

Strong Copyright vs Open Source, Open Access, Open Data: the Role of Free Trade Agreements

Roberto Caso and Paolo Guarda

University of Trento

Faculty of Law

LawTech Research Group

lawtech

The Law and Technology Research Group

www.lawtech.jus.unitn.it

Outline

1. Copyright vs Openness
2. FTAs and Copyright: some examples
3. Towards a better regulation?

1

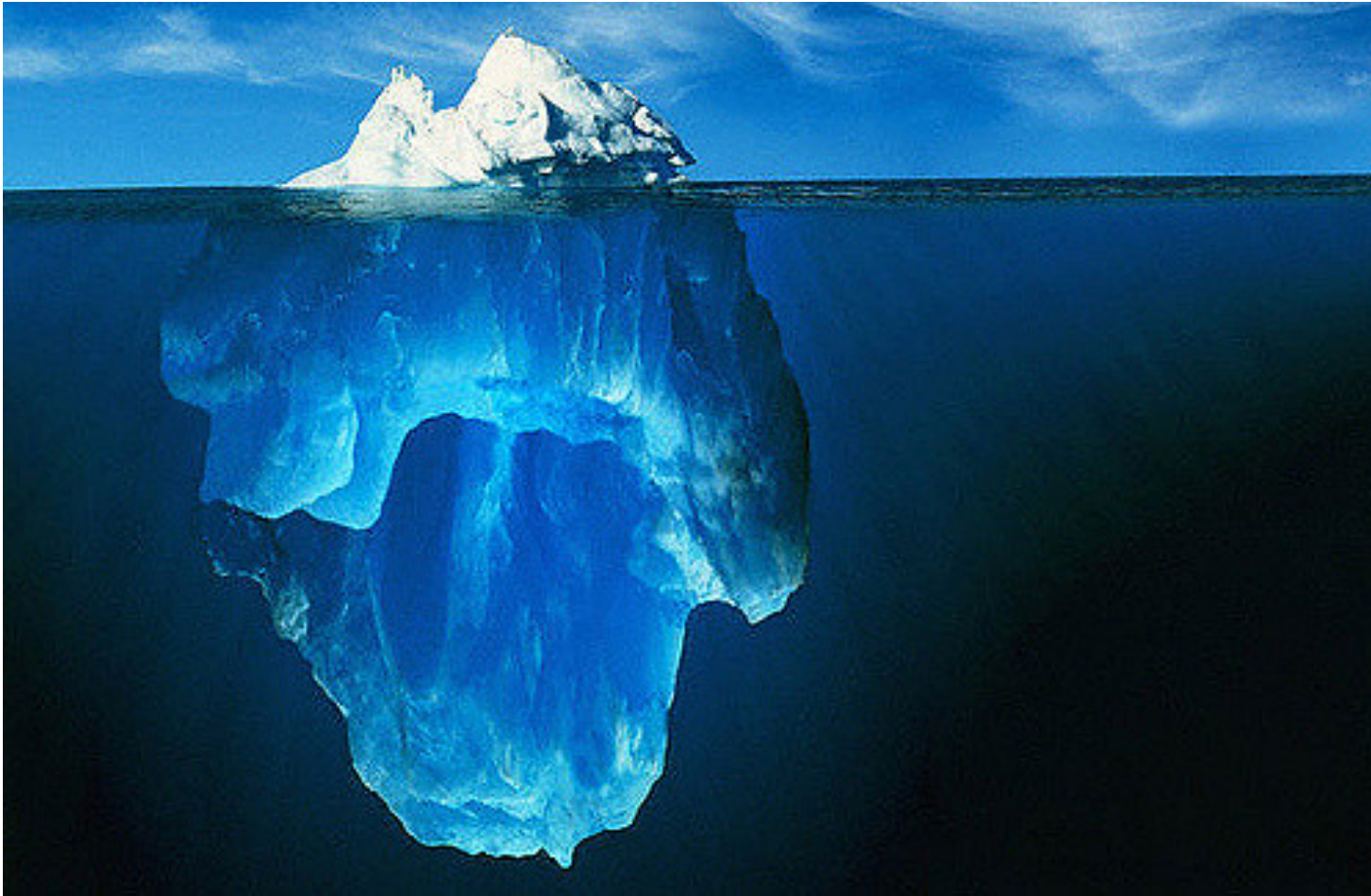
The role of copyright

- The relevance of copyright in the new technological age
- Copyright and progress of science (encouragement of learning), progress of knowledge (balancing of rights, public domain)
- A false equation: innovation = stronger copyright

Western (strong) copyright

- Two decades of solicitude (TRIPs, WIPO, DMCA, InfoSoc Dir.): more rights, stronger rights, new types of rights (e.g. protection of TPMs)
- The rethoric of “high level of protection”
- Policy laundering: international treaties and agreements (WIPO, WTO-TRIPs, FTAs, PTAs)

Open Logic as a symptom of a larger problem



Towards a new equilibrium?

