

# CRIMINALISATION OF COPYRIGHT PIRACY AND INTERNATIONAL TRADE: A MARRIAGE OF CONVENIENCE? THE CASE WITH TRANSPACIFIC PARTNERSHIP AGREEMENT

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**ABSTRACT:** *The signing of the Transpacific Partnership Agreement (TPPA) between twelve member countries, with Malaysia included, has set a new, higher benchmark for copyright enforcement. In three ways, the landscape of copyright law has been changed significantly. First, TPPA expand the coverage of the kinds of Intellectual Property recognized. Secondly, what constitute copyright violations has been expanded. Thirdly, sanctions for copyright piracy has been made tougher and sentencing lengths for such piracy has been lengthened. The usage of trade agreements to compel countries to improve copyright domestic policy is not a new strategy. The antecedent to TPPA is the TRIPs Agreement that was concluded on the basis that copyright piracy and counterfeiting has grown from just mere domestic nuisance to an effective barrier to free trade. This paper addresses the TPPA and analyses the rationale to the introduction of more stringent measures under TPPA. It seeks to understand the shift in the discourse of the policy makers regarding the 'severity' of copyright offences. It examines questions such as to what extent should copyright infringement be criminalised? Even if it is criminalised, why must it be imposed with more severe penalties than an ordinary economic crime?*

**Keywords:** Criminalisation, piracy, copyright, Transpacific Partnership Agreement

## 1. INTRODUCTION

Copyright piracy has been the impetus behind the conclusion of a number of international treaties in the world. Starting from Berne Convention, we have seen the growth of treaties which specifically aim to force reform in domestic copyright policy in order reduce copyright piracy such as TRIPS Agreement, ACTA and the latest TPPA. The use of such international treaties is to push for adoption of copyright measures which are far more restrictive than what the domestic policy of the particular country would require. If not of external forces, the said country would not have been compelled to introduce reforms in domestic policy to arrest copyright policy effectively. The reason could be that it is not in the country's trade interest to tighten copyright rules because it is not a major producer of information intensive products and services which are heavily reliant on copyright. TPPA seeks to rewrite the global rules on copyright law in three ways; first by ensuring that the member countries accede to the specified global treaties on copyright so that member countries abide by the same international rules. Secondly, member countries abide by the same minimum binding commitments. The minimum binding obligations can be further classified into several categories. The first are obligations in the form of TRIPS-plus standards that are actually US standards on IP rights. Second are obligations on areas not traditionally classified as IP rights under existing treaties, such as domain names, clinical data and Internet retransmission. This entails the extension of the above subject matters protected under IP under the proposed TPPA. The third category comprises obligations relating to the administration and management of IP which are of interest to all Contracting Parties, such as registration systems, adjudication of disputes or enforcement of rights.

The paper seeks to explore the minimum binding commitments on copyright enforcement. It seeks to examine how through trade agreements, US has been able to export their intellectual property standards to the rest of the world

through free trade agreements in the name of fighting piracy. These trade agreements compels member countries to set a new, higher benchmark for enforcement. This is followed with an examination of the justifications for and against the imposition of stronger punishment and penalties for copyright offences.

## 2. PIRACY AND TRADE AGREEMENTS

Copyright piracy and counterfeit goods are nothing new in the world, more so in ASEAN. In the area of music, whilst physical piracy shows no sign of being abated, online piracy continues to grow exponentially with new forms of online sharing and swapping of music tracks. Among the forms of online piracy are illegal websites, P2P networks and Bit Torrents. As reported by IFPI, supporting piracy dampens the growth of the music industry which may be the driver of a country's economy. The argument is that the suppression of piracy brings immeasurable benefits to the country.

The relationship between copyright piracy and domestic economy is obvious. But the relationship between copyright piracy and international trade is even more difficult to establish. Yet, many international treaties have been entered into as a means to control copyright piracy. Copyright, being intangible, can be infringed across borders. Hence, the wanton and indiscriminate piracy in one country as a result of weak copyright law may constitute trade barriers against free trade. The uneven standards of copyright from one country to another prompted the copyright industries in the US to lobby for the inclusion of intellectual property rights into a trade agreement by the World Trade Organization. The resulting agreement known as TRIPS Agreement was meant to harmonize national systems of IPRS. TRIPS is the first multilateral treaty on intellectual property that profess the link between domestic policies on intellectual property and external policies on international trade.

