

Evolution of the Copyright Exceptions and Limitations Provision in the Trans-Pacific Partnership Agreement

Jonathan Band
jband@policybandwidth.com

The Trans-Pacific Partnership (TPP) Agreement contains an important provision concerning achieving balance in the copyright systems of the twelve countries party to that free trade agreement. This provision was not present in the early draft of the agreement. Then, in July 2012, the United States proposed language that formed the basis of the text of the provision. This language subsequently was strengthened over the next three years to its final form. This paper recounts the evolution of this provision. Because of the lack of transparency of the TPP negotiations, it is difficult to reconstruct a precise timeline of when specific language was proposed, who proposed it, and why. However, a combination of leaked drafts and public statements provides evidence of the provision's trajectory.

Step 1: The U.S. IP Chapter Proposal.

In February 2011, the U.S. proposal for the IP chapter of the TPP was leaked. At Article 4.8, it contained the following bracketed language: "Placeholders for provision on (1) exceptions and limitations, (2) Internet retransmission, and (3) any other appropriate copyright/related rights provision."² (All the leaked texts discussed in this paper appear in the Appendix.)

Step 2: The Competing Copyright Limitations and Exceptions Proposals.

At some point between February 2011 and July 2012, two competing proposals on copyright limitations and exceptions were introduced to replace the bracketed language in the leaked February 2011 draft. First, a proposal supported by the US and Australia read as follows:

With respect to this Article [(Article 4 on copyright and Article 5 and 6 (which deal 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.³

¹ Jonathan Band is a copyright lawyer in Washington, D.C. The views expressed in this paper are his own.

² Trans-Pacific Partnership, Intellectual Property Rights Chapter (Feb. 10, 2011), *available at* <http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf>.

³ James Love, *Leak of TPP Text on Copyright Limitations and Exceptions*, Knowledge Ecology International (Aug. 3, 2012), <http://keionline.org/node/1516> (*hereinafter* August 2012 Text).

It is unclear whether the U.S. and Australia jointly submitted this language, or one delegation introduced it and the other subsequently signaled support. For convenience, this paper will attribute this language to the United States.

Second, a proposal supported by New Zealand, Chile, Malaysia, Brunei, and Vietnam provided:

1. Each party may provide for limitations and exceptions to copyrights, related rights, and legal protections for technological protections measures and rights management information included in this Chapter, in accordance with its domestic laws and relevant international treaties that each are party to.
2. Paragraph 1 permits a party to carry forward and appropriately extend into the digital environment limitations and exceptions in its domestic laws. Similarly, these provisions permit a Party to devise new exceptions and limitations for the digital environment.

Once again, it is unclear whether this group of five countries jointly submitted this language, or one delegation introduced it and the others joined later. It also is unclear whether both paragraphs of this proposal were introduced at the same time.

The U.S. proposal is the familiar three-step test, incorporated in various forms in the Berne Convention, the TRIPS agreement, and the various U.S. Free Trade Agreements (FTAs). The formulation in the U.S. proposal is the same as in the FTAs, without the clarifying language found in some of the FTAs.⁴

The second paragraph of the “Group of Five” proposal derives from footnote 9 of the WIPO Copyright Treaty. Similar language appears in footnote 17 of the IP chapter of the Chile-US FTA. The first paragraph appears to be a new alternative to the three-step-test, presumably reflecting the concerns raised by scholars and civil society that the three-step test is unduly restrictive.⁵

The U.S. and Australia opposed the Group of Five proposal. Likewise, the Group of Five opposed the U.S. proposal. Singapore and Peru indicated that they could support either the U.S. proposal or paragraph 1 of the Group of Five proposal.

⁴ For example, some of the FTAs contained a savings clause indicating that “unless otherwise provided in this Chapter, nothing in this Article shall be construed as reducing or extending the scope of applicability of the limitations and exceptions permitted under the agreements referred to in Articles 17.1.2 and 17.1.4 and the TRIPS Agreement.” Australia U.S. Free Trade Agreement 17.4.10(c).

⁵ See, e.g., Max Planck Institute for Intellectual Property and Competition, *Declaration on the ‘Three-Step Test’*, available at http://www.ip.mpg.de/fileadmin/user_upload/declaration_three_step_test_final_english1.pdf.

