

ENFORCEMENT OF MEDIA PIRACY: AMERICA’S HARDLINE APPROACH VERSUS JAPAN’S LACKADAISICAL APPROACH AND THE FUTURE OF ENFORCEMENT IN JAPAN UNDER THE TRANS-PACIFIC PARTNERSHIP

INTRODUCTION

Copyright enforcement has dramatically changed in the last decade, be it within the United States or abroad. This enforcement has been elevated to the forefront of the minds of legislative bodies, and the laws are constantly changing. The United States stands as the figurehead of copyright enforcement, the “big brother,” in a world of rapidly advancing Internet infrastructure. Acting as the big brother, its views and techniques have begun to weasel their way into the infrastructures of nations worldwide. Japan is the “little brother,” a country affected heavily by America’s big brother attitude towards infringement. The two countries stand on different sides of a wide spectrum, with America on the strict side of enforcement, while Japan has been historically laxer with its enforcement techniques.

America practices a hardline approach, one that looks to punish all those who infringe on the copyright of others, whereas Japan possesses a relatively lackluster enforcement history, despite the criminalization of infringement and the promise of stricter enforcement. Notwithstanding these promises, Japan has been lackadaisical in its enforcement, but that may change soon. With the passing of the Trans-Pacific Partnership (TPP), the future of Japan’s copyright enforcement may soon mimic that of the United States.

Part I of this Note will provide the common definitions in relation to piracy. Part II will trace the history of piracy and file-sharing amongst both countries. Part III will discuss the current legal status of file-sharing in Japan and its enforcement techniques. Part IV will discuss the current legal status in the United States and the enforcement techniques employed. Part V will introduce the Trans-Pacific Partnership. Part VI will highlight common criticisms of the agreement within both countries. Part VII will illustrate the copyright requirements to which Japan must adhere to under the new agreement. Finally, Part VIII will explore the future of file-sharing enforcement in Japan. Overall this Note will examine the future of copyright enforcement in Japan under the looming Trans Pacific Partnership Agreement.

I. Definitions

This section will cover the basic definitions of common terms in the realm of copyright infringement. As later sections cover, Japan’s

requirements and duties under the TPP will come directly from the Agreement's text.

Initially, a basic understanding of the treaties and declarations that have contributed a large part in the formulation of the Trans-Pacific Partnership and the backbones that both Japan and America have based their own copyright enforcement policies on is necessary. The Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention")¹ is an 1886 agreement that recognized² the importance of protecting authors and their works, justifying its application using three basic principles.³

The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement⁴ provides for "minimum standards of protection provided to each member nation,"⁵ "domestic procedures and remedies for the enforcement of intellectual property rights,"⁶ and for "dispute settlement . . . between WTO members."⁷ The agreement also includes provisions regarding enforcement of intellectual property rights⁸ and dispute

1. *Summary of the Berne Convention for the Protection of Literary and Artistic Works*, WIPO, http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Feb. 4, 2016).

2. The Berne Convention required that countries recognize certain rights, including: the right to translate, the right to make adaptations and arrangements of the work, the right to perform in public dramatic, dramatico-musical and musical works, the right to recite literary works in public, the right to communicate to the public the performance of such works, the right to broadcast, the right to make reproductions, and the right to use the work as a basis for an audiovisual work. *Id.*

3. The three basic principles are: (a) Works originating in one of the Contracting States must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals; (b) Protection must not be conditional upon compliance with any formality; and (c) Protection is independent of the existence of protection in the country of origin of the work. "If, however, a Contracting State provides for a longer term of protection than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases." *Id.* The Convention was the first of its kind that required countries to treat foreign national copyright holders as legally equal to its own domestic copyright holders. *See generally id.* It was also the first that established six guaranteed rights for copyright holders: translation, reproduction, public performance, adaption, paternity, and integrity. *Id.*

4. *Overview: the TRIPS Agreement*, WTO, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Feb. 2, 2016).

5. *Id.*

6. Generally, the agreement only "lays down certain general principles applicable to all Intellectual Property Right enforcement procedures." *Id.*

7. *Id.*

8. It highlights the procedures and remedies that must be available so that right holders can effectively enforce their rights. *Id.*

settlement.⁹ It also “lays down certain general principles applicable to all IPR (“Intellectual Property Right”) enforcement procedures” that each member must adhere to in its domestic enforcement procedures and remedies.¹⁰

The World Intellectual Property Organization (WIPO) Copyright Treaty¹¹ is a special agreement under the terms of the Berne Convention which deals with the protection of works and the rights of their authors in the digital environment. The treaty mentions two specific subject matters which must be protected and includes three additional rights granted to authors¹² not addressed in the Berne Convention.

In addition to the various treaties and agreements that are the essential building blocks of the TPP, some basic terminology is necessary to understand copyright infringement. Intellectual property “refers to the creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.”¹³ There are five common types of intellectual property.¹⁴

The five common types are copyright, patent, trademark, industrial design, and geographical indications. Copyright is the “legal term used to

9. The Agreement makes disputes between WTO Members about the respect of the TRIPS obligations subject to the WTO's dispute settlement procedures. *Id.*

10. *Id.*

11. In addition to the rights recognized by the Berne Convention, authors are granted certain economic rights. The Treaty also deals with two subject matters to be protected by copyright: “(i) computer programs, whatever the mode or form of their expression; and (ii) compilations of data or other material (“databases”).” *Summary of the WIPO Copyright Treaty (WCT) (1996)*, WIPO, http://www.wipo.int/treaties/en/ip/wct/summary_wct.html (last visited Jan. 10, 2016).

12. The WCT grants three additional rights: (1) the right of distribution (“the right to authorize the making available to the public of the original and copies of a work through sale or other transfer of ownership”), (2) the right of rental (“the right to authorize commercial rental to the public of the original and copies of three kinds of works: (i) computer programs, (ii) cinematographic works, (iii) works embodied in phonograms as determined in the national law of Contracting Parties”), and (3) the right of communication to the public (“the right to authorize any communication to the public”). *Id.*

13. Intellectual Property enables people to “earn recognition or financial benefit from what they invent.” *What is Intellectual Property?*, WIPO, <http://www.wipo.int/about-ip/en/> (last visited Feb. 5, 2016).

14. The five common types are: Copyrights, Patents, Trademarks, Industrial designs, and Geographical Indications. *Types of Intellectual Property*, WIPO, <http://www.wipo.int/about-ip/en/index.html#ip> (last visited Feb. 6, 2016).

describe the rights that creators have over their literary and artistic works.”¹⁵ A patent¹⁶ “is an exclusive right granted for an invention.” A trademark¹⁷ “is a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises.”¹⁸ An industrial design¹⁹ “constitutes the ornamental or aesthetic aspect of an article.” Geographical indications²⁰ “are signs used on goods that have a specific geographical origin and possess qualities, a reputation, or characteristics that are essentially attributable to that place of origin.”²¹

Copyright infringement “is the unauthorized or unlicensed copying of a work subject to copyright.”²² Piracy is the popular term used to describe

15. *What is Copyright?*, WIPO, <http://www.wipo.int/copyright/en/#copyright> (last visited Feb. 5, 2016). Works covered by copyright “range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings.” *Id.* Simply put, “a copyright is a form of legal protection automatically provided to the authors or creators of original works.” Ashley Dugger, *What is Copyright Infringement?-Understanding Copyright Law*, STUDY.COM, <http://study.com/academy/lesson/what-is-copyright-infringement-understanding-copyright-law.html> (last visited Feb. 11, 2016). “Copyright protection only applies to tangible forms of expression,” not ideas. *Id.* “Copyright protection automatically attaches once an original work is expressed in tangible form” (unregistered copyright). *Id.* “An unregistered copyright allows an author the exclusive right to reproduce, sell and perform his or her copyrighted work.” *Id.*

16. “Generally, a patent provides the patent owner with the right to decide how—or whether—the invention can be used by others. In exchange for this right, the patent owner makes technical information about the invention publicly available in the published patent document.” *See supra* note 13.

