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Free Trade Agreements with the United States, Rulemaking and TPMs: Why Asian Pacific Nations Should Resist Increased Regulation of TPMs in their Domestic Copyright Laws

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1 Introduction

The draft Asian Pacific Copyright Code (draft Code)[2] draws on international copyright treaties and agreements (the most recent of which were drafted in the 1990s and brought into force in the early 2000s)[3] to provide guidance on the minimum standards to be achieved in the copyright laws in the region. The draft Code is brief, however, and there is much potential for extending its scope to cover important areas of

1 Copyright © 2018 Susan Corbett. Associate Professor of Law in the School of Accounting and Commercial Law, Victoria University of Wellington and founder member and President of the Asian Pacific Copyright Association.

2 See Adrian Sterling 'Asian Pacific Copyright Code' in this volume.

3 WIPO Copyright Treaty 2186 UNTS 121 (opened for signature 20 December 1996, entered into force 6 March 2002) [WCT] and the WIPO Performances and Phonograms Treaty 2186 UNTS 203 (adopted 20 December 1996, entered into force 20 May 2002) [WPPT].

copyright that have increased in international significance since the 1990s. Accordingly, this chapter considers how copyright laws in the Asian Pacific region should regulate the use of anti-circumvention technologies – that is, technological measures that permit users to access copyright works that are protected by technological protection measures (TPMs).

A more conceptual question is whether it is appropriate or necessary to provide additional protections by way of anti-circumvention regulation in copyright law to the owners of all works that are already physically protected by TPMs. An alternative suggestion is that the anti-circumvention provisions in copyright law should be limited in their application. Anti-circumvention provisions should apply only to those TPM-protected works in regard to which the copyright owners have formally agreed to facilitate TPM circumvention for users who provide written confirmation that their proposed use of the work falls within one of the permitted exceptions in the relevant copyright legislation. Thus, similarly to inventors who choose to keep their invention a trade secret and thereby reject the temporary legal monopoly provided by the patent system, the copyright owner of a TPM-protected work who is not willing to instruct the manufacturer of the work to facilitate circumvention for legitimate purposes must accept the possibility that a third party might reverse-engineer or 'circumvent' the TPM. Unfortunately, however, due to the requirements of extant free trade agreements (FTAs) that have mandated strong anti-circumvention measures for TPM-protected works, this suggestion may not be tenable, at least for the present.

Members of the legal academy have recently begun to question the appropriateness of international copyright agreements and treaties created in a pre-digital era.[4] Some call for a new paradigm for copyright laws. Others argue that new business models must be developed alongside changes in copyright laws.[5] The regulation of TPMs, I suggest, should be a particular target of these proposals and would perhaps encourage renegotiation of the relevant terms in FTAs.

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4 See Peter K Yu 'The Copy in Copyright' in Jessica C Lai and Antoinette Maget Dominicé (eds) *Intellectual property and access to im/material goods* (Edward Elgar, UK, 2016) at ch 3; Alpana Roy 'Copyright: a Colonial Doctrine in a Postcolonial Age' (2008) 26(4) Copyright Reporter 112; and *What if we could re-imagine Copyright?* Kimberlee Weatherall and Rebecca Giblin (eds) (ANU Press, Canberra, 2017).

5 See Ian Hargreaves *Digital Opportunity: A Review of Intellectual Property and Growth* (UK Department for Business, Innovation and Skills, Independent Report, May 2011) [the Hargreaves Report]; and Nicola Searle *Changing Business Models in the Creative Industries: The cases of Television, Computer Games and Music* (UK Intellectual Property Office, October 2011).

Meanwhile, noting that some countries in the Asian Pacific region are already bound by, or are considering entering into FTAs with the United States (a net copyright-exporting country),[6] this chapter warns that countries that are net importers of copyright works should be wary of amending their laws in ways that will result in their citizens being placed at a disadvantage compared to United States' citizens.

Focusing on New Zealand as an example, this chapter describes the anti-circumvention provisions that New Zealand had proposed to introduce into its copyright law to comply with the Trans-Pacific Partnership (TPP) (now replaced by the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP)).[7] The chapter contrasts New Zealand's proposed amendments to comply with the TPP and their impact on copyright users in New Zealand with the Digital Millennium Copyright Act (DMCA), the outcome of the 2015 rulemaking process and the effect on copyright users in the United States.[8] Fortuitously for users in the Asian Pacific region more generally, the CPTPP suspends the requirements for Parties to provide more extensive protections to TPMs, pending further agreement.[9] Nevertheless, the discussion in this chapter remains pertinent, since the influence of United States law on international copyright is pervasive and may well form part of further discussions when Parties to the CPTPP renegotiate the suspended provisions.

The chapter is structured as follows: the next part explains the nature of, and the debate around, TPMs as well as the important role played by circumvention devices and the influence of copyright clauses in FTAs with the United States on increasingly draconian anti-circumvention laws

6 Existing FTAs with the United States are in place in Australia, Korea, Myanmar and Singapore. Negotiations are underway for FTAs with the United States in Malaysia, while in Thailand negotiations for a Thailand – United States FTA are currently suspended: see 'Free Trade Agreements' Asian Regional Integration Center aric.adb.org.

7 Trans-Pacific Partnership (signed 4 February 2016, version 26 January 2016) [TPP]. The official signed version is not yet public. The 26 January 2016 version is the 'legally verified text' that can be found on the website of the Ministry of Foreign Affairs and Trade (MFAT) 'Text of the Trans-Pacific Partnership' (26 January 2016) New Zealand Trans-Pacific Partnership www.tpp.mfat.govt.nz. For the legally verified text of the Comprehensive and Progressive Trans-Pacific Partnership (signed 8 March 2018, not yet in force), released on 21 February 2018, see www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/ [CPTPP].

Following the withdrawal of the United States from the TPP the remaining 11 countries – Australia, New Zealand, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore and Vietnam – have now signed the CPTPP.

8 Digital Millennium Copyright Act 17 USC § 1201 [DMCA].

9 See CPTPP, art 2 and Annex 7(h) suspending TPP, art 18.68.

that are being introduced into domestic legislation. Part 3 describes the current anti-circumvention provisions in the New Zealand Copyright Act 1994[10] and summarises the proposed amendments to those provisions that were intended to comply with the TPP. In Part 4, the equivalent provisions in United States copyright law that were introduced by the DMCA and the role of the rulemaking process are described.[11] Noting that the rulemaking process, which occurs every three years, increasingly moderates the impact of the DMCA for United States copyright users, I argue that, absent similar rulemaking processes, New Zealand and other Asian Pacific countries should be wary of introducing DMCA-compliant provisions into their respective copyright laws. Part 5 concludes by describing possible interim measures (that is, pending an eventual development of a new paradigm for copyright) that could be adopted by the Asian Pacific region to ensure its citizens are not disadvantaged by anti-circumvention laws.

2 TPMs and Circumvention Devices

2.1 Context

In the digital age, many authors and publishers argue (with some justification) that traditional copyright law is not adequate to protect their economic interests.[12] Although digital entities may be superficially indistinguishable from traditional analogue cultural entities, their underlying structure is very different. The high-level language program ('source code') for each digital entity varies depending upon both the programming language chosen and the unique characteristics of the particular entity but the machine-readable computer code ('object code') is always some form of combination of binary numbers. This characteristic means that digital entities can be easily and rapidly duplicated, combined with one another, adapted, transformed and distributed on the internet.[13]

10 Copyright Act 1994, ss 226–226E.

11 DMCA, above n 8.

12 See, for example, Peter K Yu 'Digital Copyright and Confuzzling Rhetoric' (2010–2011) 13 Vand J Ent & Tech L 881 at 918–939; Jessica A Wood 'The Darknet: A Digital Copyright Revolution' (2010) 16 JOLT 1 at 19.

