

THE TPP AND BEYOND: THE VITAL ROLE OF JUDICIAL DISCRETION IN THE ENFORCEMENT OF INTERNATIONAL COPYRIGHT RULES

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I. INTRODUCTION

The United States has an obvious interest in protecting copyrights. In 2014 alone, “core copyright industries” contributed over a

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trillion dollars to the U.S. GDP and produced nearly 5.4 million jobs in the U.S. alone.¹ However, even with the most rigorous copyright enforcement policies in the world, a myriad of studies claim that U.S. industries still lose hundreds of billions of dollars a year to piracy in its various forms.² These losses are often contributed to the lack of cohesive international enforcement policies and the availability of circumvention technology that allow for exploitation of legal loopholes in copyright laws.³ Historically, the U.S. has relied on highly leveraged free trade agreements (FTAs) that require other countries to beef up their enforcement of copyrights within their respective borders, but these enforcement efforts, for the most part, have been ineffective.⁴ For example, during the negotiation rounds of the Trade-Related aspects of Intellectual Property Rights Agreement (TRIPS), countries against a demanding enforcement regime struck key compromises that construed enforcement provisions as only granting official authority to enforce copyrights, without mandating exactly *how* and *what* to apply this authority against.⁵ These compromises disappointed enforcement-centric countries, and are now referred to as the “Achilles heel of TRIPS.”⁶

For those countries, like the U.S., who have been leading the efforts in global copyright enforcement policies, another major setback has been the ability of digital pirates and illegal downloaders to bypass both jurisdiction and law.⁷ But there have been some successes as

1. See STEPHEN E. SIWEK, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY 1, 9 (2016), <http://www.iipawebsite.com/pdf/2016CpyrtRptFull.pdf>.

2. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-423, OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFORTS OF COUNTERFEIT AND PIRATED GOODS 18 (2010), <http://www.gao.gov/assets/310/303057.pdf>.

3. See Peter K. Yu, *Enforcement, Enforcement, What Enforcement?*, 52 IDEA: THE INTEL. PROP. L. REV. 239, 241-49 (2012).

4. See *id.* at 243-49.

5. See *id.* at 242-43; see also J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, in INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 23, 71 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 2d ed. 2008); see also Rachel Brewster, *The Surprising Benefits to Developing Countries of Linking International Trade and Intellectual Property*, 12 CHI. J. INT'L L. 1, 31 (2011).

6. See Yu, *supra* note 3, at 243; see also J.H. Reichman & 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 (1996).

7. See MOISES NAIM, ILLICIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY 23-24 (2005); see also Bobbie Johnson, *Internet Pirates Find 'Bulletproof' Havens For Illegal File Sharing*, GUARDIAN (Jan. 4, 2010, 6:05 PM), <http://www.theguardian.com/technology/2010/jan/05/internet-piracy-bulletproof>; see also TIMOTHY P.

well. The 2012 indictment against Megaupload, and its founder Kim Dotcom, is often cited as the most ambitious piracy cases brought by the U.S.⁸ The government successfully argued that the court should extend jurisdiction to foreign defendants based on their use of U.S. servers, and classify commercial piracy as conspiracies.⁹ However, as previously illustrated, rigid rules cannot deter piracy in the age of flexible technology.¹⁰

The flexible means of online infringement and piracy, combined with the weak track record of international efforts continues to drive U.S. pressure on other countries to adopt or further strengthen their enforcement efforts.¹¹ In 2010, the U.S. began to push for the enforcement of copyrights through a new, and more demanding FTA known as the Trans-Pacific Partnership Agreement (TPP), urging the twelve participating countries to adopt a copyright enforcement model similar to that of the U.S.¹² In October of 2015, after five years of intense negotiations, all parties finally signed the TPP agreement, placing the ball in the courts of member-party legislative authorities for ratification.¹³

TRAINER & VICKI E. ALLUMS, PROTECTING INTELLECTUAL PROPERTY RIGHTS ACROSS BORDERS 453 (2009).

8. See generally Press Release, U.S. Dept. of Justice, Justice Department Charges Leaders of Megaupload with Widespread Online Copyright Infringement, (Sept. 14, 2014), <http://www.justice.gov/opa/pr/justice-department-charges-leaders-megaupload-widespread-online-copy-right-infringement>.

9. See generally *United States v. All Assets Listed in Attachment A*, 89 F. Supp. 3d 813 (E.D. Va. 2015) (holding the alleged acts were in furtherance of the conspiracy to commit copyright infringement within the court's judicial district when defendants "allegedly reproduced and stored infringing files on these servers and caused communications to be sent from servers in Virginia indicating that infringing files had been removed."), *aff'd sub nom.* *United States v. Batato*, 833 F.3d 413 (4th Cir. 2016).

10. See Bryan H. Choi, *The Grokster Dead End*, 19 HARV. J. L. & TECH. 393, 394-395 (2006).

11. See Yu, *supra* note 3, at 243; see also Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 989 (2011).

12. *TPP Full Text, Chapter 18, Intellectual Property*, OFFICE OF U.S. TRADE REPRESENTATIVE, <https://ustr.gov/tpp/overview-of-the-TPP> (last visited Mar. 2, 2017); *Trans-Pacific Partnership Agreement*, N.Z. MINISTRY OF FOREIGN AFF. & TRADE, <https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership> (last visited Mar. 2, 2017); see also Aditya Tejas, *New TPP Leaks Reveal US Pushing For Strong Copyright, IP Enforcement*, INT'L BUS. TIMES (Aug. 6, 2015 at 7:56 AM), <http://www.ibtimes.com/new-tpp-leaks-reveal-us-pushing-strong-copyright-ip-enforcement-2041486>; Michael Geist, *The Trouble with the TPP's Copyright Rules*, in *THE TRANS-PACIFIC PARTNERSHIP AND CANADA: A CITIZEN'S GUIDE* 159-68 (Scott Sinclair & Stuart Trew eds., 2016).

13. See *A Review of the Patent Related Provisions of the TPP*, NAT'L LAW REV. (Oct. 14, 2015), <http://www.natlawreview.com/article/review-patent-related-provisions-tpp-patentable-subject-matter-and-grace-periods#sthash.9XHpxkv1.dpuf>.

As this article went into publication, President Trump signed a memorandum to withdraw the U.S. from the TPP, thus officially bringing U.S. participation to an indefinite halt and leaving the remaining eleven member countries in uncertainty.¹⁴ However, even with the U.S. withdrawal, the TPP's implications on copyright enforcement are not entirely nullified. The TPP's heavily negotiated principles will likely, in one form or another, find its way into future international copyright agreements, as demonstrated by the transplantation of similar IP-related provisions in the past.¹⁵ Thus, although the TPP is defunct in its current form,¹⁶ it does not necessarily mean that its well-developed copyright provisions are gone for good.¹⁷

In its final form, the TPP's IP Chapter (Chapter 18) sets out an elaborate framework, outlining the minimum amount of protection that member countries must implement into their copyright enforce-

14. Memorandum Regarding Withdrawal of the U.S From the Trans-Pacific Partnership Negotiations and Agreement, 2017 DAILY COMP. PRES. DOC. 64 (Jan. 24, 2017).