Step 3: The July 2012 U.S. Proposal.

On July 3, 2012, during the round of TPP negotiations in San Diego, California, the United States issued a statement concerning copyright exceptions and limitations. The United States declared that

the balance of rights and exceptions and limitations achieved in U.S. law provides diverse benefits for large and small businesses, consumers, authors, artists, and workers in the information, entertainment, and technology sectors.

A robust copyright framework ensures that authors and creators are respected, investments (both intellectual and financial) are promoted, that limitations and exceptions provide an appropriate balance, and that enforcement measures are effective.

An important part of the copyright ecosystem is the limitations or exceptions placed on the exercise of exclusive rights in certain circumstances. In the United States, for example, consumers and businesses rely on a range of exceptions and limitations, such as fair use, in their businesses and daily lives. Further, under the U.S. Digital Millennium Copyright Act (DMCA), the United States provides safe harbors limiting copyright liability, which help to ensure that legitimate providers of cloud computing, user-generated content sites, and a host of other Internet-related services who act responsibly can thrive online.⁶

While U.S. government officials had previously made comments supportive of exceptions in international fora, this language seemed unprecedented in its detailed nature.

After this introduction stressing the importance of copyright exceptions, the United States announced that

[f]or the first time in any U.S. trade agreement, the United States is proposing a new provision, consistent with the internationally-recognized “3-step test,” that will obligate Parties to seek to achieve an appropriate balance in their copyright systems in providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research.⁷

The United States followed this description of its new proposal by asserting that

⁶ Tradewinds Blog, *USTR Introduces New Copyright Exceptions and Limitations at San Diego TPP Talks* Office of the U.S. Trade Representative (July, 2012), <https://ustr.gov/about-us/policy-offices/press-office/blog/2012/july/ustr-introduces-new-copyright-exceptions-limitations-provision>.

⁷ *Id.*

[t]hese principles are critical aspects of the U.S. copyright system, and appear in both our law and jurisprudence. The balance sought by the U.S. TPP proposal recognizes and promotes respect for the important interests of individuals, businesses, and institutions who rely on appropriate exceptions and limitations in the TPP region.⁸

On August 3, 2012, the precise language of the new U.S. proposal was leaked. Consistent with the July 3 announcement, the proposal contained a new paragraph 2 which would come after the three-step test (TST) language:

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.⁹

The proposal also contained the following footnote:

For purposes of greater clarity, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under paragraph 2.¹⁰

The six “legitimate purposes” listed in paragraph 2 are the same as those listed in the fair use provision in the U.S. Copyright Act, 17 U.S.C. § 107. The United States’ July 3 announcement makes clear that this was no accident; the United States indicated that it sought to have the exceptions in U.S. law, including fair use, reflected in TPP. Importantly, the exceptions can apply in “the digital environment,” and to “a use that has commercial aspects.”

The text of the July 3, 2012 U.S. statement, combined with the new “appropriate balance” paragraph, clearly represented a more favorable attitude on the part of the United States towards exceptions and limitations than the bare TST language it had previously proposed. What precipitated the introduction of this new language? The fact that the United States made this proposal in July 2012, just six months after the defeat of SOPA (the Stop Online Piracy Act) and PIPA (the Preventing Internet Piracy Act) in the U.S. Congress and five months after protests against ACTA swept across the EU, suggests that the US was influenced by those events.¹¹ Perhaps it concluded that unless TPP contained

⁸ *Id.*

⁹ August 2012 Text.

¹⁰ *Id.*

¹¹ The European Parliament rejected ACTA on July 4, 2012, the day *after* the U.S. announced its new proposal. However, in the weeks leading up to vote in the European Parliament, ACTA’s prospects appeared progressively dimmer. For example, on May 7, 2012, Neelie Kroes, the European Commissioner for Digital Agenda, questioned whether the EU would ultimately ratify ACTA. See Aaron Souppouris, *ACTA Unlikely to Happen, Says European Commissioner*, The Verge (May 7, 2012), <http://www.theverge.com/2012/5/7/3004275/european-commissioner-digital->

positive language concerning exceptions and limitations, the civil society and technology associations that supported such exceptions--and had opposed SOPA--would mobilize powerful political resistance against the United States joining TPP. Likewise, civil society in the other TPP countries might succeed in rallying strong domestic opposition to the agreement. To be sure, correlation does not prove causation. Nonetheless, the timing of this major change in position certainly implies that it was, at least in part, a reaction to the SOPA and ACTA defeats.

