

THE TPP AND BEYOND: THE VITAL ROLE OF JUDICIAL DISCRETION IN THE ENFORCEMENT OF INTERNATIONAL COPYRIGHT RULES

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I. INTRODUCTION

The United States has an obvious interest in protecting copyrights. In 2014 alone, “core copyright industries” contributed over a

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ment.¹⁸ In other words, member countries approved the TPP's regulatory provisions, not as a ceiling for copyright enforcement, but as a floor in order to promote the public interest in sectors of vital importance, as boldly advocated by the introductory Principles paragraph.¹⁹ The official release of the TPP text on November 5, 2015 confirmed the incorporation of most U.S.-pushed provisions, which by a closer look, reflect the core values of U.S. copyright law.²⁰ From the Digital Millennium Copyright Act's takedown process, to the abundance of criminalization provisions, one can get the impression that the U.S. simply reworded the Copyright Act, gave it some steroids, and unleashed it on its TPP partners.²¹ However, by adopting harsher and more demanding enforcement standards, member countries are urged to promote the U.S. export of copyrighted works at the expense of subjecting their citizens to steep penalties and wide-scale criminalization.²² Although this harsher standard of enforcement may one day live up to its deterrent purpose, before it does, it will pose serious issues to social welfare, international court conformance, and, perhaps most importantly, creative expression.²³

Although the recent shift of FTAs, such as the TPP, compel member countries to adopt a far stricter minimum standard of copyright enforcement, signatory countries and their courts should utilize any FTA-granted discretionary rights to level the imbalance between interests of citizens and copyright industries.²⁴ This is not to suggest that member country courts should intentionally undermine already agreed upon trade agreements. Instead, I argue that they should use any permitted discretion to tailor a balanced approach; one that takes

18. TPP Full Text, *supra* note 12.

19. *Id.*

20. Notice of Intention to Enter Into the Trans-Pacific Partnership Agreement, 2017 DAILY COMP. PRES. DOC. 64 (Nov. 5, 2015); See Jeremy Malcolm, The Final Leaked TPP Text Is All That We Feared ELECTRONIC FRONTIER FOUND. (Oct. 9, 2015), <https://www.eff.org/deeplinks/2015/10/final-leaked-tpp-text-all-we-feared>.

21. See K. William Watson, A Strong Fair Use Provision Could Help Balance the TPP's Copyright Rules, CATO INST. (Sept. 30, 2015), <http://www.cato.org/publications/commentary/strong-fair-use-provision-could-help-balance-tpps-copyright-rules>; see also sources cited *supra* note 12.

22. *Id.*; see also Michael Geist, The TPP's Unbalanced Approach to Internet Providers Pits Rights Holders Against Users RABBLE.CA (Jan. 11, 2016), <http://rabble.ca/news/2016/01/tpps-unbalanced-approach-to-internet-providers-pits-rights-holders-against-users>.

23. Abraham Gross, TPP Limits Creative Expression, WASH. SQUARE NEWS (Nov. 30, 2015), <http://www.nyunews.com/2015/11/30/tpp-limits-creative-expression/>.

24. TPP Full Text, *supra* note 12, art. 18.66; Tom Ginsburg Bounded Discretion in International Judicial Lawmaking, 45 VA. J. INT'L L. 631 (member country courts and other judicial authorities often do not participate in the deal-making and negotiation process of FTAs, thereby limiting the role of courts in the enforcement of such obligations).

into account not only their country's obligations to FTAs, but also the difficult realities of ironclad enforcement measures. By utilizing their discretionary powers to (1) elevate the threshold for criminalization; (2) introduce "fair-use" protections; and (3) place certain limitations on civil damages, member countries to TPP-like FTAs and their courts will continue to meet required minimum enforcement standards, but also be able to alleviate the imbalance of interests created under it.

