

RightsCon Toronto 2018

SESSION 403:

Can trade agreements such as CPTPP [Comprehensive and Progressive Agreement for Trans-Pacific Partnership], NAFTA [North American Free Trade Agreement], and RCEP [Regional Comprehensive Economic Partnership] be used as a tool for advancing digital rights?

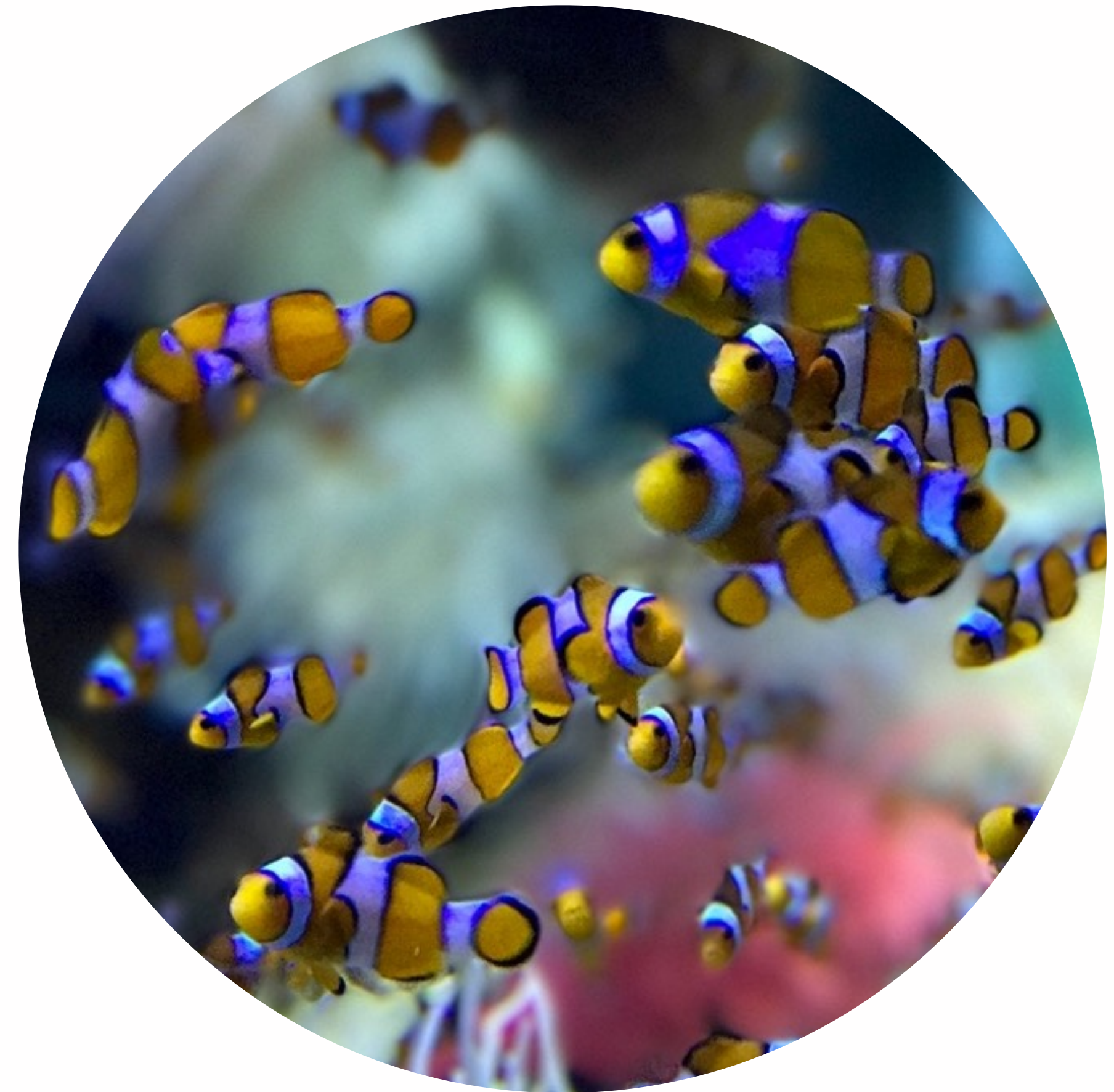
May 17, 2018

