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Shawn Marie Boyne

Indiana University School of Law-Indianapolis

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Criminal Sanctions and the TPP: Section 18.77

Shawn Boyne*

I. OVERVIEW

One of the most controversial provisions of the Trans-Pacific Partnership (TPP) is the provision that requires the treaty signatories to impose criminal sanctions for copyright infringement even in cases where the offender is not motivated by commercial gain.¹ This focus is a notable shift, as at the dawn of the digital age, state prosecutors in many countries typically targeted only commercial pirates who profited by copying and distributing thousands of copies.² But, given that the United States has led the way in imposing harsher penalties on copyright pirates, it is not surprising to see the increasing criminalization of copyright infringement appear in the TPP.

To date however, the effort by the United States to create a comprehensive international copyright regime has not significantly dented the ubiquity of copyright piracy. If we look at software piracy alone, the ballpark estimates of piracy rates and the concomitant loss of commercial value are staggering.³ The four regions of the world with the highest software piracy rates include: Central and Eastern Europe (62%); Latin America (61%); Asia Pacific (60%); and the Middle East and Africa (58%).⁴ Although the TPP's criminal law provisions are intended to reduce those rates of piracy, it is not yet apparent whether the TPP will impact Vietnam's penal code or merely spur an increase in the costs of investigation, prosecution, and punishment.

II. THE AMERICAN EXPERIENCE

When the full-text of the TPP was published in February 2016, commentators from the copyright community both criticized and applauded Chapter 18's strong protections of intellectual property rights.⁵ From the perspective of the United States Trade Representative, the provision for criminal

* Professor, Indiana University McKinney School of Law.

1. Trans-Pacific Partnership, OFFICE OF THE U.S. TRADE REP. art. 18.77, Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [hereinafter TPP]; Jeremy Malcolm, *Sneaky Change to the TPP Drastically Extends Criminal Penalties*, ELEC. FRONTIER FOUND. (Feb. 17, 2016), <https://www.eff.org/deeplinks/2016/02/sneaky-change-tpp-drastically-extends-criminal-penalties>.
2. PETER BALDWIN, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* 330 (2014).
3. Andrew D. Getsinger, *A New Approach to Combating the Piracy of Intellectual Property: Develop the Rule of Law and Increase the Supply of Legitimate Goods*, 96 J. PAT & TRADEMARK OFF. SOC'Y 30, 34 (2014).
4. *Id.* at 34–35.
5. Ciara V. Mittan & Andrew P. Bridges, *Problematic Copyright Provisions in TPP*, LAW360 (June 3, 2016), <https://www.law360.com/articles/801938/problematic-copyright-provisions-in-tpp>.

penalties protections represents a decisive step towards strengthening IP protections internationally.⁶ From an American perspective, the need to protect our motion picture, electronic game, and computer software industries has been a key driver behind the effort to internationalize the imposition of criminal penalties for copyright violations.

Even though several of the key industries that benefit from copyright protections are relatively new industries, the criminalization of copyright infringement in the United States dates back to the 19th century.⁷ The United States first enacted criminal copyright legislation in 1897.⁸ But, it is only within the past twenty-five years that Congress has dramatically expanded the reach of this criminalization effort and stiffened the potential criminal penalties. Although the early legislation targeted those who profited commercially by violating copyright protections, today prosecutors even pursue those who make copies for personal use or freely share copies of documents or files.⁹

This effort towards the increasing criminalization of copyright protections has intensified as digital technology has made it both easy and cheap to reproduce and distribute “stolen” works. As the costs of reproduction have fallen, Congress has sought to increase the penalties that can be imposed in copyright breach cases. Though Congress first introduced felony level penalties for breaches only in 1982, today American courts may impose sentences between one to ten years on copyright pirates as well as fines of up to a million dollars depending on the gravity of the offense and whether the individual is a repeat offender.¹⁰

Supporters of the criminal sanctions provision argue that civil sanctions and self-help remedies used in the domestic legal regimes of many countries have proven either to be too costly or unsuccessful.¹¹ As a result, supporters maintain that criminal sanctions are needed to deter copyright theft.¹² Critics of the agreement allege that these provisions advance the agenda of the entertainment and pharmaceutical industries at the expense of Internet users and innovators.¹³

6. *Id.*

7. Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U.L. REV. 731, 735–36 (2003).

8. *Id.*

9. BALDWIN, *supra* note 2, at 350.

10. 17 U.S.C. § 1204 (2012); 18 U.S.C. § 2319 (2012).

11. Christopher Buccafusco & Jonathan S. Masur, *Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law*, 87 S. CAL. L. REV. 275, 294 (2014).

12. *Id.* at 277.

13. *See* Malcolm, *supra* note 1.

From a defense perspective, the effort to protect copyrighted works using the criminal law crossed a key line with the Sentencing Reform Act of 1984.¹⁴ In hindsight, the weakening of the intent standard needed to secure a criminal conviction may have presaged the low *mens rea* standard in the TPP's Section 18.77.¹⁵ In particular, the possibility of convicting someone of a criminal copyright charge even if the infringement was not motivated by commercial purpose or financial gain has troubled critics of the provision.¹⁶ The indictment of Aaron Schwartz on charges that he illegally downloaded and distributed articles from an academic journal, and his subsequent suicide, prompted privacy rights advocates to condemn the government's targeting of individuals not motivated by financial gain.¹⁷

