



E-commerce, Education and Copyright: A Policy Brief

Michael Geist
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List of Acronyms

- CPTPP** Comprehensive and Progressive Agreement for the Trans Pacific Partnership
- DMCA** Digital Millennium Copyright Act
- EU** European Union
- EUJEPA** EU-Japan Economic Partnership Agreement
- GATT** General Agreement on Tariffs and Trade
- GDPR** European Union General Data Protection Regulation
- IP** Intellectual Property
- NAFTA** North American Free Trade Agreement.
- OECD** Organisation for Economic Co-operation and Development
- TPP** Trans-Pacific Partnership
- UNCITRAL** United Nations Commission on International Trade Law
- USMCA** U.S.-Mexico-Canada Agreement
- WIPO** World Intellectual Property Organisation
- WTO** World Trade Organisation

Introduction

E-commerce (i.e. online buying and selling of goods and services) has emerged in recent years as critical part of commercial activity. With mounting online sale of goods and delivery of services, the implications of e-commerce for the education community arise at both the commercial and policy levels. Indeed, e-commerce and online education delivery played an increasingly prominent and important role throughout the COVID-19 pandemic, including for the increasing commercialisation in and of education.

From a commercial perspective, the merger of e-commerce and education opens the door to new, for-profit online educational service providers that may have a disruptive impact on a sector that has traditionally operated primarily on a non-commercial, public interest basis. From a policy perspective, e-commerce is now firmly part of the international trade world, with negotiations in multi-lateral and bi-lateral trade agreements designed to facilitate increased cross-border e-commerce activity. The resulting legally binding provisions – some of which have been finalised in regional and bi-lateral agreements and which are the subject of debate within the World Trade Organisation (WTO) – could have significant implications for education and research in the years ahead. **These include restrictions on copyright limitations and exceptions to use copyright protected materials for teaching and research that are regularly relied upon by educational institutions, limitations on privacy safeguards for online learning, and mandated cross-border opening of online educational services.**

The prevalence of e-commerce within education and research means that stakeholders can ill-afford to ignore the policy issues associated with this increasingly important part of modern-day commercial activities. Indeed, as policy makers and trade negotiators rush to facilitate cross-border e-commerce activities, **the educational community must be at the table to ensure that the interests of educational institutions, teachers, and students are fully reflected in the resulting agreements and policy documents.**

This policy brief seeks to unpack recent developments in the cross-cutting area of e-commerce, education and copyright with an emphasis on work at the WTO as part of its e-commerce work program. These



include rules on copyright, intermediary liability, open data, data transfers, data localisation, non-discriminatory treatment of digital products, and e-transaction certainty. The rules are designed to support the free flow of services and may limit domestic abilities to establish restrictions or other localised policies in relation to commercial activities in education and research. Some of the issues could have a direct impact on educational policies by reshaping foundational law and policies in the interest of commercial rather than public interests. Having reviewed e-commerce specific provisions at the WTO, the brief then examines the role that regional and bilateral trade negotiations have played on the field. This includes prominent regional and plurilateral trade agreements such as the Comprehensive and Progressive Agreement for the Trans Pacific Partnership (CPTPP) and the U.S.-Mexico-Canada Agreement (USMCA), and European Union trade deals.

The brief then explores the link between education, e-commerce, and intellectual property within trade negotiations. As intellectual property - particularly copyright - has assumed increasing prominence in bi-lateral and multi-lateral agreements, there has been a steady effort to adopt stricter copyright rules that may have an adverse effect on education and research. These provisions include copyright term extension, anti-circumvention rules¹, and restrictions on limitations and exceptions. Some of these provisions are incorporated within e-commerce provisions or are justified on the basis of furthering the digital economy while neglecting the impact they may have on public goods, including education. **The cumulative effect is that the educational and research sectors face higher costs and more restrictive rules in the use of materials for teaching, learning and research. As a result, teachers, researchers and education support personnel have less flexibility in the classroom.**

1 Sometimes copyright owners use technological prevention measures (TPM) to prevent internet users from using their materials (e.g. a digital lock that prevents that a picture can be downloaded). Many copyright laws include a provision that it should be legal to circumvent the digital lock in cases where the copyright legislation states that it is lawful for a teacher to for instance use an online image for teaching. Anti-circumvention rules do the opposite. They state that teachers cannot circumvent the lock even though they have the right by law to use a certain work.

What is E-commerce?

