ICLE International Center for Law & Economics

Mandated "fair use" language has no place in trade promotion authority
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Earlier this week Senators Orrin Hatch and Ron Wyden and Representative Paul Ryan introduced bipartisan, bicameral legislation, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (otherwise known as Trade Promotion Authority or "fast track" negotiating authority). The bill would enable the Administration to negotiate free trade agreements subject to appropriate Congressional review.

Nothing bridges partisan divides like free trade.

Top presidential economic advisors from both parties support TPA. And the legislation was greeted with enthusiastic support from the business community. Indeed, a letter supporting the bill was signed by 269 of the country's largest and most significant companies, including Apple, General Electric, Intel, and Microsoft.

Among other things, the legislation includes language calling on trading partners to respect and protect intellectual property. That language in particular was (not surprisingly) widely cheered in a letter to Congress signed by a coalition of sixteen technology, content, manufacturing and pharmaceutical trade associations, representing industries accounting for (according to the letter) "approximately 35 percent of U.S. GDP, more than one quarter of U.S. jobs, and 60 percent of U.S. exports."

Strong IP protections also enjoy bipartisan support in much of the broader policy community. Indeed, ICLE recently joined sixty-seven think tanks, scholars, advocacy groups and stakeholders on a letter to Congress expressing support for strong IP protections, including in free trade agreements.

Despite this overwhelming support for the bill, the Internet Association (a trade association representing 34 Internet companies including giants like Google and Amazon, but mostly smaller companies like coinbase and okcupid) expressed concern with the intellectual property language in TPA legislation, asserting that "[i]t fails to adopt a balanced approach, including the recognition that limitations and exceptions in copyright law are necessary to promote the success of Internet platforms both at home and abroad."

But the proposed TPA bill *does* recognize "limitations and exceptions in copyright law," as the Internet Association is presumably well aware. Among other things, the bill supports "ensuring accelerated and full implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights," which specifically mentions exceptions and limitations on copyright, and it advocates "ensuring that the provisions of any trade agreement governing

intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law," which also recognizes copyright exceptions and limitations.

What the bill doesn't do — and wisely so — is advocate for the inclusion of mandatory fair use language in U.S. free trade agreements.

Fair use is an exception under U.S. copyright law to the normal rule that one must obtain permission from the copyright owner before exercising any of the exclusive rights in Section 106 of the Copyright Act.

Including such language in TPA would require U.S. negotiators to demand that trading partners enact U.S.-style fair use language. But as ICLE discussed in a recent White Paper, if broad, U.S.-style fair use exceptions are infused into trade agreements they could actually increase piracy and discourage artistic creation and innovation — particularly in nations without a strong legal tradition implementing such provisions.

All trade agreements entered into by the U.S. since 1994 include a mechanism for trading partners to enact copyright exceptions and limitations, including fair use, should they so choose. These copyright exceptions and limitations must conform to a global standard — the so-called "three-step test," — established under the auspices of the 1994 Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, and with roots going back to the 1967 amendments to the 1886 Berne Convention.

According to that standard,

> Members shall confine limitations or exceptions to exclusive rights to
>
> 1. certain special cases, which
> 2. do not conflict with a normal exploitation of the work and
> 3. do not unreasonably prejudice the legitimate interests of the right holder.

This three-step test provides a workable standard for balancing copyright protections with other public interests. Most important, it sets flexible (but by no means unlimited) boundaries, so, rather than squeezing every jurisdiction into the same box, it accommodates a wide range of exceptions and limitations to copyright protection, ranging from the U.S.' fair use approach to the fair dealing exception in other common law countries to the various statutory exceptions adopted in civil law jurisdictions.

Fair use is an inherently *common law* concept, developed by case-by-case analysis and a system of binding precedent. In the U.S. it has been codified by statute, but only after *two centuries* of common law development. Even as codified, fair use takes the form of guidance to judicial decision-makers assessing whether any particular use of a copyrighted work merits the exception; it is not a prescriptive statement, and judicial interpretation continues

to define and evolve the doctrine.

Most countries in the world, on the other hand, have *civil law* systems that spell out specific exceptions to copyright protection, that don't rely on judicial precedent, and that are thus incompatible with the common law, fair use approach. The importance of this legal flexibility can't be understated: Only four countries out of the 166 signatories to the Berne Convention have adopted fair use since 1967.

Additionally, from an economic perspective the rationale for fair use would seem to be *receding*, not expanding, further eroding the justification for its mandatory adoption via free trade agreements.

As digital distribution, the Internet and a host of other technological advances have reduced transaction costs, it's easier and cheaper for users to license copyrighted content. As a result, the need to rely on fair use to facilitate some socially valuable uses of content that otherwise wouldn't occur because of prohibitive costs of contracting is diminished. Indeed, it's even possible that the existence of fair use exceptions may *inhibit* the development of these sorts of mechanisms for simple, low-cost agreements between owners and users of content – with consequences beyond the material that is subject to the exceptions. While, indeed, some socially valuable uses, like parody, may merit exceptions because of rights holders' *unwillingness*, rather than inability, to license, U.S.-style fair use is in no way necessary to facilitate such exceptions. In short, the boundaries of copyright exceptions should be *contracting*, not expanding.

It's also worth noting that simple marketplace observations seem to undermine assertions by Internet companies that they can't thrive without fair use. Google Search, for example, has grown big enough to attract the (misguided) attention of EU antitrust regulators, despite no European country having enacted a U.S-style fair use law. Indeed, European regulators claim that the company has a 90% share of the market — *without* fair use.

Meanwhile, companies like Netflix contend that their ability to cache temporary copies of video content in order to improve streaming quality would be imperiled without fair use. But it's impossible to see how Netflix is able to negotiate extensive, complex contracts with copyright holders to actually *show* their content, but yet is somehow unable to negotiate an additional clause or two in those contracts to ensure the *quality* of those performances without fair use.

Properly bounded exceptions and limitations are an important aspect of any copyright regime. But given the mix of legal regimes among current prospective trading partners, as well as other countries with whom the U.S. might at some stage develop new FTAs, it's highly likely that the introduction of U.S.-style fair use rules would be misinterpreted and misapplied in certain jurisdictions and could result in excessively lax copyright protection, undermining incentives to create and innovate. Of course for the self-described consumer advocates pushing for fair use, this is surely the goal. Further, mandating the inclusion of fair use in trade agreements through TPA legislation would, in essence, force the U.S. to

ignore the legal regimes of its trading partners and weaken the protection of copyright in trade agreements, again undermining the incentive to create and innovate.

There is no principled reason, in short, for TPA to mandate adoption of U.S-style fair use in free trade agreements. Congress should pass TPA legislation as introduced, and resist any rent-seeking attempts to include fair use language.

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