Step 4: The August 2013 Draft.

In November 2013, the August 30, 2013 draft was leaked. This draft included for the first time the following language:

Article [referring to the TST provision] neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, Berne Convention, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.

This savings clause is similar to savings clauses found in other U.S. free trade agreements, including AUSFTA.¹²

Additionally, the “appropriate balance” paragraph now read:

Subject to and consistent with paragraph (1), Each Party shall endeavor to achieve an appropriate balance in providing limitations and exceptions, its copyright and related rights system, *inter alia* by means of limitations or exceptions that are consistent with Article [referring to the TST provision], 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, as well as facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled.¹³

agenda-acta-unlikely-to-happen. For a more detailed discussion of the protests against SOPA and ACTA, see Jonathan Band, *The SOPA/TPP Nexus*, Am. U. Wash. C. L. Digital Commons (Mar. 2012), <http://digitalcommons.wcl.american.edu/research/28/>. As discussed in that paper, the U.S. government actually voiced serious concerns with SOPA days before the online protest on January 18, 2012.

¹² Under the Berne Convention, not all exceptions must pass through the TST filter. For example, the quotation right under Article 10(1) of the Berne Convention is not subject to the TST. The savings clause makes clear that the TST provision here does not extend the TST to exceptions not required by the Berne Convention (and the other treaties) to meet the TST.

¹³ Trans-Pacific Partnership, Intellectual Property Rights Chapter (Aug. 2013), available at <https://wikileaks.org/tpp/#start> (changes highlighted for ease of comprehension)(*hereinafter* August 2013 Text). See Appendix for Parties additional proposals concerning this language.

The footnote concerning “commercial aspects” remained unchanged.

This language was more favorable to exceptions than the 2012 “appropriate balance” paragraph in several respects. First, in the 2012 language, the obligations of paragraph 2 were preceded with the phrase “subject to and consistent with” the TST in paragraph 1. The words “consistent with” were not problematic in that they suggested that paragraph 2 was interpreting the TST in paragraph 1. That is, “consistent with” implied that exceptions that achieve an appropriate balance for a legitimate purpose were by definition consistent with the TST. In contrast, the words “subject to” seemed to restrict paragraph 2 to what would otherwise be permitted by the TST. In other words, “subject to” seemed to limit the scope of paragraph 2. Happily, the phrase “subject to” did not appear in the 2013 language.

Second, the phrase “each Party shall seek to achieve an appropriate balance in providing limitations and exceptions” in the 2012 provision was susceptible to different interpretations, depending on the meaning of the word “in.” If “in” meant “when,” then a Party must have sought to achieve a balance when the Party was adopting exceptions, but the Party had no obligation to adopt any exceptions. Conversely, if “in” meant “by,” then a Party had an affirmative obligation to attempt to achieve a balance by adopting exceptions. The 2013 provision eliminated this ambiguity by rephrasing the first clause of the provision to state that “each Party shall endeavor to achieve an appropriate balance in its copyright and related rights system, inter alia by means of limitations or exceptions....” Thus, the balance sought is not in providing limitations and exceptions, but in copyright systems. This is the appropriate focus of the balance. Moreover, the balance can be achieved not only through limitations and exceptions, but also through other means, such as reduction of remedies.

Third, the 2012 provision stated that parties “shall seek to achieve an appropriate balance,” while the 2013 provision stated that parties “shall endeavor to achieve an appropriate balance.” “Endeavor” connotes a stronger effort than “seek.”

