TRANS(PARENCY) PACIFIC PARTNERSHIP: THE DOWNFALL OF THE TPP?

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The Trans Pacific Partnership (TPP) negotiations received negative criticism due to the secretive nature of the agreement. Classification of the TPP as "foreign government information," under Executive Order (EO) 13526 by former President Barak Obama, the United States Trade Representative (USTR), has allowed TPP negotiations to be conducted in secrecy. The USTR maintains that disclosure of the agreement could harm U.S. relations with foreign nations and therefore fall exclusively to the executive branch. The classification of the TPP under Executive Order 13526 raises several key issues including separation of powers and security versus privacy. Covering every issue is beyond the scope of this note. Instead, this note will focus on the transparency surrounding the agreement and the impact of inadequate transparency on individual rights under the Intellectual Property Chapter.

This note first explores the impact that TPP copyright regulations will have on individual rights and the effect of the secretive nature of the negotiations on the regulations. Next, it will discuss how more transparency in international trade deals will lead to a more effective and balanced rulemaking by allowing civil engagement. By uniting the public under a universal cause, it is possible to push for more transparency in international negotiations. Rather than protecting the rights of special interests groups, transparency will foster public debate and result in more balanced regulations that spur innovation and economic growth.

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INTRODUCTION

The Trans Pacific Partnership (TPP) is a proposed multilateral free trade agreement between the United States (U.S.) and eleven countries on the Pacific Rim that make up 40% of the global economy.[1] The overarching goal of the TPP is not only to enhance trade and investment to promote economic growth for past trade deals, but also aims to promote innovation and support the creation and retention of jobs by including regulatory and policy changes that will affect domestic and international law.[2] Throughout TPP negotiations, the public was largely ignorant or indifferent to the deal due to the secrecy surrounding the negotiations. Although the U.S. has officially withdrawn from the TPP, the remaining countries involved may still move forward with the agreement. Furthermore, the issues surrounding transparency of the negotiations are more relevant than ever, if the U.S. wishes to

1. Alan Yuhas, *Congress will Abandon Trans-Pacific Partnership Deal, White House Concedes*, GUARDIAN (Nov. 12, 2016, 8:14 PM), https://www.theguardian.com/business/2016/nov/12/tpp-trade-deal-congress-obama [https://perma.cc/C7ZF-BK52].

2. Lydia DePillis, *Everything You Need to Know About the Trans Pacific Partnership*, WASH. POST (Dec. 11, 2013), http://www.washingtonpost.com/news/wonkblog/wp/2013/12/11/everything-you-need-to-know-about-the-trans-pacific-partnership/ [https://perma.cc/BT8L-882H].

continue as a global leader.

During negotiations, the U.S. government did not publicly release drafts of the TPP. Only the United States Trade Representative (USTR) negotiators and selected members of Congress had access to the documents.[3] Despite efforts to keep the TPP secret, several leaks of the proposed rules and regulations were made public. The leaks alerted the public of major regulatory changes that would take effect should the TPP receive the necessary congressional approval.[4] Because Congress passed the Trade Promotion Authority (TPA), a fast track procedure that prevents Congress from making amendments to the agreement, ratification of the TPP would have included the changes found in the leaked documents.[5] The proposed regulations found in the intellectual property (IP) chapter of the TPP have serious implications regarding freedom of expression on the Internet, specifically in the realm of copyright law.

Article 1, Section 8 of the U.S. Constitution, empowers the U.S. Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."[6] Because this clause grants Congress the authority to award creators and inventors exclusive property rights in their works, it is also known as the Copyright Clause, and forms the basis for patent, trademark, copyright, and other ancillary federal intellectual property protections. This constitutional provision aims to foster innovation to ultimately better society, which is why the exclusive monopolies granted to authors or creators are still subject to time limits and fair use rules, rather than absolute rights.[7] Thus, there are two competing legal interests at work under U.S. IP law: privatization of IP rights through the grant of individual monopolies versus the donation of those rights to the public domain.

On one hand, awarding a creator for hard work and contribution to society incentivizes others to attempt to make their own contributions. Oliver Wendell Holmes argued that people should be rewarded for the work that they put into a creation by

3. Margot E. Kaminski, *Don't Keep the Trans-Pacific Partnership Talks Secret*, N.Y. TIMES (Apr. 14, 2015), http://www.nytimes.com/2015/04/14/opinion/dont-keep-trade-talks-secret.html?_r=0 [https://perma.cc/T8QM-MD6A].

4. *Id.*; *see also* DePillis, *supra* note 2.

5. Philip Bump, *TPP and the Trade Deals, Explained for People Who Fall Asleep Hearing About Trade Deals*, WASH. POST (Oct. 8, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/04/22/the-trade-deal-explained-for-people-who-fall-asleep-hearing-about-trade-deals/ [https://perma.cc/RW4U-B5NT].

6. U.S. CONST. art. I, § 8.

7. *See generally* Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745 (2012) (describing theories, incentives, and applications in intellectual property law).

ensuring the privatization of IP rights.[8] However, extreme privatization without a public domain or fair use can create anti-commons.[9] Excluding too many people from the use of IP prevents the resource from being used by anyone, inhibiting growth and innovation.

On the other hand, when a creator's work benefits society, granting the public unfettered access to the material allows others to put the creation to its highest use. However, creators may be discouraged from sharing their idea, if others capitalize off their hard work at no cost. Congress and the courts struggle to find the balance between the two schools of thought.[10] Thomas Jefferson was known for his skepticism of strong IP rights stating "[t]he exclusive right to invention as given not of natural right, but for the benefit of society, I know well the difficulty of drawing a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not."[11] While his statement was made specifically regarding patent law, it is applicable to all forms of IP because it expresses the idea that the best use of an invention is by society. Jefferson even goes further to say that an exclusive monopoly is an embarrassment, indicating rights should only be granted in a specific and narrow set of circumstances.[12]

The battle between privacy and public use or knowledge of others' IP contributions underscores current issues with the TPP. Congress routinely struggles to balance the two objectives when passing legislation to reach a compromise between the rights holders, who endorse strong monopolies with restrictions on use by others without adequate compensation, and the public users who demand convenient and inexpensive access to new technologies. When the rights holders are large corporations, like those found in the music, film, or pharmaceutical industries, the corporations exert greater influence due to their financial resources.

The best way to address uneven bargaining power is through high levels of transparency surrounding proposed regulations, which facilitates meaningful review and understanding by the public. However, public engagement becomes difficult when members of the public do not understand the extent that legislation or regulation, such as copyright regulations, impact their everyday lives. Many individuals might imagine this only concerns professionals, such as musicians. The public may not realize that

8. *Id.* at 1809.
9. *See id.*
10. *See id.*
11. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), THE FOUNDERS CONSTITUTION, VOL. 3, ART. I, § 8, CL. 8, DOCUMENT 12, (Philip B. Kurland, & Ralph Lerner eds., 2000).
12. *See id.*

re-posting a YouTube video onto a social media site, for example, falls under the same copyright regulations to which professional content creators are subject. Regulations, such as this, go beyond freedom of expression and implicate individual privacy rights, yet many individuals remain ignorant of the impact.[13]

Public disengagement becomes problematic when the regulations or legislation encompass a broad scope of industries because individual members do not feel like they can relate to or understand the complexities, as with trade deals. Despite the impact trade deals like the TPP have on everyday life, many laypersons may feel alienated from these issues due to the technical and political aspects involved. Most individuals are not familiar with the ins and outs of trade negotiations and would not be able to read the text of a deal like the TPP and understand the implications of the regulations. However, interest groups and agencies have the sophistication to explain them to the public. Armed with the knowledge of the impact of various regulations, the public can then weigh the pros and cons and decide which types of regulations are most beneficial to society.

