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TRANSATLANTIC TRADE PARTNERSHIPS AND THEIR CONSEQUENCES ON COPYRIGHT LAW: FROM GLOBAL TO REGIONAL

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To my Family

who always stays with me

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INTRODUCTION

Protection and enforcement of intellectual property law are fundamental to stimulate innovation and to compete in the global economy. Copyright law is not very involved in trade agreements, in which there is more space about other intellectual property rights, such as patents, geographical indications, protected designation of origin, trademarks, designs. By setting harmonized standards in copyright law, contracting States aim at reducing national discrepancies, ensuring the level of protection required to creativity and investments in production of new original works, promoting access to knowledge for users and business. The general purpose of harmonization through the negotiation of free trade agreements, among others in different fields, would be to enforce works protected by copyright law. It implies the necessary balance between the interests of right holders (in order to achieve a reinforced protection, including by extending the copyright term of protection) and users (by accessing copyright-protected works entered the public domain following the expiration of the term of protection). This equilibrium cannot be achieved by providing for an excessive extension of the term of protection of copyright, which risks distorting the copyright nature.

This research project concerns the rules provided in current trade negotiations about copyright law. Since the secrecy and lack of transparency of the trade negotiations, it has been difficult to reconstruct a precise path and background of specific language and wording of their provided rules. The reconstruction has possible thanks to leaked drafts and public statements. The result is that there are not many books and academic papers about this topic, by isolating it in academic studies.

The first chapter of this research project analyses the delicate transition from globalisation to regionalism. There is a challenge in the context of the trading system which comes from the phenomenon of globalisation versus regionalism, or centralism versus decentralization and, more precisely, in many questions concerning the compatibility and usefulness of many regional economic integration initiatives.

The presence of various Free Trade Agreements (known by the acronym *FTAs*) creates a potential conflict, which arises from the multitude of players and strategies

involved. The standards and rules laid down in the agreements that a given country concludes with its trade partners may well differ from one another.

This is the reason why this scenario has been defined as a "spaghetti bowl", in which there is the presence of free trade agreements, mega-regional agreements, microtrade agreements.

In the second chapter, there is the analysis of the Trade-Related Intellectual Property Rights Agreement (known by the acronym *TRIPS*), which provides a minimum standard of intellectual property protection and also with regards to the matter of copyright – contracting States are not obliged to intensify, in their own laws, more extensive protection than is required in the TRIPS.

In this panorama, the introduction of the Marrakesh Treaty represents an important novelty in copyright protection. The Marrakesh Treaty has been concluded to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled. It represents one of the few international instruments that make exceptions to copyright's exclusive rights.

The following chapter regards the text of many Mega-Regional Agreements and Regional Trade Agreements (known by the acronym *RTAs*) and their rules about copyright law, specifically in TPP and RCEP Agreements. This project aims to see how the balance between the business logic and the actual protection of copyright law is reached in transatlantic treaties and whether these two interests are proportionally satisfied. RTAs have the objective of creating a higher degree of integration, but actually they do not manage to do so as they are too many.

This systematic analysis of transatlantic trade combines a comprehensive analysis of the doctrinal and critical interpretations of intellectual property exhaustion with a comparative analysis of the copyright rules in Free Trade Agreements. The focus of this fourth chapter is the perspective of these agreements about the increase of the copyright term protection than the actual term. This purpose is achieved through a common "life of author plus 70 years" rule.

In the fifth chapter, the various theories about the optimal duration of copyright law are explained. Since there is a prevalent disagreement about the copyright term protection provided in the Trade Agreements, it would be necessary to propose a

reasonable alternative. Economic data, long-term projections, social values are used as cornerstone of these theories.

Finally, this research project concludes with my considerations on the impact of Free Trade Agreements and their implications on copyright law in today's globalized world.

The current copyright term protection in trade negotiations could represents a sort of misuse of right by the extension of the copyright term to "life of author plus 70 years" rule, maintaining proprietary control over individual digital distribution of copyrighted works is exceedingly costly, if even possible.

The use of the "Law and Technology" approach is also worth noting: through the investigation of the relationship between the legal world and technological innovations, we are able to find a key to better understand this international phenomenon and to predict its possible future directions.

Chapter I

FROM GLOBALISATION TO REGIONALISM IN INTELLECTUAL PROPERTY RIGHTS PROTECTION

"*What is the scope of regional variation in a system intended as universal?"*

M. KOSKENNIEMI (2003)

1.1 The Process from Globalisation to Regionalism: an Increasing Number of Free Trade Agreements and Regional Trade Agreements

The tectonic plates of the international trade world are moving.

The starting point has been globalisation, which is considered more than an intensified process of internalization.[1]

Globalisation is examined as that criticised process that integrates national economies into the international economic system through the development of trade, technology and investments.[2] Those evolutions involve fundamental change in all sectors and areas.

Since the presence of ambiguities about the advantages and risks of globalisation, the following has been stated about the phenomenon of globalisation:

> "*In normative terms, some people have associated 'globalisation' with progress, prosperity and peace. For others, however, the word has conjured up deprivation, disaster and doom. No one is different. All of us are confused*."[3]

This consideration suggests that the concept of globalisation has become commonplace, a sort of *cliché*, more than an answer to the world's current needs.

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[1] N.G. Canclini, *Cultural Policy Options in the Context of Globalisation*, in UNESCO, *World Culture Report,* 1998, pp. 157-159.
[2] C. J. Bhagwati, *In Defense of Globalisation: With a New Afterword*, Oxford, 2007, p.3.
[3] J. A. Scholte, *Globalisation: A Critical Introduction*, New York, 2000, p. 14.

It is described as a multidimensional phenomenon involving a tricky process of denationalisation of political and legal systems coupled with the change and the development of the world's economic system.

In this context, trade is the most commonly identified driving force behind globalisation and, in this sense, the last decade has clearly witnessed a significant reorientation of EU external economic relations.

Brexit has probably been the first sign of the current will to "de-globalise", but Mr Donald Trump's victory in the last US elections can be viewed as another sign of this phenomenon.

The American President conducted an electoral campaign, which was markedly against the Trans-Pacific Partnership Agreement (known by the acronym *TPP*) until he withdrew the US from TPP negotiations on 23 January 2017.[4]

This is the reason why this new-cross regionalism bears tremendous significance for the political and economic regulation of the world system, notwithstanding the uncertainty brought by Donald Trump's election.

A progress is urgently needed if we look at the current impasse of the World International Organization (known by the acronym *WTO*) in terms of a development of the rules for world trade.

Since those recent trade agreements allow the economic integration considerably and contain innovative elements, they are more than welcome: they will bring legitimate benefits for those who enters into the trade system.

In the last ten years a growing number of mega-regional trade agreements have been negotiated between countries.

Many agreements are currently being negotiated or in the process of ratification.

[4] Since Japan and a number of other TPP countries are still considering a TPP without the United States and since the agreement's conclusion and its provisions pertaining to the digital economy constitute an important watershed event in terms of treaty rule-making, it is still meaningful to discuss the relevant provision in more detail. See E. Meidinger, *Mega-Regional Trade Agreements and Global Environmental Governance: The Case of Trans-Pacific Partenership Agreement,* in *University at Buffalo School of Law Legal Studies Research*, Paper No. 38, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2943005, published on 31 May 2017, p. 16.

Like the agreements in force, most new negotiations are bilateral. There is a double level of negotiations.

On the one hand, there are regional trade agreements, which are defined as reciprocal trade agreements between two or more partners. They include free trade agreements and customs unions.

On the other hand, there are preferential trade arrangements (known by the acronym *PTA*s), which are considered as unilateral trade preferences.[5] They include the Generalized System of Preferences schemes (known by the acronym *GSPs*, under which developed countries grant preferential tariffs to imports from developing states), as well as other non-reciprocal preferential schemes granted by the General Council.

According to paragraph 5 of Article XXIV of the General Agreement on Tariffs and Trade (known by the acronym *GATT*), Member States can conclude preferential trade agreements, which have to be compatible with WTO law. This is the most favoured national principle (known by the acronym *MFN*).

This exception provided in Article XXIV of the GATT Agreement is the legal basis for the introduction of free trade agreements (both “mega” and “micro” trades) between EU and other countries.

In line with multilateral trade rules, PTAs have to respect many conditions, such as those provided in paragraph 8 of Article XXIV GATT, according to which the agreement has to substantially liberalise all trade between the contracting countries.

In explaining the proliferation of FTAs, some scholars have underlined that the sustained pace of FTA proliferation is puzzling and that this "rise of regionalism" may undermine the non-discrimination principle of the multilateral trading system.[6] But this seems to be only a partial reason of the drivers of FTA proliferation.

Other commentators note that it is fundamental to recognize how these different sets of trade agreements are interconnected in order to understand the rapid

[5] A. Panagariya, *Preferential Trade Liberalization: The Traditional Theory and New Developments*, in *Journal of Economic Literature* XXXVIII, 2000, pp. 287–331.
[6] A. Muller, *The Rise of Regionalism, Core Company Strategies Under the Second Wave of Integration*, (No. ERIM PhD Series; EPS-2004-038-ORG), Rotterdam, 2004, p. 15.

extension of FTAs;[7] they also consider that the analysis of the reasons of the rapid increase of FTAs is fundamental in order to examine both their impact on the WTO rules and their influence on the nature of regional integration.

FTAs can work for or against the emergence of coherent regional compromises.

Even in the Asia-Pacific region there is a need to subscribe these bilateral agreements on IPRs on a regional level.

The new changes in the Asia Pacific region seem to be remarkable. Until few decades ago many countries of this geographical area had no intellectual property rules or had laws that had deeply been revised since independence and that had been changed.[8]

In international law, over the past few years regional trades appear predominantly and it takes the role of a "rule" or a "principle".

According to a report of International Law Commission, there are three meanings for "regionalism" that refer specifically to international law and that should be considered as:

- a set of approaches and methods for evaluating international law: these regional treaties appear remarkable because they have lost their originally geographically limited nature and they can contribute to the development of international law;
- a technique for international law-making: regionalism as the method for approaching trade law;
- the pursuit of geographical exceptions to universal international law rules.[9]

This new regionalism has been defined as a trend in which:

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[7] M. Solìs, B. Stallings, S. N. Katada, *Competitive Regionalism: FTA Diffusion in the Pacific Rim*, in *International Political Economy Series*, United Kingdom, 2009, p. 91.
[8] C. Antons, R. Hilty, *Introduction: IP and the Asia-Pacific 'Spaghetti Bowl' of Free Trade Agreements*, MPI Studies on Intellectual Property and Competition Law 24, Berlin, 2015, p. 2.
[9] M. Koskenniemi, *Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law*, Report of the study group of the International Law Commission, Fifty-eight session, Geneva, 1 May-9 June and 3 July- 11 August 2006, pp. 102-115.

> "*Mega-regionals are deep integration partnerships between countries or regions with a major share of world trade and foreign direct investment (FDI). Beyond simply increasing trade links, the deals aim to improve regulatory compatibility and provide a rules-based framework for ironing out differences in investment and business climates*".[10]

The negotiation of RTAs is not a new phenomenon but the novelty is that now they are applied on a new scale, which has been defined as "*deep integration*".[11]

The concept of regionalism has been increased by economic liberalisation in RTA blocks; regionalism often occurs for competitive reasons and with the final aim of increasing not just regional but also global trade.

In particular, the negotiation of mega-regional agreements aims at increasing trade and investment on a bilateral or regional level but they have strategic significance for many reasons.

On the one hand, the EU and the U.S. aim to establish the centre of future global standards on issues such as trade in intellectual property, services, and investments.[12]

On this point, it's useful to quote the statement made by Sir John Kerry, U.S. Secretary of State during the Obama government, to explain U.S. interests to advance the negotiations on mega-regional trade agreements:

> "*Foreign Policy today is more than ever economic policy*".[13]

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[10] T. Hirst, *What Are Mega-Regional Trade Agreements*?, available at https://www.weforum.org/agenda/2014/07/trade-what-are-megaregionals/ , published on July 2014, last access February 2018.

[11] D. Cardoso, P. Mthembu, M. Venhaus, M. Verde Garrido, *The Transatlantic Colossus: global contributions to broaden the debate on the EU-US free trade agreement,* in *Berlin Forum on Global Politics*, Berlin, 2013, p. 55; L. Nilsson, *Trade Integration and the EU Economic Membership Criteria*, in *European Journal of Political Economy*, Vol. 16, No. 4, 2000, pp. 807–827.

[12] D. S. Hamilton, *America's Mega-Regional Trade Diplomacy: Comparing TPP and TTIP*, 49(1) *The International Spectator* 81, 2014, p. 84.

[13] U.S. Secretary of State Sir John Kerry, *Remarks at the APEC CEO Summit (Asia-Pacific Economic Cooperation CEO Summit)*, Bali, Indonesia, 7 October 2013.

On the other hand, contracting States, facing an international economic order that would be more challenging for them, wish to adopt such standards before other countries (such as growing economic countries like China) embrace the same strategy.

Other countries negotiate RTAs to complement their multilateral system or even because they think that the "multilateral-friendly" methods can help promote conjunction through RTA-driven or WTO-driven strategies.[14]

In this way, the regionalism strategy may lead to a comprehensive multilateral system.

Other factors which can facilitate multilateralization are debated and they include the interests of developing countries, the coherence with WTO agreements and international standards, the high degree of homogeneity, non-discrimination, liberal rules of origin (known by the acronym *ROO*) or lack of ROO, third-party most-favoured-nation or extension benefits, firm commitments (not best-endeavour), enforceable via dispute settlement, co-operation on implementation, significant trade creation effect, and a favourable political economy.[15]

The mega-regional trade negotiations are meant to transform the international economic order and also to develop geo-political goals.

The trade complex is expanding in three dimensions.

First of all, it is expanding institutionally. Until the early 2000s, the elemental components of the phenomenon were primarily intergovernmental organizations, regional customs unions, and bilateral agreements.

Recently, other institutional forms have proliferated, including plurilateral sectorial agreements (such as, the Anti-Counterfeiting Trade Agreement) and mega-regionals agreements. A complex system, including a plurality of institutions, involves important opportunities: it could favour incremental adaptation to a changing economic system.

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[14] K. Ash, I. Lejarraga, *Can we have Regionalism and Multilateralism,* in *Tackling Agriculture in the Post-Bali Context - A collection of short essays*, available at https://www.ictsd.org/sites/default/files/downloads/2014/07/part1-5.pdf , 2014, p. 76, in which they consider that "*multilateralizing regionalism is an intensely political question*".

[15] See OECD 2014°, *Deep Provisions in Regional Trade Agreements: How Multilateral-friendly? An Overview of OECD Findings*, in *Trade Policy Paper* No. 168, available at https://www.oecd.org/tad/policynotes/deep-provisions-regional-trade-agreements.pdf , 2014.

Secondly, the trade complex is expanding thematically. It is covering an increasing number of "WTO-extra" issues, such as data protection.[16]

Finally, it is expanding geographically. The number of countries negotiating simultaneously on several fronts is such that driving countries are progressively losing their strategic position, because of the income of other states (such as China).

Actually, the EU has not been alone in promoting this trend.

The EU had traditionally preferred the WTO as forum for further trade liberalisation and it has decided only in the last years to sign such PTAs.[17]

Since trade liberalisation has become more difficult under the WTO framework, some governments of developed countries, particularly the U.S., have used bilateral and regional trade debates to obtain what they couldn't in the multilateral WTO forum, namely the reinforcement of a high level of IP protection in developing countries.[18]

The main reasons why FTAs could be prejudicial for the WTO rules are the following.

Firstly, FTAs mislead attention and resources from multilateral liberalization strains under the WTO framework. In other words, if countries are negotiating FTAs, they may not be able to adhere to the commitments established with reference to WTO.

The gains obtained through FTAs may not be worth sacrificing WTO liberalization and excluding other countries from the bilateral agreements.[19]

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[16] H. Horn, P. C. Mavroidis, A. Sapir, *Beyond the WTO? An anatomy of EU and US preferential trade agreements,* The World Economy, 33(11), 2010, pp. 1565-1588.

[17] R. P. Merges "*Like a body building contest, two rival camps in international trade policy flex in their respective 'lats': the multilateral camp argues for continued use of general trade agreements that apply to many countries; the bilateral camp says we must form agreements with individual countries to maximize US interests*" in *Battle of Lateralism: Intellectual Property and Trade,* in *Globalisation and Intellectual Property*, available at https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2676&context=facpubs , Berkeley Law Scholarship Repository, No. 1, 1990, p. 51.

[18] J. Kuanpoth, *TRIPS-Plus Rules under Free Trade Agreements: An Asian Perspective*, in C. Heath, A. K. Sanders, *Intellectual property and Free Trade Agreements*, California, 2007, p. 2.

[19] M. K. Lewis called this phenomenon as 'me too effect', in *The free Trade Paradox*, in *21 New Zealand Universities Law Review*, 2005, p. 564; Lamy Bagalore used the term "bandwagon effect", in *Multilateral or bilateral trade agreements: which what to go?*, in *Speech to the 2007 Confederation of Indian Industries Partnership Summit 2007* (India, 17

Secondly, the large number of FTAs has eroded the significance of one of the WTO's nucleus principles, namely the most-favoured-nation treatment.[20]

Thirdly, to the extent that FTAs affect for liberalization in complex issues, it will be quite difficult to get States to agree to liberalizing these matters within the WTO context.

Last but not least, it will be difficult for the WTO to achieve consensus on issues relating to TRIPS flexibilities if the existing FTAs provide intellectual property protection rules beyond those mandated by the TRIPS agreement.[21]

The ensemble of the MFN clause and the principle of the national treatment in TRIPS means that all WTO members will have to comply with standards in FTAs that go beyond TRIPS (known as *TRIPS-plus* rules).[22]

One of the most important features of the WTO regime - including TRIPS – is that it commits contracting States to a process of constant review and negotiation.

Since many states started to negotiate large numbers of bilateral trade agreements, a sort of *trend* has developed which – together with many bilateral agreements that have been concluded for diplomatic or geopolitical reasons – has contributed to the existence of about 291 Regional Trade Agreements today, as we can see in the graph below.[23]

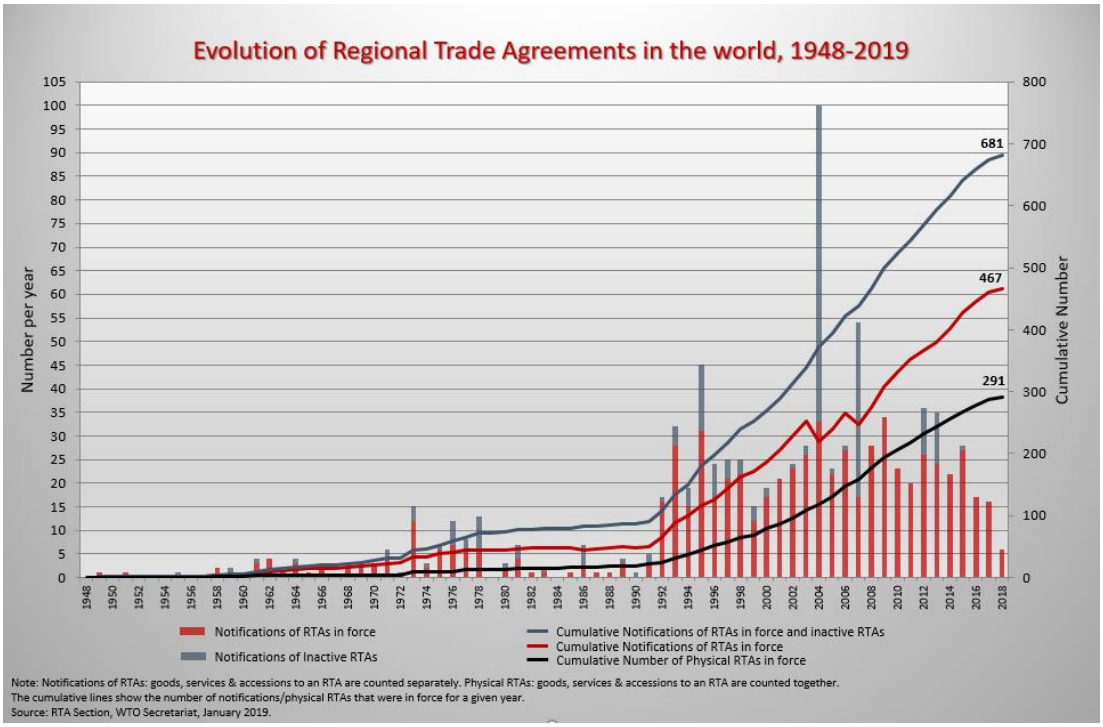
January 2007) accessible at <www.wt.org.>, last access 6 March 2018; in WTO it has been used the formula 'domino regionalism', World Trade Report 2003, p. 50.

[20] P. Sutherland, *The Doha Development Agenda: Political Challenges to the World Trading System – A Cosmopolitan Perspective,* 8 Journal of International Economic Law, 2005, p. 363, 366; T. Cottier, C. German, *Most-Favoured-nation treatment article 4*, in T. Cottier, P. Véron (eds), *Concise international and European IP law*, 2nd edn., Alphen aan den Rijn, 2011.

[21] T. Cottier, *From progressive liberalization to progressive regulation in WTO law*, J. Int. Econ Law, 2006, pp. 779-821.

[22] C. Antons, R. Hilty, *Introduction: IP and the Asia-Pacific 'Spaghetti Bowl' of Free Trade Agreements*, cit., p. 3.

[23] D. S. Hamilton, D. S. Hamilton, *America's Mega-Regional Trade Diplomacy: Comparing TPP and TTIP,* cit*.,* p. 85; J. D. Wilson, *Mega-Regional Trade Deals in the Asia-Pacific; Choosing between the TPP and RCEP*?, 45(2) *Journal of Contemporary Asia*, 2015, pp. 345-6; see also T. Cottier, *The Common Law of International Trade and the Future of the World Trade Organization*, 18 *Journal of International Economic Law*, 2018, pp. 3-20.



Source: WTO Secretariat[24]

International agreements involve several areas: agriculture, SPS (Sanitary and Phytosanitary Measures), export restrictions, trade facilitations, services, labour mobility, e-commerce, investment, competition, intellectual property rights,[25] government procurement, transparency, anti-corruption, and the environment.[26]

There is nothing genuinely new about any of FTA provisions: all those topics and matters have been incorporated from or modelled in line with WTO law.

The novelties of the current trade agreements are: the combination of these elements within one agreement; the economic power of the trading countries involved; the high level of ambition with regard to the scope of the agreements.

[24] See https://www.wto.org/english/tratop_e/region_e/region_e.htm#facts, last access on 12 April 2019.

[25] K. Maskus, *The New Globalisation of Intellectual Property Rights: What's New This Time*?, in *Symposium on Globalisation: Past, Present and Prospects,* No. 54, Issue 3, 2014, pp. 262-284.

[26] D. McNeill, P. Barlow, C. Deere Birbeck, S. Fukuda-Parr, A. Grover, T. Schrecker, D. Stuckler, *Trade and Investment Agreements: Implications for Health Protection*, *51 Journal of World Trade Issue* 1, 2017, pp.159-182.

In this framework the rules on protection of intellectual property rights begin to be included in trade negotiations: right holders, in order to protect their intellectual property rights, began to demand their domestic laws to put an end to this lack of protection.

The inclusion of IPR rules in FTAs would be necessary for many reasons.

Firstly, IPRs constitute a cost factor: for instance, the license to use a patent belonging to someone else has a price which influences the sales price of the products.

If countries didn't grant an IPR protection system, products and goods would be marketed without an additional cost and would be more competitive against the imported goods that shoulder the cost of license.

Secondly, some provisions on the enforcement of IPRs in a country, especially when goods are imported. For instance, procedural barriers may damage economic system, by creating conditions that are less favourable than those of national products and impede parallel imports that could raise price competition.

Since the protection of IPRs adopts the principle of territoriality, without a specific treaty provision a country is generally free to define or enforce its own level of protection and does not have to recognize rights that are protected in other states.

This rule is valid as far as its national law or international treaty law does not impose different or specific conditions.

Most IPRs are considered as "trade-related", as I will explain in the next chapter, because their content and their enforcement influence the conditions of trade.[27]

Two different approaches on the inclusion of intellectual property rights provisions in FTAs can be defined: i) many FTAs do not provide totally or very few provisions on intellectual property rights with substantive content;[28] ii) many FTAs provide entire chapters on intellectual property issues.[29]

The are many examples of FTAs.

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[27] K. Maskus, *Trade-Related Intellectual Property Rights*, in M. Daunton, A. Narlikar, R. M. Stern, *The Oxford Handbook on The World Trade Organization,* Oxford, 2012, p. 135.
[28] C. Antons, D. Papillai, *An Overview of Free Trade Agreements in the Asia-Pacific Region with a Particular Focus on Intellectual Property,* in *Intellectual Property and Free Trade Agreement in the Asia-Pacific Region*, Berlin, 2015, pp. 43-45.
[29] Ibidem, pp. 47-49.

The Transatlantic Trade and Investment Partnership (known by the acronym *TTIP*) is still on the negotiating table between the EU and the U.S. TTIP would remove tariffs, reduce restrictions on investments and cut red tape. This would make it easier for European companies to export goods and services to the U.S. and also for them to invest in the American area. It involves also U.S. companies wanting to export or invest in European market.

Some commentators critically argue that TTIP would ruin what can be ruined; furthermore, as concerns food law, while the EU has an impressively alliterative "farm to fork" approach, regulating each link in the food area, under American law animals can be injected with growth-promoting hormones banned in the EU.[30] For this reason, most US food would not be able to be sold in the EU at the moment.

There are some scholars who sustained that Brexit may undermine the determination of those more committed EU states to negotiate TTIP agreement in the interest of European cohesion.[31]

The Trans-Pacific Partnership (known by the acronym *TPP*) is aimed at creating a free trade zone with common labour and environmental standards, and measures to protect the data and intellectual property of multinationals.[32]

It involves twelve countries from across the Pacific Rim: Japan, the U.S., Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore

[30] S. Jeffrey, *What is TTIP and why should we be angry about it?,* The Guardian, published on 3 August 2015, available at https://www.theguardian.com/business/2015/aug/03/ttip-what-why-angry-transatlantic-trade-investment-partnership-guide.

[31] *J. Xianbai, Brexit Makes 'TTIP More Important: The Bilaterial Accord Could Morph Into a U.S.-EU-UK Agreement',* in *Global Trend, 2016*. He said that "*Brexit reinforces the already strong centrifugal forces within the EU, throwing the unity (or even the existence) of the 28-nation bloc into doubt. However, the departure of the UK—a half-hearted member which does not share much of the founding visions of the EU—could also make it easier for the remainder of the EU to stay united, think strategically, and act decisively*". The article is available at http://www.globaltrademag.com/eu-trade/brexit-makes-ttip-important.

[32] It has been called as "a "*twenty-first century" trade agreement that would match contemporary global trade better than the mercantilist and bricks-and-mortar WTO Agreements*", in C. Barfield, *The Trans-Pacific Partnership: A Model for Twenty-First-Century Trade Agreements?, International Economic Outlook 2*, American Enterprise Institute, 2011.

and Vietnam. On 23 January 2017 President Trump delayed the TPP because he has always considered this agreement as a threat to the American economy.[33]

The U.S. withdrawal from TPP agreement began a series of geopolitical consequences and recalculations throughout Asia.

The U.S. choice has been considered a political advantage for China and it has led countries, like Japan, to worry about losing its position on the international scene.

The newly Comprehensive Economic and Trade Agreement (known by the acronym *CETA*) entered into force on 21 September 2017.

The CETA should remove barriers for EU firms wanting to invest in Canada, ensure all European investors in Canada are treated equally and fairly, improve the investment climate.

It also should offer more certainty to investors by not discriminating between domestic and foreign investors or not imposing new restrictions on foreign shareholdings.[34]

The Regional Comprehensive Economic Partnership (known by the acronym *RCEP*) is a proposal for a regional free trade area in central Asia, which would initially include the ten Asian member states and those countries, which have existing FTAs with ASEAN – Australia, China, India, Japan, Republic of Korea, and New Zealand. The negotiations of this agreement led to define the issue of a "noodle bowl" of bilateral agreements to link the new concerns and additional benefits from regional liberalization.[35]

The global focus of the agreements is highlighted, both in geographical terms and in terms of trade perspectives, both political and strategic initiatives. In this sense,

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[33] By contrast, the Office of the United States Trade Representative (USTR) describes the Trans-Pacific Partnership (TPP) as a vehicle to promote "*innovation, productivity, and competitiveness by addressing new issues, including the development of the digital economy*.". See USTR, Summary of the Trans-Pacific Partnership Agreement, available at <https://ustr.gov/about- us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership>, accessed 20 June 2016. The Obama Administration has described TPP as a "*cardinal priority and a cornerstone of [its] Pivot to Asia*".

[34] C. Deblock, M. Rioux, *From Economic Dialogue to CETA: Canada's Trade Relations with the* European Union, 66(1) Journal of International Economic Law 39ff, 2010-2011, p. 41.

[35] J.N. Bhagwati, *U.S. Trade Policy: The Infatuation with FTAs*, Columbia University, Discussion Paper Series No. 726, New York, 1995, pp. 2-3.

a regional trade in the Asia-Pacific axis is been added in a network of cross-agreements.

Most of FTAs have limited tariff coverage, numerous and significant exceptions, very long transitional periods, with wide and significant internal barriers.

They have effects on regulatory convergence, taking into maximum account the national interests of the contracting states.

The catalytic effect of these agreements on trade in goods and also in investments is decisive, given the scale of the flows at stake and the economic relevance of the actors.

In particular, the TTIP and CETA agreements – together with the rival project of RCEP – stand out as mega-regional trade agreements from this rising spate of bilateralism and regionalism.

With regards to TTIP, tariff barriers are very low and it was estimated that the EU economy will grow by some € 120 billion and the U.S. economy will grow by some € 90 billion annually.

The TTIP contracting States would account also for a combined GDP of $ 34 trillion, goods and services exports of about 6 per cent of world exports, and FDI flows of about 16 per cent of world outward investment.

From another point of view, CETA would boost the Canadian economy by $ 12 billion annually and bilateral trade by 20 per cent, that is the economic equivalent of adding almost 80,000 new jobs to the Canadian economy.[36]

We can also consider that the three mega trades, TTIP, TPP and RCEP, represent over ¾ of global GDP and 2/3 of world trade.[37]

With regards to the economic impact of the RCEP on contracting states, India's business advantages are worth mentioning.[38]

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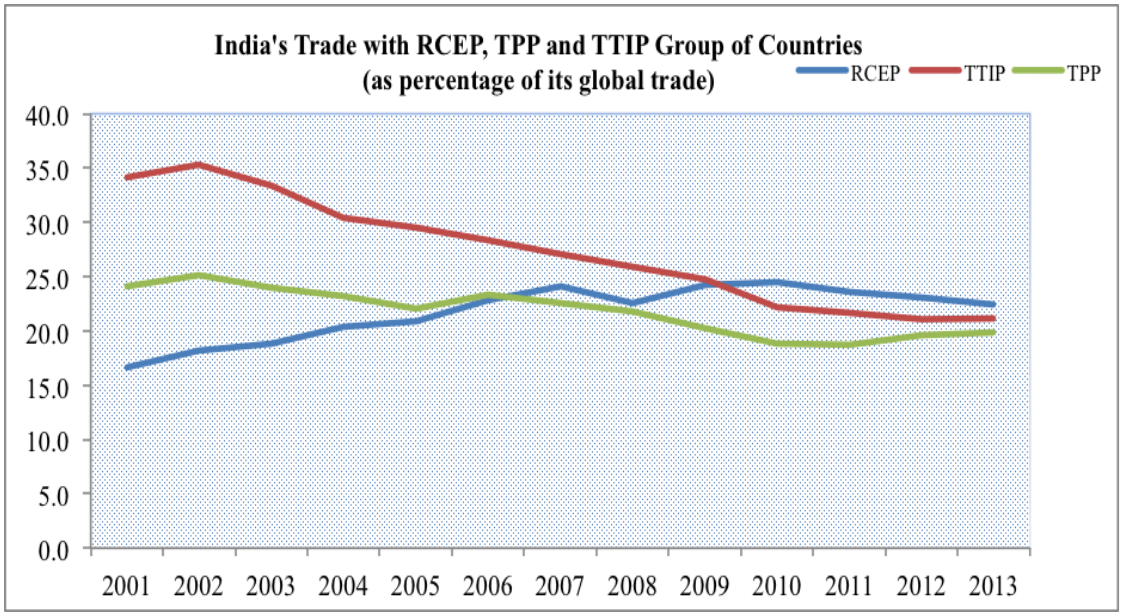
[36] The Canadian Trade Commissioner Service, *CETA expected to increase EU investment in Canada,* available at the following URL, https://www.tradecommissioner.gc.ca/canadexport/0002128.aspx?lang=eng&_ga=2.911397 3.1557561046.1555159617-1160185737.1491316725, last access on 12 April 2019.