This article advances the presented arguments through a utilitarian approach, which as I argue, enhance the efficacy of prospective FTAs and international copyright measures. However, this not only requires that member-country courts utilize their allowable discretion, but also that they should do so proactively in order to strike a much needed balance between user and producer interests. Further, this article will analyze and illustrate by example of the TPP's heavily negotiated copyright enforcement controls and discretionary provisions, which I believe reflect the future of international copyright enforcement efforts.

Part II will first provide the issues created by criminal copyright liability, in general; Part III will break down the TPP's text, by way of example, to demonstrate the means by which member-party courts may utilize discretionary language to avoid the risk of wide-scale criminalization; and finally Part IV will illustrate why steep civil remedies provided by TPP-like agreements incentivize the growth of "copyright trolls" on an international scale and the means by which the international copyright troll can be averted.

II. CRIMINAL COPYRIGHT ENFORCEMENT

Copyright producers have a legitimate concern and right to protect their copyrights. However, the means by which privacy-driven losses are cured should not rest solely on aggressive enforcement policies against the consuming public.²⁵ Recent debates about the balance, or lack thereof, between copyright producers and users under the TPP have led to much criticism on grounds that the TPP benefits producers most heavily at the potential expense of widespread criminalization of

25. Although the scope of this article focuses on member-country court discretion after the enactment of TPP-like copyright enforcement agreements, it is worth noting that commentators continue to explore alternative theories of infringement prevention that do not require the imposition of aggressive enforcement mechanisms. See Geraldine Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731, 776, n. 201 (2003); Tao Leung, *Misconceptions, Miscalculations, and Mistakes: P2P, China, and Copyright*, 30 HASTINGS INT'L & COMP. L. REV. 151 (2006).

users.²⁶ Criminal punishment is often justified as an effective means of deterrence, regardless of whether it is applied against crimes committed online or on the street.²⁷ According to the Department of Justice•s

A. The Piracy Culture of the 21st Century

Although proponents of copyright-related criminal sanctions are quick to say, “if you can’t do the time, don’t do the crime,” the culture and mindset behind illegal file sharing is much more complex than what is seen on the surface. There exists a fascinating phenomenon in the minds of file sharers, where the legality of their conduct does not prevent them from hoarding stockpiles of illegally downloaded content.³² Studies have shown that everyday users continue to illegally download copyrighted content due to their perceived anonymity, the vast availability of free media, and the intangible nature of the content.³³ After years of studying the psychology of file sharers, scholars have pinpointed “moral disengagement” as one of the key reason for this behavior.³⁴ This behavioral argument simply states that although users understand what is right from wrong, the act of illegally sharing and downloading media is often not perceived as immoral, which in turn, does not dissuade illegal file sharing.³⁵ Other studies indicate that low self-control is an influential determinant in the average users’ choice to download illegally, similar to the common cause of drug abuse.³⁶

Though a limited number of studies have attempted to draw a causal connection between the threat of criminal prosecution and its deterrent effect on users, research has consistently found that “the threat of certainty is more important than severity.”³⁷ This key finding indicates that adequate and firm notice, coupled with educational efforts to properly notify users that they will not be spared when caught, can one day conclusively curb file sharing.³⁸ However, as in the case under the TPP and other enforcement-heavy copyright agreements, pursuing deterrence through criminal enforcement is not the best

32. Alexander Peukert, *Why Do “Good People” Disregard Copyright on the Internet?* in *CRIMINAL ENFORCEMENT OF INTELLECTUAL PROPERTY* 163 (Christophe Geiger Ed., 2012).

33. *Id.*

34. *Id.*; see also Ken Burleson, *Learning from Copyright’s Failure to Build Its Future*, 89 *IND. L.J.* 1299, 1309-1310 (2014); Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 *J. COPYRIGHT SOC’y U.S.A.* 235, 253-254 (2014).

35. Menell, *supra* note 34, at 253.

36. Scott E. Wolfe & George E. Higgins, *Explaining Deviant Peer Associations: An Examination of Low Self-Control, Ethical Predispositions, Definitions, and Digital Piracy*, 10 *W. CRIMINOLOGY . REV.* 43, 45-46 (2009).

