

Session I: Keynote Panel, Describing the Legal Landscape*

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Thank you. And thanks to June and her colleagues for inviting me; it's great to be here this morning. I just want to start off by mentioning I am a partner at Mitchell Silberberg & Knupp. I've been counsel to the IIPA for many years, but what I'm going to be saying here are my views and not necessarily the positions of the IIPA.¹ So . . . I'll beg your indulgence for a few slides here, and I'm just going to trot through the thirty years of experience that Probir summarized so well² and then talk about what's been accomplished by this linkage between copyright and trade agreements and what we might look forward to in the future.

So this is the obligatory global map. Actually I'll have another one later, but this just shows who we currently have free trade agreements with that have copyright provisions in them. I mean, it's got most of them. I think Singapore was too small to show up there, so don't worry about that too much. And I think it is important to imagine this overlaid with some other graphic that shows the WTO³ TRIPS Agreement,⁴ because obviously most of the major trading countries in the world are members of the WTO, subject to the TRIPS Agreement and that's really the background, the basis for everything that's come up since then in the FTAs.⁵ So . . . that's one theme I'm going to return to—that these multilateral agreements are really the basis for our bilaterals. It's the launch pad, let's say, for our bilateral and plurilateral agreements with regard to copyright.

So I'll just run quickly through kind of a three-phase categorization of these FTAs.⁶ The first phase was the ones that were entered into in the late 80s and early 90s. This is the period when the TRIPS Agreement was being negotiated—the Uruguay Round. TRIPS didn't actually come into force fully until '94. So these are very much influenced by the Uruguay Round. And of course you have the famous NAFTA agreement that you've heard so much about on the current presidential campaign as well as the Israel Agreement.⁷

* These remarks are a transcript of a talk that was given on October 14, 2016, at the Kernochan Center Annual Symposium at Columbia Law School.

1. *About IIPA*, IIPAWEBBSITE.COM, <https://perma.cc/8A4P-UKCM> (“IIPA” refers to the International Intellectual Property Alliance).

2. Probir Mehta, *Session I: Keynote Panel, Describing the Legal Landscape*, 40 COLUM. J.L. & ARTS 311 (2017).

3. *About WTO*, WTO.ORG, <http://perma.cc/7FD4-6EVN>.

4. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

5. IIPA, *supra* note 1 (“FTA” refers to Free Trade Agreement(s)).

6. See World Trade Organization, *World Trade Report 2011*, at 51, <http://perma.cc/9N7U-5RHP>.

7. *Id.* at 52 (“NAFTA” refers to the North American Free Trade Agreement).

The second phase are those that entered into force in the first decade of this century. That's after TRIPS. That's after the WIPO Digital Treaties,⁸ which were negotiated in 1996. And so it builds on—that's the launch pad for the second wave of the FTAs. Thirteen countries that are listed there. And then the third phase is the most recent. These all came into force in 2012, but actually the copyright negotiations were pretty much completed in about 2008. There are other reasons that they were held up. And as Korea, Colombia and Panama—I'll be focusing here mostly on Korea, for reasons that will become clear.

So, if you look back at the phase one FTAs, they brought in—and building on the TRIPS Agreement—they had some plus elements that went beyond TRIPS. And I've listed here some of these, some plus features about encrypted satellite signals and other things that, again, are fairly commonplace today.

The phase two of, again, what I'm saying, plus here, I'm kind of comparing phase two agreements with the phase one agreements. And you can see quite a few plus elements here that are in these phase two agreements—it was a big step up in copyright protection and enforcement. And some of these—such as extended term of protection—Probir has already mentioned, and not all of these are in all these agreements. I would say that the provision on no compulsory license for Internet retransmission to broadcast—which is a very important provision—is drawn from the Australia agreement, primarily. And then at the bottom I've got technological protection measures—access controls—which Probir also referred to. So, again, we're kind of building in—in more detail—some of the provisions of the WIPO digital treaties that had been negotiated shortly before these phase two agreements.