Global growth of e-commerce is rapidly transforming commercial activity around the world. Ecommerce statistics state that growing numbers of global internet users have bought products or goods online via desktop, mobile, tablet or other online devices. These numbers increased in light of the COVID-19 pandemic, which forced hundreds of millions of people into self-isolation and increased their reliance on e-commerce delivery systems.

Messaging apps like WhatsApp, Snapchat, Viber and WeChat are beginning to offer more integrated functionalities including e-commerce. Hence, e-commerce companies can consider content distribution via messaging apps for more personalised marketing. Voice is beginning to replace typing in online queries. When it comes to social media platforms, 26% of people that click ads on Facebook make purchases.² Google has enabled billions of tracked store visits.

The implications for education within the e-commerce field are only beginning to emerge. E-commerce has facilitated a growing for-profit education sector at both the K-12 and postsecondary level. This includes online learning, publishing, research, instruction and service delivery. These services offer new opportunities but also raise potential concerns for fundamental rights such as the right to privacy and the right to education. For example, personal information and data collection from students, restricted access to materials and research, and homogenisation of educational materials that may result in lost local content. These rules also raise potential employment issues since e-commerce may entice some governments to shift away from local education delivery to lower cost online alternatives. When combined with e-commerce trade provisions, potential barriers to offering distance or online education may be prohibited by emerging national and international trade obligations.

2 [Kleiner Perkins, Internet Trends 2018 \(May 2018\); online at <https://www.kleinerperkins.com/perspectives/internet-trends-report-2018/>](https://www.kleinerperkins.com/perspectives/internet-trends-report-2018/)



E-commerce at the WTO

E-commerce at the WTO is not a new issue. The WTO first officially recognised the growth of global e-commerce and its creation of new opportunities for trade in the Declaration on Global Electronic Commerce adopted at the Second Ministerial Conference held in Geneva in May 1998.³ This declaration called for a work programme on e-commerce, which was established four months later and covered issues related to trade arising from global e-commerce.⁴ It also affirmed, “Without prejudice to the outcome of the work programme or the rights and obligations of Members under the WTO Agreements, we also declare that Members will continue their current practice of not imposing customs duties on electronic transmissions.”⁵ This moratorium does not include electronic distribution, meaning the offering and selling of tangible goods on the Internet, which is subject to tariffs and other *General Agreement on Tariffs and Trade* (GATT) obligations in force.⁶

Expansion of the WTO program was facilitated by the Conference on the Use of Data in the Digital Economy, held from 2 to 3 of October 2017 at the WTO headquarters. It outlined how data has very different properties than physical goods.⁷ The Comprehensive and Progressive Agreement for the Trans Pacific Partnership (CPTPP) was identified as a model of recent trade agreement that attempted to address data restrictions; however, trade regulation of data flows was found to remain outstanding, especially with actual varying national privacy approaches. The European Union General Data Protection Regulation (GDPR) was taken into account, yet it was advised that privacy policies differentiate between data machine-generated for industrial purposes (e.g., sensor data) and personally identifiable data generated by or for humans (this also encompasses machine-generated data for the Internet of Things).⁸ The use of big data

3 WTO, Declaration on Global Electronic Commerce (adopted on 20 May 1998), WTO Doc WT/MIN(98)/DEC/2, online : World Trade Organisation <https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm>.

4 The issues include the protection of privacy and public morals, the prevention of fraud, the access to and use of public telecommunications transport network and services, the rules of origin, the protection and enforcement of copyright and trademarks, and the need to increase developing countries and their SMEs' participation in e-commerce; “MC11 in Brief: Electronic Commerce” (last accessed 20 July 2019), online: World Trade Organisation <https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfecom_e.htm>.

5 *Supra* note 2.

6 WTO, Council for Trade in Services, The Work Programme on Electronic Commerce: Note by the Secretariat (16 November 1998), restricted WTO Doc S/C/W68 at para 30, online World Trade Organization <https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm>.

7 WTO, “Use of Data in Digital Economy Conference” (3 October 2017), online (pdf): WTO <https://www.wto.org/english/res_e/reser_e/datadigitalc17notes_e.pdf>.

8 *Ibid.*

and artificial intelligence has significant implications for education and research. While these communities are at the forefront of research in the field, their use within education – to identify student trends or track research developments – requires close monitoring.

