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Two Birds with One Stone: The Trans-Pacific Partnership and US Copyright Standard Setting

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Introduction

In early 2016, the United States (US) and eleven other countries signed the Trans-Pacific Partnership (TPP). Many commentators have argued that the TPP was part of an attempt by the US to counteract the growing economic influence of China in the Asia Pacific region. This views the TPP as part of President Obama's 'pivot to the Asia Pacific'. This paper does not dispute these geopolitical and security motivations of the TPP. However, it also argues that the agreement served another purpose. Namely, it represented a major advance in the US's long-running effort to export its preferred economic standards internationally. This began under President Bush's so-called 'competitive liberalisation' trade policy. Throughout the 2000s the US signed numerous bilateral free trade agreements with a number of smaller economies. This was done to disseminate a template for trade agreements that could later be emulated in multilateral forums with more parties. This strategy rose to pre-eminence as exiting multilateral forums, including the World Trade Organisation (WTO), became gridlocked and unfavourable to US interest.

This paper process traces selected copyright standards (i.e. regulations and rules governing economic exchange) from competitive liberalisation in the 2000s to the TPP. It applies the theoretical framework developed by Daniel Drezner (2007) to do so. Drezner's framework has two main elements that are important for this analysis. First, that states will be pressured by their domestic industries to harmonise international standards in accordance with existing domestic standards. Second, that states will 'forum shop' to pursue club standards when universal forums (such as the WTO) become unfavourable. They will also seek rival standards when other, equally powerful states oppose their preferences. Apply this framework, this paper argues that competitive liberalisation, including the TPP, are part of US attempts at both club *and* rival standard setting.

The paper begins by outlining the existing literature on the TPP, specifically addressing the geopolitical explanations. It then introduces Drezner's framework for analysing standard setting in the international political economy. Third, it explores the origin of the US's domestic laws

regulating the distribution and protection of copyright on the internet and through digital media. In particular, it discusses the *Digital Millennium Copyright Act*, which the US has sought to internationalise as a matter of priority following its passage in 1998. The paper will also illustrate how these standards differ to existing multilateral standards and those of a rival great power – the European Union. It then traces how these standards have been disseminated through bilateral agreements during the 2000s. It also considers the failure of the US to emulate this success in the Anti-Counterfeiting Trade Agreement due to opposition from both the European Union and local internet companies. Finally, it illustrates how the US integrated the template from bilateral agreements into the TPP, successfully appeasing all domestic industries. The ratification of the TPP would have significantly advanced the US decade's old attempt to internationalise the *Digital Millennium Copyright Act*. The paper concludes with a brief word of the US's exit from the TPP in January 2017.

The geopolitics of the TPP

Commentators have stressed the geopolitical significance of the Trans-Pacific Partnership (TPP) under the Obama Administration's 'pivot' to Asia. Indeed, the national security objectives of the TPP were explicitly trumpeted by the Obama Administration as it sought to finalise and later ratify the agreement. For example, Secretary of Defence Ash Carter argued that the TPP was one of the most important parts of the US's "rebalance to the Asia-Pacific", and that "passing TPP is as important … as another aircraft carrier" (Carter 2015). These comments came as Obama was heavily lobbying lawmakers to pass the so-called 'fast track' legislation, which would have given the Administration the authority it needed to finalise the negotiations. Fast track, also known as the trade promotion authority, was first established in 1974. It essentially delegates authority over trade negotiations from the Congress to the President, enabling negotiators to finalise agreements and guide them through ratification without being changed by anxious politicians eager to please their constituents. Fast track is only granted for limit periods, and in order to sign off on the TPP, the Obama Administration was seeking its renewal.

The US trade negotiator – the US Trade Representative (USTR) - echoed these arguments after the TPP had been signed, when Obama maintained hope of ratifying it during the 'lame-duck' sessions before leaving office. A fact sheet released by the USTR argued that the TPP would "[strengthen] relationships with our allies and partners to protect our shared global system", and more specifically, that the "TPP is a concrete manifestation of our strategy of rebalancing toward Asia" (USTR 2016). Thus, continuing the Bush-era use of preferential trade agreements to reinforce strategic relationships, the TPP shored up the US's bilateral military alliances in the Asia Pacific to achieve security objectives in the region (Capling and Ravenhill 2013, 191-2). The TPP's geopolitical significance extended beyond military matters, however. A successful TPP would have also prevented the US from being excluded from Asian economic regionalism, while establishing the US as an important agenda-setting actor for larger regional free trade efforts in the future - such as the Free Trade Area of the Asia-Pacific (Lewis 2011, 39, Capling and Ravenhill 2011).

During the negotiations scholars argued that the TPP was "the main vehicle in the economic front to ensure America's staying power in Asia" (Solís 2012, 327). The US wanted to ensure that economic integration in the fastest growing region in the international economy followed a US-favoured trajectory, which required it to "reshuffle the existing economic paradigm in the Asia-Pacific region" (Zhang 2011). This targeted economic rivals by "[erasing] the line down the middle of the Pacific, which China, Japan and perhaps others, might prefer to draw" (Lewis 2011, 38). However, the main target of this was China. Once again, this was explicitly discussed by the Obama Administration, including the President himself. For example, in the 2015 State of the Union address, when the White House was actively lobbying for fast track, President Obama argued that:

> "Today, our businesses export more than ever, and exporters tend to pay their workers higher wages. But as we speak, China wants to write the rules for the world's fastest-growing region. That would put our workers and our businesses at a disadvantage. Why would we let that happen? We should write those rules" (Obama 2015).