37. Scott E. Wolfe et al., *Deterrence and Digital Piracy: A Preliminary Examination of the Role of Viruses* 26 *Soc. Sci. COMPUTER REV.* 317, 319 (2008).

38. See Ben Depoorter & Alain Van Hiel, *Copyright Alert Enforcement: Six Strikes and Privacy Harms*, 39 *COL. J.L. & ARTS* 233, 269-70 (2015).

III. A N ANALYSIS OF THE CRIMINAL ENFORCEMENT PROVISIONS

The text of the TPP reflects a long history of the copyright problem, and the ongoing friction between the United States Trade Representative (USTR) and the many countries that the USTR finds inadequate in their copyright enforcement efforts.⁴⁴ Every year, the Office of the USTR publishes the Special 301 Report, highlighting •Watch ListŽ countries for their insufficient regulations and lax enforcement efforts.⁴⁵ It further prioritizes countries based on how their •practices have the greatest adverse impact (actual or potential) on the relevant U.S. products.Ž⁴⁶ In the 2015 report, USTR included five TPP participating countries on the Watch List: Canada, Chile, Mexico, Peru, and Vietnam.⁴⁷ A major reason for why these countries were included on the list was because the USTR found that their protection of copyrights was insufficient, or at least not to the degree preferred by copyright holders and related industries.⁴⁸ The USTR, a major player in TPP negotiations, also places countries on the Watch List for their failure to use criminal sanctions against copyright infringers.⁴⁹

In an attempt to standardize and provide greater protection to copyright holders, Chapter 18 of the TPP introduced definitive provisions that require member countries to criminalize anyone who is found to infringe on a •commercial scale.Ž⁵⁰ Chapter 18 further provides that member countries must provide for criminal procedures and penalties to be applied for •willful . . . copyright or related rights piracy on a commercial scale.Ž⁵¹ Commercial scale under the TPP is defined as:

- (a) acts carried out for commercial advantage or financial gain; and
- (b) significant acts, not carried out for commercial advantage or financial gain, that have a substantial prejudicial impact on the interests of the copyright or related rights owner in relation to the marketplace.⁵²

44. See generally OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2015 SPECIAL 301 REPORT 1 (2015), <https://ustr.gov/sites/default/files/2015-Special-301-Report-FINAL.pdf>; William New, Confidential USTR Emails Show Close Industry Involvement In TPP Negotiations, IP WATCH (May 6, 2015), <http://www.ip-watch.org/2015/06/05/confidential-ustr-emails-show-close-industry-involvement-in-tpp-negotiations/>.

45. See generally OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2015 SPECIAL 301 REPORT 1 (2015), <https://ustr.gov/sites/default/files/2015-Special-301-Report-FINAL.pdf>.

46. *Id.*

47. *Id.* at 3-4.

48. *Id.* at 1-3.

49. *Id.* at 1-4.

50. See TPP Full Text, *supra*note 12, art. 18.77.

51. *Id.*

52. *Id.*

meme is the use of a picture or video to express some idea, behavior or style, often through mimicry.⁵⁹ The crucial component of a successful meme is how well it resonates with others, which in return demonstrates its ability to go viral.⁶⁰ However, since a majority of memes incorporate copyrighted visuals or sound recordings, when the meme does indeed go viral, the creator of it may be subject to criminal prosecution and steep fines.⁶¹ Although the meme creator's intent here was not to receive a commercial advantage, the mere fact that it went viral can fall into the realm of a significant act that has a prejudicial impact on the copyright holder.⁶² This would be the case even if there was absolutely no financial gain from the success or dissemination of the meme.⁶³ Typically in the U.S., a situation involving copyright infringement through the use of memes would most likely be protected under the fair use doctrine unless it was used for marketing or other commercial purposes.⁶⁴ However, since Chapter 18 does not incorporate the basic safeguards provided by U.S. copyright law, such as the fair use doctrine, signatory countries to agreements that lack similar safeguards may need to draw out an enforcement plan with vigilance, so that they do not become compelled to enforce a large number of systematic prosecutions that would not occur even under the most stringent U.S. copyright laws.