Some counterforces:

- Open models, Open licenses
- Part of case law
- Political actions (e.g. Pirate party in EU)
- Piracy

Openness

- Fostering science
- Spreading innovation
- Enabling collaboration

2

Progress of IPRs in the FTAs: two approaches

- FTAs with no or very few provisions on IP with little substantive content:
 - they do not mention IP, but stress general exceptions as stated in Art. XX GATT, (art. 15 CIS FTA; art. IV Free Trade Agreement between India and Sri Lanka; etc.) or they contain a single permissive provision (i.e. PICTA; PACTRA II; etc.)

Progress of IPRs in the FTAs: two approaches

- FTAs with entire chapters on IP:
 - Details and obligations even beyond the TRIPs (so called “**TRIPs plus**”)
 - Facilitation in patenting process; accession to further international treaties; border enforcement measures; obligations from WIPO Internet treaties, and UPOV standards for plant varieties
 - i.e. Korea-Singapore Trade agreement; Singapore-Australia Free Trade Agreement (SAFTA); TPP; etc.

Issues in FTAs proliferation and IP

- Locking in current regime
- Confusion created by the simultaneous existence of overlapping obligations and norms (“Spaghetti Bowl”)
- Combination of divergent interests

IP Overprotection

Protection of IPRs beyond a level that is economically and socially justified



hamper innovation and foster a monopolization of technology, knowledge and expressions.



By <https://www.munz.org.nz/2009/05/26/free-trade-dairy-debacle-with-usa-was-inevitable/>



By <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/index.aspx?lang=eng>

Trans-Pacific Partnership (TPP): a paradigmatic example

- A trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, USA and Vietnam.
- Finalized proposal signed on 4 February 2016 in Auckland, New Zealand.
- It currently cannot be ratified due to U.S. withdrawal from the agreement on 23 January 2017
- After that, negotiations continued on the Regional Comprehensive Economic Partnership (RCEP).
- An example of TRIPS plus agreement!