In the 2016 State of the Union address, delivered after the agreement was signed, President Obama echoed these sentiments arguing that "[w]ith TPP, China does not set the rules in that region; we do. You want to show our strength in this new century? Approve this agreement" (Obama 2016). Both of these echo public statements issued by the Obama Administration following the signing of the trade deal in 2015 (for example see USTR 2016).

The TPP specifically targeted and affected China in two ways. First, the mere act of excluding it from the agreement would have reduced its export, specifically its exports of textiles and apparel goods (Lu 2015). Second, the 'gold standards' included in the agreement governing areas such as investment, labour relations, environmental protection and intellectual property set a high barrier for China to join the agreement later, ensuring it remained excluded (Solís 2012, 330, Devadason 2014, 476-7, Capling and Ravenhill 2011, 558). The US negotiators' preoccupation with including provisions that appeared to target China at times frustrate the other parties (Capling and Ravenhill 2013, 193). China has responded to these threats by pursuing a rival agreement, the Regional Comprehensive Economic Partnership (RCEP), to establish an alternative template for future Asian integration (Lewis 2013). To bolster its own influence within RCEP, China has sought to emphasise development concerns and trade in goods. This has involved resisting the efforts from Japan to include Australia and India, and to include non-good issues such as intellectual property and investment (Hamanaka 2014, 167-75).

Therefore, the geopolitical significance of the TPP for the Asia-Pacific, specifically as it relates to the growing influence of China, has been widely acknowledged in the literature. This paper does not dispute these geopolitical motivations and outcomes. However, the paper does argue that, in addition to this, the TPP achieved another important political and economic objective for the US. The 'template' agreement the US pursued for the Asia Pacific via the TPP in an attempt to undermine the influence of China closely replicates the template it has pursued globally to circumvent the deadlocked World Trade Organisation (WTO) from the 2000s. Thus, the TPP would not only "write the rules for the world's fastest-growing region" (Obama 2015), but would have significantly furthered the US attempts to write the rules for the world. This has also been argued by Solís, who describes the TPP as a "savvy retooling" (Solís 2012, 328) of George Bush's

'competitive liberalisation' strategy. Under competitive liberalisation, the US pursued a number of preferential trade agreements to advance its preferred template for trade agreements, hoping that the template would eventually be assumed at the multinational level. The US believed that by pushing this template in the TPP there was added incentive for states join (Solís 2012, 328). This paper seeks to expand on how the TPP can be viewed in this light.

Forum shopping and great powers

The analytical framework proposed by Daniel Drezner (2007) it well suited to this task. This approach stresses the importance of market size in determining negotiating outcomes. Market size is important because when negotiating states must contend with local political actors who use their 'voice' to create political costs (Drezner 2007, 47-51). Because of the ability of local industries to inflict political costs, states will prefer to internationalise their existing domestic standards (Drezner 2007, 40). Meanwhile, states with large markets have much to give (in terms of market access) and little to gain when negotiating with smaller parties. As a result, larger states face higher political costs from local actors and smaller states face lower ones, so the preferred option for both negotiating parties will be to accept the larger state's preferences. This suggests that the starker the asymmetry between the market size of negotiating parties, the more concession the larger party will be able to extract. This explains why bilateral free trade agreements have become a popular tool for larger economies such as the US in recent years (Held, Young, and Hale 2013, 162, Manger 2012).

Drezner argues that overall international negotiations will be dominated by so-called 'great powers'. To be considered a great power a state must not only have a large market but it must also be able to resist coercion from other states with large markets (Drezner 2007, 35-9). According to Drezner, only the US and the European Union (EU) meet this definition and can thus be considered great powers. While China has definitely been rising as an economic power, it remains too dependent on foreign markets to meet this definition. However, the US and the EU must also contend with universal organisations (for example the WTO) that enable smaller states to resist them. When great powers face resistance to their standard setting in universal organisations, they

will seek to establish 'club standards' which exclude uncooperative states. A club standard can alter the costs for excluded states causing them to change their preferences, can be used to coerce uncooperative states in other multilateral settings or can help sympathetic states to mitigate local interest groups that oppose the standard (Drezner 2007, 75-8). Meanwhile, if the two great powers are opposed to each other they seek to create 'rival standards' by co-opting and coercing smaller states to back their position and strengthen their combined market size (Drezner, 2007, 72-81).

Competitive liberalisation as forum shopping

The completion of the Uruguay Round and the creation of the WTO was a significant achievement for the US. The foundational agreements of the WTO dealt with three areas the US had identified as priorities during the 1970-80s as its economy transitioned away from goods to services. This included the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Investment Measures (TRIMS) and the Trade-Related Aspects of Intellectual Property Rights (TRIPS). However, the WTO has since become an unfavourable forum for the US and its economic interests as developing countries have better organised under the leadership of Brazil, India and China (Held, Young, and Hale 2013, 157-8, Narlikar 2010, 719-21). Furthermore, following the collapse of negotiations in Seattle there was a growing backlash against aspects of the Uruguay Rounds. To address these criticisms, the WTO adopted a 'development agenda' for its negotiations. Developing countries have been able to leverage this 'commitment' to development to oppose further obligations in areas such as investment, services and intellectual property (Lee 2012). Because of this, many US priorities have largely been left out of the WTO's post-Uruguay negotiations.