15. See Jeremy Malcolm, *RCEP: The Other Closed-Door Agreement to Compromise Users' Rights*, ELECTRONIC FRONTIER FOUND. (Apr. 20, 2016), <https://www.eff.org/deeplinks/2016/04/ceep-other-closed-door-agreement-compromise-users-rights> (noting the mirroring civil damages provisions contained in the TPP and those contained in the draft Regional Comprehensive Economic Partnership (RCEP) agreement); see also Jeremy Malcolm, *The Battle Against TPP Isn't Over, But It Has Shifted*, ELECTRONIC FRONTIER FOUND. (Nov. 9, 2016) [hereinafter Malcolm, *The Battle Against TPP Isn't Over*], <https://www.eff.org/deeplinks/2016/11/battle-against-tpp-int-over-it-has-shifted>.

TPP countries are still in the process of passing their implementing legislation, which contains all of the worst measures in the TPP that we have been fighting against for the last six years—including the extension of the term of copyright, the strict rules against DRM circumvention, [and] the tough criminal penalties against those who infringe copyright

Id.; see also Ruth Lopert et al., *Inside Views: TPP May Be Dead – But Its Impact Lingers*, IP WATCH (June 12, 2016), <http://www.ip-watch.org/2016/12/06/tpp-may-dead-impact-lingers> (“Despite the [TPP] being—to all intents and purposes—dead in the water, pursuit of some of the most egregious objectives of the corporate interests driving the TPP agenda rolls on.”); see PEDRO ROFFE ET AL., KNOWLEDGE PARTNERSHIP PROGRAMME, FROM TRIPS TO PREFERENTIAL TRADE AGREEMENTS, INCLUDING THE TRANS-PACIFIC PARTNERSHIP AGREEMENT AND RELATED TRENDS IN THE EUROPEAN UNION: CHALLENGES FOR EMERGING COUNTRIES 19, 41-43, http://www.ipekpp.com/admin/upload_files/Report_3_54_From_2237283020.pdf (providing a report of the historical similarities and transformations of IP provisions, and examples of common preferential language contained in subsequent IP agreements); see also Susan Sell, *Trips was Never Enough*, 18 J. INTELL. PROP. L. 447 (2011); Peter K. Yu, *TPP and Trans-Pacific Perplexities*, 37 FORDHAM INT'L L.J. 1129 (2014).

16. See Malcolm, *The Battle Against TPP Isn't Over*, *supra* note 15; see also Lopert et al., *supra* note 15.

17. See Alan Yuhas, *Congress Will Abandon Trans-Pacific Partnership Deal, White House Concedes*, GUARDIAN (Nov. 12, 2016, 8:14 PM), <https://www.theguardian.com/business/2016/nov/12/tpp-trade-deal-congress-obama>; see also Steven Seidenberg, *US Perspectives: TPP's Copyright Term Benefits US, Burdens Others*, IP WATCH (Mar. 23, 2015), <http://www.ip-watch.org/2015/03/23/tpps-copyright-term-benefits-us-burdens-others/>.

ment.¹⁸ In other words, member countries approved the TPP's regulatory provisions, not as a ceiling for copyright enforcement, but as a floor in order to "promote the public interest in sectors of vital importance," as boldly advocated by the introductory "Principles" paragraph.¹⁹ The official release of the TPP text on November 5, 2015 confirmed the incorporation of most U.S.-pushed provisions, which by a closer look, reflect the core values of U.S. copyright law.²⁰ From the Digital Millennium Copyright Acts' takedown process, to the abundance of criminalization provisions, one can get the impression that the U.S. simply reworded the Copyright Act, gave it some steroids, and unleashed it on its TPP partners.²¹ However, by adopting harsher and more demanding enforcement standards, member countries are urged to promote the U.S. export of copyrighted works at the expense of subjecting their citizens to steep penalties and wide-scale criminalization.²² Although this harsher standard of enforcement may one day live up to its deterrent purpose, before it does, it will pose serious issues to social welfare, international court conformance, and, perhaps most importantly, creative expression.²³

Although the recent shift of FTAs, such as the TPP, compel member countries to adopt a far stricter minimum standard of copyright enforcement, signatory countries and their courts should utilize any FTA-granted discretionary rights to level the imbalance between interests of citizens and copyright industries.²⁴ This is not to suggest that member country courts should intentionally undermine already agreed upon trade agreements. Instead, I argue that they should use any *permitted* discretion to tailor a balanced approach; one that takes

18. *TPP Full Text*, *supra* note 12.

19. *Id.*

20. Notice of Intention to Enter Into the Trans-Pacific Partnership Agreement, 2017 DAILY COMP. PRES. DOC. 64 (Nov. 5, 2015); See Jeremy Malcolm, *The Final Leaked TPP Text Is All That We Feared*, ELECTRONIC FRONTIER FOUND. (Oct. 9, 2015), <https://www.eff.org/deeplinks/2015/10/final-leaked-tpp-text-all-we-feared>.

21. See K. William Watson, *A Strong Fair Use Provision Could Help Balance the TPP's Copyright Rules*, CATO INST. (Sept. 30, 2015), <http://www.cato.org/publications/commentary/strong-fair-use-provision-could-help-balance-tpps-copyright-rules>; see also sources cited *supra* note 12.

22. *Id.*; see also Michael Geist, *The TPP's Unbalanced Approach to Internet Providers Pits Rights Holders Against Users*, RABBLE.CA (Jan. 11, 2016), <http://rabble.ca/news/2016/01/tpps-unbalanced-approach-to-internet-providers-pits-rights-holders-against-users>.

23. Abraham Gross, *TPP Limits Creative Expression*, WASH. SQUARE NEWS (Nov. 30, 2015), <http://www.nynews.com/2015/11/30/tpp-limits-creative-expression/>.

24. *TPP Full Text*, *supra* note 12, art. 18.66; Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631 (member country courts and other judicial authorities often do not participate in the deal-making and negotiation process of FTAs, thereby limiting the role of courts in the enforcement of such obligations).

into account not only their country's obligations to FTAs, but also the difficult realities of ironclad enforcement measures. By utilizing their discretionary powers to (1) elevate the threshold for criminalization; (2) introduce "fair-use" protections; and (3) place certain limitations on civil damages, member countries to TPP-like FTAs and their courts will continue to meet required minimum enforcement standards, but also be able to alleviate the imbalance of interests created under it.

This article advances the presented arguments through a utilitarian approach, which as I argue, enhance the efficacy of prospective FTAs and international copyright measures. However, this not only requires that member-country courts utilize their allowable discretion, but also that they should do so *proactively* in order to strike a much needed balance between user and producer interests. Further, this article will analyze and illustrate by example of the TPP's heavily negotiated copyright enforcement controls and discretionary provisions, which I believe reflect the future of international copyright enforcement efforts.

Part II will first provide the issues created by criminal copyright liability, in general; Part III will break down the TPP's text, by way of example, to demonstrate the means by which member-party courts may utilize discretionary language to avoid the risk of wide-scale criminalization; and finally Part IV will illustrate why steep civil remedies provided by TPP-like agreements incentivize the growth of "copyright trolls" on an international scale and the means by which the international copyright troll can be averted.

