

EXAMINING THE TRANS-PACIFIC PARTNERSHIP AGREEMENT

By **Miriam Bitton**

On November 13, 2013, a document containing a complete draft of the Trans-Pacific Partnership (TPP) agreement's chapter on Intellectual Property Rights was leaked to the world through the WikiLeaks Web site. The TPP agreement was negotiated in August 2013 between representatives from the United States, Canada, Australia, New Zealand, Japan, Mexico, Malaysia, Chile, Singapore, Peru, Vietnam, and Brunei in complete secrecy. The document is very informative because it details which negotiating countries proposed specific articles and which countries opposed them. The leaked TPP shows that the United States is pushing for a stricter approach to intellectual property rights, while most of the other countries propose a more flexible approach. The document also is important because it attempts to promote issues of intellectual property related to technological innovations, most notably the Internet,

Dr. Miriam Bitton is a law professor at Bar-Ilan University School of Law. She received her Bachelor of Laws and Master of Laws degrees at Bar-Ilan University School of Law, as well as another Master of Laws at the University of Michigan Law School and a Doctor of the Science of Law at Michigan. A former Visiting Assistant Professor of Law at DePaul University College of Law, she also was the Microsoft Research Fellow at U.C. Berkeley School of Law and a Visiting Fellow at George Washington University Law School. Dr. Bitton writes and teaches in the fields of intellectual property law, law and technology, and property. She is the winner of the prestigious Alon Fellowship for the years 2009-2011 (granted by the Council of Higher Education in Israel to promising junior faculty members in Israel) and the Marie Curie International Reintegration Grant (granted by the European Union Commission).

and its role in the transformation of the intellectual property field.

This article offers a brief overview of the leaked document and its critique, exploring the background to its consideration. The article starts by reviewing existing international intellectual property regimes under the trade-related aspects of intellectual property rights (TRIPS) agreements and the recently failed attempt to pass the Anti-Counterfeiting Trade Agreement (ACTA), which introduces the background to the consideration of the TPP agreement. Next, it offers an overview of the main substantive provisions of the TPP, with an emphasis on the proposals made by the United States. Finally, it concludes with some preliminary critiques of the agreement.

BACKGROUND TO THE TPP: THE TRIPS AGREEMENT

Up until the TRIPS agreement,¹ enforcement of IP rights was hardly mentioned in international treaties.² TRIPS came to fill that vacuum with comprehensive international minimum standards of intellectual property protection and for the enforcement of IP rights as well as a dispute settlement mechanism through the World Trade Organization (WTO). The objectives of the agreement were to contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Specifically, the TRIPS agreement introduced intellectual property law into the international trading system for the first time and remains the most comprehensive international agreement on intellectual property. TRIPS requires WTO members to provide patent rights; geographical indications, including appellations of origin; industrial designs; integrated circuit layout-designs; new plant varieties; trademarks; trade dress; undisclosed or confidential information; and copyright rights, granting protection to content producers, including performers, broadcasting organizations, and producers of sound recordings. TRIPS also specifies enforcement procedures, remedies, and dispute resolution procedures.

In 2001, developing countries suggested that developed countries were insisting on a narrow reading of TRIPS and initiated a round of talks that resulted in the Doha Declaration. The Doha Declaration is a statement of the WTO that clarifies the scope of TRIPS, stating, for example, that TRIPS can and should be interpreted in light of the goal “to promote access to medicines for all.”

Through Part III of the TRIPS agreement, ground rules for judicial and administrative procedures, remedies, and criminal enforcement were established. Section I of Part III requires signatory states to ensure the availability of enforcement procedures that “permit effective action against any act of infringement....including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.”³ Consequently, laws stipulating criminal remedies alone do not meet the requirements of Section 1; those remedies also must be enforced in order to be in compliance with TRIPS. “Effective action” houses all the available remedies (civil, criminal, and border measures).⁴ A remedy is a “deterrent” if it reduces infringement rates.⁵

Article 41.1 further specifies that such procedures should not create barriers to trade, but instead, should safeguard against the abuse of trade. Enforcement procedures must be fair and equitable, such that costly and complicated procedures are prohibited.⁶ Administrative decisions should be in writing and based on the evidence provided,⁷ and the parties involved must be provided with the right to judicial review of the decisions.⁸

Section II provides guidelines for civil administrative procedures and remedies. According to Article 42, defendants must be notified of claims made against them in a timely manner and in sufficient detail. Parties have the right to independent legal counsel and the right to present evidence.⁹ However, confidential information must be protected unless doing so would be unconstitutional.¹⁰ Article 43 enables judicial authorities to require an opposing party to provide evidence where the other party, who has sufficiently proven its claims, has described the evidence as relevant. If a party refuses to release requested information, judicial authorities may make default judgments.¹¹

Article 44 stipulates that judicial authorities may grant injunctions where an infringement is taking place and prevent the entry of infringing goods

into their jurisdiction. Judicial authorities may order an infringer to compensate the right holder for the damages he suffered, and these damages may include expenses such as attorney fees.¹² Article 46 grants judicial authorities the authority to order an infringing good to be “disposed of outside the channels of commerce” or destroyed.

Judicial authorities also have the power to order the infringer to reveal the identities of third-party infringers, as well as their distribution networks.¹³ They also may order a claimant who has abused enforcement proceedings to compensate the accused infringer.¹⁴ Finally, Article 49 mandates that administrative authorities who award civil remedies must conform to the same principles of procedure as judicial authorities.

The third section describes the provisional measures that judicial authorities can order. Provisional measures can be ordered to prevent an infringement from occurring or to preserve evidence of an alleged infringement.¹⁵ Once the measures are carried through, the affected parties must be notified.¹⁶ The defendant may request a review in which the judicial authority can decide to modify, revoke, or confirm the measures.¹⁷ If the provisional measures are revoked because of an “omission” on the part of the applicant or because an infringement has not occurred the defendant may receive compensation.¹⁸ Moreover, if an administrative authority orders the provisional measure, the procedure must conform to the principles followed by the judicial authorities.¹⁹

Section IV enables signatory states to authorize special border measures. Article 51 allows rights holders to file a complaint with the competent authority that would permit custom authorities to suspend the release of allegedly imported or exported infringing goods. Such a complaint will only be accepted if there is enough evidence to support the alleged infringement.²⁰ Article 55 limits the duration of the suspension under certain conditions. If goods are wrongfully detained, the consignee and the owner of the goods are entitled to compensation.²¹ The rights holder and the owner of the goods retain the right to have the detained goods inspected.²²

Article 58 addresses *ex officio* action. Competent authorities are authorized to order the “destruction or disposal of infringing goods.”²³ Nevertheless, counterfeit trademark goods can be re-exported under exceptional circumstances.²⁴ Article 60 allows

member states to exclude *de minimis* import of a non-commercial nature from *ex officio* action.²⁵

Article 61 obligates signatory states to provide criminal procedures and penalties for cases of willful trademark counterfeiting or copyright piracy. Such infringements must be on a commercial scale. Furthermore, the remedies available must be imprisonment and/or a monetary fine that will deter such activity. The remedies available also must be consistent with those “applied for crimes of a corresponding gravity.”²⁶ In addition, when appropriate, the remedies must enable the seizure, forfeiture, and destruction of the infringing goods and any materials that have been used to commit the crime.²⁷ Article 61 gives member states the discretion to provide criminal procedures and penalties for the infringement of intellectual property rights, besides trademark counterfeiting and copyright piracy. Thus, for example, criminal procedures and penalties can be applied to infringement that was not willful or committed on a commercial scale.