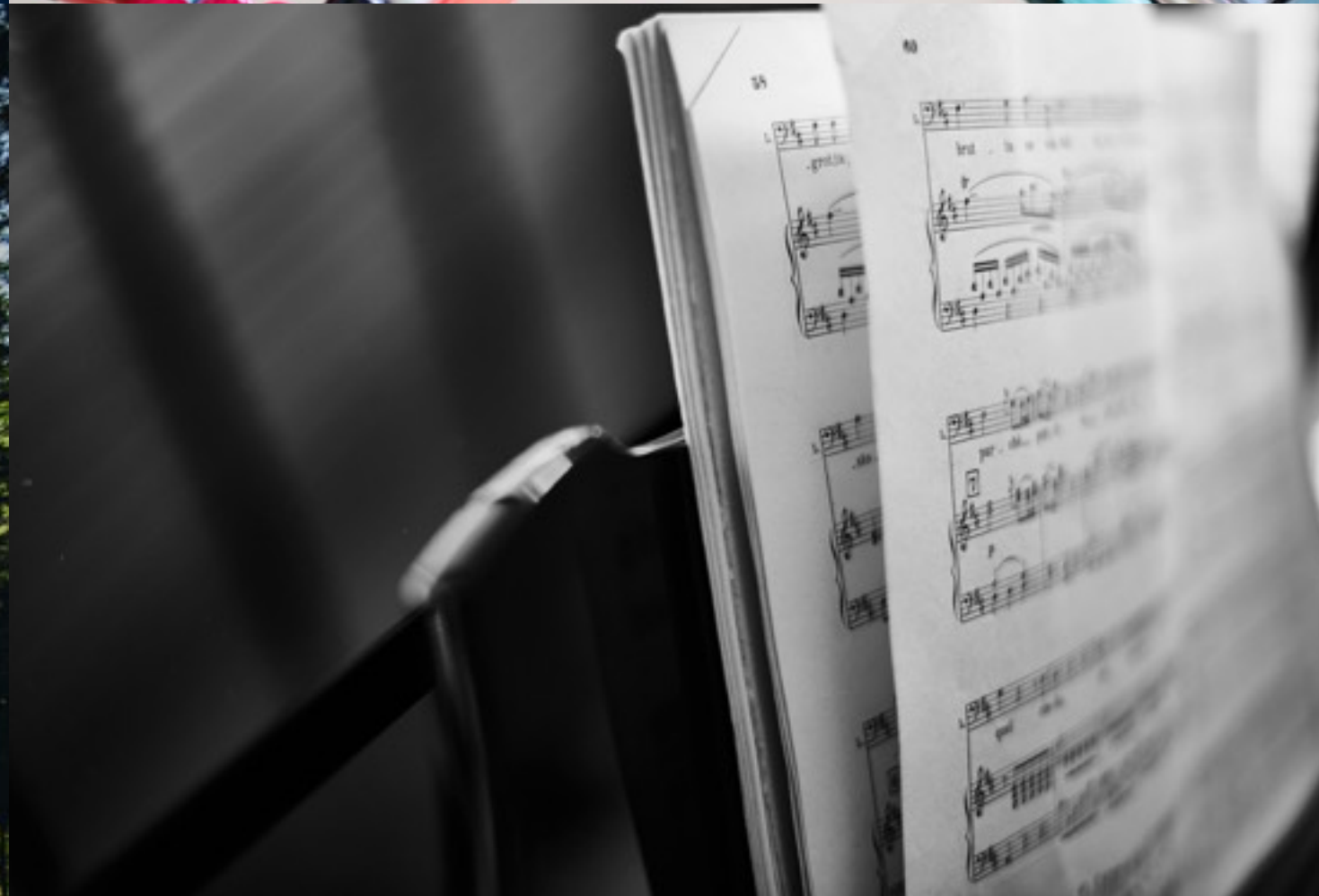
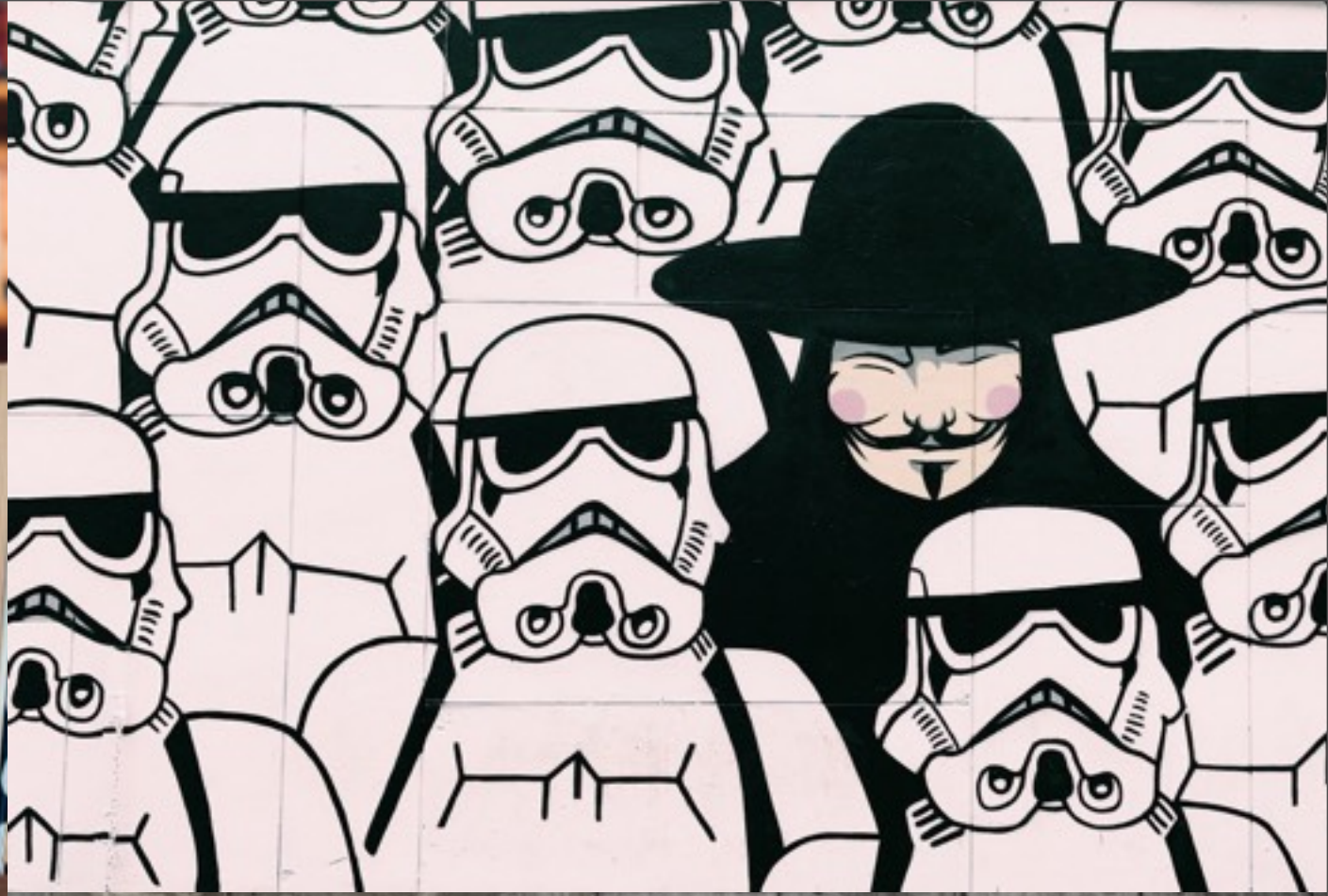
Subtopic: Copyright provisions in trade agreements as a threat to the public domain

