EU-Mercosur Trade Agreement Would Harm User Rights and the Commons

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The European Union (EU) and the Latin American sub-regional bloc consisting of Argentina, Brazil, Paraguay, and Uruguay (Mercosur) have been negotiating a free trade agreement (FTA) since 2000. The FTA is expansive, addressing trade in industrial and agricultural goods, potential changes to rules governing small- and medium-sized businesses as well as government procurement, and intellectual property provisions such as copyrights and patents. The EU-Mercosur FTA negotiations continue during a time when several of the affected countries—including Argentina, Uruguay, Paraguay and even the EU—are involved in a review of their own copyright rules.

There have been 28 rounds of EU-Mercosur FTA negotiations, most recently in Brussels in July 2017. The next round will be held in Brasilia in October 2017, and both sides are expecting to sign the agreement this year.

Only a few chapters of the draft EU-Mercosur FTA have been made available for public inspection. In November 2016 the EU released a draft of the chapter dealing with intellectual property, which is the most recent publicly available version. Civil society organisations and the public are typically excluded from participating in—or even observing—the negotiation meetings.

The EU-Mercosur FTA negotiations take place in an environment where an increasing level of copyright policy is being constructed through multilateral trade agreements. There are several current negotiations underway, including the Trans-Pacific Partnership (TPP), the Regional Comprehensive Economic Partnership (RCEP), and the renegotiation of the North American Free Trade Agreement (NAFTA).

Each of these agreements include provisions regulating intellectual property, and the recent negotiation of these trade pacts shows that when copyright is put on the table, there's a significant push to drastically increase enforcement measures for rights holders, lengthen copyright terms, and demand harsh infringement penalties. While the demands of rights holders are fully addressed, there's little consideration given to the rights of the public. Limitations and exceptions to copyright are downplayed, or not present at all. In the text we see the invisible (and powerful) hand of the EU, which wishes to export the intellectual property provisions most beneficial to rightsholders (such as harmonized longer terms), but only wants to permit the absolute minimum when it comes to limitations and exceptions (such as only temporary copying).

Below we provide an analysis of particular aspects of the EU-Mercosur intellectual property chapter, in relation to both the operation of Creative Commons licenses, as well as the public policy implications of this FTA with regard to the public domain and limitations and exceptions to copyright.

Copyright term extension is unnecessary and unwarranted

The draft IP chapter proposes to extend the duration of copyright protection for those countries that do not already adhere to the life + 70 year term. In all signatories to the Berne Convention, copyright protection is granted to authors for a limited time as a mechanism to reward creators in exchange for the right of the public at some point in the future to unconditionally reuse and draw on those works. After the term of copyright ends, the works enter the public domain, where they can be used by anyone for any purpose. The public domain is the pool of raw material from which new creativity and knowledge is built. While the term of copyright varies slightly from country to country, it has been steadily increasing in duration over the last 200 years. The chapter on intellectual property calls for the parties to set their term of copyright protection to life of the author plus 70 years (if they do not already have that term). This increases the term an additional 20 years past the baseline required by the TRIPS Agreement and WIPO Copyright Treaty.

> ***"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 for 70 years after his death..."***

Through existing FTAs, the EU already has a copyright term of life + 70 years. Brazil, Paraguay, and Argentina also have terms of life + 70 for most works, as a result of national legislation. The passage of the EU-Mercosur FTA would in practice lock these countries into the life + 70 year term, even if technically the TRIPS Agreement only mandates life + 50 years.

Uruguay has a term of protection of life of the author plus 50 years. If the EU-Mercosur FTA is adopted, Uruguay's term would increase an additional 20 years. This means that more than 500 authors whose works are in the public domain would go back under copyright protection.