[37] S. Griller, W. Obwexer, E. Vranes, *Mega-Regional Trade Agreements: CETA, TTIP, and TISA: New Orientations for EU External Economic Relations*, in *International Economic Law*, 2017, p. 132.

[38] See S. Kumar, *India's Trade Potential and Free Trade Agreements: A Stochastic Frontier Gravity Approach*, in *Global Economic Journal, 2017.*



Source: International Trade Centre's Trade Map Database, 2014[39]

There are three immediate benefits that RCEP policymakers should highlight referring to India.

Firstly, the RCEP agreement would combine India's existing free trade agreements with the Association of South East Asian Nations and some of its member countries, as Japan and South Korea.

According to some authors, the overlapping of this "noodle bowl" obstructs the effective utilization of the FTAs.[40]

This is mostly important because India is not a member of two important regional economic blocks: the Asia-Pacific Economic Cooperation and the Trans-Pacific Partnership. For this reason, the RCEP would enable India to strengthen its trade ties with Australia, China, Japan, and South Korea, and would reduce the potential negative impacts of the TPP and TTIP on the Indian economy.

[39] B. Chatterjee, S. Singh, *Why RCEP is vital for India,* in *The Diplomat,* 3 February 2015, available at https://thediplomat.com/2015/03/why-rcep-is-vital-for-india/, last access on 12 April 2019.
[40] Ibidem.

Secondly, since Asia is considered the world's throbbing heart, the RCEP will allow India's integration into one of the most important production networks.

The RCEP wants to harmonize trade-related rules, India's investment and competition rules, with those of other contracting States.

Through national policy reforms in these areas, this harmonization of rules would help Indian companies into regional and global relationships and would open the true potential of the Indian economy.[41]

Lastly, India would have a comparative benefit in some areas, such as information and communication technology, healthcare and education services.

In order to increasing foreign investments, the RCEP would increase opportunities for Indian companies to access new international markets.

It is fundamental for India to ensure that the RCEP is truly comprehensive and does not just focus on market access for goods. Through these benefits, India will need second-round reforms of its national business systems and market factors, to make its economy more competitive. These reforms will help India achieve better access to other markets and will relieve some potential threats posed to its economy by the other mega-regional agreements.

However, since the multitude of trade agreements, the concern is whether the different agreements would create conflicting obligations or precipitate the event that has been described as a "battle of the FTAs".[42]

For example, there has been a conflict between TPP (as said, recently delayed by Mr. Trump) and RCEP concerning the different leaderships involved.

While the TPP features the leadership of the United States, and now perhaps Japan, many policymakers and commentators consider that RCEP entrusts the leadership role to China.[43]

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[41] C. Li, J. Wang, J. Whalley, *The Economies of China and India: Cooperation and Conflict***,** 2017, pp. 175-194.

[42] P. K. Yu, *Sinic Trade Agreements*, 44 UC Davis L Rev 953, 2011, pp. 1011–1013.

[43] M. Du, *Explaining China's Tripartite Strategy Toward the Trans-Pacific Partnership Agreement,* 18 *Journal of International Economic Law* 408, 2015, p. 410; K. M. Campbell, *The Pivot: The Future of American Statecraft in Asia,* New York, 2016, p. 267; he stated that the conflicts between the TPP and the RCEP will make Asia as "*a vital battleground in setting the rules of the global economic order"*.

1.2 General Background of Free Trade Agreements about Intellectual Property Rights: from GATT to New Regional Trade Agreements

The global proliferation of RTAs started in the early 1990s and marked the beginning of a sort of anti-globalisation movement.

The initial RTA approach of the United States and the European Union was represented by negotiating agreements with different partners and combining many laws beyond simple import tariff barriers that had been the focus of the GATT and the WTO.

While many of the world's most industrialized and wealthy nations pushed to establish and globalize minimum IP law standards by linking international discussions about IP to international trade debates, a group of ten developing countries raised forceful protests.[44]

They objected to the linking of trade and intellectual property. Their concerns involve the effects of obliging developing nations to strengthen and enforce IP laws that were inadequate for their national conditions and short-term interests.

Representatives of these developing countries have often claimed that the presence of an unfair trading rules system is an obstacle to the grant of other rights.

They doubted about the inaccessibility of technology and import certification standards. The feeling that the trading system was unfair was also grounded in the vast disparities in levels of income and development between States.

Despite these protests, the multilateral IP negotiations was moved from the Geneva-based World Intellectual Property Organization (known by the acronym *WIPO*) to the 1986-1994 Uruguay Round of negotiations for the GATT.

The origins of GATT, the predecessor of the WTO, were born during a post-war international economic phase.

The major reason for these international agreements was to avoid the protectionism and trade wars of the 1930s.

[44] Countries such as Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania, Yugoslavia.

Its *ratio* was that open markets and global competition in international trade benefit the national welfare of all contracting States.[45]

The consequences of GATT were the following: the creation of the WTO; the drafting of TRIPS in 1986; the metamorphosis of IP law into a trade perspective.

The historical framework was, on one side, the industrialization as the key stimulating factor behind a country's accession to the WIPO conventions and, on the other side, the process of colonization as another important impulse behind the early spread of intellectual property law throughout the world.

The process of internationalization of intellectual property rights started at the end of the 19th century with the adoption of two ground-breaking international conventions: the Paris Convention on the Protection of Industrial Property in 1983 and the Berne Convention on the Protection of Literary and Artistic Works in 1886.[46]

The mentioned conventions aim at granting the same level of protection to contracting parties and preventing the imitation of works and the foreign free riding of trademarks, copyright materials, and patented works.

These treaties established the minimum standards of IP rules and they apply the principle of national treatment that requires contracting countries to guarantee to citizens of the signatory parties the same level of intellectual property protection as ensured by their own citizens.

An example is represented by the U.S. Copyright Act 1790 which protected only authors living in the United States while U.S. publishers frequently ignored United States copyright during the 1800s. By the mid-1980s the United States became a mass exporter of copyright-protected works, such as software.

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[45] In 1965 a new section was included in the GATT entitled "On Trade and Development".

[46] A new era in the international IPR system generated also other important acts: the Rome Convention for the Protection of Performers, Producers or Phonograms and Broadcasting Organizations in 1961 and in the same year also the International Convention for the Protection of New Varieties of Plants (UPOV); the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration in 1967; the Patent Cooperation Treaty in 1970; the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms in 1971; the Brussels Convention relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite in 1974 and three years later the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure.

When the Berne Convention has been signed in 1989, the United States represented a good example of a country whose national interests had changed with time and whose membership of international IP treaties evolved to satisfy its transforming needs.[47]

While the Berne Convention has an annex dealing with the special rights of developing countries, the Paris Convention does not provide such preferential provisions. Those rules represent a crucial subject of the Uruguay Round negotiations.

Since the increasing use of knowledge and technology became a decisive area, developing states demand for different levels of IPRs protection.

The pressure on previously abstaining countries to accede to Paris, Berne and other WIPO Conventions has also been a reason or result of them obtaining WTO membership. When the WTO was created in 1995, the GATT was included among its agreements.

The WTO is considered an icon of trade globalisation.[48]

Global economic development requires the adoption of common standards and safeguards, mostly when the consequences of trade expansion and economic integration may be negative.

Since trade liberalisation has advanced, developed states began to regulate non-trade matters.[49] An increasing number of new matters became a subject of discussion under discussion and the subjects of multilateral agreements.

Since tensions have risen between national regulations and free markets, the WTO has been faced with "trade linkage" or "trade-related" problems.[50]

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[47] It's important to note that, since this Convention - which has been the first multilateral copyright statute - was a harmonization of different national and bilateral agreements, it only contained "minimum" standards likely to be acceptable to a sufficiently large number if states a strong group of such states. The majority of developing countries were not among the negotiating countries. This explains why their national systems were not taken into account.

[48] A.J. Lodge, *Globalisation: Panacea for the world or Conquistador of International Law and Statehood?,* in *7 Oregon Review of International Law*, 2005, p. 224.

[49] M. Wolf, *What the World Needs From the Multilateral Trading System*, in G.P. Samspon (ed), The Role of the World Trade Organization in Global Governance, 2001, pp. 183-186.

[50] D. Leebron, *Linkages,* in *96 American Journal of International Law*, 2002, p. 5; J. Shi considers that those problems occur when the competing objectives are only about trade protectionism, since liberalisation generally trumps protectionism in the absence of other considerations, in J. Shi, *Free Trade and Cultural Diversity in International Law,* in *Studies in International Trade Law*, 2013, p. 5.

The relationship between free trade agreements and state regulations has been calculated as a zero sum game: if one is pushed too far, any benefit for one is likely to come at a cost for the other.[51]

One of the important goals of the global trading system involves the harmonization of the regulatory standards and rules at national and international levels.

In order to reconcile the contrast between trade and culture, notwithstanding the differences in trade rules resulting from the different levels of integration, it is noteworthy that the nature of trade rules combining with the essential role of judicial institutions facilitate case-law evolution, which creates a fertile area for the hermeneutic birth of different trade regimes.

It concerns the "constitutional" dimension of the relationship between free markets and state regulation.

Jackson has defined this element as a "trade constitution", which represents a

> "*Very delicate mix of economic and governmental policies, political constraints, and above all an intricate set of constraints imposed by a variety of rules or legal norms in a particular institutional setting*".[52]

Recently, there has been a convergence of case-law concerning how to address the clash between free markets and state regulation.[53]

In the past, the orientation of trade tribunals was inclined to emphasise doubts such as whether certain exceptions were so necessary as to take precedence over free trade standards. They also condemned a rule of national law when it couldn't be qualified for an exception.

On the contrary, now trade courts tend to focus on whether a State has attempted to comply with and implement its trade obligations in good faith. They are

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[51] S. Cho, *Free Markets and Social Regulation: A Reform Agenda of the Global Trading System*, 2003, p. 2.

[52] J.H. Jackson, *Reflections on International Economic Law,* University of Pennsylvania Journal of International Economic Law, No. 17, 1996, p. 25-28; J.H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, II eds., 1997, p. 339.

[53] About the role of judicial bodies in trade matters, see S. Cho, *Free Markets and Social Regulation: A Reform Agenda of the Global Trading System*, cit, p. 89.

also inclined to maintain such legislation intact and prefer concentrating on its application.

Based on the phenomenon of the convergence, a uniform set of rules or "legal references" has been invoked as the remedy to reconcile the clash between free markets and state regulation, independently from the treaty it is involved with.[54]

It may be considered a "law of trading notions". This notion has been conceptualised as the *jus gentium of international trade*, as a system of general legal rules that can be applicable to all trade systems in addressing the relationship of trade and regulation.

This new *jus* attempts to crystallise general principles of trade laws and could be used to enhance the predictability of trading systems as a whole.

In the hierarchy of the sources of law, it could be considered as a *jus cogens of international trade*.[55]

From an historical point of view, intellectual property rights responded to local needs since they constitute a territorial right.

The global ratchet for intellectual property consists of waves of bilateral (as seen, beginning in the 1980s) followed by occasional WTO multilateral standards-setting, such as TRIPS.[56] TRIPS Agreements constitute a major step in a long process of internationalization of the IPR protection.

The WTO includes elements of a free trade and market-driven goal, nowhere "free trade" is cited as an ultimate goal.[57]

Free trades would be unthinkable to reintroduce the era of escalating trade protectionism, even if many scholars may consider WTO as the most powerful trading system currently in force.[58]

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[54] S. Cho, ibidem, p. 180.
[55] S. Cho, ibidem, pp. 175-193.
[56] W. Belanger, *U.S. Compliance with the Berne Convention,* 3 Geo. Mason L. Rev. 373, 1995; the author notices that changes in global trade have led to international protections for intellectual property.
[57] R. Baldwin, *The World Trade Organization and the Future of Multilateralism,* in *Journal of Economic Perspectives*, 2016, p. 112.
[58] A. J. Lodge, *Globalisation: Panacea for the World or Conquistador of International Law and Statehood?,* cit. pp. 300-301.

While WTO and its universal membership certainly is the most known and relevant part of the world trade order, it has always be accompanied by a considerable number of "bilateral", "regional", "free" or "preferential" trade agreements (PTAs).[59]

The conclusion of the WTO Agreement on TRIPS in 1994 was seen as a breakthrough in this discussion.[60]

This negotiation brought the IP topic to the attention of industrialized economies with considerably higher protection standards and, for the first time, an agreement included a chapter on IP enforcement.

The TRIPS Agreement incorporated substantive standards of the Paris and Berne Conventions and provided additional protection, for example by introducing procedural rights relating to the registration of IP law in domestic law.

Many developing countries did not support the TRIPS Agreement because they were not major stakeholders of such property; they feared increased costs and reduced access to technology transfers.[61]

The debate about IPR protection in the Uruguay Round has been the result of divergent views on the methods and goals involved in the promotion of the technological progress of national countries.

Developed states and American companies adopt an "appropriation" view: they consider that the transfer of resources from the community is fundamental to the main characters of technological development and consequently the total social welfare is due to increase proportionately.

On the contrary, developing countries adopt a "redistribution view": they tend to subordinate the protection of IPRs to many own goals of "national development".[62]

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[59] They often are called PTAs to mean those agreements, which deviate from the principle of most-favoured-nation treatment and provide for preferences among their parties.

[60] Developed countries proposed other ambitious instruments, such as the Trademark Law Treaty in 1994, the WIPO Copyright Treaty in 1996, the WIPO Performers and Phonograms Treaty in 1996; the Patent Law Treaty in 2000.

[61] Harvard economist Jeffrey Sachs stated that "*the system of intellectual property rights must balance the need to provide incentives for innovation against the need of poor countries to get the results of innovation*", see J. Sachs, *Helping the World's Poorest,* in *The Economist,* August 1999, p. 17-20.

[62] On this point Professor Bercovitz stated "*The developed countries view patents as an instrument for technological progress at world-wide level, whereas the developing countries assign to them the same end purpose as did the developed countries themselves at the prior*

Since such preferential rules must be compatible with the Paris and Berne Conventions, States are not free to create a new treaty.[63]

Largely ignored by international academics, the IP issue was considered as an appendix to domestic law.

The WIPO produced subsequent amendments to the Paris and Berne Conventions and new Treaties opened for signature on IP standards.

The effect has been globalisation through intellectual propertization.[64]

Bilateral intellectual property and investment agreements are part of a process that is globalizing IP provisions very quickly.

The two actors responsible for this process are the United States and the European Union.

This process depends upon coordinated bilateral and multilateral IP strategies.

The United States and the European Union change the standard-setting agenda towards a topic in which they are likely to succeed: the inclusion of a principle of minimum standards in international agreements.

In this context, economic globalisation follows the path of trade agreements, which allows the process to arise rapidly and efficiently.[65]

It introduced, as I will explain in the following chapters, a drastic change in IPR law and their enforcement, since it established a minimum standard of protection that all WTO countries are obliged to comply with and there is less space available to developing countries to adapt IPR rules to their needs.

While developing countries were hoping that they had agreed to standards that would provide the maximum level of protection, the industrialized economies

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*stage in their industrial development, namely to stimulate national technological and industrial prog*ress", see A. Bercovitz, *Historical Trends in Protection of Technology in Developed Countries and Their Relationship to Protection in Developing Countries,* 1988, p. 28.

[63] W. M. Munchen, *GATT and Intellectual Property Rights – The International Framework*, in *Liberalization of Services and Intellectual Property in the Uruguay Round of GATT,* Proceedings of the Conference on "The Uruguay Round of GATT and the Improvement of the Legal Framework of Trade in Services", 1989, p. 65.

[64] J. Braithwaite, P. Drahos, *Global Business Regulation,* Cambridge University Press, 2000, p.18.

[65] A. J. Lodge, *Globalisation: Panacea for the World or Conquistador of International Law and Statehood?,* cit., p. 271.

recognized many gaps and much inadequate rules in TRIPS.

This is the reason why many developed countries have strategically moved to other bilateral agreements.

Since a revision of the TRIPS agreement would take too much time, any further reform of international rules on IPRs could be useful after an assessment of the development impact of the newly proposed rules.

The risk is that governments may be inclined to accept and adopt higher standards of IPRs in exchange for trade concessions in other sectors, but the potential trade benefits they may obtain may be satisfied by the long-term impact of high IPR standards protection.

The WTO has intervened in the area of intellectual property rights, creating an area of growing global concern.

With the TRIPS, intellectual property rights are integrated into the multilateral trading system for the first time.

With the adoption of the TRIPS Agreement, the WTO has taken a central role in the process of internationalization of IPRs.

When it became clear that the current Doha round of WTO negotiations would not help in this regard, the governments of developed nations began to shift the discussion back to the bilateral level and to include norms and chapters related to IP law into bilateral free trade and partnership agreements.[66]

The need of the negotiations of mega-regionals agreements was born from the stalemate, which the Doha Round of trade negotiations among WTO membership has been suffering for several years.[67]

This round was launched in 2001 and was intended to reform the WTO system by lowering trade barriers and amending trade rules. It got stuck early in particular due to the complexity of its topics, antagonistic interests, and the WTO's consensus-based decision-making process.

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[66] J. Bhagwati, *Termites in the trading system: how preferential agreements undermine free trade*, New York, 2008.

[67] M. Duncan, *Negotiating the IP Chapter of an EU–U.S. Transatlantic Trade and Investment Partnership: Let's Not Repeat Past Mistakes*, in *IIC – International Review of Intellectual Property and Competition Law*, No. 44, Issue 5, 2013, pp. 491–493.

In turn, this has contributed to undermining the credibility of the WTO, both as regards its substantive disciplines and its role as global negotiation forum.

These developments have been seen also as contrasting sharply with the importance of international trade in services.

Many non-tariff barriers result from different domestic risk preferences and national regulatory cultures. The discussions on such initiatives have shifted to the regional context.[68]

The current trend towards mega-regional trade initiatives would meet the expectations that were not fulfilled by the WTO Doha Round.[69]

Many commentators have defined the Uruguay Round as a "failed multilateralization".[70]

There was the risk that this need of a multilateralization of IPR protection could restore a unilateral interpretation of many principles and rules included in the traditional regime of IPR protection, such as those provided in the Paris and Berne Conventions.

The remedies for this new multilateral scenario were found in the artificial uniformization of IPR protection standards, with disregard for the actual differences in the level of development of national countries.

Another consequence had been the imposition of all obligations on countries, while all rights would remain with the right holders. The balance between economic costs and social needs involved in the exercise of monopoly rights would be in danger.

The real point behind the negotiations should be the freedom to adopt IP regimes according to the development interests of individual state as an obligation to follow strictly international rules, which may take into account such interests.

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[68] G. C. Hufbauerand, C. Cimino-Isaacs, *How Will TPP and TTIP Change the WTO System*?, 18 Journal of International Economic Law 681ff, 2015.

[69] A. L. Stoler, '*Will the WTO have Functional Value in the Mega-regional World of FTAs?*, E15 Expert Group on Regional Trade Agreements and Plurilateral Approaches, World Economic Forum, December 2013.

[70] P. R. de Almeida, *The New Intellectual Property Regime and Its Economic Impact on Developing Countries*, in *Liberalization of Services and Intellectual Property in the Uruguay Round of GATT,* Proceedings of the Conference on 'The Uruguay Round of GATT and the Improvement of the Legal Framework of Trade in Services', 1989, p. 84.

This is true since the balance between the temporary monopoly granted to inventors in order to allow them financial awards and the competing interests of assuring the distribution of technological advances has always been a competence of national states, taking into account their level of technological development.

This balance is being turned in favour of a multilateral system involving minimum standards of IP protection.

This is the reason why, in addition to these negotiations within the WTO, developing countries have been facing - beginning in the 1980s - increasing waves of bilateral negotiations from both the U.S. and the EU on intellectual property.

Even if developing countries have the relevant intellectual property know-how, their real bargaining power in a negotiation in which they are seeking access to U.S. or European markets is limited.

Many government officials even concede that multilateral liberalization is the best and most important way to liberalize, with bilateral agreements as the second best option.

Government statements often emphasize the potential for FTAs to serve as "building blocks" that hinder the WTO's ability to achieve the organization's multilateral liberalization goals.[71]

The current inability to achieve progress in the WTO has persuaded its members to seek advances in trade liberalisation through small "coalitions of the willing".[72]

Bilateral trade and mega-regionals agreements are often analysed with metaphors borrowed from mechanics, like "building blocks", "bicycle theory",

[71] R. B. Zoellick, *Unleashing the Trade Winds: A Building-block Approach*, available at https://www.economist.com/by-invitation/2002/12/05/unleashing-the-trade-winds, published on 3 May 2007, last access on 7 March 2018; P. Tumbarello, *Are Regional Trade Agreements in Asia Stumbling or Building Blocks? Implications for the Mekong-3 Countries*, IMF Working Paper, No. 07/53, March 2007.

[72] P. T. Stoll, *Mega-Regionals: Challenges, Opportunities and Research Questions,* in *Mega-Regional Trade Agreements,* Berlin, p. 4.

"parallel tracks", "stumbling stones", "domino theory", "gravity models", "ratchet effect".[73]

This means that those agreements have been created independently from one another.

Some commentators do not think that these metaphors are right.[74]

They prefer using metaphors from the field of ecology when referring to the "work in progress" TTIP negotiations. Trade agreements can be seen as "living organisms" or as a "living agreement".[75]

It means that those agreements are the direct result of earlier generations of agreements and they evolve constantly over their life span as they face with other institutions.

They constitute an intertwined ecology, known as the "trade and investment regime complex".[76]

The "eco-systemic" metaphor has its limits: thriving institutions are those that learn from and adapt to their changing environment even when under the pressure of institutional competition.[77]

PTAs largely fail to correct the balance, because of successful lobbying by industries of developed countries and a willingness of developing countries to propose higher levels of protection in return for other market access rights and opportunities under the PTAs.

PTAs are clearly becoming more complex and more economically and politically important.

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[73] S. Meunier, J.F. Morin, *No Agreement is an island: Negotiating TTIP in a Dense Regime Complex,* in J.F. Morin, T. Novotnà, F. Ponjaert, M. Telò, *The Politics of Trade Negotiations: TTIP in a Globalized World,* London, 2015, p. 173.
[74] S. Meunier, J. F. Morin, ibidem*,* p. 174.
[75] K. De Gucht, *Transatlantic Trade and Investment Partnership: Solving the Regulatory Puzzle,* available at http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151822.pdf, published on 10 October 2013, last access 9 April 2018.
[76] A. Orsini, J. Morin, O. Young, *Regime Complexes: a buzz, a boom, or a boost for global governance?*, in *Global Governance*, 19(1), 2013, pp. 27-29.
[77] K. W. Abbott, J. F. Green, R. O. Keohane, *Organization Ecology and Organizational Strategies in World Politics,* Discussion paper No. 57, Cambridge, 2013.

This is the reason why the term "mega-regionals" refers to many of those treaties in which there is the remarkable combination of ambition and trade coverage, such as the CETA[78], the TTIP[79] and the TPP[80].

They head for a "deep" integration with the standards provided in the WTO.[81]

Those agreements contain a number of rules and standards, which are more advanced than those envisaged by the WTO and that we could speak of as "WTO Plus" elements.[82]

The U.S. and some other developed countries have apparently changed their negotiation strategies by shifting the forum of negotiation from multilateral to bilateral and regional. Those countries are aware that it is difficult to swiftly implement their trade agenda on a multilateral level.

Under FTAs developed countries trade negotiators can easily manage to set benchmarks with respect to all their trade objectives that would be difficult to achieve in WTO negotiations.

According to such bilateral free trade agreements, the U.S. offers certain developing countries concessions in fundamental trade areas, like agriculture; other

[78] CETA has been entered into force provisionally on 21 September 2017.
[79] TTIP is currently under negotiation.
[80] TPP was concluded on 5 October 2015 and was signed on 4 February 2016 by 12 States, namely Canada, U.S., Japan, Australia, Malaysia, Mexico, Vietnam, Brunei. Chile, Peru, Singapore and New Zealand.
[81] As Froman states "*We see TTIP as providing an opportunity for the U.S. and the EU to not only deepen the transatlantic space that reflects our shared interests and values, but to work together to strengthen those values beyond our borders. TTIP is an opportunity to articulate and promote globally our shared values on the rule of law, transparency, public participation, and accountability. It's about shaping a global system – one with our shared values at the core*", in M. Froman, *Remarks by Ambassador Michael Froman at the German Federal Ministry for Economic Affairs and Energy*, 5 May 2014, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/May/Remarks-by-Ambassador-Froman-at-German-Federal-Ministry-Economic-Affairs-Energy, last accessed 9 April 2018.
[82] There is the difference with "WTO more" elements, which is been used to indicate the agreements, which include some matters that have not been regulated by the WTO, such as labour standards or investment protection. Precisely this is an approach sometimes used by parties to formulate rules for topics which they had previously tried to table in the WTO without success. On the contrary, there also has been used the term "WTO minus" elements for the PTAs which are also seen to relax existing WTO commitments of the parties at hand. About the confusion which could be created by these terms, Stoll said, "the terminology is not always coherent", *Mega-Regionals: Challenges, Opportunities and Research Questions,* in *Mega-Regional Trade Agreements*, cit., p. 6.

market access area provided that those countries are committed to economic reforms and the liberalisation of their markets.

These FTAs are wide in scope and cover trade, services investment, government procurement, environmental and labour rules, and IP protection[83].

FTAs to which the U.S. is a party also include and IP chapter containing TRIPS-Plus standards beyond what is already included in the WTO and TRIPS Agreement.[84]

Bilateral and regional trade agreements may be also a good option for negotiating issues that are not fully dealt with multilaterally, such a trade in services, intellectual property rules, and investments.[85]

The recent proliferation of regional trade agreements raises a lot of questions and new fears.

They risk to be discriminatory by nature, which contradicts the most important rule in GATT: the "most-favoured-nation" principle. Additionally, they can cause diversion of trade away from non-member countries.

Concerning how trade agreements might spread to third parties, it is worth looking at parallels from both previously negotiated regional and trans-regional accords.

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[83] K. Maskus, *Implications of Regional and Multilateral Agreements for Intellectual Property Rights,* Blackwell Publishers, 1997.

[84] A. Palit, *The Trans Pacific Partnership, China and India: Economic and Political Implications*, Routledge, 2014, p. 31; K. L. Cox, *The Intellectual Property Chapter of the Trans-Pacific Partnership Agreement and Investment in Developing Nations,* 35 U. Pa. J. Int'l L. 1045, 2014, pp. 1050–1051; M. E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. Cal. L. Rev. 977, 2014, p. 986; Y. Lev-Aretz, *Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering*, 27 Harv. J.L. & Tech., 2013, pp. 203, 243; R. L. Okediji, *Legal Innovation in International Intellectual Property Relations: Revisiting Twenty-One Years of the TRIPS Agreement*, 36 University of Pennsylvania Journal of International Law 191, 2014, p. 258; M. Rubinson, *Exploring the Trans-Pacific Partnership's Complexities Through the Lens of Its Intellectual Property Rights Chapter*, 31 Emory Int'l L. Rev. 449, 455 Voon & Elizabeth Sheargold, 2017, p. 358; K. Weatherall, *"Intellectual Property in the TPP" Not "The New TRIPS",* Melbourne Journal of International Law, Vol. 17, No. 2, 2016, p. 8.

[85] On this point Christine Lagarde said "*We want to sign 'WTO Plus' agreements, that is, more ambitious ones*!", *The Doha Round and the Hong Kong Declaration,* in *Challenges to Multilateral Trade,* Netherlands, 2008, p. 8.

With reference to accession, many authors distinguish between a "convoy" approach and a "club" approach.[86] These two approaches provide a useful framework approach to think about accession issues.

The EU constitutes the example of a club approach with very specific criteria that have evolved over its history with respect to third party accession.

On the contrary, in the case of a convoy, membership is open to a predefined regional grouping without additional criteria. For instance, the Asia-Pacific Economic Cooperation (known by the acronym *APEC*) represents an example of a convoy approach: after 1997, it instituted a *moratorium* on membership for 10 years after it had reached a total of 21 economies. Although the *moratorium* was expanded until 2010, since it has expired but no new members have yet been admitted.

A convoy approach can evolve into a club one.

A successful conclusion of an FTA with one country will serve as a model for other FTAs, and eventually for multilateral trade negotiations.[87]

The inclusion of the exclusivity provision is necessary from the U.S. trade negotiator's point of view as it can serve as a model for use by the U.S. in negotiations with other countries.[88]

The real intention of the U.S. Trade Representative (known by the acronym *USTR*) would be to bring the law of the trading partner closer to U.S. law and it seems they only accept minor changes.

FTA negotiations with the U.S. are generally carried out in a non-transparent manner.

Negotiations of FTAs reflect a failure of transparent policy making of the countries that enter into such bargaining.

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[86] J. Kelley, *The Role of Membership Rules in Regional Organizations,* in *Working Paper Series on Regional Economic Integration* No. 53, 2010.

[87] J. Juanpoth, *The aim to establish an acceptable international standard for IP protection is reflected in the provisions of the FTA between the US and Australia that contains for example a TRIPS-plus rule on data exclusivity although such protection is already available in Australia legislation*, in *TRIPS-Plus rules under Free Trade Agreeements: An Asian Perspective,* Intellectual property & Free Trade Agreements, London, 2007, p. 28.

[88] All FTAs signed by the U.S. are quite similar to one another.

There is also a lack of official information about what the legal effect of the FTA will be because negotiations are not public.[89]

Jadish Bhagwaty puts it apply when he denounced the "spaghetti bowl": the explosive proliferation of RTAs creates a messy maze of preferences and rules of origins.[90]

The *ratio* of mega-regionalism or interregionalism marks both the emergence of a new distribution of power around the globe and a new layer of global governance.

Some commentators have argued that new regionalism does not distinguish between regional integration and regional cooperation.[91] This model of managing regional interdependence blurs the distinction between regionalism as a doctrine positing that world politics are best organized within regions and multilateralism.

According to Bergsten, the focus of open regionalism is on the global system: its embeddedness has an impact on international trade and investment.[92]

Open regionalism represents a strategy allowing the member states of a territorially based RTA to include countries not contiguous to the trade area by means of flexible arrangements granting them the benefits of preferential trade while eschewing the traditional treaty negotiations process.

The globalisation of the incentive structure of regionalism is at the origin of its transformation from a territorially clustered project into a system of flexible cross-regional arrangements.

This process may be conceptualized as the deterritorialization of regionalism.[93]

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[89] M. Limenta, *Open Trade Negotiations As Opposed To Secret Trade Negotiations: from Transparency to Public Participation*, in New Zealand Yearbook of International Law, Vol. 10, 2012, available at http://www.nzlii.org/nz/journals/NZYbkIntLaw/2012/3.pdf , p. 73.

[90] J. Bhagwati, *US Trade Policy: The Infatuation with free Trade Areas,* cit., pp. 2-3; As also Geoff Raby, a former Australian Ambassador, to the WTO, once said "the pesto sauce in the spaghetti has now been replaced by diesel oil, the cheese by nuts and bolts."

[91] B. Hettne, *The Europeanisation of Europe: Endogenous and Exogenous Dimensions*, in *Journal of European Integration* 24, 2002, pp. 325-340.

[92] F. Bergsten, *Open Regionalism,* in *Working Paper 97-3*, Washington, DC: Peterson Institute for International Economics, 1997.

[93] B. M. Stefanova, *The deterritorialization of European Regionalism: Global Perspectives*, in *The European Union and Europe's New regionalism: The challenge of Enlargement, Neighbourhood, and Globalisation*, United Kingdom, 2018, pp. 159-201.

This term was coined by French post-structuralism supporters Gilles Deleuze and Feliz Guattaru to describe a cultural theory of globalisation. They defined it as the movement by which one leaves a territory.

At the regional level, deterritorialization constitutes not only a post-modern concept because regionalism is a perspective that transcends territoriality.