Another important point is that the obligations in some of these agreements were for the countries to accede to the WIPO digital treaties—to bring in provisions that are consistent with the WIPO digital treaties. The other important thing about these treaty agreements is that they provide an enforcement mechanism. The WIPO digital treaties have a very minimal enforcement mechanism through the World Court. But the FTA dispute settlement provisions—they vary somewhat, but they're similar in all of these agreements, so there is a way, in theory, at least, to make sure that countries live up to these agreements.

And finally, this comparison to KORUS⁹ here: What are the plus elements even beyond the phase two? And I've listed a few here: broader government mandate not to use infringing materials and not limited to software, provisions on retransmissions of lawfully encrypted signals (unauthorized cable and satellite signals), camcording, which I think has already been mentioned. And then there were some in Korea's case, some very important side letters—one on book piracy, one on online piracy that were part of the KORUS Agreement.¹⁰

8. *WIPO Internet Treaties*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://perma.cc/RS38-UARD>.

9. *Chapter Eighteen Intellectual Property Rights*, KOREA-US FREE TRADE AGREEMENT (KORUS), <https://perma.cc/RW8H-SFQ4>.

10. See Letter Between Hyun Chong Kim and The Honorable Susan C. Schwab (June 30, 2007), <https://perma.cc/3VUQ-RKS4>; Letter Between Hyun Chong Kim and The Honorable Susan C. Schwab, (June 30, 2007), <https://perma.cc/ZS8X-6K5S> (online piracy).

So there are still many issues open with some of these trading partners that we signed agreements with ten or more years ago, and I think this afternoon we'll probably hear more discussion about that. I've just listed one from phase two, which is Chile, and one from phase three, which is Colombia. Some issues haven't yet been fully resolved with these countries, and implementation is certainly one important piece, and compliance is one important piece, of unfinished business here.

So you've already heard all about the TPP. This map—well, it's still not sure whether we've got Singapore on there, but we've got pretty much everybody else. And this distinguishes between those as to which there already is a U.S. FTA in force—such as Canada and Mexico, from phase one, Australia from phase two and so forth—and those that don't, such as, notably, Japan, Malaysia In Vietnam we actually do have an agreement in force that's not a typical FTA—we have a bilateral trade agreement with them.¹¹

So, that's the TPP environment. Now what are the plus features that we find in the TPP? There is some element here of continuing to strengthen, modernize, move forward, with copyright obligations and enforcement obligations. And again, I want to say here—I'm talking about plus related to some of the phase three agreements. I'm not talking about plus related to the status quo—my little footnote there makes that clear, I hope. Because, obviously, there's a lot of pluses related to the status quo. A country like Malaysia, just to take one example, doesn't have a lot of the phase two—hasn't done a lot of the phase two requirements, like term extension and some of the others. So, this isn't plus related to the status quo. It's plus related to the most recent agreements. And I've listed a few here, and a lot of them, interestingly, have to do with the enforcement side. There's a provision to make it clear that you can have criminal liability for major commercial scale copyright infringements.¹² That's a familiar test for TRIPS, but this fleshes it out a bit more and says, if you have a substantial prejudicial impact on the right-holder, even if no money changes hands—that can attract criminal liability.¹³ There is a requirement that criminal liability include aiding and abetting—I think that's a new provision. Many countries may already have had it, but I think it's a new explicit obligation. And then there's a digital enforcement obligation—basically says that all the enforcement mechanisms that are available in the analog environment need to be available in the digital environment as well.¹⁴ It's section 18.71(2) if you're scoring at home.

And I put that in italics because we don't quite know how significant this could be. Potentially, it could be very significant. But, again, it's kind of an innovation—we don't find most of it in the previous FTAs. And again—I'll mention again that some of the obligations One plus in the TPP—although it's also in some of the

11. US-Vietnam Bilateral Trade Agreement, U.S.-Viet., Dec. 10, 2001, KAV 5968. *Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA), Chapter II on Intellectual Property Rights.