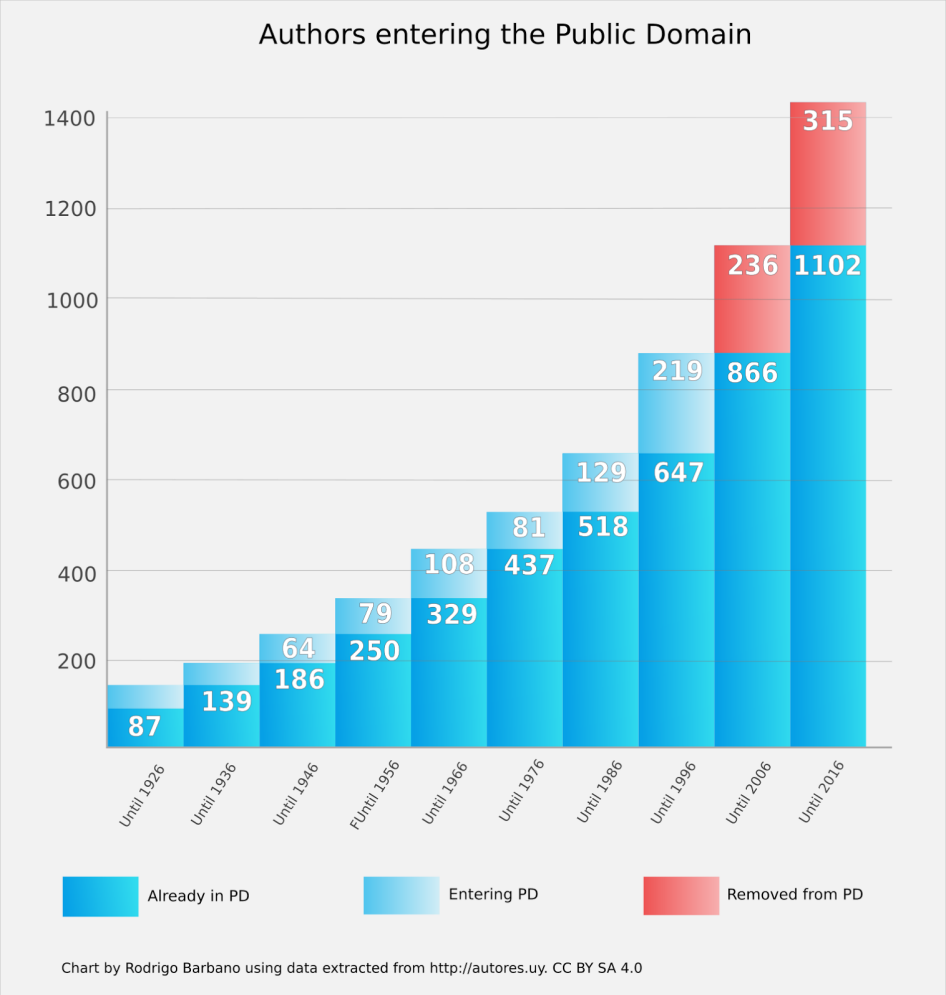

Fig 1: Chart by Rodrigo Barbano showing the number of authors in Uruguay whose works are currently in the public domain and would be removed from the public domain should its copyright term be increased. Data from http://autores.uy/

Some of the Mercosur countries have adopted a life + 70 rule for most types of works, but not all. In Argentina, some photographs receive a shorter duration of protection. In Brazil, photographic and audiovisual works are protected for 70 years after first disclosure, not 70 years following the death of the creator. And in similar agreements, such as the EU-Andean FTA, copyright in audiovisual works lasts for a term of 70 years after they become accessible to the public. Adopting the EU-Mercosur FTA would set a copyright term of life + 70 years for all works.

Further extending copyright terms also exacerbates related challenges, such as the orphan works problem. Orphan works are works still under copyright whose owner is impossible to identify or contact. Increasing the duration of copyright protection would increase the number of works that remain under copyright for longer. And since many older works under copyright are no longer actively maintained by their owners, it could worsen the orphan works problem.

In any case, the negative repercussions to society of postponing human creativity from entering the public domain far outweigh the benefits to the individual authors.

User rights must be protected by expanding limitations and exceptions

Copyright protection and enforcement measures should always be balanced with public interest considerations; in other words, the rights of authors should always be tempered by recognizing and upholding the rights of users in the copyright ecosystem.

However, the IPR chapter has little to say with regard to limitations and exceptions to copyright.

> ***"The Parties shall provide for limitations or exceptions to the exclusive rights only in certain special cases which do not conflict with a normal exploitation of the subject matter and do not unreasonably prejudice the legitimate interests of the right holders."***

This is common language found in existing treaty texts such as Berne's 3-step test. However, what the EU-Mercosur text doesn't include are safeguards introduced in the latest trade agreements and international copyright agreements that promote and protect balance in copyright agreements. Even with all its faults, the Trans-Pacific Partnership (TPP) intellectual property chapter included the following language:

> ***"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..."***

As mentioned above, it's important to include text that obligates parties to dedicate serious consideration of exceptions and limitations to copyright alongside any harmonisation or increase in protection and enforcement measures. (Other model language is documented here).

The draft intellectual property chapter proposes a single narrow copyright exception for temporary and transient copying.

> ***"The Parties shall provide that temporary acts of reproduction which are transient or incidental, which are an integral and essential part of a technological process and the sole purpose of which is to enable (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right."***

This language would align the Mercosur nations with the similar exception (Art 5.1) already in the EU's 2001 InfoSoc Directive. Since this exception is one of the few mandatory exceptions present in the EU copyright framework, the introduction of an equivalent exception for the Mercosur countries is desirable for the EU so that its trading partners are required to adopt a similar (and limited) baseline exception as is already the case in Europe. While it is reasonable to exempt these types of copying from the right of reproduction, the language is far too constrained, and would only protect a very limited set of activities, such as the necessary creation and execution of buffer copies to deliver web content. In order to be more useful in a fast-changing technological landscape, the provision should be expanded by removing the adjectives "temporary" and "transient" to expand the protection beyond only temporary copies. This language change would align with current practices, where many uses of protected content for activities such as machine learning, artificial intelligence, internet search, translation tools, etc., make permanent copies (as opposed to strictly temporary)—but which still could be considered as applicable to the spirit of the exception. These acts of reproduction should be exempted.