II. CRIMINAL COPYRIGHT ENFORCEMENT

Copyright producers have a legitimate concern and right to protect their copyrights. However, the means by which privacy-driven losses are cured should not rest solely on aggressive enforcement policies against the consuming public.²⁵ Recent debates about the balance, or lack thereof, between copyright producers and users under the TPP have led to much criticism on grounds that the TPP benefits producers most heavily at the potential expense of widespread criminalization of

25. Although the scope of this article focuses on member-country court discretion *after* the enactment of TPP-like copyright enforcement agreements, it is worth noting that commentators continue to explore alternative theories of infringement prevention that do not require the imposition of aggressive enforcement mechanisms. See Geraldine Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731, 776, n. 201 (2003); Tao Leung, *Misconceptions, Miscalculations, and Mistakes: P2P, China, and Copyright*, 30 HASTINGS INT'L & COMP. L. REV. 151 (2006).

users.²⁶ Criminal punishment is often justified as an effective means of deterrence, regardless of whether it is applied against crimes committed online or on the street.²⁷ According to the Department of Justice's 2006 Intellectual Property Manual, "criminal sanctions are often warranted to punish and deter the most egregious violators: repeat and large-scale offenders, and organized crime groups . . ." ²⁸ Megaupload is perhaps an accurate example of those infringers that the Department of Justice had in mind when they drafted this manual. Kim Dotcom, though often viewed by his supporters as a modern day Robin Hood, clearly exploited an astronomical number of works for his own personal financial benefit, and further incentivized other users to illegally share files, even after several warnings by the U.S.²⁹ Proceeds from his operations allowed him luxuries, some even beyond those enjoyed by the many creators whose works he illegally disseminated over the Internet.³⁰ Likely, his conduct would be conceived as so egregious as to justify the application of TPP's criminal copyright enforcements.

However, the language provided by TPP's copyright enforcement provisions do not limit criminal sanctions to piracy captains like Megaupload and Kim Dotcom—it instead engulfs a larger segment of society: the everyday users and consumers.³¹ If the TPP's copyright provisions are any indication of future international copyright enforcement efforts, a careful discretionary balancing by member countries would be vital in order to prevent a clash between foreign obligations and domestic realities. The following parts will focus on the behavioral aspect of piracy in the 21st century, the issues created by aggressive criminal enforcement, and the corrective discretion allowed to member country courts by FTAs.

26. Watson, *supra* note 21.

27. Moohr, *supra* note 25, at 747-49.

28. MICHAEL BATTLE ET AL., U.S. DEP'T OF JUST., PROSECUTING INTELLECTUAL PROPERTY CRIMES 5-6 (3rd ed. 2006); Miriam Bitton, *Rethinking the Anti-Counterfeiting Trade Agreement's Criminal Copyright Enforcement Measures*, 102 J. CRIM. L. & CRIMINOLOGY 67, 74 (2012).

29. Russell Blackstone, *The Fall of The House of Dotcom*, N.Z. HERALD (Nov. 23, 2014, 7:27 AM), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11363084.

30. Melanie Jones, *Why Kim Dotcom Has a Case: The Truth Behind the Megaupload Indictment*, INT'L BUS. TIMES (Feb. 02, 2012, 2:07 PM), <http://www.ibtimes.com/why-kim-dotcom-has-case-truth-behind-megaupload-indictment-213963>.

31. See *TPP Full Text*, *supra* note 12, art. 18.76; David Levine, *Trade Secrecy and the Trans-Pacific Partnership Agreement: Secret Lawmaking Meets Criminalization*, CTR. FOR INTERNET & SOC'Y (Oct. 27, 2014, 4:26 PM), <http://cyberlaw.stanford.edu/blog/2014/10/trade-secrecy-and-trans-pacific-partnership-agreement-secret-lawmaking-meets>.

A. *The Piracy Culture of the 21st Century*

Although proponents of copyright-related criminal sanctions are quick to say, “if you can’t do the time, don’t do the crime,” the culture and mindset behind illegal file sharing is much more complex than what is seen on the surface. There exists a fascinating phenomenon in the minds of file sharers, where the legality of their conduct does not prevent them from hoarding stockpiles of illegally downloaded content.³² Studies have shown that everyday users continue to illegally download copyrighted content due to their perceived anonymity, the vast availability of free media, and the intangible nature of the content.³³ After years of studying the psychology of file sharers, scholars have pinpointed “moral disengagement” as one of the key reason for this behavior.³⁴ This behavioral argument simply states that although users understand what is right from wrong, the act of illegally sharing and downloading media is often not perceived as immoral, which in turn, does not dissuade illegal file sharing.³⁵ Other studies indicate that low self-control is an influential determinant in the average users’ choice to download illegally—similar to the common cause of drug abuse.³⁶

Though a limited number of studies have attempted to draw a causal connection between the threat of criminal prosecution and its deterrent effect on users, research has consistently found that “the threat of certainty is more important than severity.”³⁷ This key finding indicates that adequate and firm notice, coupled with educational efforts to properly notify users that they will not be spared when caught, can one day conclusively curb file sharing.³⁸ However, as in the case under the TPP and other enforcement-heavy copyright agreements, pursuing deterrence through criminal enforcement is not the best

32. Alexander Peukert, *Why Do ‘Good People’ Disregard Copyright on the Internet?*, in *CRIMINAL ENFORCEMENT OF INTELLECTUAL PROPERTY* 163 (Christophe Geiger Ed., 2012).

33. *Id.*

34. *Id.*; see also Ken Burleson, *Learning from Copyright’s Failure to Build Its Future*, 89 *IND. L.J.* 1299, 1309-1310 (2014); Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 *J. COPYRIGHT SOC’Y U.S.A.* 235, 253-254 (2014).

35. Menell, *supra* note 34, at 253.

36. Scott E. Wolfe & George E. Higgins, *Explaining Deviant Peer Associations: An Examination of Low Self-Control, Ethical Predispositions, Definitions, and Digital Piracy*, 10 *W. CRIMINOLOGY. REV.* 43, 45-46 (2009).

37. Scott E. Wolfe et al., *Deterrence and Digital Piracy: A Preliminary Examination of the Role of Viruses*, 26 *SOC. SCI. COMPUTER REV.* 317, 319 (2008).

