

PROMOTING COPYRIGHT BALANCE IN NAFTA

Comments to U.S. Trade Representative, re: NAFTA Negotiation
 Docket # USTR-2017-0006

Sean Michael Flynn and Michael Palmedo
 American University Washington College of Law
 Program on Information Justice and Intellectual Property

PROMOTING COPYRIGHT BALANCE IN NAFTA	1
STATEMENT OF INTEREST	1
SUBMISSION	2
I. U.S. AND FOREIGN FIRMS BENEFIT FROM BALANCED COPYRIGHT IN OTHER COUNTRIES	2
A. <i>User Rights Database</i>	3
B. <i>Copyright Balance and Returns to U.S. Firm’s Foreign Affiliates</i>	4
C. <i>Copyright Balance and Imports of Goods and Services from the United States</i> .	7
D. <i>Copyright Balance and Returns to Copyright Industries</i>	10
II. OPTIONS FOR PROMOTING BALANCE IN TRADE AGREEMENTS	11
APPENDIX: EXAMPLES OF COPYRIGHT BALANCE PROVISIONS	12
I. TPP ARTICLE 18.66: BALANCE IN COPYRIGHT AND RELATED RIGHTS SYSTEMS	12
II. US-KOREA FTA	13
III. MARREKESH TREATY, ART 10	13
IV. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES	13
V. WCT AGREED STATEMENTS, ART 10.....	13
VI. BEIJING TREATY	14
VII. RCEP (AUS PROPOSAL)	14
VIII. EU-MERCOSUR (EU PROPOSAL)	14

STATEMENT OF INTEREST

The Program on Information Justice and Intellectual Property (PIJIP) is the internationally recognized intellectual property and information law research and academic program of American University Washington College of Law (AUWCL). PIJIP is managing a multidisciplinary research project on the impact of copyright user rights in the digital environment. One issue that faces NAFTA parties is the

degree to which they should seek to include language promoting copyright balance through limitations and exceptions in the revised agreement. We make this statement to share information from our research indicating that the promotion of balanced copyright systems promotes U.S. trade interests.

Our research indicates that American firms operating overseas in industries that rely on copyright exceptions enjoy better outcomes on average when our trading partners' copyright laws are more balanced – defined as having limitations and exceptions that are open to the use of any type of work, by any user, or with a general exception that is open to any purpose subject to protections of the legitimate interests of right holders. Econometric research on both the activities of foreign affiliates of U.S. firms and exports by U.S. firms illustrate this conclusion. At the same time, firms in the more traditional “copyright sectors” (i.e. – music, movies, and printed media), are not negatively affected by greater balance and openness.

We also provide the results of research on existing language in trade and international law that promote balance in copyright laws and include some analysis of how such provisions could better meet U.S. interests.

SUBMISSION

I. U.S. AND FOREIGN FIRMS BENEFIT FROM BALANCED COPYRIGHT IN OTHER COUNTRIES

PIJIP has been working over several years on empirical research pertaining to the impact of balanced copyright systems on trade and economic development. One key element of an adequately balanced copyright system is having sufficiently “open” limitations and exceptions for the digital environment. We refer to “open” limitations and exceptions for the digital environment as those that are open to the use of any kind of work, by any kind of user and for any purpose, as long as the use does not unreasonably prejudice the legitimate interests of the author. Such openness is the hallmark of the U.S. fair use clause. These “open” aspects are crucial because the digital environment creates new opportunities to use different kinds of works, by different users and for different purposes than were envisioned in most copyright statutes. An open statute is a flexible one – and flexibility is needed to accommodate and encourage innovation in the digital environment.

