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November 7, 2015

**Section by Section Commentary on the TPP Final  
IP Chapter Published 5 November 2015 – Part 2  
– Copyright**

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**Section by Section Commentary on the TPP Final IP Chapter  
Published 5 November 2015 – Part 2 – Copyright**

**Kimberlee Weatherall\***

**Nature and scope of this document**

This note comments on each provision of the TPP IP Chapter, and compares each provision to

- Multilateral conventions, such as Berne, Rome, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)
- in some cases, US FTA provisions (particularly the Australia-US FTA, AUSFTA, with which I am most familiar);
- Other relevant treaties like the Anti-Counterfeiting Trade Agreement.

This document covers **Section H** on copyright and related rights. Companion pieces cover the general provisions, trade mark, GIs, industrial designs, and the enforcement provisions. Note that the discussion here does need to be read also with the discussion in Part 1 covering Section A (General Provisions). Thus Part 1 of my commentary talks about important concepts like national treatment; minimum standards; application of the treaty to existing subject matter, and exhaustion.

The material here is necessarily preliminary and does not purport to be complete. It is background work, published on the basis that it may assist others' analysis and commentary.

I would welcome feedback or further comment, especially if provided with permission to incorporate insights into future iterations of this work for the benefit of others. I may be contacted at [kimberlee.weatherall@sydney.edu.au](mailto:kimberlee.weatherall@sydney.edu.au).

This document is likely to grow and change over time as further insights become available. Please check back at the source or contact me for the latest version if citing.

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## 1 Definitions

Two sets of definitions are relevant for copyright: definitions in art 18.1 and definitions in art 18.57. From 18.1 only definitions relevant to copyright are extracted here. For more discussion see Part 1 of my analysis of the TPP IP Chapter, which has a fully discussion of Section A (General Provisions).

### Article 18.1: Definitions

1. For the purposes of this Chapter:

**Berne Convention** means the *Berne Convention for the Protection of Literary and Artistic Works*, as revised at Paris, July 24, 1971;

**intellectual property** refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the TRIPS Agreement;

**performance** means a performance fixed in a phonogram unless otherwise specified;

with respect to copyright and related rights, the term **right to authorise or prohibit** refers to exclusive rights;

**WCT** means the *WIPO Copyright Treaty*, done at Geneva, December 20, 1996; **WIPO** means the World Intellectual Property Organization;

For greater certainty, **work** includes a cinematographic work, photographic work and computer program; and

**WPPT** means the *WIPO Performances and Phonograms Treaty*, done at Geneva, December 20, 1996.

2. For the purposes of Article 18.8 (National Treatment), Article 18.31(a) (Administrative Procedures for the Protection or Recognition of Geographical Indications) and Article 18.62.1 (Related Rights):

a **national** means, in respect of the relevant right, a person of a Party that would meet the criteria for eligibility for protection provided for in the agreements listed in Article 18.7 (International Agreements) or the TRIPS Agreement.

Most of these definitions are relatively standard and are merely ways to allow for shortened versions of treaty names. A couple, however, do have substantive import.

For purposes of copyright note that protected *performances* are limited to performances fixed in phonograms (ie sound recordings). Thus performances recorded in film/audiovisual form are *not* covered by the TPP. This reflects the state of multilateral conventions: performances embodied in phonograms are protected via the WPPT of 1996. Performances recorded in film receive some protection through the Rome Convention but WIPO only recently concluded a multilateral convention updating that protection for the digital era: the *Beijing Treaty on Audiovisual Performances* (done in Beijing 24 June 2012). That treaty is not yet in force (it has 10 ratifications to date out of a required 30).

For countries that are party to the Rome Convention and already provide some protection for performances captured in film and in sound recordings, the distinction in the TPP means that they will need to make a choice: whether to extend the higher TPP-style protection to all recorded performances, or only to performances in sound recordings. Trying to draw the distinction (as Australia did in implementing AUSFTA) can make for quite complex laws.

Another definition to note is that **work** includes a cinematographic work, photographic work and computer program. Although increasingly standard, this provision does have the effect of overriding the past multilateral approach of treating photographs differently from other artistic works (photographs used to have much shorter terms). It also ensures that the TPP stands in the way of more tailored forms of protection for works like software (although other multilateral conventions, such as the WCT, also do that, so little changes as a result of this approach).

#### **Article 18.57: Definitions**

For purposes of Article 18.58 (Right of Reproduction) and Article 18.60 (Right of Distribution) through Article 18.70 (Collective Management), the following definitions apply with respect to performers and producers of phonograms:

**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;

**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.

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

**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;

**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;

**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

**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.

## Relationship to other treaties and comment

These definitions reproduce art 2 of the WPPT, with the exception of one sentence omitted from the definition of **communication**: unlike the WPPT definition, the TPP definition does not explicitly include ‘making the sounds or representations of sounds fixed in a phonogram audible to the public’ in the concept of communication. This makes clear that the TPP does not deal with performance rights: the communication rights in art 18.59 (works) and art 18.62 (performances/phonograms) refer only to communications by wire or wireless means.<sup>1</sup> Note however that the TPP does require parties to ratify the WPPT, and the WPPT *does* confer a right to remuneration for public performances (which can be the subject of reservations).<sup>2</sup>

## 2 Exclusive Rights

### 2.1 Reproduction

#### Article 18.58: Right of Reproduction

Each Party shall provide<sup>63</sup> that authors, performers, and producers of phonograms<sup>64</sup> have the right to authorize or prohibit all reproductions of their works, performances, and phonograms in any manner or form, including in electronic form.

63 For greater certainty, the Parties understand that it is a matter for each Party’s law to prescribe that works in general or any specified categories of works, performances, and phonograms shall not be protected by copyright or related rights unless the work, performance or phonogram has been fixed in some material form.

64 References to “authors, performers, and producers of phonograms” refer also to any of their successors in interest.

#### Relationship to other treaties:

- In relation to *authors*, this elaborates on art 9 of the Berne Convention, which grants authors ‘the exclusive right of authorizing the reproduction of [their] works, in any manner or form’. Berne art 9 is incorporated into TRIPS (art 9.1). The TPP follows the international convention (dating from Berne) which treats films as works; for films this provision elaborates on Berne article 14*bis*. It echoes the agreed statement to art 1(4) of the WIPO Copyright Treaty, which states that ‘[t]he reproduction right... fully appl[ies] 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’.
- In relation to *sound recordings* (phonograms) this largely matches art 11 of the WIPO Performances and Phonograms Treaty, which provides for a right of reproduction ‘in any manner or form’ and is linked to an Agreed Statement similar to that in the WCT quoted immediately above.

<sup>1</sup> This is similar to Europe, where the right of public performance is one of the few unharmonised economic rights (along with translation and adaptation): see Paul Goldstein and P. Bernt Hugenholtz, *International Copyright: Principles, Law and Practice* (Oxford University Press, 3rd ed, 2012), 327.

<sup>2</sup> WPPT art 2 (definitions) and art 15. Non-inclusion of the public performance right in the TPP is nevertheless significant for a range of reasons, including in relation to national treatment (discussed in Part 1 of my analysis of the TPP chapter).