38. See Ben Depoorter & Alain Van Hiel, *Copyright Alert Enforcement: Six Strikes and Privacy Harms*, 39 *COL. J.L. & ARTS* 233, 269-70 (2015).

route where there is a lack of notice provided to the online community, and especially where the activity prompting criminalization is deeply embedded in widespread behavior. As taught by centuries of legal philosophers: when law is at odds with popular culture, that law will be difficult to enforce.³⁹

B. *The War on Piracy*

An aggressive policy against end-users is not only detrimental to the welfare of everyday citizens, but it also shifts the focus away from the core problem of digital piracy—the thriving industry created by large-scale piracy operations.⁴⁰ In order to examine whether the aggressive enforcement regime of copyrights will prove to be effective so as to justify its criminalization efforts, it is helpful to draw a historical comparison of a similar enforcement regime and its outcomes. Though digital piracy is a fairly novel issue, its causes and the approach taken by world leaders to alleviate the problem are not so different. For one, the issues created by digital piracy, and the approach taken by world leaders is eerily similar to the prohibition of drugs, namely, the “War on Drugs” policy created under the Nixon administration.⁴¹ For example, by facilitating individual enforcement through the criminal system, and mandating harsher punishment such as steep fines and criminal sanctions, the TPP’s plan against digital piracy mirrors the failed approach taken by the U.S. against victims of drug abuse.⁴² After spending, on average, \$7 billion per year on arresting and prosecuting 800,000 people for criminal offenses related to marijuana alone, the U.S. drug policy has barely put a dent in cartel operations, and the use of drugs altogether.⁴³

In retrospect, a “zero-tolerance” criminalization policy, combined with inadequate treatment, was arguably not the best policy for drug enforcement, and I believe it will have the same disappointments in the context of international copyright enforcement.

39. See generally Robert C. Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 496-496 (2003).

40. See Steven Tremblay, *The Stop Online Piracy Act: The Latest Manifestation of a Conflict Ripe for Alternative Dispute Resolution*, 15 CARDOZO J. CONFLICT RESOL. 819, 827-29 (2014).

41. Annemarie Bridy, *Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy*, 46 ARIZ. ST. L.J. 684, 686 (2014).

42. See generally Steven Wisotsky, *A Society of Suspects: The War on Drugs and Civil Liberties*, CATO INST. (Oct. 2, 1992), <http://www.cato.org/publications/policy-analysis/society-suspects-war-drugs-civil-liberties>.

43. *Id.*

III. AN ANALYSIS OF THE CRIMINAL ENFORCEMENT PROVISIONS

The text of the TPP reflects a long history of the copyright problem, and the ongoing friction between the United States Trade Representative (USTR) and the many countries that the USTR finds inadequate in their copyright enforcement efforts.⁴⁴ Every year, the Office of the USTR publishes the Special 301 Report, highlighting “Watch List” countries for their insufficient regulations and lax enforcement efforts.⁴⁵ It further prioritizes countries based on how their “practices have the greatest adverse impact (actual or potential) on the relevant U.S. products.”⁴⁶ In the 2015 report, USTR included five TPP participating countries on the Watch List: Canada, Chile, Mexico, Peru, and Vietnam.⁴⁷ A major reason for why these countries were included on the list was because the USTR found that their protection of copyrights was insufficient, or at least not to the degree preferred by copyright holders and related industries.⁴⁸ The USTR, a major player in TPP negotiations, also places countries on the Watch List for their failure to use criminal sanctions against copyright infringers.⁴⁹

In an attempt to standardize and provide greater protection to copyright holders, Chapter 18 of the TPP introduced definitive provisions that require member countries to criminalize anyone who is found to infringe on a “commercial scale.”⁵⁰ Chapter 18 further provides that member countries must provide for criminal procedures and penalties to be applied for “willful . . . copyright or related rights piracy on a commercial scale.”⁵¹ Commercial scale under the TPP is defined as:

- (a) acts carried out for commercial advantage or financial gain; and
- (b) significant acts, not carried out for commercial advantage or financial gain, that have a substantial prejudicial impact on the interests of the copyright or related rights owner in relation to the marketplace.⁵²

44. See generally OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2015 SPECIAL 301 REPORT 1 (2015), <https://ustr.gov/sites/default/files/2015-Special-301-Report-FINAL.pdf>; William New, *Confidential USTR Emails Show Close Industry Involvement In TPP Negotiations*, IP WATCH (May 6, 2015), <http://www.ip-watch.org/2015/06/05/confidential-ustr-emails-show-close-industry-involvement-in-tpp-negotiations/>.

45. See generally OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2015 SPECIAL 301 REPORT 1 (2015), <https://ustr.gov/sites/default/files/2015-Special-301-Report-FINAL.pdf>.

46. *Id.*

47. *Id.* at 3-4.

48. *Id.* at 1-3.

49. *Id.* at 1-4.

50. See *TPP Full Text*, *supra* note 12, art. 18.77.

51. *Id.*

52. *Id.*

On its face, subsection (a) reiterates the widely adopted justification for criminal sanctions—where the copyright infringement is carried out for a commercial benefit.⁵³ This subsection is an effective and often warranted tool to pinpoint large piracy operations that unjustly profit from infringed content through sources such as advertisements, and membership fees. However, subsection (b) not only applies criminal sanctions against large-scale copyright infringers, but also to individuals who, by their “significant [non-commercial] acts” over the Internet, create a “substantial prejudicial impact” against the interests of the copyright holder.⁵⁴ This language, for one, is not the type of measurable and definitive language accustomed to by U.S. trade partners.⁵⁵ Our NAFTA neighbors, Mexico and Canada, for example, criminalize copyright infringement solely if there is a “commercial gain” similar under subsection (a), but under this default standard they would also need to prosecute activity that falls under subsection (b).⁵⁶ The provision’s footnotes further particularizes on the key word “substantial,” which states that member countries have discretion to either (1) interpret “substantial” as it would in the way its applied in criminal copyright cases in their countries; or (2) by taking into account whether the “volume and value” of the infringement has a substantial impact on the copyright holder’s interests.⁵⁷ Although the goal is to deter through tough consequences, if future international IP agreements reflect the provisions in subsection (b), its vagueness and potential for wide scale criminalization of individuals may very likely lead to an over-deterrence of innovation and overcriminalization of ordinary users.⁵⁸

A. *Potential for Widespread Criminalization: File Sharing and Memes*

To illustrate how low the TPP’s threshold for criminality actually is, one should turn to the recent trend of Internet memes. An Internet

53. See, e.g., 17 U.S.C § 506 (2012); Anti-Counterfeiting Trade Agreement (ACTA), art. 23(1) Dec. 3, 2010, 50 I.L.M. 243.

54. *TPP Full Text*, *supra* note 12, art. 18.77.

55. See North American Free Trade Agreement, U.S.-Can.-Mex., art. 1717, Dec. 17, 1992, 32 I.L.M. 289 (1993).

56. *Id.*; see also Copyright Act, R.S.C. 1985, c. C-42, § 29.21 (Can.); Ley Federal del Derecho de Autor [LFDA] [Federal Law on Copyright], Diario Oficial de la Federación [DO], 17 de Marzo de 1997 (Mex.).

57. *TPP Full Text*, *supra* note 12, art. 18.77 nn. 126 & 127.

