

Washington Principles on Copyright Balance in Trade Agreements

November 15, 2017ⁱ

There is a growing recognition that the digital environment demands expansions in rights to use copyrighted material without permission of owners to facilitate a range of modern activities from social media, to online learning, to Internet search. With information increasingly available only in digital format, public interest objectives, including to promote education, cultural memory, and access to knowledge, can only be served when copyright retains the flexibility to adapt to changing formats and uses.

New research shows that digital user rights can have positive effects on innovation, creativity, and foreign direct investment, but that the adoption of digital user rights has been slow and unequally distributed between developing and wealthy countriesⁱⁱ. In this context, international copyright law - including in trade agreements - should be focused on the traditional goal of achieving “balance” between protections for copyright owners and user rights that serve “the larger public interest, particularly education, research and access to information.”ⁱⁱⁱ

NAFTA and other ongoing trade agreement negotiations have been deplorably secret. We reaffirm the statement of the international academic and public interest communities in the Washington Declaration on Intellectual Property and the Public Interest 2011:

International intellectual property policy affects a broad range of interests within society, not just those of rights holders. Thus, intellectual property policy making should be conducted through mechanisms of transparency and openness that encourage broad public participation. New rules should be made within the existing forums responsible for intellectual property policy, where both developed and developing countries have full representation, and where the texts of and forums for considering proposals are open.^{iv}

Our understanding, based on numerous conversations with people knowledgeable of each party’s undisclosed positions, is that there has been no agreement to include provisions promoting copyright user rights or the principle of balance in NAFTA. Absence of such provisions would make the final agreement unacceptable.

While maintaining our reservations about using closed-door trade forums to make international intellectual property policy, we call on all parties to NAFTA - and international copyright negotiations more generally - to support the following principles necessary to safeguard the public interest in the digital environment:

PROTECT AND PROMOTE COPYRIGHT BALANCE

To fully take advantage of the opportunities that new technologies offer to promote creativity, innovation, and access to knowledge, copyright must strike a balance between exclusive rights and limitations and exceptions to those rights that serve public interests. Trade agreements should include language requiring parties to promote such a balance, and should also include language protecting rights of countries to adopt open and flexible general exceptions like fair dealing and fair use.^v

PROVIDE TECHNOLOGY-ENABLING EXCEPTIONS

The promise of digital technology will not be realized if copyright owners can block reproductions and transmissions of their works that are functionally essential and do not substitute for protected works in any market. These include, for example, exceptions or limitations for the purposes of reverse engineering, temporary reproduction, text and data-mining, indexing, and search. Promoting the adoption of such user rights should be a core goal of the international regime.^{vi}

REQUIRE FLEXIBLE INTERMEDIARY SAFEGUARDS

An appropriate copyright balance requires mechanisms by which copyright owners call attention to instances of possible copyright infringement online, paired with demarcated safe harbors shielding Internet intermediaries from liability for infringement initiated by individual users.^{vii} We call on parties to international agreements to assure that intermediary safeguards are provided in every country, and to allow each country flexibility to define the specific obligations of copyright owners and intermediaries.^{viii}

ENSURE THAT TECHNOLOGICAL PROTECTION MEASURES PERMIT USER RIGHTS

Users cannot exercise their rights if they are locked out of copyrighted works in digital formats. We call on parties to authorize legislation that permits the circumvention of digital locks for legitimate purposes. The text of the agreement should provide for exceptions to anti-circumvention provisions that correspond to exceptions to copyright, and for an efficient, open process by which such exceptions can be regularly updated.^{ix}

REFLECT MULTILATERAL COMMITMENTS ON COPYRIGHT TERM

Copyright duration remains a debated issue at both the national and international level. There is no evidence to suggest that the private benefits of copyright term extensions ever outweigh the costs to the public. There are serious proposals being considered around the world to limit the extension of term beyond the multilateral minimum to cases where active owners assert their rights. We call on the parties to adhere to the standards for copyright term reflected in the World Intellectual Property Organization copyright treaties.

GUARANTEE PROPORTIONALITY AND DUE PROCESS

Excessive penalties deter technological development, creative production, and users' freedom to express themselves in the digital age. We call on any trade treaties that include copyright to guarantee that copyright remedies be predicated on principles of proportionality, remedial flexibility, transparency in calculation, and due process.^x In particular, the parties should avoid mandating statutory damages in excess of compensatory levels. Likewise, trade agreements should not require the introduction of new criminal penalties for civil wrongs.

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ENDNOTES

ⁱ These principles were drafted at a first-ever convening of copyright academics, experts and internet policy activists held at American University Washington College of Law October 30-31, 2017. The meeting was sponsored by the Program on Information Justice and Intellectual Property and the Global Expert Network on Copyright User Rights. See <http://infojustice.org/flexible-use> (describing Global Expert Network on Copyright User Rights).

ⁱⁱⁱ Sean Flynn & Michael Palmedo. *The User Rights Database: Measuring the Impact of Copyright Balance* (PIJIP, Working Paper, November 2017).

^{iv} WIPO Copyright Treaty preamble, Dec. 20, 1996.; accord Beijing Treaty on Audiovisual Performances preamble, Jun. 24, 2012.

^v The Washington Declaration on Intellectual Property and the Public Interest, <http://infojustice.org/washington-declaration-2>. For a recent statement of similar concerns regarding the NAFTA negotiations, see Letter from Electronic Frontier Foundation et al., to the trade ministries of the United States, Canada, and Mexico (Aug. 18, 2017) https://wiki.creativecommons.org/images/0/0c/Transparency_Digital_Rights_and_NAFTA_22_Aug.pdf.

^{vi} See, e.g., WIPO Copyright Treaty art. 10 footnote 9 Agreed Statement (permitting “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” and “to devise new exceptions and limitations that are appropriate in the digital network environment”); US-Korea Free Trade Agreement art.18.4 footnote 11, June 30, 2007 (“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”); accord Beijing Treaty on Audiovisual Performances preamble; Trans-Pacific Partnership Agreement art. 18.2 (Objectives) and art. 18.66, Feb. 4, 2016 (“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...”); Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities art. 10 (“Contracting Parties may fulfill their rights and obligations under this Treaty through . . . judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses”); cf. Senate Finance Committee Report No.114-42 (May 12, 2015) (instructing “that U.S. trade agreements should contain copyright provisions that...foster an appropriate balance in copyright systems, inter alia by means of limitations and exceptions”); Max Planck Declaration, *A Balanced Interpretation of The “Three-step Test” In Copyright Law* (“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”).

^{vii} For an example of a mandatory provision in a regional agreement that partially serves this principle, see Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society art. 5 (requiring exceptions only for “temporary” copies to enable “transmission in a network between third parties by an intermediary”).

^{viii} We refer here to safe harbors from liability for copyright as well as of other laws. See, e.g., Communication Decency Act 47 U.S.C. § 230 (1996).

All countries should have leeway to choose, for example, between “notice and take down” and “notice and notice” systems in effect in the U.S. and Canada, respectively.

^{ix} See Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities art. 7, Jun. 28, 2013 (requiring Contracting Parties to take appropriate measures to ensure that legal prohibitions against circumvention do not prevent beneficiary persons from enjoying the limitations and exceptions provided for in the Treaty); Beijing Treaty on Audiovisual Performances, footnote 10, agreed statement concerning art. 15 as it relates to art. 13 on rights to circumvent (“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”).

^x See TPP art. 18.17 (“shall take into account the need for proportionality”); Art. 18.68 (“A Party may provide that the criminal procedures and penalties do not apply to a non-profit library, museum, archive, educational institution, or public noncommercial broadcasting entity”).