The Trans-Pacific Partnership: Trade Secrets, Computer Crimes, and Whistleblowers
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Introduction
Francis Gurry

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Director General, WIPO
Article 39 (1) of the TRIPS Agreement 1994

• “In the course of ensuring effective protection against unfair competition as provided in Art 10 bis of the Paris Convention (1967), Members shall protect undisclosed information”.
Article 39 (2) of the TRIPS Agreement 1994

- Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:

- (1) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
Article 39 (2) of the TRIPS Agreement 1994

- (2) has commercial value because it is secret; and

- (3) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.
The Trans-Pacific Partnership
The Trans-Atlantic Trade and Investment Partnership
Structure

• 1. Trade Secrets
• 2. Innovation
• 3. Computer Crimes
• 4. Journalism, Whistleblowing and NSA Spying
1. Trade Secrets
A. Special 301 Reports
“Companies in a wide variety of industry sectors—including information and communication technologies, services, biopharmaceuticals, manufacturing, and environmental technologies—rely on the ability to protect their trade secrets and other proprietary information. … The theft of trade secrets and other forms of economic espionage, which results in significant costs to US companies and threatens the economic…
United States Trade Representative – Special 301 Report

• .... security of the United States, appears to be escalating. If a company’s trade secrets are stolen, its past investments in research and development, and its future profits, may be lost ... Trade secret theft threatens national security and the US economy, diminishes US prospects around the globe, and puts American jobs at risk.”
The United States Trade Representative

• The Intellectual Property chapter requires TPP Parties to provide for the legal means to prevent misappropriation of trade secrets, including misappropriation conducted by State-owned enterprises. It also requires TPP Parties to establish criminal procedures and penalties for trade secret theft, including by means of cyber-theft.
B. Case Studies
Advances in Information Technology
Advances in Biotechnology
Advances in Clean Technologies

- Department of Justice v Sinovel
C. The Defend Trade Secrets Act 2016 (US)
President Barack Obama
USPTO Director Michelle Lee
D. The *Trans-Pacific Partnership* 2015
Article 18.78 of the Trans-Pacific Partnership 2015

• 1. In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention, each Party shall ensure that persons have the legal means to prevent trade secrets lawfully in their control from being disclosed to, acquired by, or used by others (including state-owned enterprises) without their consent in a manner contrary to honest commercial practices.[136]
Article 18.78 of the *Trans-Pacific Partnership 2015*

• As used in this Chapter, trade secrets encompass, at a minimum, undisclosed information as provided for in Article 39.2 of the TRIPS Agreement.
Article 18.78 of the Trans-Pacific Partnership 2015

2. Subject to paragraph 3, each Party shall provide for criminal procedures and penalties for one or more of the following:

(a) the unauthorised and wilful access to a trade secret held in a computer system;

(b) the unauthorised and wilful misappropriation of a trade secret, including by means of a computer system; or
Article 18.78 of the Trans-Pacific Partnership 2015

• (c) the fraudulent disclosure, or alternatively, the unauthorised and wilful disclosure, of a trade secret, including by means of a computer system.
Article 18.78 of the Trans-Pacific Partnership 2015

• 3. With respect to the relevant acts referred to in paragraph 2, a Party may, as appropriate, limit the availability of its criminal procedures, or limit the level of penalties available, to one or more of the following cases in which:
  • (a) the acts are for the purposes of commercial advantage or financial gain;
  • (b) the acts are related to a product or service in national or international commerce;
Article 18.78 of the Trans-Pacific Partnership 2015

• (c) the acts are intended to injure the owner of such trade secret;

• (d) the acts are directed by or for the benefit of or in association with a foreign economic entity; or

• (e) the acts are detrimental to a Party’s economic interests, international relations, or national defence or national security.
2. Innovation
Internet Association
Talent Wants to Be Free
Why We Should Learn to Love Leaks, Raids, and Free Riding

Orly Lobel
Orly Lobel
Silicon Valley
Rochelle Cooper Dreyfuss and Orly Lobel

• Economic Espionage as Reality or Rhetoric: Equating Trade Secrecy with National Security
  http://digital.sandiego.edu/cgi/viewcontent.cgi?article=1001&context=law_fac_works
Dean Baker

• Will the Trans-Pacific Partnership Turn Silicon Valley Into Detroit?