58. See Jingjing Hu, Research On TPP “Intellectual Property Damages” And China’s Approach, (2014) (unpublished Ph.D. dissertation, Peking University Law School), https://www.law.berkeley.edu/files/Hu_Jingjing_-_draft-Research_On_TPP.pdf.

meme is the use of a picture or video to express some “idea, behavior or style,” often through mimicry.⁵⁹ The crucial component of a successful meme is how well it resonates with others, which in return demonstrates its ability to go viral.⁶⁰ However, since a majority of memes incorporate copyrighted visuals or sound recordings, when the meme does indeed go viral, the creator of it may be subject to criminal prosecution and steep fines.⁶¹ Although the meme creator’s intent here was not to receive a “commercial advantage,” the mere fact that it went viral can fall into the realm of a “significant act” that has a “prejudicial impact” on the copyright holder.⁶² This would be the case even if there was absolutely no financial gain from the success or dissemination of the meme.⁶³ Typically in the U.S., a situation involving copyright infringement through the use of memes would most likely be protected under the “fair use doctrine” unless it was used for marketing or other commercial purposes.⁶⁴ However, since Chapter 18 does not incorporate the basic safeguards provided by U.S. copyright law, such as the “fair use doctrine,” signatory countries to agreements that lack similar safeguards may need to draw out an enforcement plan with vigilance, so that they do not become compelled to enforce a large number of systematic prosecutions that would not occur even under the most stringent U.S. copyright laws.

Though the TPP’s threshold for criminalizing file sharing is low, member countries to similar agreements and their courts can prevent widespread criminalization by striking a “balance in its copyright and

59. See *Meme*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/meme>; see also *Meme*, OXFORD DICTIONARY (2017) (defined as “an element of a culture or system of behavior passed from one individual to another by imitation or other non-generic means,” through an image, video or text and is generally humorous in nature).

60. See Kate Miltner, *What made ‘Nasa Mohawk Guy’ such a successful meme?*, GUARDIAN (Aug. 8, 2012), <https://www.theguardian.com/commentisfree/2012/aug/08/nasa-mohawk-guy-bobak-ferdowski-meme>.

61. See Nicole Martinez, *Posting an Internet Meme? You May Receive a Getty Letter*, ART. L.J. (Oct. 1, 2015), <http://artlawjournal.com/internet-meme-getty-letter/>; Lorelei Laird, *Do Memes Violate Copyright Law?*, ABA J. (Sept. 1, 2016), http://www.abajournal.com/magazine/article/do_memes_violate_copyright_law.

62. See Maira Sutton, *Go to Prison for File Sharing? That’s What Hollywood Wants in the Secret TPP Deal*, ELECTRONIC FRONTIER FOUND. (Feb. 12, 2015), <https://www.eff.org/deeplinks/2015/02/go-prison-sharing-files-thats-what-hollywood-wants-secret-tpp-deal> (discussing that if copyrighted work is used, even if it is on a non-commercial scale, criminal sanctions will be imposed); see also Brandon Brown, *Fortifying the Safe Harbors: Reevaluating the DMCA in a Web 2.0 World*, 23 BERKELEY TECH. L.J. 437, 445-449 (2008).

63. See Richard J. Hawkins, *Substantially Modifying the Visual Artists Rights Act: A Copyright Proposal for Interpreting the Act’s Prejudicial Modification Clause*, 55 UCLA L. REV. 1437, 1448-50 (2008).

64. 17 U.S.C. § 107 (1976).

related rights system,” as encouraged by the TPP.⁶⁵ This minimal wiggle room is key because such an aggressive minimum enforcement standard, by default, will compel member countries to enforce criminal copyright to any case where an individual can be proven to have an impact on the copyright holders’ interest.⁶⁶ Therefore, by increasing the standard, through careful discretionary balancing, member countries and their respective courts will be able to limit the prosecution of its users to only “the most egregious violators,” as intended by the DOJ.⁶⁷ Courts can eliminate potential widespread criminalization of their citizens by first textually analyzing the negotiated language, and pinpointing the exact discretion afforded. For example, footnote 127 of Chapter 18 states, “A Party may provide that the ‘volume and value’ of any infringing items may be taken into account in determining whether the act has a substantial prejudicial impact on the interests of the copyright or related rights owner in relation to the marketplace.”⁶⁸ The permissive language provided here clearly shows that the drafters intended to allow judicial authorities some flexibility in how they are to apply the law.⁶⁹ In addition, the TPP provides guidance on implementing “fair-use” protections for particular types of infringement that involve recreations or adaptations.⁷⁰ Although the discretion allowed under criminal enforcement is minimal, there are two types of infringing conduct that courts may have a fair amount of control over: (1) illegal file sharing, and (2) unlicensed re-adaptations or derivative works.⁷¹

B. Volume-Based Approach for Enforcement of Illegal File Sharing

Whether through tracking the number of files that the file-sharer uploads through Peer-to-Peer software, or by tracking the number of illegal files downloaded by a particular IP address, Internet Service Providers (ISPs) today have an unprecedented access to the number of files that enter and exit the user’s devices.⁷² Under the TPP and similar agreements, there is a growing pressure on ISPs to keep track of this data, and through the persistence of copyright holders seeking

65. *TPP Full Text*, *supra* note 12, art. 18.66.

66. *See* Hawkins, *supra* note 63.

67. BATTLE ET AL., *supra* note 28, at 5-6.

68. *TPP Full Text*, *supra* note 12, art. 18.77 n.127.

69. *See id.*

70. *See id.* arts. 18.62, 18.66.

71. *See id.* art. 18.77.

72. Corinne Reichart, *TPP: ISPs Will Hand Over Copyright Infringer Details*, ZDNET (Nov. 6, 2015), <http://www.zdnet.com/article/tpp-isps-will-hand-over-copyright-infringer-details/>.

to file suit, the data entering and exiting one's device is no longer a secret.⁷³ Though this growing invasion is definitely more intrusive than the intermediary involvement required before, it is nevertheless a beneficial means for participating countries to gauge the severity of their file-sharing problem. This will require a careful analysis of their country's file-sharing norms, coupled with a balancing of public policy to determine the most egregious actors in each country.

Although drawing a rigid line to determine legality is not always the best way to make law, if this practice is coupled with a discretionary approach and proper notice to the public, it can potentially scale back illegal file sharing and decrease the number of criminal prosecutions.⁷⁴ By limiting enforcement efforts to each country's "high-volume" uploaders and downloaders, members can conform to minimum standards of enforcement with the added benefit of preventing wide-scale criminalization of innocent infringers.⁷⁵

First, member countries can avoid a miscarriage of justice through a volume standard by preventing the prosecution of those who are "not in fact willfully infringing copyright, [and] who genuinely believe that their conduct is legal," but instead, only prosecuting those who partake in the highest volume of infringing activities.⁷⁶ Willfulness, which is a prerequisite for criminal copyright infringement, can be inferred by the blatancy of one's conduct.⁷⁷ Therefore, if there is in fact evidence of a large volume of illegal uploads and downloads, then it is "highly unlikely that these high-volume uploaders are in fact engaged in legal conduct," or that they were oblivious as to their wrongdoing.⁷⁸

Second, if member country courts are able to determine the precise volume of illegal file sharing to be considered criminal, they will avoid wasting judicial time and resources to provide an ad-hoc analysis for each individual case. It is unlikely that there will be a lot of

73. *Id.*; see Sell, *supra* note 15, at 457; Alexandra Giannopoulou, *Copyright Enforcement Measures: The Role of the ISPs and the Respect of the Principle of Proportionality*, 7 *EUR. J. OF L. & TECH.* (2012), <http://ejlt.org/article/view/122/204>.