In order to provide the public with explanations of the impact of proposed laws, the documents must first be made available to the public by the government. Then, the regulations can be analyzed and presented to the public, who can then meaningfully participate in the adoption of the regulation through public debate. However, if trade agreements, like the TPP, are conducted in secret, the flow of information and understanding is stifled. Interest groups and agencies cannot review and interpret the information for the public, leaving many individuals ignorant or indifferent to regulatory changes.

This note focuses on the need to generate public awareness of proposed regulations to facilitate meaningful public engagement to produce efficient regulations. To generate any public interest, the U.S. government must draw people in with something that they can relate to. First, this note explores the history of the TPP and its general purpose. While the TPP regulates many different areas, one of the most universal causes for which the public wants to fight are personal rights such as freedom of speech and protection of property. Next, this note explores current and past copyright law and the public's reaction to it. Past reactions to restrictive legislation, like the Stop Online Piracy Act (SOPA), demonstrates that uniting the American public can bring about actual change. Third, this note reviews the substance of the TPP IP chapter and the secrecy surrounding the deal. Showing the public that the lack

13. Doug Palmer, *POLITICO-Harvard Poll: Americans Say 'TPP Who?'*, POLITICO (Sept. 23, 2016, 5:14 PM), http://www.politico.com/story/2016/09/americans-say-tpp-who-228598 [https://perma.cc/9MS8-ZT3G].

of transparency could result in extreme burdens on their personal rights would likely result in unification around a common and universal concern. Finally, this note explores the need for transparency in the regulatory and legislative process, proposing that the most effective way to achieve this is through public engagement. Uniting the public to protect free speech rights by demanding transparency in trade negotiations will ultimately allow for creation of not only balanced IP laws, but also balanced laws in each industry and lead to a healthier U.S. government and global economy.

I. TRANS PACIFIC PARTNERSHIP: BACKGROUND

The TPP regulates several trade practices amongst various Pacific Rim nations, including the regulation of IP.[14] The TPP was originally part of a larger global agreement called the Trade in Service Agreement (TISA), which included the Transatlantic Trade and Investment Partnership (TTIP), a corresponding deal for the Atlantic region that complements the TPP.[15] Negotiators finalized the TPP on October 5, 2015, and former President Barack Obama signed the agreement on February 4, 2016.[16] The White House notified Congress in August of 2016 of the intention to implement the TPP, establishing a thirty-day minimum requirement that allowed Congress to review the legislation prior to presentation.[17]

Ordinarily, during this first thirty-day period, Congress would be able to privately review the agreement. The agreement would then be available for public review for the following sixty days.[18] This would have marked the first opportunity the public had to see the official proposed agreement. After the waiting period, the U.S. International Trade Commission would have one hundred and five days to complete a full economic review of the deal.[19] Congress then would have another ninety days to approve or disapprove the TPP with an up-or-down vote under the TPA.[20]

However, during the 2016 presidential election, the TPP was highly politicized and became a platform issue, drastically altering

14. U.S. TRADE REPRESENTATIVE, TRANS PACIFIC PARTNERSHIP (2017) [hereinafter TPP].

15. Glyn Moody, *WikiLeaks Releases Secret TISA Docs: The More Evil Sibling of TTIP and TPP*, ARSTECHNICA (June 3, 2015, 12:37 PM), http://arstechnica.com/tech-policy/2015/06/wikileaks-releases-secret-tisa-docs-the-more-evil-sibling-of-ttip-and-tpp/ [https://perma.cc/X957-DERW].

16. Daniel W. Drezner, *Will Congress Approve the Trans Pacific Partnership?*, WASH. POST (Oct. 6, 2015), https://www.washingtonpost.com/posteverything/wp/2015/10/06/will-congress-approve-the-trans-pacific-partnership/ [https://perma.cc/UBR2-6RQX].

17. Yuhas, *supra* note 1.

18. Drezner, *supra* note 16.

19. *Id.*

20. *Id.*

the fate of the TPP. After the 2016 election, Congressional leaders in both parties announced that they would not bring the deal forward during a lame-duck session of Congress before the formal transition of power.[21] On January 24, 2017, President Donald Trump signed an executive order formally withdrawing from the TPP, fulfilling one of his many campaign promises.[22] Even though the U.S. has withdrawn from the TPP, the other member countries may continue with the deal, leaving room for another national power to enter the deal.[23] Because of the 2016 election outcome, negotiations for the TTIP and TISA have stalled.[24]

A. TPP Objectives

Trade agreements generally focus on increasing the exchange of goods between the countries involved by reducing trade barriers associated with the goods, such as tariffs and import quotas. However, to foster these types of free trade, complex national regulatory systems from each participant must be brought in, and in some cases, altered to facilitate agreement between the parties. Thus, the impact of free trade agreements with broad scopes, such as the TPP, goes beyond just the exchange of goods and has many free speech and privacy implications. Additionally, some speculate that TPP will ultimately lay the groundwork for future defense treaties between the countries in order to ally the countries against larger countries like China and Russia.[25]

The primary objective of the TPP is to create a comprehensive agreement that will increase trade between the countries involved, while opening new markets and setting high-standard trade rules.[26] However, the TPP differs significantly from past free trade agreements because it is focused on job creation, wage growth, and addressing twenty-first-century issues in the global economy.[27] The USTR also states that its position specifically relating to IP is to secure strong IP rights while "promoting an open, innovative, and technologically advanced Pacific region," noting its commitment to a free and open Internet, Internet Service Provider (ISP) "safe

21. Yuhas, *supra* note 1.

22. *Id.*

23. *Id.*

24. Andrea Shala, *EU's Katainen Sees Hope of Reviving TTIP U.S.-European Trade Deal*, REUTERS (Feb. 6, 2017, 12:58 PM), http://reut.rs/2kes8hH [https://perma.cc/LGB8-WKC7].

25. Sara Hsu, *China and the Trans-Pacific Partnership*, DIPLOMAT (Oct. 14, 2015), http://thediplomat.com/2015/10/china-and-the-trans-pacific-partnership/ [https://perma.cc/7FHQ-EFW9].

26. *America First Trade Policy*, OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/tpp/Summary-of-US-objectives [https://perma.cc/T5SR-JBDD] (last visited Apr. 16, 2017).

27. *Id.*

harbor" provisions, and prevention of piracy.[28] The USTR asserts that it will do so by harmonizing regulations throughout the region with balanced rules.[29] Finally, one of the overarching goals of the TPP is to "enhance transparency in policy-making processes and combat corruption."[30]

B. TPP Negotiations

TPP negotiations, conducted by members of the USTR, began in 2008 and concluded in 2015.[31] The USTR solicits input from the Industry Trade Advisory Committee (ITAC) members on behalf of the president when it conducted the negotiations for the TPP and when it conducts other international trade deals.[32] The U.S. Congress established the ITAC under the Trade Act of 1974.[33] ITAC is comprised of subcommittees populated by representative members of key sectors and groups of the economy; it "provide[s] policy advice, technical advice and information, and advice on other factors" relevant to trade negotiations.[34] ITAC members provide a range of comments including technical comments on wording choices in draft texts and overall policy issues.[35] Because the TPP has been classified as "foreign government information," the ITAC comments are also subject to confidentiality.[36]

