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TPMs and Access Rights

Carolina Rossini
International Intellectual Property Director
carolina@eff.org

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Key Points

- Countries' policy choices on TPMs scope and policy **significant implications for education, scientific research, free expression, competition policy, and innovation.**
- **12 years of US-DMCA shows: overbroad TPMs policy cause harm to important public policy interests** outside the copyright sphere.
- The TPP agreement should **leave the choice** of how to structure TPM provisions to member economies, **as prescribed by the international standards established at WIPO.**



Like ACTA, the TPP Agreement is a plurilateral agreement that will be used to create **new heightened global IP enforcement norms.**

Countries that are not parties to the negotiation will likely be asked to accede to the TPP **as a condition of bilateral trade agreements with the U.S. and other TPP members, or evaluated** against the TPP's standards in the annual **Special 301 process** administered by the Office of the U.S. Trade Representative.



“Digital locks” that exist on many types of copyrighted goods allegedly to prevent people from pirating that content, but also that end up preventing legally allowed uses such of content in the public domain, fair use or under exceptions and limitations provisions or even under consumer rights (not copyright infringing activities) ;

UNINTENDED CONSEQUENCES!!!

Visually impaired person who needs to use software to convert text of their e-books to speech/audio could not legally do so where the text is technologically protected despite the existing statutory exception in US law and in other countries that permits the creation of accessible format copies for visually impaired persons.

Teachers need to excerpt part of an e-book or make a clip of a movie released on DVD for use in their classroom under fair use or quotation exception would not be allowed to do so

And remember:

In the U.S., this sort of use for education would be considered fair use, and is currently the subject of a three year exemption granted by the Librarian of Congress, but without an appropriately tailored and balanced administrative rulemaking digital locks exemption procedure, under the TPP, this would violate the digital locks provisions, and could subject the school to crippling statutory damages



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International Standards

- Article 11- WIPO Copyright Treaty
- Article 18 of WIPO Performance And Phonograms Treaty (WPPT)



WIPO Copyright Treaty - Article 11

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and **that restrict acts**, in respect of their works, **which are not authorized by the authors concerned or permitted by law.**



Article 18 of WPPT

Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, **which are not authorized by the performers or the producers of phonograms concerned or permitted by law.**



U.S. Digital Millennium Copyright Act of 1998 (DMCA). Anti-circumvention provisions based on those in the DMCA have been included in the IP **chapters of the last 10 bilateral or regional free trade agreements (FTAs)** that the U.S. has concluded – as trade off for market access interests.

As the U.S. experience with the similar provisions in the DMCA over the last 12 years has demonstrated, **overbroad legal protection for TPMs has restricted fair use and other lawful uses of copyrighted material** for education and a variety of socially beneficial purposes, chilled scientific research and progress in computer security, impeded legitimate competition, and stifled innovation.

See: Unintended Consequences: Twelve Years Under the DMCA, Electronic Frontier Foundation (February 2010) @ <http://www.eff.org/files/eff-unintended-consequences-12-years.pdf>



Impacts of DMCA extension

- Overrides national copyright law exceptions.
- Chilling effect on scientific research and publication.
- Anti-competitive misuse.
- Stifled technological innovation and creation of interoperable devices.
- Threatened free and open source software
- See: *“Unintended Consequences: 12 Years Under the DMCA* @ <http://www.eff.org/unintendedconsequences>



Article 4.9 requires countries joining the TPP to - In particular, it requires countries to create:

- **a legal ban on the act of circumventing** a technological protection measure that controls access to a protected work (Article 4.9(a)(i));
- a broad legal ban on the **manufacture and distribution of certain tools, technologies and devices that can be used to circumvent any TPMs**, including access control TPMs and copy control TPMs (Article 4.9(a)(ii) and the definition of “effective technological measure in Article 4.9(f));
- **limited exceptions** to these bans for a specified set of 8 purposes mirroring those in the U.S. DMCA (Article 4.9(d) and (e));
- **criminal sanctions** for violation of the TPM provisions (Article 4.9(a) final sentence and Articles 15.5); and
- **specific civil penalties** for violation of the TPM provisions, including the ability for judicial authorities to order that a party who loses a civil lawsuit challenging whether there has been a TPM violation be required to pay the court costs and reasonable attorney fees of a prevailing rightsholder (Article 12.2).