74. See generally Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 *STAN. L. REV.* 1345, 1351-53 (2004) (arguing that a combination of approaches will be most beneficial to limiting illegal file sharing and criminal prosecutions).

75. *Id.* at 1402-04.

76. *Id.* at 1403.

77. 17 U.S.C. § 1291 (2012).

78. Lemley, *supra* note 74, at 1402.

deliberation as to the severity of the infringement if the pre-established volume that triggers criminal liability is set sufficiently high.⁷⁹

Finally, by drawing a bright and clear line as to the precise volume required for criminal punishment, file-sharers will receive sufficient notice as to the certainty of punishment against them, which in itself serves as an effective deterrent. As mentioned previously, studies have consistently found that “the threat of certainty is more important than severity.”⁸⁰ A recent study in Canada, for example, illustrates that a significant drop in Canada’s piracy is attributable to notices forwarded to users by ISPs.⁸¹ Likewise, sufficient notice provides unaware infringers the opportunity to check their systems to make sure whether or not their activities online can potentially be found criminal.

These three objectives not only prevent the widespread criminalization of users, but the attributed notice in providing a bright-line distinction between criminality and innocence may better further serve to the benefit of rights holders than an expensive witch hunt.

Though the volume-based standard suggested here, like any threshold-based regulation, may potentially allow the threshold to be worked-around by infringers, its effects do not severely hinder the ongoing fight for stronger international enforcement mechanisms.⁸² The threshold can potentially be manipulated if, for example, a member country’s judicial authorities provide notice that illegally sharing 1000 files is considered a “significant-act” that justifies criminalization, thereby prompting file-sharers to limit their file-sharing to 999. However, illegally file-sharing 999 files would still be grounds for civil suit that allows a wide-range of remedies for copyright holders to utilize.⁸³ Therefore, it would not sterilize enforcement efforts since the risk of steep civil damages can serve as a deterrent inasmuch as criminal punishment does.⁸⁴

79. *Id.* at 1402-03.

80. Wolfe, *supra* note 37, at 319.

81. Daniel Tencer, *Massive Drop In Canadian Online Piracy Under New Law, Copyright Firm Says*, HUFFINGTON POST (May 25, 2015), http://www.huffingtonpost.ca/2015/05/21/online-piracy-canada-ceg-tek_n_7372626.html.

82. See Lemley, *supra* note 74, at 1413 (arguing that although the system can be gamed, it does not necessarily mean that enforcement will become ineffective).

83. See *TPP Full Text*, *supra* note 12, arts. 18.74(8)-18.74(10).

84. *Id.*

C. *The Need for Fair Use Protection of User-Made Content*

In the U.S., the Copyright Act of 1976 affords creators of derivative or transformative content, both amateur and professional, a vital privilege to re-create copyrighted content without incurring liability for specific purposes through applicable “fair use” protections.⁸⁵ The fair use defense is a “privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without consent.”⁸⁶ The U.S. fair use protections allow parties to use copyrighted material for limited “transformative” purposes,⁸⁷ such as criticism, comment and parody, without incurring liability.⁸⁸ Given the lengthy duration of copyright protection, fair use serves as a vital exception, intended to serve the fundamental policy rationale of copyright law, “to promote progress, creativity, and innovation for the benefit of society as a whole.”⁸⁹

Once a copyright holder demonstrates a likelihood of success on an infringement claim, the burden of proof shifts to the defendant to show that her use of the copyrighted work meets the fair use four-factor test.⁹⁰ Under this test, U.S. courts evaluate a question of fair use by looking at: whether the use of the copyrighted content is transformative, the nature of the work being used, the amount and substantiality of the portion used, and the market impact on the infringed work by the infringing work.⁹¹ Normative theories regarding memes and their relationship under the fair use analysis widely support the notion that memes created by everyday individuals will almost always be protected against infringement suits.⁹² U.S.’s fair use protections, as evolved through the judicial process and codified in the U.S. Copyright Act, show that even in the U.S. where copyrights are afforded

85. 17 U.S.C. § 107 (1976).

86. HORACE G. BALL, *LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944).

87. Brian Sites, *Fair Use and the New Transformative*, 39 COLUM. J.L. & ARTS 513, 522, 534-36 (2016).

88. 17 U.S.C. § 107 (1976).

89. See Jessica Meindertsa, *Fair Use 101: Why Do We Need Fair Use*, Ohio State Univ.: OHIO STATE UNIV. LIB. COPYRIGHT RES. CTR. (Feb. 17, 2014), <https://library.osu.edu/blogs/copyright/2014/02/17/fair-use-101-why-do-we-need-fair-use/>; Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 688-91 (2015); Daniel P. Fernandez et al., *Copyright Infringement and the Fair Use Defense: Navigating the Legal Maze*, 27 U. FLA. J.L. & PUB. POL’Y 135, 138 (2016).

90. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1163 (9th Cir. 2007).

91. Ronak Patel, *First World Problems: A Fair Use Analysis of Internet Memes*, 20 UCLA ENT. L. REV. 235, 244 (2013).

92. *Id.* at 256.

expansive protections, vehicles for cultural expression such as memes and other transformative uses are worth protecting.⁹³

Though fair use is a highly cherished defense in the U.S., many participating countries to the TPP and other IP-related international agreements do not follow U.S. style fair use protections, but instead utilize an alternative model known as “fair dealing.”⁹⁴ Fair dealing, in contrast, is not an open-ended concept and is applied too rigidly to keep up with changing times.⁹⁵ It merely provides exemptions to specifically enumerated uses of copyrighted works, allowing them safeguards against infringement liability.⁹⁶ Citizens from these member countries, with limited or no protections, are at a far greater risk for suit under TPP-like agreements than those from countries with fair use protections.⁹⁷ Although the use of copyrighted content often stems from innocuous purposes, the potential for a meme to become grounds for criminal liability—due to its “substantial prejudicial impact”—poses troubling consequences for the evolving nature of cultural expression.⁹⁸ As cultural expression takes on new forms and becomes more easily shared, due to the rapid growth and expansion of the Internet, liability-triggering language such as “significant non-commercial acts” should at least be balanced with greater fair use protections.⁹⁹

As with the judicial flexibility allowed under the criminal enforcement section, the TPP also expressly encourages member countries to “achieve an appropriate balance in its copyright and related rights systems . . . by means of limitations or exceptions . . . including those for the digital environment.”¹⁰⁰ The TPP further lists out some safe-harbors that countries may use to exempt individuals from civil and

93. *Id.*

94. See, e.g., Ariel Katz, *Fair Use 2.0: The Rebirth of Fair Dealing in Canada*, in *THE COPYRIGHT PENTAGONY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW* 93-156 (Michael Geist ed., 2013) (analyzing the Canadian Copyright Act and Fair Use defense); Sean M. Flynn et al., *The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement*, 28 AM. U. INT'L L. REV. 105, 124 (2012); Organization for Transformative Works, *What the Trans Pacific Partnership Means for Fans* (Nov. 13, 2015), <http://www.transformativeworks.org/what-trans-pacific-partnership-means-fans/>.