Fourth, the 2013 language adds facilitating access for the print disabled to the list of legitimate purposes.¹⁴

A few months after the leak of the 2013 draft, U.S. Trade Representative Michael Froman referred to the provision in a speech to the Center for American Progress. He said that “for the first time in any trade agreement, we are asking our trading partners to secure robust balance in their copyright systems – an unprecedented move that draws directly on U.S. copyright exceptions and limitations, including fair use for important purposes such as scholarship, criticism, news commentary, teaching, and research.”¹⁵ Ambassador Froman also

¹⁴ Chile and Malaysia also proposed “education” as a legitimate purpose.

¹⁵ Michael Froman, U.S. Trade Representative, Office of the U.S. Trade Representative, A Values-Driven Trade Policy: Remarks by Ambassador Froman at the Center for American Progress (Feb.

stated that the American view of intellectual property is “informed by a sense of balance, of the importance of matching incentives for innovation with mechanisms to assure access and dissemination....”

Step 5: The May 2014 Draft.

In October 2014, the May 16, 2014, draft was leaked. In this draft, the “appropriate balance” paragraph read:

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 [referring to the TST provision], 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.¹⁶

The draft retained the footnote concerning “commercial aspects.” Additionally, after the clause regarding access for the print disabled, the May 2014 draft contained a new footnote stating “As recognized by the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (June 27, 2013).” This reference to the Marrakesh Treaty indicates a commitment by the TPP parties to adopt exceptions for the print disabled consistent with the Marrakesh Treaty.

Moreover, the May 2014 draft added the phrase “and other similar purposes” to the list of legitimate purposes, presumably in response to Chile and Malaysia’s proposal in the 2013 draft to including “education” in the list of legitimate purposes. This intent was made clear in the leaked May 2015 draft, discussed below, where some of the commas in the list of legitimate purposes were replaced by semicolons so as to group “teaching, scholarship, research and other similar purposes” together in one clause. (In the May 2015 draft, the list of legitimate purposes read “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.”¹⁷)

18, 2014) *in* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/February/A-Values-Driven-Trade-Policy_Remarks-by-USTR-Froman-at-Center-for-American-P.

¹⁶ Trans-Pacific Partnership, Intellectual Property Rights Chapter (May 2014), *available at* <https://wikileaks.org/tpp-ip2/> (last visited Oct. 13, 2015)(*hereinafter* May 2014 Text). See Appendix for Parties’ additional proposals concerning this language.

¹⁷ Trans-Pacific Partnership, Intellectual Property Rights Chapter (May 2015), *available at* <http://keionline.org/tpp/11may2015-ip-text> (last visited Oct. 13, 2015)(*hereinafter* May 2015 Text).

Step 6: The May 2015 Draft.

In August 2015, the May 11, 2015 draft was leaked. The language of the exceptions and limitations paragraphs was substantially the same as in the May 2014 draft, with the exception of one change: The Marrakesh Treaty footnote now included a sentence stating that “The Parties recognize that some Parties facilitate the availability of works in accessible formats for beneficiaries beyond the requirements of the Marrakesh Treaty.”¹⁸ This language made clear that the TPP’s reference to the Marrakesh Treaty established a floor, and not a ceiling, on Parties’ commitment to facilitate access for the print disabled.

Step 7: The Final Text.

Although organizations that advocated balanced copyright protection welcomed the introduction of the “appropriate balance” paragraph in 2012, concerns were expressed that the “shall endeavor to achieve” formulation was not sufficiently mandatory—for example, that a Party might meet its obligation by considering, but not adopting, important exceptions and limitations.¹⁹ Thus, some groups advocated the replacement of “shall endeavor to achieve” with “shall achieve.”

According to press reports concerning the negotiating round in Maui in August 2015, the United States proposed revising the language “in a way that would more strongly encourage other TPP countries to seek a balance in their copyright systems through exceptions and limitations similar to the concept of ‘fair use’ in the United States.”²⁰ The reports indicate that the United States made this proposal at the request of Internet companies and their supporters in Congress, such as Senator Ron Wyden. The reports stated that “among the potential changes being floated by USTR” are that TPP countries “shall foster an appropriate balance....” The reports indicated that verb “foster” derived from the Senate Finance Committee report on Trade Promotion Authority Act establishing a “fast track” framework for approval of the TPP’s implementing legislation. The Committee report stated that “U.S. trade agreements should contain copyright provisions that provide adequate and effective protection for