TPP: Copyright terms of protection

Article 18.63: Term of Protection for Copyright and Related Rights

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

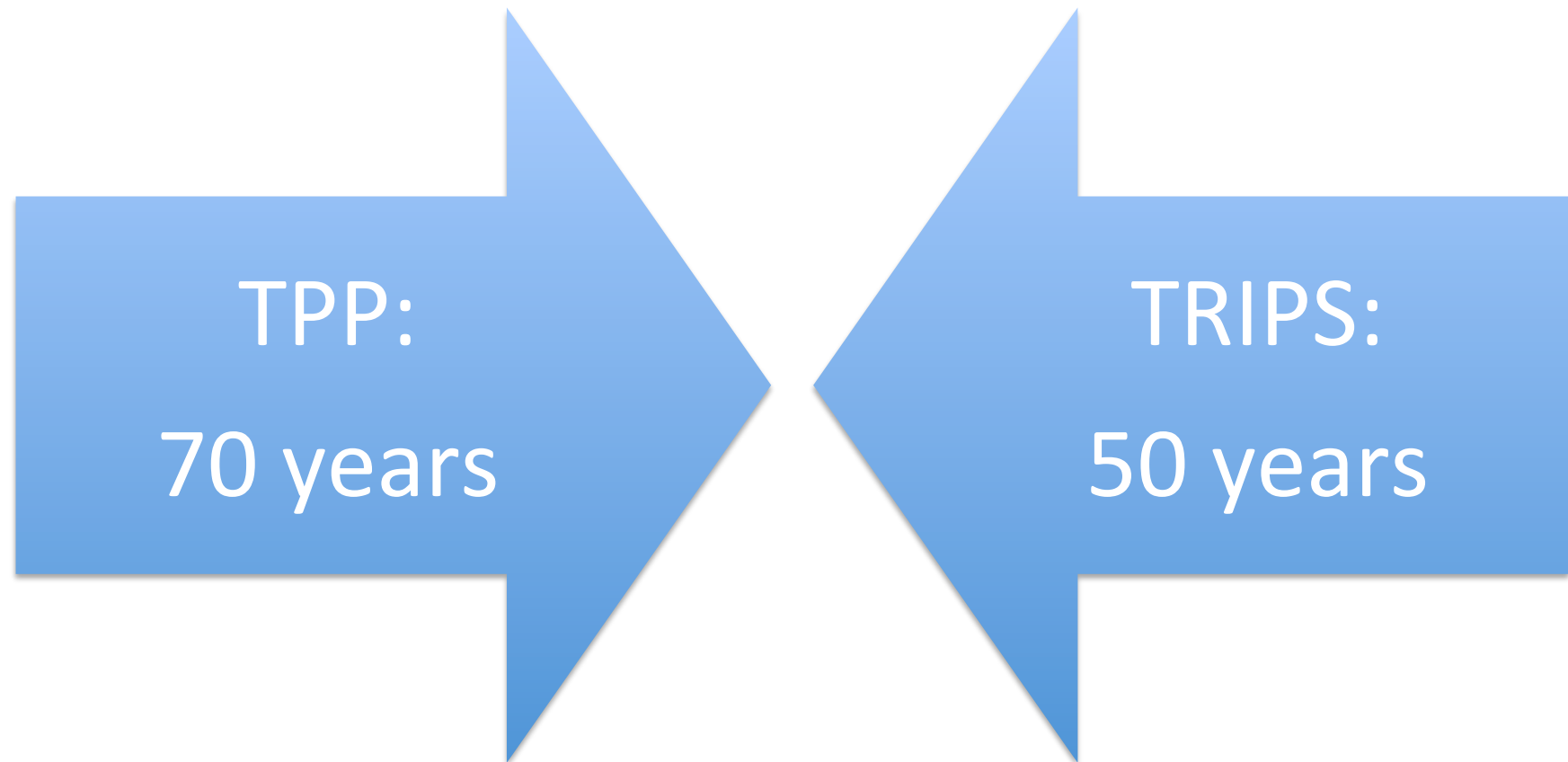
(a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author’s death; and

(b) on a basis other than the life of a natural person, the term shall be:

(i) not less than 70 years from the end of the calendar year of the first authorised publication of the work, performance or phonogram; or

(ii) failing such authorised publication within 25 years from the creation of the work, performance or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance or phonogram”