95. Katz, *supra* note 94, at 93-94, 139-40.

96. *Id.* at 138.

97. See Jean Dryden, *The Trans-Pacific Partnership Free Trade Agreement*, 34 TALL Q. 14, 14-15 (2016).

98. *TPP Full Text*, *supra* note 12, art. 18.77; Daniel Daniele, *Memes and GIFs: A New Cultural Phenomenon*, SOCIAL MEDIA L. BULLETIN (Oct. 1, 2013), <http://www.socialmedialawbulletin.com/2013/10/memes-and-gifs-a-new-cultural-phenomenon/>.

99. *Id.*

100. *TPP Full Text*, *supra* note 12, art. 18.66.

criminal liability, including: “legitimate purposes such as . . . criticism; comment, [and] news reporting.”¹⁰¹ For further clarification, footnote 79 following this section states, “a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose”¹⁰² Though this section does not expressly state that individual use of underlying copyrighted works should be protected or be provided with U.S. style fair use exceptions, it is reasonably inferred as the examples provided are not meant to be exhaustive. Rather, this section titled “Balance in Copyright and Related Rights Systems,” is to provide member countries some guidance and flexibility in providing safeguards, such as fair use defenses for qualified copyright uses, where the otherwise unlawful use is balanced against the degree of “unreasonabl[e] prejudice” to the copyright holder.¹⁰³ If the TPP’s provisions are indeed resurrected into future international copyright agreements, the above discretion should be integrated into future agreements as it provides for an optimal opportunity for member country courts to create better safeguards for individual protection.

IV. STEEP DAMAGES AND ABUSIVE SETTLEMENT TACTICS: THE COPYRIGHT TROLL

The final version of the TPP’s civil damages provisions nearly mirrors other existing and proposed international enforcement measures with respect to how participating country courts are to calculate damages in civil proceedings for copyright infringement claims by rights owners.¹⁰⁴ The third paragraph of “Article 18.74: Civil and Administrative Procedures and Remedies,” states the following:

Each Party shall provide that, in civil judicial proceedings, its judicial authorities have the authority at least to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person’s intellectual property right by an infringer¹⁰⁵

Although the language “damages adequate to compensate for the injury” is fairly ambiguous, the following two paragraphs attempt to create guidance as to the sorts of damages that would be considered adequate.¹⁰⁶ Paragraph five states that “each party shall provide that . . . its judicial authorities have the authority to order the infringer . . .

101. *Id.*

102. *Id.* n.79.

103. *TPP Full Text*, *supra* note 12, arts 18.65-18.66.

104. *See id.* art. 18.74.

105. *Id.*

106. *Id.*

to pay the right holder the infringer's profits that are attributable to the infringement."¹⁰⁷ Further, paragraph four allows courts the added discretion to use "the value of the infringed goods or services measured by the market price, or the suggested retail price" as a means for measuring damages.¹⁰⁸ As a general argument, using "market price" is a common, and arguably reasonably predictable means of measurement.¹⁰⁹ However, the following provisions go further and state that judicial authorities are required to compel defendants to pay the prevailing attorney's fees, court filing fees, in addition to any statutory or pre-established damages resulting from the infringement.¹¹⁰ This is where the damages for an illegally downloaded album can grow astronomically.¹¹¹ The threat of large court ordered damages, as illustrated by several U.S. cases,¹¹² creates an opportunity for copyright holders to make a "quick buck" through out-of-court settlements, and this opportunity for exploitation may introduce foreign countries to the copyright troll problem.¹¹³

A. *Copyright Trolls: The Creation of Thriving Conditions*

A major problem with opening up the international arena to integrated enforcement measures and allowing copyright holders to bring suit against international defendants with ease, is the possibility of infecting other countries with legal problems that persist in originating

107. *Id.*

108. *Id.*

109. Ching-Yi Liu, *The Case for Flexible Intellectual Property Protections in the TPP: How can the US do it Correctly?*, in *THE TRANS-PACIFIC PARTNERSHIP AND THE PATH TO FREE TRADE IN THE ASIA PACIFIC* 276 (Peter C.Y. Chow ed., 2016).

110. *TPP Full Text*, *supra* note 12, art. 18.74(6)-(10).

111. *See Sony BMB Music Entm't v. Tenebaum*, 719 F.3d 67 (1st Cir. 2013); *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045 (D. Minn. 2010).

112. *See Righthaven LLC v. Hoehn*, 716 F.3d 1166 (9th Cir. 2013); *West Bay One, Inc. v. Enid Eddings*, 1:10-cv-00481-RMC (2010); *Righthaven LLC v. Democratic Underground LLC*, 791 F. Supp. 2d 968 (D. Nev. 2011); *Righthaven v. DiBiase*, 98 U.S.P.Q.2d 1598 (D. Nev. 2011).

113. *See* Christopher M. Swartout, *Toward a Regulatory Model of Internet Intermediary Liability: File-Sharing and Copyright Enforcement*, 31 *Nw. J. INT'L L. & BUS.* 499, 508-13 (2011) (explaining how exceedingly high damages create the conditions for coercive settlement practices); *see also* David Llewellyn, *Statutory Damages for Use of a "Counterfeit Trade Mark" and for Copyright Infringement in Singapore: A Radical Remedy in the Law of Intellectual Property or One in Need of a Rethink*, 28 *SING. ACAD. L.J.* 61, 87 (2016) (explaining the importance of maintaining caps on the amounts that Singapore courts may award for infringement claims in order to "avoid the possibility of Singapore becoming an attractive destination for copyright trolls whose business model is based on mass threats of litigation resulting in the extortion of excessive amounts from unsophisticated infringers").

countries.¹¹⁴ One problem that has drawn major criticism from copyright experts is the persistence of the copyright troll.¹¹⁵ A copyright troll refers to “an entity whose business revolves around the systematic legal enforcement of copyright in which it has acquired a limited ownership interest.”¹¹⁶ The main type of copyright trolls in the U.S. can be described as a third-party entity who solicits litigious copyright owners, searches for possible cases of infringement online, and upon discovering a potential infringement, the third-party “troll” acquires a partial assignment of copyright from the owner to pursue its claim under that particular right.¹¹⁷ Thus it can be said that the plaintiff here is not the copyright owner per se, but rather, an entity with merely a right to sue. By opening the arena to threats of large damages, extending the duration of copyright protection, and making it easier for individuals to be found liable, imbalanced copyright measures invite entities with a mere right to sue the opportunity to coerce individuals to pry open their pocketbooks through aggressive out-of-court settlement offers.¹¹⁸ Member country courts, however, should limit the abuse of the settlement system by using any authorized discretion to reserve the right to sue to only copyright holders, set maximum caps on damages, and define aggressive out of court settlement offers as “abuse” when permitted.¹¹⁹

However permissible or legally tolerated the copyright troll scheme may be, it encourages copyright holders to take advantage of the imbalance of power between themselves and the defendant, thus allowing them to abuse the process of out of court settlements.¹²⁰ One thing copyright trolls have in common is that they propose a settlement, seeking disproportionate fines, backed up by a threat to litigate in court, where the amount sought is threatened to be far greater than the amount proposed by the settlement offer.¹²¹ This often-successful settlement tactic, which relies heavily on the reality that both individ-

114. See Jeremy Malcolm, *New TPP Leaked Text Reveals Countries' Weakening Resistance to Copyright Maximalist Proposals*, ELECTRONIC FRONTIER FOUND. (Aug. 5, 2015), <https://www.eff.org/deeplinks/2015/08/new-tpp-leaked-text-reveals-weakening-resistance-maximalist-proposals>.