The IIPA has interpreted Article 61 as a part of Article 41. This means that in order for criminal procedures and penalties to be effective they also must be applied in practice.²⁸ Moreover, seizure, forfeiture, and destruction come together as a package. One remedy cannot come without the other.²⁹ Returning seized goods only facilitates continued piracy and negates the requirement that remedies must act as deterrents.³⁰

From the outset, skeptical commentators voiced their uncertainty about the effectiveness of TRIPS enforcement provisions. The minimum enforcement standards required by the TRIPS were criticized by scholars as being too vague and difficult to enforce in practice. Professors Jerome Reichman and David Lange called the enforcement provisions the Achilles’ heel of the TRIPS agreement.³¹ They contended that the provisions were “crafted as broad legal standards, rather than as narrow rules, and their inherent ambiguity will make it harder for mediators or dispute-settlement panels to pin down clear-cut violations of international law.”³² This, and the fact that the provisions are worded to provide deference to different legal systems, will make it even more difficult for rights holders to effectively enforce their rights.³³ Christine Thelen noted that developing countries would find it especially challenging to provide enforcement, given that they lacked the institutions necessary to do so.³⁴

Even more troubling for TRIPS was the observation that some countries may enact enforcement laws, but fail to implement them.³⁵ Moreover, according to some commentators, ACTA, which is discussed below, is a product of developed nations’ frustration with the TRIPS agreement, whose enforcement mechanisms are not viewed as up to par.³⁶

The 2009 WTO Panel Report, *China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (Panel Report) was the first to interpret the enforcement provisions of the TRIPS agreement comprehensively.³⁷ As such, it had the potential to provide valuable guidance in interpreting how some of the more vague provisions should be understood and implemented by signatory states.

The Panel Report is seen largely as having failed to improve intellectual property enforcement.³⁸ Joost Pauwelyn has remarked that the report casts doubt as to TRIPS ability to ensure intellectual property enforcement in signatory states.³⁹ According to Peter Yu, the report also “signals to other less developed countries that the TRIPS Agreement does not require the high TRIPS-plus standards of intellectual property protection and enforcement that are now being advanced through bilateral, plurilateral, and regional trade and investment agreements as well as the proposed ACTA.”⁴⁰ The report further reinforces the considerable leeway given to members in implementing TRIPS.⁴¹ As the panel itself acknowledged, criminal matters (Article 61) are of a “sensitive nature” and involve “attendant concerns regarding sovereignty.”⁴²

From a practical standpoint, member states have learned that if they are to bring claims under Article 61, they will need to provide sufficient evidence to support their contentions.⁴³ In order to do so, member states will have to receive information directly from rights holders about infringing activity.⁴⁴

Given that the claims and report focused only on China’s legislation and not upon the quality of its enforcement, it remains unclear what the rules would be if a signatory state implemented TRIPS enforcement procedures and remedies into its legislation but did not effectively enforce the legislation. This point is particularly poignant with China, who even if forced to lower criminal thresholds, would not have to change its enforcement of such laws.⁴⁵

The WTO dispute-settlement system has been criticized as being ineffective unless member states

cooperate in good faith.⁴⁶ Thus, if a country's other interests override complying with a decision, TRIPS and the WTO dispute-settlement panels will be ineffective.

Peter Yu has noted that the dispute allowed the United States to learn about China's legal reasoning and the strategies it uses in the WTO. In addition, the United States was able to receive information about "censorship regulations, customs procedures, and criminal thresholds" in China, thereby giving the United States a better sense of how to protect IP rights.⁴⁷ One could also maintain that these benefits would apply to other member states that file claims. The panel reports facilitate information transparency that can be useful for rights holders when assessing how to protect their rights further in a given country.

In addition, Yu notes that the panel report emphasized that initiating the enforcement of intellectual property rights through Sections II, III, and IV is the responsibility of the rights holder.⁴⁸ This places the burden on the rights holder as opposed to on the government. Likewise, the panel also "rejected the use of recently-negotiated bilateral, plurilateral, and regional trade and investment agreements as a relevant subsequent practice for determining the term 'commercial scale.'"⁴⁹ The decision benefits countries that are not signatories to such agreements.⁵⁰ Finally, because there was not a clear winner in the dispute, less developed countries need not be deterred from bringing forth a claim against developed countries.⁵¹

BACKGROUND TO THE TPP: THE ANTICOUNTERFEITING TRADE AGREEMENT

ACTA⁵² aims to increase international cooperation and enforcement in order to combat the proliferation of trademark counterfeiting and copyright piracy in the 21st century.⁵³ Dubbed the "Anti-China Trade Alliance,"⁵⁴ ACTA has caused a firestorm of debate, in part because the negotiations preceding it were veiled in secrecy. The following sections intend to trace the development of ACTA, as well as the justifications behind its inception. ACTA's provisions will be outlined, as well as what it adds beyond TRIPS and existing treaties. A review of some critiques of ACTA also is provided.

ACTA was a product of countries' desire to strengthen intellectual property right protection and enforcement in light of the continued "proliferation of counterfeit and pirated goods as well as the proliferation of services that distribute infringing material" that serve as barriers to legitimate trade.⁵⁵ Countries wanted to establish more stringent standards than the minimum ones found in the TRIPS agreement.⁵⁶ Moreover, the agreement was negotiated outside of the accepted WTO and WIPO forums because of frustration with the "apparent multilateral stalemate on enforcement" in these forums.⁵⁷ A more exclusive forum would enable developed countries to establish standards that lean towards a maximalist approach to copyright protection rather than a minimalist approach.⁵⁸

The premise behind the ACTA agreement was first developed by Japan in 2005.⁵⁹ Following Japan's proposal of an anticounterfeiting treaty, the United States initiated a similar proposal calling for IPR-protecting countries to work together to formulate a new plan for strengthening enforcement.⁶⁰ In 2007, the United States announced its intent to negotiate an anti-counterfeiting trade agreement with Canada, the European Union, Japan, Korea, Mexico, New Zealand, and Switzerland.⁶¹ The goal of the undertaking was to "set a new, higher benchmark for enforcement."⁶² Several informal discussions took place in 2007, and by the middle of 2008, the participating countries had entered into negotiations.⁶³ Eleven rounds of negotiations followed before the countries finalized ACTA.⁶⁴ The agreement was altered several times, as it came under open criticism when leaked and then released to the public.⁶⁵ However, by the end of 2010, the final agreement was released.⁶⁶ Legal verification was completed by April 2011, such that the ACTA agreement has been open to signature since May 2011.⁶⁷

ACTA is divided into six chapters. In the first chapter, the nature and scope of a party's obligations are described as well as general definitions. Article 1 maintains that ACTA does not come in place of any other obligation established in another treaty. Each party must give effect to the agreement and is free to select the method with which it implements ACTA's obligations.⁶⁸ Moreover, parties are not required to protect rights that are not recognized in their national legislation.⁶⁹ Article 4 addresses privacy rights, exempting a member state from requiring the

disclosure of information that would be contrary to its laws, the public interest, or that would prejudice the commercial interests of enterprises. Article 5 provides definitions for various terms, such as counterfeit trademark goods, pirated copyright goods, and right holder.

