

Preferential trade agreements and power asymmetries: the case of Technological Protection Measures in Australia

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Abstract: Since the 1980s states have sought to harmonise economic standards to aid the flow of goods, services and finance across borders. The founding agreements of the World Trade Organisation (WTO), for example, harmonised standards on services, intellectual property and investment. However, multilateral trade negotiations in the WTO have since stalled. In response, the United States (US) has engaged in forum shopping, using preferential trade agreements at the bilateral, regional and multinational level to harmonise international standards. This article argues that through forum shopping the US has been able to export standards that support the commercial interests of US-based industries more than they encourage economic exchange across borders. Furthermore, because power asymmetries are starker in preferential trade negotiations smaller and middle power states should not enter trade agreements which include regulatory harmonisation. This is illustrated with the case of the US-Australia free trade agreement, looking specifically at a copyright standard known as technological protection measures. It was clear before, during and after the agreement was signed that Australia's existing standard on technological protection measures was more popular than the US-style standard. Nevertheless, a US-style standard is in effect domestically because of the trade agreement.

Introduction

As the international economy becomes more integrated states have turned their efforts to harmonising economic standards. Standards are principles, rules and laws that regulate commerce and economic exchange. Harmonising standards is seen as important to increasing the flow of trade between states. As such, international trade forums have been involved in standard harmonisation, particularly from the 1980s. The founding agreements of the World Trade Organisation (WTO), for example, harmonised standards on services, intellectual property and investment. However, since then multilateral trade negotiations in the WTO have stalled. In response, states are looking elsewhere. Some have pursued mutual recognition agreements, whereby states allow foreign regulators to certify that goods imported from their market meet local standards.. Mutual recognition has been favoured by the European Union. Other states have preferred to use preferential trade agreements at the bilateral, regional and multinational level to harmonise international standards. This activity, known as forum shopping, has been favoured by the United States (US).

This article argues that the use of forum shopping has adversely affected public policy making in small and middle powers states. This is because trade negotiations with fewer parties maximises power asymmetries. This is especially the case in bilateral agreements with the US. For this reason the article argues that states should not negotiate regulatory harmonisation in preferential trade agreements. To argue this, the article examines the Australia – US free trade agreement as a case study. It specifically focuses on a copyright standard known as a technological protection measure. Prior to its agreement with the US, Australia had a technological protection measure standard which was broadly popular with stakeholders and compliant with multilateral norms. After ratifying the agreement however, this standard has been reformed, harming Australian consumers. The US-style standard Australia adopted was shown to be unpopular in Australia before, during and after the trade negotiations with the US. Despite this, it is now the current standard in effect domestically.

The article first discusses the literature on forum shopping and preferential trade agreements. It then begins its case study by examining how the US's technological protection measure standard was established through a legislative compromise between different domestic constituents. It then examines how the US has since tried to internationalise this standard,

which is different to the existing multilateral standard under the World Intellectual Property Organisation (WIPO). Lastly the paper examines the US's free trade agreement with Australia, to illustrate how the US's favoured standard replaced Australia's existing one, which had much more local support. This case study illustrates how larger states (the US) can set economic standards in weaker states (Australia) with minimal input from local constituencies, and even local Parliaments. Furthermore, it also illustrates that through forum shopping the US has been able to export standards that support the commercial interests of US-based industries more than they encourage economic exchange across borders.

Forum shopping and preferential trade agreements

The completion of the Uruguay Round and the creation of the WTO in 1996 was a significant moment for the international harmonisation of economic standards. The founding agreements of the WTO not only addressed traditional trade issues such as tariffs and import quotas, but also services, investment and intellectual property. This touched on a number of regulatory issues. The Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement was particularly significant. With the WTO's now near-universal membership, the TRIPS agreement unites most national economies to 'roughly similar and rather high [intellectual property] protection and enforcement standards' (Muzaka, 2013, p. 820). However, TRIPS has also been one of the most controversial agreements in the WTO, even amongst the most strident supporters of free trade (Bhagwati 2004).

Since the Uruguay Round concluded, developing countries have become more assertive in both criticising agricultural protectionism, particular in the US and Europe, and opposing efforts to pursue further harmonisation on services and intellectual property through the WTO (Held, Young, & Hale, 2013, p. 158). Meanwhile, emerging multipolarity in the WTO, with the rise of China, India and Brazil, has empowered developing countries and their interests (Held et al., 2013, pp. 157-158; Narlikar, 2010, pp. 719-721). The growing influence of these countries is reflected in the Doha Round, which focuses on issues such as agriculture while neglecting issues such as intellectual property. This has contributed to the stalling of multinational trade negotiations through the WTO.

As a result of the deadlock at the multilateral level, many states have pursued preferential trade agreements instead. This includes the US in particular. Between 2000 and 2007 the US negotiated and signed 11 bilateral trade agreements¹ and one regional trade agreement in Central America (World Trade Organisation 2018). These bilateral agreements include three with Asia-Pacific countries: Singapore, Australia and Korea. However, numerous other states have sought preferential agreements in the region, resulting in a ‘noodle bowl’ of competing agreements, differing in design and scope. Regional efforts to harmonise these have so far been unsuccessful (Capling & Ravenhill, 2011, pp. 555-558).