The Chairman of the WTO General Council reported in December 2018 that he welcomed continued discussion on the moratorium on the WTO Members' custom duties for electronic transmissions.⁹ The Chairman had convened an informal open-ended meeting on 27 November 2017 to initiate India and South Africa's call to have a fresh examination of the moratorium's impacts on revenue. The two countries advanced that its continuation, if any, should be based on concrete facts and statistics. Several delegations saw merit in further studying the scope of the moratorium and factoring in the developmental dimension.¹⁰

However, other delegations found that the moratorium as a whole sufficiently encourages ecommerce and provides predictability, and that further study of its scope should focus on content to bring any additional insight. These delegations also noted the difficulty and burden to attach a specific amount and value to electronic transmissions.¹¹ Members are still free to impose internal taxes and charges.¹²

As the discussions continue, dozens of countries have submitted policy positions on the WTO e-commerce work programme, touching on a wide range of issues that have significant implications for education and research. As of January 2021, there are 86 WTO members participating in these discussions, accounting for over 90 per cent of global trade.

In December 2021, the Governments of Australia, Japan and Singapore provided the following update on the WTO work:

We welcome the substantial progress made to date in the negotiations. We have achieved good convergence in negotiating groups on eight articles – online consumer protection; electronic signatures and authentication; unsolicited commercial electronic messages; open government data; electronic contracts; transparency; paperless trading; and open internet access. The outcomes already achieved in these areas will deliver important benefits including boosting consumer confidence and supporting businesses trading online.

9 WTO, Committee on Trade and Development, Development Implications of Electronic Commerce: Note by Secretariat (23 November 1998), WTO Doc WT/COMTD/W/51 at para 1, online: WTO <[docs](https://docs.wto.org)online.wto.org>.

10 Ibid at para 1.6.

11 Ibid at paras 1.6–1.7.

12 Ibid.

In addition, we have seen the consolidation of text proposals in other areas, including on customs duties on electronic transmissions, cross-border data flows, data localisation, source code, electronic transactions frameworks, cybersecurity, and electronic invoicing, as well as advanced discussions on market access. We will intensify negotiations in these areas from early 2022. We note that provisions that enable and promote the flow of data are key to high standard and commercially meaningful outcome.¹³

There are four different WTO bodies and the General Council supporting the initiative:

GATS Council

in charge of modes of supply, domestic regulation and standards, increasing participation of developing countries, Most Favoured Nation and National Treatment principles, privacy, telecommunications, competition, and distribution services and customs duties classification

Council for Trade in Goods

addresses market access for goods, import licensing, regulations and standards for goods traded, custom duties, classification and rules of origins

TRIPS Council

examines issues related to intellectual property rights, access to technology and innovation, protection and enforcement of copyrights and trademarks

Trade and Development Committee

looks at the impacts of e-commerce on the economy of developing countries, and the challenges of enhancing participation of developing countries in international trade (especially transfer of technology and access to infrastructure, the use of information technology and the impact of ecommerce on traditional distribution methods)

General Council

continuously reviews the WTO E-Commerce Work Programme and to consider all trade-related issues of a cross-cutting nature, including customs duties (as well as moratoriums), and classification of digital products

A full analysis of the key policy positions at the WTO and their implications for education and research is discussed below.

¹³ WTO, Joint Statement Initiative on E-Commerce: Statement by Ministers of Australia, Japan and Singapore (December 2021): World Trade Organisation <https://www.wto.org/english/news_e/news21_e/ji_ecom_minister_statement_e.pdf>

Key WTO E-commerce Issues for Education and Research

The e-commerce work at the WTO remains a work-in-progress with shifting positions among many countries. This section of the guide identifies key e-commerce issues that are relevant to education and positions of countries involved in the negotiations, adapted from the official country positions submitted to the WTO.

Copyright Remuneration

Copyright remuneration is the payment that copyright owners receive when their work is being used. Several countries, including Brazil and the Ukraine, envision using the WTO process on e-commerce to establish new global rules on copyright that could have significant implications for education and research. For example, Brazil has seized on the issue related to remuneration of artists and creators:

The remuneration of artists and performers is a market-place issue that rests upon the bargaining power of the different actors involved with the copyright ecosystem. The WTO could contribute to the reduction of the asymmetries of information between the relevant actors of this ecosystem by increasing the level of transparency regarding the remuneration of copyright and related rights in the digital environment. A second contribution of the WTO to improve the business environment in the electronic copyright trade is reaffirming the territoriality of copyright in the digital environment as a principle of the international trading system. Finally, the principle that exceptions and limitations available in physical formats should also be made available in the digital environment should be discussed as well. Those elements have been previously addressed by Argentina and Brazil in document JOB/GC/113/Rev.1.