Executive Order 13526 ("E.O. 13526"), entitled Classified National Security Information, classifies the TPP as "foreign government information."[37] E.O. 13526 defines "foreign government information," as "information provided to the United States Government by a foreign government . . . with the expectation that the information . . . [is] to be held in confidence," and "information produced by the United States Government pursuant to or as a result of a joint arrangement with a foreign government . . . requiring that the information . . . [is] to be held in confidence. . . ."[38] To receive the classification status, the

28. *Id.*
29. *Id.*
30. *Id.*
31. David Nakamura, *Deal Reached on Pacific Rim Trade Pact in Boost for Obama Economic Agenda*, WASH. POST (Oct. 5, 2015), https://www.washingtonpost.com/business/economy/deal-reached-on-pacific-rim-trade-pact/2015/10/05/7c567f00-6b56-11e5-b31c-d80d62b53e28_story.html?tid=a_inl&utm_term=.b13852e33835 [https://perma.cc/2CDR-DMN7].
32. U.S. DEP'T OF COMMERCE & OFFICE OF THE U.S. TRADE REPRESENTATIVE, ITAC OPERATIONS MANUAL IV. 1–4 (2014), http://www.trade.gov/itac/documents/ITAC-OpsManual-2014-18.pdf [https://perma.cc/V38P-EHLN].
33. *Id.* at v.
34. 19 U.S.C. § 2155(d) (2012).
35. ITAC OPERATIONS MANUAL, *supra* note 32.
36. Kaminski, *supra* note 3.
37. Exec. Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009).
38. *Id.* § 6.1(s)(1)–(2).

"unauthorized disclosure of the information reasonably could be expected to result in damage to the national security."[39] The USTR contends that disclosure of the TPP could cause "harm to the . . . foreign relations of the United States" under E.O. 13526.

In June of 2015, while TPP negotiations were taking place, Congress passed the Trade Promotion Authority (TPA). Known as the "fast-track" authority, the TPA facilitates a speedy resolution of proposed regulations. When Congress is subject to the TPA, they are allowed just one "up-or-down" vote, preventing Congress from making any amendments to the documents.[40] By limiting Congress's influence over the TPP, the TPA eliminates the length process of amending the documents.[41] The fast-track authority is not unique to the TPP and has been used in other agreements and by other Presidents.[42]

C. Support and Critics

The eleven countries involved in the TPP are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. Several have criticized the agreement.[43] Many of the laws in these countries will need drastic alterations to comply with the provisions of the TPP, which in general requires strict adherence to its regulations.[44] Only a few exceptions have been made in the realm of copyright law for countries to "grandfather in" copyright regulations.[45] Nonetheless, these exceptions do not allow other countries that are currently part of the TPP or future TPP parties to adopt these regulation exceptions.[46]

Notably absent from the agreement, arguably one of the biggest players in the Pacific and global economy, is China, which has garnered much attention from critics of the TPP. The USTR asserts that the TPP allows for inclusion of China in the future.[47] Some critics believe that China was left out purposefully, so that it will have less influence in the global economy, and if at a later date it chooses to join the TPP, it will be subject to the already negotiated

39. *Id.* § 1.1(a)(4).
40. Bump, *supra* note 5.
41. *Id.*
42. *Id.*
43. Moody, *supra* note 15.
44. *See* Daniel J. Ikenson, et al., *Should Free Traders Support the Trans-Pacific Partnership? An Assessment of America's Largest Preferential Trade Agreement* (CATO Inst., Working Paper No. 39, 2016), https://object.cato.org/sites/cato.org/files/pubs/pdf/working-paper-39_3.pdf [https://perma.cc/U66Y-BMWD].
45. *Id.*
46. Hsu, *supra* note 25.
47. *Id.*

regulations and unable to propose any alterations.[48] However, others argue that China was not interested in involvement.[49] Furthermore, there is speculation that the TPP is expected to lay a foundation for future agreements that are more defense-oriented with the countries involved so that they will have more leverage in case of any conflicts.[50]

Proponents and opponents initially responded to the TPP in predictable ways. The traditional opposition to trade agreements by labor and environmentalist groups and support from pro-business groups is evident. In addition, major proponents of the TPP copyright provisions are the film and music industries who support strong protection of IP. These large industries depend on strong copyright protection for their revenue streams and often are already at an advantage in terms of lobbying due to their financial success.[51] Internet rights groups like the Electronic Frontier Foundation (EFF), Knowledge Ecology International (KEI", and larger tech organizations like Google and YouTube strongly oppose the agreement in favor of less restrictive regulations asserting that they are protecting individual rights. Drawing comparisons to previous IP bills, like the Stop Online Piracy Act and Protect IP Act ("SOPA" and "PIPA"), Internet rights organizations attempt to create fear of extreme Internet censorship in the public. However, many of these organizations also have a stake in the outcome: less restrictive regulations would allow these tech firms wider access to copyrighted works, which would ultimately boost their revenue streams. The lack of public disclosure of the proposed TPP provisions has received criticism from all sides. The secretive nature of the TPP is reminiscent of the negotiations that took place for the Anti-Counterfeiting Trade Act (ACTA). The leaked provisions of the IP chapter in the TPP have supported the fears of many by attempting to incorporate many of the most controversial provisions of U.S. copyright law.[52]

Former President Obama hoped that passage of the TPP would be a legacy of his administration, which devoted substantial resources to the agreement.[53] The TPP resulted in a unique divide among the parties in Washington, initially garnering the most support from the conservatives and Republicans, who generally favor business.[54] Typically, Democrats, pressed by organized labor,

48. *Id.*
49. Hsu, *supra* note 25.
50. *Id.*
51. Kaminski, *supra* note 3.
52. Jonathan Band, *The SOPA-TPP Nexus*, 28 Am. U. Int'l L. Rev. 31, 47–48 (2012).
53. Palmer, *supra* n. 13.
54. *See generally* Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689 (2015) (discussing the non-traditional Democrat-Republican split over the TPP).

opposed trade agreements as threatening to manufacturing jobs.[55] Past presidents from both parties relied on Republican votes for trade pacts; the support from the Republican Party facilitated the passage of the TPA this summer.[56]

However, the politicization of the TPP during the 2016 election turned traditional Republican support against the agreement. The TPP received strong opposition from Democratic candidate Bernie Sanders and Republican candidate Donald Trump. Ultimately, even Hillary Clinton, who initially supported the trade agreement, also announced opposition to the TPP in its current form.[57] The TPP became a campaign symbol for loss of manufacturing jobs, especially in rust belt states, receiving popular opposition from voters throughout the election, even though few details of the TPP were discussed on the campaign trail.

II. COPYRIGHT LAW

A. Current Law

The Copyright Act of 1976 governs U.S. copyright law. The fundamental purpose underlying copyright law is to promote progress in the useful arts by incentivizing authors to create new works. The Copyright Act is supplemented by additional legislation including the Digital Millennium Copyright Act (DMCA), which implements treaties of the World Intellectual Property Organization (WIPO). The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is one such treaty that sets down minimum standards for many forms of IP regulation as applied to nationals of other World Trade Organization (WTO) members.