17. *Id.*

18. *Id.*

19. “A design may consist of three-dimensional features, such as the shape or surface of an article, or of two-dimensional features, such as patterns, lines, or color.” *Id.*

20. “Most commonly, a geographical indication includes the name of the place of origin of the goods.” *Id.*

21. *Id.*

22. *Copyright Infringement*, TECH LAW JOURNAL, <http://www.techlawjournal.com/glossary/legal/infringement.asp> (last visited Nov. 1, 2015). The 1996 WIPO Copyright Treaty makes clear that computer programs and databases are protected by copyright, and the treaty “recognizes that the transmission of works over the Internet and similar networks is an exclusive right within the scope of copyright, originally held by the creator.” It also “categorizes as copyright infringements both (i) the circumvention of technological protection measures attached to works” and (ii) “the removal from a work of embedded rights management information.” *International Copyright Basics*, RIGHTS DIRECT, <http://www.rightsdirect.com/international-copyright-basics/> (last visited Feb. 10, 2016). “The concept of infringement arises in patent, copyright, and/or trademark law. When someone copies software without permission of the copyright or patent owner, or uses a trademark without the permission of the trademark owner, he or she has committed an act of infringement, that is, he or she has infringed on the rights of the copyright, patent, and/or trademark owner.” *Glossary of Anti-Piracy and Copyright Terms*, THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION, <http://www.siiia.net/Divisions/IP-Protection-Services/About/Glossary-of-Anti-Piracy-and-Copyright-Terms> (last visited Feb. 10, 2016).

the reproduction and distribution of copyright-protected material, yet “national copyright legislations generally do not include a legal definition.”²³ An internationally agreed upon definition of “piracy” is non-existent, but the definition outlined in TRIPS may be the closest to an “agreed-upon” definition.²⁴

“File-sharing is the public or private sharing of computer data or space in a network with various levels of access privilege.”²⁵ Peer-to-peer is a common form of file-sharing and is a “type of computer network that uses diverse connectivity between participants (peers) in a network and the cumulative bandwidth of network participants rather than conventional centralized resources where a relatively low number of servers provide the core value to a service or application.”²⁶

One of the most popular peer-to-peer sharing services is BitTorrent. “BitTorrent is a peer-to-peer file sharing protocol designed to reduce the bandwidth²⁷ required to transfer files by distributing the transfers across

23. *What is Piracy?*, UNESCO, http://webarchive.unesco.org/20161022102714/http://portal.unesco.org/culture/en/ev.php-URL_ID=39397&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Oct. 15, 2017).

24. Pirated copyright goods shall mean any goods which are copies made without the consent of the right-holder or person duly authorized by the right-holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 51, n. 141, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), available at https://www.wto.org/english/docs_e/legal_e/27-trips.pdf. One possible reason that an internationally agreed upon definition does not exist could be, as mentioned before, that the term piracy is merely a common word, historically understood, yet modernized. There has never been a definition in relation to copyright infringement, because the word itself is easily understood and there need not be an elaboration of its definition.

25. File sharing allows many people “to use the same file or files by some combination of being able to read or view it, write to or modify it, copy it, or print it.” Margaret Rouse, *File-Sharing*, TECHTARGET, <http://searchmobilecomputing.techtarget.com/definition/file-sharing> (last visited Feb. 8, 2016). File-sharing is the commonly used term, yet file-copying may be a more accurate term. When files are shared between computers or networks, the original copy of the file remains on the host system.

26. R. Martin, *Peer-to-Peer ≠ Piracy*, available at <http://www.cs.rutgers.edu/~rmartin/teaching/fall08/cs552/position-papers/023-01.pdf> (last visited Nov. 5, 2015).

27. Bandwidth is the “maximum data transfer rate of a network or Internet connection” which measures “how much data can be sent over a specific connection in a given amount of time.” *Bandwidth*, TECHTERMS, <http://techterms.com/definition/bandwidth> (last visited Feb. 10, 2016).

multiple systems, which lessens the bandwidth used by each computer.”²⁸ When using BitTorrent, users download a torrent, which is “a file sent via the BitTorrent protocol”²⁹ and is referred to as such because during the transmission of a file, it is incomplete.³⁰

Lastly, an Internet Service Provider (ISP) is a company that provides individuals and companies access to the Internet and other related services,³¹ and an Internet Protocol Address (IP or IP Address) is the unique address of a connected device to an IP network (TCP/IP network).³²

When visualizing bandwidth, it may help to think of a network connection as a tube and each bit of data as a grain of sand. If you pour a large amount of sand into a skinny tube, it will take a long time for the sand to flow through it. If you pour the same amount of sand through a wide tube, the sand will finish flowing through the tube much faster. Similarly, a download will finish much faster when you have a high-bandwidth connection rather than a low-bandwidth connection.

Id.

28. *Bittorrent*, TECHTERMS, <http://techterms.com/definition/bittorrent> (last visited Feb. 10, 2016).

29. *Id.* Some of the most popular BitTorrent Clients are: uTorrent, Deluge, and BitComet. Alan Henry, *Five Best BitTorrent Clients*, LIFEHACKER (May 17, 2015), <http://lifehacker.com/5813348/five-best-bittorrent-applications>. Essentially how “torrenting” works is an everyday user uses a BitTorrent Client to download a torrent of a copyrighted work. Through the client, the user connects to thousands of people worldwide who share only small portions of the finished product. After some time, and the pieces are all downloaded, they connect to form the infringed work, which can be a movie or a television show. It’s important to note that not all torrents are of copyrighted material, but the majority are. *Id.*

30. *Torrent*, TECHTERMS (Oct. 3, 2007), <http://techterms.com/definition/torrent>. Torrents that contain copyrighted material are usually downloaded from file-sharing websites that are all too easily accessible on the internet.

31. An ISP is a company that has the proper “equipment and telecommunication line access required to have a point-of-presence” (an access point from one place to the rest of the internet) “on the internet for the geographic area served.” Margaret Rouse, *ISP*, WHATIS.COM (Feb. 24, 2006), <http://searchwindevelopment.techtarget.com/definition/ISP>. Some common ISPs in the United States are: Cox Communications, Charter Communications, AT&T Internet Services. Sig Ueland, *20 Top Internet Service Providers*, PRACTICALECOMMERCE (Dec. 12, 2011), <http://www.Practicalcommerce.com/20-Top-Internet-Service-Providers>. Some common ISPs in Japan are: Nippon Telegraph and Telephone (NTT), Asahi Net, au (KDDI), and Softbank. *Internet in Japan: Finding a Service Provider in Tokyo*, REALESTATE-TOKYO.COM (Mar. 15, 2015), <http://www.realestate-tokyo.com/news/internet-in-japan-finding-a-service-provider-in-tokyo/>.

32. “An IP address is a logical address that is assigned by software residing in a server or router.” *Definition of: IP Address*, PC MAGAZINE, <http://www.pcmag.com/encyclopedia/term/45349/ip-address> (last visited Feb. 10, 2016). “In order to locate a device in the network, the logical IP address is converted to a physical address” which is “written in ‘dotted decimal’ notation”. *Id.* “Network infrastructure devices such as servers, routers and firewalls are typically assigned permanent ‘static’ IP addresses.” *Id.* “The client machines can also be assigned static IPs by a network administrator but most often are

II. History and Legal Status of File-Sharing

A. The United States

Digital file-sharing in the United States has a long history tracing to the birth of the worldwide web. Bulletin Board Systems (“BBS”),³³ Usenet,³⁴ Topsites³⁵ and IRCs³⁶ started the file-sharing movement, but Napster³⁷ was the medium that brought file-sharing into the limelight and to the masses.³⁸ Napster was a cultural revolution that for the first-time legitimately threatened the record industry and inspired the idea of free music in the minds of consumers.³⁹

Napster, created in 1999 by Shawn Fanning, “enabled anyone . . . to share audio files in MP3 format.”⁴⁰ Stored on a centralized server, users

automatically assigned ‘dynamic’ IP addresses via software.” *Id.* “Cable and DSL modems are typically assigned dynamic IPs for home users and static IPs for business users.” *Id.*

33. Bulletin Board Systems acted as an intranet. *The History of File-Sharing*, TORRENTFREAK (Apr. 22, 2012), <https://torrentfreak.com/the-history-of-filesharing-120422/>. “[U]sers would dial-in with their modems to read/send messages, access news, and . . . share files.” *Id.* Users learned about BBSs from word of mouth or through printed magazines, and were able to download files from them. *Id.*

34. Usenet, or Newsgroup, were similar to BBS, but “UseNet servers were able to receive files and re-distribute them amongst . . . Usenet servers” which created “multiple copies of . . . files across hundreds upon thousands of serves.” *Id.* Major file sharing did not occur until around 1993, with the creation of a program (RAR) “which allowed users to split files”. *Id.* This allowed users to distribute files faster and more efficiently than ever before. *Id.*

35. Topsites were underground file sharing networks “based on invite only systems.” *Id.* “[D]ue to the private and closed nature of this distribution network, it was difficult . . . to gain access to these Topsites.” *Id.*

36. IRC (Internet Relay Chat) allowed users to connect to server chatrooms. From there, they could request clients directly from other users connected to the same IRC server and could freely share files. *The History of File-Sharing*, TORRENTFREAK (Apr. 22, 2012), <https://torrentfreak.com/the-history-of-filesharing-120422/>.

37. Napster “software operated as a peer to peer file sharing network used strictly for music.” *Id.*

38. Emma Jones, *Napster: Two unwitting teenagers and a cultural revolution*, INDEPENDENT, Mar. 19, 2013, <http://www.independent.co.uk/arts-entertainment/music/features/napster-two-unwitting-teenagers-and-a-cultural-revolution-8539728.html>.

