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Copyright Provisions in Trade Deals: A Bird's-eye View

Jean-Frédéric Morin and Dimitri Thériault

Key Points

- No fewer than 107 preferential trade agreements (PTAs) include provisions on copyright protection.
- Some PTAs refer to multilateral copyright agreements or replicate their requirements, but an increasing share of them also provide obligations that go beyond multilateral requirements.
- The most active proponents of copyright provisions in PTAs are the United States, the European Union and the European Free Trade Association (EFTA).
- There is a strong correlation between the propensity to include copyright provisions in PTAs and a country's interest in copyright protection.

Introduction

The recent trade war between the United States and China brought attention to the linkage between copyright protection and trade negotiations. In April 2018, the US government released a report claiming that China fails to offer sufficient protection for intellectual property (IP) rights. Among other things, the United States criticized China for its failure to “address major gaps in copyright protection.”¹ Claiming that Chinese IP practices have destroyed “thousands of American factories and millions of American jobs,” US President Donald Trump “announced approximately \$50 billion in additional tariffs.”² China immediately reacted with retaliatory measures and the two countries entered a tit-for-tat trade war. The only way out of this escalation appears to be a bilateral trade deal in which China makes additional IP commitments and the United States abandons its unilateral trade sanctions.³

1 See Office of the United States Trade Representative, *2018 Special 301 Report* (2018), online: <<https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf>>.

2 See White House, “Statement from President Donald J. Trump on Additional Proposed Section 301 Remedies” (5 April 2018), online: <www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-additional-proposed-section-301-remedies/>.

3 A US-China trade deal on IP would not be unprecedented. The two countries concluded a bilateral agreement on IP in 1992, after the United States threatened to increase tariffs on Chinese products.

About the Authors

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At CIGI, Jean-Frédéric is contributing to the ILRP's research themes on international intellectual property and environmental and trade laws by building large databases, sponsored by the Canadian Foundation for Innovation, CIGI and Laval University. These databases will document institutional interactions among trade, investment and environmental institutions. They will enable Jean-Frédéric and other CIGI researchers to study the emergence, variation, diffusion, implementation and effectiveness of hundreds of different provisions found in thousands of multilateral, regional and bilateral agreements.

Previously, Jean-Frédéric was a professor of international relations at Université libre de Bruxelles from 2008 to 2014. He has an interdisciplinary training in law and political science and has taught in law programs as well as in political science programs. He is currently conducting research in the fields of trade policy, investment law, global environmental politics and international intellectual property law with a particular interest in studying how transnational networks shape the interactions of international institutions.

Dimitri Thériault holds a master's degree in international studies from the Institute for Advanced International Studies at Laval University and a bachelor's degree in economics and politics from Laval University. During his studies, Dimitri worked as a research assistant with Jean-Frédéric Morin, Canada Research Chair in International Political Economy. Dimitri's main role was to provide statistical analysis and charts based on TREND. Currently, he is a briefing officer at Global Affairs Canada.

Ever since the conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)⁴ at the World Trade Organization in 1994, several bilateral or regional trade agreements now include provisions on copyright protection. Many of these PTAs are "TRIPS-plus agreements," as they include IP provisions that go beyond the minimal requirements of the TRIPS Agreement. These TRIPS-plus agreements can have important policy consequences, including for the production of and the access to creative products, such as books, movies, music, software, scientific journals and news articles, thereby affecting the creative economy.

However, the historical development and the geographical distribution of these PTAs with copyright provisions remain unclear. The existing literature tends to focus on a few "megadeal" agreements, such as the recent Canada-United States-Mexico Agreement or the Comprehensive Economic and Trade Agreement between Canada and the European Union.⁵ These agreements are highly visible due to their heavyweight parties. They are nevertheless the trees hiding the forest. Several other PTAs with copyright provisions remain under the radar.

The purpose of this policy brief is to identify global trends created by the aggregate number of PTAs with copyright provision, whether they

4 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, (entered into force 1 January 1995) [TRIPS Agreement].