1. Copyright Act of 1976

U.S. copyright law dates back to the original Copyright Act of 1790; however, there have been many updates and revisions, the most recent one being the Copyright Act of 1976.[58] With aims of encouraging creation of art and culture through the reward of an exclusive set of rights, the Copyright Act of 1976 sets out the basic copyright law of the U.S. The Copyright Act grants authors exclusive rights to make and sell copies of their works and the rights to create derivative works, subject to a time limit, which is

55. *Id.*
56. Yuhas, *supra* note 1.
57. Palmer, *supra* n. 13.
58. JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 3 (4th ed., 2015).

generally seventy years after the author's death.[59] The Copyright Act also provides for remedies in the case of copyright infringement.[60] The Copyright Act has been criticized for the lengthy term of the copyright as well as the elimination of copyright registration, which exacerbates the "orphan works" problem.[61]

Many have criticized the 70-year duration of the copyright term as too long.[62] A lengthy copyright term severely limits citizen's ability to use copyrighted works, which conflicts with copyright law's purpose of furthering innovation. Ultimately, these cultural works are locked within the law for so long that they provide little incentive for further expansion and are underutilized.[63] One particular problem that arises with the long copyright term is that orphan works are kept out of the public domain. Orphan works result when the owner of a work is impossible to identify or contact.[64] Because of the unknown circumstances surrounding the work, it is impossible to determine when the copyright of the work has expired or to request permission from the author for use. As a result, distribution of these works is significantly limited. They are not able to be digitized or used in new works, but may only be used when fair use exceptions apply.[65]

2. Digital Millennium Copyright Act (DMCA)

The DMCA criminalizes digital rights management (DRM) circumvention and implements a notice-and-take-down system for copyright infringement on the Internet. DRM refers to various access control technologies, such as encryption and restrictive licensing agreements that restrict usage of proprietary software, hardware, or content.[66] Both the DRM and notice-and-take-down provisions of the DMCA have been criticized as ineffective and conflicting with the goals of furthering progress and innovation in the useful arts.[67]

DRM proponents argue that criminalization of circumvention is necessary to protect IP rights and allow the owner to maintain artistic control. Opponents contend that it serves anti-competitive purposes. These opponents argue that DRM stifles innovation, only helps big business, and in some cases restricts users in exercising

59. *Id.* at 4.

60. See Derek Khanna, Guarding Against Abuse: The Costs of Excessively Long Copyright Terms, 23 COMMLAW CONSPECTUS 52 (2014).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *See generally* Andrea M. Matwyshyn, *Technoconsen(t)sus*, 85 WASH U. L. REV. 529 (2007) (discussion on the problems with DMCA DRM regulations).

67. *Id.*

individual rights.[68] Individual users are prevented from activities such as backing up CDs, accessing works in the public domain, and in some cases using copyrighted materials under the fair use doctrine.[69] The DMCA not only criminalizes circumvention of DRM, but also communications about circumvention, as well as the creation and distribution of tools used for DRM circumvention.[70] The DMCA calls for civil and criminal penalties for individuals who circumvent these technological protection measures.[71]

The DMCA notice-and-take-down system has received a great deal of criticism for inefficiency.[72] The notice and takedown system requires that ISPs take down infringing content posted by users when the copyright holder notifies them via a "takedown request." Once notified, ISPs send a "notice" to the alleged infringer and then subsequently "takes down" the infringing content.[73] The notice informs the user that the owner of the material believes that the material is infringing and provides a counter-notification system to the user, should the user believe that the use does not infringe. The DMCA also created a "safe harbor" for ISPs in order to provide copyright liability protection when individuals use the ISP to store and post infringing material.[74] The "safe harbor" protects ISPs from liability when they store content online at the direction of the individual user, so long as they remove or disable access to the material upon receiving the takedown request.[75]

This system has been criticized as ineffective for several reasons. First, many people who are posting the content may not realize that it is infringing, or that the use could even be protected as fair use. Because the notices are written in "legalese," many average posters do not realize that their particular use may not be infringing and do not take advantage of the counter-notification process. Many fair uses may end up being removed as a result. Second, this system only allows for the original post to be removed. By the time the ISP gets around to actually removing the content, another user may have downloaded the infringing content and uploaded it. This second posting requires that the copyright holder place a second request to the ISP and another round of notice and takedown must take place, and more users could be downloading and re-uploading the content. In November of 2015, Google received over sixty-six million copyright takedown requests.[76] The notice-

68. *Id.*
69. *Id.*
70. 17 U.S.C. § 1201 (2012).
71. *Id.*
72. Matwyshyn, *supra* n. 66.
73. 17 U.S.C. § 512 (2012).
74. 17 U.S.C. § 512.
75. *Id.*
76. *Google Transparency Report*, GOOGLE, https://www.google.com/transparencyreport/removals/copyright/

and-take-down system allows for further abuse by rewarding ISPs with legal immunity if they inadvertently take down something that does not infringe at the request of a copyright holder.

B. Transparency

While domestic regulations remain transparent, secrecy surrounding international trade agreement negotiations increases.[77] Because the agreements are between foreign countries, the USTR can classify the agreements as "foreign government information," which falls solely under the executive branch's power to negotiate with foreign countries. The USTR has justified increased secrecy by asserting that by keeping negotiations within the executive branch, it allows negotiators to maintain bargaining power and keeps lobbyists and other domestic constituencies at bay.[78]

Shielding the substance of foreign negotiations from both the public and lobbyists is understandable, especially regarding defense agreements, but negotiations for the TPP fall short of this goal. Many of the members of various interest groups still have access through ITACs. Private industry and trade groups represent the majority of members of these committees, with only a few members coming from other organizations such as labor unions, academia, and government.[79] These committees are able to use the access to keep out competitors and citizens, while simultaneously advocating for their own interests.[80] The Obama administration attempted to combat inherent disadvantages the public faces regarding access to negotiation documents with the creation of a new public interest advisory committee. Unfortunately, this committee has less direct access than the industry groups and cannot discuss certain issues with the public, ultimately keeping the access to negotiation documents imbalanced.[81]

In addition to the imbalance between interest groups and public influence over negotiations, the lack of transparency also delegitimizes trade agreements in the eyes of other countries such as members of the European Union (EU), New Zealand, and Australia.[82] These countries fear that the public will rebel against the finalized negotiations once the texts are released and all the

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[https://perma.cc/3CAZ-MMS9] (last visited Apr. 16, 2017).

77. Kaminski, *supra* note 3.

78. *Id.*

79. Christopher Ingraham & Howard Schneider, *Industry Voices Dominate the Trade Advisory System*, WASH. POST (Feb. 27, 2014), http://www.washingtonpost.com/wp-srv/special/business/trade-advisory-committees/ [https://perma.cc/8G8F-FEN2].

80. Kaminski, *supra* note 3.

81. *Id.*

82. *Id.*

work that has been done will be undermined.[83]

1. SOPA and PIPA

SOPA and PIPA were two domestic bills subject to public transparency. SOPA and PIPA were introduced in 2011 as a way to combat the problems of foreign websites engaging in infringing activity outside U.S. jurisdiction.[84] The bills sought to remedy this problem by requiring intermediaries, such as ISPs and search engines that are subject to U.S. jurisdiction, to block access to these sites or cut off their revenue flow, lest they risk enforcement proceedings before U.S. courts.[85] Opponents considered SOPA and PIPA to be extreme Internet censorship bills, arguing that domain name and search engine blocking restricted free expression. In addition to the restrictions on free expression, the bill provided strong incentives to ISPs to monitor user activity, which many citizens considered a violation of privacy.[86]

After introduction, both SOPA and PIPA moved quickly through Congress and were posed to pass as soon as the bills were finalized. Prior to negotiations, however, interest groups warned the public that both SOPA and PIPA would lead to extreme Internet censorship. During the negotiations, advocacy organizations were able to monitor the proceedings and confirm the rumors of SOPA and PIPA's restrictive provisions.[87] The advocacy organizations subsequently distributed the information to the public, fostering a highly visible public debate.