That is, the universal forum of the WTO has enabled smaller states to oppose the agenda of the US. In light of this, the US has instead pursued agreements outside of the WTO. This has included a number of bilateral and regional preferential trade agreements. The proliferation of these agreements has occurred under the 'competitive liberalisation' agenda established by the Bush Administration. Robert Zoellick (2003b, 19), USTR for President Bush's first term, described competitive liberalisation as an "activist strategy" to put free trade "on the offense" to re-establish

US leadership over international trade liberalisation, especially in the wake of the failure of the Seattle negotiations. It is a multi-pronged approach to trade, pursuing global, regional and bilateral agreements (Zoellick 2003b, 20). However, the WTO remained a key element of the strategy, with the US keen to use its leadership to maintain "forward momentum in the negotiations and ...[keep] WTO members focused on the core issues of market access" (Zoellick 2003, 21) . This included emphasising to the least developed states the benefits of free trade in order to "keep all WTO members effectively invested in the process" (Zoellick 2003, 23-4). The role of bilateral agreements under competitive liberalisation is to support the multilateral process.

From 2000 to 2007, the US signed eleven bilateral agreements and one regional agreement (the Central American Free Trade Agreement – which also includes the Dominican Republic). These agreements were used to "promote the broader U.S. trade agenda by serving as models, breaking new negotiating ground, and setting high standards" (Zoellick 2003, 27) while creating allies for WTO negotiations (Zoellick 2003b, 37, Genna 2010, 643-4). That is, bilateral agreements "create an environment of competitive liberalization and lead momentum to successful WTO negotiations" (Thomas 2004, 4). Competitive liberalisation thus fits the definition of a club standard under Drezner's framework. The US has been seeking to build alliances with weaker states that can be leveraged in universal forums such as the WTO. However, there are also key areas where the template the US has pursued is opposed, not only by developing states in the WTO, but also by fellow great power – the EU. Therefore, competitive liberalisation can also be considered a rival standard in specific area – including copyright.

Copyright and the internet – universal standards

The EU and the US have more common ground on copyright matters, and intellectual property rights (IPRs) more broadly, than not. Both favour robust and enforceable IPR protections, and worked together to secure such protections in the TRIPS agreement. Historically, however, this has not been the case. For centuries, Anglo-American and Continental European states have clashed over copyright harmonisation efforts (Baldwin 2014). This is because each are based on different philosophies of how copyright ought to be regulated and protected. This divide has waxed

and waned over time, narrowing after the Second World War as the US moved to stronger IPRs after a long history of lax protections. This is particularly the case as the US, motivated by its trade competitiveness in copyright industries, has sought to international protection for its copyright owners (Aufderheide and Jaszi 2011, 38-41). Universal agreements such as TRIPS, as well as various World Intellectual Property Organisation (WIPO) agreements, have also seen a trend towards harmonisation, even between these disparate copyright systems (Baldwin 2014, 21-9). Nevertheless, differences linger, including how best to protect copyright in the digital environment which (as mentioned above) the US has prioritised under its competitive liberalisation agenda.

The WIPO internet treaties

During the 1980s, countries across the world were grappling with how to protect copyright in the face of home taping technology such as the videocassette recorder. These technologies raised questions about how private use of copyright, in people's homes, could or should be regulated. In 1987, US negotiators in the Uruguay Round identified the inconsistent approach to addressing home taping technology as a trade problem (General Agreement of Tariffs and Trade 1987, 23). In a draft TRIPS text circulated by negotiators in 1990, the US specifically addressed the issue of home taping through the following clause: "Protected works shall enjoy the same protection in respect of private or personal copying accorded under the domestic law of a contracting party to works of national origin" (General Agreement of Tariffs and Trade 1990, 5). However, this did not offer a solution to the home taping; it merely stated that the protections offered to copyright owners over private use could not be discriminatory. Overall, the negotiations underway for a TRIPS agreement were simply at too high a level to get into detail over the regulation of new technologies, and these initial efforts from the US were not carried through.

WIPO was not actively pursuing new standards to address home taping either. However, it did influence the national responses to these new technologies through 'guided development'. Under this approach, WIPO bodies, in coordination with the United Nations, would meet to discuss how *existing* international standards might apply to the new technologies. These meetings made recommendations to help national governments respond to the developments (Ficsor 1996, 197). The progress and outcomes of this process was reported to the TRIPS negotiators by the WIPO

International Bureau (General Agreement of Tariffs and Trade 1988). However, by the late 1980s it was clear that guidance was not going to be enough – new international standards needed to be developed (Ficsor 1996, 198). This was spurred by the release of digital audio tapes in the late-1980s, which were able to make digital (i.e. unlimited and perfect) copies of music. Work on a new WIPO agreement to address copying technologies began in 1989, however made little progress due to the ongoing TRIPS negotiations (Ficsor 1996, 198, Ficsor 2002, 18-9). By the time of the *de facto* finalisation of TRIPS negotiations in 1992 a new, much more disruptive technology had emerged – the internet.