- In relation to *performers* this largely matches art 7 of the WPPT and the related agreed statement.
- The provision is less detailed and less prescriptive than provisions from previous US Free Trade Agreements.

### **Comment**

The interesting thing about this provision is what is *not* there. Earlier leaked drafts included a specific reference to *temporary* copies as falling within the copyright owner's right (consistent with the approach of past US FTAs). Copies multiply in the digital environment. 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. Including temporary copies within the reproduction right therefore has the tendency to transform copyright into an '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). The issue is far from being theoretical, for example, the question whether or not temporary copies made as a result of internet browsing were infringement has been litigated in the UK.<sup>3</sup> It is also not necessarily consistent with US law: the US' own courts have not uniformly treated temporary copies as covered by the reproduction right,<sup>4</sup> 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.<sup>5</sup> Early leaked texts of the TPP chapter did include some exceptions for technical copies, however, such exceptions were limited, prescriptive and could have caused problems into the future.

The fact that references to temporary copies are no longer in the text means that the provision effectively goes no further than the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty in recognising that electronic copies count as reproductions (subject to fulfilling other local requirements, which could include, per some US case law, a certain degree of permanence or longevity).

## **2.2 Communication to the public**

### **Article 18.59: Right of Communication to the Public**

Without prejudice to Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii), and 14*bis*(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,

<sup>3</sup> See *Public Relations Consultants Association Limited v The Newspaper Licensing Agency Limited* [2013] 2 All ER 852. 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* [2010] FSR 20.

<sup>4</sup> 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).

<sup>5</sup> See eg *Copyright Act 1968* (Cth) ss 43A, 43B, 111A, 111B, 116AB, 200AAA; see also the mandatory exception in art 5.1 of the *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* [2001] OJ L 167/10.

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.<sup>65</sup>

65 The Parties understand 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 11*bis*(2) of the Berne Convention.

#### **Relationship with other treaties:**

- This goes beyond TRIPS: TRIPS mostly repeats the Berne Convention, which did not separately address the question of online communication or asynchronous communications.
- This provision is identical to WCT article 8, including footnote 65 which is identical to the Agreed Statement concerning article 8.
- It is also identical in text to AUSFTA art 17.5 (AUSFTA does not include the footnote)

#### **Comment**

This provision reflects existing multilateral standards found in the WIPO Internet Treaties of 1996, which extended authors' and owners' rights to ensure exclusive rights to authorise wired and wireless communications including making available online asynchronously (ie on demand). Like the WIPO Treaties, the provision does not dictate the form the exclusive right should take. It preserves the exception in 11*bis*(2) of Berne, which allows countries to determine conditions under which authors have the right to control broadcasting, rebroadcasting and public performance of their works subject to requirements to provide equitable remuneration and recognise moral rights.

### **2.3 Distribution**

#### **Article 18.60: Right of Distribution**

Each Party shall provide to authors, performers, and producers of phonograms the right to authorize or prohibit the making available to the public of the original and copies<sup>66</sup> of their works, performances, and phonograms through sale or other transfer of ownership.

66 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.

#### **Relationship with other treaties:**

- No equivalent provision in TRIPS, Berne, or Rome Conventions
- WIPO Copyright Treaty contains equivalent and identical provision for authors: art 6
- WIPO Performances and Phonograms Treaty equivalent and identical provision for performers (art 8) and producers of phonograms (art 12);
- Equivalent in AUSFTA art 17.4.2

#### **Comment**

The provision is consistent with multilateral standards found in the WCT and WPPT. In international terms, the distribution right is less universally accepted than the



reproduction right; few national systems grant authors/owners a comprehensive distribution right.<sup>6</sup> The distribution right is commonly limited by the principle of exhaustion, which is preserved in art **18.11**. Note that the reference to the transfer of *ownership* excludes rental or loan through library systems.

## **2.4 No hierarchy/co-existence of rights**

### **Article 18.61: No Hierarchy**

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.

### **Relationship to other treaties:**

- No equivalent provision in TRIPS, Berne or Rome Convention
- Similar concept embodied in WPPT art 1(2), particularly the agreed statement attached to that provision;<sup>7</sup>
- Similar provision in AUSFTA: Article 17.4.3.

### **Comment**

The provision is consistent with multilateral standards in the WPPT. This is generally consistent with multilateral conventions and the way that copyright works: different kinds of rights subsist simultaneously, and permission is required from all rights holders to undertake any act falling within copyright (but note qualifications in WPPT art 15, around the communication right, and see art 18.62 discussed below).

The fact that this is standard international copyright law doesn't necessarily mean it makes sense. It significantly adds to the costs of copyright in the digital environment: the existence of multiple layers of rightsholders and the need to negotiate with each rightholder before any act can be undertaken increases the cost of establishing new services which utilise copyright works. In theory too there are other ways that rights could be handled: for example, at the time an author's work is embodied in a phonogram, there could be negotiation between author and producer settling terms and distribution of any returns from the phonogram, so that third parties would only have to negotiate with the phonogram owner (in some systems, this is how rights in material

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<sup>6</sup> Goldstein and Hugenholtz, above n 1, 309.

<sup>7</sup> Art 1(2) of the WPPT states that 'Protection granted under this Treaty [ie to performers and producers of phonograms] shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection'. The Agreed Statement accompanying art 1(2) states that 'It is understood that Article 1(2) clarifies the relationship between rights in phonograms under this Treaty and copyright in works embodied in the phonograms. In cases where authorization is needed from both the author of a work embodied in the 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, and vice versa.'

incorporated into films are dealt with). This rule stands in the way of any attempt to 'defragment' copyright to take account of new digital realities.

Realistically, given the current international framework, however, and the fact that various treaties protect the assorted rightsholders in an unqualified way, we are unlikely to see any move to rationalise or 'defragment' copyright rights. Remember too that defragmenting rights would likely concentrate rights in the hands of producers – and could disadvantage composers. We have to hope that collective rights management organisations or groups of owners can get their act together to facilitate licensing.

## 2.5 *Related Rights*

### **Article 18.62: Related Rights**

1. Each Party shall accord the rights provided for in this Chapter with respect to performers and producers of phonograms to the performers and producers of phonograms who are nationals<sup>67</sup> of another Party and to performances or phonograms first published or first fixed<sup>68</sup> in the territory of another Party. A 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.
2. Each Party shall provide to performers the right to authorise or prohibit:
  - (a) the broadcasting and communication to the public of their unfixed performances, unless the performance is already a broadcast performance; and
  - (b) the fixation of their unfixed performances.
3. (a) Each Party shall provide to performers and producers of phonograms the right to authorize or prohibit the broadcasting or any communication to the public of their performances or phonograms, by wire or wireless means,<sup>70,71</sup> including the making available to the public of those 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.
  - (b) Notwithstanding subparagraph (a) and Article 18.65 (Limitations and Exceptions), the application of this right to analog transmissions and non-interactive, free over-the-air broadcasts, and exceptions or limitations to this right for such activities, shall be a matter of each Party's law.<sup>72</sup>

67 For the purposes of determining criteria for eligibility under this Article, with respect to performers, a Party may treat 'nationals' as those who would meet the criteria for eligibility under Article 3 of the WPPT.