It has been argued that such trends constitute an aspect of the deterritorialization of EU regionalism.

The Brexit vote represents an important case illustrating the deterritorialization of European regionalism: the outcome of the Brexit referendum had a profound negative impact on the proposed TTIP.

The ex-secretary for UK exit-negotiations after Brexit Sir David Davis criticized the EU for negotiating FTAs with too many countries, for not making much progress with the U.S. on the liberalization project of TTIP, and because the inclusion of the financial markets in the agreement wasn't secured within the framework of TTIP.[94]

The transatlantic free trade TTIP, particularly important for the UK, was not adequately promoted by Germany and France due to invalid reservations.[95]

TTIP selectively addresses areas in need of regulatory governance creating a different density of trade integration. TTIP extends a process of deterritorialization of European regionalism.

This side of the evolution of regionalism constitutes a process of recreation of spaces of interaction and contiguity beyond conventional regionalist premises.

As a new form of regionalism, reterritorialization process is the result of the political choices and strategies of states.

[94] P. J. J. Welfens, *An Accidental Brexit: New EU and Transatlantic Economic Perspectives*, United Kingdom, 2017, p. 165.

[95] David Devis told about also to the CETA Agreement as a model worthy of consideration about the design of the future UK-EU relationship. Referring to the anti-liberalization sentiment within the political circles of certain continental European countries, strengthened by the Brexit referendum, it is not a certainty that the member states' ratification of the CETA will actually take place.

It is associated with the deterritorialization of long-standing regional integration projects and the EU is an example of such evolving trends.[96]

Free trades are unlikely to produce global welfare without the institutional support of the GATT and WTO trade system.

They have played a fundamental role based on the theory of "comparative advantage" first formulated by the English economist Sir David Ricardo in 1817, because they enhance trade and reduce protectionism and free up global markets.[97]

This theory is fundamental to understand why contracting states export and import particular goods and services, and why the commodity composition of trade could change.

In order to illustrate this theory, the economist Ricardo applied the simple exchange of "wine-for-woollens".

This approach considers economic efficiency and wealth maximisation as its pre-eminent values.

According to this theory, free trades allow the best products to flow across national borders at the lowest price, and become a means to effectively allocate resources and economic efficiency.

From the perspective of the whole global system, trade is a positive-sum rather that a zero-sum game.

This theory relates to the theory of economies of scale. When States specialise, they become more efficient in production. If they can trade their products or services for the different products or services that another country specialises in producing, all parties involved will be better off.[98]

Currently, Ricardo's theory has become a central point for international economic relations.

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[96] B.M. Stefanova, *The deterritorialization of European Regionalism: Global Perspectives*, cit., p. 186.
[97] About Ricardo's theory, see J.R. McCulloch, *The Works of David Ricardo*, Oregon, 2002; A. Maneschi, *International trade theory and comparative advantage*, in J. Linarelli, *Research Handbook on Global Justice and International Economic Law*, 2013, p. 51.
[98] J.H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations*, 2000, p. 418.

Beginning in the 1980's, free trade policy was repackaged to include deregulation.

The end of the cold war marked the beginning of a period during which trade has replaced ideology as the focus of globalisation.[99]

According to the idea of "comparative advantage", the economy of scale become possible as the result of wide access to a barrier-free international market. This leads to product innovation and, further reduces costs.

Since the emergence of new trading blocks and new major exporters, such as China, policymakers and economists continue to analyse the rapid evolution of comparative advantage in the process of the transmission of technological knowledge across national borders.

In conclusion, trade system is fundamental for the international community and for global transformation.

1.3 The Potential Conflict between Free Trade Agreements on Intellectual Property Rules in the International Law Framework and Remedies

The presence of various FTAs creates a potential conflict, which arises from the multitude of players and strategies involved.

The standards and rules laid down in the agreements that a given country concludes with its trade partners may well differ from one another.

An important factor for reducing the potential conflict between FTAs provisions in the international law panorama would be the favourable rules, under which the rules and the agreements, which to a greater extent favour the protection of right holders, prevail.[100]

This principle is widely used in international IP protection agreements, such as

[99] D. Goulet, *The Evolving Nature of Development in the Light of Globalisation*, 6 Journal of Law, 2004, p. 186.
[100] A. Seyed, A. Sadat, *Methods of Resolving Conflicts between Treaties*, Graduate Institute of International Studies, Geneva, 2003, p. 205.

in the Berne Convention,[101] the Copyright Convention[102] and the Rome Convention in 1961.[103]

Another important element is the practice of laying down simple minimum standards rather than a minimum-maximum obligation in multilateral agreements.

At the moment FTAs typically do not provide maximum protection standards, but only minimum protection level. Since there is a contrast in the maximum protection levels laid down by the FTA, a conflict between them could arise.

According to international law, in this case provisions in universal agreements like TRIPS prevail over FTA standards.

As I will later explain, the TRIPS Agreement is an example of a universal agreement with an IP minimum standards protection.

According to Article 1(1) of the TRIPS Agreement, it provides contracting parties discretion to

> "*Implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement".*

Any increase in the protection standards for enforcement rules would normally be possible for TRIPS.

A problem could arise in connection with provisions, which are reciprocal and mutually incompatible: in this case the stricter standards is always incompatible with another minimum provision.

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[101] Art. 20th Berne Convention for the Protection of Literary and Artistic Works. Opened for signature on 9 September 1886 and entered into force on 5 December 1887.

[102] Art. VIII and XIX Universal Copyright Convention, as interpreted by the Inter-Governmental Copyright Conference, opened for signature on 6 September 1952 and entered into on force 16 September 1955.

[103] Arts 21 and 22 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, which was opened for signature on 26 October 1961, and entered into force on 18 May 1964. It is often referred to as the 'Rome Convention.

The potential conflict between the rules of an international IP protection agreement, such as TRIPS, and IP provisions laid down in a "spaghetti bowl" FTA is to be considered impossible in practice.

A harmonious interpretation of the various provisions that a given party enters into in the spaghetti bowl is always considered useful, also in case of seemingly incompatible obligations (principle of presumption against conflict).[104]

The addition of an FTA may either just blend into the existing discipline, based on the protection levels provided in that FTA.

It means that if the IP enforcement level is lower than that of the FTA with the highest precedent standard, the IP rules of such an FTA can easily be traded in for advantages or concessions in other areas.

On the contrary, if the IP protection standards of the new FTA is higher than that of all pre-existing FTAs for that party, the results are that that standards must be extended to all contracting parties and incoming IP right holders.

The existing "spaghetti bowl" framework FTAs legal effects may be considered as setting the panorama for one coherent IP protection standard in "the bowl".[105]

Since the incompatibility of obligations between FTAs and the TRIPS Agreement is practically excluded, a concern could arise with reference to the relationships between the various FTAs.

The risk could be a fragmentation of the international IP protection framework and the accumulation of unrelated obligations.

The resulting fragmentation in legal terms, perhaps better defined, as a diversification of normative systems, would be widely acceptable in view of what such agreements achieve.

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[104] This principle was recognized in Report of the WTO Panel, *Indonesia-Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS59R/R, WT/DS64/R, 1998, PARA 14.28. For a broad analysis of this principle, see P. F. J. Macrory, A. E. Appleton, M. G. Plummer, *The World trade Organization: Legal, Economic and Political Analysis*, Berlin, 2005, p. 300.

[105] C. Antons, R. Hilty, *Introduction: IP and the Asia-Pacific 'Spaghetti Bowl' of Free Trade Agreements*, cit., p. 10.

It is difficult for many states to have the possibility of raising the issue of legitimacy, since it is considered fully acceptable to conclude agreements outside the WTO decisions in order to make progress if there is no consensus.

On the other hand, it would also be significantly useful to conclude "light" agreements, which would contain what is strictly necessary to establish a free trade area in an old-fashioned way, basically through the elimination of tariffs and other restrictions.

This kind of a hybrid structure could be a remedy to fragmentation and cause legitimacy concerns, since such agreements may be seen capturing the common substance of the world trade order.

A remedy to defend a fair balance of interests and avoid unjustified practices in FTA negotiations would be found in the conclusion of a global agreement on the prevention of an abuse of a right in the antitrust law. More specifically, it would fight certain kinds of abuse of IP rights upon enforcement.

Another remedy would be the introduction of a horizontal clause in international agreements, such as in TRIPS, concerning opt-outs from agreed FTAs according to pre-established conditions. Those opt-outs would extend to an introduction of comparable maximum levels for IP protection globally.

They could be identified as temporary exceptions or modifications or, on the contrary, as the implementation of the TRIPS-plus IP provisions.

It would necessarily create a global organ ad hoc for an impartial assessment to forestall abuse and on the validity of the opt-out rule in according to the specific interests of a country, which would have to be duly substantiated by the party seeking the opt-out.

The general international law involves all members states, while specific international law provides rules only for the countries which have signed these norms.

The risk would be the development of a conflict of norms between different treaties signed by the same State.[106]

A debate on conflict of rules in international law raised on WTO, since it provided the following concerns: i) WTO jurisdiction is limited to the "covered

[106] E. Sciso, *Gli accordi internazionali confliggenti*, Bari, 1986, p. 1-35.

agreements" and it may be not able to interpret claims pursuant to non-WTO provisions; ii) WTO rules can apply general principles of international law whether the WTO Agreement does not provide any specific rule; iii) WTO rules should be interpreted in accordance to conflict with any relevant rules of international law binding on all WTO Members; iv) in the event of a conflict between the WTO rules and another provision of international law, a WTO rule could resolve the conflict of provisions in favour of the non-WTO rules.[107]

About the application and interpretation of successive treaties to the same subject matter, it is noteworthy the Article 30 of the Vienna Convention on the Law of Treaties, which states:

> "1. Subject *to article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.*
> *2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.*
> *3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.*
> *4. When the parties to the later treaty do not include all the parties to the earlier one:*
>
> *(a) as between States parties to both treaties the same rule applies as in paragraph 3;*

[107] J. Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law relates to other Rules of international Law*, Cambridge, 2009, p. 477.

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty".

The wording of this provision means that this Convention applies only to national agreements concluded in writing between States and after its entry into force with respect to them.[108]

Treaties give rise more easily to conflicting provisions than customary international law.

1.4 Microtrades as an Alternative Approach to Free Trade Agreements or as Elements of Further Disaggregation.

As seen in the previous paragraphs, opposition against FTAs is far from being homogenous, let alone an all-progressive movement.

Recent technological and economic advances have been unprecedented and the result has been the increase of international trade on a global scale.

Many critiques of globalisation have focused also on the emerging crisis of economic and financial problems considered as the result of free trade rules under the current system of international trade.[109]

Even the WTO has recognized the fact that trade policies need to be in line

[108] P. Muchlinski, F. Ortino, C. Schreuer, *Investment and non-investment obligations,* The Oxford Handbook of International Investment Law, Oxford, 2008, p. 161.
[109] About this topic, see J.N. Baghwati, R. Hudec, *Fair Trade and Harmonization: Prerequisites for Free Trade?*, Cambridge, 1996.

with other factors of macroeconomic perspective.

Perhaps the most important example of the close relationship between trade and macroeconomics may be that exports provide a mechanism to meet the challenges of deficiencies in current aggregate demand.

Trade liberalization has also been used as an instrument to control the inflationary phenomenon. Financial deregulation has been a driver of trade liberalization because finance leads trade.

International capital flows have become one of the most important features of the world economy. In case of a persistent trade deficit, capital flows contribute to the analysis of the exchange rate, precisely when an amendment should be necessary. Capital flows risk intensifying the negative consequences of trade flows.

The problem is that those who live in developed countries have benefited greatly from the advent of modern technology but the same can't be said for the least developed countries (known by the acronym *LDCs*).

This is the reason why a new term has been coined to define a trade on a small level: the microtrade.[110]

Microtrade has been considered as the younger brother of international trade and it is based on the regulation of small amounts of capitals and technology available in the least developed countries.

It could be considered as the response to FTAs at a local level and it could be defined as a local initiative that uses the mechanism of international trade even if it does not require a large scale industrial initiative (such as, instead, East Asian countries which have had a fast development).

Generally, the word "micro" has been used in terms of quantity, in contrast to the word "macro" to indicate a unit of measurement.

Microtrade focuses on finding small amounts of trade, while mega-regional agreements focus on increasing profit margins for developing-country producers in line with existing standards on the trade of goods from developing countries on a much

[110] Y.S. Lee, *Conceptual Framework*, in *Microtrade: a New System of International Trade with Volunteerism Towards Poverty Elimination,* Routledge Research in International Economic Law, Abingdom, 2013, p. 2.

large scale than is envisioned for microtrade.

The prefix "micro" can be used also as level of operation of an activity, such as in trades. Microtrade is related to many concepts such as microfinance, as they both represent a mechanism to improve the economic position of people who live in LCDs.

The concept of microtrade invokes also the concept of "local", which we can find within the national, transnational, international, and global framework.[111]

The legal element justifying microtrade negotiations is possibility to make an exception to the general principle of non-discrimination for international trades according to Article 1.1 of the GATT (which, as seen, represents the integral part of the current WTO system).

Under this fundamental rule of the WTO, the most favoured nation (MFN) principle is required, forbidding discrimination on the origin of product. There are two examples of this rule which constitute a precedent for microtrades and that justify their stipulation.

One is represented by free trade agreements, and also customs unions, which constitute the exception to this rule under paragraph 5 of XXIV GATT, that offers preferential treatment to custom unions and contracting states of FTAs. The same may be true for microtrades.

Another example is the provision – in the WTO system – of a General System of Preferences (known by the acronym *GSPs*) that provide lower import tariffs for developing countries according to many standards required by the offering state.

This is called as "enabling clause", which allows developed countries to derogate from the most favoured nation principle to grant preferential access to developing countries. In those GSP mechanisms there is also the tariff-free and quota-free system for imports from LDCs. This preferential system for microtrade is considered facilitated and approved by the WTO provisions.

With reference to the relationship between microtrade and conventional

[111] J. K. J. Gibson - Graham, B*eyond Global vs. Local: Economic Politics Outside the Binary Frame, in* A. Herod and M. W. Wright et al. (eds)*, Geographies of Power Placing Scales,* 2008, p. 11; J. S. Guy, *What is Global and What is Local?: A Theoretical Discussion around Globalisation*, in *Parsons Journal for Information Mapping*, available at http://piim.newschool.edu/journal/issues/2009/02/pdfs/ParsonsJournalForInformationMapping_Guy-JeanSebastian.pdf , 2009, pp. 1-2.

international trade, microtrades do not present the conditions required for large-scale economic development initiatives, including those involved in conventional international trade. The ambition of this project is that it would lead to large increases in the trade system resulting in trade that is no longer "micro" and becomes more conventional.

In relation to the need for the regulation of microtrades, it could be said that regulation of the domestic level would be useful but it would be not sufficient for the rapid development of economic condition of the last developed counties.

Microtrades offer an alternative vision of the trading system.

The current international trading system is defined as "free", but it is not considered "fair". The reason is that the current system seems to prefer helping developed countries, only with reference to the regulation of capital flows and investments, despite other matters, such as labour.

It is called the philosophy of the "race to the bottom" by global companies under the international trading system.[112]

Microtrade and the fair trade movement constitute development-oriented alternative trading regimes in the current international system.

The microtrade movement proposes the presence of small manufactured products based on the ethical value of social contribution. The fair trade theory, instead, offers to challenge the idea of free trade by underlining the ethical significance of the traded commodities.

In conclusion, they could be useful to one another. The microtrade mechanism may derive the idea of introducing regional authorities, which could work in line with the trade project, for instance by adopting many initiatives of microtrade mechanisms concerning the certification of product origins that are often costly.

[112] P. Khumon, *Microtrade and fair-trade,* in *Microtrade: a New System of International Trade with Volunteerism Towards Poverty Elimination,* Routledge Research in International Economic Law, Abingdom, 2013, p. 87.

1.5 Final Remarks

From a theoretical point of view, the negotiations of free trade agreements appear to be fundamental for the international community and for global transformation, because they represent an opportunity to homogenize domestic legal systems.

From a practical point of view, the resulting fragmentation in legal terms, considering the diversification of normative systems, can't be acceptable in view of what such agreements are providing in their current text.

In addition, the microtrade system risks being another element of an already fragmented trading system.

From a legal perspective, it is difficult to define the borders between the application of a microtrade or a local agreement and other international agreements concluded by a State.

The response to the increasing number of FTAs and mega-regional trade Agreements should not be the introduction of more agreements, but the inclusion of rules and provisions which would represent the interests of everybody and not only the expression of the needs of business companies and big industries, also in intellectual property law.

Chapter II

INTERNATIONAL COPYRIGHT PANORAMA

"Can openness be understood as a system capable of strengthening science and treating the diseases that afflict it?"
R. CASO (2017)

2.1 TRIPS Rules on Creativity and Originality Standards for Copyrighted Works

Originally, copyright has been considered as a tool to ensure that authors are able to create freely envisaging safeguards for them from the abuse of others and from the risk of censure.

The economic role of copyright law is to provide incentives to create and distribute the expression of ideas.[113]

It includes the protection and the disclosure of the expression of ideas in tangible form. In order to be protected by copyright, ideas have to be described in an original way.

With the aim of securing the common good of knowledge, a balance between exclusive control of right holders and freedom has been considered necessary to promote creativity: the result is that some exploitation is not permitted to the right holders, by providing limitations to their exclusive right.[114] These limitations to the exclusive rights have always represented a fundamental role in the production of new creative works.

There are no existing limitations, included in the different legal systems, which are specifically appropriate to define the borderline between the creative use of copyrighted works and the form of derivative works.

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[113] In *Harper&Row Publishers, Inc. v. National Enterprises*, 471 U.S. 539, 558 (1985). The Supreme Court stated that copyright was meant to be "*the engine of free expression*".
[114] A. Chander, M. Sunder, *TPP vs. RCEP: The battle to Define Asia's Intellectual Property Law*, University of California Law Review, No. 8, 2018 available at http://www.law.uci.edu/events/ip-law/ip-and-human-rights-2016/IP-and-HumanRights2016oct28-abstracts.pdf., last access October 2018.

When an author wants to produce a new work based on precedent works and there is the need to borrow some of the contents of this previous material, he may need the authorization of the right holders of the previous work.

This could be considered a sort of censorship of new materials, because individuals can decide what can be created and exploited.

This case has to be compatible both with the copyright aim of promoting creativity and with the protection of human rights, as freedom of ideas and of artistic works.

Referring to the international panorama, in order to protect a creation with copyright law, it must be considered the notion of an intellectual work.

Article 2(1) of the Berne Convention refers to literary and artistic works, which are "*productions in the literary, scientific and artistic domain*".

Since these words are not clarified, the negotiating background of this rule demonstrates that the signatories States to the Berne Convention agreed on the need for the requirement of creativity.

There is no definition either of the concept of "originality" in international copyright treaties, the meaning depends on how national systems describe standards such as creativity or originality.[115]

A WIPO Committee of Experts concluded that "originality" was synonymous with "intellectual creation" and that such a formula should be understood as "an original structure of ideas or impressions".[116]

The Committee also stated that originality "was an integral part of the definition of the concept of "work".

The TRIPS Agreement only includes an implicit definition under Article 9(2) - it was the first time in an international agreement in the field of copyright -, stating that

[115] T. Margoni, *The harmonization of EU copyright law: the originality standard*, in Global Governance of IP in the 21st century: Reflecting Policy through Change, 2016, Berlin, pp. 85-105.

[116] The First Session of the Committee of Experts on model provisions for Legislation in the Field of Copyright report CE/MPC/I/3 met on 3 March 1989.

"Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such".

Article 9(2) of the TRIPS Agreement fixes the copyright principle according to which ideas are not subject to copyright protection: consequently, extending copyright protection to ideas would penalize creativity requirement and copyright aims.

The term of copyright protection influences the creativity level of new works.

The problem is that some authors produce similar works to previous ones that are protected by the copyright regime but are in hibernation status.[117]

These authors can refrain from creating their works for fear of being accused of copying hibernating materials.

The longer copyright protection duration has some effects, creating a higher level of inhibition and a greater loss in terms of cultural creativity.

Under a shortened term, it would be easier for the public to have access to works, which become of public domain and are used by other media providers.

The shortened copyright term should encourage publishers to expand more effective business strategies in order to maximize the use of copyrighted works.

Authors can benefit from the reputational benefits of their works that enter the public domain earlier than under the current system.

Since from its beginnings, the purpose of copyrights has always been to protect authors and their works: a shortened copyright term will bring benefits both to the authors and to citizens and to creativity and originality.

About information, as goods, they are often difficult and expensive to create.[118]

Other people apart from their creators easily reuse them, and it is almost impossible to enforce payment for reuse.

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[117] J. Parc, P. Messerlin, *The true impact of shorter and longer copyright durations; From authors' earnings to cultural creativity and diversity*, European Centre for International Political Economy, available at http://ecipe.org/app/uploads/2017/12/Copyrights-Parc-Messerlin-A1-20171220.pdf, last access November 2017, p. 11.

[118] E. Mackaay, *Economic Incentives in Markets for Information and Innovation*, Harvard Journal of Law and Public Policy, Vol. 13, No. 3, 1990, p. 867.

The spontaneous result is "free-riding": the achievement of benefits from these goods by those who have not shared in the cost of their production.[119]

The last outcome is under-protection: in other words, they are not produced even though, once produced, they would be worth more to consumers than the cost of producing them.[120] The inability to enforce payment for the use of these goods acts as a disincentive to their production in the first place.

In order to encourage creativity, there are some academic studies that suggest some strategies.[121]

The first way is by reducing the cost of creation, for example by increasing the use of technology and reducing transaction costs such as the registration fees.

The second possible strategy is to improve the likelihood of success, for example by increasing direct funding of the arts and/or the prizes available for new works.

The third way is for society to find and fund the genuine value of creativity.

The last way is to recognize the saliency and optimism bias, in order to influence the perceived probability of "success".

Incidentally, the creativity concern cannot leave aside the various theories on the purpose of the copyright system.[122]

There is the utilitarian view, which considers that that the goal of copyright is to act as an incentive for the author to create, for the benefit of society.

In line with this approach, the author would be encouraged to create new works by the prospects of a reward in the form of a right, which he can make use of to receive remuneration.

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[119] A. Barron*, Copyright infringement, 'free-riding' and the lifeworld*, in *Copyright and Piracy: An Interdisciplinary Critique*, (L. Bently, J. Davis, J.C. Ginsburg eds.), Cambridge, 2016, p. 2.

[120] J. Umbeck, *Might Makes Right: A Theory of the Foundation and Initial Distribution of Property Rights*, Economic Inquiry, Vol. 19, No. 1, 1981, pp. 38-59; Y. Barzel, *Economic Analysis of Property Rights,* Cambridge, 1989, p. 89.

[121] R.S.R. Ku, J. Sun, Y. Fan, *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty,* Vanderbilt Law Review, Vol. 63, 2009, pp. 37-38.

[122] W. Fisher, *Theories of intellectual property, New Essays in the Legal and Political Theory of Property*, Cambridge University Press, 2001, p. 168-199.

Copyright presents itself as a means of rewarding the investment the author must make to create the work and as a remuneration of the artist's dedication.

While there may exist some divergence between the different theories, it is at least agreed upon that they are concerned with the material interests of the author.

There is also the "natural right" theory that states that the purpose of copyright is to reward authors for their creative efforts.[123]

It is the property in one's own person that is extended to the fruits of one's work and the personal rights, which protect the works as an illustration of the personality of the author.[124]

According to this theory, authors have a natural property right in their creative expression which might also be a factor in copyright's extension.

Natural rights supporters believe the author deserves a property right in the original expression by virtue of having created it.

There is another theory, which considers that there would still be creativity without copyright law, which envisages the protection of statutory rights.[125]

For example, certain online journals and open source software such as Linux's products are accessed at no cost, but the recognition for the authorship of the work remains as an indispensable prerequisite.

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123 In the eighteenth century, proponents of a natural copyright law applied to authors John Locke's proposition that one who improves a common resource by mixing his labour with it gains the right to acquire that resource as his own. For instance, William Blackstone in his Commentaries on the Law of England, pp. 405-406. There is also an alternative basis for authors' natural rights and it was defined by Kant. According to him, creative works are an extension of their author's personalities and authors have a moral claim to receive authorship. But in contrast to Blackstone, Kant considered authors' right as personality rather than property. See I. Kant, *Von der Unrechtmassigkeit des Buchernachdruck*es, in E. Cassirer, ed., Immanuel Kant Werke (B. Cassirer, 1914), p. 1194.

124 L. M.C.R. Guibault, *Copyright Limitations and Contracts: An analysis of the contractual overridability of limitations on copyright*, The Hague Kluwer Law International, International Law Series No. 9, 2002, pp. 24-48; C. Geiger, "*Constitutionalising" intellectual property? The influence of fundamental rights on intellectual property in the European Union*, International Review of Intellectual Property and Competition Law, Vol. 37, No. 4, 2006, pp. 371-406.

125 P. J. Groves*, Sourcebook on Intellectual Property Law*, Cavendish Publishing Limited, London, 2003, p. 261.

The protection of copyright at the international level was motivated by the need to protect the economic interests of the author or right holder and to ensure better protection of one country's copyrighted works in another country.

According with an economic perspective, copyright law vests in the author of a work an array of transferable rights to control certain acts of copying: all kinds of reproduction –including adaptation – of the works, various forms of distribution of the works and all kinds of public communication of the work.

Law-and-economic scholars (known by the acronym *L&E*) consider it necessary to institute rights of private property in relation to these goods, although there is no considerable agreement as to how and to what extent this should occur.

A property right is a mechanism by which would be non-payer can be denied use of the goods to which the right pertains unless the right holder's price is paid.

Instituting property rights enables the internalization – within a market in valued uses of valued goods – of external benefits previously achieving to users.[126]

Copyright rights should be achieved in order to grant full protection with other fundamental interests and rights, such as the spread of knowledge, access to technology transfer, open access approach, knowledge and progress, dissemination to works, freedom of expression, the promotion of creativity and the protection of public domain. In this sense copyright law has a social function.

A copyright is a legally enforceable property right that covers first idea of certain categories of information goods and subsists in relation to them.

Already in 1196, the United States interpreted the expansion in copyright's length and depth, as analysed by Neil Netanel in "*Copyright and a Democratic Civil Society*".[127]

He has noted - as one of the major factors behind this expansion of copyright – a "blend of neoclassical and new institutional economic property theory" that he attributed to the L&E scholars.

[126] A. Barron*, Copyright infringement, 'free-riding' and the lifeworld*, in *Copyright and Piracy: An Interdisciplinary Critique*, cit., p. 94.
[127] N. W. Netanel, *Copyright and a Democratic Civil Society*, The Yale Law Journal, Vol. 106, No. 2, 1996, pp. 292-386.

Emphasizing that this approach was conceptually distinct from the more traditional "economic incentive" rationale for copyright, Netanel explained that in the neo-classicist view, the essential function of copyright is to enable copyright owners to "realize the full profit potential for their works in the market" (because only will creative works "move to their highest socially valued uses").[128]

According to the neo-classicist view, copyright is a mechanism for facilitating markets with existing works.[129]

This would more likely be achieved the more the system approximates an ideal property rights system. Such a regime has four key-characteristics.[130]

Firstly, it is universal and so every valued use of every work covered by the regime should be included within the sphere of the owner's rights and the law should allow right-owners free rein to appropriate the value of these uses by whatever means necessary.

Secondly, right holders made available by the regime should be concentrated in a single person so that transaction costs can be minimized in the management of the works covered by it.

Thirdly, the rights made available by the regime should be exclusive, and they should provide to right holder an absolute power of veto over others' exploitations of the work.

Finally, rights lawfully recognized by the regime should be fully transferable, so that they may be easily moved to the highest-value users.

The neo-classicist approach differs from traditional copyright incentive economics. Incentive analysis considers copyright as a necessary but flawed answer to the public goods concern.

Without some means to prevent unlicensed copyists, authors will have an insufficient incentive to create and distribute their creative works.

At the same time, incentive economics means that copyright carries some of the problems of monopoly pricing and economic loss.

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[128] N. Netanel, ibidem, p. 309.
[129] N. Netanel, *Why has Copyright Expanded? Analysis and Critique*, in Public Law & Legal Theory Research Paper Series, No. 07-34, 2007, p. 18.
[130] A. Barron, cit., pp. 14-15.

Copyright should not be expanded beyond the minimum necessary to provide authors with an incentive to create and make their works available to the public.

Those theories create a conflict on the cornerstone of copyright purpose.

In recent decades a leading force shaping United States copyright law has been the desire to conform U.S. law to the laws of other countries where many American companies and individuals in the copyright industries frequently pursue business.[131]

The "harmonization" of laws has brought the promise of predictability and ease of conducting business across national borders.[132]

This harmonization is also considered not useful because it has brought distinct change to U.S. law in ways contrary to the fundamental purposes of copyright law and its social objectives.[133]

Copyright harmonization has been oriented to enforce and develop the domestic intellectual property law by incentivizing the competitiveness of industries, remove obstacles, create new jobs, and protect and stimulate the business of producers of new works and common cultural heritage.

Other interests, such as the promotion of knowledge, are confined to marginal statements, and the cultural character of copyright is limited to its role as the method to recognize, protect and incentivize the dissemination of the knowledge by granting authors an adequate remuneration.[134]

Changes in copyright law by invoking the "harmonization" principle also defy deeper principles of property ownership. Rights of free alienation are generally secured by the "first-sale" doctrine of copyright law, which allows the owner of a lawful copy to pass that copy to others by sale, rental or gift.[135]

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[131] Those countries are often in Western Europe, where U.S. film producers, software developers etc. make sales.

[132] D. Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States*, 55 Law & Contemp. Probs. 2, Spring 1992, p. 211; Y. Gendreau, *Copyright Harmonization in the European Union and in North America*, 20 Colum. VLA J.L. & Arts 37, 1995.

[133] K. D. Crews, *Harmonization and the Goals of Copyright: Property Rights or Cultural Progress?*, in Indiana Journal of Global Legal Studies, 1998, p. 134.

[134] C. Sganga, *Systematizing and Rebalancing Eu Copyright through the Lens of Property*, Opinio Juris in Comparatione, 2017, pp. 5-6.

[135] Article 7 WIPO Copyright Treaty.

Many of the arguments in favour of these changes also heighten tensions among the rights of creators, property claims, and the public rights of use.[136]

Change is generally inevitable and it allows the law to adapt to new social demands and requests and incentives the law to be open-ended to contemporary needs, whether political or technological.

The problem with many of the recent changes in U.S. copyright law is that they are overwhelmingly motivated by pressure for harmonization with the laws of other countries, rather than by the assumption that the changes will make better law.[137]

All focus on the public interest[138] and the constitutional foundation of copyright to improve the growth of knowledge and learning has been lost in recent debates over copyright.

Recently, the "public interest" has also been used in relation to users' or consumers' interests,[139] as the counterweight to authors' rights and to a market-based and industry-oriented inspiration of copyright law.[140]

The public interest in the copyright field includes the promotion of creativity, knowledge and progress, distribution and access to works, freedom of expression, and the public domain.

The changeover from the constitutional foundation of copyright represents the more problematic consequence of harmonization.[141]

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[136] For example, K. D. Crews refers to one basic principle of copyright is the separation of the work from its copyright; according to Crews, an artist may create and sell a painting but the buyer owns only the object but the copyright and its appurtenant privileges remain with the artist, in K. D. Crews, *Harmonization and the Goals of Copyright: Property Rights or Cultural Progress?* cit., p. 130.

[137] K. D. Crews, ibidem, p. 135.

[138] About the new concept of public interest in copyright matter, see R. Giblin, K. Weatherall, *What if we could reimagine copyright?* Australia, 2017, p. 3.

[139] G. Davies, *Copyright and the Public Interest,* Sweet & Maxwell, 2th ed., 2002, p. 7. He invokes the public interest "*in favour of free and unfettered access by the public to copyright works*".

[140] According to the preamble of the WIPO Copyright Treaty, there is "*the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information*".

[141] K. D. Crews, *Harmonization and the Goals of Copyright: Property Rights or Cultural Progress?*, cit., p.138 stated that "*The public may well benefit from the economic residuals of legal structures, but the public will ultimately lose as cultural and intellectual progress is increasingly subject to rigorous structures of the law*".

Not only do these developments in the law reflect constitutional, policy, social transition but they also show a constant change in the identity of the actors involved in the evolution of U.S. intellectual property law.