TPP: Copyright terms of protection

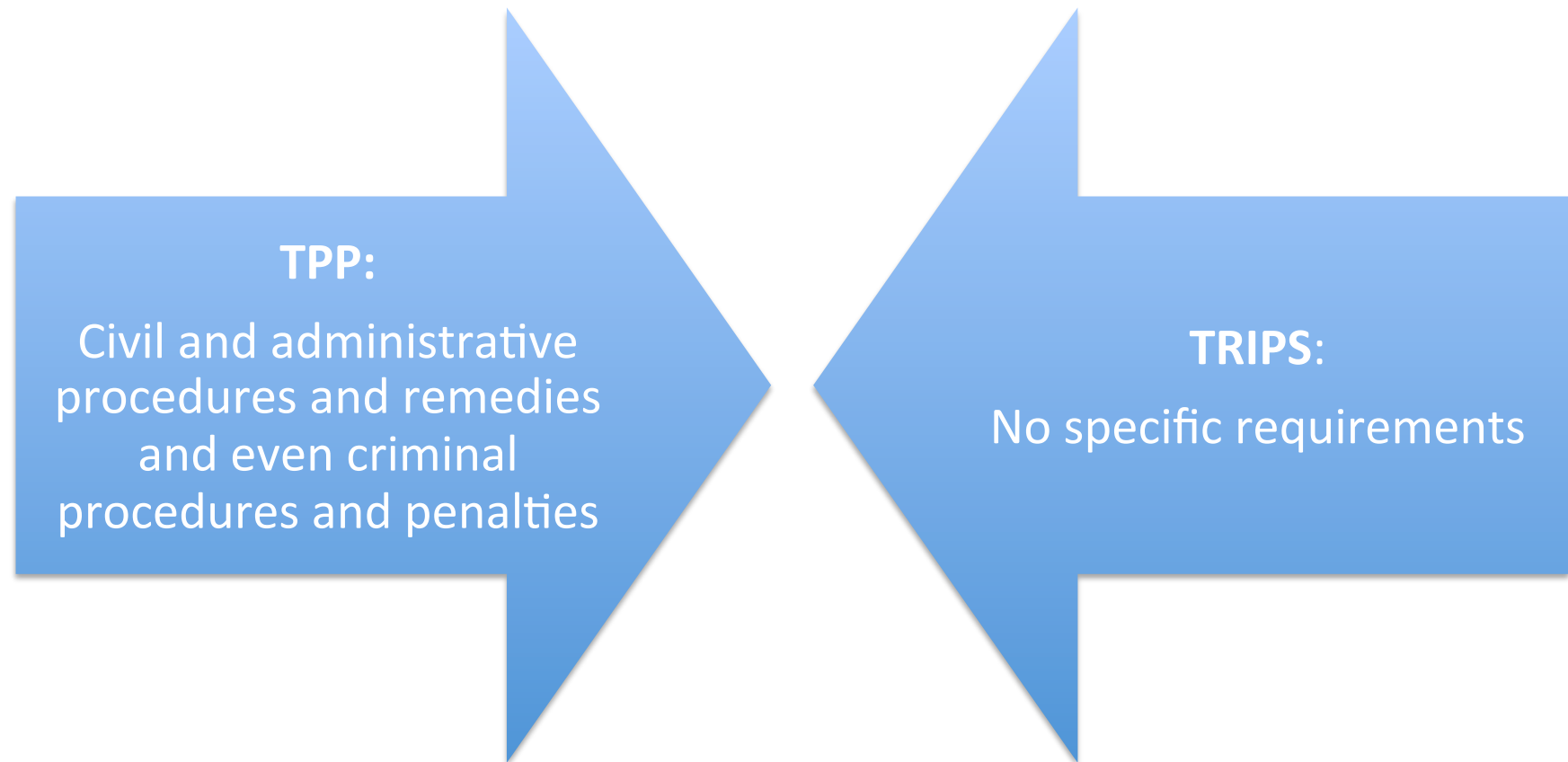


TPP: Stronger Copyright Enforcement

- **Article 18.68: Technological Protection Measures (TPMs):**
 - *“1. In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorised acts in respect of their works, performances, and phonograms, each Party shall provide that any person that:*
 - *(a) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram; or (...)*
 - *is liable and subject to the remedies provided for in Article 18.74 (Civil and Administrative Procedures and Remedies).*

(...) Each Party shall provide for criminal procedures and penalties to be applied if any person is found to have engaged wilfully and for the purposes of commercial advantage or financial gain in any of the above activities (...)”

TPP: Removal of TPMs



3

FTAs and IPRs: a “Marriage of Convenience”

IP as a
“bargaining currency”
to negotiate FTAs



By <http://www.sauer-thompson.com/archives/opinion/002141.php>

Openness: principles for improving negotiations on Copyright

- Minimal and flexible IP rules
- Integration of the public interest as a core value for copyright
- Increasing of transparency

Hilty & Jaeger 2015

- “Legal Effects and Policy Considerations for Free Trade Agreements: What Is Wrong with FTAs?” in Christoph Antons and Reto Hilty M. Hilty (eds), Intellectual Property and Free Trade Agreements in Asia-Pacific Region, Springer, 2015, 55