Chapter 2 of ACTA establishes the legal framework for enforcing intellectual property rights. Section 2 of Chapter 2 obligates member states to make available civil judicial procedures for enforcing intellectual property rights.⁷⁰ Judicial authorities must have the authority to issue injunctions against an infringing party or third-party infringers.⁷¹ Member states must ensure that judicial authorities have the authority to award damages,⁷² and in the cases of “infringement of copyright or related rights protecting works, phonograms, and performances, and in cases of trademark counterfeiting,” there must be a system of statutory damages or an alternative system.⁷³ Article 10 addresses providing remedies, which include ordering the destruction of the infringing goods and the materials that were used to facilitate the infringement at the right holder’s request. Article 11 provides for the disclosure of information related to the infringement. Article 12 discusses provisional measures.

Section 3 of Chapter 2 sets forth the rules governing border measures (which do not apply to patents and trademarks).⁷⁴ Border measures apply not only to imports, but also to exports and in-transit goods.⁷⁵ Customs authorities must be given the authority to act on their own initiative, and right holders must be allowed to request competent authorities to “suspend the release of suspected goods.”⁷⁶ As described by David Quinn, member states can allow their customs authorities: “(1) to search an individual’s personal electronic device; (2) confiscate the device upon suspicion of infringing goods; (3) perform an internal investigation; (4) determine that the device in fact contains infringing goods; (5) and charge the individual with civil liability.”⁷⁷ Competent authorities also must be given the authority to destroy infringing goods or dispose of them outside the channels of commerce.⁷⁸ In addition, member states may authorize competent authorities to provide a right holder with information about shipments of goods.⁷⁹

Criminal enforcement is tackled in Section 4 of Chapter 2. This section does not exclude patents and trademarks. Article 23 calls for member states to provide for criminal procedures and penalties in willful

“trademark counterfeiting or copyright or related rights piracy on a commercial scale.” Commercial scale is defined to include acts “carried out as commercial activities for direct or indirect economic or commercial advantage.”⁸⁰ Criminal procedures and penalties also must be available in cases of label and packaging offenses and unlawful copying of movies in cinemas.⁸¹ Aiding and abetting must be subject to criminal liabilities.⁸² Offenses must be punishable with imprisonment and monetary fines.⁸³ Article 25 dictates that competent authorities must have seizure, forfeiture, and destruction powers and describes how those powers should be applied. Article 26 enables *ex officio* criminal enforcement.

Section 5 of Chapter 2 addresses the heated topic of enforcing intellectual rights in the digital environment. Article 27 extends civil and criminal enforcement to infringing acts that are carried out in the digital environment (the Internet). Enforcement procedures apply to “unlawful use of means of widespread distribution for infringing purposes”⁸⁴ that could “target both commercial and non-commercial peer-to-peer file-sharing.”⁸⁵ Such procedures must be implemented so that they do not violate freedom of expression, fair process, and privacy principles.⁸⁶ For example, the liability of Internet service providers (ISPs) can be limited.⁸⁷ However, ISPs can be ordered to disclose the identity of an infringing user to the rights holder if an infringement claim has been filed.⁸⁸ In addition, Article 27 calls on member states to “provide adequate legal protection and effective legal remedies against the circumvention” of technological measures used to protect right holders’ works. Furthermore, ACTA sets forth provisions protecting electronic rights management information.⁸⁹ These provisions are similar to the DMCA.⁹⁰

Chapter 3 addresses best enforcement practices and Chapter 4 discusses international cooperation. Chapter 5 establishes the “ACTA Committee,” a separate body from the WIPO and WTO.⁹¹ Among other things, it has the authority to review the implementation of the agreement, proposed amendments to the agreement, and the terms for becoming a party to the agreement.⁹² Chapter 6 contains final provisions pertaining to matters such as signing the agreement, withdrawing from the agreement, and ascension.⁹³

ACTA builds upon the minimal standards set by the TRIPS agreement, heightening the standards for civil enforcement, border measures, and criminal

enforcement, as well as adding requirements that do not exist in other treaties.⁹⁴

At the very start of the agreement, when defining “counterfeit trademark goods” and “pirated copyright goods,” ACTA expands on the definition given in TRIPS, defining goods as infringing, according to the law of the country where procedures “are invoked”⁹⁵ as opposed to the “country of importation.”⁹⁶ This grants customs authorities the ability to seize goods that merely are passing through their countries (as opposed to entering).⁹⁷ In addition, “intellectual property” is defined broadly thereby protecting a greater scope of intellectual property rights throughout ACTA than did TRIPS.⁹⁸ Moreover, the definition of “person” includes legal persons that will “heighten liability for companies challenged as direct infringers, such as search engines or peer-to-peer services.”⁹⁹

In the area of civil enforcement, ACTA stipulates that judicial authorities must be given the authority to order the destruction of infringing goods, whereas such a stipulation does not exist in TRIPS.¹⁰⁰ While TRIPS required that the seriousness of the infringement be taken into account when awarding remedies, ACTA contains no such provision.¹⁰¹ In contrast to TRIPS, provisional measures and injunctions are extended to apply to third parties, such that they can be ordered against ISPs.¹⁰² Perhaps one of the most significant ACTA additions to the TRIPS standards is in regard to damages. Article 9.1 mandates that when “determining the amount of damages for infringement of intellectual property rights . . . judicial authorities shall have the authority to consider . . . any legitimate measure of value the right holder submits . . .” This gives right holders a generous alternative to TRIPS,¹⁰³ where judicial authorities were given the authority to order damages “adequate to compensate for the injury the right holder has suffered because of an infringement.”¹⁰⁴ In addition, ACTA requires that statutory damages be available for copyright or related rights infringement and trademark counterfeiting, an obligation that goes beyond TRIPS’ requirements.¹⁰⁵