5 See Carsten Fink & Patrick Reichenmiller, "Tightening TRIPS: Intellectual Property Provisions of U.S. Free Trade Agreements" in Richard Newfarmer, ed, *Trade, Doha, and Development: A Window into the Issues* (Washington, DC: World Bank, 2006) 289; Iain Osgood & Yilang Feng, "Intellectual Property Provisions and Support for US Trade Agreements" (2017) 13:3 *Rev International Organizations* 421; Jean-Frédéric Morin & Edward Richard Gold, "An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries" (2014) 58:4 *International Studies Q* 781; Mohammed K El Said, "The European Trips-Plus Model and The Arab World: From Co-Operation to Association – A New Era in the Global IPRS Regime?" (2007) 28:1 *Liverpool L Rev* 143; Anke Moerland, "Do Developing Countries Have a Say? Bilateral and Regional Intellectual Property Negotiations with the EU" (2017) 48:7 *IIC-International Rev Intellectual Property & Competition L* 760; Perez Pugatch, "A Transatlantic Divide? The US and EU's Approach to the International Regulation of Intellectual Property Trade-Related Agreements" (2007) *European Centre for International Political Economy Working Paper No 02/2007*; Beatrice Lindstrom, "Scaling Back TRIPS-Plus: An Analysis of Intellectual Property Provisions in Trade Agreements and Implications for Asia and the Pacific" (2009) 42:3 *NYUJ Intl L & Pol* 917; Ivo Krizic & Omar Serrano, "Exporting Intellectual Property Rights to Emerging Countries: EU and US Approaches Compared" (2017) 22:2 *European Foreign Affairs Rev* 57; Thomas Cottier, Dannie Jost & Michelle Schupp, "The Prospects of TRIPS-Plus Protection in Future Mega-Regionals" in Thilo Rensmann, ed, *Mega-Regional Trade Agreements* (Cham, Switzerland: Springer, 2017) 191.

are megadeals or lesser-known agreements. The authors focus on neither a particular world region nor any particular type of copyright provision. Instead, the authors take a step back and look at the overall landscape of PTAs with copyright provisions. Like with pointillist paintings, some patterns can only emerge by zooming out and looking at a large number of data points in a single view.

For this purpose, the authors rely mainly on the “T+TPA dataset,” which is a data set on IP provisions in trade agreements recently released by Jean-Frédéric Morin and Jenny Surbeck.⁶ This T+TPA data set identifies no fewer than 107 PTAs with provisions on copyright protection among the 525 PTAs concluded between 1991 and 2016.⁷ This policy brief complements this data set with some additional data to analyze the development and the distribution of copyright provisions in PTAs.⁸

A Wide Diversity of Copyright Provisions

PTAs contribute to copyright protection in various ways. Several PTAs build on existing multilateral agreements to set standards on copyright protection. These multilateral agreements include the 1886 Berne Convention, the 1994 TRIPS Agreement and the 1996 World Intellectual Property Organization (WIPO) Copyright Treaty. PTAs frequently require their parties to ratify these multilateral agreements or to implement their obligations. For example, the 2003 agreement between the EFTA and Chile required its parties to ratify the WIPO Copyright Treaty before January 2007.⁹ While Chile had already ratified the WIPO Copyright Treaty at the time of making this commitment, the four EFTA countries (Iceland,

Liechtenstein, Norway and Switzerland) had yet to do so. The 2013 PTA between China and Switzerland even calls its parties to ratify or accede to the Beijing Treaty on Audiovisual Performances,¹⁰ which had been concluded just a year before (in 2012) and has not yet entered into force.

Other PTAs do not explicitly refer to multilateral agreements but replicate their obligations verbatim. For example, the 1998 agreement between Chile and Mexico provides that “Compilations of data or other material, whether in machine-readable or other form, which by reason of the selection or arrangement of their contents constitutes intellectual creations, shall be protected as such.”¹¹ The same wording is found in article 10(2) of the TRIPS Agreement to which Chile and Mexico were already parties at the time of concluding their trade agreement. Yet, such replication of multilateral commitments in a bilateral PTA is not futile: it can strategically make the PTA dispute settlement mechanism available in case a country does not comply with its obligations.