13 For a detailed explanation of the technicalities of digitisation and its versatility in relation particularly to copyright works, see Peter S Menell 'Envisioning Copyright Law's Digital Future' (2002–2003) 46 NYL Sch Rev 63 at 108 and 114.

The opportunities for copyright infringement of digital works are almost unlimited and can take a plethora of forms, including using peer-to-peer (P2P) file-sharing technology to distribute and share digital media, cloud storage services allowing uploading of potentially infringing works and virtual private networks that allow users to hide their physical location and access geo-blocked copyright works. In essence, the widespread sharing of digital media files has weakened the effective strength of copyright law worldwide. Indeed, it is arguable that copyright law's traditional ex post provisions are largely ineffective in the digital environment. For example, P2P websites such as The Pirate Bay[14] and kickasstorrents[15] regularly switch domain names to avoid court orders requiring local internet service providers (ISPs) to block access to their original websites. Frequently the P2P sites display news of one another's re-emergence, thereby allowing their users to participate in the uninterrupted illegal sharing of digital media. Furthermore, users of the sites are able to circumvent blocked access, by using methods such as reverse proxies.[16] A recent example of exactly this situation is *Roadshow Films Pty Ltd v Telstra Corporation Ltd,*[17] in which the Federal Court of Australia applied a new provision of the Copyright Act 1968,[18] ordering Australia's largest ISPs[19] to block customer access to four movie torrent sites[20] but refusing to grant a rolling injunction that would have required the ISPs to also block mirror domains set up by the torrent sites.[21]

The very real fears of creators and distributors of digital works can be likened to the fears of authors and publishers when the use of photocopying became widespread and to those of the music publishers on the advent of the tape recorder. Producers of digital works have therefore increasingly turned to TPMs in an attempt to physically prevent unauthorised access to the underlying computer software.

14 The Pirate Bay thepiratebay.org (note: the URL changes frequently).
15 kickasstorrents kickasstorrents.to (note: the URL changes frequently).
16 Ernesto Van Der Sar 'Pirate Sites Remain Popular in the UK, Despite Website Blockades' (2016) Torrent Freak torrentfreak.com.
17 *Roadshow Films Pty Ltd v Telstra Corporation Ltd* [2016] FCA 1503, (2016) 122 IPR 81.
18 Copyright Act 1968 (Cth), s 115A.
19 Telstra, Optus, TPG and M2.
20 The Pirate Bay thepiratebay.org; Torrentz torrentz.eu; TorrentHound www.torrenthound.com; and IsoHunt isohunt.to. Note: all URLs change frequently.
21 Instead, the ISPs must apply separately for injunctions against mirror sites: see *Roadshow Films Pty Ltd v Telstra Corporation Ltd*, above n 17, at [13].

2.2 TPMs

The term TPM describes various types of digital technologies used by copyright owners to provide them with physical (ex ante) control over their copyright works, as opposed to relying on the unsatisfactory (ex post) prohibitions in copyright laws.

TPMs provide two categories of physical control: the first is intended to prevent unauthorised persons obtaining access to a work (access control TPMs), the second is intended to prevent acts protected by copyright (copy control TPMs). Typical TPMs include encryption (which allows only persons with the appropriate 'key', or code, to access a work) and technological copy controls (which allow authorised users to access a work but not to make copies). Due to the prevalence of computer software-driven devices and products in modern life, TPMs are ubiquitous and can be found in such diverse products as cars, medical devices, ebooks, toys and domestic appliances.

TPMs have been strongly criticised by the academy and the community for preventing legitimate 'permitted uses' of copyright works, such as fair use and fair dealing,[22] and for also preventing uses that are not rights pertaining to copyright, such as facilitating the avoidance of consumer protection laws.[23] A TPM can be used to support non–copyright related activities that are anti-competitive by, for example, locking protected products to a particular manufacturer or service provider.[24] Privacy concerns are also linked to some TPMs, which are used by businesses to collect data about their customers – often unbeknownst to the customer due to the activity taking place at a very deep level of the product.[25] Furthermore, a TPM is capable of protecting a copyright work for an infinite time, rather than being limited to the finite term of copyright provided by legislation, thereby potentially preventing copyrighted material from entering the public domain. TPMs thus present a challenge

22 See Louise Longdin 'Copyright and Fair Use in the Digital Age' (2004) 6(1) UABR 1; and Gideon Parchomovsky and Philip J Weiser 'Beyond Fair Use' (2010) 96 Cornell L Rev 91.

23 See Pamela Samuelson and Jason Schulz 'Should Copyright Owners Have to give Notice of their Use of Technical Protection Measures?' (2007) 6 JTHTL 41; Lucie Guibault and Natali Helberger *Copyright Law and Consumer Protection* (European Consumer Law Group, 2005).

24 Dan L Burk 'Anticircumvention misuse' (2003) 50(5) UCLA L Rev 1095; Dan L Burk 'Legal and Technical Standards in Digital Rights Management Technology' (2005–2006) 74 Fordham L Rev 537; Maryna Koberidze 'The DMCA Rulemaking Mechanism: Fail or Safe?' (2015) 11(3) Wash J of L Tech & Arts 213 at 225.

25 See Samuelson and Schulz, above n 23, at 50.

to users of copyright works, who argue that they are an overreaction by copyright owners, that they represent an unjustifiable restriction of users' rights and that the use of TPMs will inevitably lead to a reduction of the public domain of creative works and information.[26] Such arguments have driven the development of competing technological devices that are able to overcome or circumvent the TPMs put in place by copyright owners. These devices are termed 'circumvention devices'.

2.3 Circumvention Devices

Just as the TPM is capable of preventing both infringing and non-infringing uses of a copyright work, the potential use of a circumvention device is not confined to non-infringing uses: such a device can also provide the means for infringing copyright in a digital work. Common examples involve the circumvention, using mod chips,[27] of key encryption or scrambling technology installed to prevent the illegal copying of computer games.[28] Moreover, it takes only one person to successfully circumvent a TPM on a digital work, such as a movie on a DVD, for that unprotected movie to be distributed to thousands or millions of other users via P2P sharing.

The World Intellectual Property Organization's (WIPO) economic report on anti-piracy enforcement notes that in the 10 years following the creation of Napster in 1999,[29] sales of recorded music decreased globally by 50 per cent.[30] Similarly, after BitTorrent was created,[31] sales of DVDs and VHS (that had risen between 2000 and 2003) dropped by 27 per cent.[32] The report notes a general consensus among economists (based on synthesis of 21 studies in peer-reviewed journals)[33] that piracy negatively impacts sales across all media (to different degrees according

26 See, for example, Séverine Dusollier 'Electrifying the Fence: Legal Protection of Technological Measures for Protecting Copyright' (1999) EIPR 285; and Burk 'Anticircumvention Misuse', above n 24, at 1103.