Copyright law protects works such as computer software or programs, a growing source of domestic employment and revenue as well as foreign trade. It's clear that the economic reach of these goods has been an important influence in making U.S. copyright law.

The economic pressures and the growing international importance of copyright have led to new law.

One point which is noteworthy special attention regarding that process: the interaction between international politics and particular IP regimes.

Although there are valid reasons for a nation with a centralized economy to gradually hybridize its approach and phase-in efficiency-based IPRs, domestic political considerations will frequently play a compensating role.[142]

The desire or need to maintain control over public discourse makes some IPRs more problematic than others. China is a case study.[143]

A reasonable compromise must take into consideration, for example, a temporary harmonized copyright standard which might reflect the same approach used to resolve the U.S.-EU normative differences over patentability field: it requires domestic copyright law to protect the IPR owner's economic interests but is subject to domestic *order public* expectations limiting public dissemination.[144]

The U.S. dissent constitutes the very reason of normative conflict. The U.S. barred importation and distribution of material it considered immoral and its denial

[142] I. Calboli, E. Lee, *Research Handbook on Intellectual Property Exhaustion and Parallel Imports,* United Kingdom, 2016, p. 142.
[143] E. Priest, *Copyright and Free Expression in China's Film Industry*, 26 Fordham Intell. Prop. Media & Ent. L.J. 1, 2015, p. 3; P. K. Yu, *The Rise of China and Other Middle Intellectual Property powers,* 8 Drake U. Occasional Papers in Intell. Prop. L. 30-31, 2013, pp. 51-53. He notices that patent law focuses on functional innovation, which advances the economic development in a hybridizing economy; although copyright law produces similar economic benefits, it also creates special political concerns. Its market-based incentive to individual expression can free authors from the need for public funding and with it, the related constrains on getting too far off message.
[144] I. Calboli, E. Lee, *Research Handbook on Intellectual Property Exhaustion and Parallel Imports,* cit., p. 143.

still turns on "community standards", both are reflections of its domestic normative sensibilities.[145]

Although the reasons for censorship will vary, normative positions are strongly held and will have a very real effect on a nation's need for domestic IPR adoption.

The reasons for a rejection to compromise must consider the consequences of IPR harmonization and the related expectations regarding international agreement.

2.2 TRIPS Rules and Their Impact on Access to Knowledge: Term of Copyright Protection

The issue of intellectual property rights is particularly vital to the discussion of culture and trade.[146]

This is the reason why the WTO has intervened on the global matter concerning the implementation of intellectual property rights protection.

Since the negotiation of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) in 1995, IP has been linked with trade negotiations.[147]

The basic provisions of the TRIPS Agreement on the protection of "Copyright and Related Rights" are to be found in Articles 9 to 14.

In the Preamble of the TRIPS Agreement, there is the statement about the goals of this agreement, namely

> *"To reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade".*

[145] I. Calboli, E. Lee, ibidem, p. 144.
[146] The protection of patents plays a crucial role in audio-visual equipment, while copyright is generally more relevant to trade in culture since cultural products are almost all copyrighted materials.
[147] D. Gervais, *The TRIPS Agreement: Drafting History and Analysis,* II ed., London, 2003, pp. 10-26.

The approach taken in the copyright provisions of the TRIPS Agreement is to adopt and amend the regime of copyright protection provided in the Berne Convention.[148]

For example, in relation to the term of copyright protection, under Article 7(1) of the Berne Convention, the general term of protection coincides with the life of the author and 50 years.[149]

Article 12 of the TRIPS Agreement defines that whenever the term of protection of a work is calculated on a basis other than the life of a natural person:

- such term shall be no more than 50 years from the end of the calendar year of the authorised publication or;
- where authorised publication does not occur, 50 years from the end of the calendar year of the making of the work.

Furthermore, the Berne Convention provides that copyright protection would be confined to works which have been fixed in some material form, such as

> "[…] *every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings* […]".

On the contrary, the protection of copyright and of related rights, which is fundamentally provided in TRIPS Agreement, confirms the existing rules for the protection of this category of IPRs.

Article 9(2) TRIPS defends the traditional copyright dividing line between non-protectable expressions and protectable ideas. There is some extension for the

[148] About the specific description of all categories of work protected by copyright regime under TRIPS Agreement, see M. Blakeney, *Trade related Aspects of Intellectual Property Rights: A concise Guide to the TRIPS Agreement*, London, 1996, pp. 46-55.

[149] According to Article 7(2), the contracting States of the Berne Union provide for a term of protection expiring fifty years after the work has been made available to the public with the consent of the author, or 50 years after it has been made. About the term of protection of photographic works, according to Article 7(4), it is determined by legislation but with a minimum term of 25 years.

protection of the works included in this Article, which are not in the public domain, such as confidential information, also by patenting.

The focus of attention should be the minimum standard protection under Article 1.3 of TRIPS. It has three substantial consequences:

- the Agreement provides a minimum standard of intellectual property protection and also with regards to the matter of copyright – contracting States are not obliged to intensify, in their own laws, more extensive protection than is required in the TRIPS;
- members are free to define the way to increase the provisions of the Agreement on IP in their national legal systems;
- a greater and deeper protection of IPRs, which Members can provide, than that included in TRIPS, may not contradict the TRIPS rules.[150]

In 1994 the TRIPS Agreement was considered a good compromise because it would put an end to bilateral pressures.

The need for increased standards of IP protection has continued in both bilateral and plurilateral negotiations.

There were some countries, which, concluding these treaties, considered new IP standards as a realist approach to trade and to their relationships or, otherwise, were doubtful about the adequacy of those standards to their national economy.

The answer to this concern has been different from one State to another, but using bilateral or plurilateral trade and negotiations has been the initiative preferred by those countries, which supported IPR protection at the multilateral level.

The WTO, through the TRIPS-Agreement, provides a relatively effective mechanism for enforcing copyright protection at an international level.

[150] In this way, there is also the TRIPS-Plus phenomenon, which corresponds to the view that the TRIPS Agreement does not adequately reflect the high standards of intellectual property protection needed to promote global trade to respond to the requirements of the digital age.[150] The term TRIPS-Plus is used with regard to a bilateral agreement which include two different types of consequences: it should require a Member to implement a more extensive standard or which eliminates an option for a Member under TRIPS standards.

Despite a certain level of harmonisation, the national copyright system continues to exist. Since the absence of global copyright, national treatment has been introduced as a way to recognize the right holder copyright protection.

2.3 TRIPS Copyright Minimum Standards

The conclusion of the TRIPS Agreement provided minimum standards of protection to signatory members.[151]

Developing countries may agree to consider intellectual property rules as part of the compromise they have to signatory, as the price to pay in order to form relationships and interact with economic powers, such as Europe and the US.

The international intellectual property panorama has changed radically over the last few years. This change is due to three main factors:

a) many new states are discussing intellectual property protection, those who may not have correctly perceived the aim of TRIPS Agreement they signed up to in 1994, now have much more awareness in the area of intellectual property rules. That knowledge is provided in part by movements "in civil society" against intellectual property, which have given rise to many studies and alternative strategies;[152]

b) greater knowledge about intellectual property law has also shown that one of the strengths of intellectual property is its optimal protection term. More intellectual property protection does not necessarily constitute a good result, balancing both the effectiveness of the protection and the aim of incentivizing or remunerating creativity. On this point, the Supreme Court of Canada stated that

[151] T. Cottier, *The agreement on trade-related Aspects of intellectual property rights,* in Macrory PFJ, Appleton AE, Plummer MG (eds) The world trade organization: legal, economic and political analysis, Springer, 2005, pp. 1041-1120; T. Cottier, *Trade and intellectual property protection, in WTO law: collected essays*, London, 2006, pp. 81-86.

[152] D. Gervais, *The changing landscape of International Intellectual Property,* in Intellectual property & Free Trade Agreements, United Kingdom, 2007, p. 62. The author suggests that the use of "Trade-Related Aspects" to describe the "intellectual property rights" in the long-name of TRIPS Agreement was meant to "*give the impression that the subject matter was confined to more traditional GATT questions*".

> "*Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization*".[153]

c) the third factor is that the increasingly strong interaction between intellectual property and other rights (such as health) is deepening the need to find a balance between them. For example, in the field of patented medicines, it is necessary to consider the balance between the protection of intellectual property and the aim of reducing health care costs.[154]

The apparent paradox of intellectual property is that the law provides a monopoly to allow society to have access to new works and inventions but, in order to enable everybody to have access, the access is limited.

Stronger protection of copyright is not always good because it may result in unfairly reduced public access to copyrighted materials.[155]

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[153] Théberge *v*. Galerie d'Art du Petit Champlain Inc., 2 S.C.R. 336, 2002 SCC 34 (2002) at para 32, available at https://scccsc.lexum.com/scccsc/scccsc/en/item/1973/index.do?r=AAAAAQATQ2FuYWRhIEV2aWRlbmNlIEFjdAE, last access on 6 March 2018.

[154] In this sense, see *Bristol-Myers Squibb Co. V. Canada* (Attorney General), 1 SCR 533, 2005 SCC 26 (2005), at para 1-2.

[155] In 2015 Broadview Press, independent academic publishers, warned about the dangers of the term extension of copyright. In particular, Broadview CEO, Mr Don Lepan, held up Broadview's edition of Mrs Dalloway or The Great Gatsby as examples of text available in Canada but not in the U.S. where terms are longer. He stated that they are "looking at publishing similar editions of works by other authors who have been dead for more than 50 but fewer than 70 years – works such as Orwell's *Animal Farm* and *1984*, for example; [...] We are also looking forward to January 1, 2016, when we will finally be able to make the superb Broadview edition of [T. S. Eliot's] *The Waste Land and other Poems* – with its excellent explanatory notes and extensive range of background material on modernism – available in Canada. If TPP is approved in Canada, say goodbye to those Orwell and Eliot editions". The entire document is available at http://donlepan.blogspot.ca/2015/10/copyright-tpp-and-canadian-election.html, last access on 18 April 2018.

The authorisation to give higher-level protection results in the TRIPS Agreement.

The TRIPS Agreement expressly states that members may give higher levels of protection[156] because it requires minimum legal standards so that states may not provide lower protection than the agreed standards in their national legal systems, but they may provide more extensive protection.

In 1989 - and so in the same period in which TRIPS was being negotiated - the Director for Intellectual Property at the Office of the USTR stated that

> *"What happens if we fail [to obtain TRIPS]? I think there are a number of consequences to failure. First, will be an increase in bilateralism. For those of you who think bilateralism is a bad thing, a bad thing will come about".*[157]

There were concerns about the fact that if developing countries agreed to TRIPS, the U.S. would refrain from the negotiations about IP standards bilaterally.[158]

The conflict between intellectual property rights and education in developing countries could be seen mostly as a consequence of actual differences between developed and developing countries.[159]

This absence of a limit or a maximum standard in TRIPS creates an authorisation to extend and increase IP rights through FTAs and to expand intellectual property protection in the same limitless way.

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[156] TRIPS Agreement, Art. 1.1.

[157] E. Simon, *Remarks of Mr Emory Simon, in Symposium: Trade-Related Aspects of intellectual Property*, 22 Vanderbilt Journal of Transnational Law 367, 1989, p. 370.

[158] For a more detailed account of the bilateral phase in the development of international copyright standards, see R. L. Okediji, *Back to bilateralism? Pendulum swings in the international intellectual property protection*, University of Ottawa Law and Technology Journal, Vol. 1, 2004, pp. 125-147; D. J. Gervais, *The Internalization of Intellectual Property: new challenges from the very old and the very new*, Fordham Intellectual Property and Entertainment Law Journal, Vol. 12, 2002, pp. 929-990.

[159] S. I. Strba, *International Copyright Law and Access to Education in Developing Countries Exploring Multilateral Legal and Quasi Legal Solutions*, Graduate Institute of International and Development Studies, Vol. 10, 2016, p. 17.

The limited consequences of competition law as a check on infringement of intellectual property are the main reason why international intellectual property agreements should not be limited to minimum standards, but also include maximum standards.

Pursuant to Articles 41-60, TRIPS Agreement contains many maximum standards, such as the obligation for States to respect limitations, which ensure the balance between the interests of right holders and importers affected by such measures.

The higher protection is sometimes a crucial point.

Greater subject matter coverage is a clear example of more extensive protection. The TRIPS Agreement does not have special safeguards for domain names.[160]

Another example of more extensive protection is the duration of rights, as in the copyright field.

Again, the result of the different interpretations of Article 10 of the TRIPS Agreement, requires protection of the intellectual creation aspects of databases.[161]

Databases without such intellectual input fall outside of TRIPS Agreement coverage. If a country provides protection for this 'non-intellectual' database, is that country providing more or less extensive database protection than that required by the TRIPS Agreement? For instance, the EU has a database unfair extraction right, which provides protection for these 'non-intellectual' databases.[162]

This more extensive protection than the TRIPS Agreement as it regulates protection for more; however, the contrary can be said on two grounds.[163]

The first way in which it is a less extensive protection is because it covers matters outside of the protection of the TRIPS Agreement.

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[160] In this sense, FTA that include domain name protection rules would be considered as a TRIPS-plus protection.
[161] F. W. Grosheide, *Databases Protection the European Way*, Washington University Journal of Law & Policy, Vol. 8, 2002, p. 39.
[162] EU Directive on the Legal Protection of Databases, Council Directive 96/9 EEC, Chapter 3, Arts 7-11.
[163] S. Frankel, *The Legitimacy and Purpose of Intellectual Property Chapters in FTAs*, in R. Buckley, V. I. Lo, L. Boulle, *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements*, Netherlands, 2008, p. 191.

This seems to be the European strategy, as the unfair database right is not provided on a national treatment basis.

Secondly, it could be argued that the protection of non-original databases is a lesser level than the TRIPS Agreement requires because it undermines the fact that databases constitute "intellectual creations".

This field of databases shows on one hand that the significance of more extensive protection is itself potentially ambiguous and on the other the absence of any agreement on what could be considered an optimum level of intellectual property protection even among developed countries.[164]

Although the TRIPS Agreement allows for increased protection, there must be a rational limit on the level of protection.[165]

Due to Articles 3 and 4 of the TRIPS Agreement, bilaterally and preferentially agreed standards increase levels of protection beyond the parties to a specific bilateral agreement. This is the reason why TRIPS and PTAs form the common law of intellectual property protection, according to some commentators.[166]

There is certainly a limit that each State would consider adequate in its national legal system. It's not the same everywhere as it depends on the country on the basis of the state of development and also on the number of intellectual property-based companies in an economy. The same problem of intellectual property concerns the patent field.

The possible answer to the problem of the rational limit of intellectual property protection should coincide with the object and purpose of intellectual property law.

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[164] S. Frankel, ibidem, p. 192.

[165] L. R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 UC Davis LR, 2007, p. 971; See letter from Pascal Lamy, Director General of the World Trade Organization, to members of the European Parliament, 4 May 2010, http://keionline.org/sites/default/files/WTO-Lamy_Answer-to-MEP-letter.pdf.; P. K. Yu, *TRIPs and Its Discontents*, *Marquette Intellectual Property Law Review* 10, 2006, p. 402; G. Dinwoodie, *The International Intellectual Property Law System: New Actors, New Institutions, New Sources*, *Marquette Intellectual Property Law Review* 10, 2006, p. 214; H. G. Ruse-Khan, *A Trade Agreement Creating Barriers to International Trade? ACTA Border Measures and Goods in Transit, American University International Law Review* 26, 2011, pp. 653–657.

[166] T. Cottier, *The Common Law of International Trade and the Future of the World Trade Organization*, cit., pp. 3-20.

The TRIPS principle of minimum standard plays a crucial role.

Each bilateral or multilateral agreement about IP should include a rule about the possibility that a State to such an agreement may provide more extensive protection than is required under the agreement, or that does not derogate from other agreements providing even more favourable treatment.

Each next bilateral or multilateral agreement can fix higher standards.[167]

Bilateral agreements should be written in order to assure that developing countries are integrated into multilateral IP regimes with maximum speed.

Developing countries are being obliged to adopt multilateral standards in trades to which they are not a signatory party, to ratify multilateral treaties, or both.

Since developing countries would first need to respect the lowest common standards for creativity and innovation, it would be beneficial for them to be the main characters during negotiations when defining IPRs protection standards is important.

2.4 The Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled

Since a lawful aim of copyright regime is access to created works, recent international agreements also reflect a new perspective according to which copyright law has a role in promoting development and knowledge.

According to some commentators, the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled (hereinafter the "Marrakesh Treaty") is an important multilateral demonstration of this view.[168]

It explicitly recognizes in its Preamble

[167] K. Yu, *Doing Deals with Al Capone*, in P. K. Yu, *Intellectual Property and Information Wealth: Issues and Practices in Digital Age,* Vol. 4, 2006, p. 145.
[168] H. G. Ruse-Khan, *The (Non) Use of Treaty Object and Purpose in Intellectual Property Disputes in the WTO*, Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 11-15, 2012, p. 4.

> "*The need to maintain a balance between the effective protection of the rights of authors and the larger public interests, particularly education, research, and access to information, and that such balance must facilitate effective and timely access to works for the benefit of persons with visual impairments or with other print disabilities".*

In October 2008, a treaty to reduce the differences of access to knowledge between developed and developing countries and to remove the need to digitise a separate copy of each work was proposed at WIPO.

It represents an important contribution to improving access to people with print disabilities worldwide, which has constituted a phenomenon, known as "the book famine".

The positive conclusion of the Marrakesh Treaty is a clamorous victory for the good cause of the protection of disability rights.

The three main goals of this Treaty are the following.[169]

Firstly, it makes it mandatory for signatories States to include accessible versions of works for the benefit of people with print disabilities. In this sense, the Marrakesh Treaty represents one of the few international instruments that make exceptions to copyright's exclusive rights.[170]

Secondly, the Treaty requires signatory countries to provide lawfully made accessible formats to be distributed by organizations assisting people with print disabilities.

Finally, under Article 7 of the Marrakesh Treaty, it requires signatory States to introduce exceptions to their circumvention regimes to ensure that they do not prevent

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[169] P. Harpur, *The Weakening of the Exception Paradigm*, in P. Harpur, *Discrimination, Copyright and Equality: Opening the e-Book for the Print Disabled*, Cambridge, 2017, p. 80-81.

[170] The Marrakesh Treaty is considered as "*the beginning of an era in which international copyright law will again accord the public interest its legitimate place, advancing human rights, personal development, and the progress of open societies*", V. Franz, *The Miracle in Marrakesh: Copyright Reform to End the "Book Famine*", available at https://www.opensocietyfoundations.org/voices/miracle-marrakesh-copyright-reform-end-book-famine, published 28 June 2013, last access on 14 October 2018.

beneficiaries from benefiting the limitations and exceptions that the Treaty provides for.

It does not exclude the possibility of individual States requiring the remuneration of reasonable royalties to copyright holders for conversion of their work into accessible copies.

The Marrakesh Treaty establishes a framework for international cooperation in this regard.

It ensures that all contracting states may be obliged to introduce a minimum set of exception that allows visually impaired people to make and use accessible copies of works.

It allows the flow of accessible materials through a globally coordinated approach to share accessible formats digitized around the world.

In order to decrease the existing barriers in accessing written works for blind people, the strategies could be represented by investing in the digitisation of existing works and requiring the future deposit of new works in an accessible form.[171]

In the area of modern FTAs, there is also the experience of the Australia and United States FTA (known by the acronym *AUSFTA*) as an example of free trade agreement with noticeably higher standards of protection in relation to almost all IPR.[172]

According to AUSFTA, it is worthy of note that Australia's circumvention exception for people with print disabilities must be reviewed every four years.

Australia's obligation under this FTA aims to avoid any permanent exception being created: disability organizations will be required to continue to bring evidence during each review cycle to ensure an exception.

[171] P. Harpur, N. Suzor, *Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm*, 36 (3) University of New South Wales Law Journal, 2013, p. 778.
[172] This is the reason why it is described as a TRIPS-super-plus FTA: see P. Drahos *et al*., *Pharmaceuticals, Intellectual Property and Free Trade: The case of the US-Australia Free Trade Agreement*, Prometheus, 2004, p. 243.

2.5 Copyright Rules in Free Trade Agreements: A General View

IP rights and assets play a central economic role from different perspectives: from the rights of creators of artistic and literary works, through the health impact of better pharmaceutical innovations, to the diffusion of knowledge, information and know-how.[173]

The existence of intellectual property rights could be a barrier to trade because of its nature, which is not always adapt to enable trade.

It may be used to define the borders between markets and to stop the import or export of intellectual property goods.

This is also a consequence of the fact that intellectual property rights remain territorial.[174]

This territoriality means that rights in one market are distinct from those in another market.[175]

The territorial nature of copyright involves the commercialisation of copyrighted works in various countries, through a licensee.

It is not surprising that the free trade agreement could be considered as one policy area characterized by the presence of an "elaborate game of cat and mouse".[176] It has derived from the conflict between the proponents and opponents of increased IP protection and enforcement that confront each other in various debates.

Copyright law constitutes the legal framework for contracting in cultural industries, which are essentially synonymous with companies that produce or distribute copyrighted materials or services.[177]

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[173] Intellectual Property is not a term with a standard meaning. Traditionally it was used to describe the copyright protection of authors and to distinguish this from industrial property – as trademarks, patents for inventions, industrial design rights.
[174] See I. Calboli, E. Lee, *Trademark Protection and Territoriality Challenges in a Global Economy*, United Kingdom, 2014, p. 9.
[175] S. Frankel, *The Legitimacy and Purpose of Intellectual Property Chapters in FTAs*, *cit*., p. 193.
[176] S. K. Sell, *Cat and Mouse: Industries', State's and NGOs' Forum – Shifting in the Battle Over Intellectual Property Enforcement*, 2009, p. 1-31.
[177] P. Torremans, *Questioning the principle of territoriality: the determination of territorial mechanisms of commercialisation, in Copyright law: A Handbook of contemporary research*, 2007, p. 462.

States may intervene to benefit national cultural companies adopting rules and a legal system on copyright and related rights.

The lack of conformity of copyright laws and enforcement and the trade volume in copyrighted goods create many trade debates about the treatment of related rights.[178]

Effective protection of copyright and related rights involves a rigid application of international agreements and trades.

While right holders are inclined to distribute their copyrighted works on a large scale, a State may invoke cultural protection to limit the entry of foreign copyrighted works into its national market, reducing the benefits of a trade system.

The interest in international protection of copyright developed early in the nineteenth century as a result of the development of national markets for copyrighted works, resulting from the growth of the middle class, as well as the increasing international importance of those markets for the national economy.

The Berne Convention and the TRIPS Agreement grant States the discretion to determine the conditions under which copyright right can be exercised and to impose limitations on the exploitation of those rights.

International law does not oblige states to provide limitations or exceptions, but rather grants permission to establish them at the national level.[179]

The way in which states take advantage of this permission concerns how they balance the utilization of copyrights and the access to copyrighted works by the public, through the introduction of limitations and exceptions.

This is the basis for the principle of "national treatment", according to which foreign nationals are equivalent and are not considered less favourable than national rights holders.

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[178] For instance, the U.S. criticised the Canadian and European public performance rights for producers and performers because it offends "fairness", see K. Acheson and C. Maule*, Much Ado About Culture: North Americans Trade Disputes,* 1999, p. 23.

[179] It means "*limitations and exceptions are permissive and not mandatory*" according to S. I. Strba, *International Copyright Law and Access to Education in Developing Countries Exploring Multilateral Legal and Quasi Legal Solutions,* cit., p. 111.

Article 3 of the TRIPS Agreement forces the WTO Members to ensure that citizens of other Members receive treatment that is no less favourable than the one accorded to its own nationals with regard to the protection of IP.

This protection under Article 3 of the TRIPS Agreement is extended also to performers, broadcasting organizations and producers of phonograms.

To hedge the effects of only protecting one's own work, while also obtaining benefits in return for protecting foreign subject matter, countries started stipulating bilateral agreements, which mutually recognized national treatment to the citizens of other countries.

The protection of copyright took on a new role: it became a tool for the protection of one country's works in another country.

The result has been the proliferation of bilateral treaties, even if this situation became administratively difficult to manage.

Since countries need to regulate the protection of IPRs, it became apparent that having one international copyright instrument would be useful.[180]

It is important for two main reasons. The first one is to lawfully recognize the moral and economic rights of creators to their creations. The second reason has been to incentive creativity and the distribution of their works.

According to the WIPO Convention, the improvement of protection of IP globally was seen by the members of the organization as a way to promote the creativity of authors.[181]

By creating a property right in these matters on the one hand helps creative individuals to be involved in trade and on the other hand permits copyright owners to have a remuneration from them.[182]

On the issue of the inclusion of intellectual property rights in FTAs, Carsten Fink and Carlos Primo Braga stated in their analysis

[180] S. I. Strba, ibidem, p. 16.
[181] Without copyright, there would be little incentive for creative individual to write poems, paint pictures and music. Nor would there be any incentive for publishers, broadcasters and record companies to invest in the reuse of those works.
[182] P. J. Groves, *Sourcebook on Intellectual Property Law,* cit., p. 261.

> *"Economic analysis suggests that the effect of IPR protection on bilateral trade flows are theoretically ambiguous. Because of the complex static and dynamic considerations related to a policy of tighter protection, it is difficult to generate normative recommendations. When we estimate the effects of IPR protection in a gravity model of bilateral trade flows, our empirical results suggest that, on average, higher levels of protection have a significantly positive effect on nonfuel trade. However, this result is not confirmed when confining the estimation to high technology goods, for which we found IPRs to have no significant effect*".[183]

Once established the importance of the inclusion of intellectual property field in negotiations of free trade agreements, the FTAs reflect the TRIPS Agreement about copyrights and related rights or do not have a specific mention of this topic.[184]

Some FTAs go beyond the TRIPS Agreement with respect to specific copyright issues.[185]

The U.S. FTAs require contracting members to extend the term of copyright protection from 50 years from the death of the author to 70 years after the death of the author, in line with U.S. law.[186]

The term of "life-plus-seventy" has been proposed from U.S. as the adequate standard for all members of the EU.

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[183] C. Fink, C. Primo Braga, *How stronger Protection of Intellectual Property Rights Affects International trade Flows*, in Fink and Maskus (eds.), Intellectual Property and Development, Lessons from recent Economic Research, 2005, p. 35. At converse, other commentators consider that increased protection is better for trade: for example, Choi stated that "in general, a privilege or preferential treatment in the field of TRIPS means a greater level of protection", in W. M. Choin, *Legal Problems of Making Regional Trade Agreements with Non-WTO Member States*, 8 Journal of International Economic Law, 2005, pp. 825, 848.

[184] E. Schwartz, *The Impact of International Copyright Treaties and Trade Agreements on the Development of Domestic Norms*, in *40 Colum. J. L. & Arts*. 339, 2017, p. 349.

[185] For example, bracketed text in the US-Australia FTA makes reference to respect for moral rights, which would go beyond the TRIPS Agreement, which explicitly includes article 6-bis of the Berne Convention that refers to moral rights.

[186] J. C. Ginsburg, *The Constitutionality of Copyright Term Extension: How Long is too Long?,* 18 Cardozo Arts & Ent. L. J., 651, 2000, p. 701; S. I. Strba, *International Copyright Law and Access to Education in Developing Countries Exploring Multilateral Legal and Quasi Legal Solutions*, cit., p. 40.

This phenomenon has been described by the Australian Financial Review as "Mickey Mouse holds the key to the future" because it is the result of lobbying by U.S. copyright companies and industries, which represent such giants of the economy.[187]

Copyright law making involves more than just debates for doctrine and scholars.

Legislative results are the consequences of agreements reached between competing interest actors, but the rapid advancement of technology has fundamentally challenged settled compromises in the international copyright system.

In the view of some copyright companies, stronger copyright enforcement is needed in the digital development.

These industries have pressured the U.S. to fix stronger copyright enforcement standards (as those for intermediary liability) in new bilateral and regional trade agreements.[188]

It is a benefit of twenty additional years of protection for all new works, particularly for existing U.S. works that may have been on the edge of accessing in the public domain.[189]

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[187] As the Disney Corporation, Sony Pictures Entertainment, Warner Brothers, MGM, Universal Studios, Paramount Pictures, Twentieth Century Fox. For some commentators, the reason why the U.S. adopted a copyright term extension does not come from the motion picture industry, but from music composers and publishers (since "*I held at the Copyright Office the first hearing on copyright term extension in the early 1990s. The motion picture industry was mostly absent from that earing*").

[188] An example of this pressure is the public protest in 2012 against the Stop Online Piracy Act (SOPA) and the PROTECT-IP Act (PIPA) that were echoed in Europe and other parts of the world. Such international coordination by a "global public" is another new feature of international copyright law making. About these protests, see J. E. Cohen, L. P. Loren, R. L. Okediji, M. A. O'Rourke, *Copyright in a Global Information Economy,* 2013, p. 19.

[189] S. Zeitlin, *Starngling Culture with a Copyright Law*, N.Y. Times, 25 April 1998, at A15.

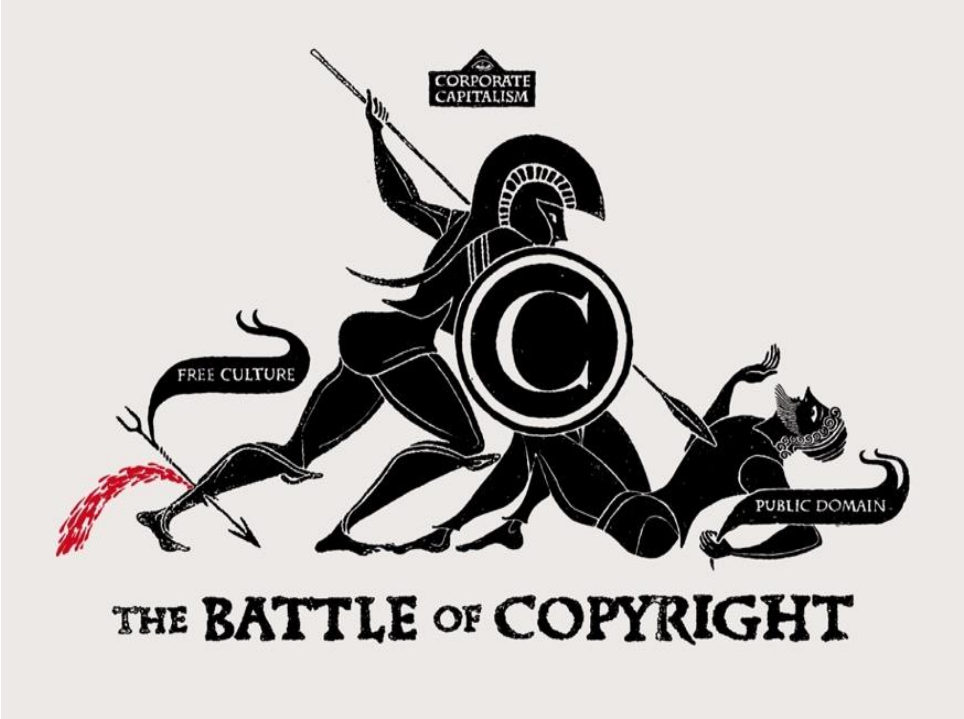

Figure 1. Source: The battle for copyright, by Christopher Dombres[190]

[190] The image is available at the website https://commons.wikimedia.org/wiki/File:THE_BATTLE_OF_COPYRIGHT.jpg, published in 2011, last access on 12 April 2019.

This illustration, realized by Dombres, is an allegory of the battle between corporate capitalism (the soldier who pierces) and public domain (the man pierced) for the extension of intellectual property rights. "Free culture" is represented by the arrow shot through the calf of "corporate capitalism".

According to the author's opinion, the legend of Achilles' invulnerability served as inspiration.

This allegory means that since the U.S. Congress may not be able to make copyright perpetual, it could make the terms so long that copyright would seem persist forever.

If this were to happen, millions of works that should be freely available for use would stay inaccessible in the cover of the copyright system.

It is also a risk for the harmonization copyright law with the rules of other countries in order to provide maximum protection for U.S. copyrights in those other countries.

These developments, often under the name of harmonization, are supported by some arguments. Arguments in favour of passage are mainly bases on economic implications.