Panelist: Cynthia Khoo
Founder/Principal Lawyer, Tekhnos Law

Track: International Trade and the Commons

Details: [Description on Sched](#)





Threats to Public Domain through Copyright in Free Trade Agreements

Shrinking Public Domain (TERM EXTENSIONS)

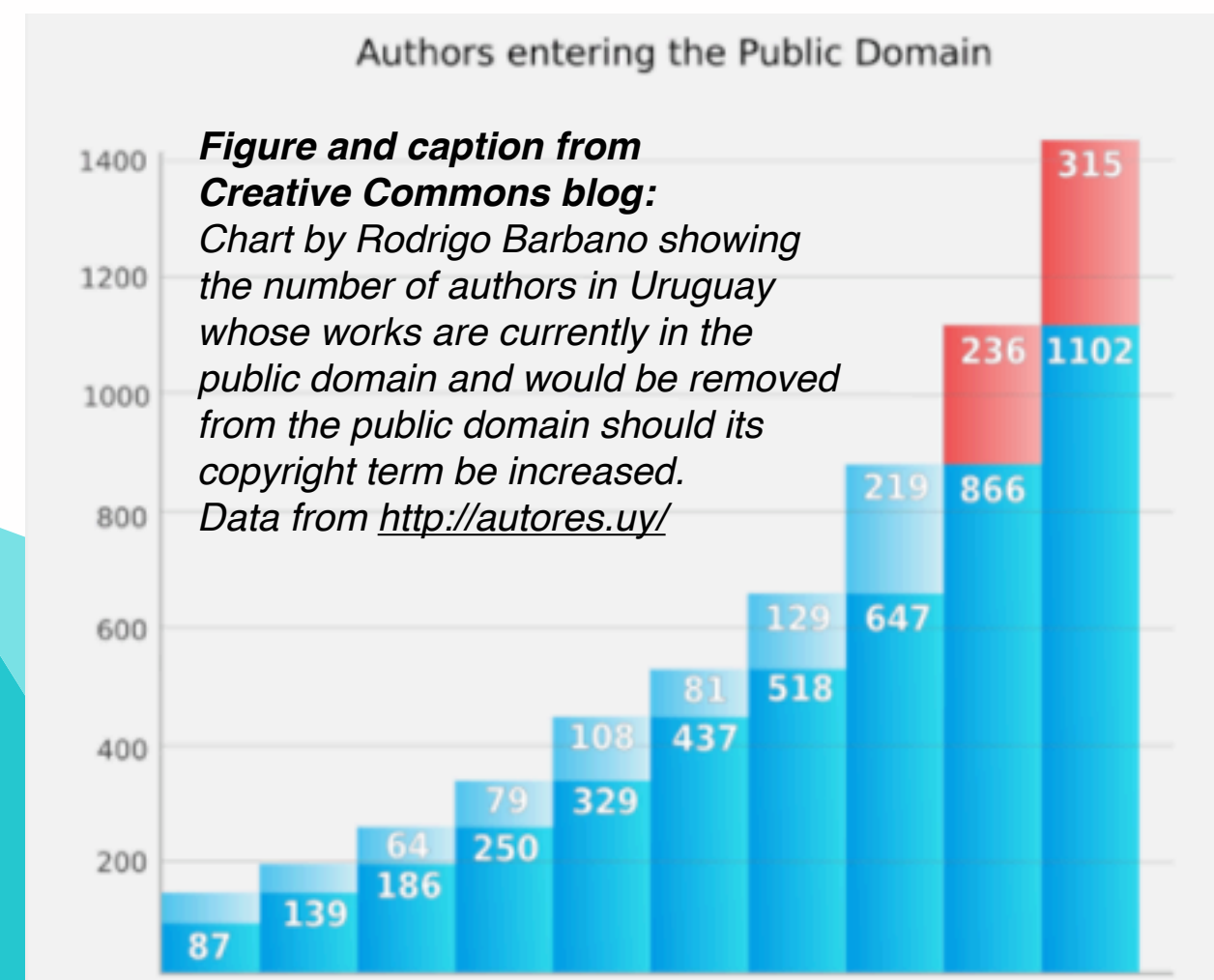
TPP -- Article 18.63 (*suspended*):

"Each Party shall provide that in cases in which the term of protection of a work, performance or phonogram is to be calculated:

(a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death..."