Though the TPP's threshold for criminalizing file sharing is low, member countries to similar agreements and their courts can prevent widespread criminalization by striking a balance in its copyright and

59. See Meme MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/meme>; see also Meme OXFORD DICTIONARY (2017) (defined as "an element of a culture or system of behavior passed from one individual to another by imitation or other non-generic means, through an image, video or text and is generally humorous in nature").

60. See Kate Miltner, What made Nasa Mohawk Guy such a successful meme? GUARDIAN (Aug. 8, 2012), <https://www.theguardian.com/commentisfree/2012/aug/08/nasa-mohawk-guy-bobak-ferdowski-meme>.

61. See Nicole Martinez, Posting an Internet Meme? You May Receive a Getty Letter. ART. L.J. (Oct. 1, 2015), <http://artlawjournal.com/internet-meme-getty-letter/>; Lorelei Laird, Do Memes Violate Copyright Law?, ABA J. (Sept. 1, 2016), http://www.abajournal.com/magazine/article/do_memes_violate_copyright_law.

62. See Maira Sutton, Go to Prison for File Sharing? That's What Hollywood Wants in the Secret TPP Deal, ELECTRONIC FRONTIER FOUND. (Feb. 12, 2015), <https://www.eff.org/deeplinks/2015/02/go-prison-sharing-files-thats-what-hollywood-wants-secret-tpp-deal> (discussing that if copyrighted work is used, even if it is on a non-commercial scale, criminal sanctions will be imposed); see also Brandon Brown, Fortifying the Safe Harbors: Reevaluating the DMCA in a Web 2.0 World 23 BERKELEY TECH. L.J. 437, 445-449 (2008).

63. See Richard J. Hawkins, Substantially Modifying the Visual Artists Rights Act: A Copyright Proposal for Interpreting the Act's Prejudicial Modification Clause 55 UCLA L. R. EV. 1437, 1448-50 (2008).

64. 17 U.S.C. § 107 (1976).

related rights system,⁶⁵ as encouraged by the TPP.⁶⁵ This minimal wiggle room is key because such an aggressive minimum enforcement standard, by default, will compel member countries to enforce criminal copyright to any case where an individual can be proven to have an impact on the copyright holders' interest.⁶⁶ Therefore, by increasing the standard, through careful discretionary balancing, member countries and their respective courts will be able to limit the prosecution of its users to only the most egregious violators,⁶⁷ as intended by the DOJ.⁶⁷ Courts can eliminate potential widespread criminalization of their citizens by first textually analyzing the negotiated language, and pinpointing the exact discretion afforded. For example, footnote 127 of Chapter 18 states, "A Party may provide that the volume and value of any infringing items may be taken into account in determining whether the act has a substantial prejudicial impact on the interests of the copyright or related rights owner in relation to the marketplace."⁶⁸ Courts can eliminate the 1 ner in relation to n eliminNgv(684.

to file suit, the data entering and exiting one's device is no longer a secret.⁷³ Though this growing invasion is definitely more intrusive than the intermediary involvement required before, it is nevertheless a beneficial means for participating countries to gauge the severity of their file-sharing problem. This will require a careful analysis of their country's file-sharing norms, coupled with a balancing of public policy to determine the most egregious actors in each country.