WIPO negotiations started in earnest after negotiations on TRIPS had completed. The internet raised a number of new issues, in addition to the problem created by digital copying. This included whether or not temporary copies, such as computer Random Access Memory, should be considered a 'reproduction' of copyrighted work, how to define transmission over the internet (public broadcast versus a reproduction) et cetera. While these technical considerations were important and sometimes contentious, they are beyond the scope of this paper. However, the paper will consider one of these new issues; the use of the internet to distribute and share infringing (i.e 'pirated') material. This, in turn, raised question over the liability for online service providers (OSPs). An OSP includes companies and organisations that provide access to internet (such as America Online), as well as those that provide services over the internet (such as Yahoo! email). The question policy makers had to address was whether OSPs should be responsible if someone uses their service or network to break copyright law.

Liability had emerged as a contentious issue in the US following a policy review task force established by President Clinton (Lehman and Brown 1995). Legislation based on this task force's recommendations was defeated in 1996 after backlash from OSPs. They objected to the bill because it did not include limitations on their liability. They argued that the mass of information being transmitted on the internet was so great they could not reasonably be expected to be responsible for it. As such, making them liable for the copyright infringement would cripple the development of the internet (Burrington 1996, Black 1996, Heaton 1996). The defeated legislation

also addressed the issue of digital copying through so-called 'technological protection measures[1]' (TPMs). These gave legal protection to 'digital 'locks' and encryption that restrict the use, including copying, of digital copyright. For example, encryption that prevents you from making a digital copy of a compact disc would be a TPM. It would be illegal, under the legislation, to import and distribute a product that can circumvent such TPMs. The TPM provision was also opposed by OSPs, as well as civil society and education groups (for example see Senate Committee on the Judiciary 1996, Subcommittee on Courts and Intellectual Property 1996).

While the US's legislation was seen as potential template for the WIPO negotiations (Ficsor 1995), its defeat did not derail international efforts. In 1996, a WIPO diplomatic conference agreed to two agreements – the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. These two are collectively called the 'WIPO internet treaties'. The treaties addressed many technical issues relating to copyright and the internet mentioned above. They also included their own TPM standard. The TPM provision from the WIPO Copyright Treaty reads:

> "Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law" (WIPO 1996, Article 11).

The WIPO Performances and Phonograms Treaty's TPM standard is functionally the same. However, both the WIPO internet treaties only address OSP liability in a general way, mostly leaving it to individual states to determine themselves. The US ratified the WIPO internet treaties in 1998 through the *Digital Millennium Copyright Act* (DMCA). This included a compromise position on TPMs and OSP liability negotiated between the OSPs and the copyright owners. The preferential trade agreements that the US has pursued under competitive liberalisation have included copyright provisions that closely mirror the DMCA. This is consistent with Drezner's

[1] Also called 'effective technological measures'.

model, which argues that states prefer to internationalise their existing domestic standards because they "represent the domestic political equilibrium on the relevant issue" (Drezner 2007, 40).

The Digital Millennium Copyright Act

The compromise under the DMCA included limited liability for OSPs through so-called 'safe harbors' provisions. These safe harbours protect OSPs from liability under four specific circumstance: conduit functions (automatic transmission), caching (creating temporary copies to allow quicker access), user storage and information location tools such as search engines (Balaban 2001, 262-4). However, in order for OSPs to be eligible for these, they must comply with three conditions. First, they must expeditiously remove infringing content after being notified by the copyright owner – the so-called 'take down' provision. This in particular has been heavily utilised by copyright owners; in 2014 alone Google removed 222 *million* pages from its search results after receiving DMCA notices (Google 2014). Second, copyright owners can subpoena OSPs for identifying information of their users. Last, OSPs must implement a system to terminate the services of repeat infringers under 'appropriate circumstances'. Safe harbours therefore not only outline conditions for when OSPs are safe from liability, but also when they are not. In doing so they create obligations on OSPs to protect copyright on the internet.

However, as part of the compromise, the TPM standard included in the failed legislation in 1996 was significantly altered in favour of copyright owners. Under the previous bill, 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, 328, Norris 2005, 4, Honigsberg 2002, 502). The DMCA's definition therefore affords legal protection to technology used for *commercial reasons*. For example, if a consumer bought a compact disc they are generally allowed under most national copyright laws to make a copy a song so they can listen to it on their smart phone. However, if the disc includes technology to prevent a consumer from making a copy, this would be considered a TPM under the DMCA. If the consumer

sought to bypass this TPM, they could be in violation of the law, despite the fact that the copy they would make is itself legal. Furthermore, the DMCA has exceptions that is circumstances when circumventing a TPM is permitted. However, these are very narrowly defined.

The European Directives

The European directive on TPMs more closely resembles the standard set out in the WIPO internet treaties. That is, unlike the DMCA, the directive does not offer protection for technologies that limit access, only those that prevent infringement (European Parliament 2001, Article 6). Meanwhile, the EU addresses OSP liability in two European directives (European Parliament 2001, Aritcle 5, 2000, Section 4). These are similar to the DMCA, offering safe harbours to OSPs under similar circumstances. However, unlike the DMCA, 'location tools' (i.e. search engines) are *not* explicitly protected by safe harbours under the EU directives (Baistrocchi 2002, 127-7, Edwards 2011, 8-13). The directives also include conditions that OPS must meet in order to avoid liability. These are not as extensive as those in the DMCA. For example, obligations such as terminating the accounts of repeat infringers are not included– although several European states, such as France, have implemented such schemes on their own accord.