27 Mod chips are devices that, when fitted to a games console, enable the user to play pirated games: see David Cran 'The modchips are down – Nintendo obtains summary judgment for circumvention of copyright protections' (2010) 21(8) Ent LR 315.

28 See *Nintendo Co Ltd and Nintendo of Europe GmbH v Playables Ltd and Wai Dat Chan* [2010] EWHC 1932 (Ch); *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58.

29 Napster us.napster.com.

30 See Brett Danaher, Michael Smith and Rahul Telang *Copyright Enforcement in the Digital Age: Empirical Economic Evidence and Conclusions* WIPO/ACE/10/20 (2015) at 4 (citing Stan Liebowitz, *The Economics of Copyright* (Edward Elgar, UK, 2014)).

31 BitTorrent www.bittorrent.com.

32 Danaher, Smith and Telang, above n 29, at 4.

33 At 4.

to geographic regions, time periods, distribution and media).[34] Reports, such as the foregoing, have encouraged the creative industries to lobby strenuously for amendments to copyright laws that would prevent the use of circumvention devices.[35]

Although earlier research reported by Nicola Searle suggested that new business models in the creative industries appeared to have led to a reduced reliance on copyright laws,[36] Searle's latest research suggests otherwise.[37] In a recent posting on the IPKat law blog,[38] Searle describes her surprise at finding that, 'while the creative industries have lobbied against changes to copyright, very little has changed by way of business models'.[39] The seeming lack of initiatives taken by the creative industries to develop new business models in the face of challenging new technologies is puzzling. Seemingly, it indicates that the industries are content to continue their reliance on copyright law, despite the certain knowledge that developments in the law will always lag behind technological developments.

As early as 1996, confronted with an increasing desire by publishers to make use of digital technology to distribute copyright works, WIPO held a diplomatic conference to consider how the law might be developed to provide adequate and effective protection for digital copyright works. The outcome of that meeting was the WIPO Copyright Treaty (WCT).[40] Article 11 of the WCT addresses TPMs and their circumvention:[41]

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

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34 At 4.

35 See Publishers Association of New Zealand 'Submission to Foreign Affairs, Defence and Trade Committee on consultation document: Implementation of the Trans- Pacific Partnership Intellectual Property Chapter'; see also Barry B Sookman and Daniel G C Glover 'TPMs are Alive and Well: Canada's Federal Court Awards Nintendo $12.57-million in Damages' (March 2017) Lexology www.lexology.com.

36 Searle, above n 5.

37 Nicola Searle 'A Tale of Stability – Business Models in the Creative Industries' (15 June 2017) The IPKat ipkitten.blogspot.co.nz.

38 IPKat ipkitten.blogspot.co.nz.

39 Searle, above n 37.

40 WCT, above n 3.

41 Article 11.

The objective of art 11 is clear: the rights of copyright authors (or owners) must be protected, while those of copyright users, art 11 implies, are of lesser importance. Indeed, the final words of art 11 suggest that authors have far-reaching 'rights' worthy of protection by TPMs and that their 'rights' are not confined to 'rights protected by law'. Unfortunately, however, many countries that have introduced TPM regulation into their domestic laws have implicitly taken the emphasis of art 11 on the rights of owners to extreme levels, sometimes of their own accord, but more often due to the requirements of the United States as a condition of its entering into an FTA with that country.

The importance of intellectual property to the global economy is reflected by the inevitable presence of an intellectual property chapter in bilateral and multilateral FTAs. The United States, a net exporter of copyright works, leads many such agreements and requires contracting states, many of which are copyright importers, to strengthen their intellectual property laws to be equivalent to the United States' laws.[42] The strengthened anti-circumvention laws required by the United States in its FTAs with other states generally conform to the equivalent provisions in the DMCA.[43] However, such requirements do not explicitly acknowledge the outcomes of the rulemaking process that moderates the anti-circumvention provisions of the DMCA for specific classes of users of certain copyright works every three years.[44]

An example is the TPP, a free trade agreement that was intended[45] to facilitate free trade and investment between 12 countries, including the United States, New Zealand and five other countries from the Asian Pacific region.[46] Notably, once the United States joined the TPP

42 This situation is well-traversed in academic literature. See, in regard to Thailand, Noppanun Supasiripongchai 'The development of the provisions on the protection of technological protection measures (TPMs) in the light of the prospective Thailand – United States Free Trade Agreement (FTA) and its possible impacts on non-infringing uses under copyright exceptions in Thailand: what should be the solution for Thailand?' (2013) 19(1) CTLR 21. In regard to the Australia – United States Free Trade Agreement (AUFSTA), see Susan Corbett 'Copyright law in Australia: What price free trade?' (2004) 4(1) NZIPJ 5. In regard to the Korea – United States Free Trade Agreement (KORUS), see Dae-Hee Lee 'KORUS FTA and Copyright Protection in Korea' in C Antons and R M Hilty (eds) *Intellectual Property and Free Trade Agreements in the Asia-Pacific Region* (Springer, New York, 2015).

43 DMCA, above n 8.

44 DMCA, above n 8, § 1201.

45 The TPP did not come into force following withdrawal of the United States, but has been replaced by the CPTPP – see text to n 7 above.

46 TPP, above n 7; the other 10 countries are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore and Vietnam.

negotiations,[47] it assumed a leadership role and demanded changes to the intellectual property laws of the other 11 countries to provide parity with its own intellectual property laws.[48] However, a few months prior to the signing of the TPP, the United States Register of Copyrights released her recommendation to the Librarian of Congress relating to the sixth round of rulemaking on exemptions from the anti-circumvention provisions of the DMCA.[49] The rule, which came into force on 28 October 2015, permits exemptions from the anti-circumvention provisions for 10 additional classes of copyright works – the highest number to date.[50]

In essence, by its use of the rulemaking process, the United States provides a more user-friendly copyright environment than appears in the DMCA for its own citizens.[51] Conversely, the United States requires, in the form of intellectual property chapters in its negotiated FTAs, rigorous protections for TPMs in the domestic copyright laws of other jurisdictions, most of which are copyright-importing nations.[52]

The following Part describes the anti-circumvention provisions in the New Zealand Copyright Act 1994 (the Copyright Act) and the proposed changes to that Act that were intended to comply with the requirements of the TPP.[53]

3 New Zealand Anti-Circumvention Law

3.1 Background

In 2008, following a review of the Copyright Act, new provisions were inserted to address the issue of TPMs and to implement the requirements of the WCT.[54] Although New Zealand had not formally acceded to

47 The United States joined the negotiations in February 2008 but withdrew from the TPP Agreement on 23 January 2017; see David Smith 'Trump withdraws from Trans-Pacific Partnership amid flurry of orders' *The Guardian* (online ed, UK, 23 January 2017).

48 The TPP was signed by the then 12 participating countries on 4 February 2016.

49 Jacqueline C Charlesworth *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies* (Library of Congress, US Copyright Office, 37 CFR 201, 28 October 2015); DMCA, above n 8, § 1201.

50 § 1201.

51 DMCA, above n 8.

52 See Steven Seidelberg 'US perspectives: TPP's Copyright Term Benefits US, Burdens Others' (23 March 2015) Intellectual Property Watch www.ip-watch.com.

