‘Good Copyright Citizenship’: Intellectual Property, Trade and Diplomacy

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ABSTRACT

This paper uses two case studies to examine the diverse strategies deployed in an attempt to extend international compliance with intellectual property law in the creative industries. Graham Dutfield (2008) coined the term ‘intellectual property fundamentalism’, to describe the way in which trade agreements have resulted in countries relatively new to intellectual property regulation adopting regimes more onerous than those of the United States and many European countries. I argue that in addition to these regulatory methods, a concept of ‘good copyright citizenship’ has emerged as an additional element of ‘intellectual property fundamentalism’. The first case study explores the reception given Dutch artist Florentijn Hofman's inflatable *Rubber Duck* when it was installed in China in 2013 and enthusiastically reproduced in cities beyond the official program. These were referred to in the media as ‘counterfeits’ and condemned by government. The second case study examines the enthusiastic downloading of the popular HBO television series *Game of Thrones* among Australian viewers, a matter that has attracted criticism from the US ambassador to Australia. This case study analyzes the motivations of those engaged in ‘illegal’ downloading and the diplomatic interventions that seek to counter this activity. Since each case study raises separate aspects of intellectual property law and market behavior, linking these two case studies illuminates how governments engage in diplomatic activity in an effort to encourage ‘good copyright citizenship’.

Keywords: Intellectual property, Trade agreements, Creative industries, Diplomacy, Copyright compliance

1. INTRODUCTION

This paper uses two case studies to examine attempts to extend international compliance with intellectual property law in the creative industries. Graham Dutfield (2008) coined the term 'intellectual property fundamentalism', to describe the way in which trade agreements have resulted in countries relatively new to intellectual property regulation adopting regimes more onerous than those of the United States, and many European countries. The case studies are used to illustrate what I call 'good copyright citizenship', which I argue has emerged as an additional element of Dutfield's 'intellectual property fundamentalism'. Manifested through media statements and public campaigns, 'good copyright citizenship' calls upon citizens to comply with standards of behaviors that exceed strict legal compliance with intellectual property law and exhorts the respect for 'rights' that may not even exist.

The first case study explores the reception given the Dutch artist Florentijn Hofman's inflatable *Rubber Duck* when it was installed in China in 2013 and enthusiastically reproduced in cities beyond the official program. The reproductions were referred to in the media as 'counterfeits', their makers as 'copycats', and both were roundly condemned by the government and other authorities. An analysis of these events demonstrates how intellectual property rights are claimed and traded, without adequate assurances as to whether the creation meets the necessary tests in order to obtain legal protection under intellectual property law. The second case study examines the enthusiastic bit-torrenting of the popular HBO television series *Game of Thrones* among Australian viewers, which drew criticism from the United States Ambassador to Australia in a post to his Facebook page in April of 2013. This activity was characterized as theft and its perpetrators as criminals, a view reinforced by industry organizations and government officials. This case study demonstrates the way in which unauthorized downloading of copyright protected content for private use is being labelled 'illegal', when its status as a criminal offence is not certain in many jurisdictions. Each case study investigates separate aspects of intellectual property law and market behavior. What links these two case studies is the way in which governments, embassies and non-government agencies are engaged in efforts to encourage 'good copyright citizenship' as an expansion of conventional international standards.

International copyright protection in the late 20th century has largely been driven by the World Trade Organization (WTO) through the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which established a framework for a minimum harmonization of intellectual property rules on a global basis, and made compliance with TRIPS a condition of membership of the WTO. Noted economists Claude Henry and Joseph Stiglitz observe that the use of the nomenclature "trade related intellectual property" was "designed to shoehorn intellectual property into a trade agreement" (2010, p. 243). In effect TRIPS was driven by the US, Japan, and the European Union with the involvement of representatives of the copyright and patent industries, including the entertainment industry. The agreement required 'developing' countries with little or no existing law in the area of intellectual property to implement laws that met specific minimum standards. As a result, according to Sell, "the vast majority of countries signing on to TRIPS will be negatively affected (at least in the short term)" in large part because bringing intellectual property standards up to the developed nation level disadvantages those countries with an intellectual property trade deficit (Sell, 2003, p. 121, see also Henry & Stiglitz, 2010; Lindstrom, 2010; Yu, 2006).