In response to the rigid and unbalanced provisions of SOPA, many major opponents of the bill, such as Google, participated in an Internet blackout day.[88] Entities with an Internet presence blocked content from their websites, providing only links to information about SOPA and PIPA in order to demonstrate the consequences of allowing enactment of the bills.[89] The blacked-out websites also provided contact information for local congressional representatives and encouraged users to voice their opposition to SOPA and PIPA.[90] On the day of the blackout, many users found they could not access their favorite websites, causing serious

83. *Id.*
84. Band, *supra* note 52.
85. *Id.*
86. *Id.*
87. Connor Adams Sheets, *ACTA vs. SOPA: Five Reasons ACTA is Scarier Threat to Internet Freedom*, INT'L BUS. TIMES (Jan. 24, 2012, 2:26 PM), http://www.ibtimes.com/acta-vs-sopa-five-reasons-acta-scarier-threat-Internet-freedom-400004 [https://perma.cc/FN7D-7PXF].
88. *See* Band, *supra* note 49, at 11 ("The English language site of Wikipedia, the online encyclopedia, blocked its content and referred users to information about SOPA and PIPA.").
89. *Id.*
90. *Id.*

inconveniences and general panic among Internet users, who make up a huge portion of the population.[91] Other web content providers blacked out their logos, calling consumer attention to the issue.[92] In response, concerned users, following the advice on the restricted sites, began signing petitions and pressuring their local representatives to vote against SOPA and PIPA. As a result, a bill that was expected to pass without problems was indefinitely suspended. While there were additional factors in the rejection of SOPA, the online protest was one of the most visible and powerful factors due to the widespread coverage it received through traditional media.[93]

2. ACTA

Around the same time as the SOPA and PIPA bills, the U.S. began negotiating an international trade agreement that aimed to protect IP and harmonize the laws between the countries involved. Negotiations for the ACTA began in 2008 and continued until 2011.[94] The ACTA received criticism due to its very strict regulations specifically regarding criminal copyright provisions and parallels to SOPA and PIPA.[95]

The ACTA, like SOPA and PIPA, would have required criminal liability for aiding and abetting infringement as well as for direct and indirect economic and commercial advantage.[96] However, due to the vague language used throughout the agreement, critics were concerned that personal computer manufacturers, search engine operators, and a vast array of websites and blogs, could be liable for assisting in copyright infringement.[97] Despite the similarities to SOPA and PIPA, the ACTA did not meet the same fate as SOPA and PIPA. The U.S. and several other countries involved in the negotiations signed the trade agreement.[98]

Because SOPA and PIPA regulated domestic U.S. law, it could not be classified as "foreign government information," which allowed the public to actively engage in debate about the proposed regulations. In contrast, the USTR classified the ACTA as "foreign

91. *Id.*

92. *Id.* ("Google blacked out its logo, and Facebook, Twitter, and Amazon placed prominent notices on their home pages concerning the legislation.").

93. *Id.* (describing additional factors of the White House Statement, Megaupload Indictment, OPEN Act, and ACTA protests).

94. Michael A. Carrier, SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation Agreements, 11 Nw. J. Tech. & Intell. Prop. 21 (2013).

95. Margot Kaminski, *The Leaked TPP: Some Notes, and Criminal Copyright*, CONCURRING OPINIONS (Oct. 16, 2014), http://concurringopinions.com/archives/2014/10/the-leaked-tpp-some-notes-and-criminal-copyright.html [https://perma.cc/5EWC-8UPR].

96. Carrier, *supra* n. 94.

97. *Id.*

98. *Id.*

government information" and kept the negotiations secret from the public. Despite concerns about the bill, several countries including Australia, Canada, Korea, New Zealand, and Singapore signed ACTA in 2011. Notably, the EU rejected ACTA—despite its involvement with the negotiations—largely because of legitimacy concerns due to the lack of transparency.[99]

III. TRANS PACIFIC PARTNERSHIP: SUBSTANCE

Like SOPA and PIPA, the TPP contains provisions that impact free Internet expression and user privacy. However, the public has not responded to the TPP in the same way that it responded to SOPA and PIPA. The TPP classification likely created the lack of public engagement. Much like ACTA, the USTR classified the TPP as "foreign government information," which subjected it to heightened levels of secrecy. The only information officially given to the public regarding the agreement was in the form of objectives through the USTR.

One of the main assertions of the TPP is the objective of "promoting transparent, efficient, and fair regulatory systems."[100] Article 18.9 of the TPP directly addresses transparency, requiring that all participants endeavor to make intellectual property regulatory information available to the public.[101] Ironically, the TPP received strong criticism during negotiations due to its secrecy, despite its noble objectives of enhancing transparency and combatting corruption. No documents or information detailing proposed changes were officially released to the public by the government. However, drafts of the documents were made public through organizations like Knowledge Ecology International, a nonprofit organization that searches for better outcomes in the area of knowledge management, who leaked the proposed changes to sites like WikiLeaks.[102]

A. Finalized Negotiations and Implications

The proposed copyright regulations in the TPP include the expansion of copyright duration, an ISP liability section, criminal sanctions for non-commercial copyright infringement, and the banning of DRM circumvention. For the most part, the TPP requires other countries to implement regimes similar to current U.S. copyright law. Additionally, the highly controversial Investor-

99. Sheets, *supra* note 87.

100. TPP, *supra* note 14.

101. *Id.* at art. 18.9.

102. Aditya Tejas, *New TPP Leaks Reveal US Pushing for Strong Copyright, IP Enforcement*, INT'L BUS. TIMES (Aug. 6, 2015, 7:56 PM), http://www.ibtimes.com/new-tpp-leaks-reveal-us-pushing-strong-copyright-ip-enforcement-2041486 [https://perma.cc/NN33-W28K].

State Dispute Settlement (ISDS) provision, which provides international companies an adjudicative hearing for conflicts, also influences copyright law. Ultimately, the provisions in the TPP IP chapter will have profound implications on free expression and privacy of citizens.

Both the copyright duration expansion and the notice-and-takedown provisions in the TPP mimic current U.S. copyright law. At first glance, requiring other countries to conform to U.S. standards would seem favorable, at least to the U.S., because this would require no change to current laws and facilitates harmonization amongst U.S. and foreign copyright regulations. However, passage of the TPP will result in ineffective, albeit harmonized, international regulations as well as significant expense increases to all countries involved.

The finalized TPP draft provides that the duration of a copyright is the life of the author plus seventy years, which is significantly longer than durations authorized in other countries.[103] In foreign countries with shorter copyright durations, works that would otherwise enter the public domain within a shorter period will now remain under the authors' control for much longer. This will increase costs for individuals who would have been able to access or purchase these works for a much lower price once they entered the public domain. Additionally, the U.S. will have to wait longer, or pay more, for earlier access to those foreign works whose copyright duration has increased under the TPP. The increase in copyright duration also creates problems for orphan works by extending the amount of time for that work to enter the public domain. The copyright duration expansion ultimately inhibits global free expression by keeping information out of public domain.[104] Furthermore, extensive copyright durations could allow governments to censor online content at will by claiming that the use constitutes copyright infringement.[105]

The TPP requires participating countries' ISPs to police copyright infringement by implementing the notice-and-takedown system found in the DMCA.[106] However, while establishment of the takedown system is mandatory, the counter-notification section that allows users to challenge the infringement allegations is not required. Some countries may adopt safe-harbor regimes in response that more strongly favor copyright owners over users. The controversial provision states that ISPs would be required to hand

103. TPP, *supra* note 14, at art. 18.63.

104. Abigail Abrams, *Trans-Pacific Partnership Intellectual Property Law: Why Internet Freedom Groups Don't Like TPP Trade Agreement*, INT'L BUS. TIMES (Nov. 5, 2015, 5:50 PM), http://www.ibtimes.com/trans-pacific-partnership-intellectual-property-law-why-Internet-freedom-groups-dont-2171936 [https://perma.cc/M227-VUJ7].