The Brazilian delegation has also referenced the “value gap”, a consistent lobbying issue for major copyright industries who argue that they are inadequately reimbursed for the use of copyright works online. **If the issue is pursued at the WTO, the new rules could have enormous implications for education and research. For example, remuneration issues have been used in some fora to call for restrictions on limitations and exceptions that are essential for a balanced copyright approach that respects the needs of teachers, students, and educational institutions.**



Intermediary Liability

Intermediary liability is used to hold websites and online platforms accountable when their users upload or create content that is unlawful (e.g. copyright infringements) or harmful. The U.S. is one of several countries that has called for the establishment of global safe harbour rules that would limit or eliminate liability for content posted on websites. It argues:

Governments holding Internet intermediaries liable for content created by third parties can suppress vibrant online forums and stifle innovation in services that depend on user engagement. Trade rules can guarantee that merely storing, processing, or transmitting content does not make intermediaries legally liable for the content of that data, while still allowing for measures that ensure rigorous enforcement of intellectual property rights and criminal laws.

The U.S. approach is opposed by some countries such as Brazil, which supports exploration of increased liability for platforms. Regardless of the approach, the inclusion of global safe harbours would have direct implications for the liability of large internet platforms such as Google and Facebook for the content on their services. **From an educational perspective, the adoption of such rules would potentially protect educational institutions that establish their own learning or research platforms from criminal liability. However, the same rules also insulate the large Internet platforms from liability, even when used for educational or research purposes.**

Anti-Circumvention Rules

Anti-circumvention rules, sometimes referred to as legal protection for digital locks, has been a significant copyright concern for the education community for many years. The anticircumvention rules, which stem from the 1996 WIPO Copyright Treaties, afford legal protection for digital technologies that may restrict access to copyright works. With these provisions, attempts to circumvent or defeat the technological safeguards will constitute infringement, even if the intended use of the underlying is permitted. In the context of education for instance, the copyright exceptions might allow a teacher to show an online video in class, however, even though it is lawful for the teacher to use this video it is unlawful for the teacher to break the digital lock. The digital lock, therefore, prevents the teacher from making us of his/her right.

For example, the use of the anti-circumvention rules have limited access to e-books, a major concern for students who may find themselves “locked out” of their educational materials. The Brazilian delegation supports re-assessing the anti-circumvention rules, in light of their impact on education. The delegation states:

To give a concrete example, in the analog environment students may freely access a book at their local library. If the book is in the public domain, they are entitled to fully copy the book. If the book is under copyright protection, exceptions and limitations may be applied, allowing, for instance, the use of short excerpts. In the case of the digital environment, however, the lack of balance in the implementation of rules on TPMs may create a situation in which studies are obliged to pay for the access to a book from the 19th century, which is already in the public domain. Therefore, exceptions and limitations regarding the educational use of an e-book in a classroom would be hindered if students were not able to access the content of the e-book, even in the case of small excerpts, thereby affecting the dissemination of information and knowledge.

The inclusion of anti-circumvention within the WTO e-commerce work represents an important opportunity for the education community. If pursued, improving access to digital works could help remove troubling barriers for students to copyrighted works.

Open Data

Open data refers to the public availability of government data – including research data – for reuse under open licences such as the Creative Commons licence. Several countries have raised open data as a potential WTO e-commerce objective. For example, the Japan position at the WTO calls for:

With the aim of contributing to further promotion of e-commerce or digital trade, data gathered by governments, such as statistical information, data on public transport and data on disaster prevention can be open and accessible to the public. By making such data available to both domestic and foreign companies, the governments could enhance opportunities for promoting innovation. In the case that access to such data is only allowed to domestic companies, this would effectively take the form of a national treatment barrier for foreign companies to enter into the concerned market. Therefore,



the data which are gathered by governments should be open and widely accessible on a non-discriminatory basis. It would be worth considering reaching such an agreement in the WTO.