12. Trans-Pacific Partnership Agreement art. 18.77, Feb. 4, 2016.

13. *Id.*

14. *Id.* at art. 18.71(2).

earlier agreements—is that obligations that derive from the WIPO digital treaties would be subject to the dispute settlement process.¹⁵

So, this is continuing more of the plus features.

Now we turn to something new. We have some minus features in the TPP. There are some areas where it falls short of what we achieved in the KORUS Agreement. That's what I'm referring to really as the phase three. And I've just listed a few of these here. One is dealing with exceptions to these prohibitions on tampering with access controls with technological protection measures—as Probir mentioned, these are really key enabling technologies for digital delivery of copyright materials. And all of the success that consumers around the world have been enjoying with more access to more works, in more ways, and in more media, at more price points than ever before, depend on protection of technological protection measures.¹⁶

But there can be exceptions to those protections. There are in U.S. law, there are in some of the prior agreements, but what's in the TPP—it's much broader, it's more general, likely to be more liberal, and we'll talk about that later. And I mention the government use of infringing materials,¹⁷ that's kind of coming back, only applying to software in the TPP. And on the point of protection against cable signal theft, in the TPP, you can either have civil enforcement or criminal enforcement; you don't have to have both. So, some of these are maybe more important than others, but there are some minus features, I think, in TPP compared to the phase three agreement.

So that's our quick run through what's been going on over the last thirty years, and I want to spend the rest of my time just talking a little bit about—stepping back and saying, “What have we accomplished?” What has been accomplished through this linkage over the past thirty years, and what is the future of this linkage? Now, just—again, to be clear—the fulcrum of this is the idea that countries that you're negotiating with want access to the U.S. market, which is incredibly important for many countries for all kinds of goods and services. And so that gives them an incentive to agree to improvements in their copyright regimes that they might not otherwise agree to. That's kind of the linkage that we're talking about: What has been the impact of that? I think, if you step back and look at it—I think it's been an incredible success over the past thirty years, and I say that in four dimensions.

One has already been referred to—it's obviously been a very big plus for the copyright industries here in the United States. There [have] been some studies on this; the ITC did a study on trade agreements in general that the IIPA contributed some information to.

One thing that we do with the IIPA every couple of years is commission a study on copyright industries in the U.S. economy; we've been doing this ever since about 1990.¹⁸ And if you go back and look at that study, you can really see the growth in foreign sales and exports of U.S. copyright materials, has grown from about \$27

15. *See generally id.* ch. 28.

16. *Id.* at art. 18.68.

17. *Id.* at art. 18.80.

18. *See, e.g.*, STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2016 REPORT (2016), <http://perma.cc/VN9W-Z78P>.

billion in 1989 to \$156 billion in 2013.¹⁹ Even if you adjust for inflation, there has been a quadrupling of this, and this obviously has helped benefit the U.S. economy in many, many ways, and it really confirms the premise—the U.S. entered into this about thirty years ago—that stronger copyright protection and enforcement around the world is in the best national interest of the United States. So that’s one dimension. But there’s others.

I think it’s quite likely that this has been a very positive development for copyright industries within the domestic economies of our trading partners. We like to say particularly if you think of the smaller economies—maybe not China, but if you think of a smaller economy: Who is hurt most by rampant, unchecked piracy? It’s very often the local creators, the local copyright industries and creative industries, because—particularly for reasons of language isolation, or cultural particularities—that’s their market, and if that market is stolen from them by pirates, they have nothing. Whereas in, you know, a United States producer, the United States sells copyright material in the world market. And while obviously we want to be able to compete in all the markets around the world, if some market becomes closed due to piracy, well, there are a lot of other markets available—so it doesn’t have quite as much of a necessarily existential impact as it would on the local industries. So the local industries have, I think, clearly benefited from having the improvements that have been driven by some of these FTAs.