Furthermore, while the directives do include a 'take down' system for infringing content, this is different to the DMCA's take down provisions. In particular, there is a lack of clarity on how long OSPs have to comply with a take down request and under what process they are to be informed of infringement (Baistrocci 2002, 124-7; Edwards 2011, 8-13). As a result, US internet companies, particularly those that provide services over the internet such as Google, eBay and YouTube, have been found liable in Europe under circumstances that are protected under safe harbours in the US. For example, in 2010 YouTube was sued in the US by media conglomerate Viacom. Viacom claimed that YouTube was liable for copyright infringement because it encouraged its users to upload videos of copyrighted content without permission. It also claimed that due to the scale of the problem on the site, YouTube was fully aware that copyright infringement was taking place. However, the courts determined that YouTube was protected by the DMCA (Smith 2011, 1568-73). Meanwhile, YouTube was found liable in similar cases in Germany and Italy (Smith 2012, 1575-9).

An extensive comparison of the EU and US safe harbour regimes by the Transatlantic Technology Law Forum (Farano 2012, 65-147) found numerous other differences in how the two apply safe harbors and OSP liability. In particular, they disagree on what sites are considered 'hosts' (versus publishers – which attract liability), the threshold at which an OSP can be consider to have knowledge of copyright infringement on their site (and thus face liability for not removing it), what OSPs need to do after they are aware of infringement, and other areas. Therefore, there are significant differences between the US and the EU on safe harbours and OSP liability.

Generally, the US has applied safe harbours to offer more protection for OSPs than European states, and this has frustrated US internet companies. For example, the Computer and Communications Industry Association (CCIA), a leading trade group for OSPs, has argued that "[i]nternational asymmetries in liability rules…often serve as barriers to market entry by penalizing multinational enterprises, at times in favor of domestic plaintiffs. International trade policy must be more proactive in harmonizing liability rules to ensure open markets for Internet business" (Sternburg and Schruers 2013, 12).

Competitive liberalisation and the DMCA

The US's DMCA is different to both existing universal standards and those of the EU in two respects. First, it has established a detailed regime for (limited) OSP liability and copyright protection on the internet. No such standard exists at the multilateral level at all, while the EUs standard, although similar, has a number of key differences. Second, it has a TPM standard that protects technology that restricts *access* to digital copyrighted work. Both the EU and WIPO standards require states to protect technology that restricts actual copyright infringement. Meanwhile, the WTO has become deadlocked and unfavourable to US interests, particularly from the early 2000s. As too has WIPO, which has embraced a development agenda of its own (Muzaka 2013). Together these factors mean that if the US wants to harmonise international standards according to the DMCA, it must pursue them via club/rival standards and side-step universal forums.

This has indeed been the case, as copyright, along with other IPRs, have been a priority of the US's preferential trade agreements under competitive liberalisation. According to former-USTR Zoellick, the IPR provisions of the bilateral agreements secured under competitive liberalisation represent a "gold-standard" (Zoellick 2004, 13) that can be used as a framework for larger agreements. While the US was working under Bush to achieve such high standards hemisphere-wide, it also worked with individual states that would be willing to accept them (Zoellick 2004, 13). The ultimate goal of this was to re-write the TRIPS agreement to better protect US copyright owning industries and, specifically, to address technological developments such as the internet and digital technologies (Zoellick 2003a, 60). However, the USTR felt that this could not be achieved under the Doha Round, and instead sought to focus its multilateral efforts on ensuring compliance with the TRIPS agreement. While TRIPS was the end goal the USTR argued that "first, we will seek to establish these standards bilaterally and regionally through our FTA negotiations" (Zoellick 2003a, 60). That is, through competitive liberalisation the US has been building a club standard based on the DMCA.

The USTR is obligated to pursue international copyright standards that closely mirror US law. As discussed, since 1974 the USTR has relied on fast track legislation to negotiate and sign free trade agreements. When the Congress delegates authority to the USTR through fast track it places a number of conditions on what the USTR must achieve. Since 1988, this has included an obligation to for trade agreements to have 'recognition' and 'adequate protection' of intellectual property. However, when fast track was renewed under the *Trade Act* in 2002 this obligation was expanded: the USTR was now to secure intellectual property provisions that "reflect a standard of protection similar to that found in United States law" (quoted in Weatherall 2015a, 550). In additions to this, the USTR must seek means of "providing strong protection for new and emerging technologies" which transmit and distribute intellectual property. This appears to address safe harbours for OSPs. That is, the USTR had a legislative obligation to internationalise US law on copyright, including the DMCA.

The protection for copyright owners was open-ended but specific –countries party to free trade agreements with the US must protect copyright the same way the US does. Meanwhile, the

obligations for safe harbors was more general in that it did not reference US law specifically. Nevertheless, OSPs at the time were supportive of the fast track legislation. In fact, they established a lobbying group, the US High-Tech Coalition on Trade Promotion Authority, to support the 2002 *Trade Act* and earlier incarnations. This Coalition included several of the OSPs from the negotiations to establish the DMCA, including the Electronic Industries Alliance and the Telecommunications Industry Association (U.S. High-Tech Coalition on Trade Promotion Authority 2001). The Coalition was crucial in securing support for the *Trade Act* from Democratic lawmakers. In particular, it built strong relationships with the 'moderate' New Democratic Network (CongressDaily 2001). The support from these Democrats proved decisive as the 2002 *Trade Act* passed the House of Representatives by just three votes.