The extension of the copyright term will generate unfavourable economic consequences on libraries, universities, cultural institutions, and the public at large.[191]

Firstly, researchers consider that increasing 20 years copyright term will provide negligible or no incentive for authors to create more works and that such term extension will benefit foreign authors or industries.[192]

The extension will particularly increase the costs of educational institutions for an extra twenty years, expand the payment of royalties, reduce the incentive to create

[191] R. Falvey, N. Foster-McGregor, D. Greenaway, *Intellectual Property Rights and Economic Growth,* in Internalisation of Economic Policy Research Paper, Vol. 10, No. 4, 2006, p. 2. They state "*Giving innovators too much protection may limit the spread of new ideas and lead to monopoly*".

[192] S. J. Liebowitz, S. Margolis, *Seventeen Famous Economists Weigh in on Copyright: the Role of Theory, Empirics, and Network Effects*, 2005 18 Harv. J. L. & Tech. 435, 2005, pp. 437–438, 447.

new works, and finally tilt the balance very much in favour of copyright holders creating more disadvantages and expenses of users.[193]

For example, such as arguments for expanding the copyright term are that authors need major protection and that people live longer.

It will heighten the problem of orphan works because the term extension provision will extend the deadline for them to fall into the public domain.

As a result, there will be works that are more protected by copyright, but users will not be able to identify their owners to negotiate license agreements and exploit them lawfully.

Many commentators have noted how global copyright extension for the "creative industries" has in recent years facilitated deregulation of working conditions for "creative workers".[194]

The trend to enforce and expand copyright globally for longer, also has negative impacts on future creative freedom and risks to disincentive creation, through the intensified protection of past works.

Extending copyright does not promote better neither creativity nor creation.

The extended term of protection may generate 20 more years of commercial gains for many works. Much of that income may come from foreign countries where a vast number of books, novels, and other U.S. works from the early 20th century continue to be marketable.

The economic argument influences also the employment prospects, tax revenues, and right holders incomes that expand the economy.[195]

If those revenues are derived from transnational markets, the strengthened protection and longer term of protection for copyrights may also help the changing of balance of international trade in favour of the U.S.[196]

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[193] A similar provision is included in RCEP Agreement, according to Article 2.5.3 of the draft IP chapter.
[194] D. O'Brien, *Creativity and Copyright: The International Career of a New Economy*, in M. David, D. Halbert (eds.), *Sage Handbook of Intellectual Property*, London, 2015, pp. 315-330.
[195] K. D. Crews, *Harmonization and the Goals of Copyright: Property Rights or Cultural Progress?*, cit., p.138.
[196] K. D. Crews, ibidem, p.132.

The US FTAs provide greater protection than TRIPS for works in digital form.[197]

Temporary reproduction such as temporary archiving in electronic form is considered a copyright infringement under the bilateral trade deals between the U.S. and its trading partners.[198] This provision extends the author's right also over their works on the Internet.

Unlike the traditional copyright rules, the prohibition of temporary reproduction allows the copyright owner to control the use of the Internet.

While the use of conventional copyrighted works, such as reading a book, is not considered infringement, browsing or using the Internet will be excluded because of infringement of copyright.[199]

It is clear that multilateralism on intellectual property in TRIPS has not been aimed to regulate common intellectual property standards. The plurilateral trend to strengthen IP standards has occurred in the context of a long and undecided process of bilateral agreements.

The United States and the European Union continue to request for TRIPS-plus standards and standards in accordance with TRIPS.

This strong trend to bilateralism is also due to the presence of trade rules which cover a wide range of matters and fields than ever before and as a result they are interconnected with non-trade rules and other rights not considered, such as environmental protection and human rights.

With the withdrawing from TPP by U.S. according to the initiative of President Trump, also 15 years of debated bilateralism has been lost.

With regards to Brexit, on 28 March 2018, the European Commission published a document about the effects of Brexit on UK copyright law.[200]

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[197] According to Article 16.4(1) US-Singapore FTA.

[198] J. Kuanpoth, *TRIPS-Plus Rules under Free Trade Agreements: An Asian Perspective*, in C. Heath, A. K. Sanders, *Intellectual property and Free Trade Agreements*, California, cit., p. 43.

[199] J. Kuanpoth, ibidem, p. 44. The author states that trading partners must ensure that the owners of copyright can track every use made of digital copies and trace where each copy resides on the network and what is being done with such copies at any time. These two requirements will affect the public right of fair use with respect to digital works.

[200] See *Notice to Stakeholders: Withdrawal of the United Kingdom and EU rules in the field of copyright*, available at

According to this statement,

"*The international framework will govern as of the withdrawal date:*

- *The protection of copyright and related rights [...];*
- *The term of protection of copyright and certain related rights;*
- *Databases* […]*;*
- *Computer programs;*
- *Semiconductor topographies;*
- *Enforcement of copyright (as one of the intellectual property rights in part 3 of TRIPS), including border measures".*

The document notes that the withdrawal of the UK will have consequences in the field of copyright and related rights to these categories: broadcasters, collective rights management (online rights in musical works), orphan works, access to published works for persons who are blind, visually impaired or otherwise print-disabled, online content Portability, *sui generis* database right.

The term of copyright is required to be 70 years after the death of the author at European level, however the international treaties only provide for a minimum term of 50 years after the death of the author.

Following the withdrawal from the European Union, the UK would no longer be bound to 70 years from the death of the author as the term of copyright.

The internationally binding WIPO Performances and Phonograms Treaty of 1996 provides for a minimum term of 50 years from the set of the performance.[201]

UK Government could choose to revert to the minimum requirements required by international agreements.

Another focus concerns the fact that while IPR were only directly incorporated into the international trading regime in 1995 with the creation of the WTO, they have

https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_copyright_final.pdf, published on 28 March 2018, last access 10 May 2018.

[201] Article 17 WIPO Performances and Phonograms Treaty.

always been included within the aim of international investment agreements (known by the acronym *IIAs*)[202].

The connection between the protection of intellectual property rights (IPRs) and international trade is clear.

For example, both in Art. 9.2(a) of New Zealand-Thailand Closer Economic Partnership Agreement (known by *ThaiNZCEP* Agreement) and in Art. 902 of Thailand and Australia FTA (known by the acronym *TAFTA*) include a section returns on royalties for intellectual property rights in the investment paragraph.

The coupling of IPR and investments is not an unusual element of bilateral investment treaties but it is considered more than what the TRIPS Agreement provides and so it may be defined as a TRIPS-plus issue.

As most IIAs are traditionally aimed at investment promotion and protection, they define "investment" as protecting a wide range of investments.[203]

Investment is often defined by the treaty in a broad manner, including not only the capital and money but also virtually all other kinds of assets that can be owned by a foreigner in the territory of the host country.[204]

New agreements are even more comprehensive, with a common rule provided by the U.S. IIAs, which defines an investment as

> "*every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as*

[202] This term includes both FTAs and BITs (Bilateral Investment Treaties) that contains a comprehensive chapter on investment.
[203] The explicit approach was taken in the first IIA negotiated between Germany and Pakistan in 1959, with the Article 8(1)(a) stating "the term 'investment' shall comprise capital brought into the territory of the other Party for investment in various forms in the shape of assets such as foreign exchange, goods, property rights, patent and technical knowledge".
[204] *Millicom International Operations B.V. The Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal (16 July 2010) para 76, in which the arbitral tribunal characterized the not entirely uncommon definition of investment which "*shall comprise every kind of asset, including all kind of rights" in the Netherlands-Senegal BIT ad "extremely broad*."

the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk".[205]

The manner in which IPRs are incorporated into IIAs is highly fragmented.

Many agreements explicitly include IPRs as a covered investment.[206]

In others, one or more provisions make it reasonably certain that IPRs are included as a covered investment.[207]

In others still, there is no reference to the inclusion or exclusion of IPRs but they are likely to fall within the definition of a covered investment as "asset", "intangible property" or "return".[208]

There are also IIAs which include IPRs under their scope by explicitly enumerating the kind of IP that is covered under the agreement. For example, the German 2008 Model BIT includes in the listed items that should be considered as investments:

"*(d) Intellectual property rights, in particular copyrights and related rights, patents, utility-model patents, industrial designs, trademarks, plant variety rights;*
(e) Trade-names, trade and business secrets, technical processes, know-how, and good- will".[209]

[205] Fore recent examples, see Article X.3 of the CETA; Article 14.2(f) of the Agreements between Australia and Japan for an Economic Partnership; Article 9.1(1) of the Free Trade Agreement between the European Union and the Republic of Singapore (EU-Singapore FTA).
[206] For a deep analysis of the definition of IPR as investments in investment treaties, see L. Vanhonnaeker, *Intellectual Property Rights as Foreign Direct Investments: From Collision to Collaboration*, United Kingdom, 2015, p. 182.
[207] For examples, see Article 11.28 of the Free Trade Agreement between the U.S. and the Republic of Korea; Article 10.28 of the CAFTA.
[208] For examples, see Article 1139(g) of NAFTA; see Article 96(i)GG of the Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership.
[209] Treaty Between the Federal Republic of Germany and _____ concerning the Encouragement and Reciprocal Protection of Investments available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2865 (last accessed 14 March 2017); another example can be found in the French 2006 Model BIT and in Chinese 1997 Model BIT.

The substantive rights that are further regulated by the treaty require considerable attention, as they may need to protect investors and investments in intellectual property.[210]

In conclusion, the close interconnection between multilateral, plurilateral and bilateral trades reflects common trends in international relations, which ultimately have to reflect countries' expectations, also in copyright field.

2.5.1 The Copyright Case in the Korea-U.S. Agreement

The U.S. has recently followed an explicit bilateral trade policy of going beyond the TRIPS Agreement by including TRIP-Plus provisions in its FTAs: an example is the Korea-U.S. FTA which adopts plus copyright provisions, which didn't exist in Korean copyright law.

The main new rights and schemes are:

a. the copyright term extended to the life of the author plus 70 years for works, as in the U.S. and the European Union, and to 70 years from the date of publication for films and sound recordings;
b. an obligation to provide for criminal procedures and penalties to be applied at least in cases of wilful copyright infringement or related rights piracy on a commercial scale.[211]

With regards to this copyright field, it is necessary to highlight that the U.S. has agreed to withdraw its demand for prohibition on parallel imports of copyrighted works, and Korea has conceded its demand for the inclusion of the author's personal rights. This is why, under Korean law, personal rights are considered as rights recognized separately from copyrights, referring to the author's rights to reproduce, to show the name of the author and to maintain the original work without adjustments, which are not recognized under U.S. law.

[210] For a deepening about the definitions of IPRs as investments, see B. Mercurio, *Safeguarding Public Welfare,* in *Mega-Regional Trade Agreements*, Springer, pp. 241-269.
[211] B. Kim, *Copyright and Free Trade –A Korean Perspective*, in *Intellectual Property & free Trade Agreements*, United Kingdom, 2007, pp. 249-250.

Reproduction rules have arisen involving the disclosure of online materials, and "streaming" should be treated as implicating reproduction rights.

In order to stream a work, an initial server copy must be made on the computer and if the context is not downloaded, it is temporarily on a computer.

On this topic, the U.S. and Korea have different opinions.

The U.S. has argued that this temporary saving should be treated as invoking reproduction rights and should be included in the FTA.

On the contrary, Korea considers it as an overreaching prohibition on the user's rights, because the writer is already protected by various other means, such as rights against unauthorized reproduction.[212]

This debate was won by the U.S.

Korea has agreed to accept the U.S. position provided that certain exceptions can be made with respect to fair use.

2.5.2 The Copyright Case in the Dominican Republic-Central America Agreement

On August 2004, the U.S., Costa Rica, Guatemala, El Salvador, Honduras, Nicaragua, and the Dominican Republic signed the Dominican Republic-Central America FTA (known by the acronym *Dr-CAFTA*).

Copyright rules would clarify use of digital works – exceeding TRIPS standards – including extended terms of protection for copyrighted works, temporary copies of materials on computers (such as software and video), the requirement that governments use only legitimate computer software, rules for liability of internet service providers in case of copyright infringement.

With regards to the right of reproduction, the Dr-CAFTA partly uses the formula of the TRIPS and Berne Convention, firstly adding "authors" to the categories while TRIPS mentions only "performers" and "producers".

[212] Y.S. Lee, *The Beginning of Economic Integration*, in *Challenges to Multilateral Trade*, Netherlands, 2008, p. 142.

Secondly, it states that the term "reproductions" covers all reproductions "permanent or temporary".[213]

The right of distribution of Dr-CAFTA gives authors, producers of phonograms, and performers the right of distribution of originals or copies their works.

The Dr-CAFTA would also mandate statutory damages in case of abuse of copyrighted material[214] and this represents a novelty.

2.6 From National to International Copyright Exhaustion in the U.S.

Since the aim to protect copyright holders from a strict restriction of their rights, there are specific conditions for the applicability the principle of exhaustion.

Firstly, it could be used only when a tangible copy of the work has had a transfer of ownership by the right holder or with his content. Furthermore, exhaustion only involves the right to distribute the single copy put on the market and only applies in the European market.[215]

It is interesting to analyse Kirtsaeng v. John Wiley & Sons. Inc. case law: a historical decision of the U.S. Supreme Court, stating that the principle of exhaustion is not subjected to geographical limitations.[216]

In March 2013 the Court stated that the principle of copyright exhaustion as provided in section 109(a) of the Copyright Act applies without distinction to products and goods manufactured and lawfully distributed in the USA as well as in foreign countries.[217]

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[213] In TPP Agreement text it's not include the wording "permanent or temporary".[213]

[214] J. F. Hornbeck, *The Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA),* CRS Report for Congress, updated on July 6, 2005, available at http://www.au.af.mil/au/awc/awcgate/crs/rl31870.pdf , p. 24.

[215] G. Spedicato, *Online Exhaustion and the Boundaries of Interpretation,* in *Balancing Copyright Law in Digital Age. Comparative Perspectives*, (eds. R. Caso, F. Giovanella), Berlin, 2014, p. 33.

[216] Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013).

[217] The principle of copyright exhaustion originally developed as a judicial doctrine in *Bobbs-Merril v. Straus* (Bobbs-Merril v. Straus, 210 U.S. 339, 1908) in the early 1900s and it was first codified in the 1909 Copyright Act.

It is the result over 20 years of litigation for the court to this statement and clarify that new books, software, and other copyrighted goods can be freely imported into the U.S. not only by copyright holders but also by independent third parties.

It is not important where the products are "lawfully made" and first sold in the international market.

The impact of the decision in Kirtsaeng influences international trade not only with reference to books and other products, which are traditionally the subject matter of copyright filed.

It directly extends to international trade in many other consumer products (as chocolate[218]). Even though these products cannot be copyrighted in their complex because they are non-copyrightable goods, they frequently carry "incidental features" such as decorations, product design, logos, and so forth that can qualify for copyright protection.[219] By securing copyrights also in these goods, IP holders could benefit from the effects of both trademark and copyright protection for their products.

U.S. courts implemented the principle of IP exhaustion to balance the exclusive rights granted to inventors and creators in their goods and works with the rights of users and consumers to freely sell these products after having lawfully purchased them in the global market.[220]

The principle of exhaustion finds its *ratio* in the consideration that IP rights must not be used as a tool to control market distribution, to protect competitors against unfair market competition for trademarks and to protect consumers against confusion.

It involves the restriction of the exclusive right of sale of IPR owners to the first sale and distribution of the product.

The approach to facing the exhaustion of IPRs can be included into three categories:[221]

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[218] *Euro-Excellence Inc. v. Kraft Canada Inc.,* 3 S.C.R. 20, 2007 SCC 37 (2007).
[219] I. Calboli, E. Lee, *Trademark Protection and Territoriality Challenges in a Global Economy*, cit., p. 152.
[220] I. Calboli, *An American Tale: The Unclear Application of the First Sale Rule in United States Copyright Law (and its Impact on International Trade),* in Intellectual Property at the Crossroads of Trade 67, Jan Rosen ed., 2012, pp. 71-72.
[221] I. Calboli, ibidem, p. 157.

1. national exhaustion: this is the most protectionist position. It provides that national IPRs are considered exhausted only when the products have been distributed for sale in the domestic territory by IP owners or with their consent by, for example, a licensee or a distributor. It allows the possibility to grant numerous exclusive license valid in different countries.[222] IP holders can oppose as infringement, however, the importation into the domestic market of goods that have been distributed firstly outside the national territory;
2. international exhaustion: this prospective is more favourable toward free trade. According to this theory, in countries adopting international exhaustion, IP owners cannot object to the importation of grey market goods that were first marketed outside of the national market or the re-entry of pristine goods that were exported abroad after their first domestic sale,
3. regional exhaustion: Article 6 of TRIPS states that nothing in the Agreement can be used to address the issue of the exhaustion of intellectual property rights. Since the absence of a common international standard, countries have adopted different territorial approaches with respect to the principle of exhaustion.[223]

The U.S., in particular, follows on one hand a system of national exhaustion with respect to patent law and patented products and on the other hand referring to trademark law.

222 G. Okutan, *Exhaustion of Intellectual Property Rights: A Non-Tariff Barrier to International Trade,* Annales de la Faculte de Droit d'Instanbul, 1996, p. 125. The author states that "*Under the territorial application of exhaustion, it is possible to prevent grey imports together with parallel imports; however, this may not be possible under international exhaustion of IPRs, which is a threat towards both consumers and producers*".
223 V. Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion, and a Few Other Things*, 21 Mich. J.Int'l L. 333, 2000, p. 347.

Until the Supreme Court's decision in Kirtsaeng, it was unclear whether section 109(a) of the Copyright Act established a system of national[224] or international[225] copyright exhaustion, even though the majority of the courts seemed to be partial to an interpretation of the rule in favour of domestic exhaustion.

In Kirtsaeng, the Supreme Court clarified that the Copyright Act does not impose a territorial limitation on the application of the principle of copyright exhaustion, which build the United States' position, at least for the time being, in line with the international exhaustion standard adopted according to the trademark law.

The decision in Kirtsaeng eliminated the possibility of invoking copyright protection against grey market products due to the lack of an equivalent provision in trademark law.

The effects of the decision may be short-lived.

After the decision in Kirtsaeng, Maria Pallante – the U.S. Register of Copyright – publicly called upon Congress, stating that the time had come for Congress to undertake important copyright reforms that would finally bring American copyright law in line with the need and challenges, both technological and otherwise, brought forward by the rapid changes of the 21th century.[226]

On 23 April 2013 the House Judiciary Committee Chairman Bob Goodlatte announced that the Judiciary Committee would redact a comprehensive bill of U.S. copyright law.[227]

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[224] Based on the interpretation of the majority of the courts, it seemed to lean towards an approach favouring national exhaustion. On this point see *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908); *BMG Music v. Perez*, 952 F.2d 318 (9th Cir. 1991); *Parfums Givenchy, Inc. v. Drug Emporium, Inc.,* 38 F.3d 477 (9th Ci. 1994); *Denbicare U.S.A. Inc. v. Toys "R", Us. Inc.*, 84 F.3d 1143; *Quality King Distribs., Inc. v. L'anza Research Int'l., Inc*., 523 U.S. 135 (1998).

[225] *Sebastian International Inc. v. Consumer Contacts* (Pty.) Ltd., 847 F.2d 1093 (3d Cir. 1988). The Third Circuit supported the position that section 109(a) limited the importation right in section 602(a)(1) and equally applied to national and international sales.

[226] M. A. Pallante, the Register of Copyrights of the United States and Director of the U.S. Copyright Office, delivered a keynote speech on the copyright hearings and related discourse in the nation's capital. The speech was given at The John Marshall Law School's 58th Annual Intellectual Property Conference and it's available at https://www.copyright.gov/about/office-register/copyright-hearings-and-related-discourse.pdf, last access 15 March 2018.

[227] The speech is available at: https://judiciary.house.gov/wp-content/uploads/2017/03/SLW_502_xml.pdf?utm_source=House+Judiciary+Committee+Pre

After the decision in Kirtsaeng, the position supported by the U.S. at the international level – so far national copyright exhaustion – no longer aligns with the post- Kirtsaeng interpretation of sections 109(a) and 602(a)(1) of the Copyright Act.[228]

In Kirtsaeng's case law, Justice Ginsburg, in clear disagreement with the majority – issued a dissenting opinion.[229]

She noted that the position of the majority in the case was in conflict with the position repeatedly taken by the U.S. in international trade agreements, that copyright owners should have the right "to prevent the unauthorized importations of copies of their work sold abroad". According to Justice Ginsburg, the U.S. preferred provisions in favour of a system of national copyright exhaustion in some of the FTAs currently in force or that are being negotiated between the U.S. and other countries, such as under Article 4(11) of the United States-Jordan Free Trade Agreement.[230]

She denounced that the U.S. pretended that national copyright exhaustion was the official national attitude on the matter while negotiating international agreements, both at multilateral level, such as during the TRIPS negotiations, as well as the multilateral level while negotiating FTAs with foreign countries.[231]

In the IP chapter of the TPP, Article QQ.G.3 states that contracting members of the agreement shall provide to copyright owners

> "*the right to authorize or prohibit the importation into that Party's territory of copies of the work, performance, or phonogram that are made*

ss+Releases&utm_campaign=0a41230351EMAIL_CAMPAIGN_2017_03_23&utm_medium=email&utm_term=0_df41eba8fd-0a41230351-101202689 , last access 15 March 2018.

[228] The courts derived this position from the combined interpretation of sections 109(a) and 602(a)(1) of the Copyright Act. Precisely, the section 602(a)(1) states that the "importation into the United States into the United States" of a copyrighted work acquired outside the U.S. "without the authority of the (copyright) owner" is "an infringement of the exclusive right of distribution".

[229] In Kirtsaeng, 133 S.Ct. at 1373 (Ginsuburg J. dissenting). Justice Kennedy joined and Justice Scalia agreed in part.

[230] I. Calboli, E. Lee, *Trademark Protection and Territoriality Challenges in a Global Economy,* cit., p. 169.

[231] This is the reason why someone has told about Kirtsaeng case law as the "game over": see I. Calboli, *Game Over or Just Time out? Exhaustion and misuse of Intellectual Property Rights in the United States before and after Kirtsaeng v. Wiley & Sons*, in Distribution des Intangibles, Les Edition Thémis, 2012, pp. 69-73.

without authorization, or made outside that Party's territory with the authorization of copyright owners".[232]

With minimal variations, the same provision is provided in the United States-Morocco FTA[233] and in the United States-Jordan FTA.[234] In the same way, Singapore currently follows a system of international copyright exhaustion; the Singapore Copyright Act also includes the prohibition against the enforcement of copyright protection for accessory copyright in the context of international parallel trade.

It's not surprising that the various parties interested in overruling Kirtsaeng would start arguing that Congress should realign the national position on copyright exhaustion with the obligation undertaken by the U.S. in international trade agreements.

The principle of exhaustion of intellectual property rights has been developed in order to prevent intellectual property rights from being used as a mechanism to control post-sale product phase.

While TRIPS is silent on the issue, the various members of TRIPS have followed the territorial approach (national, international, or regional exhaustion) that is considered as the most appropriate one for their national economy.

On the contrary the U.S. has traditionally followed a system of international market.

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[232] Article QQ.G.17, TPP, which is opposed by the U.S. and Australia, stating that "the parties are encouraged to establish international exhaustion of rights" in https://www.globalresearch.ca/the-final-leaked-secret-tpp-text-is-all-that-we-feared-top-down-control-of-the-internet/5481702, last access 15 March 2018.

[233] Article 15.5(2), United States-Morocco Free Trade Agreement, June 15, 2004, 44 I.L.M. 544 (2005), available at https://ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file797_3849.pdf last access 15 March 2018.

[234] Article 4(11), Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Oct. 24, 2000, 41 I.L.M. 63 (2002), available at https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005607.asp, last access 15 March 2018.

The criticised point is that the U.S. should harmonize the system of IP exhaustion, which is divided between national exhaustion in copyright law and international exhaustion in trademark law.

It would be necessary to introduce appropriate mechanisms to terminate this crossroad.[235] For example, a provision prohibiting copyright protection for "accessory copyright" against parallel imports should be introduced following the examples of other legal systems, such Singapore and Australia.

After Kirtsaeng case law, it's obvious that granting copyright holders the right to prevent imports under section 602 of the Copyright Act, the U.S. faced that non-exhaustion rule's domestic cost problems.

Since the principle of exhaustion involves the limit of exploitation of intellectual property rights by their holders, in the international context there is the trend to divert the attention from the comparison between the exhaustion and non-exhaustion principle.

It allows the countries to focus their attention to creating a set of rules and exceptions, taking on related national cost concerns that produce an acceptable result on which all parties can agree.

2.7 The TRIPS Exhaustion

According to the principle of exhaustion, the issue of whether IPRs are exhausted after the first sale of a product with an IPR attached, for example in the case of trademarks, is noteworthy.

This topic refers copyright matter because most copyright laws establish that a copyright owner may control the importation of a protected work.

This is a concern involving right holders who tried to place the parallel importation of trademarked products likewise copyrighted products.

[235] I. Calboli, E. Lee, *Trademark Protection and Territoriality Challenges in a Global Economy,* cit., p. 177-178.

The TRIPS Agreement does not directly settle the exhaustion matter of IPRs. The reason is probably the fact that the negotiating parties could not find a compromise on such a fundamental topic easily.

Article 6 TRIPS provides the basic freedom of each contracting party to establish its own exhaustion legislation, so long as there is no violation of Article 3 (about national treatment) and Article 4 (about the most-favoured nation treatment).

Article 6 provided that in this agreement nothing can be used to address this issue.

The TRIPS exhaustion and implementation suggest that until the underlying distributional problems are resolved, a good agreement or a good rule cannot be achieved.[236]

One solution, in the expansion of the WTO trade negotiation, may be to make compensating economic amendments.

That approach is already being adopted in the bilateral and regional trade agreements negotiated since TRIPS.

These more limited contexts permit the parties to expressly negotiate economic benefits in exchange for IPR concessions as TRIPS-plus provisions.

For example, bilateral treaties between developed economic states and developing countries or with mid-level economies have granted the latter preferential access to the developed nations' market in exchange for domestic IP law amendments including a rule of international non-exhaustion or an express agreement to limit the parallel import of IPR goods.

In the same way, regional agreements provide non-discriminatory market access with specific TRIPS-plus harmonized IPR standards and an agreement to implement a safeguard of intraregional exhaustion.[237]

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[236] I. Calboli, E. Lee, *Research Handbook on Intellectual Property Exhaustion and Parallel Imports,* cit., p. 136.

[237] Marco M. Aleman, *Topic 12: Patent-related Provisions in the Framework of Preferential Trade Agreements*, in WIPO Sub-Regional Workshop on Patent Policy and its Legislative Implementations, April 2013, available at http://www.wipo.int/edocs/mdocs/patent_policy/en/wipo_ip_skb_13/wipo_ip_skb_13t12.pdf last access 17 March 2018.

It is important to note that the developing countries might even consider making additional concessions on their own.

This problem can also be faced by changing the TRIPS provided standards to adapt the benefits and costs to developing countries.[238]

About the advantages, positive improvements can be taken to develop their active participation in the global IP market.

It is also necessary for developed countries to be more flexible and exceed the market efficiency goal, when considering the developing countries' needs and conditions.

The distributional topic is interconnected with the exhaustion.

The distributional concern could be resolved if the developed nations invoked the efficiency paradigm for limiting their IPR right holders' returns to the first sale as well as accepting a rule of international exhaustion.[239]

Even making the necessary amendments, in order to achieve greater efficiency, may be insufficient because the different national legal systems regarding copyright law represent the most significant problem in this sense.

Copyright law's justification parallels patent law, granting authors a remuneration to invest in new materials by giving them the legal tool to prevent others from copying their original works.

The appropriate efficiency-based transnational rule on exhaustion would track patent law, generally by applying international exhaustion but subject to contractual amendments to allow customizing of acquisition prices and greater access.[240]

Many nations also view the IPR regime as providing protection to individual natural rights, such as the right to attribution regarding works they have created.

In order to be acceptable to these countries, the rule of international exhaustion must contract these non-efficiency policy concerns.[241]

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[238] I. Calboli, E. Lee, *Research Handbook on Intellectual Property Exhaustion and Parallel Imports,* cit., p. 137.
[239] I. Calboli, ibidem, p. 138.
[240] V. Chiappetta, *Working toward international harmony on intellectual property exhaustion (and substantive law),* in *Research Handbook on Intellectual Property Exhaustion and Parallel Imports*, United Kingdom, 2016, p. 138.
[241] V. Chiappetta, ibidem, p. 139.

Finding a workable solution requires adjusting the rule of international exhaustion to produce an acceptable compromise: for example, both actors might agree to a rule that limits exhaustion to a copyright holder's economic right abstained from by the author.[242]

The inability of the TRIPS negotiators to achieve an agreement on IPR exhaustion has been followed by the doctrine's distributional debates when imported into the global economic context.

While developed countries generally prefer the international non-exhaustion approach which allows its IPR right holders to maximize their profits, developing states generally prefer international exhaustion principle and the resulting parallel import competition which lowers national market prices and increases national access to IPR goods.

According to the international exhaustion principle, products can be distributed freely once they are lawfully sold on the market but it could discourage new inventions.[243]

These circumstances related to the exhaustion concern also explain the slow progress toward IPR harmonization under the TRIPS agreement.

As with exhaustion, obtaining harmonization requires dealing with these original causes by making sure developing countries can obtain adequate profits from the global market access to justify their adhesion and that the TRIPS standards provide enough flexibility to satisfy different rules and economic realities.

This compromise involves providing time for the developing states economies to evolve and this naturally increases the national advantages of implementing TRIPS standards of IPR law.

Since the difference between domestic perspective on the exhaustion principle, there is the evolution of the European case-law with specific regard to online exhaustion.

The starting point is the freedom of the contracting parties under Article 6(2) of the WIPO Copyright Treaty of 1996 (known by the acronym *WCT*).

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[242] V. Chiappetta, ibidem, p. 140.

[243] G. Okutan, *Exhaustion of Intellectual Property Rights: A Non-Tariff Barrier to International Trade,* cit., p. 125.

According to this provision, nothing in this Treaty shall affect their freedom to determine the conditions, if any, under which the exhaustion of the distribution right applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.

This rule on exhaustion rule does not exclude its applicability to digital copies.

It is confirmed also by the fact that there is not a clear definition of the distribution right in Article 6(1), such as the exclusive rights of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

The vagueness of these rules allows to consider that the online distribution of intangible copies of a work is protected under the right to make the work accessible to the public, which would preclude the possibility of extending the principle of exhaustion to intangible copies circulated on online market.[244]

2.8 Between the "Absolute Protection Copyright" and the "Copyright's Incentives-Access Paradigm"

A paradox has been noted with regards to copyright.

The law ensures those who create, or produce, or publish their works with exclusive rights to prohibit many ways of use of this knowledge, just to increase the access to this knowledge.[245]

As described by Mark Lemley, the "absolute" or "full value" of intellectual property protection is the term to outline a strict normative commitment to the internalization of all outsourcing created from the use of information.[246]

In this panorama, IPRs should theoretically expand to every valued use of information, in a way that users would be required by law to pay the right holders' cost for any use.

[244] G. Spedicato, *Online Exhaustion and the Boundaries of Interpretation,* cit., p. 37.
[245] D. Gervais, *The Changing Role of Copyright Collectives*, cit., p. 4.
[246] M. A. Lemley, *Property, Intellectual Property, and Free Riding,* Texas Law Review, No. 83, 2005, p. 1031.

This is the reason why there is the constant expansion in the purpose of copyright at international and regional levels.[247]

Especially in the U.S., courts prefer an absolute protection approach to copyright.

Supporters of the absolute protection model consider access as not "lost" as copyright expands, because as copyright expands access is organized through the private initiatives of right-owners and would-be users.[248]

They consider that there is a difference between the incentive-access and absolute protection approaches to copyright.[249]

According to the analysis by Glynn Lunney, an efficient system of copyright protection is a "balanced" regime that limits the unpaid use of information just enough to secure the right level of incentive to promote its production at a socially optimal level: this is the so-called copyright's incentives-access paradigm.[250]

This model was born from the idea that copyright is itself attended by two kinds of social costs, associated with the lost access to information goods and the right holders' powers of exclusion.

Firstly, copyright can provide to right holders a level of monopoly power in markets for delivery goods incorporating exact replications or repetitions of their works.[251]

Secondly, the incentives-access paradigm identifies as imposed by copyright concerns second-generation creators, as distinct from passive consumers.[252]

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[247] Critics of expansionist tendencies n copyright will find too many friends in economics. For example, Professor Amartya Sen had extended welfare economics to include values such as freedom, which are central to debates about copyright. Another example is Professor Bruno Frey who have examined why monetary incentives can be counterproductive.