¹⁸ *Id.*

¹⁹ Already in August 2012, the Library Copyright Alliance called for the amendment of the “appropriate balance” paragraph “to make unambiguous the obligation to achieve a balance of interests....” Letter from Prudence Adler, Executive Director, Association of Research Libraries on behalf of the Library Copyright Alliance, to Ambassador Ron Kirk, U.S. Trade Representative (Aug. 15, 2012), *available at* http://www.librarycopyrightalliance.org/storage/documents/lt_kirktp14aug12.pdf. See also Mike Masnick, *Why Does the TPP Repeatedly Require Stronger Copyright, But When It Comes to Public Rights...Makes it Voluntary?*, *TechDirt Daily* (Aug. 6, 2015), <https://www.techdirt.com/articles/20150805/15521431864/why-does-tpp-repeatedly-require-stronger-copyright-when-it-comes-to-public-rights-makes-it-voluntary.shtml>.

²⁰ Matthew Schewel, *U.S. Explores Changes to TPP Copyright Language, Spurring Criticism*, *Inside U.S. Trade* (Aug. 13, 2015).

U.S. right holders as well as *foster* an appropriate balance in copyright systems, inter alia by means of limitations and exceptions consistent with the internationally recognized 3-step test.”²¹

According to the press reports, this proposed change was “vehemently opposed by movie studios and other U.S. right holders.” U.S. rights holders were described as “livid about USTR’s move to revisit the language on exceptions and limitations, and have pushed back strongly against it.” This pushback included “urging members of Congress and their staff to exert pressure on USTR to change course....”

Ultimately, no amendments to the “appropriate balance” paragraph were agreed upon in Maui. The exceptions and limitations language remained unchanged in the final text agreed to in Atlanta on October 5, 2015. According to the final text leaked on October 9, 2015, that language read:

Article QQ.G.16: {Limitations and Exceptions}

(a) 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.

(b) Article QQ.G.16(a) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne Convention, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.

Article QQ.G.17: {Appropriate Balance in Copyright and Related Rights Systems}

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.16, 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.^{83, 84}

⁸³ As recognized by the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (June 27, 2013). The Parties recognize that some

²¹ S. Rep. No.114-42 (May 12, 2015), available at <https://www.congress.gov/congressional-report/114th-congress/senate-report/42/1?q=%7B%22search%22%3A%5B%22%5C%22s995%5C%22%22%5D%7D>.

Parties facilitate the availability of works in accessible formats for beneficiaries beyond the requirements of the Marrakesh Treaty.

84 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.16.3.²²

The official text, released on November 5, 2015, contained a few non-substantive changes reflecting the “legal scrub” to eliminate errors and inconsistency. The final language, with highlighted changes to the leaked May 2015 and October 2015 drafts, reads:

Article 18.65 ~~QQ.G.16~~: {Limitations and Exceptions}

1. (a) With respect to this 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. (b) This Article QQ.G.16(a) does not neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne Convention, the WCT WIPO Copyright Treaty or the WPPT WIPO Performances and Phonograms Treaty.

Article 18.66 ~~QQ.G.17~~: {Appropriate Balance in Copyright and Related Rights Systems}

Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things ~~inter alia~~ by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions) ~~QQ.G.16~~, 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.^{77 83, 78 84}

^{77 83} 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.

²² Trans-Pacific Partnership, Intellectual Property Rights Chapter (Oct. 5, 2015), *available at* <https://wikileaks.org/tpp-ip3/WikiLeaks-TPP-IP-Chapter/WikiLeaks-TPP-IP-Chapter-051015.pdf> (last visited Oct. 13, 2015)(*hereinafter* October 2015 Text).

78 84 For purposes of greater certainty 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) QQ.G.16.3.²³

Conclusion

Paragraph 2 of the United States' 2012 proposal regarding copyright exceptions and limitations, which was based on language appearing in the fair use provision, 17 U.S.C. § 107, constituted an important shift in the U.S. negotiating position in IP international negotiations in general, and the TPP negotiations in particular. Given the timing of the introduction of this proposal on July 3, 2012, it is safe to assume that the shift in position was caused to some degree by the defeat of SOPA and PIPA in the U.S. Congress and opposition to ACTA in the European Union earlier in 2012.