The competitive liberalisation strategy itself also had support from domestic industries in the US, as illustrated by the reports from industry advisory groups[2] following successfully negotiated free trade agreements. For example:

> "FTA [free trade agreement] negotiations provide the most effective approach currently available to the United States for improving global intellectual property protection... The resultant level of intellectual property protection that it contains should set a new baseline for future FTA, including the FTAA [Free Trade Agreement of the Americas]. This baseline is continually reflected in the model FTA text which is constantly updated based on what industry and government learn through negotiating each of the FTAs" (IFAC-3 2004, 3).

All of the agreements the US signed from 2000 to 2007 have included the US's TPM standards, protecting technologies that limit access not just actual infringement. While the exact wording

[2] There are a number of industry groups that advise the USTR during negotiations. They often receive drafts texts in order to do this. These groups will also write reports evaluating the agreements once they are signed. Critics of the TPP would often note that despite the secrecy surrounding the negotiations, 500 or so corporate groups, so-called 'cleared advisers', had access to the texts. This refers to members of these advisory groups. Such groups exist for a variety of industries and areas, not just intellectual property.

changes marginally between the agreements (although in some cases is identical), they all include some variation of the following wording:

> "Effective technological measure means any technology, device, or component that, in the normal course of its operation, **controls access to** a protected work, performance, or phonogram, **or protects** any copyright or any rights related to copyright" (United States-Peru Free Trade Agreement 2009, 16.7.4(b)).

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 outlaying bilateral free trade agreement is the one with Jordan, 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 9). The language in the Jordan agreement is less clear, but is open to an interpretation that protects access and not just infringement. The Jordan agreements, which was completed prior to the 2002 *Trade Act,* is also the only one signed between 2000 and 2007 that does not include safe harbour standards. The rest include similar provisions, providing safe harbour under the circumstances set out in the DMCA (including 'location tools' i.e search engines). They also include the same conditions, such as the obligation for OSPs to expeditiously remove infringing content after obtaining knowledge of it.

The Anti-Counterfeiting Trade Agreement

As a club standard building exercise, the goal of competitive liberalisation was not to open up economic opportunity in small markets like Oman and Australia, but rather to disseminate a template for agreements in the hope that it would trigger a "cascade effect in which a club [standard] expands to near universal size" (Drezner 2007, 76). The bilateral partners were intended to be allies in this endeavour. For example, Australia has traditionally used its free trade agreements to support exiting multilateral standards, not build on them. However since its free trade agreement with the US, Australia has shifted its preferences, actively pursuing intellectual

property provisions consistent with Australian law and thus above existing multinational standards (Weatherall 2015a). However, the importance of these partnerships was intended to be realised in multilateral forums. The US wanted to build to re-writing TRIPS through the WTO. As it became clearer throughout the 2000s that the WTO was unlikely to make progress towards a new agreement of any kind, least of all one that would incorporate the US's desired intellectual property standards, the US moved to establish its own multilateral forums. One of these was the Anti-Counterfeiting Trade Agreement (ACTA) launched in 2007.

The US had a number of allies in the ACTA negotiations, including Australia, South Korea, Morocco, and Singapore, all of which had free trade agreements with the US[3]. The USTR argued that these bilateral agreements provided models for effectively building on the minimum standards set out in the TRIPS agreement. As such, the USTR suggested early in the negotiations that criminal enforcement, border measures, civil enforcement and distribution of copyright over the internet could all form part of the legal framework to be included in ACTA (USTR 2008). This approach was supported by copyright owners, including the International Intellectual Property Association, which believed that ACTA should "go beyond TRIPS, along the lines of the IPR Chapters the U.S. government has negotiated in its Free Trade Agreements" (Smith 2008). However, despite its name, ACTA was not a free trade agreement, and was not being negotiated as such. The Bush and Obama Administrations instead negotiated ACTA as an 'executive agreement', meaning that it would not need to pass the Congress. This made ACTA controversial, particularly among internet companies, which feared that copyright owners would use the agreement to undermine domestic law and increase the obligations of OSPs for policing copyright infringement on the internet.

In September 2008, just three months after the negotiations commenced, various internet companies showed scepticism that ACTA could maintain the same adherence to the DMCA's safe harbours that previous free trade agreements achieved, which could result changes in US law. Consequently, they urged safe harbours to be left out of the negotiations completely (American Association of Law Libraries et al. 2008). Google went even further, arguing that as ACTA was

[3] Jordan attended the first round of negotiations but eventually dropped out of the agreement.

established to address IPR enforcement and stop the trade in 'fakes' there was no reason for it to discuss anything other than border and customs enforcement issues (Google 2008). As ACTA sought to establish 'best practice' enforcement procedures, internet companies were concerned that the negotiations would "re-open the DMCA" (American Association of Law Libraries et al. 2008). The USTR sought to reassure OSPs that ACTA would reflect the balance struck in the DMCA (Inside U.S. Trade 2008). However, in addition to domestic opposition the USTR faced another major hurdle in the ACTA negotiations: the fact that the EU was a party.