PTAs can also go beyond multilateral agreements’ minimum requirements. This is notably the case for the duration of copyright protection. The TRIPS Agreement provides that copyright term “shall be no less than 50 years.”¹² The T+PTA data set shows 30 different PTAs that provide instead a minimal protection of 70 years after the authors’ death. A total of 63 countries made this commitment in at least one PTA.¹³

Several PTAs provide additional rights to copyright holders. The authors identified 36 PTAs that prohibit the circumvention of technological measures that prevent the use of a copyrighted work. The 2004 agreement between the United States and Bahrain, for example, provides that “any person who circumvents without authority any effective technological measure that controls access to a protected work, performance, phonogram, or other subject matter...shall be liable and subject to the remedies provided for in Article

6 See Jean-Frédéric Morin & Jenny Surbeck, “Mapping the New Frontier of International IP Law: Introducing a TRIPS-Plus Dataset” (2019) *World Trade Rev* 1.

7 As a consequence, the data set does not include the recent free trade agreement between Canada, the United States and Mexico because it was concluded in 2018.

8 For a similar analysis on patent law, see Jean-Frédéric Morin & Dimitri Thériault, “How Trade Deals Extend the Frontiers of International Patent Law” CIGI, CIGI Papers No 199, 20 November 2018.

9 See *Free Trade Agreement Between the EFTA States and the Republic of Chile*, 26 June 2003, Annex XII, art 2(2) (entered into force 1 December 2004).

10 *China-Switzerland Free Trade Agreement*, 6 July 2013, art 11.3(2) (entered into force 1 July 2014).

11 See *Chile-Mexico Free Trade Agreement*, 17 April 1998, art 15-09.4 (entered into force 1 August 1999).

12 See *TRIPS Agreement*, *supra* note 4, art 12.

13 Among these 63 countries are the 28 members of the European Union and the four members of the EFTA.

14.10.14.”¹⁴ Although the WIPO Copyright Treaty addresses anti-circumvention measures, the TRIPS Agreement does not include a similar clause.

Another TRIPS-plus measure concerns the exhaustion of IP rights. The TRIPS Agreement allows the WTO members to decide if they favour a national or an international doctrine of exhaustion in their domestic legal system.¹⁵ Under the international exhaustion doctrine, rights granted to copyright holders are terminated after the protected good is sold anywhere in the world. This implies that copyright holders that have already commercialized their products somewhere in the world will lose the right to prevent the importation of these products in countries applying this doctrine. In contrast, under the doctrine of national exhaustion, copyright holders enjoy rights over a product until the good is sold on the domestic market. This enables copyright holders to prevent the “parallel importation” by third parties — often at a cheaper price — of products they have already commercialized elsewhere in the world. The doctrine of national exhaustion allows copyright holders to segregate markets and offer their products at different prices in different countries to maximize their profits. Five PTAs require parties to adopt a national or a regional exhaustion doctrine for copyrights, giving additional control to copyright holders over imports.¹⁶

There are several other types of TRIPS-plus provisions related to copyright. They include provisions on the liability of internet service providers, the protection of videograms, the protection of authors’ moral rights, restrictions on private use exceptions, protection against the recording of films in cinemas (camcording), the burden of proof in case of copyright infringement and the role of copyright collective management.¹⁷ The analysis of each of these provisions is beyond the scope of this short policy brief. Instead, the authors aim to uncover general trends in the

development and diffusion of copyright provisions in PTAs, starting with the following section.