39. *Id.*

40. Clyde Haberman, *Grappling with the ‘Culture of Free’ in Napster’s Aftermath*, N. Y. TIMES, Dec. 7, 2014, http://www.nytimes.com/2014/12/08/technology/grappling-with-the-culture-of-free-in-napsters-aftermath.html?_r=0.

could easily download⁴¹ files that were hosted by the company. The Recording Industry Association of America (RIAA) sued Napster for copyright infringement,⁴² and they were forced to shut down.⁴³ This was the first time a federal court extended “traditional copyright protection to a medium in which creative works . . . can be traded widely with the click of a mouse.”⁴⁴

Following the failure of Napster for its centralized server based service, Kazaa, LimeWire, and eDonkey⁴⁵ came into existence.⁴⁶ Each of the programs and file-sharing protocols ended up failing because “they were rooted in commercial (and corporate) interest.”⁴⁷ In addition to being popular avenues for adware/spyware, these types of programs were susceptible to RIAA lawsuits and injunctions.⁴⁸

41. A download is the transfer of data from the memory of one computer to that of another. *Download*, MERRIAM-WEBSTER DICTIONARY, available at <https://www.merriam-webster.com/dictionary/download>.

42. Matt Richtel, *The Napster Decision: The Overview; Appellate Judges Back Limitations on Copying Music*, N. Y. TIMES, Feb. 13, 2001, <http://www.nytimes.com/2001/02/13/business/napster-decision-overview-appellate-judges-back-limitations-copying-music.html>.

43. *Id.*

44. *Id.*

45. Kazaa, LimeWire, and eDonkey are just three examples of popular peer-to-peer networks that allowed users to search and share files. Through a series of nodes, users connected to a variety of other users with a variety of files. A search request searches other users' files for criteria that matches yours and then you are able to download the file from that source in small parts. See generally Michael Welzl, *Peer-to-Peer Systems – Unstructured P2P File Sharing Systems*, UNI INNSBRUCK INFORMATIK, available at <https://heim.ifi.uio.no/michawe/teaching/p2p-ws08/p2p-2-2.pdf>.

46. The services lacked the central server that Napster possessed in the sense that users did not all connect to one server to download files. *Id.*

47. See *supra* note 33.

48. The Recording Industry of America has explored various lawsuits against the P2P system. *RIAA v. The People: Five Years Later*, ELECTRONIC FRONTIER FOUNDATION (Sep. 30, 2008), <https://www.eff.org/wp/riaa-v-people-five-years-later>. The lawsuits have ranged from suing the music fans who shared songs on peer-to-peer networks, to the creators of the programs themselves. *Id.* Despite the ever-growing number of lawsuits filed by the RIAA against the ordinary user, the number of people downloading music only increased. *Id.* See also Ed Oswald, *RIAA Sues LimeWire Over Piracy*, BETANEWS, Aug. 4, 2006, <http://betanews.com/2006/08/04/riaa-sues-limewire-over-piracy/> (discussing the RIAA's underlying claim against peer-to-peer networks that their business model allows companies to profit from the piracy trade, and that by failing to block copyrighted content, companies encourage users to pirate music). See also Ed Oswald, *Kazaa Owner Settles with Record Labels*, BETANEWS, Jul. 27, 2006, <http://betanews.com/2006/07/27/kazaa-owner-settles-with-record-labels/> (highlighting one method the RIAA uses to deter music piracy, by obtaining judgment against P2P program creators).

Finally, BitTorrent⁴⁹ revolutionized the approach to file-sharing. Initially invented for the encryption and storage of one file into multiple files, its use was quickly adapted for file-sharing purposes.⁵⁰ Unlike earlier file-sharing protocols, torrents enable the user to upload and download files from thousands of users at the same time.⁵¹ analysis shows that it accounts for about 35% of all Internet activity.⁵²

B. Japan

In 2001, File Rogue was released, which was similar to Napster, in the sense that it was a centralized peer-to-peer network, which was used to share music files.⁵³ In 2003, the JASRAC⁵⁴ and the RIAJ⁵⁵ filed a civil suit.⁵⁶ The Tokyo District Court found that File Rogue infringed on the right to transmission, and handed an injunction to its creator.⁵⁷ From this case, the Karaoke Doctrine⁵⁸ emerged: if a business enterprise has control over an infringing activity and profits by the activity, then the business is liable for direct infringement.⁵⁹ This civil suit eliminated the for-profit model of file sharing that courts were worried about.⁶⁰

Unlike File Rouge, which lacked popularity, WinMX, the first real mass sharing client utilizing Japanese characters, was used by millions of

49. BitTorrent is a file-sharing system that breaks files into multiple chunks and utilizes peer-to-peer to share files among users. Jahn A. Johnsen et al., *Peer-to-peer networking with BitTorrent*, NTNU (2005), available at <http://web.cs.ucla.edu/classes/cs217/05BitTorrent.pdf>.

50. *Id.* at 4.

51. While downloading a file via BitTorrent, a user is concurrently uploading the same file to other users. *Id.* at 5.

52. *Id.* at 4.

53. Takashi B. Yamamoto, *Legal Liability for Indirect Infringement of Copyright in Japan*, 35 COMP. L. Y.B. INT'L. BUS. 1, 13 (2013).

54. Japanese Society for Rights of Authors, Composers, and Publishers.

55. Recording Industry Association of Japan.

56. *See supra* note 53.

57. *Id.*

58. *Id.* at 9-11.

59. *Id.* at 10-11.

60. *Id.*

Japanese users.⁶¹ It possessed no anonymity, and because it used central servers to keep track of who was sharing what file, the police could easily track a user.⁶²

In response to the lack of anonymity, a Japanese Graduate Student created WinNY.⁶³ In what constituted the first case of copyright infringement based on uploading, in November 2003, two users were arrested after posting what files they were going to upload on a popular Japanese message board, 2channel.⁶⁴ From this information, the police traced the IP addresses and arrested the two individuals.⁶⁵ From this lawsuit, another lawsuit was brought before the court, against the creator of WinNY.⁶⁶ Against a charge of copyright infringement, the Japanese Supreme Court held that the creator was not guilty of infringement.⁶⁷ The Supreme Court held that knowledge of a mere general possibility that software could be used for infringement purposes does not amount to infringement, there must be specific intent during creation for a software creator to be liable.⁶⁸ Although initially found guilty in the district court, on appeal the Osaka Appellate Court stated that “[s]ince we cannot find that [WinNY] was offered solely or chiefly to promote online copyright

61. Jason Moiron, *Japanese Peer-to-Peer*, JMOIRON.NET (Jul. 14, 2008), <http://jmoiron.net/blog/japanese-peer-peer/>.

62. *Id.*

63. *Id.*

64. See *supra* note 53.

65. *Id.*

66. *Id.* at 7-8.

67. Initially, Kaneko was found guilty of contributory infringement of copyrighted material in the District Court. He was sentenced to one year prison confinement and was fined 1.5 million yen. The Osaka High Court reversed the decision. Takashi B. Yamamoto, *supra* note 53, at 8-9 (2013). This decision was then affirmed by the Japanese Supreme Court. *Id.*

68. Considering that newly developed software may not only be variously valued in a society but also requires speed for its development and that effort should be made to avoid causing excessive chilling effect for the development of the software, providing the software will not be instantly construed to constitute an accessory to a copyright infringement merely because: there is a general possibility that the software would be used for copyright infringement, the provider is knowing and affirming such general possibility; and a copyright infringement is actually committed using such software.

Id. at 8.

infringement, we hold that we cannot conclude that defendant[’s conduct] meets the standard for the crime of contributory copyright infringement.”⁶⁹

Following the crack of WinNY’s anonymization in 2003, Share, another program for file-sharing was released.⁷⁰ Once Share was eventually cracked, meaning de-anonymized, in 2006, Perfect Dark came into existence.⁷¹ Perfect Dark is the current king of piracy.⁷² Perfect Dark uses a system that departs from WinNY and Share and is geared towards anonymizing user’s conduct, rather than convenience and speed.⁷³ Perfect Dark uses “a built in protection” against flooding of false data by companies using a “distributed voting system”⁷⁴ which is commonplace in Japan’s peer-to-peer technology today.⁷⁵

69. Ridwan Khan, *Pure Software in an Impure World? WINNY, Japan’s First P2P Case*, 8 U. PA. E. ASIA L. REV. 21, 25 (2012). “[I]n finding for the program’s author, the appellate court agreed with his lawyers who likened the software developer to politicians building roads.” *Id.* at 22-23.