Over the next three years, the language concerning copyright exceptions and limitations improved steadily. Although the Parties in the end did not adopt the "shall achieve" or "shall foster" formulation, they nonetheless agreed to an unambiguous mandatory obligation to endeavor to achieve a balance in their copyright systems. The 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.

The strength of the Parties' commitment is reflected in USTR's summary of the IP chapter's provisions: "[T]he chapter includes an obligation 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."²⁴ (Emphasis supplied.) In other words, Parties do not fulfill 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.

²³ TPP Full Text, available at <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>.

²⁴ Press Release, U.S. Trade Representative, Summary of the Provisions of the Trans-Pacific Partnership Agreement (Oct. 2015), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership> (last visited Oct. 13, 2015).

Appendix

2011 U.S. Proposal

8. [Placeholders for provision on (1) exceptions and limitations, (2) Internet retransmission, and (3) any other appropriate copyright/related rights provisions]

August 2012 Text

Article QQ.G.16: Limitations and Exceptions

[US:

1. [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.]

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 no limited to, criticism, comment, news reporting, teaching, scholarship and research.⁹²]

[NZ/CL/MY/BN/VN propose; AU/US oppose⁹³: 1. Each party may provide for limitations and exceptions to copyrights, related rights, and legal protections for technological protections measures and rights management information included in this Chapter, in accordance with its domestic laws and relevant international treaties that each are party to.]

[US/AU propose: With respect to this Article and Articles 5 and 6, 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. [NZ/CL/MY/BN/VN propose; US/AU oppose: Paragraph 1 permits a party to carry forward and appropriately extend into the digital environment limitations and exceptions in its domestic laws. Similarly, these provisions permit a Party to devise new] [US/AU propose; NZ/CL/MY/BN/VN oppose: it's understood that each party may, consistent with the foregoing, adopt or maintain] exceptions and limitations for the digital environment.]

⁹² [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]

93 Negotiator's Note: SG/PE: Can accept both versions of paragraph 1.

August 2013 Text

Article QQ.G.16 {Limitations and Exceptions}¹⁷⁹

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

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 propose¹⁸¹: ,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]^{182 183}.

179Negotiators' Note: CA supports a provision on limitations and exceptions and is reflecting further.

180Negotiators' 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.

181Negotiator'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, sholarship and research. US/MX believe the word 'education' is covered by teaching, scholarship and research, but is considering further.

182FN: 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.

183Negotiator's Note: NZ/ AU is flexible on either options referring to persons with disabilities.

May 2014 Text

Article QQ.G.16: {Limitations and Exceptions}

- a. 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.
- b. Article QQ.G.16(a) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne Convention, [VN propose; US/SG oppose: the Rome Convention,] the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.¹¹⁵

Article QQ.G.Y: {Limitations and Exceptions}

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.16.1, 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 [AU oppose: published] works for persons who are blind, visually impaired, or otherwise print [AU propose: or perceptually] disabled.^{116 117}

116{In particular,} As recognized by the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (June 27, 2013).

117For 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.16.3.

May 2015 Text

Article QQ.G.16: {Limitations and Exceptions}

- (a) With respect to Section G, 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.
- (b) Article QQ.G.16(a) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne

Convention, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.

Article.GG.Y {Limitations and Exceptions}

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 QQ.G.16.1, 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. [164][165]

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

[165] 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.16.3.

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Article QQ.G.16: {Limitations and Exceptions}

(a) 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.

(b) Article QQ.G.16(a) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne Convention, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.

Article QQ.G.17: {Appropriate Balance in Copyright and Related Rights Systems}

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.16, 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^{83, 84}.

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

84 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.16.3.

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Article 18.65: Limitations and Exceptions

1. With respect to this 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.

2. This Article does not reduce or extend 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, among other things 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.^{77,78}

77 As recognised 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 recognise that some Parties facilitate the availability of works in accessible formats for beneficiaries beyond the requirements of the Marrakesh Treaty.

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