115. Shyamkrishna Balganes, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 738-39 (May 2013); Matthew Sag, *Copyright Trolling, an Empirical Study*, 100 IOWA L. REV. 1105, 1112-14, 1120 (2015).

116. Balganes, *supra* note 115, at 732.

117. See Sag, *supra* note 115, at 1111.

118. Balganes, *supra* note 115, at 736-38; Brian L. Frye, *IP as Metaphor*, 18 CHAP L. REV. 735, 751-52 (2014-2015); Sag, *supra* note 115, at 1119-21, 1135-36.

119. See *TPP Full Text*, *supra* note 12, arts. 18.2-18.3, 18.67, 18.72, 18.74(1), 18.76.

120. See Sag, *supra* note 115, at 1113-16.

121. See *id.*

ual defendants and copyright holders often seek alternatives to avoid the judicial process, further opens the doors for the copyright troll industry to thrive.¹²² Likely, even defendants with a strong chance of prevailing over the plaintiff would rather settle for a discount than risk paying greater damages, in addition to attorney and court fees.¹²³

Although the TPP provides language that gives individuals basic protection against the copyright holder's misuse of enforcement procedures,¹²⁴ it is not enough incentive for individuals to risk going through trial for the slight chance of earning the ability to recover attorney and court fees. Additionally, from a policy perspective, the quiet nature of private settlements arguably do not deter others from infringement.¹²⁵ Since settlements take place away from the public eye, they therefore fall short of providing notice of the repercussions of infringement to the public at large.¹²⁶

B. Restricting the Right to Sue and Preventing Abusive Settlement Tactics

The main problem with this business model is that such lawsuits are not intended to deter, but instead "are used to encourage quick settlements."¹²⁷ What makes this even more troubling is that a large cut of purported damages do not even reach the injured party, but rather fall in the hands of third party trolls.¹²⁸ In no way would this scenario be "conducive to social and economic welfare, and to a balance of rights and obligations" as the TPP's objective attempted to establish.¹²⁹ Judicial authorities of member countries should therefore utilize discretion allowed under the TPP and similar agreements in the interest of maintaining a fair court system and alleviating the imbalance created by the potentially abusive damage measurements.¹³⁰

For example, the following provision (Article 18.3), if incorporated in future international agreements and actually exercised by

122. See *id.* at 1113, 1116; Swartout, *supra* note 113, at 513.

123. Swartout, *supra* note 113, at 513.

124. See *TPP Full Text*, *supra* note 12, art. 18.69(1).

125. See Swartout, *supra* note 113, at 509.

126. See Llewellyn, *supra* note 113, at 83.

127. James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 *UCLA ENT. L. REV.* 79, 98 (2012) (citing Julie E. Cohen., *Pervasively Distributed Copyright Enforcement*, 95 *GEO. L.J.* 1, 17 (2006)).

128. Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 *U. COLO. L. REV.* 53, 72-79 (2014).

129. See *TPP Full Text*, *supra* note 12, art. 18.2.

130. See *id.* arts. 18.3, 18.71(1), 18.72(15), 18.75.

member party courts, can be construed so to prevent the copyright troll problem in their respective countries, which states:

Appropriate measures, provided that they are consistent with the provisions of this Chapter, may be needed to *prevent the abuse of intellectual property rights by rights holders* or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.¹³¹

In addition, courts should be insistent on making sure that the party bringing suit is in fact the copyright holder or an official representative.¹³² For example, this can be accomplished through the incorporation of provisions such as “Article 18.75: Provisional Measures,” which states, “judicial authorities have the authority to require the applicant . . . to provide any reasonably available evidence in order to satisfy themselves with a *sufficient degree of certainty that the applicant’s right is being infringed*.”¹³³ By utilizing these two discretionary provisions, courts may be able to define “abuse” to include coercive settlement offers, and further require the party bringing suit be able to identify themselves as the injured party through a demonstration of the legitimacy of their claim. As the language “applicant’s right” indicates, the TPP allows for courts to require that the applicant be the one to bring suit, and to show that the rights violated are in fact her own.¹³⁴

The matter of individual injury and whether copyright trolls have proper standing was recently deliberated in the Ninth Circuit, where the court held that an entity who is merely assigned a right to file suit does not have standing “to sue for infringement because it was not the owner of any of the exclusive rights in the news articles required for standing.”¹³⁵ Righthaven, LLC, who is known to commentators as a notorious copyright troll, had followed the well-known practice of acquiring a limited, revocable license for the mere purpose of filing suit.¹³⁶ However, the Ninth Circuit found that in order to have standing, Righthaven needed to be the exclusive rights holder under the Copyright Act.¹³⁷ The model followed by the Ninth Circuit can serve

131. *Id.* art. 18.3 (emphasis added).

132. *See id.* arts. 18.72(1), 18.75(2).

133. *Id.* art. 18.75(2) (emphasis added).

134. *See id.*

135. *Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1168, 1171 (9th Cir. 2013).

136. Balganes, *supra* note 115, at 739; Benjamin Marks, *Righthaven v. Hoehn: Bad News for Copyright Trolls*, LAW360 (May 21, 2013, 12:54 PM), <http://www.law360.com/articles/443335/righthaven-v-hoehn-bad-news-for-copyright-trolls>.

137. *Righthaven LLC*, 716 F.3d at 1169 (quoting 17 U.S.C. §501(b) (2000)) (citing *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005)).

as a model for member country courts, and given the unfavorable consequences of copyright trolling, it is unlikely that other member countries would deliberately avoid making a decision to limit these coercive tactics.

V. CONCLUSION

Though, on its face, the TPP's aggressive minimum standard of enforcement has stirred a lot of debate and criticism, its discretionary language has not been given enough credit. Whether it be for adopting new standards of criminal enforcement, implementation of fair-use policies, or calculating damages, the TPP leaves many key terms open to discretionary application. Although the TPP, in its current form, begins to look more and more as a thing of the past, its carefully crafted concessions that allow member parties certain limitations and flexibilities should not be ignored. As with TRIPS and the TPP, discretionary safeguards in IP enforcement provisions will continue to exist, especially where the U.S. is a party. Thus the key question is not whether member parties will continue to enjoy similar discretions in the future, but instead whether they will actually make use of them.

However, even if discretion is actually exercised, the turning point for international copyright enforcement in the following years will depend on whether member countries to similar agreements and their courts will be able to better fit their needs and demands while conforming to minimum standards of enforcement. This can only be achieved through a fair balance of producer rights and individual interests, while keeping in mind the realities of normative enforcement measures.