ACTA’s section on border measures is not without additions to TRIPS’ standards. Border measures are applied to every intellectual property right besides patents and trademarks.¹⁰⁶ The exclusion of *di minimis* imports from border measures are notably reduced from “small quantities of goods of a non-commercial nature contained in travelers’ personal

luggage or sent in small consignments”¹⁰⁷ to only “small quantities of goods of a non-commercial nature contained in travelers’ personal luggage.”¹⁰⁸ Customs officials also may seize in-transit goods that are not entering the country, but are only passing through.¹⁰⁹ This addition to TRIPS “gives rise to the seizure of goods that do not infringe in either the originating or importing country thereby (1) maximizing IP internationally to the standard of the IP maximalist countries through which goods are shipped, and (2) challenging the sovereignty of the shipping countries, whose citizens risk confiscation of their goods by third-party countries.”¹¹⁰ Furthermore, ACTA applies border measures to exports as well as imports, where TRIPS only applies to imports.¹¹¹

Margot Kaminski points out that the border measures of ACTA alter the previous balance struck between the interests of right holders and importers, in favor of right holders.¹¹² For instance, while TRIPS required a higher burden of proof in order to seize goods, ACTA permits customs authorities to seize goods (*ex officio*) if they are “suspect.”¹¹³ Right holders also can request that customs authorities provide them with information about shipments of goods, even if those shipments are not suspect.¹¹⁴ Moreover, the process for requesting that goods be seized is also easier in ACTA and applies to a greater variety of intellectual property rights than the application process in TRIPS.¹¹⁵ In comparison to TRIPS, ACTA also reduces the penalties applied to applicants who abuse the application process and the liability of customs officials.¹¹⁶ With regard to the avenues of recourse for importers, ACTA also limits the paths opened in TRIPS.¹¹⁷

Criminal enforcement is significantly strengthened in the ACTA agreement. The scope of enforcement is broadened to include piracy of copyright-related rights, whereas TRIPS applied only to trademark counterfeiting and copyright piracy.¹¹⁸ While TRIPS did not define “commercial scale,” ACTA defines it as acts “carried out as commercial activities for direct or indirect economic or commercial advantage.”¹¹⁹ According to Kaminski, “indirect economic or commercial advantages” also may apply to online infringement, thereby including “such benefits as advertising revenue or the prevention of expenditures.”¹²⁰

ACTA criminalizes infringement activities that were not even discussed in TRIPS.¹²¹ Labeling and

packaging (trademark) offenses, recording movies in theaters, and aiding and abetting are all criminalized. Kaminski notes that the extension of criminal liability to legal persons who aid and abet also may include “companies such as Google or Facebook, for infringement by their members.”¹²²

TRIPS mandated that crimes be punishable with imprisonment or fines, and ACTA mandates that crimes be punishable with imprisonment *and* fines.¹²³ ACTA also broadens provisions regarding seizure, forfeiture, and destruction “of defendants’ assets.”¹²⁴ Finally, ACTA permits *ex officio* enforcement.¹²⁵

In the area of digital enforcement, ACTA breaks new ground that TRIPS did not even touch. Here, the WIPO Copyright Treaty¹²⁶ bears relevance, as ACTA adds onto the obligations contained in that treaty.¹²⁷ ACTA imposes liability for infringement through digital networks, which may include downloading and uploading on peer-to-peer networks.¹²⁸ In addition, ACTA establishes new international standards for acts of circumvention.¹²⁹ Legal protection and remedies must be applied when “effective technological measures” are circumvented.¹³⁰ According to Kaminski, effective technological measures can be “substandard or poorly designed digital rights management,” which expands the scope of protection.¹³¹ Moreover, marketing circumvention devices is prohibited, as are manufacturing products that are primarily designed to circumvent.¹³² Kaminski argues that these provisions set a new international standard that stifles innovation “as new products or programs that have not yet found a market will be prohibited under this language so long as it can be shown that they circumvent technological measures.”¹³³ With regard to digital management rights, ACTA prohibits “making available” to the public copies of works whose digital management information has been removed.¹³⁴ Kaminski notes that this adds to the WIPO Copyright Treaty because “making available” applies to peer-to-peer networks.¹³⁵

Finally, ACTA differs from TRIPS by focusing on international cooperation through information sharing and assisting other member states in ratcheting up their enforcement capabilities.¹³⁶ ACTA also establishes a new international forum for intellectual property enforcement, called the ACTA Committee.¹³⁷

In sum, from its initial beginnings, ACTA has undergone many changes that have silenced the loud

outcries against it. Despite these adjustments, ACTA remained controversial, especially because of the fact that it was viewed as a product of country-club politics. It also has been highly critiqued as taking an extremist approach to enforcement of intellectual property rights and compromising users’ rights and freedoms. Therefore, it is not surprising that the European Union as well as other countries refused to join the agreement and as a result, it has not yet come into force. In light of these challenges it is not at all surprising that the TPP has been initiated.

AN OVERVIEW OF THE TPP AGREEMENT

The TPP agreement offers a variety of changes and enforcement schemes in every field of intellectual property law.

TRADEMARK LAW

In Article QQ.C.1, the majority of the countries propose that a country may require, as a condition for registration of a trademark, that the sign be perceivable and that it have an accurate description or graphical representation.

GEOGRAPHICAL INDICATIONS

In Article QQ.D.2, it suggests that the countries will not burden parties who submit applications or petitions for Geographical Indications with too many formalities.

PATENT LAW

In the field of patent law it is apparent that the United States desires expansion of the protections of patent law as well as a reduction in the methods of terminating patent protection. According to the United States’ proposal in Article QQ.E.1, patent protection also should apply to inventions related to plants and animals. The United States also proposes allowing patent protection on surgical procedures not only for humans but for animals as well.

Another proposal that seems to expand the protection of patent law in Article QQ.E.1 is that an invention that does not increase efficiency of a known product will not definitely be denied the protection of a patent.

In a footnote in Article QQ.C.2 the United States also proposes provisions that will help pharmaceutical companies by allowing them to receive separate patent protection for each form of a drug as well as to extend the patent life of a drug and prevent generic competition. This could impact the price of drugs on a worldwide scale.

Another proposal by the United States mentioned in Article QQ.E.16 is “data exclusivity,” which prevents third parties, such as regulators, from using previously established data to register drugs, most significantly generic medicine, unless the party who established the previous data consents. The country’s authorities not only can refuse to give a third party safety or efficacy information previously submitted in support of the marketing approval for at least five years, they also may refuse to hand a third party evidence of the existence of the marketing approval for at least five years.

Article QQ.E.17 takes a further step and requires the countries to provide a system in which if someone applies for a patent that is similar or identical to an existing patent, the current patent holder will be notified and informed of the identity of the applicant.

According to Article QQ.E.XX, each country should, at the request of the patent-owner, adjust the term of the patent in order to compensate for unreasonable delays that occur during the application process. A delay is considered unreasonable if the patent is either issued four years from the date of filing the patent application or two years after the request for examination of the patent application.