Our research indicates:

- Greater openness is associated with better outcomes for foreign affiliates of U.S. multinational enterprises in the Scientific, Technical & Professional Services industries
- Commerce department data provides no evidence that affiliates of U.S. firms classified under the NAICS 51 heading - including publishing, music, and movies - perform more poorly in countries with more open copyright user rights
- U.S. firms in the computer service, information service, and contract R&D industries export more services to countries with greater openness
- Imports of books from the U.S. are not negatively affected by the

openness of copyright user rights in the importing countries

- Greater openness is not associated with lower net income for the local firms in movie or music industries in the countries that we have studied, though there is weak evidence of a negative relationship between openness and print publishing

A. User Rights Database

We are currently developing a User Rights Database tracking changes to user rights in copyright laws from countries around the world. To date, we have collected information about the history of copyright user right laws in 21 geographically and economically diverse countries, allowing us to run initial econometric tests. We plan to expand the database to include information on 40 or more countries.

To build the database, we circulated a detailed survey on changes in copyright law over time to legal scholars in 40 countries to collect data on the presence of openness, flexibility, and generality in copyright exceptions over time. The survey defines “law” broadly, explicitly including “all authoritative, published rules or interpretations,” including “statutory law, administrative regulations or directives, decisions by courts, enforcement agencies or others.” The survey asks a series of questions about 20 copyright limitations often found in national laws, (i.e. – the quotation exception, the education exception).¹ For each of the provisions, we ask whether the law is open to use for any purpose, open to use of any type of work, open to use by any type of user, and open to commercial uses. For some copyright limitations, we ask further questions relevant to that specific provision – for instance, we ask if the exception for use of computer programs is open to reverse engineering for the development of interoperable products.

Once we receive initial survey responses from our experts, we cite check and code the data. For coding purposes, we assign a numerical value of between 0 and 3 for each question. 0 indicates that the attribute (e.g., whether a particular exception is open to the use of any work) is definitely not present in the nations law. 3 indicates that the attribute is definitely present. 1 and 2 indicate the exception is “probably not” or “probably or mostly” present depending on factors such as the ambiguity of statutory language and its development through case law.

Our data is publically available under a creative commons license at <http://infojustice.org/survey>. The site includes both the survey responses in their raw form as provided by respondents, and in its coded form for use in empirical work. We have posted the survey on this page as well.

To test whether firms doing business in a particular country are affected by the

¹ The user rights that form the subject of our survey are the General Exception; Quotation; Education; Research; Personal or Private Uses; Computer Programs; Databases or Other Compilations of Non-Original Facts; Text and data mining; Library Rights; Disability Access; Transformative Use; Parody and/or Satire; Incidental Inclusion; Panorama Right; Orphan Works; National Government Works; Exhaustion of Rights; Safeguards From Secondary/ISP Liability; Temporary Copies for Technological Processes; and Protections from Supremacy of Contracts.

openness of copyright exceptions in that country, we devised an “Openness Score” from our dataset. This is the unweighted average of the 76 questions in our survey that ask about the openness of copyright exceptions. Each country earns a score between 0 and 3 for each year. PIJIP has run a series of econometric tests of the relationship between openness of countries’ copyright limitations and the returns to U.S. and local firms.

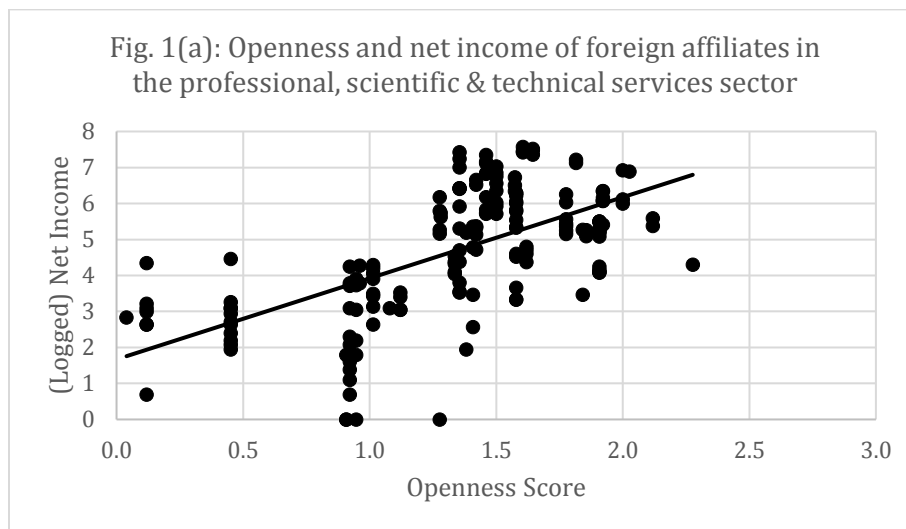
We are continuing to solicit data on the changes in copyright law over time, and we plan to update our Copyright User Rights database later this year. We would be happy to keep the Trade Policy Staff Committee up to date with new research outputs as we move forward.