EU-Mercosur -- Article 9.7 (*draft*):

"The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and not less than 50 years or for 70 years where the domestic legislation of the Parties so provides, after the author's death."



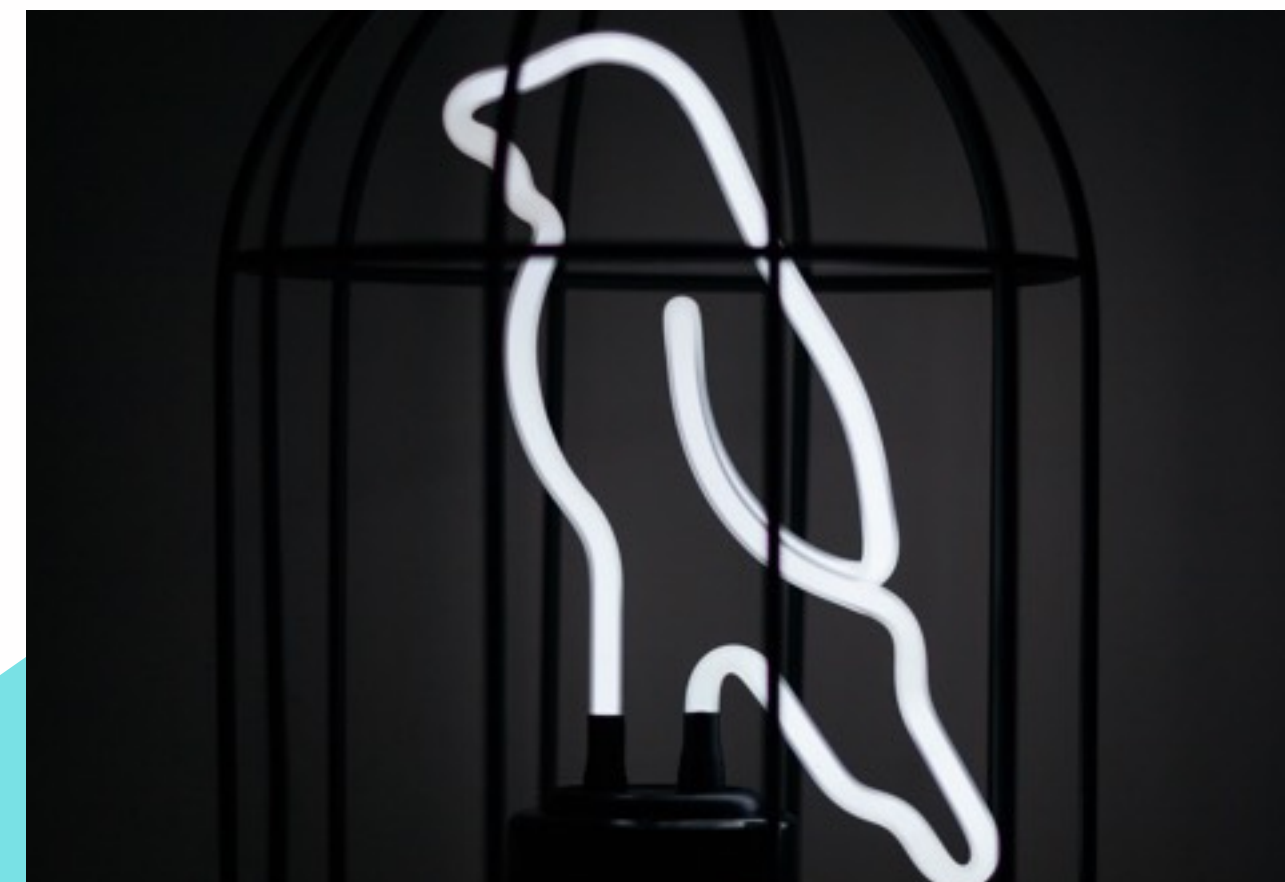
Locking Up Public Domain (DIGITAL RIGHTS MANAGEMENT)