[248] R.P. Merges, *A New Dynamism in the Public Domain*, University of Chicago Law Review, No. 71, 2004, p. 183; J. Cohen*, Lochner in Cyberspace: the New Economic Orthodoxy of Rights Management,* Michigan Law Review, 1998, p. 92.

[249] A. Barron*, Copyright infringement, 'free-riding' and the lifeworld*, cit., p. 5.

[250] G. S. Lunney, *Reexamining Copyright's Incentives-Access Paradigm*, Vanderbilt Law Review, No. 49(3), 1996, p. 483.

[251] M. J. Sag, *Beyond Abstraction: the Law and Economics of Copyright Scope and Doctrinal Efficiency*, Tulane Law Review, No. 81, 2006, pp. 187 and 196; W. Gordon, *Authors, Publishers and Public Goods*, in *Loyola of Los Angeles Law Review*, No. 36, 2002, pp. 139 and 195.

[252] A. Barron, *Copyright infringement,'free-riding' and the lifeworld*, cit., p. 104.

Proponents of the incentives-access model regard the challenge this presents as one of balancing the copyright system's dynamic benefits against its static costs.[253]

EU scholars criticize EU copyright harmonization trend for adopting an inappropriate "property logic", which affects the interpretation of copyright rules with the theory of the absolute protection.[254]

Eu copyright law has oriented towards a high level of protection of authors, involving new relationships between copyright and other rights, interests and socio-cultural values.

The difference between the absolute protection and incentives-access model is that the latter identifies the lost free access connected with a copyright system as a cost of the regime, and only measures the advantages earning from the degree to which the system incentivizes the initial creation of information goods.

The absolute protection paradigm considers free access to IPRs goods as itself imposing social costs, and underlines additional advantages of the copyright system not registered by the incentives-access model.[255]

Proponents of this theory believe that it is most responsible for the development in copyright's goals in recent years, an expansion they are concerned to reverse or at least suspend.[256]

They also intend to recreate a version of the incentives-access rationale to counteract the absolute protection approach. Finally, they are convinced of this paradigm's distinctness from the traditional incentive-access logic for copyright.[257]

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[253] J. Aldred, *Copyright and the limits of the law –and-economic-analysis,* in Copyright and Piracy: An Interdisciplinary Critique, Cambridge, 2010, p. 132.

[254] A. Peukert, *Intellectual Property as an End in Itself,* European Intellectual Property Review, 2011, p. 67. C. Sganga, *Systematizing and Rebalancing Eu Copyright through the Lens of Property*, cit,. p. 1-3.

[255] R. P. Wagner, *Information Wants to be Free: IP and the Mythologies of Control,* Columbia Law Review, No. 103, 2003, p. 995.

[256] B.M. Frischmann, M. A. Lemley*, Spillovers*, Columbia Law Review, 2007, pp. 277-278. Their position is criticised by Anne Barron, a proponent of the absolute protection paradigm, who considers that the "lingering adherence of these critics to economic theory, and to the representations and norms that are presupposed by economic theory, has stymied their well-meaning efforts to account for the social value of "information" in terms distinct from the merely economic measure of price", in A. Barron, *Copyright infringement,'free-riding' and the lifeworld*, cit., p. 102.

[257] H. Demsetz, *Toward a Theory of Property Rights, American Economic Review,* 57(2), 1967, p. 350; H. Demsetz*., Frischmann's View of "Toward a Theory of Property Rights,*

They condemn the absolute protection approach to copyright.

According to these commentators, many uses of information that proponents of absolute protection would argue ought to be deemed infringements of copyright if the price not paid involved "innovation spill overs" (with reference to uncompensated advantages and profits generated by the strategy of producing information) and a safeguard should legally be found.

In particular, Lemley considers that the absolute protection paradigm cannot deliver an efficient intellectual property system.

He states that there is a too-easy analogy between IP and tangible property on which each depends and he distinguishes between two different variants of the "ex post" justification for broad IPRs.[258]

The first version analogizes IPRs to right holders in respect to tangible things, but it suggests that rights in intellectual works should be such as to enable all the social advantages involved by these creations to be internalized, even though neither the economic theory nor the law of tangible property penalises this in relation to tangibles.

The second variant is very interesting. It analogizes intellectual creations to tangible things and suggests that IPRs are necessary to prevent their overuse, even though intellectual creations are inexhaustible. The intellectual commons are not subject to the "tragedy" that afflicts open-access tangible resources, since information cannot be exhausted by overuse.

According to Lemley's opinion, absolute protection would impose unnecessary social costs for no additional social benefits: the value idea fails to connect the right to capture this value to the social benefit of having IPRs in the first place, which is that of incentivizing the production of information.[259]

Review of Law and Economics, No. 4(1), 2008, p. 127. He suggests that the externality issues that arise in relation to open-access "ideas" are "closely analogous to those which arise in the land ownership example" and can be dealt with using the same means: internalisation via property rights in "ideas".

[258] M. A. Lemley, *Ex Ante versus Ex Post Justifications for Intellectual Property, University of Chicago Law Review*, 2004, pp. 129-130.

[259] M.A. Lemley, *The Economics of Improvement in Intellectual Property Law,* Texas Law Review, 1997, pp. 989 - 1083.

The analysis made by Lemley and Frischmann can be understood as a conventional economic theory of property rights set to account for the characteristics of information as an inexhaustible resource system.[260]

They support that the risk is that the social costs of property rights to do so may still exceed the advantages; in this case, property rights in information must be "balanced" by commons (open access) arrangements to include the incentives-access equilibrium referable to traditional copyright-law-and-economics theory.

The incentive-access model gives a positive value on free access to a work and it considers the violation of this freedom as a cost associated with any expansion in the name of copyright protection. It only registers the work as a benefit to be valued against this cost and any increase of copyright expansion will create incentives for the production of such works.

The theory of incentive-access aims to protect a sphere of life from the monopoly by market strategies and practices. An excessively copyright system limits the public sphere by providing an excessive cap the knowledge.

This system actually evolves ideas into private property which may be valuable in monetary terms.

In the public sphere, the price is defined on judgements, which are verified not in monetary terms, but in terms of the arguments, which support them.

2.9 Open Source and Open Access: an Alternative to the Copyright Paradigm

There is a solution, which involves copyright duration: it's open access approach.

It aims to publicly fund research and the granting of prizes, instead of copyright for innovation.[261]

[260] Anne Barron considers that "*Yet it is not entirely clear what is new about this new theory"*, in *Copyright infringement,'free-riding' and the lifeworld,* cit., p. 120.
[261] There is also the Open Source movement that is the leading example of such a model of IP regulations.

Open Access (OA) is a social movement, which is also known as Open Science (OS).[262]

As international trade and cultural exchanges expanded, it has become clear that protecting only national works and inventions could lead to unjust results: if a nation protected only domestic literary and artistic works, foreign works would become available in "pirate" form – usually at a much lower price.

There has been a general historical trend towards the institutionalization of private property regimes, evidence of a contrary movement – from private property to open access – in some contexts, including that of copyright, can be accommodated by Demsetz's theory.

When the costs of preventing unintentional proceeds grow, as they have during the last decade with regards to computerized music downloading and computer disk copying, society shifts to greater tolerance of communal rights in the use of the involved resources, at least until cheaper methods of monitoring involuntarily arranged "takings" arise. All this is according to the theory of institutional change discussed in "Toward a Theory of [Property Rights]".[263]

Open-source software is distributed under a series of public licences, and although reliant on copyright law, open source is promoted as an alternative to the copyright paradigm.[264]

When developing computer programs became an industry during the 1970s and 1980s, the software industry wanted to protect its investments in the creation of programs.

This was achieved by using technical measures and by securing copyright protection for programs in the legal process described above.

In 1983, Sir Richard Stallman announced the GNU project to provide users with an operating system that would be free to use, modify, and redistribute.

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[262] R. Caso, P. Guarda, *Copyright Overprotection vs. Open Science: the Roles of Free Trade Agreements*, in *Free Trade Agreements*, (eds. L. Corbin, M. Perry), Berlin, 2018, pp. 35-51.
[263] Demsetz, *Frischmann's View of "Toward a Theory of Property Rights*, cit., p. 131.
[264] J. Okpaluba*, Free-riding on the riddim'? Open source, copyright law and reggae music in Jamaica*, in *Copyright and Piracy: An Interdisciplinary Critique*, Cambridge, 2016, pp. 385-386.

In 1985, Stallman founded the Free Software Foundation (known by the acronym *FSF*) to work for the idea of free software.

The definition of free software is, according to FSF, "software that respects users' freedom and community. It means that the users have the freedom to run, copy, distribute, study, change, and improve the software system. "Free software" is a matter of freedom, not price. To understand the concept, the term "free" has to be considered in formulas such as in "free speech", not as in "free beer" ".[265]

In 1989, Stallman wrote the first version of the GNU Public License (known by the acronym *GPL*) for use with the programs developed as part of the GNU project.

In 1998, the Open Source Initiative (known by the acronym *OSI*) was founded in order to promote the use of open source software.

The GPL allowed to limit the ability of software developers to commercialise modifications to the code on one hand by insuring that any derivative works remained subject to the same license and on the other hand by prohibiting the mixing of open-source and closed-source software in any distributed works.[266]

If the author of a piece of open-source software were to abdicate their copyright, it would mean that anyone could use their code and create a derivative work and license it as a proprietary piece of code, consequently preventing others from using the software in a freely.

For the production of music there is a different argument.

While the open-source model has made a significant impact on the computer software industry, it would be fair to say that it has not caught on in the same way in the production of music.[267]

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[265] See GNU Website available at https://www.gnu.org/philosophy/free-sw.en.html, last accessed 6 April 2018.

[266] L. Liang, *A Guide to Open Content Licenses,* 2004, available at http://www.theartgalleryofknoxville.com/ocl_v1.2.pdf, last accessed 19 March 2018, p. 18

[267] L. Liang, ibidem, p. 19. This is the result of may of various reasons. At first, as the model of open-source software rests, among other things, on the assumption that the original work becomes far more valuable as many add their own contributions, it may be that production of music using the open-source model is suited to certain types of artists, and not to others, equally it may well be suited to certain types of music and not to others. Secondly, the author notes that from he author's perspective, one has to question the desirability of not having the right to prevent or authorise derivative works, which in turn raises issues of moral rights, and the unauthorised distortion of works. In the end, it may simply be that many artists are reluctant to subscribe to the open-source model because of the lack of any direct monetary reward.

An open source license strikes a different balance between developer and user than the one established by statutory copyright law. It is copyright law, which makes it possible for the developer to enforce this balance. An open source license to some extent both rejects and embraces statutory copyright law.

Proprietary licenses are based on the legal copyrights granted to the author of a program.

According to statutory copyright law, users are only entitled to copy, alter and distribute program with license from the developer of the program.

The initial theory of the free software movement maintained that copyright law too strongly favoured the developers as opposed to the users.

The open source license provides users with many more rights than what follows from copyright law.[268]

Free and open source software has been seen as a rejection of copyright.

However, open source licenses also rest on the copyright provided to the author of the open source program.

Although an open source license provides users with many rights, it also establishes user requirements, which request fulfilment, including information requirements.

It is the underlying copyright that makes it possible for the developer to establish requirements in the open source license.

Copyright could do a much better job, if released from existing limitations.

2.10 Final Remarks

The reason why the results of the need of a consolidated IPR protection are so ambiguous is mostly a consequence of the fact that IPRs are more adequate as supportive elements than as enablers for economic growth.

[268] T. Riis, *User Generated Law: Re-Constructing Intellectual Property Law in a Knowledge Society*, United Kingdom, 2016, p. 105.

Trade rules about IPRs reach so deeply into subjects who are normally the competence of single national orders and they should themselves be the subjects of a greater democratic effective multilateralism.

Attention to the benefits or dangers of multilateralism in trade must be paid.

Looking at the Marrakesh Treaty, it's possible to understand that the international copyright panorama recognizes the importance of limitations and exceptions to ensure knowledge, by promoting disclosure.

It has shown that without an appropriate balance between protection and access, the international copyright system not only has negative consequences on the global public but also undermines its own ability to reward creativity investments for the long-term.

The needs and economic aims of multinational companies, publishing, software have been incorporated in copyright regimes both at national and at international level through treaties, such as TRIPS Agreement, in which right holders were specifically identified in copyright law.

However, at the moment, exceptions and limitations to these rights to facilitate access to knowledge are general, ambiguous, and discretionary. As a result, the balance in copyright between the rights of authors and the rights of users has been lost.

Since there is the risk that citizens suffer the weight of this preference in favour of right holders, open-access movement has raised its voice to show that copyright law requires lower level of protection and higher flexibility, in order to favour everyone.

While many States have considered that the theoretical effective trade liberalization may be described as a "short pain for longer-term gain", the actual consequence of increased IP standards through FTAs is penalising competition and creativity.

The real effect of the territorial nature of IPRs is not that the international legal framework has failed to create anything that could be named an international copyright nor has a full-scale harmonisation of national copyright laws been obtained.

Chapter III
COPYRIGHT, TECHNOLOGICAL PROTECTION MEASURES AND DATA PROTECTION: TPP AS CASE STUDY

"*From its inception, the TPP was conceived as a 'high ambition', 'gold standard', '21st century' agreement*".

U.S. EMBASSY AND CONSULATE IN NEW ZEALAND (2015)

3.1 Premise

Since the secrecy and lack of transparency of the TPP negotiations, it is difficult to reconstruct a precise path and background of specific language and wording of the provided TPP rules.

The following reconstruction is possible thanks to leaked drafts and public statements.

3.2 Copyright Term Protection: in Disfavour of the Trans-Pacific Partnership Agreement

Wikileaks published a draft of the Intellectual Property Chapter of the TPP in November 2013,[269] in which the TPP appears to be a monstrous trade, which aims to protect the investment of transnational corporations.

The final 30 chapters in the agreement may be pooled into three areas: i) increased market access for goods, agriculture, services and investments; ii) expanded content and aim of the regulatory disciplines comparing to previous agreements among the parties about, among other, intellectual property rights; iii) new chapters and rules that combined substantive regulatory commitments and process obligations.[270]

[269] WikiLeaks, *Secret TPP treaty: Advanced Intellectual Property chapter for all 12 nations with negotiating positions*, available at https://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf , published November 13, 2013.

[270] J. Kelsey, *The Trans-Pacific Partnership Agreement and the Regional Comprehensive Economic Partnership: A Battleground for Competing Hegemons?,* in Free Trade Agreements: Hegemony or Harmony (L. Corbin, M. Perry eds.), Berlin, 2018, p. 26.

The current term of copyright protection in TRIPS is life of author plus 50 years or 50 years from the making, where the author's life is not the basis of calculating the term.

Article 18.63 TPP provides that:

"*Each party shall provide that in cases in which the term of protection of a work, performance or phonogram is to be calculated:*

(a) On the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and

(b) On a basis other than the life of a natural person, the term shall be:

(i) Not less than 70 years from the end of the calendar year of the first authorised publication of the work, performance or phonogram; or

(ii) Failing such authorised publication within 25 years from the creation of the work, performance or phonogram, not less than 70 years from the end of the calendar year of creation of the work, performance or phonogram".

With regards to the proposal of an extension of the copyright protection term in TPP, the background is the fact that amongst the TPP negotiating parties at least the US, Chile, Singapore and Australia have a longer term of copyright protection than the TRIPS minimum.

Their copyright laws provide a term of protection of life plus 70 years or at least 70 years, where the term is not calculated on the basis of the author's life. On the contrary, New Zealand does not have TRIPS-plus copyright terms.

Supporters of TPP consider this FTA as the possibility to build a new de facto global standard for IP.[271] Copyright provisions in the IP Chapter represent the search

[271] J. Lee, *Digital Copyright in the TPP*, in *Paradigm Shift in International Economic Law Rule- Making: TPP as a New Model for Trade Agreements*, Berlin, 2017.

for a more stringent standard than the TRIPS and other major international IP treaties, which is sometimes referred to as TRIP-Plus standards.

These terms proposed in the TPP are so long that for many copyright works, they could effectively be considered as perpetual terms of protection.

The benefits of increased copyright terms would primarily flow out of TPP signatory states, with the exception of the US, where the industries and companies would benefit from this growth of the term protection.

There were some countries, such as Canada[272], New Zealand, Brunei, Malaysia, Vietnam and Japan, in which the was no need to sign the TPP in order to extend the copyright term by 20 years. They were reluctant to embrace a longer copyright term during TPP negotiations.[273]

Contrary to the initial proposals to fix the duration between 90 and 120 years (!), the final text adds "only" 20 years.[274]

According to a Canadian policy perspective, the decision to maintain the international standard of life plus 50 years is consistent with the evidence that term extension creates harm by leaving Canadians with an additional 20 years during which no new works will enter the public domain, with virtually no gains in terms of new creativity.[275]

In Canada there is an active IP community who has intervened in the suggestion of the extension of copyright term protection.

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[272] Professor Michael Geist likewise estimated that the term extension in TPP costs the Canadian public more than $100 million per year in M. Geist, *The Trouble with the TPP's Copyright Rules,* Canadian Centre for Policy Alternatives, 2016, available at https://www.policyalternatives.ca/sites/default/files/uploads/publications/. National%20Office/2016/07/Trouble_with_TPPs_Copyright_Rules.pdf; M. Geist, *Is Canada Set to Cave on Copyright Term Extension in the TPP?*, 2015, available at https://www.eff.org/deeplinks/2015/07/canada-set-cave-copyright-term-extension-tpp.

[273] C. Rossini, Y. Welinder, *All Nations Lose with TPP's Expansion of Copyright Terms*, available at https://www.eff.org/deeplinks/2012/08/allnations-lose-tpps-expansion-copyright-terms, published on 8 December 2012.

[274] J. J. Schott, B. Kotschwar, J. Muir*, Sticking Point in the TPP negotiations,* in *Understanding the Trans-Pacific Partnership*, Policy Analyses in International Economics No. 99, January 2013, p. 29.

[275] M. Geist, *The Trouble with the TPP: Copyright Term Extension*, cit., published on 6 January 2016.

Professor David Lametti[276] is in favour of shorter copyright terms, in light of the commercial life of copyright works.[277] He considers the possibilities to vary the terms of copyright according to the subject matter and the introduction of a registration system in respect of copyright works.

In Australia, the Government agreed to a copyright term extension as part of the Australia-United States Free Trade Agreement (known by the acronym AUSFTA).[278]

The Australian Productivity Commission has stated that Australia is a net importer of copyright works and that the extension of copyright terms imposes costs: an additional 20 years protection would result in the net transfer from Australian consumers to foreign rights holders of around $ 88 million per year.[279]

The TPP copyright regime is considered far more than is needed. Few creators are motivated by the promise of financial returns long after death, particularly since the commercial life of most works is less than 5 years. In a legal system in which copyright battles to balance creativity and access interests, term extension reduces access but does not optimise creativity.

The Commission concluded that Australia has no unilateral capacity to alter copyright terms, but can negotiate internationally to lower the copyright term.

The problem is that at the international level, a sensible balance between the public interest and the rights of IP holders has been provided. The provisions set in the FTAs and particularly by the TPP have upset its balance.

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[276] Now Professor Lametti is the parliamentary secretary to the Minister of Innovation, Science and Economic Development, Navdeep Bains in Justin Trudeau's Government.

[277] D. Lametti*, Coming to Terms with Copyright*, in M. Geist (ed.), *In the Public Interest: The Future of Canadian Copyright Law*, Irwin Law, Toronto, 2005, pp. 480-516.

[278] M. Rimmer, *Robbery Under Arms: Copyright Law and the Australia-United States Free Trade Agreement*, available at https://firstmonday.org/ojs/index.php/fm/article/view/1316/1236, published on 6 March 2006.

[279] Australian Productivity Commission stated that "*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 note preferential. This could amount to up to $88 million per year, or up to $700 million in net present value terms. And this is a pure transfer overseas, and hence pure cost to Australia*", in Australian Productivity Commission, *Intellectual Property Arrangements – Draft Report*, Melbourne: Productivity Commission, 2016, p. 114 available at http://www.pc.gov.au/inquiries/current/intellectual-property/draft/intellectual-property-draft.pdf, last access on 1 May 2018.

The extension of copyright term protection has no theoretical or empirical foundation, which could explain this overprotection of TPP.[280] It may serve to increase the profits of big content industry players rather than the real content creators.

The expansion of copyright terms implies that users or the general consumers will have to bear more copyright costs.

Some commentators have envisaged other negative consequences of that copyright legal system.[281]

Firstly, the copyright rules in TPP (and actually, in all IP Chapter) absolutely diverge from the current international standards set both in WIPO and TRIPS. Under the TPP Chapter everyone living in TPP signatory countries may need to pay for continuous royalties.

Secondly, long copyright terms are usually aimed to compensate the kind of creators who receive relatively low royalties for their copyrighted works. One of the major functions of copyright is to prevent the public from accessing copyrighted works, which usually contain valuable information.

It is not necessary to have long copyright terms as an incentive to encourage creation, especially when the copyright terms go beyond the life of the creator. On the other hand, the public domain is essential for creators to access valuable information, to learn from prior works, and to create their own writings and art.

Finally, the extension of copyright terms will further aggravate the problems arising from "orphan works" and which would be released into the public domain as a result. The problem is that, since TPP IP Chapter will give no exemption for orphan works, and instead orphan works will remain copyrighted for the life plus 70 years period, the extension of copyright terms under the concluded text of the TPP Intellectual Property Chapter carries the potential risk that the public's ability to use orphan works will be seriously affected.

Many economic commentators do not support extending copyright terms.[282]

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[280] P. C. Y. Chow, *The Trans-Pacific Partnership and the Path to Free Trade in the Asia-Pacific,* New York, 2016, p. 277.
[281] C. Rossini, Y. Welinder, *All Nations Lose with TPP's Expansion of Copyright Terms,* cit.
[282] J. C. Ginsburg, *How Copyright Got a Bad Name for Itself*, Columbia Journal of Law and the Arts, Vol. 26, No.1, 2002, p. 12. He defines copyright as bad name, since the overprotection included in FTA.

In U.S. the extension of terms was challenged as unconstitutional on the basis that it conflicted with constitutional clause from which U.S. copyright law stems.[283]

That challenge failed and the U.S. has become one of the main proponents of extending the term even further.

TPP copyright provisions have been also criticized because they are often viewed as overwhelmingly favouring right holders at the cost of users and public interests,[284] for example because of the extension of copyright protection term. The consequence will be that copyright users will have less access to various cultural resources as the public domain has shrunk.

The expanding criminal liability for copyright infringement poses a significant threat to users of copyrighted materials.

Many commentators argue that stronger IP protection in TPP – and in general, in my opinion - is not justified because there is no proof that it can effectively reduce online infringement.[285]

3.3 TPP's Limitation and Exceptions: a Point in Favour (almost)

Originally, the United States adopted a detached and undetermined position on TPP's limitations and exceptions.

The situation changed in July 2012 when the United States proposed a version of the rule on TPP's limitations and exceptions, which was reviewed and reconsidered in several occasions.

On 3rd July 2012 the USTR proposed to introduce a new copyright exceptions and limitations provision during the round of negotiations in San Diego, California.

It has been considered as the first balanced proposal in response to the growing need for international harmonization of minimum limitations and exceptions to IPRs.

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[283] S. Frankel, *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade*, C. L. Lim, D. K. Elms, P. L. Cambridge (eds), Cambridge, 2013, p 162.
[284] K. Weatherall, *The TPP as a Case Study of Changing Dynamics for International Intellectual Property Negotiations*, in Tania Voon (eds), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement*, New York, 2013, p. 54.
[285] J. Band, *The SOPA-TPP Nexus*, PIJIP Research Paper Series No. 6, 2012, p. 52.

Previous FTA generally included specific rights and protections for right holders, but failed to address limitations and exceptions.

In this statement the USTR declared that:

> "[…] *Will obligate Parties to seek to achieve an appropriate balance in their copyright systems in providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research. These principles are critical aspects of the U.S. copyright system, and appear in both our law and jurisprudence. The balance sought by the U.S. TPP proposal recognizes and promotes respect for the important interests of individuals, businesses, and institutions who rely on appropriate exceptions and limitations in the TPP region".*[286]

Exactly a month later, the U.S. proposal contained a new version of paragraph 2 in which there are two new copyright "legitimate purposes":

- "*The digital environment*" (included explicitly in the text);
- "*A use that has commercial aspects*" (included in a footnote).

This new version represents a first step to the openness of the U.S. to accepting expansions of mandatory limitations and exceptions in international IP law and also to aid the negotiations of binding treaties on limitations and exceptions for the blind, and for libraries.

Probably this new variant is due to the fact that the U.S. risked facing protests both from technology associations, which supported such exceptions and from civil society in other TPP countries, which disagreed with those exceptions.[287]

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[286] Office of the U.S. Trade Representative, *USTR introduces New Copyright Exception and Limitations at San Diego TPP Talks Office,* July 2012, available at https://ustr.gov/about-us/policy-offices/press-office/blog/2012/july/ustr-introduces-new-copyright-exceptions-limitations-provision.

[287] J. Band, *Evolution of the Copyright Exceptions and Limitations Provision in the Trans-Pacific Partnership Agreement*, 2015, available at http://infojustice.org/wp-content/uploads/2015/11/band-tppfairuse-version11102015.pdf , p. 5.

In August 2013 a new TTP draft text was created but it was published in November 2013.[288] It states:

> *"Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, inter alia by means of limitations or exceptions that are consistent with Article QQ.G.X, including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to, criticism, comment, news reporting, teaching, scholarship, research, as well as facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled".*

First of all, it is noteworthy that there is a new focus of attention: the balance requested is in the whole copyright system, which included also limitations and exceptions and not only in providing them.

Chile and Malaysia proposed to include "education" as legitimate purpose. Reading the negotiations' note, it is indicated that there were two different positions from the other TPP countries:

- SG, CA, PE, BN, NZ, AU were flexible about this proposition;
- the United States and Mexico considered "education" as already included in *"teaching, scholarship, research"* activities, but they recognize the *quid pluris* of this concept.

Secondly, there is a new legitimate purpose, namely the facilitating access to works published for persons who are blind, visually impaired, or otherwise print disabled.

This addition is the result of Chile's proposition and on this topic there was the *consensus* of other TPP countries.

[288] WikiLeaks, *Secret TPP treaty: Advanced Intellectual Property chapter for all 12 nations with negotiating positions*, cit., pp. 64. In this round of negotiations Mexico has proposed a longer copyright term of "life plus 100", D. Khanna, *Guarding Against Abuse: The Cost of Excessively Long Copyright Terms*, CommLaw Conspectus, Vol. 23, p. 116.

This new leaked text reveals that parties have now agreed to language applying limitations and exception for persons who are blind, visually impaired, or otherwise print disabled and also contains a footnote referencing the Marrakesh Treaty.

This language on limitations and exception is a welcome inclusion that ensures that the TPP will not undermine fair use a critical "safety valve" in copyright law, and shows support for the Marrakesh Treaty.[289]

In this occasion, the USTR, Sir Michael Froman, published a new statement about the historical significance of this version for the strengthening and reinforcement of copyright, underlining the need of balance between giving incentives for innovation and granting access and dissemination.[290]

On 16 May 2014 a new version of the provision was prepared and it was published only in October 2014.[291]

The new elements of this version are the following:

- in the category of the legitimate purposes the open formula "*and other similar purposes*" is added. Probably it is the result of the proposal of Chile and Malaysia in the previous draft of 2013, which wanted to add "*education*" to this list;
- there is the introduction of a new footnote, which expressly mentions and recognizes the Marrakesh Treaty. It means that the TPP countries want to adopt exceptions for the print disabled provided in the Marrakesh Treaty.

In 2015 there were two publications:

[289] B. Butler, *Fair Use Rising: Full-Text Access and Repurposing in recent Case Law*, in *RLI 285: Research Library Issues: A report from ARL, CNI, and SPACR 2015 – Special Issues on Copyright*, 2015, p. 20.

[290] The U.S. Trade Representative Michael Froman, A Values-Driven Trade Policy: Remarks by Ambassador Froman at the Center for American Progress, published on 28 February 2014, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/February/A-Values-Driven-Trade-Policy_Remarks-by-USTR-Froman-at-Center-for-American-P .

[291] Wikileaks, *Updated Secret Trans-Pacific Partnership Agreement (TPP) – IP Chapter (second publication,)* https://www.wikileaks.org/tpp-ip2/#start, published on 16 October 2014.

- in August 2015 another version of TPP text was published, dated 11 May 2015.[292] The footnote, already included in the previous draft about the Marrakesh Treaty, clarifies that the TPP countries' commitment is to facilitate access for the print disabled "*beyond the requirements of the Marrakesh Treaty*";
- the final version was drafted on 5 October 2015 and published on 9 October 2015.[293] The provision remains practically unchanged, except for a little amendment in the footnote n. 79.

Pursuant to Article 18.66 "*Balance on Copyright and Related Rights Systems*":[294]

> *"Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system inter alia by means of limitations or exceptions that are consistent with Article18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.[78] [79]".*

The footnotes n. 78 e 79 declare:

> *"[78] As recognized by the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled (June 27, 2013). The Parties recognise that*

[292] *The Trans-Pacific Partnership Agreement Negotiations (known as TPP or TPPA*), available at https://www.keionline.org/wp-content/uploads/Section-G-Copyright-Related-Rights-TPP-11May2015.pdf, published on May 2015.
[293] WikiLeaks, *TPP Treaty: Intellectual Property Rights Chapter Consolidated Text (October 5, 2015*) https://wikileaks.org/tpp-ip3/WikiLeaks-TPP-IP-Chapter/WikiLeaks-TPP-IP-Chapter-051015.pdf, published on 5 October 2015, p. 32
[294] USTR, *TPP Final Table of Contents*, https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf, p. 36.

some Parties facilitate the availability of works in accessible formats for beneficiaries beyond the requirements of the Marrakesh Treaty.

[79] For purposes of greater certainty, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under Article 18.65 (Limitations and Exceptions)".

These rules have not been seen before in other free trade agreements.

Considering the steps in the TPP negotiations, it is undeniable that the United States, with the Obama Administration, was focused on the very balance of exceptions and limitations.

Some scholars have argued that TPP fails to balance private and public interest because of the limitations and exceptions in copyright law.[295]

Copyright provisions in the TPP are viewed as being asymmetrical and unbalanced.

The TPP not only mandates copyright protection, it also leaves limitations and exceptions as optional. In addition, achieving an appropriate balance is always the ultimate and ideal policy goal for all copyright law. Given the interests and stakeholders involved in copyright policymaking, it is impossible and inappropriate to oblige TPP members to ensure their law achieves an appropriate balance in its copyright and related rights system.

There remains the possibility of including the Marrakesh treaty in the TTIP.

Any specific obligations that are proposed with respect to copyright in the TTIP reflect a balance and include limitations and exceptions.[296]

[295] R. Caso, P. Guarda have written that TPP is a "*paradigmatic example*" of its copyright overprotection, in *Copyright Overprotection vs. Open Science: The Role of Free Trade Agreements*, cit., p. 10; J. J. Schott, B. Kotschwar, J. Muir*, Sticking, Point in the TPP negotiations,* in *Understanding the Trans-Pacific Partnership*, cit., p. 29.

[296] B. Butler, *Fair Use Rising: Full-Text Access and Repurposing in recent Case Law*, cit., pp. 21.

3.4 Technological Protection Measures in the Trans-Pacific Partnership Agreement

In the modern digital world, copyrighted works are often saddled with technological protection mechanisms (known by the acronym *TPMs*) that can prevent access and prevent fair use.

The U.S. leaked text requires greater protection of TPMs and narrower exceptions to those protections.[297]

In this text there is the extension of civil and criminal enforcement of intellectual property law in three ways:[298]

- criminal enforcement for circumventing TPMs, even when there is no copyright infringement;[299]
- introducing a system for pre-established damages, which shall be available at the election of the right owner;[300]
- providing a legal regime of ISP liability and obligations, which is more extensive than the U.S. national law to police the content of users of their networks (such as, the need identify website users).[301]

The TPP provides an expansive approach to the topic of technological protection measures (TPMs).

This may prevent courts from seeking to delimit the definition of TPMs.