Copyright can also be one of the main economic driver of a country which compels that country to monitor piracy across its border. The United States for example keep a vigilant

watch or surveillance of global piracy by listing country's piracy performance in the U.S. Trade Representatives annual "Special 301" Reports from as early as 1980s. In this list, many of the ASEAN countries are classified as either under the Watch List or more serious the Priority Watch List. The covert method to enforce legal reform through Special 301 measures has been an effective US foreign policy against developing countries particularly that require some form of disciplining for lack of strong rules and enforcement of copyright policies.

The table below illustrates the ranking of ASEAN countries in the United States Trade Representative Reports (USTR) Special 301 Report. In the table below, it can be seen that Malaysia has been listed under the Watch List since 2006 and

was phased off in 2014 as a result of more stringent copyright measures introduced in the 2012 copyright amendment. Indonesia, in the meantime has been listed in the Priority Watch List since 2006 and has been there until now. According to the 2015 USTR Special 301 Measures[1], US is particularly concerned with piracy in Indonesia which it considers as market access barriers affecting US businesses that depends on intellectual property protection. Among factors cited are lack of enforcement, lack of cooperation between relevant ministries that has led to rampant piracy and counterfeiting in Indonesia. Indonesia is a member of WTO and would have been in compliance with the TRIPS Agreement.

**Table 1: The ranking of ASEAN countries in the USTR Special 301 Report**

|             | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 |
|-------------|------|------|------|------|------|------|------|------|------|------|
| Brunei      |      |      |      | WL   | WL   | WL   | WL   |      |      |      |
| Cambodia    |      |      |      |      |      |      |      |      |      |      |
| Indonesia   | PWL  | *WL  | WL   | *PWL | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  |
| Laos        |      |      |      |      |      |      |      |      |      |      |
| Malaysia    | WL   | WL   | WL   | WL   | WL   | WL   | *    | WL   |      |      |
| Myanmar     |      |      |      |      |      |      |      |      |      |      |
| Philippines | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | *    |      |
| Singapore   |      |      |      |      |      |      |      |      |      |      |
| Thailand    | WL   | *PWL | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  |
| Vietnam     | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |

Source: USTR Special 301 Report (2006-2015)

TRIPS Agreement was considered to be an ambitious multilateral agreement at the time of its conclusion, i.e. 1994. It seeks to harmonize global standards on intellectual property protection, developed countries and developing countries alike. Among the strong measures introduced by TRIPS Agreement are the mandatory protection of copyright

to lifetime plus fifty, copyright to be granted automatically, the recognition of computer program as the subject matter of protection and the acceptance of exceptions to exclusive right but subject to the three step test.

**Table 2: Copyright enforcement provisions under the TPPA**

|   |   |
|---|---|
| Presumptions                              | The validity of copyright, trade mark and patents that have been substantively examined by the competent authority  |
| Enforcement practices                     | Judicial decisions and administrative rulings shall preferably in writing, and published<br>Publish information on enforcement of IPR   |
| Damages                                   | Damages may include lost profits, the value of the infringed goods or services measured by the market price, or the suggested retail price<br>Availability of pre established damages or additional damages<br>Damages may not be available against a non profit library, archives, educational institution, museum, or public non commercial broadcasting entity |
| Criminal liability for aiding or abetting | Member States to provide for criminal liability for aiding and abetting copyright infringement.   |
| Border measures                           | Judicial authorities have the authority to order for infringing goods to be destroyed without any compensation of any sort<br>Availability of court order to obtain relevant information regarding person, means of production or channels of distribution of infringing goods<br>Border measures available for imported goods, export and                        |

|   |                                   |   |
|---|-----------------------------------|---|
|   |                                   | goods in transit<br>Goods detained or suspended as a result of border measures - the right holder must be informed of the names of the parties involved as well as of the details of the goods<br>Ex officio border measures available also for imports, exports and goods in transit<br>Border measures also applicable to goods of commercial nature sent in small consignments |
|   | Criminal procedures and penalties | On a commercial scale includes acts carried out for commercial advantage or financial gain and significant acts, though not carried out for commercial advantage or financial gain, that have a substantial prejudicial impact on the interests of the right holder<br>Also applicable to willful importation   |
| Trade Secrets   | Criminal procedures and penalties | Availability of criminal procedures and penalties for unauthorized, willful access and disclosure of trade secrets  |
| Protection of encrypted programs-carrying satellite and cable signals | Criminal offences                 | Manufacture, assemble, modify, import, export, sell, lease or distribute devices used to decode an encrypted program-carrying satellite signals   |
|   | Civil and criminal remedies       | Availability of such remedies in specified circumstances  |

Source: Extracted from Chapter 18 of the Trans-Pacific Partnership Agreement

Despite the success of TRIPS Agreement in regulating copyright piracy between member countries, it soon transpired that the TRIPS standards are not effective enough to stem piracy. This leads to the inclusion of more stringent copyright measures through free trade agreement either at bilateral, regional or pluri-lateral level.