The TRIPS framework is being rapidly sidelined in favor of multilateral and bilateral trade agree-

ments which seek to impose what commentators describe as "TRIPS-plus" rules (Lindstrom, 2010, p. 919). Despite its weaknesses, TRIPS does contain some constraints on intellectual property protections, which TRIPS-plus provisions in multilateral and bilateral agreements override or ignore by seeking to extend intellectual property to new and different subject matter and restrict the range of exceptions (Dutfield, 2008, p. 36).

Of particular relevance to this paper are extra-legal provisions: those that require parties to engage in public campaigns that encourage compliance with intellectual property standards. One such example cited by Lindstrom (2010, p. 928) is Article 1305 of the Australia-Thailand Free Trade Agreement which is headed *Other Cooperation* and requires that the parties to the agreement "shall exchange information and material on programs pertaining to education in and awareness of intellectual property rights"; "encourage and facilitate the development of contacts and cooperation between their respective government agencies, educational institutions, organizations and other entities concerning the protection and development of intellectual property rights"; and enhance "the capacity of and opportunity for the owners of intellectual property rights to obtain the maximum utilization and commercial benefits from those rights". Similar provisions appear in the Singapore-Australia Free Trade Agreement. The United States, under its US-China IP Cooperation Framework Agreement, has agreed to provide technical assistance to China's intellectual property entities which will strengthen "the protection and enforcement of intellectual property rights" (Department of Commerce, 2013).

Unfortunately, as we shall see in the following case studies, activity which may be undertaken in compliance with TRIPS-plus provisions is often based on a willfully incomplete knowledge of existing intellectual property standards, in both the relevant conventions and domestic laws. Dutfield has described this type of activity as "missionary work", involving government and business stakeholders visiting developing countries, or non-compliant populations, to "spread the IP gospel" through "the dissemination of propaganda extolling the virtues of intellectual property" (2008, p. 34). Conducted in cooperation with national embassies and consulates, this work becomes part of Oliver Naray's concept of commercial diplomacy, an activity that sees embassy staff promoting the protection of intellectual property rights through the production of education materials and awareness campaigns (Naray, 2011, p. 121). This evangelical activity also involves characterizing less than fulsome compliance with a TRIPS-plus view of intellectual property law as tantamount to sanctioned piracy and implicitly criminalizes all forms of copyright infringement through the dissemination of the mantra: "to copy is to steal" (Dutfield, 2008, pp. 34, 37).

2. CHINA – A LAND OF COPY CATS AND RUBBER DUCKS

The Dutch artist Florentijn Hofman's *Rubber Duck* is particularly well-travelled. Since 2007, the oversized inflatable rubber duck has appeared on waters across the globe, miraculously transported from Saint-Nazaire in France to Sydney, Australia, from Kaohsiung, Taiwan to Pittsburgh, United States (Hofman, 2014). *Rubber Duck* is constructed anew at every location and its size can vary from 26 meters tall to a more demure five meter high version. The *Rubber Duck* is promoted by Hofman as having healing properties: "The friendly, floating *Rubber Duck* has healing properties: it can relieve mondial tensions as well as define them" (as cited in Taylor, 2013). However, the *Rubber Duck*'s appearances have not been without controversy, most notably in 2013 when it was exhibited in Hong Kong and Beijing.

2.1 Rubber Duck in Hong Kong

Florentijn Hofman's *Rubber Duck* appeared in Victoria Harbour in May 2013, coinciding with an inflatable festival hosted by M+, an emerging contemporary art complex in West Kowloon. Not long after it first appeared in Hong Kong, reproductions of the rubber duck appeared in cities across mainland China. Initially it was reported that these were authorized versions of the duck, but it quickly became apparent that neither Hofman, nor his representatives, had been involved in the creations. Rather than seeing this as a ripple effect consistent with the artist's intentions for his work: that it bring joy and happiness, Hofman admonished the Chinese perpetrators as if this were a question of national character, one which needed to be curbed: "Right now what it is showing is that there is a lack of trust in China, and that is an enormous problem. If I was a Chinese person, I would revolt. I would really revolt. This kills society, this kind of behavior" (as cited in Yang & Chen, 2013). The national and international media reported these events as if they were the symptoms of the phenomenon of the copycat or counterfeit. References to the reproductions as copies brought with it the implication that there was indeed an authentic version of the duck and that as its creator Hofman had the right to control all uses or reproductions thereof: "If people want the real duck, they have to come to me" (as cited in Yang & Chen, 2013).