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

69 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 greater certainty, consistent with Article 18.8 (National Treatment), each Party shall accord to performances and phonograms first published or first fixed in the territory of another Party treatment no less favourable than it accords to performances or phonograms first published or first fixed in its own territory.

70 With respect to broadcasting and communication to the public, a Party may satisfy the obligation by applying Article 15(1) and 15(4) of the WPPT and may also apply Article 15(2) of the WPPT, provided that it is done in a manner consistent with that Party's obligations under Article 18.8 (National Treatment).

- 71 For greater certainty, the obligation under this paragraph does not include broadcasting or communication by the public, by wire or wireless means, of the sounds or representations of sounds fixed in a phonogram that are incorporated in a cinematographic or other audiovisual work
- 72 For the purposes of this subparagraph, it is understood that a Party may provide for the retransmission of non-interactive, free over-the-air broadcasts, provided that such retransmissions are lawfully permitted by that Party's government communications authority; any entity engaging in such retransmissions complies with the relevant rules, orders or regulations of that authority; and such retransmission do not include those delivered and accessed over the Internet. For greater certainty, this footnote does not limit a Party's ability to avail itself of subparagraph (b).

### Relationship to other treaties:

Broadly, this provision:

- **Repeats** (18.62.2) TRIPS art 14.1 and WPPT art 6 by granting performers rights to prevent fixation of unfixed performances and broadcast or communication to the public of unfixed performances
- **Repeats** (18.62.3) WPPT art 14 in granting a right to make available performances and phonograms to the public by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.
- **Seems to extend** beyond TRIPS and the WPPT in granting general communication and broadcast *rights* to performers and phonogram copyright owners (18.62.3), where TRIPS/WPPT only provide for a right to remuneration rather than an exclusive right. However, this is qualified by footnote 70. That footnote transforms the apparent exclusive right into a right of remuneration (WPPT art 15.1/15.2). *Further*, owing to art 18.62.3(b) the right need not be applied at all or can be applied in a limited way only to analog transmissions and non-interactive, free over-the-air broadcasts.<sup>8</sup> This preserves some, but not all, of the freedom to enter reservations to the WPPT,<sup>9</sup> and enables countries to maintain statutory licences they may already have in the (analogue) broadcast context.

But for footnote 70, this article would have taken away some freedom countries otherwise have to apply statutory licensing or other equitable remuneration schemes in the digital environment in relation to sound recordings and performances – or, at least, would require any country desiring to do more with statutory licensing or equitable remuneration to make a case for such a limitation under the three step test (which can be difficult if the effect of the statutory licensing is to substantially replace an exclusive right). As it is, the article requires that ‘on-demand’ services must be licensed (there can be no statutory licence for on-demand services); streamed or broadcast services can be subject to a statutory licence/equitable remuneration (without fulfilling the requirements of the three step test).

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<sup>8</sup> Note that there is some discrepancy as between the language of art 18.8 (national treatment) and article 18.62. Article 18.8 contemplates exceptions (to national treatment) in the case of ‘analog communications and free over-the-air broadcasting and other non-interactive communications to the public’. Article 18.62 on the other hand refers to ‘analog transmissions and non-interactive, free over-the-air broadcasts’ – which appears to leave out ‘*other* non-interactive communications to the public’ (which would include digital streaming and digital retransmission). Excluding digital retransmission could be inconsistent with Canada’s reservation to the WPPT art 15.

<sup>9</sup> Art 15.3 of the WPPT allows parties to enter reservations to the right to equitable remuneration for broadcasting/communication to the public of phonograms and performances. Of the existing TPP parties, the US, Canada, Singapore, Chile and Japan have all entered reservations to art 15.3 limiting the right in one way or another.

Footnote 72 would appear to retain freedom for government authorities to engage in retransmission of non-interactive, free over-the-air broadcasts: this might be necessary, for example, in a country like Australia to overcome reception difficulties in remote areas not well-served by the market.

Note that this provision also interacts with 18.8 (national treatment). It requires national treatment for performers and phonogram owners, but remember that 18.8 allows for exceptions for national treatment in a set of cases where a Party has limited copyright as it relates to communications and broadcasts of performances and phonograms (as the US, and some other TPP countries have) (art 18.8.2). Presumably 18.8 prevails by reason of the reference in footnote 69 to the fact that it is meant to be 'consistent with art 18.8'.

### 3 Duration/Copyright Term

#### **Article 18.63: Term of Protection for Copyright and Related Rights**

Each Party shall provide that, where the term of protection of a work (including photographic work), performance, or phonogram is to be calculated:<sup>73</sup>

- (a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death;<sup>74</sup> and
- (b) on a basis other than the life of a natural person, the term shall be:
  - (i) not less than 70 years from the end of the calendar year of the first authorized publication<sup>75</sup> of the work, performance, or phonogram; or
  - (ii) failing such authorized publication within 25 years from the creation of the work, performance, or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance, or phonogram.<sup>76</sup>

73 For greater certainty, in implementing this Article, nothing prevents a Party from promoting certainty for the legitimate use and exploitation of works, performances and phonograms during their terms of protection, consistent with Article 18.65 (Limitations and Exceptions) and that Party's international obligations.

74 The Parties understand that if a Party provides its nationals a term of copyright protection that exceeds life of the author plus 70 years, nothing in this Article or Article 18.8 (National Treatment) shall preclude that Party from applying Article 7.8 of the Berne Convention with respect to the term in excess of the term provided in this subparagraph of protection for works of another Party.

75 For greater certainty, for the purposes of Article (b), where a party's law provides for the calculation of term from fixation rather than from the first authorised publication, that Party may continue to calculate term from fixation.

76 For greater certainty, a Party may calculate a term of protection for an anonymous or pseudonymous work or a work of joint authorship in accordance with Article 7(3) or Article 7*bis* of the Berne Convention, provided that the Party implements the corresponding numerical term of protection required under this Article QQ.G..

#### **Relationship to other treaties:**

- The provision extends the copyright term beyond any currently granted in a multilateral convention. The provision is equivalent to most past US FTAs.
- Berne, TRIPS and the WCT grant copyright in works of authorship for the life of the author plus 50 years or 50 years from publication (or, if unpublished, 50 years from making). Berne/TRIPS except photographic works and works of applied art, which must be granted 25 years' protection from making. The WCT removed this flexibility for photographic works. Thus the TPP *extends* the basic copyright term for 20 years more *and* (for non-WCT parties) extends the term for photographic works and applied art (if protected) by considerably more.
- Rome provided a term of 20 years from fixation for performances and phonograms. TRIPS extended this to 50 years from fixation. The WPPT extended this marginally by providing for a term of 50 years from publication (or from fixation if unpublished after 50 years). Thus the TPP extends copyright in this area by 20 years (70 yrs, not 50). This is less than the US originally proposed (the US originally proposed a term of 95 years where the term was not defined by the extent of the author's life).

### **Comment**

This provision locks in the (massively over-extended) copyright term for countries that already have a US FTA; I understand that Brunei, Canada, Japan, Malaysia, New Zealand and Vietnam will all be required to increase their copyright terms. Condolences!