It is noteworthy and positive that this language creates an affirmative duty ("shall provide") for a mandatory exception. It is also beneficial that it is an obligation to provide a copyright exception—rather than merely a liability safe harbour (such as was seen in the TPP text).

Mandatory remuneration frustrates the intentions of some Creative Commons licensors

The IPR chapter includes a provision that would require remuneration for performers and producers of musical works. The provision harmonises the legal situation in the Mercosur countries with the existing framework already in place in the EU under Directive 2006/115/EC on rental and lending rights:

> ***"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..."***

The provision may be well-intended in that it aims to provide a single payment to performers and producers of audio works. And it is limited only to instances where the recording is published for commercial purposes.

At the same time, this type of arrangement would interfere with the operation of some Creative Commons licenses by requiring a payment even when the intention of the author is to share her creative work with the world for free. For example, a performer may choose to release an audio performance under a Creative Commons license that purposely permits commercial reuse, such as CC BY. Many authors simply want to share their creativity freely under open

terms for promotional purposes, or simply to benefit the public good—not because they expect financial remuneration. Indeed, their choice of a license like CC BY expressly permits commercial use.
The agreement should permit an exemption to this rule for performers and producers who wish to share their works under open licenses without remuneration.

Technical protection measures must not limit the exercise of user rights

The IPR chapter includes prohibitions to circumventing technological protection measures to gain access to a work:

> ***"The Parties shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned, carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective..."***

It also includes a provision that would prohibit the creation and sharing of technologies that could enable a user to circumvent technological protection measures:

> ***The Parties shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services..."***

This type of language is recognizable from existing treaties and free trade agreements. The problem is that it doesn't take into account situations where users should be able to leverage a limitation or exception, but cannot due to prohibitions on circumventing a technological measure. Language should be added to protect the exercise of exceptions for any purpose that is protected by limitations and exceptions in copyright. For example, the Beijing Treaty Art. 15, FN 10 (proposed by Peru in the negotiation), includes the following text :

> ***"it is understood that nothing in this Article prevents a Contracting Party from adopting effective and necessary measures to ensure that a beneficiary may enjoy limitations and exceptions provided in that Contracting Party's national law..."***

Precautionary injunctions against "imminent" infringements harms freedom of expression and the rule of law

The IPR chapter introduces the idea that an injunction could be levied against both infringers and intermediaries (which includes ISPs) "to prevent any imminent infringement of an intellectual property right" (Article 15). This would mean that rights holders can take pre-emptive legal action against an infringement that has not yet occurred. This practice is

unjustified, and harmful to freedom of expression—both for the individual accused of infringement, and other users of the platform. Not only does the provision violate Article 13 of the American Convention on Human Rights, it also contradicts the the terms of Article XX.4 of the draft agreement at hand, which states that a provider "is not liable...if it does not have actual knowledge of illegal activity or information". If an infringement has not happened yet, then there can be no possibility that the ISP knows about it.

Trade agreement negotiations must be transparent and involve the public

Trade agreement negotiations need to be transparent and participatory. They are not. The secrecy demonstrated in the negotiation of the TPP and other FTAs left civil society organizations like Creative Commons and the broader public at an extreme disadvantage, as only a privileged few stakeholders invited into the closed negotiation circle had their interests fully considered. The EU-Mercosur negotiations should be conducted through procedures that are transparent to the public and which include all stakeholders. Increased transparency and meaningful public participation will lead to better outcomes.

As noted above, the last version of the IPR chapter was made available in November 2016. The agencies responsible for negotiating the EU-Mercosur FTA should publicly release the proposed text of the agreement prior to each negotiating round, and publish the considered text at the conclusion of each round. National level legislators should be actively consulted during the negotiation of the agreement. In addition, civil society organisations and representatives of the public should be able to observe negotiation proceedings, and negotiators should invite active participation from underrepresented stakeholders at the meetings. The feedback and recommendation from civil society groups and the public should be carefully and seriously considered.

Conclusion

In both substance and process, the EU-Mercosur FTA is following in the unfortunate footsteps of recently-negotiated trade pacts like the TPP. Its provisions aim to export the protectionist copyright framework already in place in the EU, which for some of the Mercosur countries will include extending the copyright term, providing for only extremely weak limitations and exceptions, and harmonising restrictions on sharing. This FTA will harm users and the commons. It will limit the ability for Mercosur states to construct appropriate public policies for the full exercise of fundamental educational and cultural rights.

The negotiations of the EU-Mercosur FTA remain mostly secretive and closed, with little public knowledge on what's in the actual text, and few opportunities for the public to voice their concerns. The negotiations must be reformed to fully support a process that is transparent, inclusive and accountable. It's a legitimate question whether such sweeping agreements can

actually promote trade and economic activity that is beneficial to a majority of citizens as opposed to a few powerful rightsholders. But assuming the this process will continue, it's crucial that negotiators rethink the copyright provisions to protect users and the public good.