

Promoting and Protecting Copyright Balance in NAFTA

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A. Examples from Previous Trade Agreements

There are specific examples from international intellectual property and trade law where fair use rights are protected or promoted. But to date they are intermittent. Few if any have become part of the regular corpus of international law, like rights to protection have.

Provision		Protect Fair Use	Promote Fair Use
US-Korea FTA Art. 18.4	“each Party may adopt or maintain limitations or exceptions to the rights described in paragraph 1 for fair use”	X	
WCT Agreed Statements Art. 10	“Contracting Parties [may] carry forward and appropriately extend into the digital environment limitations and exceptions”	X	
Marrakesh Treaty Art. 10	“Parties may fulfill their rights and obligations [through] judicial, administrative or regulatory determinations . . . as to fair practices, dealings or uses”	X	
TPP Art. 18.66: Balance In Copyright And Related Rights Systems	“Each Party shall endeavour to achieve an appropriate balance”		X
Infosoc Directive Art. 5(1)	“The Parties shall provide [exemption for] temporary acts of reproduction which are transient or incidental, which are an integral and essential part of a technological process”		X

B. Model Copyright Balance Clause

A better model for promoting copyright balance in trade agreements would combine all past protections and promotions of fair use rights into a single clause. For example:

1. Parties shall take all appropriate steps, in accordance with international law, to ensure¹ an appropriate balance in its copyright and related rights system by providing limitations and exceptions, consistent with paragraph [xx 3-step test], for legitimate purposes such as education, research, criticism, comment, news reporting, libraries and archives, and facilitating access for persons with disability.²
2. For greater certainty, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose.³
3. The Parties shall provide that acts of reproduction which are an integral and essential part of a technological process and the sole purpose of which is to enable a transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made (such as a use for research, indexing or other purpose that does not itself express or communicate the work to the public),⁴ shall be exempted from the reproduction right.⁵
4. Article [3 Step] does not prohibit any Party from adopting or maintaining⁶ open ended limitations or exceptions⁷ that permit judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses,⁸ so long as the scope of such limitations and exceptions is reasonably foreseeable.⁹
5. Article [3-Step] neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne Convention, the Rome Convention, Marrakesh Treaty, Beijing Treaty, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.¹⁰

¹ Convention on the Rights of Persons with Disabilities art. 30.3 (Intellectual Property), Mar. 30, 2007, 2515 U.N.T.S. 3. [hereinafter CRPD].

² Regional Comprehensive Economic Partnership [RCEP] Negotiation, Australia Proposal. *See also* Trans-Pacific Partnership [TPP] art. 18.66: Balance in Copyright and Related Rights Systems.

³ TPP art. 18.66.

⁴ *See* Matthew Jockers, Matthew Sag & Jason Schultz, *Digital Archives: Don't Let Copyright Block Data Mining*, 490 *Nature* 29-30 (October 4, 2012); Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 *Nw. U. L. Rev.* 1607-1682 (2009).

⁵ EU-Mercosur FTA Negotiation, EU Proposal.

⁶ FTA US-Korea art. 18.4.

⁷ Max Planck Declaration, A Balanced Interpretation of the "Three-step Test" in Copyright Law

⁸ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled art. 10, June 27, 2013, 52 *I.L.M.* 1312.

⁹ Max Planck Declaration, A Balanced Interpretation of the "Three-step Test" in Copyright Law

¹⁰ RCEP Negotiation, Australia Proposal. *See also* WIPO Copyright Treaty [WCT] Agreed Statements art. 10.