70. See *supra* note 61.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* What established Perfect Dark as the most commonly used and concurrently used p2p network was that it has one of the most comprehensive search engines available for such a network. There exist options to review content which gives users the ability to flag and to alert other users whether or not files are compromised or contain some sort of tracking software that would identify the downloaders. The popularity of the program increased with popular message boards, such as 2chan. See generally, *Id.*

III. Legal Status and Enforcement Techniques of Japan

A. Legal Status

Following the landmark case against WinNY's creator, the Japanese Supreme Court held that the creation of software that can infringe on the protected copyright of others is illegal only if:

(i) where a person has released and provided a software program while perceiving and accepting a specific and immediate risk of copyright infringement to be committed with the use of the software program, and such copyright infringement has actually been committed and (ii) where in light of the nature of the software program, the objective situation of use of the software program, and the method of providing it, it is highly probable that among those who acquire the software program, a wide range of persons will use the software program for the purpose of infringing copyright, to a level where their use cannot be tolerated as exceptional, the provider has released and provided the software while perceiving and accepting such high probability, and the principal has actually committed copyright infringement with the use of the software program.⁷⁶

This was the first time the Japanese Supreme Court established law holding software creators criminally accountable, but it was not until 2012 that those who downloaded the material were held criminally responsible.⁷⁷

76. Saikō Saibansho [Sup. Ct.] Dec. 19, 2011, 2009 (A) No. 1900, 65 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 6-7 (Japan). The case established the basic and fundamental understanding that creating a program that could be used for copyright is essentially bad. The Court created the foundation for liability against the creators, but not the downloaders themselves. *Id.*

77. This lack of accountability is the main reason why Japan's stance towards copyright infringement was viewed as lackluster. The idea was that holding people civilly responsible was enough, but increasing economic and political pressure and lack of dwindling piracy numbers, forced Japan to take a second look at its enforcement ideology.

Before 2012, copyright infringement was a civil offense. The first law making online copyright infringement illegal, Act No. 65 of December 3, 2010, was passed in 2010.⁷⁸ It made the uploading or downloading of copyright infringing material illegal, but there were no penalties if one was caught.⁷⁹ In 2011, the Anti-Counterfeiting Trade Agreement (ACTA)⁸⁰ was passed, which was an agreement to establish an international legal framework for targeting counterfeit goods, generic medicines, and copyright infringement.⁸¹

The transition from purely civil offense to criminal offense was alarming, as historically, “Japanese tradition favors amicable disputes over open dissent.”⁸² The Japanese government has discouraged litigation for decades.⁸³ However, foreign pressure and intervention have recently forced Japan to shift its traditional positions on intellectual property and copyright infringement more in line with modern Western views.⁸⁴ Due to foreign complaints about insufficient access to legal remedies and the enhanced combativeness of domestic right owners, and as a result of Japan’s increased involvement in international business transactions, “Japanese IP owners do not only defend their rights within Japan, but are also exposed to litigation practices in other countries.”⁸⁵ Despite providing expansive protection and

78 . *Japan – Copyright Act*, WIPO, available at <http://www.wipo.int/wipolex/en/details.jsp?id=8881>.

79. Tomoko Otake, *Music Industry Wins a Battle as Antidownloading Bill Gets Some Teeth*, JAPAN TIMES, Jun. 21, 2012, http://www.japantimes.co.jp/culture/2012/06/21/culture/music-industry-wins-a-battle-as-antidownloading-bill-gets-some-teeth/#.Vr-rT_IrKhd.

80 . Anti-Counterfeiting Trade Agreement, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, http://www.mofa.go.jp/policy/economy/i_property/acta.html (last visited Feb. 7, 2016).

81. *Id.* Japan was the only country to ratify the agreement, which showed Japan’s slow progression to the 2012 law. Maira Sutton, *Japan Was the First to Ratify ACTA. Will They Join TPP Next?*, EFF.ORG, Oct. 26, 2012, <https://www.eff.org/deeplinks/2012/10/japan-ratify-acta-will-they-join-tpp-next>.

82. Traditionally, before the Meiji period (1868-1912), although there were legal rules, they were penal in character. The government would charge individuals who brought claims in the same manner as they would the criminals. INTELLECTUAL PROPERTY IN ASIA: LAW, ECONOMICS, HISTORY AND POLITICS 147 (Paul Goldstein & Joseph Straus eds., 2010).

83. *Id.*

84. *Id.*

85. *Id.*

enforcement for patents,⁸⁶ trademarks,⁸⁷ and unfair competition,⁸⁸ copyright has been the least enforced of the lot.⁸⁹

Under the 2012 provisions, Japanese internet users who download copyright infringing files face up to two years in prison or fines up to two million yen.⁹⁰ Naoki Kitagawa, CEO of Sony Music, said that the “revision [would] reduce the spread of copyright infringement activities on the internet,”⁹¹ yet worry persisted⁹² the 2012 bill was controversial,⁹³ but was seen as a strong first step towards the solidification of its copyright policies.⁹⁴

B. Enforcement Techniques

86. Patents are governed by the Patent Act of 1959. INTELLECTUAL PROPERTY LAW IN ASIA 179 (Christopher Heath ed., 2003).

87. “Trademark law is statutorily regulated by the Trade Mark Act of 1959.” *Id.* at 189.

88. Governed by the Unfair Competition Act. *Id.* at 197.

89. *Id.* at 200.

90. Glyn Moody, *Japan Criminalizes Unauthorized Downloads, Making DVD Backups – and Maybe Watching Youtube*, TECHDIRT, Jun. 25, 2012, <https://www.techdirt.com/articles/20120625/03200019461/japan-criminalizes-unauthorized-downloads-making-dvd-backups-maybe-watching-youtube.shtml>. This revision was made law after a strong lobbying push by the Recording Industry Association of Japan (RIAJ), after increased pressure by the United States to punish those who download copyrighted material. *See generally id.*

91. *Japan Introduces Piracy Penalties for Illegal Downloads*, BBC, Oct. 1, 2012, <http://www.bbc.com/news/technology-19767970>. “The Recording Industry Association of Japan had pushed for the move, suggesting that illegal media downloads outnumbered legal ones by about a factor of 10.” *Id.* This move was viewed a “part of a wider international crackdown on online piracy,” which included efforts from the United States, France and the European Parliament. *Id.*

92. “Treating personal activities with criminal punishments must be done very cautiously, and the property damage caused by individual illegal downloads by private individuals is highly insignificant.” *Id.* Under the 2012 law, although never prosecuted, the possibility existed that knowingly watching an illegally uploaded infringing YouTube video would be illegal. *See id.*

93. *See supra* note 79. “Daisuke Tsuda, an IT and music journalist called in as an expert witness, also expressed fears that the prosecution of pirated music could eventually be extended to other materials such as games and writings, hampering the public’s access to information and the long-term promotion of contents industries.” *Id.*

94. As the current situation of piracy has continued to escalate, the 2012 bill is now viewed as insufficient, as Japan’s enforcement techniques improperly failed to grow with its citizen’s increasing liability. *See generally id.*

Japanese enforcement techniques are extremely lax in the sense that catching and prosecuting file-sharers and creators is rare.⁹⁵ However, Japan has tried to mimic the United States in its enforcement techniques. Japan's first excursion into copyright enforcement came in 2006, when Internet Service Providers (ISPs) began to screen for the use of programs such as WinNY and shut off internet users' access to the web when those programs were detected.⁹⁶ However, this method of enforcement was short-lived, as the ISPs' abilities to monitor which programs individual users were running raised serious privacy concerns, which prompted the Japanese Ministry of Internal Affairs and Communications to ban the practice before any findings were made about the merits of the techniques.⁹⁷

Later, in 2008, four of Japan's largest internet providers (ISPs) agreed to send notices to those who continued to download copyrighted material and shut off their internet if they failed to comply.⁹⁸ Unlike the United States, where companies may upload illegal files themselves to find downloaders, Japanese companies merely needed to download their own file in WinNY and Perfect Dark, ask for a list of peers, and it would then have a list of IP addresses to send to ISPs who would then send notices.⁹⁹

Japanese copyright enforcement has been shown to be insufficient to meet the demands of today's copyright holders and through the TPP, enforcement techniques will now mirror those used in the United States.

IV. Legal Status and Enforcement Techniques of the United States

95. Referring to the high number of copyright-infringing downloaders in relation to the amount of prosecutions and fines imposed, which have been practically nonexistent, except in the most extreme of cases. Preston Phro, *Still no arrests one year after illegal downloading law went into effect*, JAPANTODAY, Oct. 2, 2013, <https://japantoday.com/category/crime/still-no-arrests-one-year-after-illegal-downloading-law-went-into-effect>.

96. George Ou, *Japan's ISPs Agree to Ban P2P Pirates*, ZDNET, Mar. 16, 2008, <http://www.zdnet.com/article/japans-isps-agree-to-ban-p2p-pirates/>.