Once the *Rubber Duck* imitations were labelled as counterfeits and the work of copycats they came to epitomize the widespread reproduction of authentic western products throughout China, sold both domestically and internationally. Suddenly Hofman's *Rubber Duck* was at the center of concerns on the part of China's trading partners relating to the enforcement of intellectual property rights. From 2008 onwards, a number of Western countries have been involved in negotiating an Anti-Counterfeit Trade Agreement, with China conspicuously absent from these discussions, despite the unverifiable claims that 80% of counterfeit goods originate in China (Pelicci, 2012, pp. 132–133). With an increased focus on bilateral trade agreements with China, and growing concern about the lack of a rigorous intellectual property law framework and enforcement mechanisms, a number of countries were keen to highlight the brazen copying of Florentijn Hofman's *Rubber Duck*, and quick to label this as the copycat culture at work. *The Australian* newspaper covered the story with the headline: "China's ruling party in flap over copycat yellow ducks" (AFP, 2013).

The Chinese government itself appeared keen to use the occasion as an educational opportunity, as China was not only enhancing the scope and awareness of intellectual property law as a necessary pre-requisite to expanding trade with the west, but had also identified the need for a more innovative economy, one that created its own trade in intellectual property rather than produce work designed by others, either under contract or as part of the counterfeit economy. China's own history of intellectual property is relatively short, but no less complex than the web of international conventions, domestic legislation and trade related agreements that have shaped intellectual property law more broadly (see Alford, 1995). The development of Chinese law has gone hand-in-hand with its access to Western markets and trade. However it has also emerged at a time when China has encouraged greater creativity amongst its own population as it seeks to take its place in the international trade in the creative industries (Keane 2010). An editorial in the *People's Daily*, China's most-circulated newspaper, condemned the imitators for betraying what it said was Hofman's own message and declared that this ran counter to developing a creative culture within China: the emergence of unoriginal copycat ducks "will ruin our creativity and our future and lead to the loss of imagination eventually" and that "The more yellow ducks are

there, the further we are from Hofman's anti-commercialisation spirit, and the more obvious is our weak creativity" (AFP, 2013). The editorial left no doubt that the reproductions of *Rubber Duck* were not to be celebrated as a display of the joyful impact of Hofman's work. Rather, the activity was to be understood more of the same: "From fake eggs to faux brand-name handbags, China's enterprising counterfeiters are known for pushing the limits" (AFP, 2013). While the debate about the inappropriateness of copying the Hong Kong duck continued, it was announced that, with the support of The Netherlands Embassy in China, Hofman and his duck would be special guests at Beijing Design Week in September and October of the same year.

2.2 Beijing Design Week 2013

The announcement that Hofman's conceptual artwork would appear in Beijing as part of 2013 Beijing Design Week heralded it as an opportunity to highlight intellectual property in art works, and as a direct response to the proliferation of yellow rubber ducks that coincided with the appearance of *Rubber Duck* in Hong Kong (China Daily, 2013a). The work was included as a result of Amsterdam having been selected to host the 'guest city' program for Beijing Design Week and the announcement was made at an event featuring the artist and representatives of the Netherlands Embassy. The Beijing Design Week organizing committee had decided to highlight issues relating to what it described as the "copyright protection" of the *Rubber Duck* and that copyright protection of the artist's work would be one of the main discussion topics during the meetings with Florentijn Hofman (Zhang, 2013; BJDW, 2013a). It was reported at the time that Wang Jun, a Senior Consultant to BJDW's Intellectual Property Protection Office stated: "We want to use the *Rubber Duck* case to drive an awareness programme raising the sensibility towards intellectual property rights around China" (BJDW, 2013a).