The third dimension, I think, is in the area of copyright law harmonization, and this—we obviously have the multilateral agreements, we have the WIPO treaties, but they’re at a very high level of generality and the FTAs get a little more granular. And I’ve been spending a lot of time over the last several years in the environment of—in the internet policy environment at the Internet Corporation for Assigned Names and Numbers and other venues, and it’s really been driven home to me the extent to which we have a much higher level of harmonization of copyright law—and a way of dealing with abuses that take place online—than we do in almost any other area where there are online abuses—we don’t have anything like that level of harmonization or of international disciplines with malware, dealing with spam, dealing with even child protection. Copyright really has become much more harmonized, and, obviously, it’s not unified, it’s not uniform, there are a lot of differences, but we do have a much higher level of harmonization. And I think, again, the FTAs have driven that.

The last dimension I would mention of success for this strategy—really, again, taking a broader view—is for globalization and for global consumers. I think as I’ve mentioned, more people have more access to more works of U.S. and other creators put forward than ever before, and there are a lot of reasons for that, but I think the FTAs have contributed to it; there’s a much higher level of trade in works of authorship, in copyright materials. Now if you don’t think trade is a good thing and globalization has a lot of positives, then you may not think this is a positive, but I happen to think this is one positive result that the FTAs have helped to contribute to.

19. STEPHEN E. SIWEK, *COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2016 REPORT 2* (2016), <http://perma.cc/F6MZ-BXQB>.

So, that's great—I think we've done quite well over the past thirty years. I think the other side of the coin is that we may well have reached the high watermark of this linkage and the ability to use it to advance these goals. That's true both in terms of trade agreements and in terms of the normative, norm-setting process, for example, at WIPO. It's no secret that . . . the path to bring TPP to force is far from clear at this point. And also, as I mentioned, the TPP Agreement is really the first in the series that we've talked about that actually does have some minuses. I think it has many pluses, and those outweigh the minuses, but I think there are some areas in which TPP falls short. And then as far as the normative agenda, I think—and I'm sure we'll get into this later—I think it's quite likely that the Marrakesh Treaty,²⁰ the first one to recognize, to mandate exceptions to copyright protection, may well be the last treaty that WIPO is in a position to produce for quite a while. So I think, again, we may be seeing some movement away from this high watermark.

Why is this so? Well, a couple of reasons are pretty obvious. One is that—compared to thirty years ago—there's a very organized and well-funded opposition to expansion of copyright protection and enforcement. It's organized globally, it's funded globally, and that's an issue that has to be contended with that wasn't there in the 1980s and 90s. Second, of course, is the overall backlash against trade, and—to the extent that trade agreements have been the vehicle for getting some of these positives accomplished—that vehicle is under intense bombardment now, not just in the United States but really in many countries—it's no news here, that there's a backlash against globalization and perceived downsides of free trade.

And so those are kind of the obvious and big picture reasons. I think we also have to be candid and say there [are] some other reasons that are a little bit closer to home. One is that, if you look at these phase two agreements—and some of the important provisions were extremely detailed and prescriptive, and it's no wonder that countries might resist, not necessarily signing onto a concept, but signing on to a very detailed menu of how they had to implement that concept. In some cases, this prescriptiveness was not due to the advocacy by copyright interests. I think the fact that some of these agreements had very prescriptive provisions on ISP liability and notice of takedown was because the telcos—the carriers—insisted on bringing basically what was adopted in the DMCA²¹ in the United States into the agreements almost verbatim and would not budge from that position. But there were probably areas, too, where copyright interests, copyright advocates, maybe needed to be more aware of the downside of some of these provisions—and I guess the best example of that is in TPMs, technological protection measures, where again, some of these agreements had very prescriptive limitations on what exceptions can be recognized. I think that's actually—there's a lot of good reasons for that—but it's not surprising that some countries pushed back against that, and particularly in the context of a very complex multilateral—or plurilateral—negotiation that Probir was running for the

20. *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*, WIPO, <https://perma.cc/K9LG-4HE3>.