The United States is not alone in imposing substantial penalties for copyright infringement. In the United Kingdom, individuals convicted in the low-level magistrate courts face a potential maximum term of incarceration of 6 months, a fine of up to £50,000, or both.¹⁸ However, offenders convicted in the United Kingdom's Crown Court may face a ten-year maximum term.¹⁹ In comparison to the United States and the United Kingdom, France has taken a more lenient approach to criminalizing copyright violations as the maximum criminal sanction for infringement is three years imprisonment and a corresponding fine.²⁰

III. IMPACT OF SECTION 18.77 ON VIETNAM

It is important to recognize that beginning in 2005, Vietnam began to adopt extensive intellectual property laws and regulations as part of its participation in the World Trade Organization and specifically, its participation in the "TRIPS" agreement.²¹ But, despite those protections, few copyright hold-

14. Buccafusco & Masur, *supra* note 11, at 293 n.104.

15. *The Trans-Pacific Partnership*, LAW OFFS. OF STEWART & STEWART, <http://www.stewartlaw.com/Content/Documents/TPP%20Side%20by%20Side%20Chapter%2018.pdf> (last visited Jan. 30, 2018).

16. *Id.*

17. Larissa MacFarquhar, *Requiem for a Dream*, NEW YORKER (Mar. 11, 2013), <http://www.newyorker.com/magazine/2013/03/11/requiem-for-a-dream>.

18. Copyright Designs and Patent Act 1988, c. 48, § 107 (Eng.), <http://www.legislation.gov.uk/ukpga/1988/48/part/I/chapter/VI/crossheading/offences>.

19. *Id.*; The Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch. 4, part 1, ¶ 17(Eng.).

20. CODE LA PROPRIÉTÉ INTELLECTUELLE [Intellectual Property Code] art. L615-14 (Fr.).

21. VIETNAM CIVIL CODE, No. 33/2005/QH11, Part Six (2006) (Viet.); *IRP Toolkit*, U.S. EMBASSY & CONSULATE IN VIETNAM, <http://vietnamembassy-usa.org/basic-page/intellectual-property> (last visited Jan. 30, 2018); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh

ers attempt to enforce their rights in Vietnamese courts.²² The lack of litigation on the civil side may illustrate the likely impact of the TPP's criminal sanctions on copyright pirates. As one example, at a recent conference in Vietnam, the tribunal president of the Economic Court stated that his court settled only about twenty cases of copyright infringement annually between 2000 and 2007.²³ Despite that low litigation rate, the actual rate of infringements is far higher.²⁴ For example, in 2005 in Ho Chi Minh City, there were at least 231 cases.²⁵

But, it is too soon to tell how the criminalization of copyright piracy will impact Vietnam. It is not yet clear whether Section 18.77's requirement that signatories impose criminal penalties in cases of willful copyright or related rights on a commercial scale will require Vietnam to alter its current penal code provisions. With the implementation of the Vietnamese Penal Code of 2015, Vietnam began treating copyright infringement as a crime.²⁶

Given the absence of copyright litigation in Vietnam's civil courts, one might question whether Section 18.77 of the TPP will impact the detection and prosecution of copyright piracy. Assuming that the country prioritizes criminal enforcement, implementing a stiffer domestic enforcement regime will impose enforcement costs. In essence, the criminalization of copyright protections imposes both a responsibility and a burden on the government to protect the rights of private copyright holders, who previously bore the burden of bringing enforcement actions. Beyond the costs to the government, the increased enforcement of copyright regulations will raise the cost of doing business among those small to medium sized enterprises, which rely heavily on pirated software. These industries will bear the brunt of the costs of stiffening intellectual property regimes in the short-run.

IV. CRITIQUE

The main purpose of criminal law is to protect society by facilitating the detection and prosecution of criminal acts. From an economic perspective, it makes sense to use criminal penalties in an attempt to deter individuals or organizations who violate copyright protections on a large scale but are essentially judgment proof. From the perspective of social harm, a case may also be made for imposing criminal sanctions on individuals who work for

Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

22. *Copyright Theft Plagues Vietnam's Software Producers*, SUNRISE INTELLECTUAL PROP. LAW FIRM, <http://sunriseip.com/english/indexen.php?mod=ipnews&id=31&page=1> (last visited Mar. 15, 2017).

23. *Id.*

24. *Id.*

25. *Id.*

26. VIETNAM PENAL CODE, No. 15/199/QH10, art. 131 (2015) (Viet.).

large-scale operations that illegally copy and sell bootlegged movies, music, and software. However, by giving governments the power to criminalize all “willful” copyright infringement, Section 18.77 risks allowing governments to targeting casual file sharers rather than the enterprises that engage in the most socially harmful conduct.²⁷ Taken to the worst extreme, critics fear that states will disproportionately prosecute the low hanging fruit, namely poor offenders.²⁸ To this end, Section 18.77 contains no provisions that will ensure that governments will target large-scale counterfeiting operations.²⁹ Also, the provision’s weak *mens rea* requirement allows governments to impose criminal liability, not only on individuals who do not profit economically from an alleged infringement, but also on individuals who acted in good faith.³⁰ Before imposing criminal liability on an individual, state prosecutors should be required to show that the suspect knew that the infringed works were protected by copyright and that he knew that his conduct was unlawful.³¹ Such a requirement would help distinguish harmful from valuable conduct such as non-commercial file sharing.

27. See TPP, *supra* note 1, art. 18.77.

28. See Jeremy Malcolm, *The Final Leaked TPP Text is All That We Feared*, ELEC. FRONTIER FOUND. (Oct. 9, 2015), <https://www.eff.org/deeplinks/2015/10/final-leaked-tpp-text-all-we-feared>.

29. See TPP, *supra* note 1, art. 18.77.

30. See *id.*

31. Buccafusco & Masur, *supra* note 11, at 316.