By any measure, President Obama’s Asia-Pacific tour in November of 2011 was a remarkable success. The press focused on the President’s announcement of a Marine deployment in Australia, and his deft handling of South China Sea disputes at the East Asia Summit. Yet historians may recognize the defining moment of the trip as his revelation, at the Asia-Pacific Economic Cooperation (APEC) summit in Hawaii, that the United States and nine other APEC members have agreed on the outlines of a grand multilateral free-trade pact. Known as the Trans-Pacific Partnership (TPP), this agreement has the potential not only to spur growth around the Pacific rim, but also to advance America’s long-term strategic interests in Asia.

Given the economic and strategic significance of the TPP, as well as the controversy that it is likely to engender in APEC capitals as negotiations proceed, it is important that the particulars of the agreement reflect sound policy. With regard to environmental and labor standards, there are grounds for optimism. Yet the same cannot be said for intellectual property. While the copyright provisions of the TPP have not been fixed, it appears that the US content industries and their Congressional allies will attempt to use the agreement to export problematic features of American copyright law, even where the contours of that law remain unsettled in domestic courts.

Although the TPP has already existed for five years, its current membership is limited to the relatively small economies of Brunei, Chile, New Zealand, and Singapore. But with the likely accession of the United States, Australia, Malaysia, Peru, and Vietnam, the TPP will create one of the world’s largest free trade areas. And its ambit will only grow as other Pacific nations scramble to remain competitive. Indeed, despite opposition from powerful domestic agricultural interests, Japan and Canada are already inching toward membership.

To get a sense of what the TPP may say about intellectual property, a good place to start is with the recently-completed Korea-US Free Trade Agreement (KORUS). Last May, a group of 28 senators wrote a letter to President Obama urging that in negotiating the intellectual property provisions of the TPP, the White House “build upon the high standards” embodied in KORUS.1 Under that agreement, South Korea, itself another potential TPP member, has committed to enacting rules based on the Digital Millennium Copyright Act, a controversial US law which criminal-
izes circumvention of so-called “digital rights management” tools, or digital locks. In a parenthetical, KORUS defines copyright infringement to include the creation of temporary electronic copies, such as those made during routine computer operations, despite the fact that US courts have achieved no consensus as to whether this expansive definition is consistent with American law. The question of when the creation of a temporary electronic copy ought to constitute copyright infringement is highly technical but surprisingly important in the internet age, and it would be precipitous to cast it as settled in the TPP. As Jonathan Band and Jeny Marcinko argued in the Stanford Technology Law Review in 2005, “US trade representatives should refrain from inserting in bilateral trade agreements language concerning temporary copies that conflicts with evolving case law.” This conclusion, which remains valid today, applies \textit{a fortiori} to multilateral pacts like the TPP.

If history is any indication, the US content industries will also seek to use the TPP to force member states to extend their copyright terms to the length of life of the author plus seventy years. A number of potential TPP members still recognize a term of life of the author plus fifty years, the baseline under the Berne Convention for the Protection of Literary and Artistic Works. As the American legal academic Lawrence Lessig and others have demonstrated, extensions beyond the Berne term are unnecessary, since they have no effect on the creation of new works, and are also dangerous, since they reduce the size of the public domain.

US entrance into the TPP should be welcomed. Even setting aside the manifest economic benefits of free trade, participation will help cement Washington’s leadership role in Asia, enabling the United States to advance its interests in the region. And given that copyrighted materials comprise a sizable chunk of US exports, it is reasonable for Washington to ask that trade partners commit to enforcing the rights of US citizens and firms. But robust copyright protection can be achieved without reifying unstable doctrines in international trade deals, and without requiring our trade partners to accept unjustifiable copyright term extensions. A TPP that incorporates these principles should be favored over one that does not.

– Adeel Ishtiaq served as Lead Editor for this op-ed.

\textbf{NOTES}

1 Letter from Senators Orrin Hatch, Maria Cantwell, \textit{et al.}, to President Barack Obama, May 17, 2011.

2 Article 18.4:1 of KORUS states: “Each Party shall provide that authors, performers, and producers of phonograms have the right to authorize or prohibit all reproductions of their works, performances, and phonograms, in any manner or form, permanent or temporary (including temporary storage in electronic form).”

3 See, e.g., CoStar Group, \textit{Inc.} \textit{v.} LoopNet, \textit{Inc.}, 373 F.3d 544 (4th Cir. 2004) (holding that temporary copies made on servers of Internet service providers are not saved for “more than a transitory duration,” and cannot be considered “fixed” under the Copyright Act); Cartoon Network LP \textit{v.} CSC Holdings, \textit{Inc.}, 536 F.3d 121 (2d Cir. 2008) (holding that buffer copies are not saved for more than a transitory duration).


5 Indeed, Lessig has presented a compelling argument that the Copyright Term Extension Act of 1998 is unconstitutional. See, “How I Lost the Big One,” \textit{LEGAL AFF.}, March / April, 2004.