The Historical Development of Copyright Provisions in PTAs

To help distinguish broad historical trends in the data, a cumulative index of the depth of copyright protection in PTAs was created. This index combines the following 13 variables: copyright term of at least 70 years (yes/no); protection of videograms (yes/no); restrictions on private use exceptions (yes/no); protection of moral rights (yes/no); protection of anti-circumvention technologies (yes/no); national exhaustion of rights (yes/no); national or regional exhaustion of rights (yes/no); protection of computer programs (yes/no); protection of databases (yes/no); protection against camcording (yes/no); reference to the Beijing Treaty (yes/no); reference to the WIPO Copyright Treaty (yes/no); and reference to the WIPO Performances and Phonograms Treaty (yes/no). Values range between zero for the absence of one of these provisions to 13 for inclusion of them all. Considering its aggregation of dissimilar clauses and its incomplete coverage of copyright provisions, this index is of little use for micro-level analysis, focusing on a particular agreement or a particular country. However, it greatly facilitates the macro-level analyses of global historical trends and geographical patterns.

Figure 1 presents the dispersion of the copyright index between 1991 and 2016. Each point represents a different PTA with at least some IP provisions. PTAs that do not include any IP provisions are excluded from this scatter graph, as their great number would have concealed some interesting results.

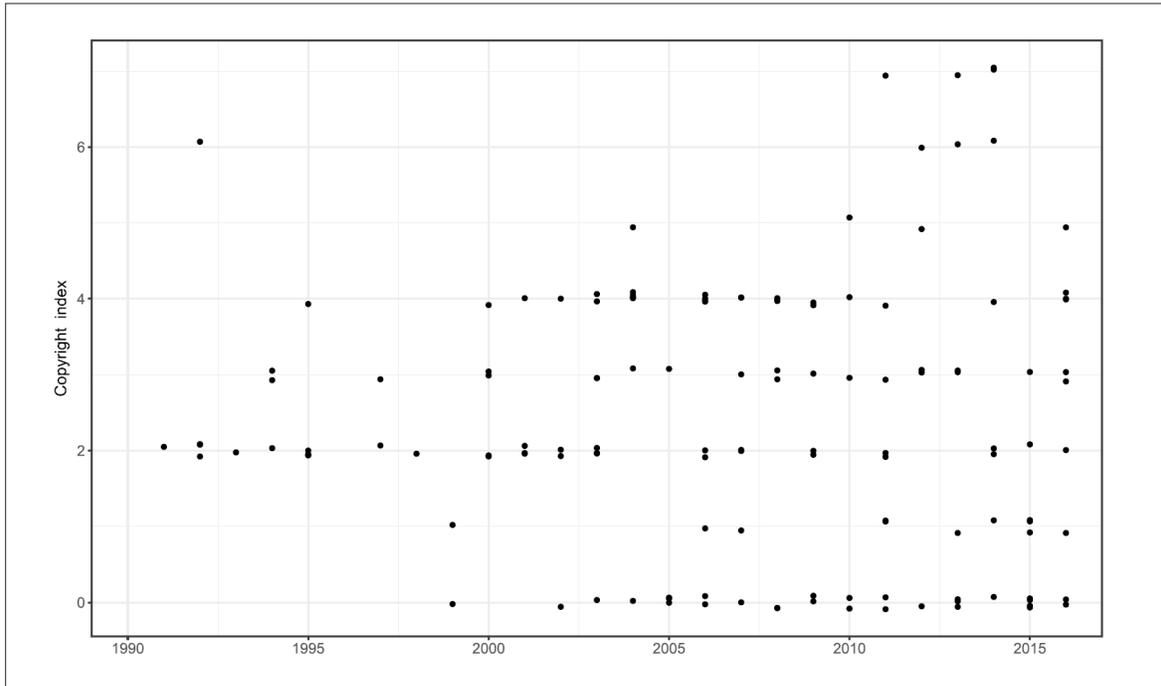
14 See *United States-Bahrain Free Trade Agreement*, 14 September 2004, art 14.4.7 (a) (entered into force 11 January 2006).

15 *TRIPS Agreement*, *supra* note 4, art 6 provides that “nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.”

16 For more details on exhaustion and parallel imports, see WIPO, “International Exhaustion and Parallel Importation”, online: <www.wipo.int/sme/en/ip_business/export/international_exhaustion.htm>.