However, using *Rubber Duck* as an exemplar of justifiable intellectual property rights protection, and Florentijn Hofman as a spokesperson for international enforcement of intellectual property rights, was either unfortunate, or deliberately misleading. At the press conference announcing the inclusion of *Rubber Duck* in Beijing Design Week, Hofman stated: "The *Rubber Duck* knows no frontiers, it doesn't discriminate people and doesn't have a political connotation" (BJDW, 2013a). Hoffman's claim that *Rubber Duck* "doesn't have a political connotation" must now be viewed with some skepticism. No sooner was the *Rubber Duck* (Beijing) installed than claims to exclusive ownership were hastily made on the part of Hofman, and on his behalf, to rights in the *Rubber Duck*. Hofman was clearly constrained by the fact that he had entered in an exclusivity arrangement in relation to the "rights to develop, produce and sell derivative works and products of the *Rubber Duck*" (BJDW, 2013b), hence the need to assert his (initial) ownership of intellectual property rights. It is a common practice for contracts to contain exhaustive provisions that refer to 'intellectual property rights whatsoever exist' but this catchall clause does not itself prove the existence of any specific rights; rather it determines that should rights exist, they are owned by a particular party to the contract. As I discuss later, the most likely action, at least under Australian law, would be for misrepresenting a copy as being the work of Hofman in the event that any of the replicators claimed that their duck was a 'Hofman.' Instead Hofman found himself asserting that his was the 'real duck': "If people want the real duck, they have to come to me" (as cited in Yang and Chen, 2013). A media statement from the organizers of Beijing Design Week (BJDW, 2013b) set out its understanding of the legal arrangements:

> *We hereby declare that the work Rubber Duck is created by the Dutch artist Florentijn Hofman independently. Mr. Hofman is entitled to all*

> *the intellectual property rights and relevant interests in the work. The right to display the Rubber Duck publicly in Beijing has been exclusively granted to Beijing Gehua-Rizzoli Design Communication Co., Ltd., the executing institution of Beijing Design Week. The rights to develop, produce and sell derivative works and products of the Rubber Duck and relevant rights and interests in China are exclusively granted to Beijing Glory Culture International Communication Co., Ltd..*

The statement also asserted that from the date of the statement the organizers would have the right to take legal action against any infringers that occurred in mainland China. It claimed that this statement was made with the support of the Netherlands Embassy and the artist. Chinese officials, as evidenced in the editorial comment in the *China Daily*, expressed ambivalence as to the originality of Hofman's work: "[s]ome people may say that Hofman's design, too, is an imitation", but still felt able to state that:

> *The utter disregard some people in China have for intellectual property poses a fatal threat to innovation. So the Chinese authorities have to ensure that all innovative processes follow a given set of rules, and not violating intellectual property rights should be one of them* (China Daily, 2013c).

The inevitable occurred and once again copies were made, including an 'homage' appearing on a lake in Beijing. This version wore a snappy green vest and trailed a series of green eggs behind (China Daily, 2013b). The *China Daily* had already noted that the duck had been on display in Australia, Brazil, Japan, France and Belgium but "that in no other country or region, except the mainland, was any fake duck seen on display" (China Daily, 2013c). Extolling the *Rubber Duck*, as "a creative concept" and "innovative piece of work", the article then advanced a more general justification of intellectual property law as necessary, otherwise those who devote "years of research and painstaking work" would not bother to waste their time if the work is going to be "copied and sold in the market" (China Daily, 2013c). Two days later the *China Daily* again speculated as to "whether others are allowed to float a similar rubber animal, in say a public park, without infringing on Florentijn Hofman's intellectual property rights" (Zhou, 2013), but still failed to identify quite what the nature of these rights might be.

2.3 The *Real* Duck

Hofman himself may not have been interested in the finer points of copyright law and it is likely that he received a fee for the 'rights'. However, those who had entered into the exclusive licensing agreements with Hofman for the display of the work and distribution of reproductions and related merchandise using *Rubber Duck* motifs had a clear financial interest. A detailed exploration of intellectual property protection would have raised questions as to whether the duck met the requisite level of originality required to attract rights under intellectual property law, and the scope of contract terms that purport to transfer the rights to "to develop, produce and sell derivative works and products of the *Rubber Duck*". It may well be that all Hofman could do would be to take an action against anyone who implied that their *Rubber Duck* was a Hofman, in which case the action would be in misrepresentation or passing off.