Since access control TPMs control all access to a copyrighted work, including access for lawful, non copyright-infringing purposes, a legal ban on circumventing access control **TPMs would give rightsholders a new right of controlling access to copyrighted works**, separate from and potentially unconnected to, the enumerated copyright rights granted to authors under the Berne Convention, the WCT and the WPPT. Thus, **a legal prohibition on circumventing access control TPMs could effectively override the traditional boundaries of copyright law.**



- **Knowledge Requirement** (liability where a person accidentally circumvented or had no subjective knowledge of having circumvented a TPM)
 - **Actual and constructive knowledge of circumvention should be required to impose civil and criminal liability** for circumvention of a technological protection measure
 - **Problematic for US-Chile/ korus/ US-Australia
 - Permit flexibility to exclude civil and criminal liability for innocent infringers.
- **Allow flexibility based on multilateral agreements**
 - more flexible regulations governing access to circumvention tools and services that preserve the ability to obtain access to circumvention tools and services to make lawful non-infringing uses of copyrighted works
 - ** Problematic for New Zealand
 - **See also http://www.eff.org/files/filenode/FTAA/20040830_uschile_fta.pdf
- **Sanctions: there are other ways!**
 - The U.S.-Chile FTA contains a number of additional flexibilities for structuring penalties for TPM violations that are less likely to result in harm to other public policy goals;
 - Limit criminal and monetary liability for scientific research and educational purposes;



- **Limit Scope! - Art. 4.9©** - requires countries to treat violation of the TPM measures as a separate cause of action, independent of any infringement that might occur under the Party's law on copyright and related rights = laws are required to prohibit bypassing rightsholder TPMs even if the circumvention is not tied to any illegal action (**SLIPT COURT DECISIONS IN USA!**)
 - Amend Article 4.9(a)(i) to read *“knowingly circumvents, for the purpose of infringing a right protected under TPP countries’ national copyright law, without authority any effective technological measure ...”*
- **Allow innovation!** - TPM Provisions Should Incorporate a Legislative or Administrative Review and **Exemption Process that Permits Exemptions to be Granted for Both the Act of Circumvention and the Tools Necessary to Do So**



Conclusions

- TPP Agreement should not include specific TPM provisions, but leave policy choices on how to structure TPM laws to member economies.
- If the TPP Agreement includes TPM provisions they should be based on the WCT and WPPT provisions, and give member economies discretion in how to implement.



Conclusions - Key principles:

- Circumvention should only be unlawful if results in copyright infringement.
- TPM laws should not hinder creation of new copyright exceptions and limitations to meet domestic needs.
- TPM laws should permit use of circumvention devices/ services for non copyright-infringing purposes.
- Give member economies discretion to regulate anti-competitive misuse of TPMs and structure penalties to minimize chill on innovation and socially beneficial activities.



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And remember – the USTR does not represent consensus within the USA

For instance, opposition to SOPA

<https://www.cdt.org/report/list-organizations-and-individuals-opposing-sopa>

And it is important to understand why...





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Thank you!

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Further info...



Lawful Use Restricted

- TPMs can prevent lawful non-infringing uses.
- U.S. copyright law's balanced set of rights replaced by “anti-circumvention” law:
 - new access right - protection beyond copyright
 - no right to circumvent to make fair use
 - device ban - downstream fair use no defense
 - U.S. statutory exceptions overridden - as documented by those who have had to apply for exemptions every 3 years:
 - Libraries and Archives not able to make copies of TPM protected works to preserve cultural heritage;
 - Educators sought exemption to make DVD clips for film class;
 - American Federation of Blind for e-book text to speech.



Chilled Scientific Research

- Chilling effect on scientific researchers, journalists, publishers:
 - 2000 Music industry group threatened to sue Princeton Professor Felten and research team for publishing research paper on security vulnerabilities.
- Ongoing effect - computer security weakened:
 - 2005 Researcher discovered Sony BMG music CD “Rootkit” software security risk but consulted with lawyers for several weeks before raising alarm.
 - 2006 exemption for good faith security testing of music CD access TPMs.



Technology Innovation Stifled

- Overbroad TPM laws give control over pace and nature of technology innovation:
 - TPMs and license conditions control DVD player feature set.
 - Prevent creation of interoperable new technologies.
 - DVD movie jukeboxes (DVD-CCA v. Kaleidescape)
 - iTunes on iPods (Apple v. RealNetworks)



Anti-Competitive Misuse

- Blocked aftermarkets, product lock-in at monopoly prices:
 - printer cartridges (Lexmark v. SCC)
 - garage remote controls (Chamberlain Group v. Skylink Technologies)
 - computer maintenance service (Storage Tek v. CHE)
 - cell phone unlocking (TracFone v. SOL Wireless)
 - recent administrative exemption, but not for tools
- Geographic market segmentation:
 - Sony Playstation MOD chips (Sony v. Gamemasters; Sony v. Stevens)