX believe the word 'education' is covered by teaching, scholarship and research, but is considering further.
162 FN: For purposes of greater clarity, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under Article QQ.G.Y.

163 Negotiator's Note: NZ/AU is flexible on either options referring to persons with disabilities.

Other alternatives

Beijing Treaty on Audiovisual Performances

Article 13 Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer [8].

8 Agreed statement concerning Article 13: The Agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty (WCT) is applicable mutatis mutandis also to Article 13 (on Limitations and Exceptions) of the Treaty.

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh, June 27, 2013) article 11

In adopting measures necessary to ensure the application of this Treaty, a Contracting Party may exercise the rights and shall comply with the obligations that that Contracting Party has under the Berne Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty, including their interpretative agreements so that:

(a) in accordance with Article 9(2) of the Berne Convention, a Contracting Party may permit the reproduction of works in certain special cases provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author;

(b) in accordance with Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, a Contracting Party shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder;

(c) in accordance with Article 10(1) of the WIPO Copyright Treaty, a Contracting Party may provide for limitations of or exceptions to the rights granted to authors under the WCT in certain special cases, that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author;

(d) in accordance with Article 10(2) of the WIPO Copyright Treaty, a Contracting Party shall confine, when applying the Berne Convention, any
limitations of or exceptions to rights to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.