Nonetheless, the obsession with protecting Hofman's rights, whatever these might be, persisted. Perhaps the most peculiar action that was taken in defense of these rights occurred when the *Rubber Duck*'s Beijing residency had come to an end. It was reported that when the *Rubber Duck* was deinstalled from the Summer Palace the

work was cut into pieces so as to "protect the designer's intellectual property rights" (China Daily, 2013d). Later that year *Rubber Duck* once again featured in Dutch-Sino affairs, this time providing the backdrop for talks between the Dutch Prime Minister Mark Rutte and Premier Li Keqiang as "a symbol of cooperation between China and the Netherlands" (Li, 2013). The report in *China Daily* quoted political experts who asserted that Hofman's duck had been instrumental in the development of economic relations between China and the Netherlands with claims made that *Rubber Duck*'s presence in Beijing that year 'brought an estimated $32.8 million in revenue to the Chinese capital' (Li, 2013).

As Alford noted in his detailed study of the history of US-China intellectual property law discussions, the type of individual entitlements on which intellectual property rights are premised, runs counter to the dominant collective, or state ownership of property embedded in Chinese culture (Alford, 1995, p. 119), and that a direct transition to the western mode of intellectual regulation could not possibly be smooth, and would not necessarily be in China's national interest. But the arguments raised by the *Rubber Duck* are of a different order altogether. Those asserting that intellectual property rights exist in Florentijn Hofman's work never actually identify the precise nature of these. The *Rubber Duck* had little possibility of being deemed an artwork with sufficient originality that would enable it to attain copyright protection. As I have noted, the validity of Hoffman's claims were discreetly challenged by the Chinese authorities as they were perhaps coming to realize that they were enlarging the scope of intellectual property protection. Others were more explicit: "*Rubber Duck* artist Florentijn Hofman doesn't understand intellectual property" was the heading of an article on the website Shanghaiist, describing Hofman as "seeking to claim that companies that riff on or recreate the Hong Kong duck are infringing upon the artist's "intellectual property", a narrative that has been seized upon and bolstered by the Chinese press in a series of handwringing editorials" (Shanghaiist, 2013). If copyright were to exist in *Rubber Duck* then this would run counter to a basic principle of copyright law. The idea of enlarging a yellow rubber duck may be original, but it is a fundamental premise of copyright law that ideas themselves are not protected. We might think of Hofman's *Rubber Duck* as a TRIPS-plus Trojan horse: its benign cuteness disguising the intellectual property fundamentalists that it harbors, who vigorously assert and protect its ambiguous intellectual property rights. Rather than an opportunity to educate the Chinese population about copyright law, the project in fact misrepresented the nature of copyright protection, and arguably discouraged the creativity it so wanted to encourage.

3. AUSTRALIA – A NATION OF PIRATES

While Chinese citizens are characterized as copycats, Australians are roundly denounced as pirates. In a second example of incremental extension of intellectual property laws through recourse to 'good copyright citizenship', private copyright infringing activities were characterized as criminal offences. These events relate to the popular HBO series *Game of Thrones* and the enthusiasm with which its Australian fans access the episodes through bit-torrenting. Over the past decade, the term 'piracy' has been used indiscriminately to describe both uploading and downloading activities, commercial and private use, unauthorized copying, seeding and leeching. Headlines such as "Nation of unrepentant pirates costs $900m" (McMahon, 2011), created the impression that Australians are serious offenders when it comes to unauthorized access to online content. This was reinforced when in 2012, 2013 and 2014 it was widely reported that Australians were prolific torrentors of the season opening and closing episodes of *Game of Thrones*.

3.1 Ambassadorial Postings

In April 2013, on the occasion of the 17th annual United Nations World Book and Copyright Day, the United States Ambassador to Australia posted on his Facebook page a strongly worded rebuke to those in Australia who were torrenting *Game of Thrones*. Headed "Stopping the game of clones", the post labelled this activity as theft, and those who engaged in it as criminals. Torrentors were also accused of threatening the jobs of the creative talent employed by the multinational corporations producing and distributing this hugely successful series (Bleich, 2013). The Facebook post attracted wide publicity and in excess of 250 'comments' which set out the many and varied motivations of the downloaders[1]. Pre-empting the common reasons given for accessing *Game of Thrones* through unauthorized means, the Ambassador concluded: "none of those reasons is an excuse – stealing is stealing" (Bleich, 2013). The Ambassador's post rhetorically constructed the activities of Australian *Game of Thrones* fans as criminal with half of the 24 sentences containing one or more of the following terms: theft, pirate, illegal, stole, offenders, crime, obeying the law, illegally share, illegal downloaders, illegal file sharing, stealing.