B. Copyright Balance and Returns to U.S. Firm’s Foreign Affiliates

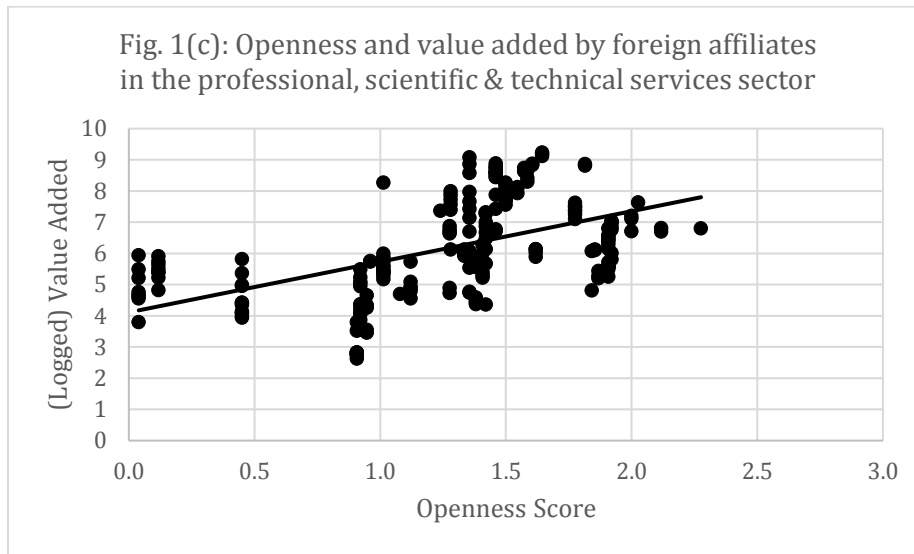
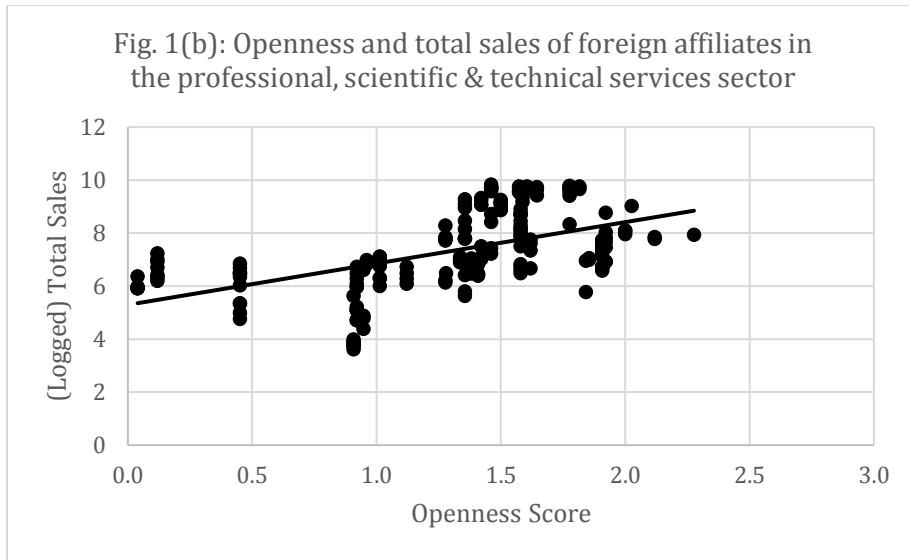
A key finding from our research thus far is that having more balanced copyright systems abroad – defined as systems in which a greater number of limitations and exceptions are open to any work, user, and purpose – benefit U.S. companies.