COPYRIGHTS AND RELATED RIGHTS

In Article QQ.G.6, the United States proposes extending the duration of copyright protection from the existing standard of 70 years after the author’s death to 100 years after the author’s death. Moreover, in the same Article, the United States suggested that the duration of copyright protection for any other copyright holder, other than single author (such as in a cooperative endeavor) should be 95 years.

Furthermore, the United States suggested that the duration of copyright protection for unpublished works should be for 120 years.

In Article QQ.G.X, the United States also suggested loosening the formalities for copyright protection so that an author will not lose or gain rights according to formalities such as the use of “All rights reserved.”

The severe attitude towards copyright infringement is at a maximum in the case of temporary copies (Article QQ.G.1), such that even temporary reproductions of copyrighted works that are not authorized by the copyright holder will be treated as copyright infringement. This is a heavy burden on Internet users because anything viewed or downloaded from the Internet can be considered a temporary reproduction.

According to Article QQ.G.10, any person who knowingly circumvents the copyright protection, even not for profit (except for libraries, archives, and educational institutions) should be subject to criminal procedures and penalties.

Article QQ.G.13 stresses that anyone who knowingly removes or alters any electronic rights management information (such as Digital Rights Management or Trusted Platform Module), even without the intention to circumvent copyright protection, would be subject to criminal procedures and penalties.

ENFORCEMENT

The strict stance of the United States can be seen in Article QQ.H.7, where it proposes applying criminal procedures to parties accused of trademark piracy, counterfeiting, or copyright infringement, even if the piracy is not considered a malicious act or for financial gain.

In Article QQ.H.4, the United States suggests that each party should provide civil judicial proceedings and that, in cases of patent infringement, civil courts should have the ability to award compensatory damages for the injury suffered by the right holder. Article QQ.H.4 suggests that when evaluating the losses of the right holders, judicial authorities can consider, among other things: loss of profits and the profits that the infringer gained from the infringement according to the market/retail price. Additionally, the judicial authorities will have the

authority to grant injunctions preventing the goods linked with intellectual property infringement from reaching trade routes. The Article also suggests that if the infringer abused enforcement procedures, judicial authorities should have the ability to award compensation to the right holder for the injury suffered as a result of the abuse.

In Article QQ.H.4.X, the United States proposes that the judicial proceeding could award pre-established damages to the right holder to compensate for the harm done by the infringement. The additional damages should be awarded according to any other matter the courts find relevant, including the extent of the infringement and the need to prevent future infringements.

The United States proposes that the judicial authorities have the authority to award damages for patent infringement at up to three times the amount of the injury suffered (Article QQ.H.4.Y). Also suggested is that any civil judicial proceedings regarding copyright or trademark counterfeiting could lead to the seizure of suspected infringing products. Moreover, the judicial authorities have the authority, at the request of the rights holder, to destroy the confiscated goods, without any compensation to the infringing party (except in exceptional circumstances). In relation to trademark counterfeit, the removal of the trademark is not enough to permit the release of the goods (except in exceptional circumstances).

Nevertheless, the United States does not allow for compensation for parties hurt by enforcement abuse (Article QQ.H.4.4).

In Article QQ.H.12, the United States proposes that the countries should not permit the retransmission of any television content on the Internet without the permission of the rights holders of the content.

INTERNET SERVICE PROVIDERS

The United States' desire to impose heavy intermediary liability on ISPs can be seen in Article QQ.I.1.

If an ISP subscriber uses the provider network for copyright infringement, the provider will be held liable and will need to compensate the copyright holder.

According to the Annex to Article QQ.I.1.3(b) (ix), in order for the ISP not to be held liable for the subscriber infringement acts, the ISP can provide the

copyright holder with the suspected copyright infringer's ISP subscriber information, including address and phone number. For that reason, ISP companies need to provide a written statement (it can be electronic) in which the subscriber provides personal details and agrees that in case of suspicion of copyright infringement, the ISPs will be able to act on behalf of the copyright holder and will be responsible to send notice about the claimed infringement and remove it from its networks.

However, other countries oppose such a strict liability on the ISPs and want to develop a suitable liability structure in order to best fit the laws in the specific country.

CRITICISM OF THE AGREEMENT

There are many problems with the proposed framework of the TPP. The discussion that follows offers some preliminary critiques of the agreement.

GENERAL PROVISIONS AND DISPUTE RESOLUTION

Generally, existing agreements (such as the WTO's TRIPS agreement) provide a good balance between the copyright holders and users. The TRIPS agreement has general and specific restrictions that provide a variety of safeguards and protections both for users and for the public interest. The United States' proposal in the new TPP agreement is to introduce new restrictions without the defenses (or with weaker versions of them).

The provisions regarding dispute settlement allow for both the governments and private investors to demand and carry out financial compensation in cases for which the arbitrator decides that the implementation of the agreement is not favorable enough to the right holders. This gives the right holders three exercisable options (one from the WTO and two from the TPP), while consumers hold no such options.¹³⁸

COPYRIGHT TERMS

The United States proposes that for an individual rights holder, the period of protection be

extended past 70 years after the death of the creator (or 100 years after under Mexico's proposal). This proposal bypasses US law, which prescribes 70 years as a maximum, while the TPP document sets a minimum requirement of 70 years. If the right holder is a corporation, the term extends to 95 years from the first publication and cooperative works that are not published within 25 years of their creation are protected for a term of 120 years from the date of creation. This proposal has no empirical reasoning and serves only to increase the profits of the big companies rather than the royalties of the creator. Additionally, it harms consumers by keeping works outside the public domain for longer.

There are many problems with this proposal:¹³⁹

1. It would force everyone living in a TPP signatory country to pay a heavy price in continued royalties (e.g., one scholar estimated that the copyright extension has resulted in Australians sending an extra \$88 million per year in royalties overseas¹⁴⁰). This is particularly problematic because it exploits international law in order to escalate the scope of copyrights.
2. This agreement extends the validity of rights far beyond that required by international standards set forth in WIPO, ATRA, and TRIPS.
3. The accepted justification for copyright law is to incentivize people to produce materials for the general public. Lawyers and economists have found that the optimal copyright period is shorter.¹⁴¹ Long copyright terms generally are intended to compensate creators, who, for the most part, receive relatively low royalties for their work. The law gives the right holders exclusive rights to royalties received from their works but in most cases, the use of the rights is a way to prevent the public from obtaining valuable information. There is no need for long copyright terms to encourage creation (especially when it is beyond the life of the creator) and the public domain is a necessary source from which authors can learn and create; it fuels our shared culture and recognizes that everything is built on the past.¹⁴²
4. Extension of this period also exacerbates the problem of "orphan works" (works where the right holder cannot be identified or located, which people are afraid to use, causing millions

of works to disappear from the cultural commons until their copyright terms expire). Sweepingly extending the terms of copyrights will seriously affect the ability to use these works.