Extension of copyright term is a real, monetary cost for any country that currently observes the multilateral standards of life plus 50 years or 50 years from publication. Term must be extended for all in-copyright works as a result of articles 18.83 and 18.10. This represents a pure windfall for copyright owners and a transfer of wealth from users to copyright owners, most of whom will be located overseas since a majority of copyright content consumed in most TPP countries will be produced overseas (except for the US). Extended terms coupled with the absence of any obligation to register copyright creates 'orphans' – content for whom no owner can readily be found. This creates difficulties for libraries, galleries and archives among others, leading to a range of proposals designed to limit the impact of extended terms, for example by requiring registration for later parts of the copyright term.<sup>10</sup> Remember too that copyright term extension applies not just to creative works where the copyright incentive is important, but archival documents, and, in many countries, even government documents.

One positive worth noting in passing is that earlier proposals for the TPP had a 'no formalities' provision akin to Berne article 5.2. By *not* including a no formalities provision in the TPP, the Parties have left open to TPP parties who *do* have to extend the term the possibility that formalities (like registration) could be introduced at least for the Berne-plus part of the copyright term – mitigating, albeit not entirely removing, the orphan works problem.

Numerous policymakers have noted the problems with term extensions. On conclusion of the TPP in principle, New Zealand's Government described the 'foregone savings on books, films, music and other works' as a result of extending the copyright term as the '*only* significant cost' of the TPP's incursions into regulatory freedom. Australia extended its terms as a result of the AUSFTA (art 17.4.4). Independent analysis commissioned by

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<sup>10</sup> See eg Maria Pallante, 'The Next Great Copyright Act' (2013) 36(3) *Columbia Journal of Law and the Arts* 315

a Senate Committee at the time the AUSFTA was signed,<sup>11</sup> and more recently the Australian Productivity Commission,<sup>12</sup> concluded that this extension imposed significant costs on the Australian economy and was against Australia's interests. There seems to be little evidence or economic theory to support the idea that extending the copyright term long into the future will increase incentives for creativity: the gains are simply too far into the future to be taken into account.<sup>13</sup>

Extending copyright term has costs beyond the obvious cost of royalties for an additional 20 year period. Copyright term extension that applies to all existing protected works leads to administration/transaction costs owing to difficulties in calculating copyright term into the future, particularly for countries (in essence, everywhere but the US) where the duration of copyright for works produced by employees is calculated by reference to the death of the author. Copyright term is not a 'simple' calculation of 'is it 70 years since the work was published' or even 'is it 70 years since the author died': rather, it is 'is it 70 years since the author died' but also 'but was the work in the public domain as of the date the TPP came into force for this country': a date that could well vary for different TPP countries. For New Zealand, copyright term is further complicated by the transitional provisions (which may decrease the cost of royalty payments overseas by gradually transitioning to the 70 year term but will likely increase administrative costs by creating a series of cut-off dates for determining what is or is not in the public domain). In short, copyright term calculations are complicated by the way the TPP extends term for some works and not others, *and* it is not harmonised internationally by provisions like article 18.63: it will remain different between different countries. The result is substantial, unnecessary, transaction costs and real monetary costs (royalties) with little or no benefit for most human creators. Only corporate copyright owners are likely to benefit (somewhat) from term extension.

It is bad policy, made concrete and unchangeable, in the face of repeated calls for a rethink.

Note that TPP parties will need to make a decision whether to extend the term for other kinds of copyright content not covered by the TPP: in particular, broadcasts and performances recorded in film/audiovisual form. Countries will also need to decide whether to apply the rule of the shorter term to non-TPP countries (Berne Convention article 7(8); allowed under TRIPS art 3.1), confining protection of copyright originating in non-TPP countries to the TRIPS terms.

### **3.1 Extension of rights to existing copyright material**

**Article 18.64: Application of Article 18 of the Berne Convention and Article 14.6 of the TRIPS Agreement.**

<sup>11</sup> Philippa Dee, 'The Australia-US Free Trade Agreement: An Assessment' (Report Commissioned by the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, APSEG Australian National University, June 2004).

<sup>12</sup> Australian Productivity Commission, *Bilateral and Regional Trade Agreements*, Research Report (November 2010).

<sup>13</sup> For a discussion of the evidence, see Rebecca Giblin, 'Rethinking Duration: Disaggregating Copyright's Rewards and Incentives via a System of Rolling Rights' (*Monash University Faculty of Law Legal Studies Research Paper* No. 2014/09 February 5, 2015). Available at SSRN: <http://ssrn.com/abstract=2561108>.

Each Party shall apply Article 18 of the *Berne Convention for the Protection of Literary and Artistic Works* (1971) (Berne Convention) and Article 14.6 of the TRIPS Agreement, *mutatis mutandis*, to works, performances, and phonograms, and the rights in and protections afforded to that subject matter as required by this Section.

The chief impact of this provision is to extend new rights to material still within copyright. Notably, for countries extending copyright term as a result of the TPP, this includes the benefit of the longer term. It is worth noting that both Berne article 18 and TRIPS article 14.6 allow for conditions to be imposed on the application of this principle, and article 14.6 of TRIPS allows parties to provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. Query whether this brings some Rome reservations etc into the TPP.

#### 4 Exceptions and Limitations

##### **Article 18.65: Limitations and Exceptions**

1. With respect to this Section, each party shall confine limitations or exceptions to exclusive right 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. This Article neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne Convention, the WCT, or the WPPT.

##### **Article 18.66: Balance in Copyright and Related Rights Systems**

Each Party shall endeavour 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 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled.<sup>77,78</sup>

77 As recognized by the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled*, done at Marrakesh, June 27, 2013 (Marrakesh Treaty). The Parties recognize that some Parties facilitate the availability of works in accessible formats for beneficiaries beyond the requirements of the Marrakesh Treaty.

78 For purposes of greater clarity, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under Article 18.65 (Limitations and Exceptions).

##### **Relationship to other treaties**

- Article 18.66 represents a significant departure in IP treaty-making: it is an entirely new provision
- Article 18.65 is the well-known three step test. Here it extends beyond TRIPS (which only applied to exceptions in relation to *works*), but reflects the

combined force of the WCT (art 10.1) and WPPT (art 16.2), although note that it is the legitimate interests of the *right holder* that is protected – ie the owner, not the author (but since parties must ratify the WCT, the interests of authors are also protected via the mechanism of the WCT which refers only to the interests of the author). Note that the phrase ‘with respect to this Section’ confines the three step test to rights addressed in the TPP (meaning, for example, that exclusive rights to make words audible/visible (ie via live performance) are not covered by the TPP’s three step test). It also makes clear that the three step test does not apply to the enforcement provisions, which fall within a different section of the chapter.

- Article 18.65.2 preserves other exceptions in various multilateral treaties that are not presently subject to the three step test – such as the mandatory quotation exception in the Berne Convention. Notable non-inclusions in the list are the Rome Convention and the Marrakesh VIP Treaty.