All of the US’s bilateral agreements involved stark power asymmetries. Most party states to the agreements had economies that were less than 1% the size of the US economy at the time the negotiations began. The largest partners the US engaged at this time were Australia and Korea – although both still accounted for less than 4% and less than 8% of the US economy, respectively (World Bank, 2016). Capling and Ravenhill (2011, p. 559) argue that this underlines ‘the fact that the central drivers of US PTAs [preferential trade agreements] have been foreign policy and security objectives, not commercial considerations’. This is true to a point. While preferential trade agreements have a number of geopolitical and security objectives (Wesley, 2008) they are also being used by powerful states to further their goal of writing the world economic policy in accordance with their own. This benefits US-based commercial interests.

The US always intended to expand on the commitments of the TRIPS agreement (Sell 2010). Intellectual property and services were amongst the issues it secured in the ‘built-in agenda’ written into the WTO’s founding agreements. The built-in agenda was a schedule for future negotiations on unresolved issues. According to the US Trade Representative (USTR), a cabinet level official who negotiates trade agreements on behalf of the President, the built-in agenda suited the US’s interests as it covered numerous issue that it ‘did not get enough on’ during the Uruguay Round (Barshefsky, 1997, p. 28). The US also enacted sweeping copyright reforms in 1998 to address the internet – reforms it was eager to internationalise (Zoellick,

¹ Jordan (2000), Chile (2003), Singapore (2004), Australia (2004), Morocco (2004), Bahrain (2004), Oman (2006), Peru (2006), Colombia (2006), Panama (2007) and Korea (2007).

2003, p. 60). However, these efforts have been hampered by WTO gridlock, which is why the US has instead turned to preferential trade agreements.

This behaviour is called *forum shopping* – shifting between and creating new international forums when existing ones are unfavourable. There are three reasons why states use forum shopping. First, different forums will embody rules, norms and resources that will benefit some interests over others, so states will use the ones that best suits their goals. Second, forum shopping builds momentum for the preferred standard by ‘applying pressure to the favoured arena by creating a contradictory policy in others’ (Murphy & Kellow, 2013, p. 146). Third, creating new forums can block those being created by a rival state (Murphy & Kellow, 2013, pp. 144-146). That is, states pursue forum shopping in order to build to a new multilateral standard in their favoured forum – in this case, the WTO.

Sell (2010, pp. 450-1) makes the distinction between horizontal forum shopping and vertical forum shopping. Horizontal forum shopping involves states creating new standards in other multilateral organisations – that is, organisations with universal membership such as the WTO, the World Health Organisation et cetera. Vertical forum shopping involves states creating new standards below the multilateral level – this includes bilateral and regional efforts, as well as exclusive multinational organisations such as the Organisation for Economic Co-operation and Development. According to Sell (2010), developing states prefer to use *horizontal* forum shopping as it increases their ability to act collectively against more powerful states. Dominant states, meanwhile, favour *vertical* forum shopping which enhances the effects of power asymmetries. Power asymmetries are particularly pronounced in a bilateral setting, allowing more powerful parties to extract maximum concessions from the weaker one while having to make few concessions of their own (Held et al., 2013, p. 162; Manger, 2012).

However, the purpose of the US’s bilateral agreements is not to take over the world one bilateral agreement at a time. Rather, the US has been building what Drezner (2007) calls a club standard. That is, preferential trade agreements allow states to ‘disseminate new rules that can be incorporated more widely and perhaps eventually become a multilateral standard’ (Solís & Katada, 2015, p. 159). Through seeking out bilateral agreements, the US hopes to create a ‘cascade effect in which a club [standard] expands to near universal size’ (Drezner, 2007, p. 76). As former USTR Robert Zoellick explained in 2003, while re-writing multilateral

standards is the ultimate goal, the US would first ‘seek to establish these standards bilaterally and regionally through our [free trade agreement] negotiations’ (Zoellick, 2003, p. 60). Indeed, over time the US has gradually moved to larger agreements, such as the Anti-Counterfeiting Trade Agreement (ACTA) and the Trans-Pacific Partnership (TPP), where US negotiators used the bilateral agreements as templates.

Because of the power asymmetries that exist, the use of forum shopping to expand on international intellectual property norms has had adverse consequences for smaller states. In particular, bilateral agreements have been able to rewrite domestic law, even when it is popular among domestic constituents and compliant with existing multilateral norms. To illustrate this, the research will examine copyright standards in the Australia- US free trade agreement (AUSFTA). AUSFTA is notable for ‘broaden[ing] the scope of preferential trade deals from the exchange of good and services to the institutions that define a country’s independent capacities for economic advancement and social protection’ (Thurbon, 2015, pp. 463-464). As such, its critics have claimed that it has put Australia on a ‘trajectory that fundamentally undermines our sovereignty, or more specifically our ability to legislate to protect our nation’s economic, social and environmental wellbeing’ (George, 2015, p. 468). That is, by including economic standard harmonisation, AUSFTA undermines domestic policy processes. This illustrates that even developed countries such as Australia should avoid including regulatory harmonisation in negotiations with more powerful states.