53 Copyright Act 1994; TPP, above n 7.

54 Copyright Act 1994, ss 226, 226A–226E; WCT, above n 3.

the WCT, the Ministry of Economic Development (MED), which led the review process, had stated its intention to adopt a deliberate policy of taking into account the provisions of the WCT, while 'addressing particular concerns for New Zealand copyright stakeholders'.[55]

The new provisions expanded the prohibition formerly contained in s 226 of the Copyright Act ('copy-protection'), to cover not just unauthorised copying, but all the exclusive rights of the copyright owner and replaced the term 'copy-protection' with 'technological protection measure (TPM)'.[56] This term is described in the amended s 226, in very broad language, as 'any process, treatment, mechanism, device, or system that in the normal course of its operation prevents or inhibits the infringement of copyright in a TPM work'.[57] However a process, treatment, mechanism, device or system that controls access for non-infringing purposes such as geographic market segmentation is not a TPM.[58]

A TPM circumvention device is defined as a device or means that is primarily designed, produced or adapted for the purpose of enabling or facilitating the circumvention of a TPM and that has only limited commercially significant application, except for its use in circumventing a TPM.[59] Trafficking in circumvention devices, or information about circumvention devices, is prohibited if the trafficker knows or has reason to believe that the device, service or information will be, or is likely to be, used to infringe copyright in a TPM work.[60] Notably, because the definition of TPM does not include access control, anti-circumvention provisions have no bearing on devices that assist with access.

It is noteworthy that the actual *use* of a circumvention device is not prohibited (although if the device should be used to make infringing copies, that activity would of course be actionable by the copyright owner or licensed issuer of the work). Indeed, if a person has a device or means specifically designed to circumvent copy-protection in his or her possession and a licensed issuer of TPM works believes that the person is

55 Ministry of Economic Development *Digital Technology and the Copyright Act 1994 Position Paper* (December 2002).
56 Copyright Act 1994, s 226; Copyright (New Technologies) Amendment Act 2008, s 90.
57 Copyright Act 1994, s 226(a).
58 Section 226(b).
59 Section 226.
60 Sections 226A(1), (2) and (3).

intending to use the device to make infringing copies, then the issuer may seek an order for delivery up of the device in the same way as a copyright owner may apply for delivery up in relation to an infringing copy.[61]

The Copyright Act provides limited exceptions in that the rights of issuers of TPM works do not 'prevent or restrict the exercise of a permitted act' or:[62]

> the making, importing, sale, or letting for hire of a circumvention device to enable a qualified person to exercise a permitted act on behalf of a user of a TPM work, or to undertake encryption research.

'Qualified person'[63] means the librarian of a prescribed library,[64] the archivist of an archive[65] or an educational establishment.[66]

Finally, the current TPM provisions provide options for a person who wishes to exercise a permitted act but is prevented from doing so by a TPM – they are instructed to apply for assistance from the copyright owner or licensee. If the assistance is not forthcoming in a reasonable time, they may engage a qualified person to exercise the permitted act on their behalf.[67]

Contrary to MED's stated position, the anti-circumvention provisions place an extraordinary amount of power in the hands of issuers of TPM works at the expense of the public good side of the traditional copyright balance. Without the ability to obtain circumvention devices or information about how to circumvent a TPM, the average citizen has no practical way of making use of the provision that allows them to exercise a permitted act.[68] It seems impractical and complex, to say the least, for each person who wishes to exercise a permitted act (assuming that 'permitted act' is intended to refer to all activities described in Part 3 'Acts permitted in relation to copyright works')[69] to try to get assistance from the issuer and then to 'engage a qualified person to exercise the act on their behalf',[70] particularly when the categories of 'qualified person' are so restricted.[71]

61 Section 226B(3).
62 Section 226D.
63 Section 226D.
64 For 'prescribed library' see s 50(1).
65 For 'archive' see s 50(1).
66 For 'educational establishment' see s 2(1).
67 Sections 226E(1) and (2). Encryption researchers have an additional exemption: s 226E(3).
68 Section 226D.
69 Part 3; s 226D.
70 Section 226E(2)(b).
71 Section 226D.

Somewhat surprisingly, however, the anti-circumvention provisions presently in the Copyright Act have not, to date, been controversial – there has been no outcry by New Zealanders about the anti-trafficking provisions, for example. There have been no recorded disputes or judicial hearings. However, this situation may change, if and when the TPP Agreement Amendment Act 2016 (TPPA Act) comes into force.[72]

3.2 Proposed Amendments – The TPP Agreement Amendment Act 2016

On 12 May 2016, the Trans-Pacific Partnership Agreement Amendment Bill 2016,[73] described as 'an omnibus bill that amends New Zealand law as part of the implementation of the free trade agreement named the Trans-Pacific Partnership Agreement', was introduced to the New Zealand Parliament.[74] The Bill passed through all stages of the legislative process and is listed as the Trans-Pacific Partnership Agreement Amendment Act 2016 (the TPPA Act),[75] although it states that it will not come into force until the date on which the TPP enters into force for New Zealand.[76]

The New Zealand legislature moved swiftly to draft the TPPA Act, which proposes changes to the Copyright Act to comply with the requirements of the TPP.[77] Many of the proposed amendments are contentious and worthy of debate (but may have been suspended following the abandonment of the TPP and the uptake of the CPTPP in its place). This chapter, however, focuses on the provisions of the TPPA Act that were intended to introduce new anti-circumvention measures into the existing Copyright Act.[78] For simplification, from here on in this chapter these proposed anti-circumvention measures are referred to as the 'suspended TPM amendment provisions'.

72 At the date of writing, the Act is not in force.

73 Now the Trans-Pacific Partnership Agreement Amendment Act 2016 [TPPA Act] – which will come into force on 'the date the TPP Agreement enters into force for New Zealand': s 2.

74 Trans-Pacific Partnership Agreement Amendment Bill 2016 (133-3); 'Trans-Pacific Partnership Agreement Amendment Bill' New Zealand Parliament www.parliament.nz.

75 TPPA Act 2016; TPP, above n 7.

76 TPPA Act 2016, s 2. At the time of writing, the situation is not clear. One presumes that the TPP Act will be extensively amended to take account of the failure of the TPP to come into force and its recent replacement by the CPTPP (see text to n 7 above).

77 TPPA Act 2016; Copyright Act 1994; TPP, above n 7.

78 TPPA Act 2016, ss 38–43, (implementing the TPP, art 68, which is now suspended by the CPTPP); Copyright Act 1994; see also Jessica C Lai 'The Development of Performers' Rights in New Zealand: Lessons for the Asian Pacific Region?' in this volume.

Article 18.68 of the TPP required Parties to introduce strict restrictions on the trafficking of TPMs and the use of access control TPMs and to provide increased penalties for activities that are carried out in disregard of those restrictions.[79]

Parties were, however, permitted to provide exceptions from criminal and civil liability for breach of the TPM provisions by non-profit libraries, museums, archives, educational institutions and public non-commercial broadcasting entities, provided the activities were carried out in good faith and without knowledge that the activity was prohibited.[80] Finally, the TPP allowed parties to create limitations and exceptions to the new TPM provisions to enable 'non-infringing uses' but only where there was an actual or likely adverse impact on those non-infringing uses and after considering whether there were means of making non-infringing uses without circumventing TPMs.[81] Furthermore, additional exceptions were not permitted to undermine the protection of TPMs or the effectiveness of remedies against TPM circumventors.[82]

The circumvention activities that would be permitted for New Zealand users, if the TPPA Act had come into force in its unamended form,[83] are similar to but in some instances exceed those afforded to United States' copyright users by the DMCA itself (ignoring the rulemaking amendments to the DMCA).[84] Nevertheless, the suspended TPM amendment provisions in the TPPA Act are onerous and exceed the requirements of both the WCT and the TPP.[85]

The TPPA Act, in its current form, also proposes to extend the application of the TPM provisions to include TPM-protected performers' rights[86] (a performer will be treated as an issuer of a TPM work if their performance is fixed in a TPM sound recording).[87]

79 TPP, above n 7, art 18.68 paras 1(a) and (b). Note that the CPTPP suspends the implementation of the TPP, art 18.68.

80 Article 18.68 para 1(b). Confusingly, exceptions from civil liability for these institutions are required to be subject to a proviso that the activities 'are carried out in good faith without knowledge that the conduct is prohibited'.