### Comment

The inclusion of positive language on exceptions in copyright is a welcome development. Past international IP texts have tended to include prescriptive provisions creating ever-more-detailed exclusive rights and enforcement for IP owners, while including few or none of the balancing provisions found in legal systems around the world. Inclusion of a strong provision on exceptions furthers multiple positive goals: it can affirm and strengthen countries’ rights to include balancing provisions in IP law; it can make the agreement as a whole less unbalanced; 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, in particular articles Articles 18.2–18.4) support an interpretation of the purposes of the agreement as a whole that reinforces the importance of a range of interests and is not confined to strengthening IP rights.

Jonathan Band has a detailed discussion of the text and its evolution from early proposals in 2012 through to the final text which is worth reading to understand this provision.<sup>14</sup> Key points are:

- The language that Parties must ‘endeavor to achieve an appropriate balance’ is not as strong as it could be, but also not as weak as it could have been;<sup>15</sup>
- The obligation is to balance the copyright *system as a whole* – and not only through exceptions. Other sources of ‘balance’ may come from restrictions on the conferral of rights in the first place, real thresholds for protection (such as requiring originality), and restrictions on remedies.
- The provision is open-ended, and it may be, as Band argues, ‘[t]he incorporation of the non-exclusive list of legitimate purposes from 17 U.S.C. § 107 provides TPP countries a powerful basis for concluding that this balance is best achieved through the adoption of an open-ended flexible exception like fair use’ [or, I would interpolate, at the very least suggests that fair use is entirely consistent with articles 18.65–18.66];<sup>16</sup>
- Footnote 77 is useful in recognizing the Marrakesh VIP Treaty – and impliedly suggesting that exceptions outlined in that Treaty are consistent with the three

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<sup>14</sup> Jonathan Band, ‘Evolution of the Copyright Exceptions and Limitations Provision in the Trans-Pacific Partnership Agreement’ (American University Working Paper, October 2015), available at <http://infojustice.org/wp-content/uploads/2015/10/band10202015.pdf>.

<sup>15</sup> Band notes suggestions that stronger language (such as, ‘parties shall foster an appropriate balance’) were mooted. On the other hand, other provisions in the chapter are even weaker: see eg art 18.15 (public domain).

<sup>16</sup> Band, above n 14, 10.



step test – *and* also recognizing that exceptions beyond those agreed multilaterally in the Marrakesh treaty can nevertheless be legitimate.

- As Band further notes, the USTR summary of the IP chapter states that the obligation is for ‘Parties to *continuously* seek to achieve balance in copyright systems through among other things, exceptions and limitations for legitimate purposes, including in the digital environment.’ (Emphasis added). This means that ‘Parties do not fulfil their obligation by attempting on occasion to achieve an appropriate balance. Rather, they must seek to achieve this balance on an ongoing basis in response to evolving technologies and market conditions.’<sup>17</sup>

## 5 Contractual transfers

### Article 18.67: Contractual Transfers

Each Party shall provide that for copyright and related rights, any person acquiring or holding any economic right<sup>79</sup> in a work, 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, 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.<sup>80</sup>

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

80 Nothing in this Article affects a Party's ability to 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 protect the interests of the original right holders, taking into account the legitimate interests of the transferees.

### Relationship to other treaties

- No equivalent provision exists in any of the multilateral copyright treaties;
- A similar provision is commonly found in US FTAs
- Footnote 80 reflects a qualification proposed originally by Chile and reflected in Chile's FTA with the US.

### Comment

This provision entrenches a conception of copyright as a full, transferable proprietary right, and stands in counterpoise against a conception of copyright as a human right bound up with human personality. It seems designed to limit the adoption of copyright policies aimed at protecting human creators, such as unwaivable or unassignable rights of a type found in Europe.<sup>18</sup> It would prevent a Party from prohibiting the outright

<sup>17</sup> Band, above n 14, 10.

<sup>18</sup> 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 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 *Directive*

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. It might also be interpreted 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. It is well-known that individual authors (other than a small subset of 'superstars') often do not benefit significantly from copyright, owing to their limited market power when negotiating deals with producers and other distributors. Respected international copyright scholars have pointed to arguments in favour of policies to promote the interests of individual authors, and have pointed to European provisions as being one way to do so.<sup>19</sup> Footnote 80 goes some way towards enabling some such policies, as it allows for 'reasonable limits to protect the interests of the original right holders'. Parties may well disagree as to what constitutes a 'reasonable' limit.

## **6 Technological Protection Measures (anti-circumvention) and Rights Management Information**

### **6.1 Introduction**

Anti-circumvention law is controversial. It applies to the technologies (called 'technological protection measures, or 'TPMs'; aka digital rights management or DRM) used by copyright owners to control the uses that may be made of copyright material. Anti-circumvention laws are designed to protect these technologies from being circumvented or avoided, on the basis that this allows copyright owners to operate in the digital space without having their rights (and profits) undermined by circulation of free copies or access. The difficulty with anti-circumvention law is that the same technology that enforces copyright may be used to enforce control beyond that which would be allowed by copyright law, including allowing greater market segmentation; undermining exceptions and user rights; and contributing to the disappearance of content if businesses or technologies fail. Circumvention may be necessary for all kinds of legitimate reasons: for the visually-impaired to use specialist software; for security research or testing; for archiving or preservation; for fair dealing or fair use.

One problem with anti-circumvention law has been that the ground rules were written early in the history of the mainstreaming of the internet: current US law (and through it, the rules that inform US FTAs) was written almost 20 years ago in the period 1995–1998; EU law in a similar period (the relevant directive was finalised in 2001). The rules that were written back then were built on assumptions that have since proved to be false: chiefly, that DRM would be *the* key way that copyright content would be protected; *and* that technologies of this kind would not have much impact beyond copyright content like books, films, and sound recordings, and commodity software. In fact, today

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*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* [1993] OJ L 248/15, art 9; *Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property* [2006] OJ L 376, art 5; *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* [2001] OJ L 272, art 6(2).

<sup>19</sup> William Cornish, 'The author as risk-sharer' (2002) 26 *Columbia Journal of Law and the Arts* 1; Jane Ginsburg, 'The Concept of Authorship in Comparative Law' (2003) 52 *DePaul Law Review* 1063.

access control software is embedded in everything from printers to tractors, and as a result anti-circumvention law has potential to impact much more broadly.

The TPP does *not* reflect or make concessions to this evolved reality. The TPP provisions reflect 20 year old rules with marginal adjustments. They are more prescriptive than the *Anti-Counterfeiting Trade Agreement* which was overwhelmingly rejected back in 2011–2012. They are admittedly less prescriptive than the initial US proposals for the TPP and less prescriptive than past US FTAs. If the TPP comes into effect, the key to making these provisions workable lies in sensible interpretation that reads down their scope.