The case study will specifically assess a standard on so-called technological protection measures (TPMs). Laws on TPMs govern how digital encryption used to restrict the copying and use of digital music, films et cetera can be circumvented. For example, most TPM standards make it illegal to circumvent encryption on a CD so you can make a ‘pirated’ copy of a song. However, digital encryption and locks can also be used for a variety of commercial reasons, separate from copyright. For example, many digital copyrighted products are subject to ‘region coding’, which makes a product sold in one market incompatible with another from a different market. This means, for example, DVD players bought in Australia cannot play DVDs sold in the US. Australians want to buy American DVDs because they are usually cheaper, so region coding can be used to enforce price discrimination and force Australian consumers to buy more expensive versions of otherwise identical products.

Technological Protection Measures in US and international law

The first attempt to legislate TPMs in the US was under the NII Copyright Protection Act ('the NII') introduced in 1995. The TPM provision of this bill attracted criticisms from numerous stakeholders. For example, the Digital Futures Coalition, a coalition of library associations, scholarly societies, consumer groups and IT-related businesses, argued that the TPM standard included in the bill was 'vague and sweeping' (Oakley, 1996, p. 46) and would undermine other important parts of copyright law designed to create balance. Various industry trade groups agreed that the TPM provisions of the bill was too broad and ambiguous (Black, 1996). The critics argued that instead the provisions needed to be technology-specific and based on negotiated positions between relevant parties (Oakley, 1996, p. 43).

However, the biggest objection to the NII was over the issue of liability for internet service providers. The bill meant that internet service providers could be held responsible for the use of their networks and services to pirate copyrighted material over the internet. They argued that the mass of information being transmitted meant that they could not be responsible for all of it, and that making them liable for copyright infringement would cripple the internet just as it was beginning to emerge (Black, 1996; Burrington, 1996; Heaton, 1996). The internet service providers were by this time large enough to lobby to prevent the NII from progressing. Despite the hostility of the copyright industry to the idea limiting liability, it was obvious that such limitations would need to be included in a compromise in order to get enough support to pass the Congress. In 1998 the *Digital Millennium Copyright Act* (DMCA), which increased protection of copyrighted material online while including limitations on internet service providers' liability, became law. Interests which had sparred over the NII supported the compromise included in the DMCA, including America Online, the music industry, Disney, the United States Telephone Association and various others (Mosquera, 1998).

However, as part of the compromise, the TPM provisions of the *NII* were significantly altered in favour of copyright owners. Under the *NII*, TPMs were defined as a technology which 'prevents or inhibits the violation of any of the exclusive rights of the copyright owner' (NII Copyright Protection Act 1995, Sec. 1201). That is, circumventing technology was only unlawful if it actually prevented someone from *infringing* copyright. The DMCA, meanwhile, makes it unlawful to circumvent a technology which prevents *access* to copyrighted work,

meaning that TPMs cover uses that do not infringe copyright at all (Hill, 2000, p. 328; Honigsberg, 2002, p. 502; Norris, 2005, p. 4). The DMCA's definition therefore gives legal protection to technology used for *commercial reasons* – such as the use of region coding discussed above. While the DMCA also included exceptions - that is, circumstances when circumventing a TPM is permitted, these are very narrowly defined (Digital Millennium Copyright Act, 1998, Chapter 12).

Technology industry trade groups were content with the compromise within the DMCA and muted their opposition to its TPM standard, despite the fact that it was much broader than the standard they vigorously opposed under the *NII*. However, there remained considerable opposition from civil society groups. The Digital Future Coalition, for example, continued its campaign against the TPM standard, arguing that it unreasonably prevented the use of copyrighted work, had far-reaching negative ramifications for the development of the internet and extended protection beyond the traditional bounds of copyright law (The Digital Future Coalition, 1997). However, the support from both the main copyright owners and internet service providers was enough for the DMCA to pass into law.

The broader TPM definition included in the DMCA also meant that the US's standard was different to the one which resulted from multinational negotiations at the World Intellectual Property Organisation (WIPO), which were finalised in 1996 under the WIPO Internet Treaties². Under WIPO's standard TPMs are defined as technologies that are used by copyright owners 'in connection with the exercise of their rights' and that restrict uses that are 'not authorised' by the owner 'or permitted by law' (WIPO Copyright Treaty 1996, Article 11). This makes them similar to the definition included in the failed *NII* bill. Because the WIPO standard ties TPMs to actual copyright, its definition does not protect the commercial use that the DMCA does. Region coding, for example, is not protected by the WIPO definition.

[Internationalising US standards on technological protection measures](#)

² This refers to two separate treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty. Both of these define TPMs (or 'effective technological measures') in the same way.

Since passing the DMCA the US has sought to internationalise its definition of TPMs. However, while the US has been using preferential agreements to achieve this, the standard does not apply in a preferential manner. Once a trade partner changes its TPM standard, all copyright owners, be they domestic, US-based or based in a third country are able to use digital locks for commercial reasons. Despite this, the TPM standard the US has internationalised favour US nation interests and those of its copyright owning industries.

While the US has consistently run large deficits in the trade of goods (and an overall trade deficit) since the early 1980's, it has also consistently run a surplus in the trade of service (United States Census Bureau, 2015). Between 2000 and 2007 intellectual property account for, on average, two-thirds of this trade surplus in services (Bureau of Economic Analysis, 2015). The US also continued to dominate the intellectual property trade internationally. In 2006 the US accounted for 46% of all world exports of intellectual property, while its copyright industries³ alone accounted for 20% of world intellectual property exports (calculated from Bureau of Economic Analysis, 2015 and World Bank, 2015). Because US companies are some dominate in the international trade of copyright, strengthening the control that copyright owners have over copyright content primarily benefits US companies.