105. *Id.*

106. TPP, *supra* note 14, at art. 18.81–.82.

over details of illegal downloaders to copyright owners, who in general are major studios.[107] The document, however, provides only a vague description of the damages that are included, saying that it "would be sufficient to compensate the rights holder for the harm caused by the infringements, and with a view to deterring future infringements."[108] Additionally, ISPs would bear the costs of tracking down and identifying the pirates, whose identities will then be provided to rights holders to seek damages.[109] Not only will this increase costs for consumers, but this track-and-identify regime will have serious implications for consumer privacy.

Article 18.28 of the TPP requires that participants publish and maintain reliable and accurate databases of real names and addresses of website owners.[110] Provisions like this are dangerous for dissenters in repressive countries, who face the possibility of identification and may potentially be stopped from voicing their opinions.[111] Domain name databases, like the ones provided in this section, also create privacy concerns for average website owners, leaving them more vulnerable to scammers and trolls.[112]

Article 18.68 of the TPP addresses DRM and imposes liability on those who circumvent effective technological protection measures when they "knowingly or have reasonable grounds to know" that they are doing so.[113] Despite proposals from Chilean negotiators to require that the acts infringe, the final agreement does not contain these provisions, which means that sanctions could be imposed independent of actual copyright infringement.[114] Like many of the TPP provisions, which require imposition of harsh penalties on users, parties may choose to create legislative or administrative exceptions to the anti-circumvention rule, but the exceptions are not required.[115]

The TPP imposes both criminal and civil sanctions for

107. Emily Moulton, *Wikileaks Releases TPP Agreement Which Gives More Rights to Film Studios Over Copyright*, NEWS.COM.AU (Oct. 15, 2015 5:26 PM), http://www.news.com.au/technology/online/wikileaks-releases-tpp-agreement-which-gives-more-rights-to-film-studios-over-copyright/story-fnjwneld-1227569821603 [https://perma.cc/H8PG-PMWE].

108. TPP, *supra* note 14, at art. 18.74.

109. *Id.*

110. TPP, *supra* note 14, at art. 18.28.

111. Evan Greer, *The Clock is Ticking on a Time Bomb that Could Blow up a Free Internet: the TPP*, GUARDIAN (Nov. 6, 2015, 12:15 PM), https://www.theguardian.com/commentisfree/2015/nov/06/clock-ticking-time-bomb-blow-up-free-internet-tpp [https://perma.cc/N4SN-KBJN].

112. *Id.*

113. TPP, *supra* note 14, at art. 18.68.

114. Maira Sutton, *Go to Prison for File Sharing? That's What Hollywood Wants in the Secret TPP Deal*, ELEC. FRONTIER FOUND. (Feb. 12, 2015), https://www.eff.org/deeplinks/2015/02/go-prison-sharing-files-thats-what-hollywood-wants-secret-tpp-deal [https://perma.cc/6F2R-U294].

115. *Id.*

copyright infringement for both direct and indirect infringers.[116] The TPP penalty provisions are similar to the ACTA provisions and illustrate the same problems that ACTA has with expanding liability to those "aiding and abetting."[117] These sections also call for the destruction of any materials or implements used in the infringement.[118] The specific language in the TPP calls for penalties for willful copyright infringement "on a commercial scale," which includes infringements that have no direct or indirect motivation of financial gain, as well as for private financial gain.[119] Critics have said that allowing for sanctions absent financial gain is disproportionate to actual harm inflicted on copyright holders and fear that the sanctions could be used against individual users who are partaking in potentially isolated acts of piracy.[120] Some organizations, like the EFF, describe an innocent user who downloads a few songs illegally suddenly having his home computer destroyed by government agents, an image that easily creates fear for average users.[121]

The ISDS provision is not unique to the TPP, but similar provisions are increasingly common in international free trade agreements, and apply to all aspects of the TPP, including the intellectual property chapter.[122] Originally, ISDS was developed to encourage foreign investment in countries with weak legal systems.[123] It provides a way to challenge a country's laws in an independent judicial proceeding, rather than in that countries own legal system, thereby creating greater downside certainty for investors.[124] An international panel of arbitrators, made up of corporate lawyers, presides over copyright infringement suits and may award hefty damages that the losing party cannot challenge or appeal under U.S. law.[125]

ISDS regimes receive heavy criticism due to the obvious advantage that it provides to large multinational corporations. Because the ISDS provision only applies to foreign corporations, domestic corporations in the U.S. are unable to use this type of proceeding.[126] The use of corporate lawyers as judges further tilts it

116. TPP, *supra* note 14, at art. 18.77.
117. Carrier, *supra*, note 97.
118. *Id.*
119. TPP, *supra* note 14, at art. 18.77.
120. Sutton, *supra* note 114.
121. *Id.*
122. Elizabeth Warren, *The Trans Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html [https://perma.cc/GV3Z-C8ZT].
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*

in favor of big business.[127] The ISDS is also problematic because, in instances where a multinational corporation challenges U.S. regulations, it moves beyond a dispute between two corporations and into a dispute between companies and governments.[128] Ultimately, the ISDS increases expenses for U.S. taxpayers who are likely to provide the money for damages awarded to the corporations.[129] While the use of the ISDS makes sense in cases of developing countries, the need for an ISDS regime under the TPP is unclear, as the legal systems within the countries involved in the TPP are generally sound.[130]

The ISDS will have a significant impact on IP regulations in the TPP. Under the ISDS, private international corporations could challenge limitations and exceptions to copyright, patents, and trademarks. These challenges would be resolved in ISDS hearings, rather than under domestic law and could heavily favor large corporations over individual users. Chapter 11 of the TPP, which provides for the ISDS, purports to provide an exception for IP rights, by stating that the ISDS does not apply to IP rights that are consistent with the Agreement on TRIPS, which sets down minimum standards for many forms of IP for WTO members.[131] However, the TPP provides an additional footnote that allows the ISDS tribunals to determine whether the IP rights in dispute comply with TRIPS, effectively allowing private corporations to enforce free trade agreements.[132] Copyright intensive industries, such as the music and media industries, are hostile to the U.S. fair use doctrine and could use the ISDS provision to forum shop.[133]

In light of the notable impact that TPP regulations will have on individual rights, there was little public debate about the TPP, when compared to the reactions to SOPA and PIPA, especially considering the similarity between the subject matter of the regulations. Exacerbated by the extreme secrecy surrounding negotiations of the TPP, the lack of public engagement likely stems from the public's lack of familiarity with international trade deals. Regarding transparency, the TPP is much more akin to the ACTA, which passed with little involvement from the public, despite the

127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. Sean Flynn, *Inside Views: How The Leaked TPP ISDS Chapter Threatens Intellectual Property Limitations and Exceptions*, INTELL. PROP. WATCH (Mar. 26, 2015), http://www.ip-watch.org/2015/03/26/how-the-leaked-tpp-isds-chapter-threatens-intellectual-property-limitations-and-exceptions/ [https://perma.cc/8EE5-LXH9].
132. *Id.*
133. Maira Sutton, *Leaked TPP Investment Chapter Reveals Serious Threat to User Safeguards*, ELEC. FRONTIER FOUND. (Apr. 1, 2015), https://www.eff.org/deeplinks/2015/04/leaked-tpp-investment-chapter-reveals-serious-threat-user-safeguards [https://perma.cc/9SF2-U2KT].

implications the agreement would have on individual rights.