## 6.2 *Scope of the prohibitions*

### **Article 18.68: Technological Protection Measures<sup>81</sup>**

1. In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms, each Party shall provide that any person that:

(a) knowingly, or having reasonable grounds to know,<sup>82</sup> circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram;<sup>83</sup> or

(b) manufactures, imports, distributes,<sup>84</sup> offers for sale or rental to the public, or otherwise provides devices, products, or components, or offers to the public or provides services, that:

(i) are promoted, advertised, or otherwise marketed by that person<sup>85</sup> for the purpose of circumventing any effective technological measure;

(ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure;<sup>86</sup> or

(iii) are primarily designed, produced, or performed for the purpose of circumventing any effective technological measure,

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

Each Party shall provide for criminal procedures and penalties to be applied where any person is found to have engaged wilfully<sup>87</sup> and for the purposes of commercial advantage or financial gain<sup>88</sup> in any of the above activities.<sup>89</sup>

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

2. In implementing paragraph 1, no Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics,

telecommunications, or computing product provide for a response to any particular technological measure, provided that the product does not otherwise violate any measures implementing paragraph 1.

3. Each Party shall provide that a violation of a measure implementing this Article is independent of any infringement that might occur under the Party's law on copyright and related rights.<sup>90</sup>

... [Exceptions provisions; see below]

5. "Effective technological measure" means any effective<sup>94</sup> technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, or phonogram, or protects copyright or related rights related to a work, performance or phonogram.

81 Nothing in this Agreement requires a Party to restrict the importation or domestic sale of a device that does not render effective a technological measure the only purpose of which is to control market segmentation for legitimate physical copies of cinematographic film, and is not otherwise a violation of law.

82 For the purposes of this subparagraph, a Party may provide that reasonable grounds to know may be demonstrated through reasonable evidence, taking into account the facts and circumstances surrounding the alleged illegal act.

83 For greater certainty, no Party is required to impose civil or criminal liability under this subparagraph for a person who circumvents any effective technological measure that protects any of the exclusive rights of copyright or related rights in a protected work, performance or phonogram, but does not control access to such work, performance or phonogram.

84 A Party may provide that the obligations described in this subparagraph with respect to manufacturing, importation, and distribution apply only in cases in which those activities are undertaken for sale or rental, or if such activities prejudice the interests of the right holder of the copyright or related right.

85 The Parties understand that this provision still applies in cases in which the person promotes, advertises, or markets through the services of a third person.

86 A Party may comply with this paragraph if the conduct referred to in this subparagraph does not have a commercially significant purpose or use other than to circumvent any effective technological measure.

87 For greater certainty, for purposes of this Article and Article 18.69 (RMI), wilfulness contains a knowledge element.

88 For greater certainty, for purposes of this Article, Article 18.69 (RMI) and Article 18.77.1 (Criminal Procedures and Penalties), the Parties understand that a Party may treat "financial gain" as "commercial purposes".

89 For greater certainty, no Party is required to impose liability under this Article and Article 18.69 (RMI) for actions taken by that Party or a third person acting with the authorisation or consent of that Party.

90 For greater certainty, a Party is not required to treat the criminal act of circumvention set forth in paragraph 1(a) as an independent violation, where the Party criminally penalises such acts through other means.

...

94 For greater certainty, a technological measure that can, in a usual case, be circumvented accidentally is not an "effective" technological measure.

### **Relationship to other treaties:**

- TRIPS, Berne and Rome pre-date the rise of digital technologies and do not address this area of para-copyright law;
- The WCT contains a very general requirement that parties provide 'adequate legal protection and effective legal remedies against the circumvention of effective technological measures'.
- The provisions here are ACTA-plus (see more below).
- Past US FTAs, like AUSFTA, follow a similar model in relation to prohibitions and technologies covered.

A number of points arise on the text regarding the kinds of technology covered. One issue in debates around circumvention law is how broadly technology should be protected. There are three key sources of difference between legal systems internationally.

The first is whether protection is limited to technologies used to **prevent infringement** or extended to a broader set of technologies used by copyright owners to control use and access. New Zealand’s *Copyright 1994* (NZ) for example protects ‘any process, treatment, mechanism, device, or system that in the normal course of its operation *prevents or inhibits the infringement of copyright*’.<sup>20</sup> I understand that Japan has adopted a dual system, protecting measures that ‘prevent or deter such acts as constitute infringements on moral rights or copyright ... or neighbouring rights’ via the copyright law, but offering some protection for access control technologies via unfair competition law.<sup>21</sup> Australia, the US, and Singapore on the other hand protect both access control technologies (specifically) *and* (separately) technologies that ‘in the normal course of their operation, prevent, inhibit or restrict the doing of an act comprised in the copyright.’<sup>22</sup>

The TPP chapter protects a potentially very expansive set of technologies. Compare the basic definition to that agreed with Europe in the *Anti-Counterfeiting Trade Agreement*:

TPP art 18.68.5	ACTA art 27.5 (footnote 14)
<p>“<b>Effective technological measure</b>” means any effective technology, device, or component that, in the normal course of its operation, <b>controls access</b> to a protected work, performance, or phonogram, <b>or</b> protects copyright or related rights related to a work, performance or phonogram.</p>	<p>For the purposes of this Article, <b>technological measures</b> means any technology, device, or component that, in the normal course of its operation, <b>is designed to prevent or restrict acts</b>, 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.</p>

Unlike ACTA, the TPP is explicit in its inclusion of ‘pure’ access controls: this reflects the fact that Europe participated in the ACTA negotiations and EU Directives in this area do not explicitly require protection of access controls as such.<sup>23</sup>

The protection of access controls means, subject to any exclusions, probably means that it is not legitimate under this provisions to circumvent (or provide devices to circumvent) DRM or TPMs used to ‘geo-block’ content (ie deny access to content to people outside a particular geographical region). This is a very real issue for populations in countries outside the US, who can, as a result, be either charged very different (and potentially much higher) prices for content or essential tools (such as software), or

<sup>20</sup> Prior to AUSFTA, the Australian *Copyright Act 1968* (Cth) contained similar language.

<sup>21</sup> Jerry Jie Hua, *Toward a More Balanced Approach: Rethinking and Readjusting Copyright Systems in the Digital Network Era* (Springer, 2014), 95–96. The rationale is that copyright should only support established rights, and copyright does not grant a right to control access. In 2012 laws specifically prohibiting the circumvention of controls on DVDs were enacted in Japan as part of a set of reforms aimed at strengthening enforcement in the online and digital space.

<sup>22</sup> *Copyright Act 1968* (Cth) s 10.

<sup>23</sup> The *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* [2001] OJ L 167/10 art 6.3 is very similar to ACTA art 27.5.

denied access altogether.<sup>24</sup> Region-coding and geo-blocking both prevent access to legitimate content sold overseas – and in that sense are the opposite of free trade.

This provision is deeply ambivalent about free trade in legitimate digital content, carving out one small scenario to allow, out of the mass of possible scenarios. Specifically, footnote 81 is designed to allow for devices that overcome region-coding on physical copies of films (ie, DVDs). The footnote is technologically specific, dated, and hence likely useless. It applies only to films (not region-coded video games or other content), and only to physical copies, so the means for circumventing geo-blocking of downloads are not saved.<sup>25</sup>

By protecting access controls, the TPP provisions also have the potential to interfere in markets beyond those for copyright content. Two phrases, and their interpretation, are the key to ensuring that these provisions do not become too great a burden on non-core copyright markets: the technologies protected must:

- Be used by copyright owners in connection with the exercise of their rights; and
- Restrict unauthorized acts.