All of the post-TRIPS bilateral agreements that the US as signed have included its definition of a TPMs. The main distinction between the US's TPMs definition and that included in WIPO is the US definition offers protection to measures that protect against accessing a work not just those which prevent actual copyright infringement. While the exact wording changes marginally between the agreements (although in some cases is identical), most include some variation of the following wording, taken from AUSFTA:

Effective technological measure means any technology, device, or component that, in the normal course of its operation, **controls access** to a protected work, performance, phonogram, or other protected subject matter, **or protects** any copyright (Australia-United States Free Trade Agreement 2004, 17.14.17(b))

³Movies and television programming, books and sound recordings, broadcasting and recording of live events and computer software.

As the bolded parts suggest, these definitions mean that TPMs do not need to protect from actual infringement, they can just protect ‘access’ to a work. Furthermore, the agreements also include similar exceptions to the DMCA, although the Chile agreement omits some qualifiers on these exceptions. The only outlying bilateral free trade agreement is the first one the US negotiated and signed – the Jordanian agreement- which includes different language. However, it also includes a footnote that specifies that ‘[a]ny violation of the prohibition **shall be independent of any infringement** of copyright or related rights’ (United States-Jordan Free Trade Agreement 2001, 13 footnote 19). The language in the Jordan agreement is less clear, but is open to an interpretation that protects access and not just infringement. By protecting access, the definition of TPMs the US has pursued commits the party-states to protecting commercial activity, not just preventing copyright infringement.

Case study: The Australia-US free trade agreement

The above analysis shows how the US’s definition of TPMs was established through a compromise between internet service providers and copyright owners, and how this definition has been internationalised through US free trade agreements. This section will explore the adverse outcomes created in smaller trading partners, in this case Australia, which signed the Australia-US free trade agreement in 2004. This agreement included the US’s definition of TPMs, which protect technologies which prevent *access* to copyright work. Not only this, but the agreement also includes ‘narrowly crafted exceptions – in close consistency with how the U.S. Congress crafted those exceptions in U.S. law’ (IFAC-3, 2004, p. 9). As a result of this, Australia, under the agreement, cannot introduce exceptions which would allow circumvention of TPMs for non-infringing uses. This constrains Australia from maintaining a connection between TPM protections and actual copyright infringement. As will be discussed below, Australia had to reform its copyright laws in order to comply with the agreement, meaning that Australian residents have been impacted by international standard setting through AUSFTA.

While the Australian public did not have input to the process of legislating the DMCA, there was presumably opportunities to consult and lobby the Australian government when it was negotiating AUSFTA. That is, Australia was under no obligation to accept the US definition of TPMs. Any interests, commercial or civil, could have pressured the Australian negotiators

to not accept the US's definition. According to Australia's Department of Foreign Affairs and Trade (DFAT), there was ample opportunity to do this. Prior to the negotiations DFAT accepted submissions from the public on issues to be discussed, and received approximately 200 such submissions including 60 from leading industry groups. Throughout the negotiations DFAT 'continued to consult State and Territory governments, business and the general public extensively', meeting with over 200 groups from industry, labour, civil society and state governments (Department of Foreign Affairs and Trade, 2004, pp. 1-2).

However, despite this many felt that consultation was inadequate. For example, the Australian Digital Alliance, a coalition of IT companies, universities and cultural organisations, argued that although DFAT did run consultations, these were of little value as the negotiations themselves were closed. As such, 'participants in consultation were not privy to information at an appropriate level of detail as to the nature of provisions being considered; (Australian Digital Alliance, 2004, p. 5). Meanwhile, prominent intellectual property law scholar Kimberly Weatherall criticised the treaty making process for lacking the transparency and accountability found in domestic law making. Specifically, she argued that 'democratic processes of public consultation and review have been ignored' (Weatherall, 2004, p. 12). She also echoed the criticisms of the Australian Digital Alliance, noting that the consultations run by DFAT suffered from an 'information gap', which resulted in the attendees essentially having to guess what may be important to discuss (Weatherall, 2004, p. 13). The Senate committee established to examine the free trade agreement after it had been signed agreed with these criticisms (Senate Select Committee, 2004, p. 29).

However, the argument of this article is that the problem with bilateral trade agreements for smaller negotiating parties is not the lack of consultation with domestic constituencies, but rather the inclusion of regulatory harmonisation in negotiations and the power asymmetries which can exist at the bilateral level. The US comparative size is the problem, along with its insistence that AUSFTA include detailed standards. The fault is not with the actions of DFAT. In fact, DFAT had advised the then-Howard government to walk away the agreement due to the intransigence of US negotiators on agricultural issues, and the likelihood that the final agreement would be adverse to Australia's interests. Howard refused, mostly for domestic electoral reasons (Capling & Ravenhill, 2015, p. 499). The argument is not that DFAT is less responsive to stakeholder concerns when negotiating bilateral agreements. It is that DFAT is

less able to address stakeholder concerns when faced with a negotiating partner as powerful as the US – as the case of TPMs illustrates.

