The Trans Pacific Partnership: Copyright Law, the Creative Industries and Internet Freedom

In a timely manner, only three days after the announcement of the conclusion of negotiations on the Trans-Pacific Partnership Agreement (TPP), Prof. Matthew Rimmer accepted our invitation and shared few of the hidden secrets behind the agreement as part of IP Osgoode speaks series.

This ‘blockbuster agreement’—supposedly a jovial landmark in the sphere of diplomatic international relations—was diluted with a mixture of uncertainty and secrecy. According to Prof. Rimmer, the TPP is a controversial agreement for several reasons. First, many concerns were raised regarding the involvement of major companies, via special advisory groups and executives, in drafting parts of the agreement. Consequently, the companies allegedly had more influence over the TPP than the legislators since the latter could not review the agreement that was protected (and still is) under the blinds of confidentiality. Second, a few notable countries are not signatories of the TPP (China and Russia for example). The reasons underlying China and Russia’s exclusions raise questions regarding the TPP’s true nature—is it really a trade agreement or simply, as Prof. Rimmer implied, ‘the coalition of the willing’ that was established as part of a U.S. global trade strategy.

Much of what we know to date about the TPP was retrieved from WikiLeaks. Jamie Love, the director of Knowledge Ecology International (KEI), who recently shared a glimpse into the TPP deliberations, alerted that “in many sections ... the TPP would change global norms, restrict access to knowledge, create significant financial risks for persons using and sharing information, and, in some cases, impose new costs on persons producing new knowledge goods.”

IP Principles and Objectives

The TPP’s IP chapter covers a wide scope of topics and is positioned to change the normative boundaries of IP and, more specifically, of copyright. The traditional approach, as shaped in the U.S. and the U.K., is rooted in the perception of copyright as a means to inspire creation and proliferate knowledge. However, as Prof. Rimmer explains, it appears that the current vision of the TPP, under the influence of the music and movie industries, seeks to transform the normative balance of IP in order to strengthen the owners’ well-fortified rights. It is not hyperbole to define the TPP as a game changer that could have grave implications to the public domain.

A ‘Mickey Mouse’ Copyright Term Extension

According to Prof. Rimmer, the movie and the music industries have strategically argued for a prolonged extension of copyright terms. The TPP seems to answer their call, as it extends the term of protection to 70 years after the life of the author. This extension will likely have a profound affect in various fields, including Canadian cultural heritage, competition, innovation and the public domain. However, it is unclear if the TPP will include a demand for the revival of copyright works that were previously in the public domain. Prof. Rimmer also indicated that the TPP seeks to limit policy flexibilities for orphan works.

Fair Use/Dealing and Disability Rights

There has been much academic discourse concerning whether the TPP language, in regards to the definition of fair use/dealing, is far too narrow or too broad compared to previous agreements, particularly the Berne Convention, in defining copyright exceptions. The TPP definition will most likely affect the course of this discussion. If the TPP adopts a narrow definition for fair use/dealing, it could set back recent developments
Copyright and disability rights stand in the center of recent international progress in copyright law. The Marrakesh Treaty —the most prevalent—aims to expand the recognition of the rights and interests of disabled people to access copyright protected materials, ending what was known as the 'Book Famine'. According to Prof. Rimmer, the TPP makes an effort to recognize the Marrakesh Treaty. However, the Marrakesh Treaty is narrowly limited in scope to the visually impaired. Prof. Rimmer argues for a broader scope that will include other disabilities as well.

DMCA

The TPP seeks to export aspects of The Digital Millennium Copyright Act (DMCA) and imbed Technological Protection Measures (known as 'digital Locks'). Such anti-circumvention measures might endanger the fair use/dealing exceptions. The DMCA is a premature regime that was enacted almost two decades ago, in a pre-search engine and social media era, and is not well designed for current challenges. Stressing the absolute DMCA model as part of the TPP seems unreasonable. It should be noted that the DMCA model may have grave consequences to Canada, which in the past decade have defended its copyright laws against the DMCA successfully.

Protection and Enforcement

Protection and enforcement measures play an important role in the implementation of any international agreement. The TPP includes an arsenal of IP enforcement measures such as criminal offences and civil remedies. However, the TPP’s rigid structure does not enable the members of the agreement much flexibility in adapting the TPP into their domestic laws. Prof. Rimmer criticized that the TPP 'locks' a specific model rigidly; it is uncompromising in regards to changes and modifications to the enforcement measures since it requires the approval of all members.

TPP’s Radical Vision

Prof. Rimmer concluded his lecture by stating that the TPP agreement 'is radical’ not only in its objectives and purposes, but it also changes some of the fundamental doctrines in copyright such as term extension, fair use/dealing, liability issues etc., while diminishing the public domain in the process.

The TPP agreement is indeed a defining moment in the international effort to consolidate IP laws, however, the shroud of secrecy surrounding the TPP is not an encouraging sign. There is the general concern that the leaked terms of the TPP agreement will cause copyright laws to regress and destabilize the delicate balance between authors’ and creators’ rights to the public domain, thereby doing more harm than good.

The Sum of All Fears

On the eve of posting this blog, The Office of the U.S. Trade Representative (USTR) finally published the full text. Not surprisingly, we discovered that the TPP’s negotiation leaks were, in general terms, accurate. For example, the TPP includes a copyright term extension of 'not less than the life of the author and 70 years after the author’s death’ (Article 18.63(a) to the TPP) as predicted. Obviously, we should read the TPP thoroughly, however—as it seems—it is indeed what we all feared it to be.

Aviv Gaon is a PhD candidate at Osgoode Hall Law School