Support for an open data provision within the WTO e-commerce rules can also be found in the U.S. and Ukraine positions. **Open data is a critical issue for researchers, who increasingly rely on access to open government data, particularly in light of the COVID-19 pandemic where open data formed the foundation for research in the field.**

Customs Duties on electronic transmissions

Electronic transmissions can “encompass anything from software, emails, and text messages to digital music, movies and video games”.¹⁴ Customs duties on electronic transmissions represents the first e-commerce issue addressed by the WTO, which established a longstanding moratorium on new duties. A permanent moratorium is supported by many countries including New Zealand, Russia, Japan, Singapore, the U.S., Ukraine, Canada, EU, China, and Brazil. A common position is the proposition that no party shall impose customs duties, fees or other charges on a digital product transmitted electronically. However, it does not prevent a Party from imposing internal taxes, fees or other charges on a digital product transmitted electronically, provided that those taxes, fees or charges are imposed in a manner consistent with the WTO Agreement.¹⁵ **If adopted, the absence of customs duties could have implications for cross-border education initiatives such as international online courses and exchanges between researchers and education institutions.**

Electronic transactions

Electronic transactions are a form of payment, fund transfer or cash withdrawal action that is paperless. Many countries, including New Zealand, Japan, Ukraine, EU, Singapore, and Canada support establishing a domestic electronic transactions framework which aims to establish a basic framework for electronic contracting that coheres with international best practice in the form of the relevant well established UNCITRAL or UN documents. The nature of cross-border electronic transactions means that a degree of commonality is desirable to ensure

14 ICC, *WTO Moratorium on Customs Duties on Electronic Transmissions – A primer for business*, (online, pdf): International Chamber of commerce < <https://iccwbo.org/content/uploads/sites/3/2019/11/2019-icc-wto-moratorium-custom-duties.pdf>>.

15 (INF/ECOM/34)

there are no major differences in regulatory approach that might impede electronic commerce across and between different jurisdictions. Common standards for electronic transactions would have implications for all e-commerce activities, providing certainty for institutions on the validity and enforceability of online transactions.

Data Localisation

Data localisation rules, which require data to be stored locally, have emerged as an increasingly popular legal method for providing some assurances about the privacy protection for personal information. The issue first came to the fore in Canada in 2004, when a provincial government proposed outsourcing the management services associated with its Medical Services Plan.¹⁶ The proposal was challenged by the affected union, which argued that the data generated under the plan, which included sensitive health information, could be put at risk due to provisions found in the *USA Patriot Act*. Sceptics dismissed the union's opposition as a transparent attempt to protect local labour, but the concerns resonated with a wide range of communities, including privacy advocates, civil liberties groups, and health care activists. The Province of British Columbia government responded by enacting legislation designed to temper public concerns by requiring that certain public data be hosted within the province. Soon after, the Province of Nova Scotia government enacted similar legislation.

Data localisation requirements are not unique to Canada, with similar statutes popping up around the world. Today there are localisation requirements in European countries such as Germany, Russia, and Greece; Asian countries such as Taiwan, Vietnam, and Malaysia; Latin American countries such as Brazil, and in Australian data localisation requirements for health records.¹⁷ The issue is one of several privacy-related issues raised within the WTO e-commerce work.

Data localisation concerns have already arisen within the education community, particularly where cloud-based global providers offer low-cost online educational services. These services may offer advantages, but the privacy risks associated with storing student data in countries without adequate privacy safeguards may raise concerns from students, parents, and educators.

16 Michael Geist and Milana Homs, *Outsourcing Our Privacy?: Privacy and Security in a Borderless Commercial World*, 54 UNB Law Journal 272 – 307 (2005)

17 For a comprehensive review of data localisation measures, see, Albright Stonebridge Group, *Data Localization: A Challenge to Global Commerce and the Free Flow of Information* (September 2015); online at <https://www.albrightstonebridge.com/news/data-localization-challenge-global-commerce-and-free-flow-information>



The data localisation provisions may therefore limit the ability to require that student data be subject to a localisation requirement.

Data Transfer Restrictions

The legal situation with respect to data transfer restrictions mirror those for data localisation. Insofar as restrictions on data transfers can be used by governments as a restrictive measure that run counter to an open Internet, limitations on their use is a welcome development. However, those restrictions may also be used as a safeguard for privacy and security.

Data transfer restrictions are a key element of the EU approach to privacy, which restricts data transfers to those countries with laws that do not meet the “adequacy” standard for protection. That approach is becoming increasingly popular, particularly in light of concerns regarding governmental surveillance practices. Some countries, such as the U.S., promoted data transfer limitations that required countries to “allow the cross-border transfer of information by electronic means, including personal information.” **Data transfer restrictions could therefore have implications for educational services that require cross-border transfers of student or teacher data.**

E-commerce within Regional Trade Agreements

Regional trade agreements increasingly feature e-commerce or digital trade chapters. These provisions could have significant implications for education and research. For example, they frequently include copyright provisions that may limit limitations and exceptions that are essential for education. Some agreements touch on platform liability, which could impact the delivery of online education programs, particularly in light of the COVID-19 pandemic that shuttered many schools and forced educational institutions to adopt online teaching technologies.