97. Allowing ISPs to terminate the internet access of suspect downloaders was met with hostility from its consumers and viewed as inherently wrong and draconian. *See generally id.*

98. *Id.*

99. *Id.*

A. Current Legal Status

In the United States, copyright infringement is both a civil and criminal offense.¹⁰⁰ Most cases of copyright infringement by downloading are civil in nature, but those caught uploading infringing files are more likely to be charged criminally.¹⁰¹ Criminal punishments “play[] a critical role in safeguarding U.S. economic and national security interests as well as protecting the health and safety of consumers worldwide.”¹⁰² Criminal liability is seen as a deterrent towards those that file-share, but most Americans are unaware of the true consequences that infringing on someone’s copyright via downloading can have. In lieu of filing criminal charges, copyright holders generally seek civil remedies from individuals,¹⁰³ and with the threat of criminal liability, cases are generally settled between rights-holders and infringers before charges are ever filed.

B. United States Enforcement Techniques

In the United States, the most prevalent technique comes from ISPs partnering with companies to properly enforce copyright infringement. They use warning letters, Internet shut-offs, Internet slow-downs, civil liability, and the release of private information to companies to deter piracy. In addition to ISP partnership with copyright-holding companies, the RIAA has denounced piracy and flocked to the courts for relief.¹⁰⁴ The RIAA

100. Infringement of Copyright - 17 U.S.C. § 501 (2017). Although codified, downloading a copyright file is usually a civil offense that has the possibility of federal charges added on, which rarely has occurred in the past. Betty Wang, *Illegal Downloads: What are the Penalties?*, FINDLAW (Jul. 9, 2013, 9:04 AM), <http://blogs.findlaw.com/blotter/2013/07/illegal-downloads-what-are-the-penalties.html>.

101. *See generally id.*

102. *See generally* H. MARSHALL JARRET & CAMERON G. CHANDLER, U.S. DEPARTMENT OF JUSTICE, PROSECUTING INTELLECTUAL PROPERTY CRIMES (4th ed. 2015), http://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/03/26/prosecuting_ip_crimes_manual_2013.pdf (describing the justification of criminal copyright enforcement, as well as the prosecutorial methods of intellectual property crimes).

103. *Sony BMG Entm’t v. Tenenbaum*, 660 F.3d 487 (1st Cir. 2011) (ordering an individual who downloaded and shared thirty songs via the internet to pay \$675,000 in fines). *See also* *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (holding that peer-to-peer file sharing companies can be held civilly and criminally liable for users infringing on copyrights).

104. According to the RIAA:

Within the Internet culture of unlicensed use, theft of intellectual property is rampant. Many individuals see nothing wrong with downloading an occasional

considers the most effective anti-piracy strategy to be “help[ing] to build a thriving legal marketplace.”¹⁰⁵

In the United States, although individual copyright-holders have had strong incentive to spearhead the war against piracy, copyright-holding companies are the frontline combatants in today’s war against online file-sharing and file-sharers. Companies use a variety of techniques in their guerilla-like warfare, with techniques and protocols such as header probing,¹⁰⁶ traffic logging,¹⁰⁷ P2P network sniffing,¹⁰⁸ and torrent honey-pots¹⁰⁹ to catch infringers.

song or even an entire CD off the Internet, despite the fact it is illegal under recently enacted federal legislation . . . RIAA is pursuing a multi-faceted approach, combining education, innovation, and enforcement.

Music Copyright, UNIVERSITY OF SOUTH FLORIDA, <http://www.usf.edu/it/documentation/music-copyright.aspx> (last visited Feb. 10, 2016).

105. Cara Duckworth, *Memo From the RIAA: Legal Action is First Step to Legal Listening*, THE WRAP, Jun. 7, 2012, <https://www.thewrap.com/memo-riaa-legal-action-first-step-legal-listening-43261/>. The RIAA believes that the fear of being caught is enough to deter piracy. *See id.*

106. “Header probing” is a technique that entails an active engine on the network to look at the file headers for any files being transferred. The engine is set to look for files over a certain size. The captured header traffic is then scanned for keywords, which look for specific movie, music, software, etc. keywords. If the scanner catches one of the keywords, an alert is given to the person in charge of content monitoring. This technique is quite common within college campuses. *Autodesk Against Piracy: An In-Depth Look*, DORMAN BELL LLP, <http://www.dormanbell.com/autodesk-against-piracy-an-in-depth-look/> (last visited Feb. 11, 2016).

107. “Traffic logging” is a technique that monitors the IP activity of all upload and downloads activities on a server. *See generally* Mike Freedman, *Inaccurate Copyright Enforcement: Questionable “best” practices and BitTorrent specification flaws*, FREEDOM TO TINKER, Nov. 23, 2009, <https://freedom-to-tinker.com/2009/11/23/inaccurate-copyright-enforcement-questionable-best-practices-and-bittorrent-specification/>. When a company files a copyright takedown notice on the file, the server, which holds all the data of those who had connected to the site, is potentially given to the company claiming infringement. *See generally id.* IP logging is another term to describe this technique. *See generally id.*

108. P2P network sniffing “involves setting up an account” on a P2P network and “performing searches for what other people are sharing. Once a use name is found to be associated with illegally shared files,” it is easy to request IP addresses and then physical addresses from the ISP. *See Autodesk Against Piracy, supra* note 106.

109. Torrent “honey-potting” is when a company either hosts a torrent directly by the content producer, or it may pirate a file they are aware exists and download it. When torrenting using conventional methods, the tracker provides a dynamic list so users can transfer bits to other users. It is not difficult to see what users one is connected to, and from the IP address, which is in plain view, after confirmation that the content is theirs, can request addresses for ISPs. *See generally* Margaret Rose, *Honey-pot (honey pot)*, SEARCHSECURITY, <http://searchsecurity.techtarget.com/definition/honey-pot>.

When someone violates the rights of these companies, who generally own the copyright, the owner (or company) “is entitled to file a lawsuit in federal court.”¹¹⁰ Before filing a lawsuit in federal court, copyright holders will generally follow the applicable principles of the Six-Strikes Policy, in which, “through a series of warnings [copyright alerts] suspected pirates are informed that their connections are being used to share copyrighted material without permission, and told where they can find legal alternatives.”¹¹¹ The goal is to shift social norms and behavior and to rejuvenate the notion of the value of copyright that existed years ago.¹¹² Finally, ISPs have the ability to slow down the internet speed for customers, as well as turning off their connection to the internet, as a last resort.

V. What is the TPP?

The Trans-Pacific Partnership Agreement (“TPP”) is a free trade agreement “aimed at further expanding the flow of goods, services and capital across borders.”¹¹³ The agreement,¹¹⁴ between twelve Pacific Rim

110. *Copyright Registration and Enforcement*, STANFORD UNIVERSITY LIBRARIES, http://fairuse.stanford.edu/overview/faqs/registration-and-enforcement/#how_are_copyrights_enforced_is_going_to_court_necessary (last visited Feb. 2, 2016).

111. Ernesto Van der Sar, “Six Strikes” Anti-Piracy Warnings Double This Year, TORRENTFREAK, Aug. 30, 2014, <https://torrentfreak.com/six-strikes-anti-piracy-warnings-double-year-140830/>. The program was instigated to target casual pirates, and is a way of reducing the size of the piracy problem over time, by possibly changing social norms. *Id.* Copyright alerts assist in the process by: “making account holders aware that unlawful content sharing may have happened using their internet account, educating account holders on how they can prevent copyright infringement from happening again, and providing consumers information about ways to access digital content legally.” *What is a Copyright Alert?*, CENTER FOR COPYRIGHT INFORMATION, <http://www.copyrightinformation.org/the-copyright-alert-system/what-is-a-copyright-alert/> (last visited Nov. 5, 2015).

112. The ever-increasing numbers of users who download copyrighted material is one of the common reasons why this technique has been viewed as a failure.

113. *In Depth: What is the Trans-Pacific Partnership*, CBC NEWS, Jul. 06, 2014, <http://www.cbc.ca/news/world/what-is-the-trans-pacific-partnership-1.1147888>.

114.

The Trans-Pacific Partnership (TPP) is one of the most ambitious free trade agreements ever attempted which has similarities with the TTIP between the US and EU. The TPP agreement is the successor of the Trans-Pacific Strategic Economic Partnership Agreement or TPSEP signed by Singapore, New Zealand, Chile and Brunei in 2005. Several other countries gradually enter the discussions for further trade liberalization in the Pacific area. The US, Australia, Vietnam and

countries,¹¹⁵ was reached on October 5, 2015 enduring stark criticisms. Although the publicly stated goals are to “promote economic growth; support the creation and retention of jobs; enhance innovation, productivity and competitiveness; raise living standards; reduce poverty in our countries; and promote transparency, good governance, and enhanced labor and environmental protections,”¹¹⁶ the true goals are shrouded in secrecy.¹¹⁷ Although the negotiations have been conducted in secret,¹¹⁸ there can be no doubt that the passing of the TPP will have a substantial effect on the world’s economic and political geosphere. Some have argued that the “biggest beneficiaries would be giant American corporations, along with their shareholders.”¹¹⁹ Within the details of the trade agreement, there exists a section on intellectual property rights.