81 Article 18.68 paras 4(a) and (b).

82 Article 18.68 para 4(c).

83 TPPA Act 2016; see also TPP above n 7.

84 DMCA, above n 8; see also Supasiripongchai, above n 42.

85 TPPA Act 2016; WCT, above n 3; TPP, above n 7; however the TPPA Act 2016 is likely to be extensively amended to take account of the CPTPP, see above n 76.

86 TPPA Act 2016, s 38, which proposes replacing the Copyright Act 1994, s 226.

87 TPPA Act 2016, s 40, which proposes amending the Copyright Act 1994, s 226B and inserting new s 226B(6). See further Lai, above n 78.

Finally, and more significantly, the TPPA Act in its current form exceeds the requirements of the TPP, as its provisions are clearly intended to apply to both *access* control and *copy* control TPMs.[88]

In order to ensure that the proposed new TPM regime will apply to both physical and online distribution, the definition of 'issuer of a TPM work' will be amended to include a copyright owner or a person licensed by the copyright owner who issued a copy to the public, or who communicated the TPM work to the public.[89]

The TPPA Act includes a new definition of an 'access control TPM' and defines 'TPM' as:[90]

> an access control TPM, or a technology, device, or component that, in the normal course of its operation, prevents or inhibits the infringement of copyright in a TPM work or of any specified performers' rights (other than a technology, device, or component that can, in the normal course of its operation, be circumvented accidentally).

Under the existing Copyright Act, one is not permitted to provide a circumvention device or service knowing that it will be used 'to infringe copyright' in a TPM work.[91] The suspended TPM amendment provisions (should they come into force) will explicitly allow providers of circumvention devices and of services to circumvent a TPM to make them available to users for non-infringing purposes.[92] This proposed change is a positive step, as it resolves the situation created by the original provision that had prevented the ordinary user from being able to access circumvention devices for non-infringing purposes. A similar provision is proposed that will permit a person to circumvent an access control TPM for non-infringing purposes.[93]

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88 TPPA Act 2016, s 38, which proposes replacing the Copyright Act 1994, s 226A and inserting new s 226AAA; TPP, above n 7.

89 TPPA Act 2016, s 38, which proposes replacing the Copyright Act 1994, s 226.

90 Proposed new s 226(1) of the Copyright Act 1994 (see TPPA Act 2016, s 38). The bracketed exception aligns with the definition of the word 'effective' in the TPP text, above n 7: both the DMCA, above n 8, and TPP, above n 7, limit their definitions of TPM as one that provides 'effective' control. Arguably, the TPPA Act 2016 is overly complex and in addition it is not clear whether the exception applies to the whole of the definition of TPM or only to the phrase 'specified performers' rights'.

91 Copyright Act 1994, s 226A.

92 TPPA Act 2016, s 39 which proposes replacing the Copyright Act 1994, s 226A with new ss 226A, 226AB and 226AC.

93 TPPA Act 2016, s 39 which proposes replacing the Copyright Act 1994, s 226A.

The TPPA Act in its current form proposes to insert new permitted exceptions into the Copyright Act that roughly align with the existing exceptions in the DMCA, though they are described in broader terms.[94] In addition, the TPPA Act proposes to explicitly permit circumvention of a TPM for acts permitted under Part 3 of the existing Copyright Act 1994 and for any act that 'otherwise does not infringe copyright in the TPM work and does not infringe any specified performers' rights in the TPM work'.[95]

The TPPA Act will permit circumvention of a TPM that controls geographic market segmentation.[96] In this regard, New Zealand has chosen not to follow the route of the United States, the United Kingdom and Australia, where producers such as Sony have relied on anti-circumvention provisions in copyright legislation to prevent the circumvention of equipment fitted with regional zone coding TPMs, despite there being no copyright infringement.[97] The New Zealand Government, however, considers that this prohibition would be inconsistent with its parallel importing policy.[98]

The proposed TPPA Act in its current form provides for the making of regulations for new exceptions and the modification or removal of any existing TPM exceptions, but does not describe any mandatory considerations, the review process or the timing.[99] These provisions will be reinforced by minor amendments to s 234 of the Copyright Act 1994, which already provides for the Governor-General, by Order in Council, to make regulations for various purposes.[100] The Select Committee considering the TPP Amendment Bill stated:[101]

94 TPPA Act 2016, s 41 which proposes inserting new ss 226F to 226L into the Copyright Act 1994; Copyright Act 1994; DMCA, above n 8.

95 TPPA Act 2016, s 41, which proposes inserting new s 226E into the Copyright Act 1994.

96 TPPA Act 2016, s 41, which proposes inserting new s 226F into the Copyright Act 1994.

97 For example, in Australia see *Kabushiki Kaisha Sony Computer* Entertainment v Stevens (2003) 57 IPR 161.

98 TPPA Act 2016; see 'Parallel Importing in New Zealand' (22 September 2016) Ministry of Business, Innovation and Employment www.mbie.govt.nz. Other provisions include circumvention by the Crown for the purposes of law enforcement and national security, for encryption research, circumvention of embedded software in relation to goods and services (thereby enabling consumer self-help) provided the circumvention does not infringe copyright and enabling circumvention of TPM-protected computer programs that are no longer supported by a remote server: see TPPA Act 2016, s 39, which proposes inserting new ss 226G, 226H and 226I into the Copyright Act 1994.

99 TPPA Act 2016, s 44, which proposes inserting new ss 226K and 226L into the Copyright Act 1994.

100 Copyright Act 1994, s 234; see new ss 234QA and 226QB (Trans-Pacific Partnership Agreement Amendment Bill 2016 (133-3), cl 44).

101 Trans-Pacific Partnership Amendment Bill (133-2) (select committee report) at 2.

> This regulation-making power would future-proof the regime as technology can change very quickly. We recommend amending section 234(c) to include two factors that the Minister must consider when recommending regulations under section 234(1)(qa) and (qb). Those factors are the proposed effect on the dissemination of works and the use of non-infringing works. We also recommend inserting section 234(6) to ensure that regulations made under this power would be subject to confirmation by Parliament. This would mean that the regulations would have a temporary effect unless confirmed by Parliament through a confirmation bill.