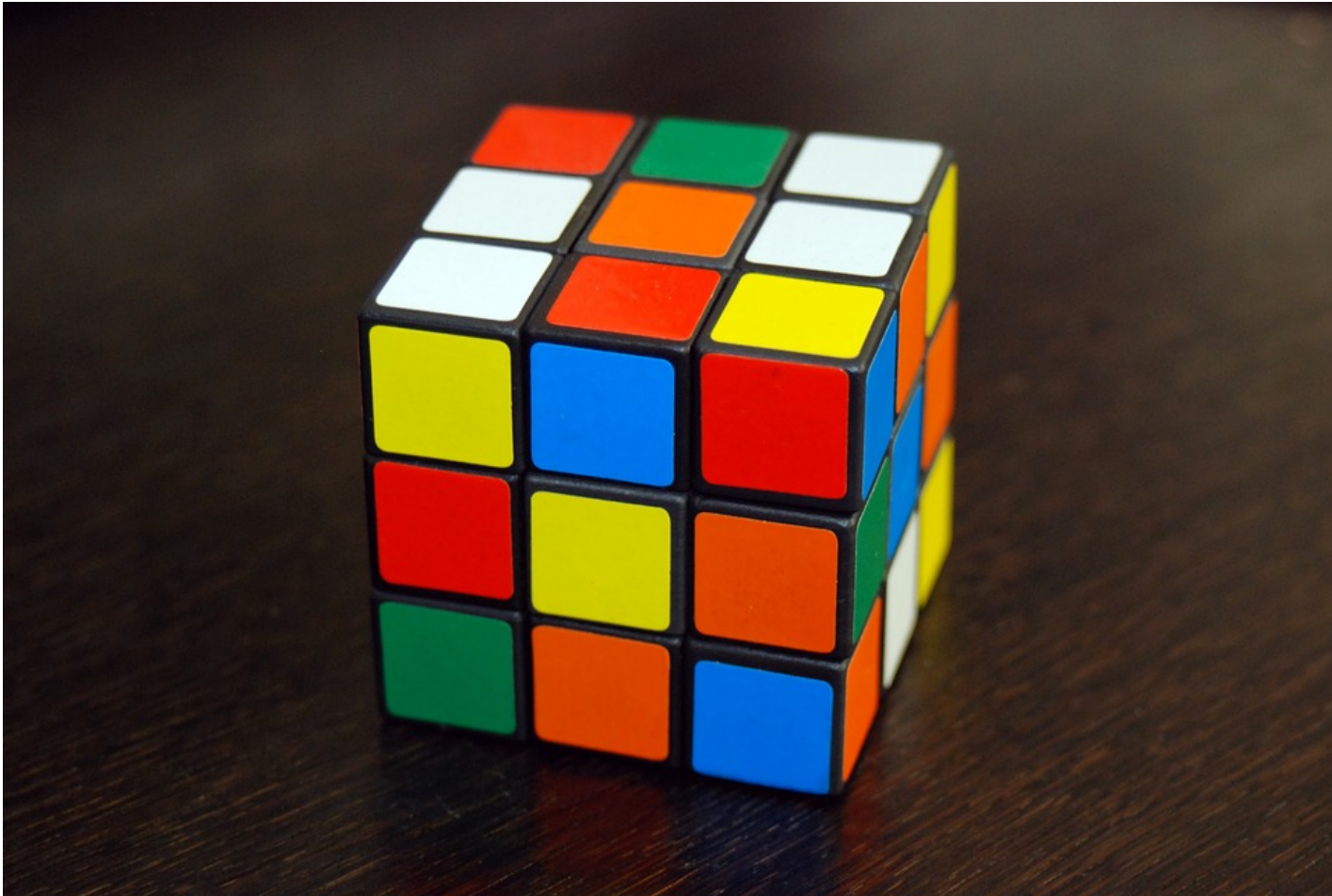
TRIPS: the original sin

- National treatment and Most-favoured nation
- Hilty and Jaeger:
 - “These two provisions of TRIPS yield leveraging effects in terms of transposing high IP protection standards either (1) from the domestic to the international level (NT principle), and/or (2) from a bi- or multilateral FTA setting to a universalist setting (MFN clause)”

Abuse of right: a remedy?

- Hilty and Jaeger: “conclusion of a global accord on the prevention of a misuse of rights that goes beyond the sphere of just antitrust law. Such an accord would fix specific countermeasures to be taken by states parties to forestall or end certain kinds of abuses of individual IP rights upon enforcement”

IP: a single piece of a complex puzzle



References

- Antons C., Hilty R.M. (editors), *Intellectual Property and Free Trade Agreements in the Asia-Pacific Region*, Springer-Verlag Berlin Heidelberg 2015
- Braga C.P.P., *Innovation, Trade and IPRs: Implications for Trade Negotiations*, 2016, Working Paper, East-West Center Workshop on Mega-Regionalism - New Challenges for Trade and Innovation, at SSRN: <https://ssrn.com/abstract=2745500>
- Caso R., Ducato R., Open bioinformation in the life sciences as a gatekeeper for innovation and development, in G. Bellantuono, F. T. de Rezende Lara, (Eds.), *Law, Development and Innovation*, Springer, 2015 115, <http://www.springer.com/series/10062?detailsPage=titles>
- Hofmann C., Osnago A., Ruta M., *Horizontal Depth: A New Database on the Content of Preferential Trade Agreements* (February 22, 2017). World Bank Policy Research Working Paper No. 7981, at SSRN: <https://ssrn.com/abstract=2923535>