Although drawing a rigid line to determine legality is not always the best way to make law, if this practice is coupled with a discretionary approach and proper notice to the public, it can potentially scale back illegal file sharing and decrease the number of criminal prosecutions.⁷⁴ By limiting enforcement efforts to each country's high-volume uploaders and downloaders, members can conform to minimum standards of enforcement with the added benefit of preventing wide-scale criminalization of innocent infringers.⁷⁵

First, member countries can avoid a miscarriage of justice through a volume standard by preventing the prosecution of those who are not in fact willfully infringing copyright, [and] who genuinely believe that their conduct is legal, but instead, only prosecuting those who partake in the highest volume of infringing activities.⁷⁶ Willfulness, which is a prerequisite for criminal copyright infringement, can be inferred by the blatancy of one's conduct.⁷⁷ Therefore, if there is in fact evidence of a large volume of illegal uploads and downloads, then it is highly unlikely that these high-volume uploaders are in fact engaged in legal conduct, or that they were oblivious as to their wrongdoing.⁷⁸

Second, if member country courts are able to determine the precise volume of illegal file sharing to be considered criminal, they will avoid wasting judicial time and resources to provide an ad-hoc analysis for each individual case. It is unlikely that there will be a lot of

73. *Id.*; see Sell, *supra* note 15, at 457; Alexandra Giannopoulou Copyright Enforcement Measures: The Role of the ISPs and the Respect of the Principle of Proportionality *EUR. J. OF L. & TECH.* (2012), <http://ejlt.org/article/view/122/204>.

74. See generally Mark A. Lemley & R. Anthony Reese, Reducing Digital Copyright Infringement Without Restricting Innovation, 56 *STAN. L. REV.* 1345, 1351-53 (2004) (arguing that a combination of approaches will be most beneficial to limiting illegal file sharing and criminal prosecutions).

75. *Id.* at 1402-04.

76. *Id.* at 1403.

77. 17 U.S.C. § 1291 (2012).

78. Lemley, *supra* note 74, at 1402.

deliberation as to the severity of the infringement if the pre-established volume that triggers criminal liability is set sufficiently high.⁷⁹

Finally, by drawing a bright and clear line as to the precise volume required for criminal punishment, file-sharers will receive sufficient notice as to the certainty of punishment against them, which in itself serves as an effective deterrent. As mentioned previously, studies have consistently found that the threat of certainty is more important than severity.⁸⁰ A recent study in Canada, for example, illustrates that a significant drop in Canada's piracy is attributable to notices forwarded to users by ISPs.⁸¹ Likewise, sufficient notice provides unaware infringers the opportunity to check their systems to make sure whether or not their activities online can potentially be found criminal.

These three objectives not only prevent the widespread criminalization of users, but the attributed notice in providing a bright-line distinction between criminality and innocence may better further serve to the benefit of rights holders than an expensive witch hunt.

Though the volume-based standard suggested here, like any threshold-based regulation, may potentially allow the threshold to be worked-around by infringers, its effects do not severely hinder the ongoing fight for stronger international enforcement mechanisms.⁸² The threshold can potentially be manipulated if, for example, a member country's judicial authorities provide notice that illegally sharing 1000 files is considered a significant act that justifies criminalization, thereby prompting file-sharers to limit their file-sharing to 999. However, illegally file-sharing 999 files would still be grounds for civil suit that allows a wide-range of remedies for copyright holders to utilize.⁸³ Therefore, it would not sterilize enforcement efforts since the risk of steep civil damages can serve as a deterrent inasmuch as criminal punishment does.⁸⁴

79. *Id.* at 1402-03.

80. Wolfe, *supra* note 37, at 319.

81. Daniel Tencer, Massive Drop In Canadian Online Piracy Under New Law, Copyright Firm Says, HUFFINGTON POST (May 25, 2015), http://www.huffingtonpost.ca/2015/05/21/online-piracy-canada-ceg-tek_n_7372626.html.

82. See Lemley, *supra* note 74, at 1413 (arguing that although the system can be gamed, it does not necessarily mean that enforcement will become ineffective).