Comprehensive and Progressive Agreement for the Transpacific Partnership (CPTPP)

The e-commerce provisions are largely replicated across agreements and have emerged as a template for new agreements. For example, the CPTPP is based on liberalised premises in favour of an open digital economy. Chapter 14 of the agreement is dedicated to electronic commerce. The chapter protects the free flow of information across

borders; prohibits unauthorised disclosure of personal information, online fraudulent and deceptive commercial practices, and unsolicited commercial electronic messages or spam; prevents governments of its member countries from requiring the use of local services for data storage and demanding access to an enterprise's software source code; and ensures that its member countries do not discriminate against or impose custom duties or any other charge on online digital products.¹⁸

The agreement maintains that the Internet be kept free and open, to enable the creation and growth of new Internet services. Cross-border data flow is facilitated with the removal of data localisation requirements, and electronically transmitted products are free from import duties. Article 14.13 of CPTPP states that governments cannot require the use or location of computing facilities inside the country in order to be entitled to provide services in their country. Furthermore, market access cannot be made contingent on forced transfers of technology.

The CPTPP also has significant implications for privacy. Rather than setting the CPTPP privacy bar at having a national privacy law based on the OECD principles, the agreement weakened the shift toward a minimum standard of privacy protection. Article 14.8 looked promising with respect to privacy protection:

each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce. In the development of its legal framework for the protection of personal information, each Party should take into account principles and guidelines of relevant international bodies

However, the provision is subject to a footnote that effectively eviscerates the requirement for a privacy legal framework:

For greater certainty, a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as a comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy.

The footnote effectively means that the CPTPP's privacy requirements can be met without the need for any privacy law at all.

18 Ibid.



A core aspect of the e-commerce chapters is that they facilitate the free flow of digital services by prohibiting customs duties or other regulatory restrictions. These provisions, which ensure non-discriminatory treatment of digital services, may be applied to educational services delivered by electronic means.

Educational provisions have appeared in at least one side letter to the CPTPP. The side letter between Australia and Vietnam opens the door to technical assistance and pilot programs for online education between the two countries, providing for assistance on distance education delivery models, assessing applications from Australian providers to deliver online education, and work to recognise the qualifications obtained from such courses. Moreover, the letter states that:

Viet Nam will cooperate with Australia to facilitate a pilot program under which Australian universities would deliver courses in Vietnam that may be delivered wholly or substantially online.

The letter includes details on a pilot program, which is geared toward enhancing Australia's higher education presence in the country and taking advantage of digital opportunities.

The side agreement can be expected to be emulated by other countries, pointing to the potential outcome of e-commerce agreements being used by developed countries to use online educational service delivery in developing countries. The approach offers developed countries potential economic benefits without the costs associated with scholarships and student financing that typically accompanies access to foreign students.

U.S.-Mexico-Canada Agreement (USMCA)

The USMCA features a digital trade chapter that similarly restricts customs duties on digital products, such as e-books, videos, music, software and games. Suppliers' use of electronic authentication or electronic signatures is not restricted, which in turn facilitates digital transactions and guarantees that enforceable consumer protections (e.g., privacy and unsolicited communications) apply to the sales of digital products.¹⁹ In addition, the chapter on intellectual property contains more rigid protections for trademarks and patents apply to all e-commerce activities.²⁰

¹⁹ Zak Stambor, "NAFTA is now USMCA: Here's What the Deal Means for E-retailers," *Digital Commerce 360* (1 October 2018), online: <<https://www.digitalcommerce360.com/2018/10/01/nafta-is-now-usmca-heres-what-the-deal-means-for-e-retailers/>>.

²⁰ *Supra* note 6.

European Union Trade Agreements

Trade agreements involving the European Union contain similar provisions. For example, The European Union-Japan Economic Partnership Agreement entered into force on February 1st of 2019. On 16 July 2018, the E.U. and Japan concluded their negotiations on data protection adequacy, agreeing to recognise each other's data protection systems as "equivalent."²¹

The e-commerce provisions of EUJ EPA cover all trade done by electronic means. They address more specifically the non-imposition of customs duties on electronic transmissions, the source codes, the Parties' domestic regulation, the principle of non-prior authorisation, the conclusion of contracts by electronic means, the authentication of electronic identities and electronic signatures, the protection of consumers, and the prohibition on unsolicited commercial electronic messages. Digital trade interests, which both Japanese and European companies and consumers have, are balanced with the realisation of policy objectives.²²