References

- Maskus K. E., Ridley W., *Intellectual Property-Related Preferential Trade Agreements and the Composition of Trade* (September 2016). Robert Schuman Centre for Advanced Studies Research Paper No. 2016/35, available at SSRN: <https://ssrn.com/abstract=2870572> or <http://dx.doi.org/10.2139/ssrn.2870572>
- Moscon V., University knowledge Transfer: From Fundamental Rights to Open Access within International Law, in Bellantuono G., Rezende L., *Law, Development and Innovation*, 2015, pub. Springer. ISBN: 9783319133102. - URL: <http://www.springer.com/us/book/9783319133102>
- Puutio T.A., *Intellectual Property Rights in Regional Trade Agreements of Asia-Pacific Economies*, Asia-Pacific Research and Training Network on Trade No. 124/May 2013, available at SSRN: <https://ssrn.com/abstract=2779903>

References

- Puutio T.A., Parisotto L., *Intellectual Property Rights in the Asia-Pacific Trade Context* (December 29, 2015), available at SSRN: <https://ssrn.com/abstract=2788732>
- Seuba X., *Intellectual Property in Preferential Trade Agreements: What Treaties, What Content?*, *The Journal of World Intellectual Property*, 2013, at SSRN: <https://ssrn.com/abstract=2670201>
- Tang Y.S., Teodoro J.P.H., *The Politics and Outcomes of Preferential Trade Strategies: Evidence from TRIPS-Plus Provisions in US-Latin America Relations*, *Journal of World Trade*, Vol. 50, No. 6, p. 1061-1084, 2016, at SSRN: <https://ssrn.com/abstract=2884847>

MPI Studies on Intellectual Property and Competition Law 24



Christoph Antons
Reto M. Hilty *Editors*

Intellectual Property and Free Trade Agreements in the Asia-Pacific Region

 Springer

Sxi – Springer for Innovation / Sxi – Springer per l'Innovazione

Giuseppe Bellantuono
Fabiano Teodoro Lara
Editors

Law, Development and Innovation

Sxi

 Springer

E-mail:

roberto.caso@unitn.it

paolo.guarda@unitn.it

Web:

[http://www.lawtech.jus.unitn.it/index.php/people/
roberto-caso](http://www.lawtech.jus.unitn.it/index.php/people/roberto-caso)


[http://www.lawtech.jus.unitn.it/index.php/people/
paolo-guarda](http://www.lawtech.jus.unitn.it/index.php/people/paolo-guarda)

LawTech Trento

<http://www.lawtech.jus.unitn.it/>

[Home](#) | [Biobank Law](#) | [Areas of research](#) | [Publications](#) | [The Law and Technology Research Group](#)

lawtech



UNIVERSITY OF TRENTO - Italy
Faculty of Law
Department of Legal Sciences

Home

Main Menu

- Mission
- Courses & labs
- People
- Events
- Law&Technology Scholarship
- Contact Us

Lawtech Paper Series

- Research Paper Series
- Student Paper Series

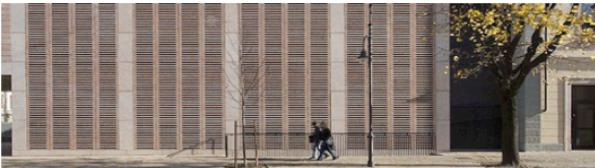
Login

Username

Password

Remember Me ☐ [Log in](#)

[Forgot your password?](#)
[Forgot your username?](#)
No Account Yet? [Create an account](#)



On the Spot

Trento Lawtech Seminars 2011

The program in progress of the Trento Lawtech Seminars 2011 edition is now available


COMING NEXT

February 3, 2011 – Presentation by Roberto Caso, [Dal libro all'e-book: crimini e misfatti del diritto d'autore](#) [From the Book to the E-Book: Crimes and Misdemeanors of Copyright], Politecnico-Università degli Studi, Aula Magna Università degli Studi, via Po 17, Torino.

February 9, 2011 – Presentation by [Giovanni Pascuzzi](#) and [Paolo Guarda](#), La cybersecurity degli altri: appunti di diritto comparato [The Cybersecurity of Others: Comparative Law Notes]. [View all](#)

PUBLICATIONS

[Matteo Ferrari, THE LIABILITY OF PRIVATE CERTIFICATION BODIES FOR PURE ECONOMIC LOSS. Comparing English and Italian Law](#), in [Journal of European Tort Law](#) 2010, Volume 1, Issue 3, pagg. 266-305



1 2 3 4 5 6 7 8

Copyright

Copyright by Roberto Caso and Paolo Guarda

This work is licensed under a
[Creative Commons Attribution 4.0 International License](#)

Thank Marta Breschi for her invaluable research assistance