Our first tests utilized industry level data on foreign affiliates of U.S. multinational enterprises, taken from the Bureau of Economic Analysis tables.² The data is available for the 15 year period running from 1999 to 2014. First, we examine outcomes experienced by affiliates in the Scientific and Technical Services sector. These are the industries under the two-digit NAICS code 54, which include research and development services and computer systems development, among others.

Among the countries in our dataset, affiliates in this sector tended to have greater net income and total sales when they resided in countries with greater openness of copyright user rights, and they tend to have more value added by their affiliates in these countries. Figures 1(a-c) shows the raw correlations.



² <https://www.bea.gov/international/di1usdop.htm>



To control for other factors that ought to affect industry returns, we ran a series of regressions testing the relationship of openness with three dependent variables: net income, total sales, and value added. In these regressions, GDP per capita and population control for the wealth and size of the national markets in which the affiliates operate, and fixed effects control for time.³ The results are summarized in Table 1.

³ Data on GDP and population were taken from the World Bank databank.

Table 1: Regression results for NAIC 54
Professional, Scientific, and Technical Services

VARIABLES	Dep. Var.: (Logged) Net Income	Dep. Var.: (Logged) Total Sales	Dep. Var.: (Logged) Value Added
Openness Score	1.197*** (0.179)	0.286*** (0.0967)	0.323*** (0.0941)
(Logged) GDP per capita	1.104*** (0.101)	1.228*** (0.0672)	1.287*** (0.0600)
(Logged) Population	0.808*** (0.0658)	0.798*** (0.0402)	0.927*** (0.0388)
Constant	-21.47*** (1.809)	-18.51*** (1.131)	-22.44*** (0.989)
Observations	175	204	255
R-squared	0.679	0.790	0.783
Time F.E.	Yes	Yes	Yes

Robust standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

The coefficient on our openness score is positive and statistically significant at the 99% level of confidence for each of the three tests. The coefficients on the control variables are also positive and significant, as expected, and R-squared between 0.67 and 0.79 indicates a good overall fit. Taken together, the results indicate that openness is associated with greater returns to foreign affiliates of U.S. firms in these industries, even when controlling for other factors (wealth, market size, and time) which affect returns as well.

Next, we examine returns to foreign affiliates of the “information” sector, identified under the two-digit NAICS codes 51. This is a high level of industry aggregation – including copyright industries such as print publishing (5111), movies (5121), and music (5122), as well as industries that rely more on flexibilities in copyright, such as data processing, hosting (5182), and software development (5112). The high level of aggregation makes the result difficult to interpret, but this is the only publicly available industry-level data on foreign affiliates we are aware of, and it allows us to test the effect of openness of copyright user rights on a set of industries that should be sensitive to copyright protection.

We run the same set of regressions as before, this time using data from the information sector industries. Our control variables are significant and the overall fit of the model is good, yet we find no statistically significant relationship between our openness score and any of the three dependent variables measuring industry outcomes. The results are summarized in Table 2 below.