TPP -- Article 18.68(1) (*suspended*):

- Anti-circumvention laws: making it illegal and providing penalties for circumventing technological protection measures (TMPs), or supplying devices that enable TPM circumvention, regardless of whether copyright infringement occurred
- Criminalization of anti-circumvention for commercial advantage or financial gain (exceptions only optional)

EU-Mercosur -- Article 9.6 (*draft*):

Mandatory payment: "The Parties shall provide a right in order to ensure that a single equitable remuneration is paid by the user to the performers and producers of phonograms, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public."



Chilling Growth of Public Domain (DISPROPORTIONATE ENFORCEMENT)

RCEP -- Article 9bis.6(2) (*draft*):

"Each Party shall further provide that its judicial authorities have the authority to order that materials and implements, the ... use of which has been in the manufacture or creation of such infringing goods, be, without undue delay and without compensation of any sort, destroyed or disposed of..."

RCEP -- Article 9quinquies.3 (*draft*):

"Each Party shall take effective measures to curtail repetitive infringement of copyright and related rights on the Internet or other digital network."

RCEP -- Article 9quinquies.5 (*draft*):

Criminalizes using or trying to use, knowingly and without authorization, a recording device to transmit or record a film or A/V work in a theatre

NAFTA -- Article 1705(5) (*current*) // RCEP -- Article 2.5 (*draft*):

"Each Party shall confine limitations or exceptions to the rights provided for in this Article to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." (*Berne 3-step test*)

TPP -- Article 18.82(1)(a) (*suspended*):

Legal remedies shall include "legal incentives for Internet Service Providers to cooperate with copyright owners..."

TPP -- Article 18.82(3) (*suspended*):

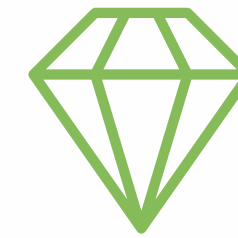
Notice-and-Takedown Provisions

Why Is Copyright Balance Essential to a Thriving Public Domain?



Freedom of Expression

If people have to worry that creative expression or building on others' work will lead to losing Internet access or a criminal charge, this could result in harmful chilling of speech or self-censorship.



Cultural Evolution

Culture is constantly evolving through the public domain, by allowing inspiration, remixing, and transformative uses of works. Overzealous copyright would fossilize culture, and potentially society at large, including its norms and values.



Education

Lack of balance in copyright impedes EU students' education by restricting common teaching methods.



Access to Knowledge

Disproportionate copyright law allows companies to profit from publicly funded research or scholarship they don't pay academics for, while paywalling those works from the public.

How Can Trade Agreements Be a Tool to Protect & Cultivate the Public Domain?

Recommendations:

1. **Include explicit, mandatory provisions that require signatories to protect and promote the public domain and access to it**, in recognition of its fundamental importance to culture, knowledge, society, and human rights. *“Shall”, not “may”*. (Proposed text by Mercosur countries in EU-Mercosur: *“The Parties shall take due account of the need to preserve a robust, rich, and accessible public domain...”*)
2. **Ensure any expansion of intellectual property rights in a trade agreement is balanced by corresponding and equally binding expansion in users’ rights, protection for fair use / fair dealing, and commitment to maintaining a robust public domain**. Trade agreements involving IP rights have typically only attempted or continued to expand and export them and corresponding copyright enforcement systems around the world--shrinking, locking up, and chilling the public domain on a global scale.
3. **Use trade agreements to proactively advance users’ rights, fair use/fair dealing principles, and protection for a robust and accessible public domain--rather than predominantly be on the defensive to maintain the status quo**. (E.g. Advocate to include in FTAs more provisions in the spirit of *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*)

Thank you!

Questions/Comments?

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