DAMAGES—(QQ.H.4: 2TER)

The section on damages is much harsher than the equivalent paragraph in the ACTA agreement. Aside from the overreach involved in requiring consideration of "the suggested retail price," the United States' proposal ignores national laws regarding copyright, patents, and trademarks, as well as TRIPS rules regarding layout-designs (topographies) of integrated circuits, and restricts the damages in cases of infringements (this also harms the ability of the United States to limit the requirement of damage in cases of the "orphan works" mentioned above).¹⁴³ Additionally, according to the proposal, foreign countries and private investors can bring legal action against companies in TPP signatory countries unless the countries adopt practices that limit the rights of consumers.¹⁴⁴ Enforcing the laws detailed in the document could override the authority of the signatory countries. It proposes the establishment of a general court to deal with the claims—a court which would have no human rights protections, enabling it to use "confidential evidence" with monitoring and enforcement provisions taken from the rescinded SOPA and ACTA agreements.¹⁴⁵

FAIR USE

The three-step test gives governments the ability to define any exceptions to the exclusive rights that are not specifically defined in the Berne Convention according to the more flexible definitions accepted in the TRIPS agreement. The TPP agreement accepted some, but not all, of the specific definitions from the Berne Convention, but with much less flexibility than the TRIPS. This gives governments the ability to limit the use of the specific definitions in Berne (such as education, quotes, public affairs, news, etc.). The TPP agreement creates a well-bounded domain in which the rights of fair use and trade can be given to the citizens. The flexibility in copyright issues is essential for innovation and freedom of expression and limiting it in this form is problematic.

ANTICIRCUMVENTION—(QQ.G.10)

There is a disagreement in the document concerning the wording of the clause prohibiting the circumvention of Digital Rights Management (DRM),¹⁴⁶ but it includes criminal responsibility for violations of these clauses, unless it is done by a nonprofit organization. A similar law in the United States (the DMCA) limits freedom of expression and competition and restricted legitimate expression by entrepreneurs, researchers, filmmakers, etc. Moreover, the broad language in the document also may include those who bypass technological restrictions, even when the restricted work is not under copyright and even when it is done for legal reasons.

TEMPORARY COPIES—(QQ.G.Z)

In the current version of the document, the provision regarding temporary copies of copyrighted material considers them a violation, reflecting a lack of understanding of the basic way the Internet works. Because it's technically necessary to download a temporary version of everything we see on our devices, under the United States' proposed language, anyone who ever views content on his or her device could potentially be found liable for infringement. This would be disastrous for users within TPP countries but would also effect technological innovation aimed at providing users with new ways of exploring and accessing content. A definitive international standard on temporary copies would not only create a new, more intricate layer of copyrights, it would impact the cost of accessing licensed content and raise concerns about how the provision could affect privacy. Without further clarification, the TPP proposal could require licenses for every single copyrighted file that passes through a device. It is impossible to monitor this using existing software and hardware and developing the technology to monitor all transient copies of files would have profound negative effects on user privacy.¹⁴⁷

PATENTS

While the United States pushes to expand the patent legislation and limit the ways in which a

patent may be revoked, many other countries oppose it (e.g., as mentioned above, the United States proposes that patents be made available for inventions that are "plants and animals" and almost all the other countries are opposed). In addition, the United States is trying to lower the bar for patentability, for example, by allowing patents on small changes for existing drugs, thereby diminishing the flexibility granted in the TRIPS agreement, which allows each country to progress with patent law at its own pace, in an attempt to prevent "evergreening" (drug companies making small changes to their drug and thus 'blocking' the patent's expiration for another 20 years).¹⁴⁸

ACCESS TO MEDICINES

The TPP agreement includes proposals for many measures that would limit competition and raise prices in the pharmaceutical industry. These include provisions that would lower the global standard for obtaining patents, make it easier to file patents in developing countries, extend the term of the patent beyond 20 years, and create data exclusivity on test data to approve safe and effective drugs. This likely will create a monopoly of big companies and narrow the competition and the possibilities for development and introduction of new drugs to the market.¹⁴⁹ In addition, there is an attempt to reduce the application of the WTO TRIPS agreement and the obligation to provide access to medicine for all.¹⁵⁰

PATENTS ON SURGICAL METHODS

The WTO agreement allows various countries to exclude methods of "diagnostic, therapeutic, and surgical methods for the treatment of humans or animals." The United States' proposal narrows the exception in cases involving "the use of a patented machine, manufacture, or composition of matter in violation of such patent." This means that according to the United States' proposition, the exception would only apply to "surgical methods you can perform with your bare hands." This is being criticized because the 'consultants' of the agreement actually are lobbyists for medical device manufacturers, which is the reason that the United States is pushing in this direction.¹⁵¹

INTERMEDIARY LIABILITY

The proposal by the United States and Australia puts the primary responsibility for removing copyrighted content from the Internet on the shoulders of the ISPs. The document offers a variety of methods for removing content: disconnection of users (termination of Internet accounts), blocking and disabling content, and some level of obligatory monitoring. This proposal seeks to include search engines and linking sites and the ISPs would only be exempt from liability if they comply with these requirements. Additionally, the exemption would be conditioned on the ISP “adopting and reasonably implementing a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers.” The proposal extends the law to include caching (there is controversy over whether Internet providers are required to apply a general notice to the infringers (Canada), or required to block content and cancel subscriptions (the United States)).¹⁵² In this manner, the TPP actually meets the demands of various organizations in Hollywood (e.g., the Motion Picture Association of America).¹⁵³ The United States’ proposal also bypasses privacy laws by stating that ISPs must provide information about their customers when they are ordered to do so.¹⁵⁴

In summary, it is unclear whether the TPP will be adopted eventually given many of its shortcomings. As ACTA it also has been negotiated in complete secrecy, preventing public involvement in discussing its provisions and their impact on innovation and creativity. Therefore, it is likely that the TPP will not be adopted unless it addresses the concerns regarding its broad and overreaching scope.