While Australia was not a signatory to the WIPO Internet Treaties at the time, it nevertheless had established a law on TPMs in the *Digital Agenda Act* of 2000 (Digital Agenda Act 2000, 15B Subsection 10). This law was consistent with the WIPO definition of TPMs and thus would have met the obligations of the agreements had Australian been party to them. It was also inconsistent with the US's definition under the DMCA, by requiring measures to actually 'prevent or inhibit the infringement of copyright' (Digital Agenda Act 2000, 15B Subsection 10(1)). This point was reaffirmed in a high profile case before the High Court, Australia's highest court, in which Sony accused a defendant of distributing circumvention devices in the form of 'mod chips' which enabled PlayStation gaming consoles to bypass the region-coding of the devices and games. The High Court rule against Sony, stating that:

The true construction of the definition of 'technological protection measure' must be one which catches devices which prevent infringement. The Sony device does not prevent infringement. Nor do many of the devices falling within the definition advanced by Sony. The Sony device and devices like it prevent access only after any infringement has taken place (quoted in Rimmer, 2007).

Therefore, in Australia TPMs were determined not to include measures that did not protect copyrighted work from infringement. This was in contrast to how TPMs are defined under the US's DMCA.

There was no indication that policy makers felt compelled to broaden the TPM definition to include access controls prior to the US free trade agreement being signed. To the contrary, a number of reviews and reports, all of which had extensive domestic consultation processes, reaffirmed the approach taken under Australian law. In 2002 the now-defunct Copyright Law Review Committee conducted a review of Australian copyright law, including TPMs. The report, *Copyright and Contracts*, recommended that Australia retain its provisions on TPMs (Copyright Law Review Committee, 2002). Another extensive review of the *Digital Agenda Act* commissioned by the Attorney General, which ran concurrently with the AUSFTA negotiations, actually recommended that Australia *tighten* its definition by making the law

more explicit in stating that TPMs must be designed to ‘prevent or inhibit the infringement of copyright’ and not ‘merely deter or discourage a person from infringing copyright’ (Phillips Fox, 2004, p. 107). The Senate Select committee was concerned AUSFTA essentially usurped these domestic policy reviews, which included widespread consultation:

These processes rejected some of the very changes to Australian IP [intellectual property] law that the AUSFTA now requires Australia to adopt. This suggests to the Committee that at least some of the changes required to Australian law under the AUSFTA are not desirable from an Australian policy perspective. The Committee considers it neither desirable nor appropriate that domestic law reform processes have been made virtually redundant by the AUSFTA negotiations (Senate Select Committee, 2004, p. 82).

These concerns were shared by the broader community, with many organisations raising objections to how consultation over the intellectual property provisions were conducted in the negotiations. This included a variety of commercial interests, including copyright owners and copyright users, as well as consumers, libraries et cetera (Senate Select Committee, 2004, pp. 52-56).

Opposition to the new definition of TPMs was apparent after the details of the agreement were publicly known. Consumer groups, libraries, the tech community and Australia’s competition and consumer regulator all raised objections to the increased scope of the standard (Senate Select Committee, 2004, pp. 79-89). Of particular concern was the issue of price discrimination. Australia is an isolated, wealthy and small market, meaning that products (including copyrighted products) have often been sold at higher prices in Australia when compared with other markets overseas. To prevent arbitrage (i.e. ‘parallel importing’ cheaper, though identical, products from cheaper markets) companies have used region coding on a variety of digital products sold in Australia. Meanwhile, consumers have used their own means to get around these codes. This issue was at the centre of the Sony High Court case, which reaffirmed the right of consumers to do this. However, the definition of TPMs under AUSFTA would disallow this practise.

The US's goal is to see 'parallel importing' banned outright. It has tried unsuccessfully to include parallel importation bans for copyrighted works in all of its post-TRIPS bilateral agreements, only succeeding in its agreements with Jordan and Morocco (IFAC-3, 2004b, p. 10-1). However, while a parallel importation bans for copyright⁴ was not included in AUSFTA, some feared that the definition of TPMs would protect the use of technologies for price discrimination, making parallel importing difficult in practice. An Australian parliamentary research paper on the intellectual property chapter of AUSFTA raised these objections. It noted that the new definition 'severely limits the ability of the Government to allow wide exemptions for non-infringing uses' which could adversely impact consumers as at least some of the technological protections used by the copyright industry 'are designed more to maximise profits than prevent piracy' (Richardson, 2004). A separate parliamentary research paper was more direct: 'It does seem incongruous that a "free trade" agreement, purportedly intended to liberalise trade, should assist copyright holders to establish their own trade barriers' (Varghes, 2004, p. 33).

These concerns did not abate. In 2006 another parliamentary inquiry was conducted, looking specifically at how to implement AUSFTA's provisions on TPMs. Once again, it consulted broadly with the community. It recommended that when implementing the TPMs provisions of AUSFTA 'the definition of technological protection measure/effective technological measure clearly require a direct link between access control and copyright protection' (House Standing Committee on Legal and Constitutional Affairs, 2006, p. 26). This recommendation is essentially an appeal for the status quo and a rejection of the definition included in AUSFTA, which requires no such link between access control and copyright protection. Furthermore, through the narrow exceptions included in AUSFTA, the agreement also *prevents* Australia from making such a direct link between TPMs and infringement part of its law.