Malaysia, despite having graduated from the USTR Watch List find itself having to agree for more stringent copyright measures through the Trans Pacific Partnership Agreement. This paper moves into examining the measures introduced by TPPA to hit hard on piracy.

### 3. TRANSPACIFIC PARTNERSHIP AGREEMENT

Transpacific Partnership Agreement (TTP) has been hailed as the 21st century trade rules that has rewritten the rules for global trade. By creating a single set of trade and investment rules on trade areas, TPPA promises to provide greater certainty and predictability for business by creating harmonisation of standards enabling parties to compete on a more level playing field. TPP is quite comprehensive in its coverage, extending on traditional trade issues such as market access, technical barriers to trade, sanitary and phytosanitary measures to non traditional trade issues such as labour standards and capacity building. The harmonization of intellectual property rules is established through the intellectual property chapter, one of the biggest chapters in the TPPA. In particular, TPPA aims to rewrite global rules on copyright enforcement. The list of these new rules can be found in table (2) below.

The TPPA contains provisions on criminal offences which originates from the US law [2]. In the US, the shift in the policy discourse on the severity of copyright offences triggered the enactment of No Electronic Theft (NET) Act in 1997. The Act marks the beginning of treating copyright offences as criminal offences. The analogy is that copyright offences are equivalent to theft and should be treated like other offences that cause grave harm to the public [3]. The

process of copyright criminalisation entails that a major paradigm shift from civil to criminal copyright [4].

Article 18.77(1)(b) of TPPA requires Member States to provide for copyright offences in respect of acts which are not carried out for commercial advantage or financial gain but have a substantial prejudicial impact on the interests of the copyright owner. The article provides:

1. Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale. In respect of wilful copyright or related rights piracy, "on a commercial scale" includes at least: (a) acts carried out for commercial advantage or financial gain; and (b) significant acts, not carried out for commercial advantage or financial gain, that have a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace. With this provision, TPPA has substantially changed the rationale behind the criminalisation of copyright offences [5]. Previously, the international standard is to impose criminal penalty when piracy occurs at a commercial scale as set by Article 61 of the TRIPS Agreement. The rationale is that civil suits are available to the right holders and criminal procedures should only be available if the piracy is so widespread that it harms the society. In the words of Article 61, strong criminal penalty should be made available when the piracy is 'committed willfully and on a commercial scale'. The scope of Article 61 has been the subject of review in a WTO Dispute Settlement Body's decision in China-Intellectual Property Rights. In the estimation of the Panel, both 'willful' and 'on a commercial scale' constitute a major limitation to the provision of criminal penalties. The two phrase which comes before and after the phrase 'trademark counterfeiting or copyright piracy' defines the types of cases of that of grave consequences that they deserve maximum penalty. Fundamental to the issue is to what extent would

copyright piracy or trade mark counterfeiting be considered to be "on a commercial scale"? On this the Panel viewed that "commercial scale" refers to the magnitude or extent of typical or usual commercial activity, i.e. the piracy must occur at a magnitude that it will harm the commercial interest of the copyright owner.

The WTO Panel decision in China-Intellectual Property Rights, was a major turning point for the United States as they lost their endeavour to impose their jurisprudence on copyright criminal provisions on the rest of the world. With the intention to shift the discourse of policy makers regarding the 'severity' of copyright piracy and counterfeit trade marks, the US champions the imposition of more stringent penalties in trade negotiations, hence the conclusion of the Trans- Pacific Partnership Agreement.