21. Digital Millennium Copyright Act, 17 U.S.C. § 512.

last umpteen years, and which has been so successful overall in terms of the results in more areas that were just, sort of, a bridge too far.

So I guess that the question is, if we are having to shift our focus, where is that focus going to shift to? And I'll just mention two points on that. One I've already said is implementation. There are many agreements that are enforced now but that really are not being implemented. And no one—not the U.S. creators, not the creators in the other country, not those who have an interest in the harmonization of the law and globalization of the economy—we're not getting those benefits yet. So, I mentioned a couple of them: the phase two, the Chile agreement; phase three, the Colombia agreement. And I have to say on TPP what we're looking at right now—and it's unfortunate that Suzie Frankel wasn't able to join us, because New Zealand, which is the country that's probably about farthest along in the process of considering implementing legislation for the TPP, has a proposal that is profoundly noncompliant with the TPP with regard to access to those technological protection measures. So if that's enacted in its current form, it would really set a terrible precedent, and we'll just have to see how that plays out over the next few months.

The other focus I would mention is that a lot of energy that has been devoted to intellectual property issues in the trade environment over the last thirty years has shifted to the e-commerce area—and this is a very important area for the copyright industries as well. Increasingly, the products and services that the copyright industries provide are being disseminated through electronic commerce, so there's a lot of talk about digital trade as a kind of moniker but not everyone agrees on what it actually covers—but I think it's clear that the copyright industries are at the heart of digital trade and increasingly our copyright material is being traded in the e-commerce environment. So the TPP provisions here are very important milestones, but I think it's the most ambitious set of international obligations in the e-commerce area.²² Very important. There are a lot of other areas where e-commerce issues are rising in prominence: at the WTO, the Department of Commerce has created a digital attaché program which they now say they will be expanding;²³ the International Trade Commission had a study on digital trade.²⁴ So it could well be that we might see in the future a lot more focus on electronic commerce issues in future trade agreements, future negotiations at the WTO—and if it's done right, it could have a very positive impact as well as for those who produce and depend upon creative products and services.

Now, it may not actually work out that way for a variety of reasons, and I'll just mention one. As I mentioned before, the plurilateral and multilateral standards were kind of a launch pad for all of the things that were accomplished in the copyright trade linkage. If you didn't have the . . . well, starting with Berne, but if you didn't have the WTO Agreement, and then later the WIPO Digital Treaties, I don't think as much could have been accomplished. Electronic commerce is an area where there's

22. Trans-Pacific Partnership Agreement ch. 14, Feb. 4, 2016.

23. Penny Pritzker, *Commerce Launches Digital Attaché Program to Address Trade Barriers*, DEP'T OF COM. (Mar. 11, 2016, 1:45 PM), <http://perma.cc/X55V-VNHH>.

24. Digital Trade in the U.S. and Global Economies, Part 2, Inv. No. 332-540, USITC Pub. 4485 (Aug. 2014).

not as much existing international legal discipline. So, in other words, there's no floor beneath which most countries can't sink. Since most countries are in Berne and the WTO, it's a disincentive for them to spurn those obligations, but there isn't anything comparable in the electronic commerce area that I know of. So that may be one limitation on e-commerce as the venue here.

The other, of course, is that we have the copyright industries, they're not the only party with a stake in electronic commerce—most perhaps identify with it, or sometimes an adversarial position vis-à-vis the copyright industries. I think this is an area where we're going to have a lot of interests that coincide or align, and at other times we'll have to disagree or fight vehemently with some of our colleagues in the technology industries. So it'll be interesting to see how that plays out.

I think the one thing that we can be sure of is—it was really very well summed up by our new Nobel Laureate, one of the great American creative artists, one of the crowns of our creative community, when he said many years ago—“the times, they are a changin.”²⁵

25. BOB DYLAN, *The Times They Are a-Changin'*, on THE TIMES THEY ARE A-CHANGIN' (Columbia 1964).