Table 2: Regression results for NAICS 51 Information Industries

VARIABLES	Dep. Var.: (Logged) Net Income	Dep. Var.: (Logged) Total Sales	Dep. Var.: (Logged) Value Added
Openness Score	0.463 (0.308)	0.133 (0.216)	-0.0542 (0.155)
(Logged) GDP per capita	1.027*** (0.135)	1.050*** (0.110)	1.195*** (0.0859)
(Logged) Population	0.546*** (0.0878)	0.685*** (0.0859)	0.937*** (0.0717)
Constant	-15.14*** (2.439)	-14.78*** (2.219)	-21.44*** (1.870)
Observations	107	194	214
R-squared	0.558	0.497	0.583
Time F.E.	Yes	Yes	Yes

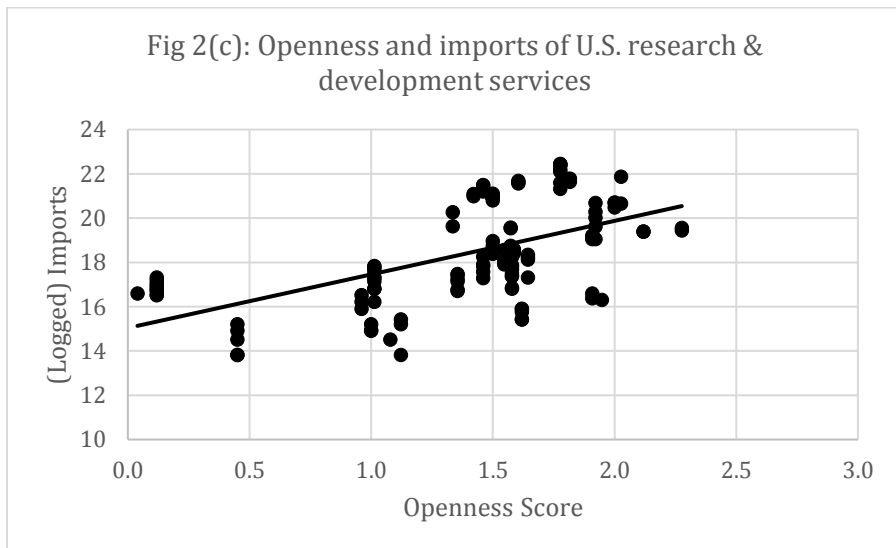
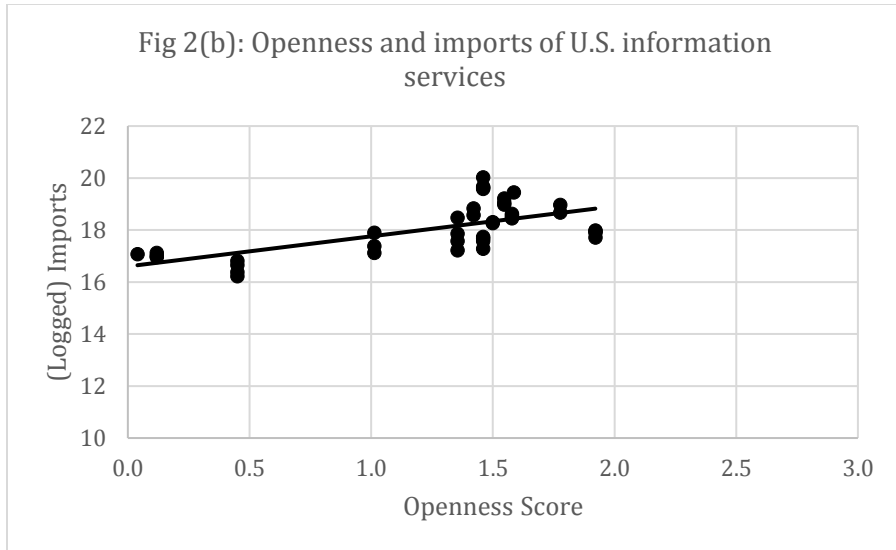
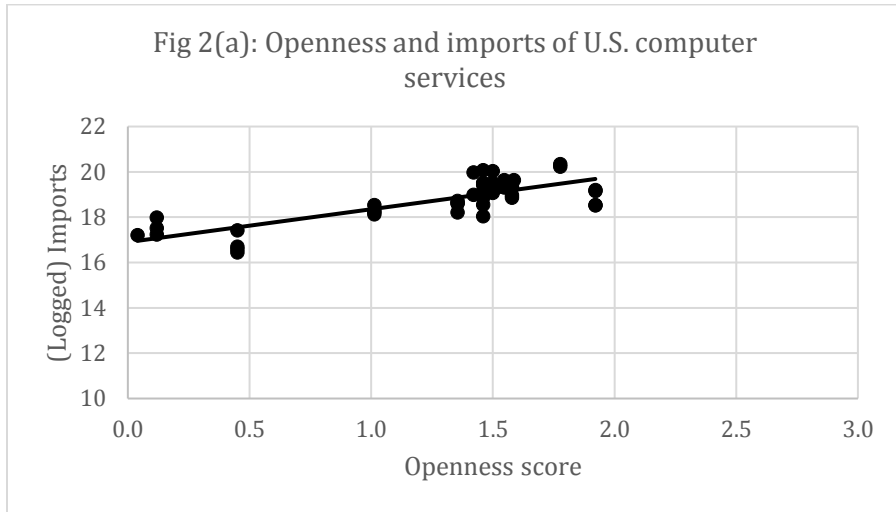
Robust standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