The contribution by Ambassador Bleich is but one example of the way in which the rhetoric of criminality pervades public discourse and media representation of unauthorized private use. It is also part of the ongoing program of activities by the United States Trade Representatives (USTR), whose mission it is to promote and extend the protection of United States' intellectual property throughout the world. One element of this activity is to create and reinforce the perception that unauthorized use of intellectual property, on any scale, is tantamount to a criminal act. In 2004, the USTR mission statement contained the provision that: "Effective protection of intellectual property rights involves customs, courts, prosecutors and police, commitment by senior political officials; and a general recognition that 'to copy is to steal' and to deprive finance ministries of revenue" (as cited in Dutfield, 2006, p. 2). A 2011 Year in Review post on the USTR website described its activities as part of the "global struggle against job-stealing piracy and counterfeiting" (USTR, 2011).

3.2 Australians Have Very Bad Habits

One might have thought that public officers, peak bodies, or industry organizations would have intervened to correct or at least clarify the criminal status of the behavior of Australian fans of US cable television programs. Instead, it seems that the opportunity was taken to reinforce this characterization of copyright infringement as theft. Kim Williams, Head of (then) News Limited, a 50% stakeholder in Foxtel, used his keynote address to the 2012 Australian International Movie Convention to call for an amendment to copyright law that would leave no doubt as to the criminal status of private and individual copyright infringement: "I am asking for a new set of copyright laws that protect our work from theft. T-H-E-F-T. 'Theft.' Robbery. Stealing. Pilfering. Larceny. Shoplifting. And plain pinching;" and warned: "And all those sleepless nights, knowing you've done the wrong thing, realizing you may have cost your uni friends potential jobs, and wondering if, one day, you're going to be prosecuted for it" (Williams, 2012, p. 5). The theme of Australians' lawlessness was taken up by News Corp's Global Chief Executive, Robert Thomson, who told a Goldman Sachs conference in New York that: "People are just in the habit of illegal downloads. Australians have very bad habits piracy happens to be one of them" and that in Australia more efforts were needed to educate consumers on "the inherent value of content and obeying a law" (Tabakoff, 2013).

Later that year Peter Beattie, as outgoing chairman of the National Association of Cinema Operators and previously the premier of Queensland,

[1] A detailed analysis of these comments undertaken by the author is the subject of a forthcoming article.

referred to the high levels of piracy in relation to a *Breaking Bad* episode, and that if the figures were correct: "then per capita Australians are the highest illegal downloaders of pirated material in the world" (Beattie, 2013). Throughout the article Beattie refers to the episode as 'illegal content' and the activity of the viewers as being 'illegal downloading' and 'online theft'. The persistent use of the terms stealing and theft serve to create the impression that the end user who torrents *Game of Thrones*, *Breaking Bad* or any other content that is subject to copyright protection, has committed a crime.

The Australian Attorney General, George Brandis, has adopted a similar rhetorical framing in relation to unauthorized access to online content. In an address to the 2014 Australian Digital Alliance Forum he stated that: "The illegal downloading of Australian films online is a form of theft. I say Australia films, but of course the illegal downloading of any protected content is a form of theft" (Brandis, 2014). When questioned in a 2014 Senate Committee hearing about copyright law amendments, Brandis took the opportunity to observe that "Australia, I'm sorry to say, is the worst offender of any country in the world when it comes to piracy and I'm very concerned that the legitimate rights and interests of rights holders and content creators are being compromised by that activity" and expressed his concern for "singers and film makers – arts practitioners who see the fruits of their creative endeavors being stolen through piracy" (Parliament of Australia, 2014, p. 74). The contributions of each of these stakeholders to a public debate about reform considerations are disturbingly similar in their rhetorical slippage between unauthorized use, copyright infringement, piracy and theft, leaving a strong impression that the extent of copyright infringement among Australians is of epic proportions. The hyperbole is created by ascribing to individual acts of copyright infringement the same status as that which might be attached to an industrial scale operation supplying counterfeit luxury brand label goods to retailers worldwide.