17 See Cottier, Jost & Schupp, *supra* note 5.

Figure 1: Development of the Copyright Index between 1991 and 2016



Source: Authors.

Note: Observations jittered to reduce overplotting.

One observation to draw from Figure 1 is that a number of PTAs from the early 1990s already included significant copyright provisions. For example, the 1992 agreement between EFTA and Israel provides that “parties shall ensure in their national law...adequate and effective legal protection of copyright, including computer programs and data bases.”¹⁸ This commitment was made two years prior to the conclusion of the TRIPS Agreement.¹⁹ To be sure, most PTAs concluded in the 1990s do not include a single provision on IP. Less than eight percent of all PTAs concluded in the 1990s include at least one of the 13 copyright provisions of the copyright protection index. However, if one looks only at PTAs that cover IP provisions, those from the 1990s already offer a strong protection. With time, deviation from the average became less pronounced. Starting in the early 2000s, including copyright protection in trade negotiations became more normalized.

The Correlates of PTAs with Copyright Provisions

It is difficult to establish causal explanations for the inclusion of a copyright provision in PTAs. The design of trade agreements is a multicausal phenomenon and no variable provides in itself a sufficient explanation. While a complete explanatory analysis is beyond the scope of this policy brief, this section identifies some key explanatory variables.

First, the authors expect countries with stronger economic interest in copyright protection — countries with significant creative industries — to be more likely to include copyright provisions in their PTAs. To explore this hypothesis, the countries’ interest in copyright protection was measured with two indicators for which data is available for several countries: their licensing revenues (all industries combined) as a percentage of GDP²⁰ and

18 Agreement between the EFTA States and Israel, 17 September 1992, Annex V, art 3(1) (entered into force 1 January 1993).

19 See TRIPS Agreement, *supra* note 4, art 10.

20 See World Bank, “World Development Indicators”, online: <<http://datatopics.worldbank.org/world-development-indicators/>>.

the number of feature films produced per capita.²¹ Unfortunately, reliable data on other copyright sectors, such as music, literary work and software, are not available for a larger number of countries. For each PTA, the contracting party with the highest score on these two indicators (licensing revenues and film produced) was identified. The result of bivariate analyses suggests that the stronger a country's interest in copyright protection, the more likely it is to include copyright provision in its PTA.

Second, the authors expect that asymmetry among parties, whether political or economic, increases the likelihood to have copyright protected in PTAs.²² The assumption here is that economically rich and powerful countries offer stronger copyright protection than poorer and weaker countries. When these very different countries negotiate a PTA together, for example, when the United States negotiated a trade agreement with the Dominican Republic, the former has both the interest and the capacity to impose the introduction of copyright protection in their agreement. The authors measured the degree of asymmetry among parties for each PTA by the difference between the highest GDP and the lowest GDP. Here again, bivariate analysis reveals that asymmetry among parties is indeed correlated with copyright protection.

Other variables are related to these key explanatory variables and they can interfere with statistical findings. Among them is the depth of the PTA.²³ Another important variable to consider is the period during which a PTA is concluded. To account and control for these variables, the authors conducted multivariate analyses. More specifically, the authors constructed linear models to predict PTAs' score on the copyright index and logistic regression to predict whether a PTA includes copyright provisions or not. The finding in all the models is that there are positive and significant relations (at the 0.001 level) for licensing revenues and the number of films produced. GDP asymmetry is also positively and significantly (at the 0.05 level) related to copyright provisions. These findings

suggest that PTAs' copyright provisions are partly driven by economic interests and political capacity.