Section 234 of the Copyright Act, with the amendments proposed by the TPPA Act, may well be intended to approximate to the rulemaking provision contained in the DMCA.[102] Clearly, however, a *power* to make regulations, which has no specific timeline attached, is a much weaker regulatory mechanism than the *requirement* to review every three years that is mandated in the DMCA.[103] Should the TPPA Act come into force in its current form, thereby introducing TPM access control provisions into New Zealand copyright law, it is essential to re-evaluate the existing TPM exemptions and to equate the abilities of New Zealand citizens to circumvent certain TPM access controls with those permitted by the rulemaking provisions to United States citizens.[104]

In the following Part, I examine the existing permanent exceptions to the anti-circumvention provisions set out in the DMCA and the outcome of the most recent rulemaking, which has considerably extended those exceptions.[105]

4 United States Anti-Circumvention Law

The United States gave domestic effect to the WCT by means of the DMCA.[106] The DMCA, however, goes far beyond the requirements of the WCT (which requires only that countries provide 'adequate

102 Copyright Act 1994, s 234; DMCA, above n 8.
103 DMCA, above n 8.
104 TPPA Act 2016; see Table in Part 4.1 of this chapter for a comparison between United States Copyright Office *Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention* (8 October 2015) [2015 Rules] and the proposed changes to be made by the TPPA Act 2016, should it come into force.
105 DMCA, above n 8; 2015 Rules, above n 104.
106 DMCA, above n 8, § 1201; WCT, above n 3.

protection' against the circumvention of TPMs),[107] in that it prohibits both the act of circumventing technological access controls and also that of manufacturing or distributing (perhaps even creating and making available) technologies whose primary use is to enable circumvention of technological protection systems.[108] Pamela Samuelson warns that the DMCA anti-circumvention provisions contain language very close to that 'rejected by the WCT's Diplomatic conference as overbroad and detrimental to the public domain'.[109] Since its inception, the DMCA's anti-circumvention provisions have been criticised as 'fiendishly complicated',[110] over-broad and unclear, 'creating new rights that are expansive and unprecedented',[111] thereby offering too much protection to authors and publishers at the expense of users of copyright works and constituting a threat to the public domain.[112] In particular, the DMCA prohibits circumventing a TPM that prevents access to a work – which is not a right protected by traditional copyright law.[113] The 'rights' of a copyright owner include copying a work, issuing it to the public, playing, showing or communicating a work to the public, or making an adaptation of a work.[114] They do not include a right to restrict access to the work per se (that is, once it has been released or communicated to the public).

Nevertheless, the DMCA does include certain permanent exceptions to each of the prohibitions.[115] Further, the act of circumventing a TPM that protects the rights of a copyright owner in a work or part of a work ('copy control') is not explicitly prohibited by the DMCA.[116] The reason for this different treatment is, in part, because Congress believed that to prohibit the conduct of circumventing copy controls would penalise certain non-infringing conduct, such as fair use. Indeed, the DMCA affirms that fair use and other existing defences to copyright infringement

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107 WCT, above n 3, art 11.

108 Pamela Samuelson 'Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised' (1999) 14(2) Berkeley Tech L J 519 at 521.

109 Pamela Samuelson 'The US Digital Agenda at WIPO' (1997) 37 Va J Intl L 369 at 413 (cited in Burk 'Anticircumvention Misuse', above n 24, at 1103).

110 David Nimmer 'Riff on Fair Use in the Digital Millennium Copyright Act' (2000) 148(3) U Pa L Rev 673 at 675.

111 Burk 'Anticircumvention Misuse', above n 24, at 1103.

112 See Samuelson, above n 108, at 519.

113 DMCA, above n 8, § 1201(a)(1)(A).

114 Copyright Act 1994, s 16.

115 DMCA, § 1201.

116 DMCA, above n 8.

will not be affected by the anti-circumvention provision.[117] (Notably, however, in several decisions the United States courts have denied that fair use is an adequate rationale for circumvention of a TPM.)[118]

Other specific exceptions to the anti-circumvention provision in the DMCA are non-profit libraries that are open to the public, archives and educational institutions (for the limited purpose of making a decision whether or not to purchase a copy of the digital work for that institution's non-infringing purposes);[119] law enforcement, intelligence and other government activities;[120] the reverse engineering of a lawfully acquired computer program by the owner for the purpose of achieving interoperability with other programs;[121] encryption research;[122] protection of minors from internet materials (for example, safe search);[123] removal of capacity to collect or disseminate personally identifying information;[124] and security testing.[125]

However, there is another route by which the permanent exemptions in the DMCA may be expanded to include other classes of works and users. This route is the 'Section 1201 Rulemaking'.[126]

4.1 Background to the DMCA Rulemaking

In the face of widespread opposition to the DMCA's anti-circumvention provisions, the 1998 Report of the House Committee on Commerce on the DMCA[127] recommended that certain exceptions should be provided that would continue for three years from the coming into force of the provisions and that would ensure that the public would have continued ability to engage in non-infringing use of copyrighted works, such as fair use.[128]

117 DMCA, above n 8, § 1201(c)(1).
118 See *Universal City Studios Inc v Reimerdes* 111F Supp 2d 346 (SDNY 2000), affd 273 F 3d 429 (2d Cir 2001) at 457–458; and *MDY Indus LLC v Blizzard Entertainment Inc* 629 F 3d 928 (9th Cir 2010), 948–950.
119 DMCA, above n 8, § 1201(d).
120 § 1201(e).
121 § 1201(f).
122 § 1201(g).
123 § 1201(d).
124 § 1201(i).
125 § 1201(j).
126 § 1201.
127 Digital Millennium Copyright Act of 1998 (105-551) (Report of the Committee of Commerce) at 36.
128 Despite the fact that it is unclear whether DMCA, above n 8, § 1201 would in fact allow the development of technologies for such non-infringing use.

Congress therefore directed the Register of Copyrights to conduct a rulemaking proceeding, soliciting public comment and consulting with the Assistant Secretary for Communications and Information, during the two years between the enactment of the DMCA, on 28 October 1998, and the effective date of the anti-circumvention provisions. The specific areas to be examined by the Register are set out in the DMCA:[129]

i. the availability for use of copyrighted works;
ii. the availability for use of works for non-profit archival, preservation and educational purposes;
iii. the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship or research;
iv. the effect of the circumvention of technological measures on the market for or value of copyrighted works; and
v. such other factors as the Librarian considers appropriate.

After reviewing all submissions, the Register concluded that a case had been made for granting exemptions in respect of only two classes of works, each of which, she explained, satisfied the statutory requirements that exceptions be granted only to 'particular classes of copyrighted works' and only where 'genuine harm to the ability to engage in non-infringing activity has been demonstrated'.[130] These classes were:

> compilations, consisting of lists of websites blocked by filtering software applications; and
>
> literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsoleteness.[131]

Every three years the Register is required by the legislation to make a determination on potential new exemptions, followed by recommendations to the Librarian of Congress (the Librarian).[132]

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129 §§ 1201(a)(1)(C)(i)–(v).

130 United States Copyright Office, Library of Congress 'Digital Millennium Copyright Act: Circumvention of copyright protection systems for access control technologies: exemption to prohibition' (27 October 2000) 65(209) *Federal Register* 64555 at 64563.

131 At 64562.

132 The Librarian is senior to the Copyright Register and as such is required to approve or not allow the Register's recommendations in regard to rulemaking.

The most recent (sixth) rulemaking proceeding was completed in October 2015 and was described by the Register as 'the most extensive and wide-ranging to date'.[133]

The exemptions granted by the 2015 rulemaking are summarised in the table below, which also shows proposed changes to be made to the Copyright Act 1994 by the TPPA Amendment Act (should it come into force):

Table 1: Summary of proposed changes to the Copyright Act 1994.