Bearing in mind the purpose of the provisions – ie ‘to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use’ – these phrases should be interpreted as allowing exclusion of any technology whose use is unrelated to the exploitation of copyright content. Thus access controls on software embedded in another product – whether a printer or garage door opener, or a car or tractor – should be entirely excluded from anti-circumvention law.<sup>26</sup>

A second issue relates to the acts that are restricted: are there bans on *both* circumvention *and* marketing/distribution of circumvention devices/services? Is there a distinction between different kinds of technologies? Is circumvention a separate wrong from infringement such that you can breach even if you do not infringe copyright? In summary:

- The TPP takes the expansive approach by prohibiting *both* circumvention and sale/marketing, although a Party can continue to allow circumvention of copy controls (cf ACTA, which made bans on circumvention optional); and
- Circumvention must be a wrong separate from infringement.

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<sup>24</sup> For an extended discussion, see House of Representatives Standing Committee on Infrastructure and Communications, Parliament of Australia, *At What Cost? IT pricing and the Australia tax* (2013).

<sup>25</sup> For Australia, there is a real question whether this footnote is sufficient to allow the continued existence of the exclusion in s 10 of the *Copyright Act 1968* (Cth). Australia currently excludes from protection a device, product, technology or component to the extent that it 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.

<sup>26</sup> Current Australian law does this: it excludes devices, products, technologies or components that are ‘embodied in a machine or device’ and that ‘restricts the use of goods (other than the work) or services in relation to the machine or device’: *Copyright Act 1968* (Cth) s 10. Note that ‘access’ here has more than one potential meaning. Access could mean ‘cause a device or software to operate’ (so an access controls when the embedded software will work), as well as ‘access’ in the usual sense of ‘extract and look at’. Arguably the former kind of access should not even be considered access for the purposes of TPM law. To the extent that ‘access’ is understood that far, the other provisions should be interpreted so as to ensure that mechanisms for controlling the working of embedded software are not protected by anti-circumvention law. The latter kind of access (extract/look at) is access in the relevant anti-circumvention law sense.

Footnote 84 is a very interesting footnote: suggesting that it is possible for Parties to allow non-commercial acts of manufacturing or even distributing circumvention devices subject to a requirement that they not allow act that prejudice copyright owners. This could be particularly useful to allow activities like circumvention for preservation purposes or in the case of orphaned digital content.

Footnote 86 is also interesting – it allows Parties to apply the trafficking ban in cases where the ‘circumvention device’ has *no use other than circumvention*.

A third issue relates to the application of **criminal** as well as civil liability. The TPP requires **criminal** liability to be applied at least to knowing, wilful circumvention or trafficking of circumvention services/devices, for commercial purposes (which need not include the purposes of non-profit libraries, museums, archives, educational institutions and public broadcasters) (note here the effect of footnote 88: although the text requires criminal sanctions in cases of ‘financial gain’ this can be read as confined to ‘commercial purposes’.<sup>27</sup> In this respect the TPP is ACTA-plus: ACTA does not require criminal liability for breaches of anti-circumvention law (in part because Europe was part of the ACTA negotiations and the European *acquis communautaire* does not include criminal provisions.

Note that governments can exempt themselves completely from all anti-circumvention law (footnote 89).

### 6.3 Exceptions to anti-circumvention law

4. With regard to measures implementing paragraph 1:
- (a) A Party may provide certain exceptions and limitations to the measures implementing paragraph 1(a) or paragraph 1(b) in order to enable non-infringing uses where there is an actual or likely adverse impact of those measures on those non-infringing uses, as determined through a legislative, regulatory, or administrative process in accordance with the Party’s law, giving due consideration to evidence when presented in that process, including with respect to whether appropriate and effective measures have been taken by rights holders to enable the beneficiaries to enjoy the limitations and exceptions to copyright and related rights under that Party’s law.<sup>91</sup>
  - (b) Any limitations and exceptions to a measure that implements paragraph (1)(b) shall be permitted only to enable the legitimate use of a limitation or exception permissible under this Article by its intended beneficiaries<sup>92</sup> and does not authorise the making available of devices, products, components, or services beyond those intended beneficiaries;<sup>93</sup> and
  - (c) A Party shall not, by providing limitations and exceptions under paragraph 4(a) and paragraph 4(b), undermine the adequacy of that Party’s legal system for the protection of effective technological measures, or the effectiveness of legal remedies against the circumvention of such measures, that authors, performers, or producers of phonograms use in connection with the exercise of their rights,

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<sup>27</sup> Another wonderful example of the footnotes basically contradicting the text.

or that restrict unauthorized acts in respect of their works, performances or phonograms, as provided for in this Chapter.

91 For greater certainty, nothing in this provision requires a Party to make a new determination through the legislative, regulatory, or administrative process with respect to limitations and exceptions to the legal protection of effective technological measures: (i) previously established pursuant to trade agreements in force between two or more Parties; or (ii) previously implemented by the Parties, provided that such limitations and exceptions are otherwise consistent with this paragraph.

92 For greater certainty, a Party may provide an exception to subparagraph 1(b) without providing a corresponding exception to subparagraph 1(a), provided that the exception to subparagraph 1(b) is limited to enabling a legitimate use that is within the scope of limitations or exceptions to 1(a) as provided under this subparagraph.

93 For the purposes of interpreting subparagraph 4(b) only, subparagraph 1(a) should be read to apply to all effective technological measures as defined in paragraph 5, *mutatis mutandis*.

### **Relationship to other treaties:**

- The WCT requires only 'adequate legal protection and effective legal remedies': it does not prescribe any particular model for exceptions;
- Past US FTAs have had a much more prescriptive model: strictly limiting exceptions to the marketing prohibition (ie 1(b)) to a fixed and narrow list based entirely on US law, and allowing prohibitions to the prohibition on circumvention only through an administrative process, modeled on the US one, where the need for an exception must be clearly established on a recurring basis.
- The model here is more restrictive than ACTA, which merely notes that parties 'may adopt or maintain appropriate limitations or exceptions' (art 27.8).

This provision on exceptions is much better than it threatened to be. Original proposals based on the US approach would have had a fixed list of allowable exceptions and required evidence to justify new exceptions to the circumvention ban – that is, it followed the US FTA approach which has been proven too inflexible in Australia.<sup>28</sup> The real concern was that we'd end up with a model that required ongoing, expensive, recurrent processes requiring strict proof to a high standard in order to create new exceptions. This is impracticable even in the US and Australia (where, despite applications made years ago, new exceptions have proved monstrously difficult to get through the relevant government department): all the more so in smaller countries.

Under this text, new exceptions can be created on a Party's own timetable, via administrative or legislative processes, and do not require 'evidence' as such (although any evidence must be considered, as you would expect). It would be entirely permissible under this provision to simply decide appropriate exceptions through a legislative process or through the promulgation of regulations. The language accommodates countries that have recurring administrative systems for proving the need for exceptions (like the US).