The implementation of the new TPM standard, which passed the parliament in late 2006, tried to split the baby in half (Copyright Amendment Act 2006, Schedule 12). It includes an exemption for circumventing 'geographic market segmentation' -thus allowing a consumer to, for example, bypass a DVDs region code (Attorney General's Department, 2012, p. 14)- while

⁴ Though a parallel importation bans for patents was included in the agreement.

at the same time prohibiting circumvention for non-infringing uses. While a compromise of sorts was reached this remained far from what the various reviews recommended, and remains inadequate in the eyes of many Australian constituencies. A report released by the influential Productivity Commission⁵ in 2010 criticised AUSFTA's TPMs provisions, arguing they 'make it less likely that an appropriate balance between supplier and user interests prevails in Australia's intellectual property system' (Productivity Commission, 2010, p. 167).

It is therefore difficult to argue that the TPMs provisions reflected the wishes of the Australian public. That is not to say that there was not support for the definition domestically- there was, particularly among copyright owning interests. However, several reviews both during and after the negotiations, all including extensive consultation processes, concluded that Australia's existing laws of TPMs was superior. None saw reason for anti-circumvention protection to be extended to non-infringing uses. However, the bilateral negotiations with the US rode roughshod over domestic interests – including those of Australian Parliamentary committees. As a result, Australia has a TPM standard that reflects the specific interest of US-based copyright owners, won as part of a domestic compromise with internet service providers to pass the DMCA.

After AUSFTA

Criticism of Australia's new TPMs standard remains today. For one thing, there is ambiguity as to how TPMs apply to so-called 'geo-blocking' online. This refers to the practice of identifying a website user's location in order to restrict their access to certain content or prices. For example, Australian consumers are unable to access certain content on online streaming services such as Netflix due to licensing arrangements. Again, consumers can 'dodge' these tactics by using technical means, which disguise their location. This practice was the subject of much scrutiny in a parliamentary review into price discrimination on IT products in Australia. Numerous submission to the review noted that it was unclear whether geo-blocking was considered a TPM, despite the Attorney General's department suggesting they are not

⁵ The Productivity Commission is an independent research and advisory body for the Australian Government, created by the *Productivity Commission Act 1998* (Productivity Commission 2018).

(House of Representatives Standing Committee on Infrastructure and Communications, 2013, pp. 97-106).

In 2013 this inquiry into IT price discrimination in Australia recommended amending the law to clarify and secure consumer rights to circumvent TPMs that ‘control geographic market segmentation’ – especially as it relates to the practice of geo-blocking (House of Representatives Standing Committee on Infrastructure and Communications, 2013, p. 108). This recommendation has been supported by numerous other reviews. This includes a major review of Australian competition policy in 2015 (Harper, Anderson, McCluskey, & O’Bryan, 2015, p. 353) and the review of Australia’s copyright laws in 2016 by the Productivity Commission (2016, pp. 139-145). All of these, again, consulted extensively with commercial and civil interests in Australia. The Productivity Commission also noted how the TPMs standard Australia has adopted, which restricts access, is undermining the overall balance of copyright law as it ‘has the potential to restrict uses that have been expressly permitted by parliament’ (Productivity Commission 2016, p. 140). That is, the breadth of the TPMs standard that Australia assumed under its AUSFTA obligations is so wide, it is impacting how domestic copyright laws actually apply.

However, as discussed, the US has not only engaged in vertical forum shopping through bilateral agreements because they accentuate power asymmetries and enable it to impose its standards on weaker parties, like Australia. These agreements have been part of broader effort to build new multilateral standards. AUSFTA and other bilateral agreements only serve this goal if the party states support the internationalisation of the US’s TPM standards through their involvement in other negotiating forums. Research by Kim and Manger (2017) illustrate this with regard to services in preferential agreements in the Asia-Pacific. They show that states which sign preferential agreements with larger economies like the US will often commit to extensive liberalisation across its service industries, with specific exemptions carved out. This is referred to as a ‘negative list’ approach. The alternative is a ‘positive list’ approach, whereby states propose the service industries that will be liberalised. Kim and Manger (2017) argue that the negative list approach creates path dependency because signing negative list agreements reveals information of a state’s existing protectionist policies and creates a baseline from which to negotiate further concessions. The result is a diffusion of negative list agreements by states

that have already signed such agreements – usually at the behest of larger states such as the US.

Kim and Manger (2017, p. 472) also argue that negative list agreements, ‘locks in the status quo regulatory system in the signatories’, which is particularly relevant to the case of TPMs. The harmonisation of copyright through bilateral trade agreements are not preferential. After a member state reforms their local laws to comply with an agreement, all copyright owners can reap the benefits. If a state has already committed to a standard, it has little to lose by getting new parties to agree to the standard as well. In fact, it may benefit from having other states similarly constrained, as it is. This has been acknowledged by the Productivity Commission in its review of Australian trade policy in 2010, in which it argued that while the copyright provisions of AUSFTA have had a net negative impact on Australia, given that these cannot easily be reversed, it is in the interest of Australia to encourage other countries to adopt similar standards. This is because doing so ‘would generate benefits for those Australian IP rights holders who export to the partner country, while having no new adverse effect on the price and consumption of IP material purchased in Australia’ (Productivity Commission, 2010, p. 260). This creates a path dependency for future negotiations.