Exemptions granted in the Library of Congress DMCA 1201 Rules[1] (permitting circumvention of access control TPMs for non-infringing uses of copyrighted works)	TPPA Amendment Act 2016 (NZ) proposed comparable provisions to be introduced into the Copyright Act 1994[2] (permitting circumvention of access control TPMs for non-copyright infringing uses and non-performers' rights infringing uses)
Literary works distributed electronically (i.e. ebooks), for use with assistive technologies for persons who are blind, visually impaired or have print disabilities.	
Computer programs that operate the following types of devices, to allow connection of a used device to an alternative wireless network ('unlocking'): Cell phones, tablets, mobile hotspots, wearable devices (e.g. smartwatches).	Circumventing a TPM work that is a computer program embedded in a machine or device that restricts the use of goods or services [proposed new s 226I].
Computer programs that operate the following types of devices, to allow the device to interoperate with or to remove software applications ('jailbreaking'): Smartphones, tablets and other all-purpose mobile computing devices, smart TVs.	
Computer programs that control motorised land vehicles, including farm equipment, for purposes of diagnosis, repair and modification of the vehicle (effective in 12 months).	

133 The 2015 Recommendation of the Register of Copyrights to the Librarian of Congress comprised 400 pages: 2015 Rules, above n 104.

Exemptions granted in the Library of Congress DMCA 1201 Rules[1] (permitting circumvention of access control TPMs for non-infringing uses of copyrighted works)	**TPPA Amendment Act 2016 (NZ) proposed comparable provisions to be introduced into the Copyright Act 1994**[2] (permitting circumvention of access control TPMs for non-copyright infringing uses and non-performers' rights infringing uses)
Computer programs that operate the following devices and machines, for purposes of good-faith security research (effective in 12 months or, for voting machines, immediately): Devices and machines primarily designed for use by individual consumers, including voting machines, motorised land vehicles, medical devices designed for implantation in patients and corresponding personal monitoring systems.	
Video games for which outside server support has been discontinued, to allow individual play by gamers and preservation of games by libraries, archives and museums (as well as necessary jailbreaking of console computer code for preservation uses only).	Enabling functionality of computer programs that are no longer supported by a remote server (provided that the use of the goods or services does not infringe copyright in the program or any specified performers' rights) [new s 226J].
Computer programs that operate 3D printers, to allow use of alternative feedstock.	
Literary works consisting of compilations of data generated by implanted medical devices and corresponding personal monitoring systems.	
Motion pictures (including television programs and videos): For educational uses by college and university faculty and students, K–12 instructors and students, in massive open online courses (MOOCs) and in digital and literacy programs offered by libraries, museums and other non-profits; for multimedia ebooks offering film analysis; for uses in documentary films; for uses in non-commercial videos.	

[1] United States Copyright Office, Library of Congress 'Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies' (28 October 2015) 80(208) *Federal Register* 65944.

[2] TPPA Act 2016, now likely to be substantially amended; see above n 76.

Source: Author's summary.

The rigour of the rulemaking process is illustrated by the fact that the Register declined to recommend six proposed classes of works – for either 'lack of legal and factual support for exemption' (audiovisual works for space shifting and format shifting, computer programs in video game consoles for jailbreaking purposes) or 'because incomplete record presented' (ebooks for space shifting and format shifting, computer programs that operate ebooks, for jailbreaking purposes, computer programs that operate 'consumer machines', music recording software that is no longer supported to allow continued use of the software).[134]

There is no doubt that the rulemaking process is lengthy, complex and expensive. The 2015 Register's Recommendation included comments and criticisms about the time-consuming administrative process noting that:[135]

> During the course of the rulemaking, the Office received nearly 40,000 comments. The written submissions were followed by seven days of public hearings in Los Angeles and Washington, D.C., at which the Office received testimony from sixty-three witnesses. [footnotes omitted]

Furthermore, there are flaws in the legislative requirements with which the Register must comply. For instance, the rules are restricted to cases of direct circumvention by a specified class of user – this means the Librarian may not allow rules to include the possibility of third party assistance with circumvention of a TPM work.[136] As technology becomes more complex and less accessible by a layperson, this restriction is problematic and anti-competitive. A simple example is that the law in its current form does not permit car mechanics to carry out repairs on vehicles if the fault to be addressed requires circumvention of a TPM.

Each rule is very specific, as exemplified by the 2015 rule for video games,[137] which is clearly designed for the expert in the field, whereas the average citizen would likely find it almost incomprehensible and therefore unusable.

134 United States Copyright Office *Understanding the Section 1201 Rulemaking* (28 October 2015) at 5.
135 2015 Rules, above n 104.
136 DMCA, above n 8, § 1201(a)(1)(E).
137 Library of Congress, United States Copyright Office, above n 133, at 65963.

The rulemaking process itself is controversial and potentially inconsistent. For example, in 2010 the Register recommended against renewing the exception for text-to-speech software, even though no opposition to the renewal had been received. This recommendation was, however, overruled by the Librarian.[138] Even more controversially, in 2012, the Register refused to renew the exemption that had been in place since the 2006 rulemaking permitting the unlocking of mobile phones by consumers to allow them to change wireless network carriers without permission from the original carrier linked to their device.[139] This refusal proved to be highly contentious and an extraordinary numbers of complaints from consumers persuaded Congress to introduce legislation to allow the unlocking of mobile phones.[140]

The Register's Recommendation in 2015[141] also raised concerns in that, while some exceptions sought related to the ability to access and make non-infringing uses of works such as movies and video games (a purpose that was foreseen by Congress), many other proposals for exceptions related to access for functionality, not creative content:[142]

> Many of the issues that were raised in this proceeding would be more properly debated by Congress or the agencies with primary jurisdiction in the relevant areas. Indeed, the present record indicates that different parts of the Administration have varying views on the wisdom of permitting circumvention for security research or to enable modification of motor vehicles … . The Register appreciates and agrees with NTIA's view that such concerns have at best a very tenuous nexus to copyright protection.

Two more general legislative challenges to the DMCA were introduced to the Senate in 2015: the Unlocking Technology Act of 2015 (intended to make the rulemaking process redundant)[143] and the Breaking Down

138 The Register has very little autonomy as her decisions are subject to review by the Library of Congress – for arguments that this is unsatisfactory, see, for example, *US Copyright Office: Its Functions and Resources* Serial No. 114-4, Hearing, 26 February 2015 at 35.

139 See Recommendation of the Register of Copyrights 'Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention' October 2012 at 81.

140 Unlocking Consumer Choice and Wireless Competition Act 2014 Pub L No. 113-114, 128 Stat 1751 (2014).

141 2015 Rules, above n 104.

142 At 2–3.

143 Unlocking Technology Act of 2015, HR 1587, 114th Cong (2015). Significantly, for this chapter, the Bill also 'directs the President to ensure that applicable bilateral and multilateral trade agreements are modified to be consistent with this Act' at § 4.