83. See TPP Full Text, *supra* note 12, arts. 18.74(8)-18.74(10).

84. *Id.*

expansive protections, vehicles for cultural expression such as memes and other transformative uses are worth protecting.⁹³

Though fair use is a highly cherished defense in the U.S., many participating countries to the TPP and other IP-related international agreements do not follow U.S. style fair use protections, but instead utilize an alternative model known as "fair dealing."⁹⁴ Fair dealing, in contrast, is not an open-ended concept and is applied too rigidly to keep up with changing times.⁹⁵ It merely provides exemptions to specifically enumerated uses of copyrighted works, allowing them safeguards against infringement liability.⁹⁶ Citizens from these member countries, with limited or no protections, are at a far greater risk for suit under TPP-like agreements than those from countries with fair use protections.⁹⁷ Although the use of copyrighted content often stems from innocuous purposes, the potential for a meme to become grounds for criminal liability, due to its "substantial prejudicial impact," poses troubling consequences for the evolving nature of cultural expression.⁹⁸ As cultural expression takes on new forms and becomes more easily shared, due to the rapid growth and expansion of the Internet, liability-triggering language such as "significant non-commercial acts" should at least be balanced with greater fair use protections.⁹⁹

As with the judicial flexibility allowed under the criminal enforcement section, the TPP also expressly encourages member countries to "achieve an appropriate balance in its copyright and related rights systems . . . by means of limitations or exceptions . . . including those for the digital environment."¹⁰⁰ The TPP further lists out some safe-harbors that countries may use to exempt individuals from civil and

93. *Id.*

94. See, e.g. Ariel Katz, *Fair Use 2.0: The Rebirth of Fair Dealing in Canada*, in *THE COPYRIGHT PENTAGONY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW* 93-156 (Michael Geist ed., 2013) (analyzing the Canadian Copyright Act and Fair Use defense); Sean M. Flynn et al., *The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement* 28 *AM. U. INT'L L. REV.* 105, 124 (2012); Organization for Transformative Works, *What the Trans Pacific Partnership Means for Fans* (Nov. 13, 2015), <http://www.transformativeworks.org/what-trans-pacific-partnership-means-fans/>.

95. Katz, *supra* note 94, at 93-94, 139-40.

96. *Id.* at 138.

97. See Jean Dryden, *The Trans-Pacific Partnership Free Trade Agreement* 34 *TALL Q.* 14, 14-15 (2016).

98. TPP Full Text, *supra* note 12, art. 18.77; Daniel Daniele, *Memes and GIFs: A New Cultural Phenomenon*, *SOCIAL MEDIA L. BULLETIN* (Oct. 1, 2013), <http://www.socialmedialawbulletin.com/2013/10/memes-and-gifs-a-new-cultural-phenomenon/>.

99. *Id.*

100. TPP Full Text, *supra* note 12, art. 18.66.

criminal liability, including: •legitimate purposes such as . . . criticism; comment, [and] news reporting.¹⁰¹ For further clarification, footnote 79 following this section states, •a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose¹⁰² Though this section does not expressly state that individual use of underlying copyrighted works should be protected or be provided with U.S. style fair use exceptions, it is reasonably inferred as the examples provided are not meant to be exhaustive. Rather, this section titled •Balance in Copyright and Related Rights Systems,¹⁰³ is to provide member countries some guidance and flexibility in providing safeguards, such as fair use defenses for qualified copyright uses, where the otherwise unlawful use is balanced against the degree of •unreasonabl[e] prejudice¹⁰³ to the copyright holder. If the TPP's provisions are indeed resurrected into future international copyright agreements, the above discretion should be integrated into future agreements as it provides for an optimal opportunity for member country courts to create better safeguards for individual protection.

to pay the right holder the infringer's profits that are attributable to the infringement.¹⁰⁷ Further, paragraph four allows courts the added

countries.¹¹⁴

ual defendants and copyright holders often seek alternatives to avoid the judicial process, further opens the doors for the copyright troll industry to thrive.¹²² Likely, even defendants with a strong chance of prevailing over the plaintiff would rather settle for a discount than risk paying greater damages, in addition to attorney and court fees.¹²³