Pursuant to Article 16.68.5 TPP, an effective technological measure means:

> "*Any effective technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, or phonogram, or protected copyright or related rights related to a work, performance or phonogram".*

[297] The U.S. linked text in 2011 is reported in S. M. Flynn, B. Baker, M. Kaminski, J. Koo, *The U.S. Proposal for An Intellectual Property Chapter in The Trans-Pacific Partnership Agreement*, in American University International Law Review 28, No. 1, 2012, available at http://auilr.org/wp-content/uploads/pdf/28/28.1.5.pdf.
[298] S. M. Flynn, B. Baker, M. Kaminski, J. Koo, ibidem, pp. 145-150.
[299] S. M. Flynn, B. Baker, M. Kaminski, J. Koo, ibidem, p. 149.
[300] S. M. Flynn, B. Baker, M. Kaminski, J. Koo, ibidem, p. 194.
[301] S. M. Flynn, B. Baker, M. Kaminski, J. Koo, ibidem, p. 202.

Article 18.68 TPP requires parties impose legal protection against the circumvention of the technological protection measures.

Pursuant to Article 18.68.1 TPP, the person liable should knowingly, or having reasonable grounds to know circumvent TPMs for the purpose of copyright infringement. It's also important to note that TPM in TPP does not include the measures that "can, in usual cases, be circumvented accidentally".

The same provision also provides the possibility of circumventing TPMs without legal liabilities. It further provides signatory countries with the flexibilities to determine whether the provision of circumventing devices, products, components, or services "prejudice the interests of the right holder of the copyright or related rights".

A very interesting rule is Article 18.68.4 TPP, which allows contracting parties to provide certain limitations and exceptions to the TPMs to enable the legitimate use by its beneficiaries.

This provision takes the interest of copyright use into account, which is rarely seen in other copyright provisions in TPP.[302]

From a Canadian point of view, the regime was insufficiently flexible to accommodate consumer rights under copyright law.[303]

Professor Lametti has argued that TPMs represent "*a serious conceptual flaw or incoherence" which "could overwhelm the copyright balances*".

According to some commentators, the Achille's heel is to be found in the independent legal protection that international copyright law now demands for such technical protection measures.[304]

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[302] J. A. Lee*, Digital Copyright in the TPP,* cit., p. 10.

[303] M. Geist, *The Trouble with the TPP: Damages for Breaking Digital Locks for Personal Purposes*, cit., available at http://www.michaelgeist.ca/2016/02/the-trouble-with-the-tpp-day-37-damages-for-breaking-digital-locks-for-personal-purposes/ .

[304] R. Hilty states "*The TPP IP Chapter also contains a section for internet service providers (ISPs) and requires signatories to provide them with so-called "Safe Harbours" by means of which ISPs are shielded from legal liability for copyright infringements provided that the cooperate with content owners in trying to minimize the incidence of such infringement by removing or disabling access to copyright-infringing material from websites at the request of right-holders*", R. Hilty, *Copyright Law and Scientific Research*, in P. Torremans, *Copyright law: a Handbook of Contemporary Research*, 2007, p. 319.

The consequences of this legal protection are that since TPMs cannot distinguish between privileged and forbidden uses, a system of exceptions does not work where TPMs are used.

The legal protection of TPMs means that the users would be exposed to the risk of a conflict with copyright.

The problem is that the concept of copyright may have been intended not to protect information as such, but only its specific form of expression.

The legal protection of such TPMs initially requires the existence of copyright protection: the use of TPMs necessarily means that anyone using this technology has control over the contents but technical restrictions cannot be limited to the form of expression.

In the RCEP Agreement, the draft chapter includes the usual norms on TPMs and electronic rights management information, which are shorter and more flexible than their counterparts in the TPP Agreement.

3.5 Data protection in the Trans-Pacific Partnership Agreement

Digitisation has had an impact on the economy and on law in general but many of the existing rules no longer provide appropriate answers.

Digital technology undermines traditional perceptions of copyright on authorship and exclusivity.

Some countries are privacy sensitive, as their service sector is affected by other countries' privacy standards.

It means that the service provider of another country, entering this market, has to comply with the minimum requirements to use data or even transfer it abroad.

Privacy protection is a particularly important matter for the EU since the Snowden revelation. This has been highlighted by the public outcry to the TTP documents, which showed that the EU was not taking appropriate action to ensure the implementation of data protection safeguards.

The EU has also sought commitment of its FTA partners to compatibility with the international standards of data protection, as shown under Article 7.48 of EU-South Korea FTA.

Both the CETA and the TTIP contain e-commerce as a new discipline in which market liberalization is to be enhanced.[305]

In particular, CETA goes a step further.

Due to Article 16.5 of CETA, it would ensure:

- clarity, transparency, and competition in facilitating electronic commerce;
- inoperability, innovation, and competition in facilitating electronic commerce;
- facilitating the use of electronic commerce by small and medium-sized enterprises.

The CETA has a specific norm about trust and confidence in electronic commerce.

Since the EU was insistent on data protection policies, under Article 16.4 of CETA, the parties are obliged to adopt or maintain laws, regulations or administrative measures for the protection of personal information of users engaged in electronic commerce in consideration of international data protection standards.

Future trade agreements also incorporate a direct recognition of privacy and data protection as an important public policy objective and a necessary cognition of spurring international trade.

TPP Agreement is considered as an unsuccessful regional treaty because U.S. President Trump signed an executive order to withdraw the U.S. from TPP negotiations in 2017.

Significant parts of copyright provisions in IP Chapter have been proposed in negotiations for RCEP Agreement.

Many scholars believe that many TPP provisions will become as baseline in the US' bilateral trade negotiations[306] and in future copyright treaties.[307]

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[305] Article 16.4 CETA titled "*Trust and confidence in electronic commerce*" establishes "*Each Party should adopt or maintain laws, regulations or administrative measures for the protection of personal information of users engaged in electronic commerce*".

[306] K. Weatherall, *"Intellectual Property in the TPP" Not "The New TRIPS",* cit., p. 29.

[307] H. Gasparyan, *The TPP and Beyond: the Vital Role of Judicial Discretion in the Enforcement of International Copyright Rules*, South western Journal of International Law, Vol. 23, No. 2, 2017, p. 330.

Similar provisions have been brought up in the negotiations of the TISA and TTIP.

In TISA there is contestation on the field of the movement of information. The U.S. Canada, and Japan have proposed a rigid position, according to which no Party may prevent a service supplier of another Party from transferring, accessing, processing or storing information, including personal information, within or outside the Party's territory.

On the opposite extreme, Switzerland would prefer for each Party to apply its own regulatory regime concerning the transfer of data and personal data by electronic means.

Hong Kong has suggested that there should be a balance between free movement of information across borders and protection of personal data.

In TTIP, the divergence between the U.S. and the EU on data protection is clear. There is no agreement on data flows between the negotiating parties.

The new EU General Data Protection Regulation subscribes to a particularly high standard of privacy protection and it seeks to support this not only within the borders of the Union but also for cross-border data transfers containing personal data.[308]

As long as TPP provisions do not incorporate binding requirements, such as that measures have to be "necessary", they should not be considered as a step towards harmonizing privacy and data protection regulations via international trade law.

On the contrary, they are recognition of the rising relevance of their protection for international trade in services.

With regards to data protection in international trade, it is important to note that providers closely monitor the situation in the EU as well as Brexit.

In any case, they ensure to their EU customers that they are prepared to take all necessary steps in order to comply with EU data protection law even if this means shifting data from UK data centres to EU country data.

[308] The Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L [2016] 119/1.

In TPP, it is necessary to note that it is provided only in the Article 14.8, which is among the provision in Chapter 14 on Electronic Commerce.[309]

Personal information in the TPP is not protected in line with the protection of human rights but only in relations to electronic commerce.

The word "personal data" is generally used in the EU while the word "personal information" is used in the U.S., Japan and Korea.

According to TPP Article 14.1, personal information is defined as "*any information, including data, about an identified or identifiable natural person*".

On the contrary, according to Article 4 of the General Data Protection Regulation of the European Union (Regulation 679/2016, known by the acronym *GDPR*), personal data are "any information relating to an identified or identifiable natural person". Personal data are protected in the context of human rights.[310]

Why is there only one provision about data protection?

As other free trade agreements, data protection is not considered related to trade matters but it is just needed to supplement the more economically important provisions on trade in data.[311] But, since personal data have been the focus of greater attention worldwide, the TPP requires provisions on their protection also as an object of trade.

There is a common element in trade in data and data protection.

Trade is based on data, which work on the information or communications technologies (known by the acronym *ICT*). Pursuant to the Article 14.16 TPP, the Parties agree to recognise the importance of using existing collaboration mechanisms to cooperate to identify and mitigate malicious intrusions or dissemination of malicious code that affect the electronic networks of the parties. They recognize the need to build the capabilities and their national entities responsible for computer security incident response.

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[309] The TPP chapter on e-commerce comprises 18 articles. See https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text, last accessed 5 April 2018.

[310] According to Article 1.2, GDPR protects "*fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data*".

[311] N. Park, *Data protection in the TPP: More Emphasis on the "Use" Than the "Protection"*, in *Paradigm Shift in International Economic Law Rule- Making: TPP as a New Model for Trade Agreements*, *cit*., p. 364.

The legal provisions in the TPP for the protection of personal data need to apply to "users of electronic commerce" and not to all private sector activities.

Lower standards are highlighted in the matter of privacy and data protection.

The starting point was the different current systems of data protection of the TPP Parties and there is no need to harmonize their level of data protection.[312]

Pursuant to Article 14.8.5 TPP, recognising that the Parties may take different legal approaches to protecting personal information, each Party should encourage the development of mechanisms to promote compatibility between these different regimes.[313]

The U.S., for example, does not have a general law on data protection.

In 2015 Japan amended the "Act on the Protection of Personal Information" on a comprehensive data protection law.

The compromise was that the obligation to adopt this legal framework may be complied with by such measures as "*a comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy*".[314]

This is also allowed by the fact that the TPP Parties can be free to take any approach to data protection.

The European Union would oppose this "excessively free" approach to data protection in the TTIP.[315]

With regards to the matter of information flows, the TPP is not clear since it does not contain any definition in its chapter on E-commerce.

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[312] N. Park describes this approach as the "laissez fair" in which "acknowledging data protection as a mere lip service to the legalization of the free trade in data including personal data", in N. Park, ibidem, p. 367.

[313] This provision seems to punish U.S., which could lose the privilege of free transatlantic data transfer as a consequence of the judgment of the Court of Justice of the European Union that has hit the EU-US Safe Harbor Agreement. See C-362/14, *Maximillian Schrems v. Data Protection Commissioner*, judgment of 6 October 2015, ECLI:EU:C:2015:650.

[314] This is a note to Article 14.8.2.

[315] M. F. Pérez, *Data protection and privacy must be excluded from TTIP*, European Digital Rights, 2015, available at https://edri.org/data-protection-privacy-ttip/.

This is the result of the fact that some signatory States want flexibility and others prefer some restrictions on the definition.

The TPP is the first free trade agreement with a more extensive language on privacy in which co*ntracting States want to create an effective regime to protect the privacy of Internet users.*[316]

According to TPP Article 14.7, each Party shall adopt or maintain consumer protection laws.

Article 14.8.2 TPP states[317]

> *"To this end, each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce. In the development of its legal framework for the protection of personal information, each Party should take into account principles and guidelines of relevant international bodies".*

And the footnote 6 to this Article adds:

> *"For greater certainty, a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as a comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy".*

The TPP does not require contracting States to change or reduce their privacy legal systems. The risk is that the strong protection of TPP of free data flows could collide with the growing diversity of data privacy in contracting states.[318]

Pursuant to Article 14.8.3 TPP, each Party must endeavour to adopt non-discriminatory practices in protecting users of electronic commerce from personal information protection violations occurring within its jurisdiction.

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[316] USTR, available at https://ustr.gov/sites/default/files/TPP-Final-Text-Electronic-Commerce.pdf, p. 4.
[317] USTR, ibidem, p. 5.
[318] C. Cimino-Isaacs, J. J. Schott, *Trans-Pacific Partnership: An Assessment*, Policy Analyses in International Economics, No. 104, p. 321.

Finally, as Article 14.8.4 TPP states, each Party should publish information on the data protection it provides to users of electronic commerce, including how each Party should publish information on the personal information protections it provides to users of electronic commerce, including how:

(a) Individuals can pursue remedies; and

(b) Businesses can comply with any legal requirements.

It is not strange that there are no rules on the possibility that a TPP contracting State does not maintain an adequate level of protection for the rights and freedom of individuals, since trade agreements regulate trade and not human rights issues.[319]

It is important for the TPP, as a free trade agreement, to include provisions on data protection.

Data – both personal and not personal – are recognized as the fifth element of production, after goods, services, capital and people.[320]

The TPP is the free trade agreement with the most comprehensive provisions on digital trade. In this way the TPP recognizes the importance of personal data as a new digital economy.

Although President Trump withdrew the TPP, its provisions on data protection will remain in future trade negotiations.

This is the crucial point: why the degree of data protection is not at the same level as the degree of force accorded to the use of personal data in the TPP.[321]

In contrast to other international treaties, TPP would place the onus to prove the elements on the state implementing the law.

Based on the unpredictability of the interpretation of these requirements, it is unlikely that and exception would ever be granted.

International law-making efforts can have repercussions for local data protection laws and must be considered carefully.[322]

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[319] S. A. Aaronson, J. Zimmerman, *Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking*, Cambridge, 2007, p. 3.

[320] M. N. Schmitt, *Rewired warfare: rethinking the law of cyber attack*, 96 International Review of the Red Cross 204, 2014.

[321] In this sense, Nohyoung Park states "*the use of personal data is significantly emphasized over the protection of personal data*", in *Data protection in the TPP: More Emphasis on the "Use" Than the "Protection"*, *cit*., p. 370.

[322] See R. H. Weber, D. Staiger, *Transatlantic Data Protection in Practice,* Berlin, 2017.

The current trend under the new administration is going away from such international agreements as highlighted by its withdrawal from the TPP. It is unlikely that new multilateral agreements will be passed touching upon the issues of data flows.[323]

Why is it important to cite the TPP data protection system in the copyright field?

TPP proponents consider criticisms against TPP as a misunderstanding of the objectives and effects of the online copyright TPP rules, because of the list of exceptions for individuals - who want to access online contents – included in the Article 18.66 TPP.

On the contrary, TPP critics argue that the US, Japan, and Australia want to protect and enforce online copyright regimes since they consider that strong copyright rules incentivize innovation.

It has been noted that the criticism against TPP extensive regime of copyright strengthening is based on IP rules.[324]

Critics consider that this TPP copyright legal system is the result of the intention to discourage free expression and their opinions are based on three arguments:

- the TPP copyright system is the tool for the U.S. to force other TPP states to adopt their copyright law (which they consider as containing less protection to Internet's users privacy), such as Chile;
- contracting States have to adopt criminal sanctions for copyright infringement that occurs without commercial motivation;
- the lack of transparency of the process of negotiating the TPP: the transparency implementation is required since the Internet is the subject of

[323] The recent amendment of the Singapore-Australia FTA imitates the TPP electronic commerce chapter; see Agreement to Amend the Singapore–Australia Free Trade Agreement (signed 13 October 2016), Chapter 14, http:// dfat.gov.au/trade/agreements/safta/official-documents/Pages/default.aspx.

[324] S. A. Aaronson, *At the Intersection of Cross –Border Information Flows and Human Rights: TPP as a Case Study*, Working Papers 2016-19, Institute for International Economic Policy, p. 22.

regulation and it demands a greater openness and the comparison with the public.[325]

Internet users need the rule of law, as well as limits to censorships and protectionist policies.

3.6 Transatlantic Trade and Investment Partnership: Intellectual Property as Investment

Pursuant to the draft of TTIP, the area concerning the harmonisation of IPRs is relatively small.

There are four sections of the TTIP chapter dedicated to IPRs, but only one contains a certain number of binding commitments in two identified topics: geographical indications (GIs) and a limited number of specific aspects in the field of copyright.

The three other sections concern the international agreements in which the EU and the U.S. are contracting parties, and recall several fundamental basic principles about the importance of IPRs in others domains such as innovation and employment.[326]

The uncertainties and concerns do not derive from the TTIP section on IP directly, but from another chapter of the agreement concerning investment protection. Why? IPRs are specifically included in the definition of the investments protected by the TTIP.

The protection of investments is becoming more and more frequent in FTAs.

Their aim was above all to prevent companies that invest in a country's infrastructure from being subsequently expropriated, specifically through nationalisation.

Intangible assets have also been protected as investments included in these agreements, without it being really clear what would be the relationship between the

[325] S. A. Aaronson, M. O. Moore, *A Trade Policy for the Millennials,* Baltimore Sun, available at http://articles.baltimoresun.com/2013-12-17/news/bs-ed-trade-policy-20131217_1_trade-policy-trade-agreement-trade-liberalization, published in December 2013.
[326] C. Geiger, *The TTIP and Its Investment Protection: Will the EU Still Be Able to Regulate Intellectual Property?*, in *II - International Review of Intellectual Property and Competition Law*, Vol. 49, Issue 6, 2018, pp. 631-635.

protection of IP according to the international IP rules and the protection of IP according to international investment agreements.

There has to date not been any decision in the field of copyright and it is only possible to imagine what might be the questions with investment protection.

Firstly, it is well known that the copyright systems of the U.S. and the EU differ considerably.

Secondly, there are worries about the ownership of the work: copyright often protects the investor or the employer in the U.S. because of the "work-made-for-hire" doctrine, while in Europe the creator in most cases remains the holder of the rights to his creation, independently of his employment situation.

What will happen with the creation of new copyright (a sort of "EU copyright contract law") exceptions and limitations to the libraries and archives? Will these provisions be regarded as "expropriations" included in the investment protection mechanisms of the TTIP?

The challenge for the future is whether the EU will be able to introduce specific contractual protection rules for creators, such as already in many Member States embracing the continental copyright tradition.

It is necessary to reflect on the appropriateness of such inclusion and on the consequences of the problematic relationship between IP and investment protection.

IP does not protect investment as such, but only those, which concern the creation, and that lead to an added creative value to what already exists and added value for society.

3.7 Final Remarks: After the Trans-Pacific Partnership Agreement

After the analysis of Chapter 18 TPP, I think that it could be considered neither as “the new TRIPS” nor as the new global standards of IP protection or the next global agreement on IP.

Chapter 18 TPP is more complex and less balanced than the TRIPS regime.

The common overall risk of the proposed changes to copyright law in modern Free Trade Agreements, such as TPP, is the disincentive to creativity and innovation.

The term protection extends beyond what is effective to secure knowledge produces knowledge.

In TRIPS, differently from TPP, it has been understood that intellectual property protection is consistent with liberalizing trade.

Too much intellectual property protection is almost never trade enhancing, it is protectionist.

Chapter IV

COPYRIGHT IN RCEP

"*A battle is under way to decide the intellectual property law for half the world's population. A trade agreement that hopes to create a free trade area even larger than that forged by Genghis Khan will define intellectual property rules across much of Asia and the pacific*".
ANUPAM CHANDER AND MADHAVI SUNDER (2018)

4.1 Premise

As the TPP negotiations, also concerning the RCEP, because of the secrecy and lack of transparency of its negotiations, it is difficult to reconstruct a precise path and background of specific language and wording of the provided RCEP rules.

The RCEP does not include the same formal secrecy agreement of the TPP.[327]

The following reconstruction is possible thanks to leaked drafts and briefs by other commentators.

4.2 Copyright Rules in the Regional Comprehensive Economic Partnership

As the TPP Agreement was being negotiated slowly, the Regional Comprehensive Economic Partnership was gradually negotiated.

The Regional Comprehensive Economic Partnership is a mega-regional trade, which aims to conclude a comprehensive agreement that promotes free trade and investments among Australia, China, India, Japan, New Zealand, South Korea and member states of the Association of Southeast Asian Nations (ASEAN).

According to some commentators, there is no real regionalism in East Asia yet because regionalism means preferential trade liberalization.[328]

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[327] Pursuant to the template letter available at https://www.mfat.gov.nz/assets/Trans-Pacific Partnership/TPP-letter.pdf, the contracting members to the TPP agreed not to publish negotiating documents for four years after the agreement comes into force.

[328] R. E. Baldwin, *Managing the Noodle Bowl: The Fragility of East Asian Regionalism*, in Asian Dev. Bank, Working Paper on Regional Economic Integration, No. 7, 2007, p. 6. According to the author, it would be better to tell about three different phases of East ASIA's

With regards to copyright and related rights matter, the draft RCEP chapter includes the usual language already seen in other FTAs in general, requiring the accession to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

In particular, such as the TPP, the RCEP draft chapter also requires accession to the Beijing Treaty on Audio-visual Performances, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.

Pursuant to the leaked RCEP chapter on intellectual property signed on October 2015 Japan and South Korea have drafted a proposal based on TPP.

Concerning the copyright field, also in the RCEP negotiations, signatory States would rewrite their copyright provisions, since their incapability to access the copyrighted works, to the detriment of cultural knowledge.

In its current version, the RCEP includes heavy copyright protection without providing equivalent strong exceptions and limitations that would secure access to cultural works and educational materials at affordable prices in developing countries.[329] This is a common problem common to current copyright law legal systems in the world and in this sense the FTAs would be used as the tool to react to this problem.

In order to promote the knowledge to developing countries, the RCEP should reinforce its provisions on copyright exceptions and limitations and also on term protection.

Regarding to the copyright term protection and unlike the TPP chapter, the draft RCEP chapter does not extend the copyright term beyond the life of the author plus 50 years, which constitutes the minimum required by the Berne Convention for the Protection of Literary and Artistic Works.

(almost) regionalism: rampant unilateralism (mid-1980s to 1990); regionalism delayed and unilateralism accelerated (1990 to 2000); rampant regionalism (from 2000 to now).

[329] A. Chander, M. Sunder, *The battle to define Asia's Intellectual Property Law: From TPP to RCEP*, cit., p. 340.

Copyright matter represented a hot topic for China, which currently has a copyright term of life plus 50 years.

In line with TPP, the proposal of RCEP provides the "life plus 70 years" principle.

Pursuant to Article 2.5.3 RCEP draft text:

> *"Each party shall endeavour to provide an appropriate balance in its copyright and related rights system by providing limitations and exceptions* […] *for legitimate purposes including education, research, criticism, comment, news reporting, libraries and archives and facilitating access for persons with disability".*

It is worth highlighting that: the fair use principle for copyrighted works is not expressly mentioned; [330] this list of legitimate purposes seems the same as that included in the Article 18.65 TPP.

With regards to the provision of exceptions for copyright in favour of visually impaired people, the RCEP draft currently agrees to commit the member states to this agreement.

Concerning copyright rules, the too strong protection that RCEP draft text provides for broadcasters has been severely criticized, unlike the TPP chapter, since it covers provisions such as the unauthorized retransmission of television signals over the Internet. The Electronic Frontier Found observes that

> "*Based on the current text proposals,* [the] *RCEP may actually impose more stringent protections for broadcasters than the TPP does. The TPP allows authors, performers and producers to control the broadcast of their work, but it does not bestow any independent powers over those works upon broadcasters.* [The] *RCEP, in contrast, could create such new powers; potentially providing broadcasters with a 50 years monopoly over*

[330] A. Chander, M. Sunder, ibidem, p. 348.

the retransmission of broadcast signals, including retransmission of those signals over the Internet ".[331]

The RCEP includes some motions that aim to reinforce the rights of copyright owners and reformulate procedural rules and remedies in their favour: for example, South Korea, Japan, and Australia propose that judges must be able to award damages for intellectual property infringements, including copyright, based on a product's suggested retail price.[332]

The draft RCEP Intellectual Property chapter, unlike the TPP, does not include the requirement to extend the copyright term beyond the life of the author plus fifty years, noting that this is the minimum standard provided by the Berne Convention.[333]

The RCEP IP chapter results in the combination of IP standards, both because of the growing harmonization of regional standards and divergence and because of the discrepancies between the TPP and RCEP obligations.[334]

The RCEP draft chapter will contain a set of minimum standards for IP protection in the signatory countries.

There are many reasons to suggest RCEPs adopting low standards of IP protection.[335]

The inclusion of high IP standards could be a problem for countries, which have more limited resources than developed countries, such as the European Union.

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[331] J. Malcom, *RCEP: The Other Closed-Door Agreement to Compromise Users' Rights,* Electronic Frontier Found, published on 20 April 2016, available at https://www.eff.org/it/node/91313.

[332] A. Chander, M. Sunder, *The battle to define Asia's Intellectual Property Law: From TPP to RCEP*, cit., p. 349.

[333] R. Caso, P. Guarda*, Copyright Overprotection vs Open Science: The Role of Free Trade Agreements, cit*., p. 12; Peter K. Yu, *The RCEP and Trans-Pacific Intellectual Property Norms*, in Texas A&M University School of Law, 2017, p. 709.

[334] P. Ku, *TPP, RCEP, and the Crossvergence of Asian Intellectual Property Standards*, in P. Shin-yi, L. Han-Wei, L. Ching-Fu, *Governing Science and Technology under the International Economic Order: Regulatory Divergence and Convergence in the Age of Megaregionals*, 2018, p. 393.

[335] Daniel Gervais tells about "the subtractive narrative", in D. Gervais, *Of Clusters and Assumptions: Innovation as Part of a Full TRIPS Implementation*, 77 Fordham L. Rev., 2009, pp. 2353, 2357-60. According to Professor Gervais, this is the formula to explain the insistence of developing countries on minimalist TRIPS implementation.

The consequence would be even to be forced to sign an agreement which is not adequate to national conditions and which is difficult to respect.

This is the reason why in February 2017 some academics from the University of Hong Kong have written an interesting "Statement of Public Interest Principles for Copyright Protection under the Regional Comprehensive Economic Partnership (RCEP)" which suggests the following three principles for the definition of copyright standards in RCEP IP chapter:[336]

a. integrate the public interests as a core value for copyright rules negotiations. This goal is possible by analysing the current protection of the public interest in using copyrighted works, by examining public interest mandates under international copyright treaties and by considering public interest mandates under international human rights treaties;
b. increase transparency of negotiations for the public interest;
c. institute changes in copyright provisions for the public interest. This principle concerns the liberal application of the three-steps test[337] and the expressed recognition of certain limitations and exceptions. This includes also the regional exhaustion of copyright.

This statement affirms that copyright exceptions and limitations should be included for the same fundamental legitimate purposes provided in TPP, such as criticism, comment, education, news reporting, parody, research, and facilitating access for persons with disabilities.

[336] H. Sun, *The Statement of Public Interest Principles for Copyright Protection under the Regional Comprehensive Economic Partnership (RCEP)*, in International Review of Intellectual Property and Competition Law, Vol. 48, Issue No. 3, 2017, pp. 335-337.

[337] The three-step test has been established by Art. 9(2) of the Berne Convention for the Protection of Literary and Artistic Works, the TRIPS Agreement, and Art. 10 the WCT as a core minimum standard for international protection of copyright. According to the bargaining proposals, the RCEP appears to have adopted the three-step test as well. By nature, the three-step test constrains legislative discretion to carve out limitations and exceptions to copyright. For example, Article 13 of the TRIPS Agreement requires that member states "confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.". About the three-step test see R. M. Hilty, V. Moscon, *Permitted Uses in Copyright Law: Is There Need for an International Instrument?,* Max Planck Institute for Innovation and Competition Research Paper No. 18-14.

On this topic, recently Professor Weatherall has published a commentary on each provision of the leaked RCEP IP chapter dating back to October 2015.[338]

With regards to exceptions and limitations, the author shows that the parties have to discuss two alternatives:[339] the first one is the three-step principle from TRIPS; the second one, proposed by Australia, would include formulas similar to Article 18.66 TPP, on promoting balance in copyright.

Since the critiques against this proposal, now Australia submits a RCEP version more similar to the TPP draft which:

- requires parties to endeavour to promote balance by providing limitations (and not also exception, such as TPP);
- makes no reference to exceptions in the digital environment;
- provides balance by exceptions for legitimate purposes including but not limited to those specifically listed;
- which includes no specific reference to the Marrakesh Treaty, despite the fact that the Marrakesh Treaty is included in the list of treaties that the states have to commit to ratify or implement under Article 1.8 RCEP.

Nobody can anticipate whether the RCEP Agreement will have an actual Intellectual Property chapter.[340] There seem to be three plausible ends. There could be no IP Chapter; there could be an IP chapter similar to the one in the TPP Agreement (since the TPP is dead, the RCEP needs to provide standards that are high enough to prompt current TPP partners to include the partnership as a dominant forum for setting regional IP provisions). There could be an IP Chapter but it will contain much lower standards than those provided in the TPP.

If the standards in RCEP IP chapter are set too high, they will also prevent future development, flaw global competitiveness, and jeopardize access to information and knowledge. Copyright must take into account the real conditions of the information society.

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[338] K. G. Weatherall, *RCEP IP Chapter Leaked 15 Oct 2015 – Weatherall Section by Section Comments in Brief.pdf*, Working Paper, 2016, available at: http://works.bepress.com/kimweatherall/35/, published on 13 December 2016, p.1.
[339] K. G. Weatherall, ibidem, p. 10.
[340] Peter K. Yu, *The RCEP and Trans-Pacific Intellectual Property Norms*, cit., pp. 720-740.

On the contrary, lower protection and enforcement standards will provide greater benefits to countries in the Asian pacific region. Because many of these countries are still developing countries, they will be better off declining the adoption of high intellectual property standards, which tend to ignore their domestic and local interests.

Many commentators have talked about a "battle" between the TPP and the RCEP.[341]

If the RCEP is to successfully compete with the TPP as a viable alternative for setting trade norms in the Asian Pacific region, it will need to provide effective standards in the intellectual property field.[342]

Otherwise, it will lose the support of those businesses that are driven by technology and intellectual property industries.

Without the presence of the US, the RCEP will still need to provide standards that are high enough for existing TPP partners to embrace the partnership for setting regional IP rules.

The RCEP could seem to take the TPP's place as a competitor agreement.

Relating to the intellectual property standards included in the RCEP Agreement at the moment, if established, there will be many consequences for future IP provisions setting in the Asian Pacific region. Both Agreements reflect the on going legal dilemma of IP policymakers in the world.

If the protection standards are set too low, the contracting parties will have the opportunity to promote regional harmonization. If the standards are set too high, they will also have hurt themselves by impeding future development.

The problem is that developing countries in the Asian Pacific region continue to face significant problems as the lack of access to educational matters, computer software, and scientific knowledge.[343]

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[341] Peter K. Yu, *TPP, RCEP and the Future of Copyright Normesetting in the Asia-Pacific,* Texas School of Law, Research Paper No. 17-82, 2017.

[342] M. P. Goodman, *US Economic Strategy in the Asia-Pacific Region: Promoting Growth, Rules, and Presence*, in Tang and Petrieds) *New Directions in Asia-Pacific Economic Integration*, 2014, p. 174-175; R. Scollay, *The TPP and RCEP: Prospects for Convergence*, in Tang and Petri, eds) *New Directions in Asia-Pacific Economic Integration,* 2014, p. 235.

[343] P. K. Yu, *Intellectual property and Asian Values*, 16 Marq Intell. Prop. L. Rev., 2012, pp. 379-397.

4.3 Final Remarks

The negotiations of an Asia-Pacific trade agreement represent an opportunity for developing and recently developed countries to set a new agenda for intellectual property.

RCEP proposed some developments on the TPP proposal with reference to copyright, but the risk may be the recurrence of the same concerns.

If it included an IP chapter at all, the RCEP should create a new model of intellectual property agreement, devoted to promoting IPRs protection as well as education, innovation, and knowledge.

Chapter V

CONCLUSIONS

"*No one born in the last eighty years has seen an original work created in her lifetime fall into the public domain*."

K.A. GOLDMAN (2006)

5.1 The Optimal Duration of Copyright Protection

With regards to the need of a copyright term protection, which equals to "life of author plus 70 years", the problem has been debated also for what concerns the Copyright Term Extension Act (known by the acronym *CTEA*).[344]

The arguments in favour of this rule came mostly from songwriters and critics consider this fact, as the best demonstration that the proposed extension does not take the users' interests into account.