Just a Few Active Promoters

These preliminary results should be interpreted carefully. Although all of the 164 WTO members have signed at least one bilateral or regional trade agreement, just a handful of countries are responsible for the conclusion of most PTAs with copyright provision. Chief among them are EFTA countries, with Switzerland having concluded 35 PTAs with at least one of the 13 copyright provisions identified above. This impressive number is the result of Switzerland's active trade policy. Indeed, Switzerland has concluded 45 trade agreements between 1991 and 2016, most of them in conjunction with other EFTA countries. These trade agreements were not driven primarily by concerns over copyright protection, but each of them provided Switzerland and other EFTA countries with an opportunity to address copyright protection. This opportunity was frequently seized by Switzerland and its EFTA partners, as the ratio of PTAs with copyright provisions over the total number of PTAs is particularly high for Switzerland (77 percent) and other EFTA countries (between 72 percent and 79 percent).

Despite having similar economic interests for copyright protection as EFTA countries, the European Union is not as consistent as the EFTA when it comes to including copyright protection in trade negotiations. Only 33 percent of European PTAs concluded between 1991 and 2016 cover copyright protection. Most European PTAs concluded in the 1990s and the early 2000s with developing countries or economies in transition do not address copyright protection at all. Following the adoption of the Global Europe Strategy in 2006, the European Union adopted a more aggressive approach to trade negotiation, and recent European PTAs include several ambitious provisions on copyright protection. Since the European Union has signed a record number of 63 PTAs between 1991 and 2016, the absolute number of EU PTAs with copyright protection (21) is relatively high.

The United States is far more consistent than the European Union and even the EFTA. While

21 See UNESCO Institute for Statistics, "Welcome to UIS.Stat", online: <<http://data.uis.unesco.org/>>.

22 Madison Cartwright, "Preferential trade agreements and power asymmetries: the case of technological protection measures in Australia" (2018) *Pacific Rev* 1.

23 See Andreas Dür, Leonardo Baccini & Manfred Elsig, "The design of international trade agreements: Introducing a new dataset" (2014) 9:3 *Rev International Organizations* 353.

the United States has signed only 18 PTAs since 1991, all of them address copyright protection. In fact, the United States is the only high-income country to systematically include copyright in all of its PTAs. Also, the United States extends the duration of copyright protection to 70 years and protects anti-circumvention measures far more frequently than the European Union or EFTA do.

High-income countries are not the only ones to promote copyright protection in the context of trade negotiations. Some developing countries conclude among them PTAs with provisions on copyright protection. Mexico, for example, appears as an active proponent of copyright protection. Not only does Mexico consistently include copyright provisions in its PTAs with high-income countries, but it also includes similar provisions in its PTAs with developing countries. Significant copyright provisions can be found in Mexican PTAs concluded with Colombia and Venezuela (1994), Bolivia (1994), Costa Rica (1994), Nicaragua (1997), Chile (1998), Uruguay (2003) and Panama (2014). Some of these Mexican PTAs replicate the TRIPS Agreement's requirements, but the most recent of them go beyond these minimum requirements and include TRIPS-plus provisions. Overall, Mexico has 12 PTAs with at least one of the 13 copyright provisions identified above, which represent 46 percent of its 26 PTAs concluded between 1991 and 2016. This is significantly more — both in absolute and in relative terms — than the number of PTAs with copyright provisions concluded by some high-income countries such as Canada and Japan.

Conclusion

One cannot understand the current trends in domestic copyright law without paying attention to international obligations. Likewise, one cannot have a full picture of international copyright law by looking only at multilateral agreements, such as the TRIPS Agreement and the WIPO Copyright Treaty. Of the 107 PTAs that include meaningful provisions on copyright protection, most of these PTAs establish a dispute settlement mechanism to address alleged breaches of these copyright commitments. In total, 105 countries have concluded at least one PTA with provisions on copyright protection.²⁴ This is far more than the number of PTAs with TRIPS-plus provision on patents.²⁵

This policy brief mapped these PTAs and presented some of their key features. Future research will shed light on their consequences. First, it is uncertain whether all countries fully implement their TRIPS-plus commitment. Second, the social and economic impacts of PTAs' copyright provisions remain unclear. While case studies can provide useful insight on these questions for specific countries, the T+TPA opens new possibilities to examine broad and general trends.

²⁴ They include the 28 members of the European Union.

²⁵ Morin & Thériault, *supra* note 8.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

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