Although the TPP provides language that gives individuals basic protection against the copyright holder's misuse of enforcement procedures,¹²⁴ it is not enough incentive for individuals to risk going through trial for the slight chance of earning the ability to recover attorney and court fees. Additionally, from a policy perspective, the quiet nature of private settlements arguably do not deter others from infringement.¹²⁵ Since settlements take place away from the public eye, they therefore fall short of providing notice of the repercussions of infringement to the public at large.¹²⁶

B. Restricting the Right to Sue and Preventing Abusive Settlement Tactics

The main problem with this business model is that such lawsuits are not intended to deter, but instead are used to encourage quick settlements.¹²⁷ What makes this even more troubling is that a large cut of purported damages do not even reach the injured party, but rather fall in the hands of third party trolls.¹²⁸ In no way would this scenario be conducive to social and economic welfare, and to a balance of rights and obligations as the TPP's objective attempted to establish.¹²⁹ Judicial authorities of member countries should therefore utilize discretion allowed under the TPP and similar agreements in the interest of maintaining a fair court system and alleviating the imbalance created by the potentially abusive damage measurements.¹³⁰

For example, the following provision (Article 18.3), if incorporated in future international agreements and actually exercised by

122. See *id.* at 1113, 1116; Swartout, *supra* note 113, at 513.

123. Swartout, *supra* note 113, at 513.

124. See TPP Full Text, *supra* note 12, art. 18.69(1).

125. See Swartout, *supra* note 113, at 509.

126. See Llewellyn, *supra* note 113, at 83.

127. James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages* 19 *UCLA ENT. L. REV.* 79, 98 (2012) (citing Julie E. Cohen, *Pervasively Distributed Copyright Enforcement* 95 *GEO. L.J.* 1, 17 (2006)).

128. Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses* 85 *U. COLO. L. REV.* 53, 72-79 (2014).

129. See TPP Full Text, *supra* note 12, art. 18.2.

130. See *id.* arts. 18.3, 18.71(1), 18.72(15), 18.75.

member party courts, can be construed so to prevent the copyright troll problem in their respective countries, which states:

Appropriate measures, provided that they are consistent with the provisions of this Chapter, may be needed to prevent the abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.¹³¹

In addition, courts should be insistent on making sure that the party bringing suit is in fact the copyright holder or an official representative.¹³² For example, this can be accomplished through the incorporation of provisions such as Article 18.75: Provisional Measures,¹³³ which states, "judicial authorities have the authority to require the applicant . . . to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant's right is being infringed." By utilizing these two discretionary provisions, courts may be able to define "abuse" to include coercive settlement offers, and further require the party bringing suit be able to identify themselves as the injured party through a demonstration of the legitimacy of their claim. As the language "applicant's right" indicates, the TPP allows for courts to require that the applicant, in order to bring a

as a model for member country courts, and given the unfavorable consequences of copyright trolling, it is unlikely that other member countries would deliberately avoid making a decision to limit these coercive tactics.

V. CONCLUSION

Though, on its face, the TPP's aggressive minimum standard of enforcement has stirred a lot of debate and criticism, its discretionary language has not been given enough credit. Whether it be for adopting new standards of criminal enforcement, implementation of fair-use policies, or calculating damages, the TPP leaves many key terms open to discretionary application. Although the TPP, in its current form, begins to look more and more as a thing of the past, its carefully crafted concessions that allow member parties certain limitations and flexibilities should not be ignored. As with TRIPS and the TPP, discretionary safeguards in IP enforcement provisions will continue to exist, especially where the U.S. is a party. Thus the key question is not whether member parties will continue to enjoy similar discretions in the future, but instead whether they will actually make use of them.

However, even if discretion is actually exercised, the turning point for international copyright enforcement in the following years will depend on whether member countries to similar agreements and their courts will be able to better fit their needs and demands while conforming to minimum standards of enforcement. This can only be achieved through a fair balance of producer rights and individual interests, while keeping in mind the realities of normative enforcement measures.