The imposition of stringent copyright measures under TTPA is also seen as a measure to export rules from the Anti Counterfeiting Trade Agreement (ACTA), a multinational treaty signed by twelve member countries comprising of Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, United States, Mexico and the European Union. As the Agreement focuses on global trade of counterfeit goods and copyright infringing goods, a number of new criminal provisions were introduced. Among them are provisions criminalising willful trade mark counterfeiting, copyright piracy, or "willful importation and domestic use" of counterfeit labels and packaging in the course of trade on a commercial scale". Under ACTA 'commercial scale' is defined to include acts "carried out as commercial activities for direct or indirect economic or commercial advantage". which may include online infringement. To determine whether certain goods are infringing, the relevant law is the law of the country where procedures are revoked. This entitles developed countries with higher intellectual property rights to take action in accordance to their domestic law even if such activities are lawful in the country where the goods originate [6].

ACTA also mandates for the imposition of criminal penalties for aiding and abetting criminal conduct'. Equally criminal is the act of cam cording movies in theaters, online copyright piracy and anti-circumvention measures. Finally, the border measures is extended for in transit and exports of copyright infringing and counterfeit goods. The powers of the custom authorities are also strengthened by conferring them with an ex officio powers to take action regardless of complaint or notice from the right holders. These are the exact provisions that are brought in by TPPA in its intellectual property chapter.

ACTA has been criticised heavily by many quarters as being 'global one way IP ratchet' or 'having the features of the

scheme of a Vaudeville Villain' [7]. Table 3 below illustrates how the TRIPS, ACTA and TPP progressively introduce new copyright crimes and increase the severity of the penalty for such offences. The paper proceeds with a discussion as to the justifiability of the paradigm shift in copyright offences.

#### 4.JUSTIFICATIONS OVER CRIMINALISATION OF COPYRIGHT OFFENCES

The traditional justification for more severe penalties for copyright piracy is that they are necessary in response to the increase in global trade in counterfeit goods and copyright infringing materials. The copyright industries suffer continued financial loss which is unprecedented given the evolution of new technologies to facilitate copying [8]. The widespread use of file sharing for example necessitates the prosecution of file sharing operator that openly defy civil enforcement actions [9]. As there is no longer social stigma associated with downloading and file sharing, enforcing obedience by way of criminal offences is therefore justifiable [10]. Unlike civil suits which aim to compensate the author for the unauthorised use of his work, the aim of criminal enforcement is to enforce obedience [9]. As the criminal powers is to aim deterrence, the range of penalty and punishment imposed must be severe enough to stop the offenders from repeating the offence. The continuous campaign against piracy is taking up a significant amount of cost. The amount of harm caused to the interests of the right holders are substantial [11]. This is a classic situation where John Stuart Mill's theory of harm is neatly applicable. The premise of the argument is that where the conduct of the individual causes harm to others in society, the State is justified to restrict individual liberty [10]. Further, taking other's right is a morally wrong behaviour. Considered that intellectual property belongs to the one who creates it, it is ethically wrong for someone else to reap it without sowing the seeds, so to speak [10]; [12].

Another oft repeated claims is that the organizations behind the copyright piracy are somehow connected with syndicates and organised crimes and are actually channeling the funds to terrorist activities. With criminal proceeding, the assets of the infringers can be frozen and the instruments used for the commission of the offence be seized and the proceeds of the criminal activity can be forfeited. The operation of the syndicates can be paralysed if their financial sources are stemmed. More fundamentally, the collection of crucial evidence can be facilitated through search warrant by the enforcement agencies. Enforcement agencies can scourge the computer systems of the copyright infringer for evidence or even wire tap their communication system surreptitiously for evidence gathering [12].

**Table 3: The ratcheting of copyright criminalisation through trade agreements.**

|   | TPP | TRIPS | ACTA |
|---|-----|-------|------|
| <b>SPECIAL MEASURES RELATING TO ENFORCEMENT IN THE DIGITAL ENVIRONMENT</b>                                  |     |       |      |
| Special requirements for digital enforcement  | /   | X     | X    |
| Legal incentives for ISPS in restraining the unauthorized storage and transmission of copyrighted materials | /   | X     | /    |