C. Copyright Balance and Imports of Goods and Services from the United States

PIJIP tested the relationship between the openness of a country's copyright user rights and U.S. exports to those countries from four industries, using data from the UN COMTRADE database. The results indicate that improved copyright balance and openness abroad can benefit US exporters in certain industries.

First, we tested the relationship between U.S. exports of services in three information-based sectors identified under the Electronic Balance of Payment Services (EBOPS) codes: computer services, information services, and research and development. There is a limited quantity of data, yet there is a clearly positive correlation between the openness found in a trading partner's copyright user rights and the value of services imported by that country from U.S. firms. Figures 2(a-c) present the raw correlations.



Three regressions test this relationship in the presence of control variables for market wealth and size, with fixed effects controlling for time. Table 3 summarizes the results. For each of the three service industries, there was a positive relationship between countries' openness scores and the value of U.S. service exports to that country. The control variables were statistically significant, but for these regressions, the coefficient on population was negative. As in the sets of regressions described above, relatively high R-squareds indicate a good overall fit. The sample sizes are small, yet the explanatory power of the variables is strong enough to generate statistically significant results.

Table 3: Exports of U.S. Services in Three Industries

VARIABLES	Industry: Computer Services	Industry: Information Services	Industry: Research & Development
Openness Score	0.978*** (0.171)	0.471*** (0.117)	1.031*** (0.218)
(Logged) GDP per capita	0.560*** (0.0862)	0.865*** (0.104)	1.845*** (0.147)
(Logged) Population	-0.276*** (0.0464)	-0.389*** (0.0763)	-1.124*** (0.104)
Constant	7.123*** (1.944)	0.791 (2.016)	-13.60*** (2.705)
Observations	44	41	128
R-squared	0.818	0.788	0.702
Time F.E.	Yes	Yes	Yes

Robust standard errors in parentheses
 *** p<0.01, ** p<0.05, * p<0.1

Second, we obtained data on U.S. book exports to the countries in our dataset. Since books are physical goods, we are able to test both the value of exports (measured in U.S. dollars) and the quantity of exports (measured in weight). Table 4 summarizes our results. Though U.S. book exports to countries are related to each country's wealth and size as expected, there is no relationship between a country's openness and the book exports that U.S. firms ship to that country. This is the case whether we are reporting the impact on the value or the quantity of exports.

Table 4: Imports of Books from the U.S.