NOTES

1. TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter: TRIPS Agreement].
2. Article 13(3) and 15 address enforcement in the Berne Convention. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Paris July 24, 1971, 828 U.N.T.S. 221. Articles 9-10 address enforcement in the Paris Convention. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, revised at Stockholm July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305.
3. Article 41.1 of the TRIPS Agreement.
4. *Id.*
5. *Id.* But see Panel Report, China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights, § 7.578, WT/DS362/R (Jan. 26, 2009) available at http://www.wto.org/english/tratop_e/dispu_e/362r_e.pdf. (describing the term “deterrent” in Article 61 as a flexible, imprecise concept whose interpretation depends on circumstances).
6. Article 41.2 of the TRIPS Agreement.
7. Article 41.3 of the TRIPS Agreement.
8. Article 41.4 of the TRIPS Agreement.
9. Article 42 of the TRIPS Agreement.
10. *Id.*
11. Article 43.2 of the TRIPS Agreement.
12. Article 45.1 and 45.2 of the TRIPS Agreement.
13. Article 47 of the TRIPS Agreement.
14. Article 48.1 of the TRIPS Agreement.
15. Article 50.1 of the TRIPS Agreement.
16. Article 50.4 of the TRIPS Agreement.
17. *Id.*
18. Article 50.7 of the TRIPS Agreement.
19. Article 50.8 of the TRIPS Agreement.
20. Article 52 of the TRIPS Agreement.
21. Article 56 of the TRIPS Agreement.
22. Article 57 of the TRIPS Agreement.
23. Article 59 of the TRIPS Agreement.
24. *Id.*
25. Article 60 of the TRIPS Agreement.
26. See Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* 134 (3rd ed. 2008) (interpreting “similar gravity” as corresponding to “serious crimes against property”).
27. *Id.* (noting that the materials used to help commit the offense include manufacturing and production equipment).
28. Paper, International Intellectual Property Alliance, “Copyright Enforcement Under the TRIPS Agreement,” (October 2004) at 4, available at http://www.iipa.com/rbil/2004_Oct19_TRIPS.pdf.
29. *Id.*
30. *Id.*
31. J. H. Reichman and David Lange, “Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions,” 9 *Duke J. Comp. & Int’l L.* 11, 34-40 (1998) (discussing the weaknesses in the enforcement provisions).
32. *Id.* at 35; see also Donald P. Harris, “The Honeymoon Is Over: The U.S.-China WTO Intellectual Property Complaint,” 32 *Fordham Int’l L. J.* 96, 116 (2008) (noting that member states are given “considerable latitude in fashioning laws to meet their enforcement obligations” because the enforcement provisions contain “vague phrases such as “effective,” “reasonable,” “undue,” “unwarranted,” “fair and equitable,” and “not...unnecessarily complicated or costly.”)
33. Reichman, *supra* n.31, at 35-36.
34. Christine Thelen, “Carrots and Sticks: Evaluating the Tools for Securing Successful TRIPs Implementation,” 24 *Temp. J. Sci. Tech. & Envtl. L.* 519, 525-526 (2005); see also Ramma John Ruppenthal, “TRIPS through the Far East: High Tech Product Piracy and the Need for Alternative Regional Solutions,” 20 *Wis. Int’l J.* 143, 169-170 (2001) (explaining how TRIPS enforcement measures are intended for nations and not regions, and thus do not properly address piracy in East Asia, where piracy takes place on a regional level).

35. Tuan N. Samahon, "TRIPS Copyright Dispute Settlement after the Transition and Moratorium: Nonviolation and Situation Complaints Against Developing Countries," 31 *Law & Pol'y Int'l Bus.* 1051, 1052 (2000) (asking "[w]hat happens after January 1, 2000, when developing country WTO members have appropriate intellectual property measures and enforcement provisions on their books, but limited or no actual enforcement occurs? May a developing country reply to a TRIPS violation claim that its statutory enactments fulfill WTO obligations and that actual enforcement of its laws is uniquely a matter of prosecutorial or judicial discretion?").
36. Kimberlee Weatherall, "Politics, Compromise, Text and the Failures of the Anti-Counterfeiting Trade Agreement," 33 *Sydney L. Rev.* 229, 237 (2011).
37. Panel Report, "China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights," WT/DS362/R (Jan. 26, 2009) available at http://www.wto.org/english/tratop_e/dispu_e/362r_e.pdf.
38. Peter Yu, "Six Secret (and now Open) Fears of ACTA," 64 *SMU L. Rev.* 975, 992 (2011) (citing Remarks of Howard P. Knopf, Macera & Jarzyna, LLP, at the 18th Fordham Annual International Intellectual Property and Policy Conference, Fordham University School of Law, in New York (Apr. 9, 2010)) available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=1624813.
39. Joost Pauwelyn, "The Dog That Barked But Didn't Bite: 15 Years of Intellectual Property Disputes at the WTO," 33, 35 (Nov. 2010) available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=1708026.
40. Yu, *supra* n.38 at 41.
41. Weatherall, *supra* n.36 at 237. Yu, *supra* n.38 at 45.
42. Jan Bohanes and Adrian Emch, "WTO Panel Report on China-IPR: A Mixed Result," *China L. & Prac.*, March 2009 at 102 (s. 7.501). available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=1516907.
43. *Id.* at 119 (s. 7.602); Bohanes, *supra* n.42 at 2.
44. *Id.* at 2 (stating that "companies may wish to play a more active role in assisting WTO challenges brought by their governments. Their support of cases may be crucial. Companies in China should keep records of IPR infringements and other possible WTO violations, and provide input to industry associations, chambers of commerce and governments where appropriate. Helpdesks and contact points for industry input may become valuable assets.").
45. Jung Yun Yang, "Bringing the Question of Chinese IPR Enforcement to the WTO Under TRIPS: An Effective Strategy or a Meaningless and Overused Tactic by the U.S.?" 10 *Pitt. J. Tech. L. & Pol'y* 1, 14-15 (2010). (observing that "The problem at issue does not seem to arise from China's reluctance to amend and enact domestic laws, giving higher IPRs, but rather from China's failure to enforce such laws.").
46. *Id.* at 21. The author also criticizes the WTO for its lack of adequate remedies. *Id.* at 19-20.
47. Yu, *supra* n.38 at 42.
48. *Id.* at 45; Panel Report at 53 (s. 7.247 page 53).
49. *Id.* at 46.
50. *Id.*
51. *Id.* at 47.
52. Office of the U.S. Trade Rep., Anti-Counterfeiting Trade Agreement (2010), available at http://www.ustr.gov/webfm_send/2417.
53. Office of the U.S. Trade Rep., Anti-Counterfeiting Trade Agreement (ACTA); USTR.gov <http://www.ustr.gov/acta>.
54. Yu, *supra* n.38.
55. Preamble of the ACTA "Desiring to promote cooperation between service providers and right holders to address relevant infringements in the digital environment."
56. Emily Ayoob, "The Anti-Counterfeiting Trade Agreement," 28 *Cardozo Arts & Ent Lj* 175, 182-83 (2010).
57. Weatherall, *supra* n.36; see also Margot E. Kaminski, "An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement (ACTA)," 21 *Alb. L. J. Sci. & Tech.* 385, 388 (2011).
58. Weatherall, *supra* n.36. See also Kaminski, *supra* n.57 at 388-389 (describing how countries with maximalist IP goals switched from the WIPO forum to the WTO forum, and then from the WTO forum to the ACTA forum in order to establish stronger protection and enforcement standards).
59. Yu, *supra* n.38 at 5; Kaminski, *supra* n.57 at 389.
60. Yu, *supra* n.38 at 6-7 (citing Declaration of Stanford McCoy 4-5, *EFF v. Office of the U.S. Trade Rep.*, No. 08-1599 (RMC), (D.D.C. filed 2009), available at http://www.eff.org/files/filemode/EFF_PK_v_USTR/McCoy.pdf).
61. Office of the U.S. Trade Rep., Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes, (October 23, 2007) available at http://ustraderep.gov/Document_Library/Press_Releases/2007/October/Ambassador_Schwab_Announces_US_Will_Seek_New_Trade_Agreement_to_Fight_Fakes.html. Australia, Singapore, and Morocco eventually joined the negotiations, with the noteworthy absence of China and India; countries with excessive piracy and counterfeiting rates. See David M. Quinn, "A Critical Look at the Anti-Counterfeiting Trade Agreement," 17 *Rich. J. L. & Tech.* 16 at paras. 3-4 (2011).
62. Ambassador Schwab, *supra* n.61.
63. Kaminski, *supra* n.57, at 389.
64. Office of the U.S. Trade Rep., *supra* n.52.
65. Yu, *supra* n.38 at 30; Quinn, *supra* n.61 at para. 13.
66. ACTA, *supra* n.53.
67. Foreign Affairs and International Trade Canada, Anti-Counterfeiting Trade Agreement, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/intellect_property.aspx?view=d.
68. Article 2.1 of the ACTA.
69. Article 3.2 of the ACTA.
70. Article 7.1 of the ACTA.
71. Article 8 of the ACTA.
72. Article 9 of the ACTA.
73. Article 9.3 of the ACTA.
74. Footnote 6 of the ACTA.
75. Article 16.1 and 16.2 of the ACTA.
76. Article 16 of the ACTA.
77. Quinn, *supra* n.61 at para. 13.
78. Article 20.1 of the ACTA.
79. Article 22 of the ACTA.
80. Article 23.1 of the ACTA.
81. Article 23.2 and 23.3 of the ACTA.
82. Article 23.4 of the ACTA.
83. Article 24 of the ACTA.
84. Article 27.2 of the ACTA.
85. Quinn, *supra* n.61 at para. 15.
86. Article 27.2 of the ACTA.
87. Footnote 13 of the ACTA.
88. Article 27.4 of the ACTA.
89. Article 27.7 of the ACTA.