The goal of the intellectual property rights section is that:

Peru joined the negotiations in 2008, Malaysia in 2010, Canada and Mexico in 2012, and Japan in 2013.

The Trans-Pacific Partnership (TPP) Will Increase Trade, but Will it Undermine Democracy, Public Services, and the Environment?, NETIVIST, <https://netivist.org/debate/tpp-pros-and-cons> (last visited Feb. 05, 2016).

115. The countries are: Brunel, Chile, New Zealand, Singapore, Australia, Canada, Japan, Malaysia, Mexico, Peru, United States, and Vietnam. *Id.*

116. OFFICE OF U.S. TRADE REP., SUMMARY OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership> (2015).

117. The Transpacific Partnership Agreement lacked transparency throughout its six-year long negotiation process. Some feel that the release of a generic trade agreement goal to the public shows that this lack of transparency has kept the true goals of the TPP secretive. Furthermore, there seems to be an innate lack of accountability from the countries participating in the TPP negotiations. Despite only 12 countries taking part in the negotiations, they account for almost 40% of the world’s economy. This lack of transparency and accountability has an enormous effect on world trade, not just those within the Pacific Rim. See *One-Third of Congress Demands Transparency and Accountability in TPP Negotiations*, CWA (Jun. 27, 2012), https://www.cwa-union.org/news/entry/one-third_of_congress_demands_transparency_and_accountability_in_tpp_negoti.

118. Timothy B. Lee, *The Trans-Pacific Partnership is Great for Elites. Is it Good for Anyone Else?*, VOX, Oct. 7, 2015, <http://www.vox.com/2015/4/17/8438995/why-obamas-new-trade-deal-is-so-controversial>.

119. Robert B. Reich, *Trans-Pacific trickle-down economics*, BALTIMORE SUN, May 6, 2015, <http://www.baltimoresun.com/news/opinion/bal-transpacific-trickledown-economics-20150505-story.html>.

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.¹²⁰

“According to the Office of the U.S. Trade Representation, the Intellectual Property Rights (IPR) chapter will ‘promote high standards of protection, safeguard U.S. exports and consumers against IP infringement, and provide fair access to legal systems in the region to enforce those rights.’”¹²¹

The Chapter affirms the international norms from agreements such as the TRIPS agreement and the Berne Convention, mentioned earlier, among other such agreements and it calls on each party to ratify or accede to the agreements. Some of the key elements of the Trans-Pacific Partnership Intellectual Property Rights section include: Patents,¹²² the Protection for Regulatory Test Data,¹²³ Pharmaceutical Products, Trademarks and Geographical Indications (GI),¹²⁴ Domain Name Cyber-

120. Trans-Pacific Partnership, Art. 18.2, <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>.

121. Joseph A. Laroski & Bonnie B. Byers, *Trans-Pacific Partnership IP Provisions Remain at Forefront as Scrutiny of Text*, LEXOLOGY (Dec. 30, 2015), <http://www.lexology.com/library/detail.aspx?g=ea70c59b-6b45-48f0-b790-6154c422032e>.

122. According to Laroski & Byers:

With respect to patents, the IPR chapter includes commitments to: establish a 12-month grace period in which certain public disclosures of an invention will not be used to deny a patent application; help facilitate the processing of patent applications in multiple jurisdictions, with minimum duplication of efforts; and provide for an adjustment to patent terms for pharmaceuticals products to compensate for unreasonable curtailment of patent terms due to the marketing approval process.

Id.

123. This means that “undisclosed test and other data generated to obtain marketing approval of pharmaceuticals and agricultural chemicals” is protected. The IPR chapter provides for a minimum of five to eight years of data exclusivity. *Id.*

124. According to Laroski & Byers:

The IPR chapter includes commitments to clarify and strengthen protection of brand names and other signs or symbols used to distinguish goods

Squatting,¹²⁵ Trade Secrets,¹²⁶ Copyright,¹²⁷ and the Enforcement¹²⁸ of IP rights.

or services, prevent the overprotection of geographical indications by providing opportunities for due process and requiring guidelines on how to determine whether a term is generic in its market; and ensure efficient and transparent procedures governing trademark applications, including electronic trademark registration mechanisms and promotion of regional harmonization of trademark systems. *Id.*

125. According to Nolo.com:

Cybersquatting is registering, selling or using a domain name with the intent of profiting from the goodwill of someone else's trademark. It generally refers to the practice of buying up domain names that use the names of existing businesses with the intent to sell the names for a profit to those businesses.

Cybersquatting: What It Is and What Can Be Done About It, NOLO.COM, <http://www.nolo.com/legal-encyclopedia/cybersquatting-what-what-can-be-29778.html> (last visited Feb. 10, 2016). In an effort to reduce domain name cybersquatting, the TPP ensures that, in connection with a Party's country code top-level domain name registration system, appropriate remedies are available in cases of bad faith registration of domain names that are confusingly similar to registered trademarks. *Id.*

126. Chapter 18 requires each party to provide for the legal means to prevent misappropriation of trade secrets, including misappropriation conducted by state-owned enterprises (SOEs). It also requires for the first time in a U.S. free trade agreement that each party establish criminal procedures and penalties for trade secret theft. *See supra* note 121.

127. "The IPR chapter's copyright provisions: include strong and balanced provisions on technological protection measures and rights management information, and advance transparency in systems for copyright royalty collection; promote exceptions and limitations to copyright for legitimate purposes, such as criticism, comment, news reporting, teaching, scholarship, and research; and obligate each Party to establish copyright safe harbors for Internet Service Providers (with safeguards against abuse of such regimes)." *Id.*

128.

The IPR chapter contains commitments that seek to: ensure the availability of mechanisms to enforce intellectual property rights, including border measures and criminal enforcement (including new disciplines on camcording in movie theaters and theft of encrypted program-carrying satellite and cable signals); and close loopholes used by counterfeiters and enhance penalties against trafficking in counterfeit trademark products that threaten health and safety.

Id.

Although arguments exist that the TPP is a threat to “a free and open internet”¹²⁹ and that the TPP is an “anti-free trade agreement,”¹³⁰ it cannot be argued that the TPP lacks ambition.¹³¹

VI. Criticisms of the TPP

Despite the overwhelming support from multi-national corporations and foreign governments, the people have expressed multiple concerns over the trade agreement locally, in the United States,¹³² and abroad. Julian Assange, founder of WikiLeaks, believes that “[i]f you read, write, publish, think, listen, dance, sing or invent; if you farm or consume food; if you’re ill now or might one day be ill, the TPP has you in its cross hairs.”¹³³ Public Citizen, a consumer rights advocacy group based in Washington D.C., believes, that in relation to the criminal and civil

129. Sean Nevins, *The TPP Threatens a Free and Open Internet*, MINTPRESS NEWS, May 7, 2015, <http://www.mintpressnews.com/the-tpp-could-curtailed-internet-freedom-national-sovereignty-free-open-internet/205383/>. “The United States is attempting to put language in the treaty that would criminalize anyone who publishes work on a ‘commercial scale,’ with penalties including prison and hefty monetary fines.” *Id.*

As anyone who has ever had a meme go viral knows, it is very easy to distribute content on a commercial scale online, even without it being a money-making operation. That means fans who distribute subtitles to foreign movies or anime, or archivists and librarians who preserve and upload old books, videos, games, or music, could go to jail or face huge fines for their work. Someone who makes a remix film and puts it online could be under threat. Such a broad definition is ripe for abuse, and we’ve seen such abuse happen many times before.

Id.

130. Some believe that the Trans-Pacific Partnership has been taken over by special interest groups. This includes the idea that rather than encouraging free trade, the TPP is policy-centered around large industry protectionism. Mike Masnick, *Once More: the TPP Agreement is Not a Free Trade Agreement, It’s a Protectionist Anti-Free Trade Agreement*, TECHDIRT (Oct. 08, 2015), <https://www.techdirt.com/articles/20151007/18053032475/once-more-tpp-agreement-is-not-free-trade-agreement-protectionist-anti-free-trade-agreement.shtml>.

131. Topics range from labor rights and environmental laws, to copyright and patent infringement protection and e-commerce. *See generally supra* note 116.

132. “The TPP creates a web of corporate laws that will dominate the global economy.” Chris Hedges, *TPP is the Most Brazen Corporate Power Grab in American History*, TRUTHDIG.COM, Nov. 7, 2015, <http://www.alternet.org/economy/chris-hedges-tpp-most-brazen-corporate-power-grab-american-history>.