3.3 Trade Negotiations

The reasons for the rhetorical criminalization of unauthorized downloading are likely to be two-fold: it seeks to discourage the activity by creating the (mis)apprehension on the part of otherwise law abiding consumers that they are breaking the law when they download unauthorized content, and it lays the groundwork for more restrictive legislative frameworks that introduce criminal sanctions for what is now merely a civil matter. Both motivations are consistent with the aforementioned intentions by the United States and European nations who are seeking to ensure the adoption of TRIPS plus provisions in multilateral and bilateral trade negotiations, most recently in the form of the ongoing and somewhat clandestine negotiations between Australia, the United States and 10 countries on the Pacific Rim to establish a Trans-Pacific Partnership Agreement.

Intellectual property protection is once again a key element of the proposed Trans-Pacific Partnership Agreement negotiations. One of a number of elements within the intellectual property negotiations is the desire on the part of the United States to explicitly criminalize private infringing activity. This would represent a significant shift in the existing balance within the Australian legislation between criminal sanctions for large scale 'piracy' and commercially motivated activity, and civil redress for those whose copyright has been infringed in a non-commercial or private manner. While not yet tested, it is generally assumed that private, non-commercial, downloading (or leeching in the case of the bit torrent swarm), would be regarded as a copyright infringement rather than a crime under the current provisions of the Copyright Act 1958 (Australia). Even seeding, that is contributing content to other torrentors' leeching, remains ambiguous in terms of its status under the act,

and while conceivably a criminal offence would be very difficult to prove, and because of the way in which torrenting operates, may not even constitute the copying of the requisite 'substantial part' of a copyright protected work, necessary to constitute an infringing use.

A point by point analysis of a leaked Trans-Pacific Partnership Agreement negotiating document claimed that the United States proposal would see much greater criminalization of infringing activities in the private sphere (Weatherall, 2014). While Weatherall has acknowledged that the use of BitTorrent might already be deemed a criminal offence, albeit it very difficult to prove, the proposed provisions would, "significantly increase criminal liability for Australia even over what we already have in AUSFTA to include many acts of ordinary consumers" (Weatherall, 2013, p. 41). The insistence that individual private infringements be deemed as criminal acts, would in effect give legislative force to the persistent rhetorical collapsing of the single infringing activities of end users or consumers with that of commercial scale counterfeiters.

4. CONCLUSION

Both case studies discussed in this paper involve bilateral cultural activities: Hoffman's *Rubber Duck* represented Dutch design in Beijing Design Week; and *Game of Thrones*, a cultural export of the United States, is being accessed by Australian audiences. But as the analysis has demonstrated, once placed within the field of transnational economic concerns and against a backdrop of expanding trade related agreements, these cultural transactions provoked stern words chastising the behavior of both Chinese and Australian citizens. Without clear specification of the legal basis of the claims, and placing reliance on broad and unsubstantiated claims of the requirements of intellectual property regimes, Chinese citizens were labelled copycats of the Dutch artist's work and Australian citizens labelled pirates, stealing both jobs and revenue from the United States. In the absence of actual litigation these assertions must remain speculative. I have described these two events as examples of 'good copyright citizenship' required of Chinese and Australian citizens in the face of potential criticism from trading partners. Indeed, it is arguable that both interventions seek to render unlawful action which may not give rise to any liability under current copyright law. Rather than leading to actual prosecution or litigation, official reactions to these examples of cultural consumption by Australian and Chinese audiences appear to be designed to encourage acceptance of intellectual property rights in excess of those that currently exist. These extra-legal attempts to criminalize private copyright infringement and expand the scope of copyright protection reflect the agenda of Western nations, and in particular that of the United States, in bilateral and multilateral trade negotiations. In this context, exhortation of good copyright citizenship can be understood as one strategy to encourage acceptance of ambit trade negotiation claims for the extension of current legislative intellectual property regimes.

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