In the negotiations, the USTR proposed safe harbours standards modelled off the DMCA and the free trade agreement with Korea (Inside U.S. Trade 2009a). However, despite having less specific language than both of these, the differences between the US and EU standards caused difficulty for negotiators. Neither party was willing to agree to standards that would require changes to domestic law. In fact, the US was unable to consider this at all, as it was trying to avoid the need for ratification through the Congress. Meanwhile, the mere suggestion that ACTA could affect the interpretation of US law was met with hostility from the internet industry. The EU for its part was proposing more flexible safe harbour standards with fewer conditions. It also opposed including search engines as a protected function (Inside U.S. Trade 2010a). As one commentator argued during the negotiations "[t]he bottom line is that the Europeans believe that the US proposal goes far beyond the requirements of many EU directives, and far beyond the laws of many EU member states" (Inside U.S. Trade 2009b).

By August 2010, it was reported that the US had proposed dropping OSP liability and safe harbours from the agreement entirely (Inside U.S. Trade 2010b). Indeed, a finalised draft of ACTA made available in November 2010 did not include an OSP liability or safe harbour standard. The US also attempted to include its standard on TPMs in the agreements but this was also fiercely resisted by the EU. Instead, the ACTA standard restricts devices which are '**designed to prevent or restrict acts**, in respect of works…which are not authorized…**as provided for by a Party's law**' (2011, 5.27.5 footnote 14). The ACTA definition "reflects the fact that Europe participated in the ACTA negotiations and EU Directives in this area do not explicitly require protection of access controls as such" (Weatherall 2015b, 20). In fact, the ACTA standard closely resembles the EU's directive.

These were not the only areas that the US 'gradually caved' to the EU: it also failed to include its more stringent criminal liability for IPR infringement. Overall, the standards under ACTA were weaker than the US's free trade agreements, US law and EU law (Weatherall 2010). The presence of another great power, which was also unwilling to change its domestic standards, resulted in general language in stark contrast to the specificity achieved in the bilateral agreements. In the end, this is all a moot point as ACTA was eventually rejected by the European parliament, and is in essence dead. The ACTA negotiations were hobbled from the beginning by criticisms of its secrecy and from opposition to the US's more stringent copyright protection standards, including criminal provisions and the terminations of repeat infringers. The spectre of ACTA now hangs over the US-EU bilateral negotiations under the Transatlantic Trade and Investment Partnership (TTIP). Documents released by the EU claim that, in response to concerns that the TTIP will attempt to revive ACTA provisions:

> "The EU and US have detailed enforcement provisions already, whereas some other countries that planned to join ACTA didn't. So we won't negotiate rules on things like:
>
> - penal enforcement
> - internet service provider liability" (European Commission 2015).

ACTA was an opportunity for the US to muiltlateralise the club standard it had established through various bilateral trade agreements under competitive liberalisation. However, the differences between US and EU standards made this impractical. Some commentators have argued that these bilateral standards are "not 'multilateralizable,' and have had to be watered-down in plurilateral negotiations" (Weatherall 2010, 859). It is certainly true that multilateral forums reduce power asymmetries and favour smaller and weaker states (Sell 2010). However, the failure of competitive liberalisation to progress under ACTA also reflects the fact that the EU, a rival great power, was party to the negotiations.

The TPP and competitive liberalisation

The US entered the TPP negotiations in the final year of George Bush's Presidency. Barack Obama may have inherited the agreement from his predecessor, but it soon became a major priority for his Administration. This was not only due to his pivot to the Asia Pacific. Obama's overall trade policy was in many ways a continuation of Bush's competitive liberalisation. While Bush sought to disseminate club standards through bilateral agreements, this was always with the intention that they could later be leveraged in multilateral efforts. This included the WTO, but also regional initiatives such as the Free Trade Agreement of the Americas. Obama's USTR continued to use the bilateral standards as templates to be leveraged and copied in other negotiations, including (although unsuccessfully) ACTA. In addition to continuing and finalising negotiations on the TPP and ACTA, Obama also launched another multilateral trade initiative–the Trade in Services Agreement. That is, instead of building support for the club standards on a bilateral basis, Obama has instead sought to move to competitive liberalisation's next phase – multilateralising these club standards. In this respect, the TPP was a great success, uniting 40% of the world's GDP under its preferred standards.

The TPP had more support from the internet industry than did ACTA. However, this was only after a compromise was reached domestically. During the efforts to pass the fast track authority to enable the Obama administration to finalise the TPP negotiations in 2015, the Internet Association offered only tepid support stating that the bill did "not explicitly reflect the full balance of U.S. copyright law, nor…fully take into account the benefits of Internet innovation on the global economy" (2015b). Other internet interests agreed, including the CCIA, which argued that the "intellectual property language does not reflect the needs of the modern global Internet related economy" (2015b). The bill at the time had the same intellectual property clause as the 2002 *Trade Act*, requiring that intellectual property protections in agreements matched the standard contain in domestic US law. The Internet Association proposed changes to the bill to include a requirement that international agreements reflect the limitations and exemptions contain in local US law as well – that is, to protect companies like OSPs which use copyright (Beckerman 2015).