B. TPP Transparency

The USTR classified the TPP as "foreign government information" under E.O. 13526, claiming that unauthorized disclosure of TPP information could harm U.S. foreign relations by discouraging exchanges between foreign countries and the U.S..[134] The USTR claims disclosure of TPP information, including draft texts and negotiation positions and proposals, will make foreign nations more likely to maintain rigid negotiating positions unfavorable to U.S. interests, making negotiations difficult, if not impossible.[135] Additionally, the USTR asserts that disclosure would undermine trust in the TPP negotiators and negatively affect U.S. credibility as a negotiating partner for future trade deals.[136]

Transparency advocates argue that disclosure of U.S. negotiation positions could not harm negotiations, as the positions and proposals have already been shared with foreign governments and further argue that the information will be made public upon finalization of the TPP negotiations.[137] However, the courts have found that harm resulting from disclosure of TPP information is plausible because it could reduce U.S. flexibility in negotiations and increase the complexity of information exchanges with foreign countries that are not involved in TPP negotiations.[138]

In addition to classification as "foreign government information" under E.O. 13526, the TPP is subject to a confidentiality agreement between the nations involved. The agreement provides that all participants will keep the negotiating texts, proposals, accompanying materials, and other related information confidential, unless each participant involved in the communication subsequently agrees to its release.[139] Under the agreement, TPP documents may only be released to government officials or persons outside the government who participate in the consultation process and need to review or be advised of the documents.[140] Furthermore, the agreement requires that all participants hold the documents in confidence for four years after the TPP is executed.[141] The USTR asserts that breach of the confidentiality agreement could further harm U.S. credibility in ongoing and future negotiations.

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134. Intellectual Prop. Watch v. U. S. Trade Representative, 134 F. Supp. 3d 726, 735 n.6 (S.D.N.Y. 2015).
135. *Id.* at 736.
136. *Id.*
137. *Id.* at 743.
138. *Id.* at 738.
139. *Id.* at 730.
140. *Id.* at 730–31.
141. *Id.* at 731.

In March of 2012, Intellectual Property Watch ("IP-watch"), a news organization that reports on intellectual property issues, requested information from the USTR under the Freedom of Information Act (FOIA) regarding draft texts related to intellectual property, information regarding U.S. negotiation positions, and communications between the USTR and ITAC's.[142] FOIA, an amendment to the Administrative Procedure Act (APA), requires government agencies comply with public solicitation of information, but provides for several exemptions to disclosure of requested information.[143] The USTR responded to IP-watch's request, in March of 2013, by withholding nearly all the requested documents.[144] IP-watch's requests were limited to information regarding U.S. negotiation positions provided to foreign governments, and did not request information provided to the U.S. by other countries.[145] IP-watch subsequently filed a lawsuit, under FOIA, against the USTR, in an effort to make the information available to the public.[146]

During the proceedings, the USTR claimed that the withheld documents fell under several FOIA exemptions, including matters that are under executive order to be kept secret in the interest of national defense or foreign policy, inter- or intra-agency memorandums, which safeguard the quality and integrity of governmental decisions, and matters that concern trade secrets and commercial or financial information that are confidential.[147] Almost two years later, in September of 2015, the U.S. District Court of the Southern District of New York issued a summary judgment partially granting IP-watch's requests regarding some ITAC communications, finding that the ITACs do not qualify as agencies or consultants, because ITACs are not disinterested parties.[148] However, the court denied information regarding the TPP draft chapters and decision memoranda regarding negotiation positions, finding that disclosure of the information could harm foreign relations.[149] The court also required the USTR to submit supplemental information to more accurately detail reasons for withholding the information as relating to trade secret matters.[150]

While IP-watch viewed the partial grant of the classified information as a victory, the overall outcome of the process demonstrates the difficulty the public faces in the quest for

142. *Id.* at 732.
143. 5 U.S.C. § 552 (2012). Pub.L. 114-185, § 2, June 30, 2016, 130 Stat. 538.
144. *Intellectual Prop. Watch*, 134 F. Supp. 3d at 732.
145. *Id.*
146. *Id.*
147. *Id.* at 734.
148. *Id.* at 748.
149. *Id.* at 738.
150. *Id.* at 747.

transparency. The USTR prolonged the procedure by refusing to respond to IP-watch's request for an entire year. The court noted in its ruling that deference is given to government agencies, resulting in a high burden to overcome.[151] Finally, the court issued the summary judgment order one month before TPP negotiations concluded and the information was released to the public anyway.

Since the defeat of SOPA and PIPA, many organizations have attempted to invoke the bills to rally opposition to regulations that they oppose, and this holds true for the opposition to the TPP.[152] Advocacy organizations like the EFF have directly compared SOPA and PIPA to the TPP, claiming that the TPP uses the same kinds of extreme censorship measures that SOPA and PIPA employed.[153] However, actual quotes rarely accompany these censorship allegations. The lack of textual foundation could occur because the TPP does not actually include many of the most controversial aspects of SOPA and PIPA, such as the blacklisting scheme. Alternatively, the heightened secrecy surrounding the negotiations may prevent a direct reference to the document. As a result, instead of addressing the actual concerns found in the TPP documents, Internet advocacy organizations assert that the TPP is an extreme censorship agreement like SOPA and give no further explanation. These types of unfounded conclusions are problematic because they may mislead the American public. If the public eventually came to believe that these organizations are exaggerating their claims, they may be less inclined to trust the organizations. Furthermore, these organizations likely have the resources and personnel to analyze the agreements in more detail than the average members of the public. However, instead of providing the public with information regarding the actual issues, the organizations use scare tactics to sway public opinion. While organizations may find that providing a thorough analysis a difficult task, given the secrecy surrounding agreements, like the TPP, they could also choose not to attempt to provide the information in order to push their own organizational agendas.

IV. TRANSPARENCY, BALANCE AND PUBLIC ENGAGEMENT

The TPP, as it stands now, does not live up to its own objectives of transparency, balanced IP laws, and addressing twenty-first

151. *See id.* at 738.

152. Timothy B. Lee, *No, the Trans-Pacific Partnership Isn't 'Extreme Internet Censorship,'* WASH. POST (Nov. 18, 2013), https://www.washingtonpost.com/news/the-switch/wp/2013/11/18/no-the-trans-pacific-partnership-isnt-extreme-Internet-censorship/ [https://perma.cc/YG2W-X6SQ].

153. *See generally* Evan Greer, *How the TPP Could Blow Up the Free Internet as We Know It*, ALTERNET (Nov. 9, 2015), http://www.alternet.org/economy/how-tpp-could-blow-free-internet-we-know-it [https://perma.cc/62X4-G5C5] (example of an Internet advocacy organization comparing TPP to SOPA).

century problems. Not only does the TPP perpetuate highly criticized and arguably inefficient U.S. laws throughout the Pacific Rim, but also its language creates obstacles and potentially altogether prevents the U.S. from amending its own laws to correct the inefficiencies.[154] Although the TPP no longer threatens U.S. laws directly, because the other countries involved may still move forward with the agreement, U.S. IP interests abroad may still be affected by TPP regulations. Furthermore, absent U.S. involvement, a different global player may use the opportunity to make unfavorable changes to the agreements, which could threaten global economic growth.

A. Benefits of Transparency

Transparency facilitates the creation of IP laws that balance the interests of rights holders, public users, individuals, and industry insiders. By promoting public engagement, heightened transparency allows the government to respond to and incorporate public values in regulatory policies, while protecting the public from biased organizations. Additionally, transparency legitimizes trade deals in the eyes of foreign countries.