Electronic Frontier Foundation
3. Computer Crimes
Jeremy Malcolm and Maira Sutton

• A new, more detailed provision on trade secrets introduces text that would criminalize the unauthorized, willful access of a trade secret held in a computer system, or the misappropriation or disclosure of a trade secret using a computer system. This text goes far beyond existing trade secrets law, which in the United States and other common law countries is usually a matter for the civil not the criminal courts.
Jeremy Malcolm and Maira Sutton

• No public interest exception, such as for journalism, is provided. In practice, this could obligate countries into enacting a draconian anti-hacking law much like the Criminal Fraud and Abuse Act (CFAA) that was used to prosecute Aaron Swartz.
Aaron’s Army, IP Law, and Open Access
The Case of Aaron Swartz

“Information is power. But like all power, there are those who want to keep it for themselves.”

-Aaron Swartz, 1986–2013
Senator Ron Wyden

• “Aaron was a hacker. He hacked to promote innovation through openness. Where Aaron saw injustice, he hacked for its remedy. Aaron Swartz hacked Washington. A poorly written law called him a criminal. Common sense and conscience knows better.”
Martha Minow invites you to join her for

Aaron's Law
Law and Justice in a Digital Age

A talk by
LAWRENCE LESSIG

In honor of the appointment of Professor Lessig as the Roy L. Furman Professor of Law and Leadership

Tuesday,
February 19, 2013
5:00 p.m.
Ames Courtroom
Austin Hall
Harvard Law School

Reception immediately following the talk in Milstein West, Wasserstein Hall.
All are welcome.
Professor Lawrence Lessig

“Aaron’s Laws: Law and Justice in the Digital World”
http://www.youtube.com/watch?v=9HAw1i4gOU4&feature=player_embedded
Senator Scott Ludlam
Homeland

The sequel to the New York Times bestselling
LITTLE BROTHER
HOMELAND

CORY DOCTOROW
The system is changing. Thanks to the Internet, everyday people can learn about and organize around an issue even if the system is determined to ignore it. Now, maybe we won’t win every time – this is real life, after all – but we finally have a chance. But it only works if you take part… That’s right: now it’s up to you to change the system. Let me know if I can help.
"Be curious. Read widely. Try new things. I think a lot of what people call intelligence just boils down to curiosity."
—Aaron Swartz, 1986-2013
4. Journalism, Whistleblowing, and NSA Spying
The Pentagon Papers

"All the News That’s Fit to Print"

The New York Times

PENTAGON PAPERS CHARGES ARE DISMISSED;
JUDGE BYRNE FREES ELLSBERG AND RUSSO,
ASSAILS ‘IMPROPER GOVERNMENT CONDUCT’

White House Says Attacks Will Continue in Cambodia

WASHINGTON, May 12—The White House said tonight it will look into the charges that the United States used air power to destroy the North Vietnamese government. The White House did not respond to the charges that the North Vietnamese government was using air power to destroy the United States. The White House did not respond to the charges that the North Vietnamese government was using air power to destroy the United States.

Said to Defend Inquiry

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Air of Expectancy, Then Tears, Shouts, Embraces

NEW TRIAL BANNED

But Decision Does Not Solve Constitutional Issues in Case

By MARTIN J. AXELROD

The chief of the Pentagon today said that the decision not to appeal the case in which the Pentagon papers were used as evidence was a victory for the government. The chief of the Pentagon today said that the decision not to appeal the case in which the Pentagon papers were used as evidence was a victory for the government.

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Attorney-General v Jonathan Cape Ltd [1976] QB 752
Commonwealth of Australia v
John Fairfax and Sons Ltd (1980) 147 CLR 39
Spy Catcher

by PETER WRIGHT
Former Assistant Director of MI5
WITH PAUL GREENGRASS
SOLDIER FIVE

THE REAL TRUTH ABOUT THE BRAVO TWO ZERO MISSION

MIKE COBURN
Axis of Deceit

NSA Spying
Julian Assange
Chelsea Manning
Edward Snowden
The Panama Papers
EFF and Civil Society Groups (2013)

• EFF and Other Groups to NSA: Are You Spying on Our TPP Work?
• EFF has joined over three dozen civil society groups in seeking assurances that our collective work on trade negotiations is not being surveilled by the National Security Agency (NSA) or other United States security agencies.
Phil Dorling

• Exclusive: US bugs Japan on trade and climate
• America is spying on the Japanese PM and major corporations ahead of trade talks, and sharing the intelligence with Australia.

Obama 'very sorry' over WikiLeaks' NSA spying revelations

International Business Times
Conclusion