As Weatherall (2015a) has shown, Australia has indeed been a reliable proponent of the US’s preferred copyright standards since AUSFTA– including on TPMs measures. Prior to the agreement Australia sought only to reaffirm existing multilateral standards when negotiating preferential trade agreements, but did not seek to expand upon them. While complying with all of its international obligations Australia would also enact unique copyright reforms domestically, even attracting the ire of the US in doing so, such as when it abolished numerous parallel importation restrictions in the 1990s. However, post-AUSFTA Australia has shifted its preferences, actively pursuing intellectual property provisions consistent with Australian law and thus above existing multilateral standards. Subsequent bilateral agreements with Chile, Malaysia, Korea and Japan all included intellectual property provisions which were based on Australian law and much more detailed than multilateral agreements (Weatherall, 2015a, pp. 547-552). The Australian agreement with Korea includes access control restrictions in its definition of TPMs, as does its agreement with Singapore, which was negotiated in parallel with AUSFTA (Singapore-Australia Free Trade Agreement 2003, 13.5.2; Korea–Australia

Free Trade Agreement 2014, 13.5.9). Both of these countries also have bilateral agreements with the US.

However, while the Productivity Commission also argued that including AUSFTA-style standards in agreements would benefit Australia overall, the majority of the gains would flow to third parties, namely the US. Meanwhile, like Australia under AUSFTA, parties which accepted similar standards at Australia's behest would likely lose out economically. Therefore, the Productivity Commission (2010, p.260) argued that seeking to include intellectual property provisions in bilateral agreements wastes Australia's negotiating leverage. As such, it doubted that 'the approach adopted by Australia in relation to IP [intellectual property] in trade agreements has always been in the best interests of either Australia or (most of) its trading partners', and recommended that Australia not seek to include intellectual property provisions in its bilateral trade agreements (Productivity Commission 2010, p. 263). Instead, the Productivity Commission (201, p. 264) recommended that Australia focus on multinational forums when pursuing intellectual property standards.

Under President Obama, the US also began to focus more on multinational forums. Specifically, it has pursued new agreements which included its existing bilateral partners, such as ACTA. Launched in 2007, the ACTA negotiations included a number of potential US allies including Australia, South Korea, Morocco, and Singapore - all of which had free trade agreements with the US⁶. However, the US was nevertheless unable to secure its TPMs definition in ACTA. This is because of the involvement of the European Union, which is strong enough to resist US pressure and which defines TPMs similarly to WIPO. In fact, the ACTA's standard on TPMs more closely resembles the European Union's directive than the DMCA (Weatherall, 2015b, p. 20). Meanwhile, Weatherall (2010, p. 859) argues that this reflects the fact that bilateral standards are 'not "multilateralizable," and have had to be watered-down in multinational negotiations'. However, while the presence of the European Union complicated the ACTA case, the TPP (which does not include another large economy to rival the US) is particularly instructive for how forum shopping can multinationalise club standards.

⁶ Jordan attended the first round of negotiations for ACTA but eventually dropped out of the agreement.

Leaked TPP negotiating drafts from 2013 show that Australia, Singapore, Mexico and Peru all joined the US in proposing a TPM standard which closely resembled the template used in the US's earlier bilateral agreements as well as the DMCA (WikiLeaks, 2013, QQ.G.10). All of these states, with the exception of Mexico, had committed to the US standard already through bilateral agreements (The North American Free Trade Agreement has no clause on TPMs). Malaysia, Vietnam, Brunei and Japan all opposed this standard, while Canada proposed a clause allowing states to permit circumvention of TPMs for non-infringing purposes, while still including access controls in the definition of TPMs themselves (WikiLeaks, 2013, QQ.G.10(d)(xi)). The proposal by Canada created a loophole allowing states to still restrict TPM protection to actually infringing uses. This proposal reflected those included in other Canadian preferential agreements, such as its bilateral agreement with Korea (Canada-Korea Free Trade Agreement, 2015, 16.11.7). Meanwhile, Chile, New Zealand, Peru, Vietnam, Malaysia, Brunei and Japan also proposed an alternative TPM standard which more closely resembled the existing multilateral standards under WIPO (WikiLeaks, 2013, QQ.G.12). Australia joined the US in opposing this proposal.

The final TPP agreement included the US proposal of TPMs, which includes access control like the DMCA. However, it also included a clause similar to what Canada had proposed in 2013. This means that parties to the agreement have opportunities to allow circumvention of TPMs for non-infringing purposes. Australia supported the US's initial proposal on TPMs, which was similar to what it had already committed to under AUSFTA. Indeed, after Japan Australia was the biggest supporter of US intellectual property proposals in negotiations, supporting all US proposals that matched provisions in AUSFTA (Weatherall, 2015a, pp. 544,552; Wikileaks, 2014). This is in fitting with the recommendations of the Productivity Commission in 2010. However, Australian negotiators also took advantage of the new clause and secured a side letter to the agreement that specified that the TPP's standards on TPMs would apply to Australia instead of AUSFTA's (Robb & Froman, 2016). This would have effectively weakened Australia's obligations to the US over the regulation of TPMs. This indicates that, first, Australia has been somewhat responsive to the domestic criticisms of its TPM standard and that, second, it was able to take advantage of an agreement with more parties to win concessions off of the US.