VARIABLES	Dep. Var.: Value of Exports USD	Dep. Var.: Quantity of Exports KG
Openness Score	0.0559 (0.125)	0.0617 (0.179)
(Logged) GDP per capita	1.310*** (0.0553)	1.306*** (0.0681)
(Logged) Population	1.092*** (0.0513)	1.148*** (0.0618)
Constant	-14.95*** (1.231)	-18.36*** (1.463)
Observations	484	320
R-squared	0.637	0.640
Time F.E.	Yes	Yes

Robust standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

D. Copyright Balance and Returns to Copyright Industries

Our research also indicates that traditional copyright industries may not be harmed by the adoption of more balanced and open copyright limitations and exceptions abroad.

We tested the effect that openness in a country's copyright limitations has on the net income of local firms in the copyright industries. This was done using firm-level data from the Thomson Reuters Eikon database. There are observations from all countries in our survey group except for Slovakia, and there are different numbers of observations from each industry (with the sound recordings having the fewest observations and print publishing having the most). Since these regressions use firm instead of industry-level data, we add logged total assets as a control for firm size.

The results are mixed. There is no significant relationship between openness and net sales for the motion picture and video industry; there is a negative relationship between openness and net sales for print publishing that is weakly significant at the 90% level of certainty; and there is a strongly significant *positive* relationship between openness and net income for the music industry. The control variables for firm size and wealth of the market are positive and significant as expected across all three industries, though the control for market size is negative and not always significant.

Table 5: Local firms' net income in survey countries

VARIABLES	Industry: Motion Pictures & Video	Industry: Print Publishing	Industry: Sound Recordings
Openness score	0.397 (0.297)	-0.232* (0.128)	7.260*** (2.016)
(Logged) Total assets	0.999*** (0.0292)	0.953*** (0.0132)	0.716*** (0.0623)
(Logged) GDP per capita	0.543*** (0.0731)	0.141*** (0.0445)	1.937*** (0.503)
(Logged) Population	-0.219*** (0.0461)	-0.0230 (0.0212)	-15.95*** (5.418)
High Income	-2.383*** (0.276)	-0.712*** (0.154)	-42.52*** (13.71)
Constant	-3.200*** (1.040)	-2.062*** (0.460)	310.8*** (110.3)
Observations	1,038	1,846	252
R-squared	0.704	0.751	0.658
Time F.E.	Yes	Yes	Yes

Robust standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

II. OPTIONS FOR PROMOTING BALANCE IN TRADE AGREEMENTS

International trade and treaty law has been increasingly attentive to the need for balance and user rights in copyright policy to meet the social, economic and trade interests of all countries. There is not, at present, however, a sufficient model in existing law for promoting these ends.

Samples of provisions from other Free Trade Agreements or other international agreements that could be used as a baseline for NAFTA are included in APPENDIX I. In general, the pattern from these clauses is that international law has sought three main goals thus far:

1. protecting rights of countries to enact “fair use” rights under the confines of the three step test,
2. promoting “balance” in copyrights systems,
3. Requiring limitations and exceptions for certain activities, such as for temporary copies needed to enable transmissions in the digital environment.

Each of these models could be improved.

Protecting “fair use” does not do enough. The fair use protection models, such as the language in the Korea FTA, protect “fair use” without defining what elements of

fair use they are protecting. Our research suggests that what is most important about fair use and other balanced limitations and exceptions systems is the degree to which they are open to any work, user, and purpose. Some have claimed that such open exceptions would violate the “three step test” in Berne Article 9; TRIPS article 13 and like provisions elsewhere. The protections of fair use appear intended to prevent such challenges. But they are very ambiguous. An important clarification would be that the three step test does not prohibit exceptions that apply a flexible proportionality test to an “open list” set of purposes. For example, the Max Planck Declaration, A Balanced Interpretation of the “Three-Step Test” in Copyright Law provides:

3. The Three-Step Test’s restriction of limitations and exceptions to exclusive rights to certain special cases does not prevent

(a) legislatures from introducing open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable; or

(b) courts from

- applying existing statutory limitations and exceptions to similar factual circumstances *mutatis mutandis*; or

- creating further limitations or exceptions, where possible within the legal systems of which they form a part.