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<sup>28</sup> Kimberlee Weatherall, 'The Australia-US Free Trade Agreement's impact on Australia's copyright trade policy' (2015) 69(5) *Australian Journal of International Affairs* 538



#### 6.4 *Rights Management Information*

##### **Article 18.69: Rights Management Information**<sup>95</sup>

1. In order to provide adequate and effective legal remedies to protect RMI:
  - (a) each Party shall provide that any person that, without authority, and knowing, or having reasonable grounds to know, that it would induce, enable, facilitate, or conceal an infringement of the copyright or related right of authors, performers, or producers of phonograms:
    - (i) knowingly<sup>96</sup> removes or alters any RMI;
    - (ii) knowingly distributes or imports for distribution RMI knowing that the RMI has been altered without authority;<sup>97</sup> or
    - (iii) knowingly distributes, imports for distribution, broadcasts, communicates or makes available to the public copies of works, performances, or phonograms, knowing that RMI has been removed or altered without authority,is liable and subject to the remedies set out in Article (18.74 (Civil and Administrative Procedures and Remedies)).
  - [(b)] Each Party shall provide for criminal procedures and penalties to be applied if any person is found to have engaged willfully and for purposes of commercial advantage or financial gain in any of the activities described in subparagraph (a).
  - [(c)] Each Party may provide that the criminal procedures and penalties referred to in paragraph 1(b) do not apply to a non-profit library, museum, archive, educational institution, or public non-commercial broadcasting entity.<sup>98</sup>]
2. For greater certainty, nothing prevents Party from excluding from a measure that implements paragraph 1 a lawfully authorised activity that is carried out for the purpose of law enforcement, essential security interests or other related governmental purposes, such as the performance of a statutory function.
3. For greater certainty, nothing in this Article shall obligate a Party to require a right holder in a work, performance, or phonogram to attach RMI to copies of the work, performance, or phonogram, or to cause RMI to appear in connection with a communication of the work, performance, or phonogram to the public.
4. **RMI** means:
  - (a) information that identifies a work, performance or phonogram, the author of the work, the performer of the performance or the producer of the phonogram; or the owner of any right in the work, performance or phonogram;
  - (b) information about the terms and conditions of the use of the work, performance, or phonogram; or
  - (c) any numbers or codes that represent the information referred to in subparagraphs (a) and (b),

if any of these items is attached to a copy of the work, performance or phonogram or appears in connection with the communication or making available of a work, performance or phonogram to the public.

<sup>95</sup> A Party may comply with the obligations in this Article by providing legal protection only to electronic RMI.

<sup>96</sup> For greater certainty, a Party may extend the protection afforded by this paragraph to circumstances in which a person engages without knowledge in the acts in sub-subparagraphs (i), (ii), and (iii), and to other related rights holders.

<sup>97</sup> A Party may comply with its obligations under this sub-subparagraph by providing for civil judicial proceedings concerning the enforcement of moral rights under its copyright law. A Party may also meet its obligation under this sub-subparagraph, if it provides effective protection for original compilations, provided that the acts described in this sub-subparagraph (a)(ii) are treated as infringements of copyright in such original compilations.

<sup>105</sup> For greater certainty, a Party may treat a broadcasting entity established without a profit-making purpose under its law as a public non-commercial broadcasting entity.

### Relationship to other treaties:

- The main prior agreements addressing RMI are the WCT/WPPT, and ACTA. The language of art 18.69 draws on the WCT and ACTA but is both WCT- and ACTA-plus:
  - Neither ACTA nor the WCT deals with 1(a)(ii) (distributing altered RMI (as opposed to distributing works with RMI removed))
  - Neither ACTA nor the WCT requires criminal liability; and
  - Both ACTA and the WCT are confined to *electronic* rights management information (with the TPP, a party *can*, but does not have to, limit the rules to electronic rights management information).

### Comments

RMI rules have been around since 1996 (they derive from the WCT/WPPT): although rules relating to moral rights and the failure to *attribute* copyright works (ie to identify the author) are much older, as are rules regarding the seizure of materials and implements used in manufacture or creation of infringing goods. A key point to note about the provisions is that they only apply in cases where the person that, knows, or has reasonable grounds to know, that their activity would induce, enable, facilitate, or conceal an infringement.

The absence of any real provisions on exceptions to RMI rules is significant and a significant removal of flexibility to have exceptions that exists under the WCT and even ACTA. 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’. Perhaps the narrow scope of the provision (ie the knowledge requirement) reduces the significance of this, but the idea that exceptions or limitations will never be required seems like something of a leap. It would have been simple enough to allow exceptions that do not undermine the overall effectiveness of the rule.

There are two other strange things about this provision.

The first is their extension to non-electronic RMI. The original rules were designed for *electronic* RMI – in essence, codes/numbers etc embodied or included in digital files to identify owners or conditions of use of digital files. Whether they make sense applied to physical materials is an interesting question – and how broadly the concept of ‘information’ should extend in a non-digital context is debateable. In the non-electronic context there is also significant potential for overlap with rules against manufacture/importation/use of false or counterfeit labels as well as other rules relating to materials/implements used in the manufacture/creation of infringing goods. 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.

Second, there is footnote 97, which suggests that Parties can comply with their obligations under 1(a)(ii) by providing for enforceable moral rights. First, moral rights do not cover the same ground: RMI can include information about the identity of an author (ie the moral right of attribution) but extends to identifying terms/conditions and indeed other kinds of owners. Given too that Parties should have some kind of moral rights protection as a result of the Berne Convention, footnote 97 is akin to saying ‘you can ignore this bit of the TPP text’. But in any event, Article 18.69.1(a)(ii) is the obligation to prohibit the distribution of altered RMI. It would make more sense to allow moral rights to cover the ground of (a)(iii) (distributing works without RMI). *However*, the reason for the footnote here may well be that parties to the WCT are already required to cover (a)(i) and (a)(iii) via the WCT: so the footnote effectively removes the obligations extending beyond the WCT rules.

Regarding criminal liability, note that footnote 88 applies to this provision too: a Party can treat ‘financial gain’ as ‘commercial purposes’.

## 7 Collective Management

### Article 18.70: Collective Management

The Parties recognise the important role of collective management societies for copyright and related rights in collecting and distributing royalties<sup>99</sup> based on practices that are fair, efficient, transparent and accountable, which may include appropriate record keeping and reporting mechanisms.

99 For greater certainty, royalties may include equitable remuneration.

This provision does not have equivalents in TRIPS, ACTA, or past USFTAs (at least not in AUSFTA). It is a very low-level provision simply ‘recognising’ the role of collective management (note that it does not require the Parties to ‘encourage’ or support collective management or promote it for example by expanding the standing of collective management organisations to enforce rights).

## **8 What is *not* in the copyright section?**

It is worth noting, in passing, a couple of provisions that were in early drafts of the copyright parts of the TPP chapter but which have disappeared over time.

One is the formalities provision. As noted above (see discussion Part 3, page 11), the absence of a prohibition on formalities leaves open the possibility of formalities in the TRIPS-plus period of the copyright term (the last 20 years) (at least for countries not otherwise bound to the extended term).

Another is the provision prohibiting parties from allowing retransmission of television signals on the internet (ie preventing an exception/limitation in that context). That was a technology-specific rule that has already proved problematic in Australia (it is included in AUSFTA): so its absence here is a positive.