The E.U. and Japan have also agreed to maintain a dialogue on information and experience sharing, with respect to issues like consumer protection, cybersecurity, spam deterrence, certification of electronic signatures issued to the public, e-commerce challenges for small and medium sized enterprises, facilitation of cross-border certification services, intellectual property protection and e-government.²³

Trade, Copyright, and Education

The link between education and intellectual property within trade negotiations has been an ongoing concern but until recently educational stakeholders were relatively silent on the issue. These issues may be closely linked to emerging e-commerce chapters, which frequently incorporate copyright-related provisions within their ambit. This brief identifies two types of copyright provisions linked to trade and e-commerce: those provisions that are closely linked to e-commerce policies and those provisions that are often incorporated into broader trade agreements. **In both instances, the cumulative effect is that**

21 "EU-Japan Economic Partnership Agreement: Why It Matters" (July 2018) at 2, online (pdf): *European Commission* <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155725.pdf>.

22 "The Economic Impact of the EU-Japan Economic Partnership Agreement (EPA): An Analysis prepared by the European Commission's Directorate-General for Trade" (June 2018) at 31, online (pdf): *European Commission* <http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157115.pdf>.

23 *Supra* note 10 at 32.



education faces the risk of more restrictive rules in the use of materials, higher costs, and less flexibility in the classroom.

E-commerce and Copyright

Trade agreements frequently reference e-commerce and innovation as a core policy objective of its intellectual property provisions. **However, the resulting rules rarely reflect the balanced approach to copyright supported by educational groups.** The balanced approach recognizes both the need for appropriate protection for creators and access for users such as teachers and students who work in public interest sectors such as education. Ensuring fair access through limitations and exceptions such as fair use or fair dealing has emerged as an essential copyright issue for educational stakeholders around the world. For example, leaked versions of early TPP drafts showed that most TPP countries were supportive of expanded objectives that emphasized balance and the public domain including for education. The full objectives provision, supported in full or in principle by New Zealand, Chile, Peru, Vietnam, Brunei, Malaysia, Singapore, Canada, and Mexico (opposed only by the U.S. and Japan) stated:

The Objectives of this Chapter are:

- enhance the role of intellectual property in promoting economic and social development, particularly in relation to the new digital economy, technological innovation, transfer and dissemination of technology and trade;
- reduce impediments to trade and investment by promoting deeper economic integration through effective and adequate creation, utilisation, protection and enforcement of intellectual property rights, taking into account the different levels of economic development and capacity as well as differences in national legal systems;
- maintain a balance between the rights of intellectual property holders and the legitimate interests of users and the community in subject matter protected by intellectual property;
- protect the ability of Parties to identify, promote access to and preserve the public domain;
- ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;

- promote operational efficiency of intellectual property systems, in particular through quality examination procedures during the granting of intellectual property rights;
- The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations;
- Support each Party's right to protect public health, including by facilitating timely access to affordable medicines.

Yet the final text removed virtually all of the balancing language, leaving only the following provision that heavily favoured commercial interests:

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

The objectives provision may not carry the same weight as positive obligations in the treaty, but it is important, reflecting the goals of the negotiating parties and providing a lens through which all other provisions can be interpreted. The absence of balancing language points the challenge of incorporating broader copyright perspectives into trade agreements.

The emphasis on rights holder and commercial interests – including the creative industry - over user interests such as education and research is also reflected in the restrictive approach to limitations and exceptions within such agreements. For example, the CPTPP was one of the first trade agreements to include a specific reference to copyright limitations and exceptions. However, unlike text on many copyright rights that were mandatory, the limitations and exceptions language was optional:

Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital



environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.

Trade agreements are also used to export e-commerce copyright policy. This strategy is readily apparent with the inclusion of notice-and-takedown requirements within trade agreements that have a significant impact on the approach to copyright materials found on Internet platforms and other websites. The notice-and-takedown system may result in the removal of lawful material online based on a mere, unproven allegation of infringement. For educational groups, the takedown approach can result in the removal of scholarly research and restrictions on the dissemination of teaching materials.

For example, during the TPP negotiations, the U.S. sought to export its Digital Millennium Copyright Act notice-and-takedown system. Other countries, such as Canada and Chile, preferred to retain their systems that do not require the removal of materials without a court order. The end result was a compromise that allowed Canada and Chile to maintain their systems, but require all other countries to adopt the U.S. approach. In fact, the final CPTPP version of the notice-and-takedown approach was even more restrictive than that found in the U.S., with fewer requirements for the contents of takedown notices as compared to the Digital Millennium Copyright Act (DMCA), no requirement for rights holders to state their good faith belief that the content in the notice infringes copyright, and no mandatory counter-notice system that would allow users to effectively challenge claims of infringement by requiring providers to re-post their content.