Proponents to the "plus 70 years rule" argue that:

- life plus fifty years is inadequate to meet this target term of protection, since "the increasing lifespans and the tendency to have one's children later in life";[345]
- extra protection provides authors with the economic incentive to create;
- new technologies make older works commercially viable and exploitable for longer periods of time.[346] A term extension will increase the economic rewards of creativity, which, in turn, will stimulate continued artistic activity;

[344] The Copyright Term Extension Act provided a twenty-years extension in copyright term protection, from 50 years to 70 years. See J. L. Dixon, *The Copyright Term Extension Act: Is Life Plus Seventy Too Much*, 18 Hastings Comm. & Ent. L.J. 945, 1995-1996, pp. 971-976.
[345] *Copyright Term, Film Labeling and Film Preservation Legislation: The Copyright Term Extension Act, Hearings on H.R. 989 Before the Subcomm. On Courts and Intellectual Property of the House Comm. On the Judiciary*, 104th Cong. 1st Sess., 1995, p. 235.
[346] *The Copyright Term Extension Act, Hearings on S. 483 Before the Senate Judiciary Comm.,* 104th Cong., 1st Sess, 1995.

- the recent changes in copyright duration within the European Community.[347]

The arguments contrary the "term of life of author plus 70 years" are more than in favour and they argue that:

- in response to proponents' argument of an entitlement to protection for two succeeding generations, why should an author need income for his grandchildren?
- extending copyright protection weakens the public domain and makes access to works more difficult;
- it's not true that a strengthened copyright protection incentivises authors to create, since the author has already created without the incentive of increased protection.[348]

For many commentators there is no "canonical level" of intellectual property protection.[349]

Landes and Posner have written a seminal paper about the costs and benefits of copyright extension.[350] They build a model of an abstract copyright law to illustrate the properties of an optimal level of protection, the determinants of that optimal level of protection, and the trade-off that exists at the optimum. They use their model as a platform for explaining some of the specific features of actual copyright law. They state:

> *"Various doctrines of copyright law, such as distinction between idea and expression and the fair use doctrine, can be understood as attempts to*

[347] J. L. Dixon, *The Copyright Term Extension Act: Is Life Plus Seventy Too Much*, cit. p. 975.
[348] J. L. Dixon, ibidem, p. 977.
[349] D. E. Gervais, *Of Clusters and Assumptions: Innovation as Part of a Full TRIPS Implementation,* cit., p. 2377. He states that "*The fact is that there is no canonical level of intellectual property protection. If one accepts intellectual property as (mere) instrumental regulation designed to optimize the level of innovation and commercialization of new creative products and inventions, then it is obvious that the level is not only open to debate, especially when the industrial, cultural, and economic situation of each WTO member is factored into the equation, but that this level will evolve and change as circumstances change. If one takes a more theoretical approach, the same conclusion may be drawn*".
[350] W. M. Landes, R. A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud., 1989, pp. 325, 347-361.

> *promote economic efficiency by balancing the effect of greater copyright protection – in encouraging the creation of new works by reducing copying – against the effect of less protection – in encouraging the creation of new works by reducing the cost of creating them".*[351]

With regards to optimal duration protection, Landes and Posner argue that the term of around 25 years enables right holders to generate revenue comparable to what they would receive in perpetuity, without imposing onerous costs on consumers and suggest that a term of around 25 years is sufficient to incentivise creative effort. But this is only an indicative period because the lower the discount rate used, the greater the term should be, and the authors used a relatively high real discount rate. Any estimate of the optimal term duration makes assumptions about the pattern of demand for the works over time, a difficult task. The truly optimal period may accordingly be more or less than 25 years after creation but it is completely implausible it could ever be 70 years after death.[352]

Landes and Posner elaborate on the advantages of copyright ownership, noting the possibility of excessive or inappropriate uses of intellectual properties and the role of copyright in avoiding the common access problem.[353]

They continue to contend that increasing copyright protection should generally increase the number of new works produced. They argue that copyright term extension is an aberration because

> *"The expected commercial life of a copyrighted work is so much shorter than the copyright term that it makes a lengthening of the term irrelevant to most potential registrations".*[354]

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[351] W. M. Landes, R. A. Posner, ibidem, p. 333.
[352] W. M. Landes, R. A. Posner, *Indefinitely Renwable Copyright*, 70 U. Chi. L. Rev. 471, 2003, p. 116.
[353] Ibidem, p. 485; S. J. Liebowitz, S. Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects*, Harvard Journal of Law and Technology, Vol. 18, No.2, 2015, p. 448.
[354] W. M. Landes, R. A. Posner, *The Economic Structure of Intellectual Property Law*, 2003, p. 247.

Increasing the length of copyright increases the amount of time an author may benefit from a particular revenue stream, while a change in the breadth of copyright increases the number and reliability of revenue streams.

They also have proposed a potentially indefinite copyright term, constrained only by a periodic renewal fee designed to ferret out works that are of little value to anyone.[355]

They argued that the strategy of adopting an indefinitely renewable copyright system would present numerous advantages, and it is better than the current trend of extending the copyright term.

Contrary to Landes and Posner's opinions, other studies reveal that the considerations of Landes and Posner on term extension are not aberrational, since there is no uniform statistical relationship between laws that increase the copyright protection term and the number of new works registered in general.[356]

They reason that when lawmakers consider whether to expand copyright law, there is empirical or theoretical support for the position that increasing copyright protection will increase the number of new works created.[357]

The Australian Productivity Commission exemplifies an important role of the copyright term protection publishing an inquiry about it in 2016.[358]

The Australian Productivity Commission considered many legal and economic studies - such as Landes and Posner - about the optimal duration of copyright protection since the scepticism about this term because consumers can expect to pay higher prices for longer.

The starting point is that Australia's copyright term provides protection for the author's life plus 70 years.

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[355] W. M. Landes, R. A. Posner, *Indefinitely Renwable Copyright,* cit., p. 111; F. Macmillan, *New Directions in Copyright law*, Vol. 1, United Kingdom, 2006, p. 20.
[356] R. S. R. Ku, J. Sun, Y. Fan, *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, cit., p. 1673.
[357] R. S. R. Ku, J. Sun, Y. Fan, ibidem, p. 1720.
[358] The Australia Productivity Commission Inquiry Report, *Intellectual Property Arrangements,* published on 20 December 2016, available at https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf, p. 128.

Copyright owners and the publishing industry misinterpreted the work of the Productivity Commission, considering that it wanted a reduction of the copyright term.

The Productivity Commission makes no such recommendation regarding the copyright term.[359]

In 2007 Pollock suggested that the optimal copyright term is around 15 years after creation balances the benefits and costs of the system.[360] He employs the additional number of creative works produced when copyright protection is increased and the cost that is paid by the community.

The author Richard Flanagan suggested to the Commission to reduce the term of copyright to 15 to 25 years.[361]

As concerns the case of unpublished works, in December 2015 the Australian Government released a proposal to introduce a time-limited period of protection for those works, essentially harmonising the treatment of published and unpublished works.[362]

The proposal provided that unpublished works with a known author would be protected for the author's life plus 70 years. Where an author is not known, such as for orphan works, copyright would last 70 years from the year the work was made.

The Commission declares that no case exists for unlimited copyright protection for unpublished works and the appropriate term is almost certainly longer than the current term of protection for published works.

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[359] Arguing in favor of the Productivity Commission, Peter Martin observed that the study aims to only to note the high economic cost of copyright term extensions, in P. Martin, *The Productivity Commission's Hands Were Tied on Copyright*, *The Sydney Morning Herald*, 29 April 2016, http://www.smh.com.au/federal-politics/political-opinion/the-productivity-commissions-hands-were-tied-on-copyright-20160429-goi0lx.html.

[360] R. Pollock, *Forever Minus a Day? Some Theory and Empirics of Optimal Copyright*, MPRA Paper No. 5024, 2007, p. 117.

[361] As reported by S. Thomsen, *Australia's Greatest Author Went Berserk over Copyright Changes, Saying Malcolm Turnbull Wants to Destroy the Book Industry*, Business Insider, 20 May 2016, http://www.businessinsider.com.au/australias-greatest-author-went-berserk-over-copyright-changes-saying-malcolm-turnbull-wants-to-destroy-the-book-industry-2016-5; See also S. Harmon, L. Clark, *Magda Szubanski May Leave Australia if Changes to Book Industry Go Ahead*, *The Guardian*, 20 May 2016, https://www.theguardian.com/books/2016/may/20/authors-condemn-book-copyright-and-import-proposal-as-massive-own-goal.

[362] The Australia Productivity Commission Inquiry Report, *Intellectual Property Arrangements, cit*., p. 133.

In 2017 the Australian Government responded[363] declaring that with regards to orphan works, because of the difficulty in utilizing orphan works, it had enacted the Copyright Amendment (Disability and Other Measures) Act 2017 which establishes a term of protection for unpublished works including where the identity of the authors is unknown.[364]

Pursuant to Recommendation 16.1,

> *"The Australian, and State and Territory governments should implement an open access policy for publicly funded research. The policy should provide free and open access arrangements for all publications funded by governments, directly or through university funding, within 12 months of publication. The policy should minimise exemptions".*[365]

The Productivity Commission has maintained its finding that the term of copyright protection is too long, but has stepped back from suggesting that a term of 15 to 25 years is appropriate, stating instead that a term "considerably less than" life plus 70 years is likely to be optimal (!).[366]

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[363] Australian Government response to the Productivity Commission Inquiry into Intellectual Property Arrangements, published in August 2017, available at https://www.industry.gov.au/sites/g/files/net3906/f/government_response_to_pc_inquiry_into_ip_august_2017.pdf

[364] Australia Libraries Copyright Committee, Overview of Copyright Amendment (Disability Access and Other Measures) Act 2017 states "Changes to the copyright term provisions to end the antiquated concept of perpetual copyright for unpublished works, and to set a fixed copyright term for works whose authors are unknown – all materials will now have a standards term of either life of the authors plus 70 years (works) or 70 years from creation (subject matter other than works) regardless of whether they are published or not. The main exception to this rule will be works for which the author cannot be identified, which will have a term of 70 years from when they were made public, or 70 years from creation if they have not been made public", available at http://libcopyright.org.au/sites/libcopyright.org.au/files/documents/Overview%20of%20Copyright%20Amendment%20%28Disability%20Access%20and%20Other%20Measures%29%20Act%202017.pdf, pp. 2-3.

[365] The Australia Productivity Commission Inquiry Report, Intellectual Property Arrangements, cit., p. 38.

[366] S. Roessel, D. Saltzman, M. Wolnizer, E. Hamilton, *Productivity Commission's Final Report on IP Arrangements: What's in, what's out, and what's next?*, published on 3 April 2017, available at https://dcc.com/patents/productivity-commissions-final-report-on-ip-arrangements-whats-in-whats-out/.

In this perspective, the public domain is not object to many interpretations but a threat to the commercial value of existing expression.

The response of the Australian open access movement has also been immediate:

> "*We strongly agree that there is a need for a national open access policy and that any policy at the states' level should be aligned with that at a national level, and with international policy developments*".[367]

There are many reasons to reimagine the copyright policy: to incentivize culture, to incentivize on-going investment in existing works and to reward the authors for their contributions.

There are also some scholars who have suggested an initial copyright term of 25-years for all types of works.[368]

Giblin has suggested a system that begins with this initial fixed period of about 25 years.

After that, copyright in work expires and creators can continue interests over works by registering for a "creator-right".

Unlike incentive rights, creator-rights would arise only upon registration.

According to Giblin, in the case of works, which involve more than one author, creator-rights could be renewed for life plus a generation and larger ensemble works might last until the demise of the last registered creator. This would be shorter than the life-plus-70 terms that FTAs have provided.

Since many creators could forget to register their works or fail doing it, Giblin has thought about a transition stage, after the previous expiry of rights, in which creators would be permitted to retroactively register their continuing interests.

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[367] *AOASG Response to productivity Commission Inquiry Final Report on Intellectual Property Arrangements*, published on 23 February 2017, available at https://aoasg.org.au/tag/government/ . As Professors Roberto Caso and Paolo Guarda stated "*If the new rulers of the scene understand that copyrights lower levels of protection and greater flexibility, the Open Science will have more chances to develop and establish itself; and this new policy will benefit the whole humanity*, in R. Caso, P. Guarda, *cit*., p. 16.

[368] R. Giblin, *Reimagining Copyright's Duration*, in R. Giblin, K. Weatherall, *What if we could reimagine copyright?,* Australia, 2017, p. 177.

Finally, in the final stage the work enters into the public domain.

The benefits of this reimagined copyright system are the following: each author gains a 25-year copyright; a global digital public library obtains a blanket license over all books of 25 years and older; the online registry would actively facilitate markets between creators and exploiters.

Giblin states that her proposed system would be impossible to implement because of the inexorable copyright terms via international treaties that make it "virtually impossible to deal with term on a logical basis". Her proposal has to face requiring formalities and introducing carve-outs that could violate the three-step test.

The prevailing trend in most simulations was that increasing the copyright term resulted in decreased knowledge production.

The declining trend is intuitive, because under shorter copyright protection regimes access to published articles goes up and scholars can more easily read and cite discovered knowledge. Consequently, scholars may publish new papers more rapidly.

The impact of an increase in copyright field is negative when the required standards are higher.

The Australian response represents a good step towards a greater open access regime, it is in contrast with the international trend and attitude to increase copyright term protection or not modify it for States, which already have the "life of author plus 70 years" as rule.

Since the CTEA, there has been the debate about an excessive copyright protection, which meets the interests of songwriters and of other artists, but which goes to the detriment of the public domain, and of the circulation of open and free knowledge, and wisdom.

Referring to the draft text and public statements published, the need of an open access regime or at least, of a shorter copyright term protection has been understood from a theoretical point of view.

There are many studies, in law, economics, social studies, and philosophy about the benefits of such rules. The studies were not enough to persuade many States to adopt new copyright regimes.

The question is: how could we think that in current free trade agreements would adopt new copyright rules, in favour of creativity, innovation, knowledge, the rights of persons with disabilities, if the signatories States are not ready to do this change?

5.2 Copyright Law Overprotection as Possible Misuse of Rights

Recent international trade suggests an emerging view that copyright has a role in promoting development and that a legitimate purpose of copyright is access to created works.

Judicial decision of intellectual property misuse has been fragmentated.

The focus on patent misuse initially and only recently move into copyright misuse.

The problem arises from the fact that the structure of copyright is that of a monopoly right, and not a dominant one.[369]

Some scholars have been grouped justification and limitations of the common law doctrine on copyright misuse:

- the corrective function: the misuse doctrine gives courts the flexibility to "fill in gaps" left in statutory law;
- the coordination function: the misuse doctrine allows courts to coordinate related and interdependent bodies of law and develop rules that evolve constantly;
- the safeguarding function: the misuse doctrine allows courts – as "balancer of equities" in specific cases - to safeguard the public interest generally to copyrighted expression.[370]

Article 18.4 TPP recognizes the need both to facilitate the diffusion of information, knowledge, technology, culture, and arts through IP systems and to take into account "*the interests of relevant stakeholders, including right holders, service providers, users and the public*".

[369] A. Mastrorilli, *Abuso di diritto d'autore e disciplina antitrust*, Il Foro Italiano, 1995, IV, p. 27.
[370] B. Frischmann, D. Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software*, 15 Berkeley Tech. L. J. 865, 2000, pp. 872-877.

The Preamble and under Article 18.66 TPP cite the need to respect the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled.

Many copyright holders do not want to confirm the access to copyright material could represent an abuse of rights which justifies moderate measures by the State.

Traditionally, the vast number of copyright misuse cases arises in one or more of the following behaviours:

- anticompetitive sections in contracts and licensing agreements;
- refusal to license competitors unreasonably;
- compulsory licenses;
- conditioning the sale or license of copyrighted material (such as movies) on the purchase of another products;

Pursuant to this theory, the defendant accused of copyright infringement can invoke an equitable defense in order to paralyze the process when he proves that the right holder has abused its IPR protection sphere by exceeding the limits of the protection provided by copyright law.

The same applies to the access to copyright content which is unjustifiably priced. The decisions about access and price are in essence of copyright, considered as an exclusive right since it depends on the situation of the market for copyrighted works.

IP owners argue that they are entitled to make decisions about prices and access of their works, in order to maximize profits. Not every price differential between States could be defined as objectively unjustified, since costs of selling copyright works depends on the domestic market.

Some international commentators mention high royalties as a potential abuse of IP rights.

They argued that the doctrine of abuse of copyright is provided only in a limited number of decisions and it means the limited judicial approach to this topic.[371]

There are many reasons why copyright misuse cases should be reviewed.

[371] R. Hilty, cit., p. 380.

Firstly, while patents and copyrights have some common features, they are different intellectual property rights and that their remedies can be invoked simultaneously.

Secondly, without copyright misuse, we can still protect licensees from companies trying to exercise power with regard to copyrighted works, in a borderline situation copyright protection.[372]

In the famous case *Broadcast Music. Inc. v. Hearst/ABC Viacom Enter. Serv.*, the court states that "*the copyright misuse doctrine has been illegally received in the lower courts. Some courts have flatly rejected the existence of the doctrine. Others while recognizing the defense, have rejected its application on the facts*".[373]

More courts interpret the copyright misuse in the same manner as a patent misuse.

They find that misuse occurs when a copyright owner i) illegally attempts to use his copyright to gain revenues or to extend the monopoly beyond the scope of the copyright; or ii) infringes the public policies underlying the copyright laws. The general rule is that an antitrust violation is not necessary to establish copyright misuse.[374]

An additional distortion with a proposal on an indefinitely renewable copyright protection is that it would increase current problems that just exist due to the ambiguity about the fair use.

A sort of propertization of copyright right has been considered as the last cause of many of the concerns affecting the current copyright law.

U.S. scholars link the phenomenon to the extension of the term of protection and the strict implementation of the fair use doctrine.[375]

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[372] M. Dolan, Misusing Misuse: *Why Copyright Misuse Is Unnecessary*, Vol. 17, De Paul J. Art., Tech & Intell. Prop. L., 2007, P. 58.
[373] *Broadcast Music. Inc. v. Hearst/ABC Viacom Enter. Serv*. 746 F. Support. 320, 328, 16 U.S.P.Q. 2d (BNA) 1683, 1688 (S.D.N.Y. 1990).
[374] *Practice Management Info. Corp. v. American Med. Ass'n*, 121, F.3d 516, 521, 45 U.S.P.Q. 2d (BNA) 1907 (N.D.Ill.1991); A.X. Fellmeth, *Copyright Misuse and the Limits of the Intellectual Property Monopoly,* 6 J. Intell. Prop. L. 1, 1998, pp. 24-25.
[375] M. Carrier, *Cabining Intellectual property through a Property Paradigm*, 54 Duke L. J. 2004, pp. 8-11.

The four factors that Congress listed in order to support courts in determining whether a use should be deemed "fair" are:

- the purpose and character of the use, including whether such use is of a commercial aim or is for non-profit educational goals;
- the nature of the copyrighted works;
- the breadth of the copyrighted work used in relation to the whole; and
- the effect of the use upon the potential market for or value of the copyrighted works.[376] It would increase the economic incentive to create new works by providing best revenues for those works, while simultaneously expanding the public domain. This last factor is considered as "undoubtedly the single most important element of fair use" by the Supreme Court.

An indefinitely renewable copyright regime should be interpreted implicitly with a new conception of the scope of copyright protection.

In conclusion, by the extension of the copyright term to "life of author plus 70 years" rule, maintaining proprietary control over individual digital distribution of copyrighted works is exceedingly costly, if even possible.

5.3 A brief Overview on Copyright Term Protection in Italy.

Italian copyright law is provided mostly in Law No. 633 of 22 April 1941.

With specific reference to the term of protection, Italian law distinguishes between moral or economic rights.

Moral rights are not subject to a legal term of protection.

The right of economic exploitation of the work is throughout the author's life and until 70 years after his death.

After this term, the work becomes public domain.

If there is a co-author of the work, the work becomes part of the public domain when 70 years have elapsed since the death of the last co-author.

[376] 17 U.S.C. § 107 (2000) mentioned by K. A. Goldman, *Limited Times: Rethinking the Bounds of Copyright Protection,* University of Pennsylvania Law Review, 2006, p. 729-730.

On the one hand, those rules provide an incentive to create intellectual works, guaranteeing the author a fair remuneration of earning money.

The function of this limitation in the period of protection would be to combine and satisfy the interests of the author with the other values and interests involved.

About the specific topic of the misuse of copyright, it is interesting to note that the Italian Civil Code does not provide a general rule on misuse, but only a specific Article in terms of property (Article 833), which prohibits acts exclusively directed at damaging others.

Even if this provision is considered as a general clause of the Italian private law system, it is not generally applied in the field of copyright by the courts or doctrine.[377]

Differently from U.S.,[378] in Italy there is not a broad reference on copyright misuse neither in doctrine nor an extensive case law. This is the reason why it is necessary to look at the European case law in order to find decisions on copyright misuse.

In this context, *Magill*'s decision is noteworthy.[379]

Magill concerned a borderline situation: whether a refusal to license information protected by intellectual property rights – specifically, copyright - may be contrary to Article 82 of the EC Treaty and if there are specific conditions in which a refusal to license may be considered as abusive.

In order to publish his weekly television listings guide, Magill wanted to access to RTE's copyrighted lists of television programs. When RTE refused, Magill invoked the European Commission stating that the broadcasters were breaching Article 82 by refusing to grant license of their intellectual property rights.[380]

Article 82 of the EC Treaty states:

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[377] S. Sica, V. D'Antonio, *Italia,* in *Balancing Copyright – A Survey of National Approaches*, R. Hilty, S. Nerisson, MPI Studies on Intellectual Property and Competition Law, Vol. 18, Berlin, 2012, p. 100.

[378] Morton Salt, United States v. Paramount Pictures Inc.,United States v Lowe's Inc., Lasercomb America Inc. v. Reynolds, Broadcast Music Inc. v. Columbia Broadcasting System Inc.

[379] Radio Telefis Eirean (RTE) and Independent Television Publication Ltd (ITP) v. Commission (1995) ECR I-743.

[380] P. Willis, *Introduction to EU Competition Law*, London, 2005, p. 148.

"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

In this case law the problem was the qualification of such abuse: whether the copyright abuse belongs to the antitrust area or to the category of copyright infringement.[381]

In America, the courts have adopted the theory of misused copyright on the basis of the misused patent.

There were two approaches about the copyright misuse.

The first one is that this abuse is configured in the area of antitrust, since only with reference to antitrust can we speak of abuse.

The second, on the other hand, qualifies the abuse in question as misused copyright given the violation of the public policy, in the light of the scope of the grant theory, developed within the theory of the misused patent (according to which abuse is conduct that does not fall under the rights of the owner).

According to the Court, a refusal is considered an abuse if the applicant for the license does not intend to duplicate those goods or services offered on the market by the holder of the design but intends to create new goods and services not produced by the holder and for which there is a risk of a demand from the consumer.

[381] C. Sganga, S. Scalzini, *From Abuse of Right to European Copyright Misuse: A New Doctrine for Eu Copyright Law*, Berlin, 2017, p. 7.

Adhering to the first line of interpretation and not having yet been provided with an instrument similar to the misuse of copyright, the European Court in the Magill case has preferred to recognize the copyright misuse area as field of competence of competition law.

In case of abuse of copyright, Magill case law has been considered better to invoking the antitrust law, instead of the intellectual property law.

Assuming Magill's case as landmark, the European Commission intervened on the refusal to license intellectual property rights.

In December 2005 the Directorate-General for Competition has published a discussion paper on the application of Article 82 of the EC Treaty to exclusionary clauses.

The Commission adhere to the Magill's decision, by citing many extracts from the mentioned decision ("*the refusal to license an intellectual property does not constitute an abuse in itself"*).

Only under exceptional circumstances the refusal to license an IPR could be considered an abuse: for instance, it is the case in which a technology protected under IPR law is indispensable for follow-on innovation by competitors.

The consequences of this form of abuse is the inability of the users and of public domain to benefit from innovation created by the competitors (having a dominant position in the market).

The American approach to achieving a balance between innovation and rivalry through the internal application of copyright law, rather than the external application of antitrust law, may reflect an American perception that the former is less intrusive on individual freedom and property rights.[382]

5.4 Copyright Law as a Piece of the Puzzle of Free Trade Agreements

In the time of globalisation, "trade linkage" problems constitute an example of the fragmentation of international law.

[382] A. Katz, P.E. Veel, *Beyond Refusal to Deal: A Cross-Atlantic View of Copyright, Competition, and Innovation Policies*, Antitrust Law Journal, 2013, p. 183.

The growing number of RTAs is generating the fragmentation of international trade law.

This fragmentation is caused mostly by the strict interest conflicts among states and the excessively different international legal systems.

This is the result of many factors: the increasing introduction of many branches of international law as a topic of negotiations; the proliferation in the number of international agreements; the increase of the number of international, regional, and bilateral forums of resolving disputes; the negotiations of different international agreements by different States.

Including the protection of IPRs in the object of international law allows for some rebalancing of recent developments in treaty law. It is not an easy project in light of a long tradition of fragmentation and isolation of the intellectual property field within public international law.

The protection of IPRs has evolved as a separate and distinct area of public international law.

Today IP is an important matter of international trade.

There are no convincing reasons to question its basic incorporation into the trading system and into the law of international investment protection.

The relationship between IPRs and trade is neither completely straightforward nor naturally deemed as mandatory,[383] threatening to undermine the balance achieved in many national laws and the capability of developing countries to use flexibilities existing at the international level to achieve developmental and public policy goals.

Many commentators have used the expression of "bargaining currency" or "marriage of convenience", to explain the discipline of IP in the FTA context.[384]

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[383] R. Pastor, *The Impact of Free Trade Agreements on Intellectual Property Standards in a Post-TRIPS World*, January 2006, available at https://www.bilaterals.org/?the-impact-of-free-trade . The author has defined the inclusion of IPR Chapter in FTA as "an oxymoron" p. 16.

[384] M. R. Hilty, T. Jaeger, *Legal Effects and Policy Considerations for Free Trade Agreements: What Is Wrong with FTAs?*, in C. Antons, R. Hilty R (eds) *Intellectual Property and Free Trade Agreements in the Asia-Pacific Region*, in MPI Studies on Intellectual Property and Competition Law, Vol. 24, Berlin, Heidelberg, p. 77 "If TRIPS-plus IP standards become a kind of "barganing currency" to negotiate FTAs, there is an obvious risk that substantially more or broader IP protection than would be required from an economic point of view is established": see also C. P. Braga, *Innovation, trade and IPRs: Implications for trade negotiations*, Working Paper, East-West Center Workshop on Mega-Regionalism - New

It's better to describe this relationship as "legal interoperability".

The difficulty on the incorporation of intellectual property rights in the trade debate arises from the ontological difference between the aim of IPRs and the focus of commercial markets.

IPRs aim to protect intellectual works, which are crucial to promote progress. On the contrary, trade is the activity of exchanging goods and services, which is a consequence of the intellectual work creation and is also mainly aimed at satisfying necessities efficiently, both in domestic and international markets.

IPRs and FTAs seem not to complement each other easily, but on the contrary they seem to create a fragmented situation that divides States into those that believe that a stronger IPR regime will promote free trade and those that believe it will not.

The inclusion of copyright law *ex se* is not in contradiction to free trade, but represents a part of the overall international framework, which is constituted of different national legal systems.

The process of inclusion of IPRs is not confined to specific treaty provisions, but needs to consider appropriate principles and rules relating to other areas of the law, since it's present both in national and international law.

This process could be possible under a uniform court system because the fragmentation of international law is a major constraint in balancing different agreements.

The fragmentation of the current IPRs Free Trade Agreements constitutes a "spaghetti bowl" or "noodle bowl" – in the Asian context - which is filled with "a *mishmash of overlapping supporting, and possibly conflicting, obligations*".[385]

I agree with some commentators who believe that the international legal scene is in the middle of a dark stormy night in which the different legal regimes are focusing on their individual scope, as illustrated by the growing number of FTAs, rather than working together and reducing fragmentation.[386]

Challenges for Trade and Innovation, published in March 2016, available at https://ssrn.com/abstract=274550 , pp. 6-7.

[385] S. Lester, B. Mercurio, *Introduction, in Bilateral and Regional Trade Agreements: Case Studies*, 2009, pp. 144-146.

[386] See e.g. L. Vanhonnaeker*, Intellectual Property Rights as Foreign Direct Investments: From Collision to Collaboration*, cit., p. 227; T. Cottier, F. M. Abbott, M. Burri, P. K. Yu, P.

In order to avoid the conflict between national IPR legal systems and increase coherence among international trade and domestic intellectual property laws, it's necessary to find some tool, which can allow them to work together to be stronger and more efficient.

The experience of Brexit, the negotiations of the mega-regional agreements, the withdrawal of the U.S. from TPP, demonstrate the significance of the twin processes of deterritorialization and reterritorialization for European regionalism and the EU's internal cohesion.

Developing countries are becoming aware that IPRs are used as a tool for obtaining deeper market access and reinforcing market conditions.

The existence of real benefits from strong IPRs systems at multilateral, regional, and bilateral levels must be carefully assessed before engaging in new negotiations or accepting new commitments. Assessment exercises should weigh many social and ethical considerations in the IPRs field, such as health, environment, consumer interests, and technology transfers, to avoid trivial exchanges of requirement access for public interest issues that could in the end have higher costs than benefits for the citizens of the US.

Given that IP will remain a crucial part of the economy in the 21st century, trade negotiations are a great opportunity to harmonize national IP standards.

If those standards are too high, they will be counterproductive; impeding future development, eroding global competitiveness and jeopardising access to knowledge and educational material.

This is the intellectual property policy dilemma, which is common to all free-trade agreements.

With regards to the debate on copyright term protection, there are different positions:

- the term should be very short or even inexistent: according to IP scholars and academics in order to protect cultural knowledge. A shorter copyright

G. Sampath, P. Roffe, X. Seuba, *Current Alliances in International Intellectual Property Lawmaking: The Emergence and Impact of Mega-Regionals*, Center for International Intellectual Property Studies, 2017, p. 43.

term would be good both for promoting innovations and creativity and for the public at large;

- it must be short: according to economists. The free market, with a short term of copyright regulation, leads to the most optimal outcome of competition and allocation of resources;[387]
- it should not have any limit: according to copyright lobbies. They consider the perpetual extension of copyright as constitutional.

The copyright regime has to be restored since it protects and compensates creators and does not grant public access to copyrighted works.

With regards to data protection, there are some policy views for international and regional trades to promote compatibility.

Firstly, it is important to avoid fragmentation in the regional and international approaches to data protection. In the data protection matter there is no single global agreement but, on the contrary, there are many regional and international trades.

Secondly, in most cases data protection negotiations have been developed in an open and transparent way.

Getting the balance wrong can have serious consequences for either the protection rights or for international trade.

Thirdly, the development of global and regional data protection initiatives also requires engagement with developing countries.

There is the need to adopt a set of common principles in order to improve international compatibility.

Where the level of the new FTA is higher than that of all previous FTAs for those signatory parties, the new FTA will change obligations globally and increase the IP protection and enforcement standard.

The highest level of copyright protection is welcome: it may not involve the expansion of the copyright term of protection and it should cover the quality of the

[387] M. Walker, *Economists Say Copyright Laws Are Killing Innovation; hurting the Economy,* Wash. U. St. Louis, published on 5 May 2009, available at https://source.wustl.edu/2009/03/economists-say-copyright-and-patent-laws-are-killing-innovation-hurting-economy/.

protection, by providing new remedies in order to protect rights holders and, at the same time, by protecting the status of the public domain.

Copyright law does not involve only the right holders but the access of knowledge and the spread of culture and it should be "the" guiding stars during the negotiations of treaties.

Pursuant to the different steps of the negotiations of TTIP or RCEP, as case studies in this analysis, the proposals on copyright term protection submitted from contracting States have not a specific explanation or excuse, neither economic nor moral.

It seems a sort of one-upmanship, in which the focus of the protection of intellectual property rights is lost.

Governments of the States may not consider the bargaining of the trades as a "risiko" game changers in which they can move more pawns on investments area and less pawns on copyright term protection.

Looking at the current trend adopting by contracting States during the bargaining of trades, the negotiating table seems to be more a costly and full of distractions game for the economic system, than an opportunity to provide uniform and clear rules on copyright law.

Judicial rulings on the definition of copyright misuse and its bounders which would be more welcome.

They can be adopted as the starting point in order to provide more specific rules in trade agreements on this sensitive topic.

In conclusion, in view of all the interests at stake, negotiations over the intellectual property field, mostly over copyright law, will have to be conducted more seriously.

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