|  | TPP | TRIPS | ACTA |
|--|-----|-------|------|
| Safe harbour for ISPs  | /   | X     | X    |
| Detailed notification and counter-notification procedures for right holders, ISPs and subscribers.   | /   | X     | X    |
| <b>TECHNOLOGICAL PROTECTION MEASURES</b>   |     |       |      |
| Criminalisation of unauthorized acts against the circumvention of effective technological measures   | /   | X     | /    |
| Make circumvention a distinct cause of action, independent of infringement.  | /   | X     | /    |
| <b>CRIMINAL ENFORCEMENT</b>  |     |       |      |
| criminal procedures and penalties must be applicable for willful trademark counterfeiting or copyright on a commercial scale                         | /   | /     | /    |
| Provide for criminal procedures on unauthorised transmission or copying of motion picture or other audiovisual work (TPP) or unauthorized copying of | /   | X     | /    |
| Criminal liability for aiding and abetting is available under its law.   | /   | X     | /    |
| Provides penalties that include sentences of imprisonment as well as monetary fines sufficiently high to provide a deterrent to future               | /   | /     | /    |
| Seizure of suspected counterfeit or pirated goods  | /   | /     | /    |
| Forfeiture and destruction of all counterfeit or pirated goods   | /   | /     | /    |
| Forfeiture or destruction of materials and implements  | /   | /     | /    |
| Seizure or forfeiture of assets the value of which corresponds to that of the assets derived from, the infringing activity.                          | /   | X     | /    |
| Ex officio action without the need for a formal complaint.   | /   | X     | /    |

## 5. CRITICISMS AGAINST THE CONTINUED PROGRESSION OF CRIMINALISATION OF COPYRIGHT OFFENCES

Despite those assertions, critics point out that copyright infringement lacks the moral force to be criminalised unlike theft. Many does it with no financial motive, or at a small scale and even those that encourage sharing for purpose of learning and education. As a result, many feels that the extension of property concepts to intellectual property which is intangible is difficult to digest. The public doesnot regard the harm caused by the commission of copyright offences to be as severe as theft.

More fundamentally, most of the claims on harm caused by copyright piracy has been criticised as being based on dubious statistics. In reality, there is no accurate measurement of the actual cost caused by copyright piracy. The assumption each copy of counterfeit constitute a potential loss of sale for an original piece of copyright work. Such assumption is clearly misplaced as those who indulge in file sharing may not necessarily be willing to purchase the original copyright material in the first place. The same goes with counterfeit goods

The nature of intellectual property which is non rivalrous and non excludable further departs it from tangible goods. Whilst the taking of tangible good results in the deprivation of the original owner of his ownership, intellectual property piracy involves making more copies of the work while retaining the original copy intact. There is this' no deprivation of

ownership of the property right, so to speak, unlike physical property. Due to this, commentators feel that copyright crimes should be less damaging than stealing of a physical property [2].

Critics also raised a number of human rights issue with heightened enforcement. For example, monitoring of the internet to reduce online piracy might chill freedom of expression. As the conduct of online sharing and downloading is so widespread, it is next to impossible to enforce it effectively. This might give rise to selective prosecution with indiscriminate suits again certain target groups instead of targeting the offenders at large. The gap in the enforcement of the criminal offences have been attributed to many reasons. Whilst the industry lobbyist are responsible for the introduction of criminal offences but they were not successful in forcing prosecution of cases [4]. Not surprisingly, many critics argues against TPP provisions on the basis that they are skewed to favour copyright owners interest without sufficient balance to legitimate users of the copyright goods [10].

The correlation between the severity of the punishment imposed and the offences committed has also been questioned. In the context of online policing for file sharing, the basic assumption is that copyright is unrelated to freedom of expression [13]. The concern is whether the range of punishment imposed is proportional to the harm copyright piracy caused to the society [14]. In addition, the problems with online piracy is a regurgitation of the problems faced

with music piracy in the physical world. The only difference is the scale of the operation. Regardless, the failure to stem piracy effectively may suggest that the problem could be more complicated than that [8].

## 6.CONCLUSION

The Trans Pacific Partnership Agreement pushes for a paradigm shift in the discourse relating to the criminality of copyright piracy. The push for punitive damages and longer imprisonment indicates that copyright piracy is no longer considered just economic harm but blameworthy act that harms the society. The widespread of online piracy warrants aggressive use of criminal prosecution, again, to force obedience and compliance. The penalties include a range of punishment including imprisonment as well as monetary fines sufficiently high to deter future acts of infringement. In the online environment, the concern is whether online policing is warranted as it brings the fear of a police state. Above all, it is really questionable whether copyright law can really be able to keep up with piracy [15]. It is understandable that indulging in piracy is a blameworthy act, however the bigger issue is whether the imposition of severe penalties, much higher than other economic crimes is justifiable or not. What is more worrying is that these imposition of higher standards of intellectual property rights are done in the name of free trade when it has very little to do with trade.

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