This was not achieved. However, despite this the internet industry ultimately gave the fast track bill a much warmer welcome when it eventually passed the Congress. The Internet Association said it was encouraged that the bill included "some guidance that recognizes the importance of

promoting copyright limitations and exceptions" (2015a). This 'guidance' refers to a change to a separate part of the bill requiring negotiators to protect new copyright-using technologies in a manner that facilitates digital trade. This was added by the Senate Finance Committee to help establish balance in international copyright standard setting efforts (Hatch 2015). The CCIA argued that this action from the Senate made it clear that negotiators are expected to promote balanced intellectual property in US free trade agreements (2015a). The pivot in the industry's tone was a result of a deal struck with lawmakers to pass the fast track bill. At a press conference in August 2015 a US Chamber of Commerce representative stated that "[i]n order to get trade promotion authority, I think the U.S. had to cut some deals on Capitol Hill" (Overby in Behsudi 2015). The internet industry also supported the ratification of the TPP once it was signed (Beckerman 2016, Google 2016).

Therefore, US negotiators had managed to negotiate safe harbour standards that won support from domestic industries, avoiding the divide that emerged under ACTA. Meanwhile, the EU was not a member of TPP negotiations. With no great power to oppose it, the US had far more success in progressing the club standard it had cultivated through bilateral agreements in the TPP. The TPP also included four countries that already had committed to the US's club standard on OSP liability and TPMs through bilateral agreements: Australia, Singapore, Peru and Chile. Leaked negotiating drafts show that Australia in particular was a reliable ally for the US, supporting all of the proposals that matched provisions in the Australia-US free trade agreement (Wikileaks 2014, Weatherall 2015a, 544,552). However, the TPP was a multilateral forum and as such US negotiators still faced challenges in emulating, wholesale, the bilateral club standards. This is reflected in both the TPM and safe harbour standard included in the final agreement. First, the TPP did included the US's TPM standard, extending protection to technologies that restrict access:

> "effective technological measure means any effective technology, device, or component that, in the normal course of its operation, **controls access to** a protected work, performance, or phonogram, **or protects** copyright or related rights related to a work, performance or phonogram" (TPP 2016, Article 18.68.5) .

However, while the TPP still includes access control in its TPM definition like the DMCA, it also has broader exceptions. This means that parties to the agreement have opportunities to allow circumvention of TPMs for non-infringing purposes. Even Australia, which was otherwise a reliable ally for the US, was eager to water-down it existing commitments on TPMs. The DMCA-style TPMs that Australia introduced following the bilateral agreement with the US have become controversial domestically. Numerous government reviews and reports have criticised the standard, and called for the policy to be reformed (House of Representatives Standing Committee on Infrastructure and Communications 2013, Productivity Commission 2016, Harper et al. 2015). Consequently, Australian negotiators secured a side letter to the agreement that specified that the TPP's standards on TPMs would apply to Australia instead of the Australia-US free trade agreement's (Robb and Froman 2016). The TPP's standards on OSP liability and safe harbours is also mixed. It does protect OSPs in a similar way to the bilateral club standards/DMCA, including location tools. It also has similar conditions, including the obligation on OSPs to take down infringing content and to pass on identifying information to copyright owners. However, it does not include the obligation to terminate the accounts of repeat infringers.

Overall, however, the TPP progressed US copyright standards that are different not just to the exiting multilateral ones under WIPO and TRIPS, but also those under the EU directives. The TPP was often described by its proponents a '21st Century' or 'gold standard' agreement tackling new trade issues. That is, it focused on the use of non-tariff trade barriers, targeting regulatory harmonisation as much as traditional protectionist measures such as quotas, tariffs and subsidies. However, this 'gold standard' is an US creation, refined through bilateral agreements over a decade. The TPP therefore not only isolated China regionally, but significantly advanced the US's efforts to disseminate this 'gold standard' globally. This 'gold standard' is part club standard, in that it is being pursued outside of existing universal forums such as the WTO and WIPO, and part rival standard, in that it differs from the US's only rival great power – the EU.

US withdrawal from the TPP

However, all of this would appear to be moot considering that Donald Trump, as one of his first acts as President, removed the US from the TPP. This is, ostensibly, part of his 'America first'

trade policy. However, both accounts of the TPP from the literature, including the one explored here, suggest that the TPP was highly favourable to US interests. Why then did it leave? This paper did not set out to address this question in detail. However, the answer lies in the 'gold standard' the US has been pursuing. In short, in the 1980s the US's trade policy pivoted to focussing on investor protections, intellectual property enforcement and services. This was in response to the shift in its domestic economy away from goods and manufacturing and towards services, information industries and finance. The Uruguay round addressed these priority areas of the US, all of which formed the foundational agreements of the WTO. Competitive liberalisation built on these priorities. However, while workers in Wall Street, Hollywood and Silicon Valley have benefited from this, there have also been many 'losers'. These workers are clustered in former manufacturing hubs in the Mid-Western states that delivered Trump his surprising victory. This is explained in more detail elsewhere (Cartwright 2017).

Conclusion

Most commentators have focused on the TPPs geopolitical significance. While certainly important, the TPP also served other US objectives. In particular, the TPP was the latest, and by far the most successful, attempt to internationalise US economic standards since the Uruguay Round. This paper focused specifically on the copyright standards included in the DMCA. These have been pursued as a club standard under competitive liberalisation through a series of bilateral free trade agreements in the 2000s. As it became more apparent that existing multilateral forums would be unlikely to accept these standards, the US has sought to create new ones. The first attempt to do this, through ACTA, was hampered by opposition to US standards from the EU. The US also faced resistance from domestic industries as well. The TPP was thus not only an opportunity to integrate the DMCAs standards into the Asia Pacific and isolate China, but also to establish a large rival standard that differs from the EU. In this way, the TPP was a continuation of competitive liberalisation.

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