Trade agreements can also be used to limit domestic copyright flexibility in the name of e-commerce. For example, the CPTPP established anti-circumvention legal requirements that extended far beyond those required within the WIPO Internet treaties. As a result, even those countries not party to those treaties would be subject to its provisions with restrictive interpretations that limit future flexibility and fair uses in the digital environment. **Given the growing use of digital textbooks – including textbooks made available for short-term use – the importance of these provisions for the education community has steadily grown.** As noted above, Brazil has raised this specific concern within the context of the WTO e-commerce work programme.

Trade and Copyright

Trade agreements are often used to extend copyright rules in a manner that goes beyond ecommerce. For example, some trade agreements entrench intellectual property treaty obligations to a broad range of global IP conventions. Ratification of the CPTPP requires ratification of accession of nine IP treaties:

- Patent Cooperation Treaty
- Paris Convention
- Berne Convention
- Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks
- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1977), as amended in 1980
- International Convention for the Protection of New Varieties of Plants [MX propose: (1961) as revised in 1972, 1978 or] (1991) (UPOV Convention)
- Singapore Treaty on the Law of Trademarks (2006)
- WIPO Copyright Treaty
- WIPO Performances and Phonograms Treaty

While the above-named treaties are requirements for treaty ratification, the CPTPP notably relegated the Marrakesh Treaty for Blind and Visually Impaired to a footnote with no ratification requirement:

As recognised by the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, done at Marrakesh, June 27, 2013 (Marrakesh Treaty). The Parties recognise that some Parties facilitate the availability of works in accessible formats for beneficiaries beyond the requirements of the Marrakesh Treaty.

The trade agreement impact on copyright domestic policy can be felt on a wide range of issues, some of which have significant implications for education. For example, trade agreements featuring the U.S. or European Union often include a requirement to extend the term of copyright before a work enters the public domain (i.e. when copyright protection for a work expires and the work can be used by anyone



in the public without restrictions) by additional 20 years beyond the international standard found in the Berne Convention of life of the author plus fifty years after death.

The impact on education is enormous as the measure restricts the size of the public domain and limits the use of those books in new and innovative ways without the need for further payments through licensing or royalties. Moreover, there are e-commerce implications from copyright term extension as the policy undermines access to works in open electronic form and shrinks the availability of materials for open educational resources.

Conclusion

The prevalence of e-commerce means that the education community can ill-afford to ignore the policy issues associated with this increasingly important part of modern-day commercial activities. Indeed, as policy makers and trade negotiators rush to facilitate cross-border ecommerce activities, the educational community must be at the table to ensure that the interests of educational institutions, teachers, education support personnel, researchers and students are fully reflected in the resulting agreements and policy documents.

E-commerce has facilitated a growing for-profit education sector at both the K-12 and postsecondary level. The undeniable potential for online learning, publishing, research, and service delivery may enhance access to educational materials, access to educational programs, and the manner in which those materials and programs are delivered. Yet these services also raise potential concerns regarding personal information and data collection from students, restricted access to materials and research, and homogenisation of educational materials that may result in lost local content. These rules also raise potential employment issues since the e-commerce may entice some government to shift away from local education delivery to lower cost online alternatives. The net effect could undermine fundamental rights to education and privacy and lead to an increasing privatisation and commercialisation of the education sector.

In recent years, e-commerce policies have been fueled by trade negotiations at the international and regional levels. As this brief highlights, the basic framework of e-commerce or digital trade chapters are already well-defined. These chapters are likely to have a significant impact on privacy safeguards and the open, cross-border delivery of educational materials and instruction. Moreover, when combined with the copyright provisions often included in the same agreements within e-commerce or IP chapters, the policy framework to govern online education is moving quickly toward completion.

Unfortunately, the implications for education of these e-commerce and copyright rules are frequently an afterthought as the provisions are primarily driven by IP interests, including the cultural and publishing sectors. There is a need for greater understanding of the implications of e-commerce and IP rules within trade agreements, the retention of policy



flexibility and privacy safeguards, the scope for exceptions for education and research, and the opportunity for educational stakeholders, including teachers, students, and institutions, to participate in trade policy development at the national and international levels.

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