SOPA and PIPA, when compared to the ACTA, demonstrate the importance of transparency for both informing and uniting the public. Through the Internet, the public was both informed about potentially harmful regulations that were being considered and united under a common belief in free speech. The public engagement and reaction to SOPA and PIPA, in part, prevented undesirable regulations over rights holders and public users from passing. In contrast, the ACTA was adopted due to heightened transparency preventing public engagement.

Transparency protects individuals from uneven bargaining power. Companies like Google and YouTube benefit the most from weak IP rights. Weaker IP rights allow Google and YouTube to provide more content through their services, making their services more valuable and desirable to the public, while subjecting the companies themselves to fewer regulations and expenses. While the public also benefits from weaker rights, individuals would not want to give up all their claims to any IP that they create and therefore have some interest in maintaining strong IP rights for creators. However, large companies within the entertainment industry benefit from strong IP rights. These companies profit by exercising their IP rights through licenses and the longer those rights last, the more profit the companies are able to make. The conflict between the large companies on both sides and individuals demonstrates the need for IP laws that not only balance user and creator rights, but

154. Band, *supra* note 52, at 32.

also address the imbalance between individuals and industry insiders.

Interest groups may exaggerate the dangers and provisions of the TPP in order to excite the public and further their own agenda. For example, the demonstration of what the Internet would look like with the passage of SOPA and PIPA was arguably over-exaggerated in order to communicate the legislation's problems. Participants were large companies, like Google and Wikipedia, who would benefit from rejection of SOPA and PIPA. The exaggeration of the potential results of the passage of SOPA and PIPA could be considered misleading the American public to help other large corporations rather than to protect citizens' individual rights. This exaggeration becomes especially true when there is limited amounts of time for the public to review the agreement. On the other hand, lobby groups involved in TPP negotiations through ITACs were able to push their policy goals with little opposition, leaving the regulations skewed on both ends. Passing legislation in secret, like the TPP, that restricts Internet freedom usurps power from the public.[155]

The SOPA, PIPA, and ACTA comparison demonstrates that secret negotiations undermine foreign relations. Foreign nations will be less likely to participate in trade agreements with the U.S., fearing that the U.S. will not honor the terms if the public views them negatively, as was the case with the EU and the ACTA. Increased transparency will make other countries more apt to participate in and ratify the agreements themselves. Ultimately, this will lead to balanced laws that protect IP and privacy rights, as well as better foreign relations.

Some degree of secrecy is necessary for foreign agreements, especially in dealing with foreign conflicts. However, trade agreements, like the TPP, that have so much influence on the lives of citizens should not be subject to the heightened levels of secrecy that defense agreements are subject to. In order to address this problem, it may be necessary to have a narrower trade agreement, either in the scope of industries that it covers or the number of countries involved.

B. Results of Secrecy

A multi-country trade deal provides great opportunity to boost the national economy, reduce trade barriers, open new markets, and increase invention and innovation. However, keeping the American public in the dark about the contents and effects of the agreement left many ignorant or indifferent to the deal. Without input from the public, the finalized regulations contained

155. Greer, *supra* note 111.

imbalanced laws and ultimately wasted valuable resources. Furthermore, a continued practice of conducting trade agreements in secret will not only decrease the legitimacy of the U.S. in the eyes of other countries, but also in the eyes of the American public.

Many organizations criticize the finalized TPP for lack of balance between rights holders and public users. The TPP provides binding measures to protect copyright holders while making fair use only an option.[156] For example, Article 18.74 states that parties "*shall* provide" for criminal procedures and penalties against copyright infringers, but "*may* provide" for exceptions for various institutions such as libraries or educational facilities.[157] While U.S. law allows any defendant to raise a fair use defense, the TPP allows arbitrators to use their discretion to either allow or bar defendants from raising the defense.

Initially, the language of Article 18.74 seems greatly imbalanced, giving the copyright holders more protection than the users of the public. However, the TPP must demonstrate a compromise between all members of the agreement. For many countries, guaranteeing these types of exceptions might be completely impossible and at odds with their own domestic laws. While it might be better policy to allow defendants to raise a fair use defense, this could be giving the TPP too much power and control over domestic regulations. It may be better to allow each country to provide protections for users under domestic law, but guarantee protection for copyright holders whose IP is infringed internationally.

By increasing transparency surrounding the negotiations, the government can more accurately respond to the public's beliefs about various rules and regulations. If there was more transparency surrounding the negotiations, the language could have been analyzed and alternatives proposed that would have more adequately protected fair use, while still allowing flexibility for the widely varying regulations in each country.

The TPP remained secret long after possibility for meaningful public debate was possible resulting in imbalanced regulations. The lack of transparency was facilitated by the procedure for Congressional review and exacerbated by the TPA. The final text of the TPP contains over thirty chapters. Under the current review procedure, Congress would have only ninety days to review the finalized document, and the public has even less time–sixty days.[158]

156. *See* Carolina Rossini, *New Leaked TPP Text Puts Fair Use at Risk*, ELEC. FRONTIER FOUND. (Aug. 3, 2012), https://www.eff.org/deeplinks/2012/08/new-leaked-tpp-puts-fair-use-risk [https://perma.cc/N4W4-ZCJQ]; *see also* James Love, *Leak of TPP Text on Copyright Limitations and Exceptions*, KNOWLEDGE ECOLOGY INT'L (Aug. 3, 2012, 7:10 PM), http://keionline.org/node/1516.

157. TPP, *supra* note 14, at art. 18.74.

158. Drezner, *supra* note 16.

Not only is it extremely difficult for each member of Congress to read the entire document, but to understand each provision in the agreement seems near impossible. Even if the individual members of Congress could analyze each provision of the TPP, the chance the public has is even more remote, making the chance for meaningful public debate virtually non-existent. While the finalization of negotiations would have allowed public review of the negotiations, the TPA prevented Congress from amending the TPP in response to any voiced public opinion.

In the absence of a new presidential administration, congressional response to a negative public reaction to the TPP would have resulted in discarding resources spent on negotiations for the past five years, a situation that increased transparency could have helped avoid. The same resources were wasted following the 2016 election by U.S. withdrawal from the TPP. Similarly, had there been more transparency surrounding the TPP, it may have had a different fate. Increased transparency surrounding the TPP would have created regulations that were balanced and increased public approval of the deal. Instead, the secrecy surrounding the TPP prevented American citizens from understanding the true impact of the deal. U.S. citizens relied on vague statements from their party's political candidate about the TPP, rather than actual knowledge about the contents of the agreement.

The lack of public knowledge regarding the details of the TPP is especially problematic in light of the 2016 election. Because of various campaign tactics used in the election, the U.S. public was left questioning what they can actually believe. Citizens concerned with the new administration's policies have begun voicing their opinion through highly visible protests.[159] It is more imperative than ever that U.S. citizens demand access to information and keep themselves informed of what is going on. The public could use similar strategies to pressure Congress and the government to increase transparency surrounding trade negotiations and other government regulations.

CONCLUSION

Narrower agreements would allow for greater transparency and facilitate public debate. If the public can bring the problematic sections to the attention of the negotiators, during negotiations, rather than after, it is likely possible to address the inefficiencies found in the TPP, or leave room to amend it in the future. The public can utilize the Internet to spread information and unite under a

159. Hartocollis & Yamiche, *Women's March Highlights as Hughe Crowds Protest Trump" 'We're Not Going Away,'* NEW YORK TIMES (Jan. 21, 2017), https://www.nytimes.com/2017/01/21/us/womens-march.html?_r=0 [https://perma.cc/5BPG-AML5].

common cause to demand transparency. Transparency in the negotiation process will develop a balance between competing interest groups, which will ultimately be reflected in balanced IP laws.