Barriers to Innovation Act of 2015 (intended to improve the rulemaking process and expand existing statutory exceptions in the DMCA).[144] However, neither has progressed since April 2015.[145]

Although wary of the DMCA in principle, even its strongest critics concede that the three-yearly review process, which culminates in specific exceptions to the anti-circumvention provisions, has proved to be a positive move towards providing a balance between the public interest in cultural and educational matters and the economic interests of authors and publishers of digital copyright works.[146]

For the countries of the Asian Pacific region, however, the introduction of a similar three-yearly rulemaking procedure is impracticable. These countries are mainly net copyright importers with fragile economies. They do not have the resources, expertise or indeed the political will to introduce such a demanding procedure into their copyright laws. While New Zealand (similarly to at least some other Asian Pacific countries) includes in its copyright legislation a ministerial power to make new regulations as required, there is no formal requirement for this to be actioned.[147] Other jurisdictions in the Asian Pacific region that have already introduced copy control and access control regulation into their copyright laws in order to enter into FTAs with the United States include Australia,[148] Singapore[149] and South Korea.[150] None of these jurisdictions included a compulsory rulemaking process in their copyright law. Instead, Australia and Singapore include a 'power to make regulations', while South Korea does not appear to include any regulation-making possibilities.[151]

144 Breaking Down Barriers to Innovation Act of 2015, S 990, 114th Cong (2015).
145 There is also an ongoing review of copyright in the United States, which began in 2013 and has generated much public interest. Although the review addresses many issues, including rulemaking, obstructive costs, antiquated search and record systems, lack of funding, structure and role and so on, the review has been aptly described as 'more talk than action': see Kerry Sheehan 'This Year in U.S. Copyright Policy: 2016 in Review' (2016) Electronic Frontier Foundation www.eff.org.
146 See Pamela Samuelson 'Towards a New Deal for Copyright in the Information Age' (2002) 100 Mich Law Rev 1488 at 1499 and Joseph P Liu 'Regulatory Copyright' (2004) 83(1) NCL Rev 87 at 123.
147 Copyright Act 1994, s 234.
148 Copyright Act 1968 (Cth), s 116AN.
149 Copyright Act 1987 (Singapore), s 261B.
150 Copyright Act 2006 (South Korea), art 2(28).
151 For Australia see the Copyright Act 1968 (Cth), s 249. For Singapore, see a power to make regulations in connection with TPM regulation: Copyright Act 1987 (Singapore), s 261D(2).

Therefore, the remaining Asian Pacific nations must ideally 'get it right' in their domestic copyright laws from the outset and should not automatically agree to United States demands to strengthen their laws to comply with the DMCA.[152]

5 Summary and Conclusion

There is no doubt that TPMs present a challenge to traditional copyright laws and policies. For copyright owners, the TPM provides a practical alternative to copyright laws that fail to address the vulnerability of digital copyright works to large-scale infringements. Conversely, for users of copyright works, TPMs facilitate avoidance of fair use and fair dealing provisions and encourage eternal copyright, by preventing works falling into the public domain. Although recent amendments to copyright laws appear to partially address this challenge by allowing circumvention of TPMs in strictly prescribed situations, in practice the complexity of these amendments means they are unlikely to provide any real support to the average user of a TPM-protected work. As is typical of an international treaty, the requirements of the WCT are broad; for example, there is no definition of the terms 'adequate legal protection' or 'effective remedies'.[153] Furthermore, the manner of implementation of the WCT in member countries is not prescribed. Commonalities, however, are that, while certain exceptions to the *use* of circumvention devices are generally provided in domestic copyright laws, the *trafficking* (variously described as advertising, publishing or sale) of circumvention devices by third parties is prohibited. The lack of exceptions for trafficking is a serious defect as, in practice, it limits the ability to take advantage of the exceptions for use of circumvention devices to technical experts in the field.[154] Copyright user organisations, such as the Electronic Frontier Foundation, argue that anti-circumvention laws have caused 'substantial harm to consumers, scientific research, competition and technological innovation'.[155] Moreover, the Electronic Frontier Foundation claims, the harms to developing countries

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152 DMCA, above n 8.

153 WCT, above n 3, art 11.

154 Supasiripongchai, above n 42, at 267.

155 'Electronic Frontier Foundation Briefing Paper on Technological Protection Measures Prepared for the WIPO Inter-Sessional Intergovernmental Meeting on the Development Agenda Proposal & Fourth Session of the Permanent Committee on Cooperation Related to Intellectual Property Development April 11–15, 2005' Electronic Frontier Foundation www.eff.org at 1.

that are forced to incorporate anti-circumvention laws into their copyright law 'will result in a transfer of wealth from domestic economies to foreign rights holders, without any guarantee of reciprocal investment in the local cultural economy'.[156]

As a net exporter of copyright works, in 1998 the United States addressed the claims of copyright producers by providing strict anti-circumvention measures in the DMCA, with limited support for the rights of users to circumvent TPMs. Public outcry led to the inclusion of the rulemaking provision in the DMCA, which, despite its many flaws, has achieved some moderation of the anti-circumvention measures for selected users. However, when entering into FTAs, the United States tends to require partner countries to introduce anti-circumvention measures that are equivalent to the provisions of the DMCA, neglecting to mention any moderation of those provisions that may have been provided by the current rulemaking. For this reason (inter alia of course), the countries of the Asian Pacific region, all of which are mainly copyright importers, must be cautious when entering into FTAs with the United States.

New Zealand, as a typical example, was preparing to pass into law the TPPA Act, which complies with United States requirements for all TPP Member States and includes more complex anti-circumvention laws in the proposed amendments to the Copyright Act 1994. Although the current TPPA Act attempts to address and affirm many of the rights of users of copyright works by permitting circumvention of TPMs in a plethora of circumstances, there remain many problems. These include that the legislation is complex and unlikely to be understood by the average citizen, that there are few powerful lobby groups of users in New Zealand and that there is a lack of political interest in copyright law (since as a net importer the benefits to the economy are less visible).[157] Thus, although the TPPA Act provides that (inter alia) the circumvention measures can be permitted by regulations[158] made on the recommendation of the Minister 'after consultation with persons who will be substantially affected by the

156 At 1.

157 That is not to say there are no benefits – education (which leads directly to economic improvements) being one of the main beneficiaries of copyright imports.

158 TPPA Act 2016, ss 41 (inserting new s 226L into the Copyright Act 1994) and 43 (amending Copyright Act 1994, s 234) (not yet in force).

regulations',[159] this provision is weak and does not have the reassurance provided by the compulsory rulemaking provision in the DMCA. In short, a *power* to introduce regulations is not the same as a *requirement* to review.

Thanks to the detailed rulemaking provision in the DMCA, intended to allow 'lawmakers to amend the law in a faster and more efficient manner than the traditional legislative process or court proceedings',[160] the United States, whose fair use provisions have always been much more extensive than the fair dealing provisions in New Zealand copyright law, may further overtake New Zealand in its concessions to educational and cultural users of copyright works in the digital age.

Finally, with the foregoing warnings in mind, I recommend that although the draft Asian Pacific Copyright Code provides that authors have the rights 'granted to them by relevant international instruments' (thereby incorporating art 11 of the WCT),[161] specific amendments to the Code should be made, as permitted by Clause D2 of the draft Code,[162] to ensure the users of copyright works in the Asian Pacific region will not be disadvantaged by TPM anti-circumvention laws – particularly those regulating access control TPMs.

159 Section 43 (amending Copyright Act 1994, s 234) (not yet in force).
160 Koberidze, above n 24, at 214–215.
161 See Sterling, above n 2, at cl C1; WCT, above n 3.
162 Sterling, above n 2, at cl D2.

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