133. Kevin Rafferty, *Too Early for TPP Cheers*, THE JAPAN TIMES, Oct. 20, 2015, <http://www.japantimes.co.jp/opinion/2015/10/20/commentary/world-commentary/too-early-for-tpp-cheers/#.VpiANxUrKhc>.

enforcement of intellectual property infringement, the “penalties and damages are grossly disproportionate to the actual loss to the rights holders...and that such excessive penalties will lead to a chilling effect on innovators and everyday people who wish to try and access or use existing copyrighted works.”¹³⁴

A. Criticism in the United States

One of the most alarming aspects of the TPP section on Intellectual Property Rights is that the agreement is strikingly similar to SOPA¹³⁵ and PIPA.¹³⁶ Although the United States held that the official purpose of SOPA

134. *Initial Analyses of Key TPP Chapters*, CITIZEN.ORG, available at <https://www.citizen.org/documents/analysis-tpp-text-november-2015.pdf> (last visited Feb. 10, 2016). See also *Trans-Pacific Partnership Signed, Critics Cry 'Toxic,'* ENVIRONMENT NEWS SERVICE, Feb. 5, 2016, <http://ens-newswire.com/2016/02/05/trans-pacific-partnership-signed-critics-cry-toxic/> (highlighting concerns that “many of the TPP’s intellectual property provisions would delay the introduction of low-cost generic medications, increasing health care prices and reducing access to medicine both at home and abroad”). See also Ali Raza, *TPP deal signed in New Zealand, a threat to Internet Freedom*, HACKREAD, Feb. 6, 2016, <https://www.hackread.com/tpp-deal-signed-in-new-zealand-threat-to-internet-freedom/> (discussing the idea that the TPP “would prevent investigative journalism within the [signatory] countries” because “it forbids the use of a computer network to access or expose corporate secrets”). Such criticism relies on the assumption that innovators will be afraid to pursue innovation for fear of being punished if they accidentally use a copyrighted work to do so. It argues that everyday people will be afraid to access copyrighted material online through legal channels, for fear of punishment if accidental infringement occurs. By discouraging users to access the internet freely and to cautiously watch their every step, the average internet user could potentially become a criminal under the agreement with one misclick.

135. Stop Online Piracy Act (SOPA) was a proposed United States House bill that aimed to “crack down on copyright infringement by restricting access to sites that host or facilitate the trading of pirated content.” Julianne Pepitone, *SOPA Explained: What it is and Why it Matters*, CNN, Jan. 20, 2012, http://money.cnn.com/2012/01/17/technology/sopa_explained/. SOPA would have made it extremely difficult for Internet users to access websites that the government viewed as copyright infringing. *Id.* SOPA would have potentially blacked out entire portions of the internet for users and was viewed as a direct violation of the common U.S. citizen’s freedom. *Id.*

136. Protect IP Act (PIPA) was the Senate equivalent of SOPA, which purported to make it more difficult on websites outside the United States to sell or distribute pirated copyrighted content. *Id.* See also Jorge Rivas & Jamilah King, *What Is SOPA? Here are Five Things You Need to Know*, COLORLINES, Jan. 18, 2012, <http://www.colorlines.com/articles/what-sopa-here-are-5-things-you-need-know> (discussing the mass protest among internet users to SOPA and various criticisms of SOPA). Larry Magid, *What are SOPA and PIPA and Why All the Fuss?*, FORBES, Jan. 20, 2012, <http://www.forbes.com/sites/larrymagid/2012/01/18/what-are-sopa-and-pipa-and-why-all-the-fuss/> (discussing how PIPA was met with the same criticisms as SOPA and was viewed as SOPA 2.0).

was to “expand the ability of U.S. law enforcement to combat online copyright infringement and online trafficking in counterfeit goods,”¹³⁷ many individuals believed the true goal was to stifle freedom on the Internet.¹³⁸ SOPA would have enabled bodies of law enforcement to reach outside of their borders to control content.¹³⁹ The Electronic Frontier Foundation¹⁴⁰ believes that, similar to SOPA and PIPA, the TPP has the potential to “allow for removal of enormous amounts of non-infringing content including political and other speech from the Web.”¹⁴¹ There may even be the possibility that individuals and governments would have the power, under the TPP, to censor sites and blacklist the Internet without judicial decisions or proper legislative authority.¹⁴²

B. Criticism in Japan

In Japan, the Trans-Pacific Partnership has been met with stark criticism publicly, yet government officials are wholly supportive of Japan’s involvement in the agreement.¹⁴³ Some of the Japanese public are angry including a former agricultural minister, who is leading the charge to prevent the TPP from being passed in Japan.¹⁴⁴ Kenasaku Fukui, a Japanese

137. Joe Wolverton, II, *SOPA: Dead in Congress, Alive in Trans-Pacific Partnership*, NEWAMERICAN, Mar. 17, 2014, <http://www.thenewamerican.com/economy/item/17861-sopa-dead-in-congress-alive-in-trans-pacific-partnership>.

138. *Id.*

139. SOPA would have enabled the U.S. Attorney General to seek a court order to require “a service provider (to) take technically feasible and reasonable measures designed to prevent access by its subscribers located within the United States to the foreign infringing site.” Magid, *supra* note 136.

140. EFF is an organization which works to defend civil liberties in the digital world. *About EFF*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/about> (last visited Feb. 10, 2016).

141. *SOPA/PIPA: Internet Blacklist Legislation*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/issues/coica-internet-censorship-and-copyright-bill> (last visited Feb. 1, 2016).

142. *Id.* See also David Cay Johnston, *The Trans-Pacific Partnership Threatens Our Liberty*, ALJAZEERA AMERICA, Feb. 4, 2016, <http://america.aljazeera.com/opinions/2016/2/the-trans-pacific-partnership-threatens-our-liberty.html> (speculating that the TPP makes governments “subservient to corporations,” which poses a strong “threat to freedom and self-governance,” and highlighting that the clear biases in the intellectual property provisions of the TPP favor corporations).

143. Rio Nashiyama, *All Our Base Belong to (the) US? – TPP from a Japanese Perspective*, JULIA REDA (Oct. 23, 2015), <https://juliareda.eu/2015/10/all-our-base-are-belong-to-the-us/>.

144. Richard Smith, *Japanese Group Sues to Stop TPP Talks*, CAPITAL PRESS, Sept. 4, 2015, http://www.capitalpress.com/Nation_World/Nation/20150904/japanese-group-sues-to-stop-tpa-talks. “Putting Japanese agriculture under pressure, the TPP also goes against constitutional guarantees of

copyright law expert, believes that “the extension of the [copyright] terms [in the TPP] will expand the trade deficit of Japanese intellectual property (IP) industries.”¹⁴⁵

VII. Japan’s Requirements Under the TPP

According to Gene Bernard, an IP attorney of Kilpatrick Townsend, “there is a lot of language in the draft treaty that [I would say] brings a lot of the countries that would be signatories ... up to the U.S. level of protection.”¹⁴⁶ Japan would need to mimic U.S. copyright law, in the sense that most provisions of the TPP adopted U.S. IP standards. Japan is required to be more stringent in its regulations and stricter in its enforcement. There are many broad regulations that Japan must adopt and adapt to.

For example, Japanese Internet Service Providers must provide an individual’s name if requested by copyright holders.¹⁴⁷ This is parallel to the United States policy of preventing ISPs from protecting copyright infringers after a judicial or administrative body has decided if the claim is sufficient to go forward with the claim. The problem is that a sufficient claim is ambiguous.¹⁴⁸ There only needs to be plausible belief that the infringement occurred from one’s network connection to release private and confidential

Japanese people’s right to a stable supply of food, as well as the right of agricultural workers to make their living through agriculture and dairy farming.” *Id.*

145. *See supra* note 143.

146. Doug Chartier, *TPP Proposes Intriguing Changes in US IP Law*, LAW WEEK COLORADO, Nov. 16, 2015, <http://www.kilpatricktownsend.com/~media/Files/In%20The%20News/LWCGBernardTPP111615.ashx>.

147.

Each Party shall provide procedures, whether judicial or administrative, in accordance with that Party’s legal system, and consistent with principles of due process and privacy, that enable a copyright owner that has made a legally sufficient claim of copyright infringement to obtain expeditiously from an Internet Service Provider information in the provider’s possession identifying the alleged infringer, in cases in which that information is sought for the purpose of protecting or enforcing that copyright.

Trans-Pacific Partnership art. 18.82, <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>.

148. *See id.*

information.¹⁴⁹ The complication with this is that “private ISP enforcement of copyright poses a serious threat to free speech on the internet, because it makes offering open platforms for user-generated content economically untenable.”¹⁵⁰

One striking example of the change in Japan under the TPP would be that Japan would need to update the term of copyright protection from fifty to seventy years.¹⁵¹ Japan will also be required to adopt U.S.-like penalties in both criminal, and civil law. Article 18.77: Criminal Procedures and Penalties outlines the boundaries for criminal procedures and penalties that Japan must follow and adopt within its own law. They are acts that contain: (1) counterfeiting/piracy on a commercial scale,¹⁵² (2) willful importation or exportation of counterfeit goods,¹⁵³ (3) willful importation

149. *See id.*

150. Kurt Opsahl & Carolina Rossini, *TPP Creates Legal Incentives For ISPs to Police The Internet. What Is At Risk? Your Rights.*, ELECTRONIC FRONTIER FOUNDATION (Aug. 24, 2012), <https://www.eff.org/deeplinks/2012/08/tpp-creates-liabilities-isps-and-put-your-rights-risk>. ISPs would be required to increase prices for the increased costs of private enforcement. With this increase in cost, there could be potential that some ISPs would choose shutting down in favor of providing internet access with the increase in government pressure and ISP enforcement. The fear some companies may have providing the government with information may outweigh such unforeseen benefits.