90. Quinn, *supra* n.61 at para. 15.
91. Article 36 of the ACTA.
92. Article 36.2 of the ACTA.
93. Article 39, 41, and 43 of the ACTA.
94. Kaminski, *supra* n.57 at 390-391 (discussing how the ACTA built upon the TRIPS agreement outside of the WTO).
95. Article 5(d) of the ACTA.
96. Article 51 of the TRIPS agreement.
97. Kaminski, *supra* n.57 at 395-396.
98. *Id.* at 396-397.
99. *Id.* at 397.
100. *Id.* at 398; Article 10.1 of the ACTA.
101. *Id.* at 398; Article 46 of the TRIPS agreement.
102. *Id.* at 398-399; Article 12.1 and Article 8.1 of the ACTA.
103. This provides the right holder with an alternative to the "strict proof-of-loss method of calculating damages." See Legal Information, Swiss Federal Institute of Intellectual Property, Frequently Asked Questions on the Anti-Counterfeiting Trade Agreement (June 2011) available at <https://www.ige.ch/en/legal-info/legal-areas/counterfeiting-piracy/acta.html#c4032>.
104. Article 45 of the TRIPS agreement.
105. Kaminski, *supra* n.57 at 400; Article 9.3 of the ACTA.
106. Footnote 6 to the ACTA.
107. Article 60 of the TRIPS agreement.
108. Article 14.2 of the ACTA.
109. Article 16.2 of the ACTA.
110. Kaminski, *supra* n.57 at 403.
111. *Id.* at 404; Article 16.1 of the ACTA.
112. *Id.* at 401.
113. *Id.* at 405. Article 16 of the ACTA.
114. *Id.* at 404.
115. *Id.* at 404-405.
116. *Id.* at 405-406.
117. *Id.* at 406-407.
118. Article 23.1 of the ACTA; Article 61 of the TRIPS agreement.
119. Article 23.1 of the ACTA.
120. Kaminski, *supra* n.57 at 408.
121. *Id.*
122. *Id.* at 408-409; Article 23.5 of the ACTA.
123. Article 61 of the TRIPS agreement, Article 24 of the ACTA agreement.
124. Kaminski, *supra* n.57 at 409-410.
125. *Id.* at 410; Article 26 of the ACTA.
126. WIPO Copyright Treaty art. 10, Dec. 20, 1996, WTO, available at <http://www.wipo.int/treaties/en/ip/wct/>.
127. Kaminski, *supra* n.57 at 410.
128. *Id.* at 411; Article 27.2 of the ACTA.
129. *Id.* at 412-413.
130. Article 27.5 of the ACTA.
131. Kaminski, *supra* n.57 at 413.
132. Article 6 of the ACTA.
133. Kaminski, *supra* n.57 at 413.
134. Article 7 of the ACTA.
135. Kaminski, *supra* n.57 at 414.
136. Article 34 and 35 of ACTA.
137. Article 36 of the ACTA.
138. <http://keionline.org/node/1825>.
139. Carolind Rossini and Yana Welinder, "All Nations Lose with TPP's Expansion of Copyright Terms", (Aug. 8, 2012) <https://www.eff.org/deeplinks/2012/08/all-nations-lose-tpps-expansion-copyright-terms>.
140. "The net effect is that Australia could eventually pay 25 percent more per year in net royalty payments, not just to US copyright holders, but to all copyright holders, since this provision is not preferential. This could amount to up to \$88 million per year, or up to \$700 million in net present value terms. This is a pure transfer overseas, and hence pure cost to Australia." *Report: The Australia-US Free Trade Agreement—An Assessment* Dr Philippa Dee, APSEG, Australian National University p. 23 (box) and 33 (2004). http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=freetrade_cte/rel_links/index.htm.
141. Gowers Review of Intellectual Property, p. 50 (Dec. 2006) *citing* Growth and Intellectual Property, Boldrin M. & Levine D., 2005.
142. Dennis S. Karjala, "Opposing Copyright Extension," available at <http://www.public.asu.edu/~dkarjala/commentary/term-of-protection.html>.
143. <http://keionline.org/node/1825>.
144. <http://www.itnews.com.au/News/364136,tpp-leak-reveals-hardline-us-position-on-ip.aspx>.
145. Jeremy Gatdula, "Leaking TPP," Trade Tripper, available at <http://academic.lexisnexis.co.il.proxy1.athensams.net/>.
146. <https://www.eff.org/issues/drm>.
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150. <http://keionline.org/node/1825>.
151. *Id.*
152. <http://www.michaelgeist.ca/content/view/6996/125/>.
153. <http://www.ipintegrity.com/index.php/acta/ip-in-trade/920-the-trans-pacific-partnership-tpp-and-hollywoods-holy-grail>.
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