However, while the TPP was a multinational agreement, Australia's approach to the negotiations, and the copyright provisions in particular, still came under scrutiny. Even the Productivity Commission, which had previously recommended that Australia use multinational forums for negotiating copyright standards, and that getting more states to commit to AUSFTA standards could only benefit Australia, raised concerns. Throughout the negotiations themselves, Australian negotiators went to great pains to assure stakeholders that they would not accept any provisions which would change domestic copyright law in any way (Robb, 2015). However, in its review of Australian copyright law in 2016, the Productivity Commission argued that:

While some TPP provisions appear to be in Australia's interests (such as commitments towards greater transparency of IP systems), in some areas the TPP goes beyond other agreements such as TRIPS. And the TPP further locks in past bilateral commitments, complicating any renegotiating efforts that could be taken to strike a better balance. As such, it is unclear whether Australia is a net beneficiary on the IP [intellectual property] provisions taken collectively (2016, p. 543).

The Productivity Commission went on to recommend that Australia consider a variety of forums and means, including mutual recognition, to cooperate internationally on the administration of intellectual property. However, it argued that negotiations on the protection of intellectual property, that is on copyright standards, should occur separately and only at the *multilateral* level – specifically at WIPO and the WTO (2016, pp. 542-7). The concerns over the TPP were echoed by Australia's competition and consumer regulator, the Australian Competition and Consumer Commission (ACCC). The ACCC also argued that the TPP 'appears to impose IP [intellectual property] restrictions beyond existing international treaties, and this may tilt the balance in favour of IP rights holders to the detriment of competition and consumers' (2015, p. 18). The Australian Government's lack of transparency and failure to meaningfully engage with domestic stakeholders on intellectual property issues when negotiating international agreements have also continued to be criticised (Productivity Commission 2016, pp. 524-5).

Therefore Australia, through AUSFTA accepted a TPMs standard with little support domestically. This is evident by the fact that numerous government and Parliamentary reviews,

which have much greater opportunity for community engagement and higher levels of accountability to the Australian public, have either criticised the TPM standard in AUSFTA or argued in favour of Australia's previous standard. This is true for reviews before, during and after AUSFTA was negotiated and ratified. As these reviews have also found, the new standard under Australian law adversely affect consumers and copyright users by enabling price discrimination and tipping the balance of copyright law in favour of copyright owners. Furthermore, the internationalisation of this TPM standard by Australia through subsequent trade negotiations, along with inclusion of intellectual property provisions in general, has also be heavily criticised domestically. It would therefore be difficult to argue that Australia would have been so supportive of the US's position in the TPP negotiations had it not been for AUSFTA.

AUSFTA has thus fulfilled its purpose for the US: Australia has assisted the US in disseminating its copyright standards internationally. Australia has done this through both its own subsequent bilateral agreements, and by acting as an ally in multinational forums such as the TPP. However, this is effectively a moot point following the US's exit from the TPP in 2017. While the TPP is being renegotiated following the US's withdrawal, this has already resulted in eleven intellectual property provisions being suspended from the agreement – including those on TPMs (Trans-Pacific Partnership Countries, 2017). With respect to copyright for the digital era, the new TPP does not emulate the US's WIPO-plus standards, pursued over the past two decades. Nevertheless, this case study illustrates that the use of vertical forum shopping by powerful states to harmonise international standards has had adverse outcomes on smaller states party to the negotiations. This includes multinational agreements where power asymmetries are less stark, though still present. It would therefore be prudent for countries to not pursue trade agreements that include regulatory harmonisation clauses.

Conclusion

This article argued that larger states want to harmonise standards in a way to ensure that their industries benefit the most from international commerce. They often do this via bilateral free trade agreements, which heighten the influence of power asymmetries allowing them to extract

maximum concessions. This creates adverse outcomes for weaker states, which lose control over some policy making. This is shown through the example of TPMs. In the US a standard for TPMs was established through consultation and negotiation with the affected industries and interests. This standard was exported to Australia via a bilateral free trade agreement. The constituencies in Australia, however, had no input to the US standard, and fiercely opposed its inclusion in the agreement. Since the agreement has been ratified, policy makers and the Parliament continue to criticise the standard, however are reluctant to change it due to Australia's obligation under its agreement with the US.

The US has been equally successful in exporting its TPM standard through a number of other bilateral agreements. It has, however, had less success in larger agreements. This suggests that forums which include more or equally matched parties make it difficult for larger states to secure their preferred standard. This is especially the case if the agreement includes more than one dominant state, such as the case with ACTA, which also included the European Union. However, while the TPP was less consistent with domestic US law than its bilateral agreements, it nevertheless extended the US's definition – one which included access control and thus remains inconsistent with existing multilateral standards under WIPO. This does not suggest that negotiations at the multinational level cannot create the same problems for smaller states. However, it does suggest that forums which heighten power asymmetries the most – such as bilateral trade agreements – are much more prone to creating adverse outcomes for weaker parties.

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