Likewise, the few agreements that promote “balance” are too vague to guide countries to the path of greatest benefit. The TPP’s model for promoting balance has been improved somewhat in Australia’s proposal in the RCEP negotiation, which should be noted. But it does not clearly require what is most necessary for trade in the digital environment, which is being sufficiently open to innovation in the digital environment. Specifically, it would be beneficial for every country to offer two aspects of what is known as “transformative use” in the US:

- Expressions of a work for a different purpose and for a different audience than the original, such as criticism and review, illustration, quotation (including display of snippets), pastiche, etc.
- Non-expressive uses (i.e. intermediate technological steps in the production of metadata that does not communicate the work), such as uses of works to facilitate machine learning, computational analysis, text and data mining, caching, creation of temporary copies to facilitate transmission, etc.

Trade law could evolve to more certainly require recognition of these basic user rights in the digital economy.

APPENDIX: EXAMPLES OF COPYRIGHT BALANCE PROVISIONS

I. TPP ARTICLE 18.66: BALANCE IN COPYRIGHT AND RELATED RIGHTS SYSTEMS

Each Party shall endeavor 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. 78, 79

78. 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.

79 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).

II. US-KOREA FTA

Article 18.4: Copyright and Related Rights

FN 11. Each Party shall confine limitations or exceptions to the rights described in paragraph 1 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. For greater certainty, each Party may adopt or maintain limitations or exceptions to the rights described in paragraph 1 for fair use, as long as any such limitation or exception is confined as stated in the previous sentence.

III. MARREKESH TREATY, ART 10

3. Contracting Parties may fulfill their rights and obligations under this Treaty through limitations or exceptions specifically for the benefit of beneficiary persons, other limitations or exceptions, or a combination thereof, within their national legal system and practice. These may include judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses to meet their needs consistent with the Contracting Parties' rights and obligations under the Berne Convention, other international treaties, and Article 11.

IV. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

ART 30. 3. States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials. <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

V. WCT AGREED STATEMENTS, ART 10

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

Program on Information Justice and Intellectual Property

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

VI. BEIJING TREATY

Art. 15, FN (TPMs)

10. Agreed statement concerning Article 15 as it relates to Article 13: It is understood that nothing in this Article prevents a Contracting Party from adopting effective and necessary measures to ensure that a beneficiary may enjoy limitations and exceptions provided in that Contracting Party's national law, in accordance with Article 13, where technological measures have been applied to an audiovisual performance and the beneficiary has legal access to that performance, in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that performance to enable the beneficiary to enjoy the limitations and exceptions under that Contracting Party's national law. Without prejudice to the legal protection of an audiovisual work in which a performance is fixed, it is further understood that the obligations under Article 15 are not applicable to performances unprotected or no longer protected under the national law giving effect to this Treaty.

VII. RCEP (AUS PROPOSAL)

Article 2.5 Limitations and Exceptions

1. With respect to this section {copyright}, 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 interest of the right holder.
2. Paragraph (1) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne Convention, the Rome Convention, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.]
3. Each party shall endeavor to provide an appropriate balance in its copyright and related rights system by providing limitations and exceptions, consistent with paragraph 1, for legitimate purposes including education, research, criticism, comment, news reporting, libraries and archives, and facilitating access for persons with disability.
4. For greater certainty, each Party may adopt or maintain limitations or exceptions to the rights described in paragraph 1 for fair use, as long as any such limitation or exception is confined as stated in paragraph 3.

VIII. EU-MERCOSUR (EU PROPOSAL)

The Parties shall provide that temporary acts of reproduction which are transient or incidental, which are an integral and essential part of a technological process and the sole purpose of which is to enable (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which

have no independent economic significance, shall be exempted from the reproduction right.