151. This is some sort of TRIPS plus requirement. *The Trans-Pacific Partnership Agreement: Implications for Access to Medicines and Public Health*, UNITAID, <https://unitaid.eu/assets/TPPA-Executive-Summary.pdf>. Under TRIPS, which was ratified by Japan, domestic law had to require that copyrights last for fifty years after the death of an author. The TPP now requires that countries extend this copyright protection to seventy years. *See supra* note 120. The TPP will require Japan to extend copyright retroactively, keeping many older works from entering the public domain for another two decades. K. William Watson, *First Thoughts on the TPP's IP Chapter*, CATO INSTITUTE, (Oct. 29, 2015), <http://www.cato.org/blog/first-thoughts-tpps-ip-chapter>. Articles that have been in the public domain for less than the 20 years would retroactively be taken out of public domain and returned to the copyright holders. *Id.*

152.

Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale. In respect of willful copyright or related rights piracy, “on a commercial scale” includes at least: (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 holder in relation to the marketplace.

Trans-Pacific Partnership art. 18.77, <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>.

153. “Each Party shall treat willful importation or exportation of counterfeit trademark goods or pirated copyright goods on a commercial scale as unlawful activities subject to criminal penalties.” *Id.*

and domestic use of such goods,¹⁵⁴ (4) the act of copying films in movie theaters,¹⁵⁵ and (5) liability for aiding and abetting of the acts.¹⁵⁶ With respect to the five offenses highlighted in the IPR section, the TPP attaches provisions to deter and punish the crimes. These include the requirement of penalties including prison sentences and fines¹⁵⁷ and the grant of judicial authority to determine penalties which take into account the gravity of the crime,¹⁵⁸ to seize suspected counterfeit trademark goods or pirate copyright

154.

Each Party shall provide for criminal procedures and penalties to be applied in cases of willful importation and domestic use, in the course of trade and on a commercial scale, of a label or packaging:

- (a) to which a trademark has been applied without authorization that is identical to, or cannot be distinguished from, a trademark registered in its territory; and
- (b) that is intended to be used in the course of trade on goods or in relation to services that are identical to goods or services for which that trademark is registered.

Id.

155.

Recognizing the need to address the unauthorized copying of a cinematographic work from a performance in a movie theatre that causes significant harm to a right holder in the market for that work, and recognizing the need to deter such harm, each Party shall adopt or maintain measures, which shall at a minimum include, but need not be limited to, appropriate criminal procedures and penalties.

Id.

156. “With respect to the offenses for which this Article requires a Party to provide for criminal procedures and penalties, each Party shall ensure that criminal liability for aiding and abetting is available under its law.” *Id.*

157.

With respect to the offences described in paragraphs 1 through 5, each Party shall provide the following: (a) Penalties that include sentences of imprisonment as well as monetary fines sufficiently high to provide a deterrent to future acts of infringement, consistent with the level of penalties applied for crimes of a corresponding gravity.

Id.

158. “Its judicial authorities have the authority, in determining penalties, to account for the seriousness of the circumstances, which may include circumstances that involve threats to, or effects on, health or safety.” *Id.*

goods,¹⁵⁹ to order the forfeiture of assets,¹⁶⁰ the forfeiture or destruction of contraband goods,¹⁶¹ the disposal of counterfeit trademark goods and pirate copyright goods to avoid harm to the right holder.¹⁶² Additional provisions require a country to release the goods to the relevant authority to a right holder or civil infringement purposes,¹⁶³ to issue legal action without formal complaint by a third party or right holder,¹⁶⁴ and seize assets or fine the amount of revenue generated from the infringing activities.¹⁶⁵

159.

Its judicial or other competent authorities have the authority to order the seizure of suspected counterfeit trademark goods or pirated copyright goods, any related materials and implements used in the commission of the alleged offense, documentary evidence relevant to the alleged offense and assets derived from, or obtained through the alleged infringing activity. If a Party requires identification of items subject to seizure as a prerequisite for issuing a judicial order referred to in this subparagraph, that Party shall not require the items to be described in greater detail than necessary to identify them for the purpose of seizure.

Id.

160. “Its judicial authorities have the authority to order the forfeiture, at least for serious offences, of any assets derived from or obtained through the infringing activity.” *Id.*

161. *Id.*

162.

In cases in which counterfeit trademark goods and pirated copyright goods are not destroyed, the judicial or other competent authorities shall ensure that, except in exceptional circumstances, those goods are disposed of outside the channels of commerce in such a manner as to avoid causing any harm to the right holder. Each Party shall further provide that forfeiture or destruction under this subparagraph and subparagraph (c) shall occur without compensation of any kind to the defendant.

Id.

163. “Its judicial or other competent authorities have the authority to release or, in the alternative, provide access to, goods, material, implements, and other evidence held by the relevant authority to a right holder for civil infringement proceedings.” *Id.*

164. “Its competent authorities may act upon their own initiative to initiate legal action without the need for a formal complaint by a third person or right holder.” *Id.*

165.

With respect to the offenses described in paragraphs 1 through 5, a Party may provide that its judicial authorities have the authority to order the seizure or forfeiture of assets, or alternatively, a fine, the value of which corresponds to the assets derived from, or obtained directly or indirectly through, the infringing activity.

Id.

A lot of the criticism is based on the notion that countries that are parties to the treaty, including Japan, are becoming increasingly “americanized.”¹⁶⁶ Furthermore, there is a stark belief that “[t]he intellectual property regime of the TPP agreement contains traps of which the countries seduced to join are unlikely to be aware.”¹⁶⁷

VIII. Future of Enforcement in Japan

As of November 8, 2015, the Trans-Pacific Partnership has been signed yet still needs to pass Japanese parliament.¹⁶⁸ Japanese economist Nakagawa Junji sees no problem with that occurring. “I do not think there will be much opposition,” he said in a July 2015 interview.¹⁶⁹ Japan will be one of the few countries that would meet no opposition by the government’s official body. Once the Japanese Parliament votes the TPP in, Japan will need to undertake all the TPP provisions and to reword and rework their legal code to suit the guidelines outlined in the TPP IPR chapter.

The future of copyright enforcement in Japan is uncertain. TRIPS was passed in 1995 and outlined the minimum guidelines that Japan had to adhere to; yet only twenty years later, the TPP is signed, further increasing the responsibility Japan must undertake regarding IP rights. The TPP only sets the minimum guidelines Japan must follow, but there is always the possibility that economic pressure will further increase the protection and enforcement Japan will undertake.¹⁷⁰

166. See generally Nashiyama, *supra* note 143.

167. Karel Van Wolferen, *The Predators Behind the TPP*, THE JAPAN TIMES, Feb. 6, 2016, http://www.japantimes.co.jp/news/2016/02/06/business/economy-business/predators-behind-tpp/#.VsDiv_IrKhc. The TPP lacks public support, and critics in Japan believe that by ratifying the TPP, Japan will surrender its sovereignty, and the copyright provisions are a small and important part of this surrender.

168. *Inside Views: ‘One Battleship has Arrived in Port’—A Japanese View on the TPP*, INTELLECTUAL PROPERTY WATCH, Jul. 11, 2015, <http://www.ip-watch.org/2015/11/07/one-battleship-has-arrived-in-port-a-japanese-view-on-the-tpp/>.

169. *Id.*

170. Japan has been consistently pressured by the United States to increase its copyright protection and enforcement throughout the years, and it is possible that such pressure will only further increase in the future.

CONCLUSION

Unlike the United States, who, for the most part, already adheres to most of the TPP IPR guidelines as codified in its laws, Japan will need to undertake a substantial change¹⁷¹ to its intellectual property law to comply with the TPP regulations. The TPP will more than likely completely erase any lax enforcement Japan has been known for in the recent past, as refusal to comply with the regulations outlined in the TPP is accompanied by sanctions. In conclusion, under the TPP, the Japanese government will need to enforce its new intellectual property laws more aggressively than it has ever done in the past.

Richard Michael Cannon*

171. Pressure from foreign agencies and its rights-holders will continue to increase and will potentially be met by much scrutiny by its citizens. The Japanese Government views the TPP as a stepping stone towards a stronger Japanese economy, but its citizens may meet the agreement head-on and challenge the validity of the government's intervention in its copyright enforcement.

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