

## Lacan, Laclau, and the Impossibility of Free Trade

*Thomas Owen*

### **Abstract**

This paper applies Lacan's 'negative ontology' to mediated representations of 'free trade', and, in particular, the intellectual property aspects of free trade agreements. More specifically, the paper adopts Lacan's conception of the 'Real' as radically inaccessible, and Laclau's conception of discourses as contingent and always-already dislocated, to examine how the mediated objects of 'free trade' and intellectual property are unfixed, paradoxical, and perpetually haunted by their negative outsides. Free trade agreements and intellectual property protections are key nodal points in contemporary political economy. However, the historic elaboration of 'free trade' reveals the internal incoherence of an object experiencing continued rupture, suture, and contingent impossibility. This paper deploys a historico-contextual analysis of patent protection and free trade agreements to illustrate such contingency. It then compares Lacanian negative ontology to the positive realism of mainstream journalism, argues such realism is ill-equipped to accurately capture contingency, and, finally, suggests alternative ways journalism may engage with negatively constituted social phenomena.

### **Introduction**

Free trade agreements (FTAs) are key nodal points in contemporary political economy. Intellectual property rights (IPRs) are key components of contemporary FTAs. This situation highlights a contradiction at the core of free trade. Patents are, by design, protectionist, and reliant upon government regulation for their functioning. FTAs are dedicated to the liberalisation of markets, the mitigation of protectionism, and the removal of regulations impeding free competition. The inclusion of IPRs within FTAs thus presents a paradox – in the sense that an IPR-infused FTA internalises protectionist elements (patent *protections*) within a trade liberalising instrument. FTAs with IPRs do not 'make sense' in a straightforward manner where ideology, policy, and

---

Dr. Thomas Owen is a lecturer in Communication Studies at Auckland University of Technology. His research interests include the mediation of global crises, discourse theoretical approaches to media analysis, and post-colonial education in indigenous communities. He is author of the book *Patents, Pills and the Press* (Peter Lang Publishers) about media, intellectual property rights, and the global HIV/AIDS medicines crisis. He has published articles in *The International Journal of Press/Politics, Media, Culture and Society, Critical Discourse Studies, MediaNZ, The International Journal of Communication*, and *The International Journal of Multicultural Education*. He received his PhD from Massey University, Wellington, in 2012.

stakeholder intent are neatly combined within a consistent package. They are messy, paradoxical, contradictory, and always changing. In short, they are 'impossible', in the Lacanian sense, in that their full identity is never complete.

This article uses the ideas of Jacques Lacan and Ernesto Laclau to illustrate the 'impossible' character of contemporary IPR-laden FTAs, and, indeed, of the signifier 'free trade' itself. Lacanian psychoanalysis is built around an 'ontology of lack' (Marchart 2005, 17), in that it examines how all identities are characterised by their failure to achieve closure. Fully fixed hermetically sealed identities cannot exist, for if they did, no transformation, or even identification itself, would be possible. By extension, political identities, discourses, and constructions – such as FTAs – are also inescapably un-fixed and un-closed. Laclauian discourse theory adopts a similar negative ontology, examining the processes of *hegemony*, *dislocation*, and *suture* that shape both temporary stability and continual transformation in political discourse. Lacanian and Laclauian approaches thus do not examine the positive manifestation of identities, but rather their *negative* construction: how identities are characterised by their failure to achieve coherence.

This article examines the incommensurability between Lacanian/Laclauian ontology and the realist ontology of mainstream journalism, in the context of mediated representations of IPRs and FTAs. Through a historico-contextual analysis of free trade and patent protections, it illustrates the Lacanian/Laclauian argument for unfixed identities and discourses. Following this, it then argues that the realist 'anti-ideological ideology' (Phelan 2014, 83) of mainstream journalism renders it ill equipped to accurately capture the contingent, contested, contradictory, and continually changing nature of FTAs and IPRs.

The article first outlines the broad contours of Lacan's and Laclau's approach, and then applies selected concepts from them to four historical moments in the development of FTAs and IPRs: 1) the nineteenth-century dispute pitting free trade versus patent protectionism; 2) the linguistic re-framing of patents as 'rights' instead of 'privileges'; 3) the late twentieth-century dispute between patent 'pirates' and legal patent moderations; and, finally, 4) the twenty-first century re-emergence of protectionism/free trade tensions in the form of Donald Trump's removal of the USA from the Trans-Pacific Partnership Agreement. These moments are highlighted to illustrate the messy contradictions and incomplete contingent identity of 'free trade'. With this contingency then established, the article critiques journalistic realism as an inadequate ontology through which to capture FTAs and IPRs, and suggests Marchart's (2011) concept of 'mediality' as an alternative approach to the media representation of contingency.

### Lacan's and Laclau's Negative Ontology

'I always speak the truth', opened Lacan in his 1974 lecture on psychoanalysis for French television:

Not the whole truth, because there's no way to say it all. Saying it all is literally impossible. Words fail. Yet it is through this very impossibility that the truth touches the Real. (Lacan, cited in Jacquot, 1974, 1min)

For Lacan, identity is structured like a language (Lacan 1978, 1991, 2006). Words and language structure our thinking and, thus, our experience of the universe. But 'words fail' – the signifiers of language we use do not capture the totality of the signified they seek to represent. There is always a surplus of objective material reality that the words describing it cannot grasp. Importantly, however, we act as if they did grasp it – as if the words we use do fully represent the things they describe, in their awesome totality. For Lacan, this insurmountable limitation means we all operate within a realm where our most basic representations of reality are only partial, and yet treated by us as if they were total. It is in this sense that Lacan argues that 'truth is structured like a fiction' (Žižek 1989,154). Truth and reality exist, but for all intents and purposes our access to them is through the limited fictions of language. It is here that Lacan exhibits his debt to linguistics and semiotics, and his affinity with philosophers from Kant to Derrida on the impossibility to fully capture meaning and achieve total representation of externality.

For Lacan, a pure objective material reality does exist beyond the limits of representation, and he refers to this as the Real. The Lacanian Real is un-broken total reality, irreducible to difference, and far beyond the Symbolic – that is, the words, language and representations seeking to capture it. There is no lack in the Real. Rather, the lack is in our attempts to symbolise the Real through representation. The Real is thus 'impossible', as it is impossible to imagine or symbolise the Real in its totality without imposing limits, and therefore leaving surplus reality beyond the limits – and it is this impossibility that marks the *traumatic* aspect of existence. Unable to attain the totality, we are left constantly chasing something unattainable, both acting to some degree as if it were attained, while also being troubled to some degree by the implicit or explicit realisation that it was not. For Lacan, this is the *haunting of the Real*. It is traumatic, but also productive. It is precisely because a total representation of the Real cannot be attained that we constantly seek to attain it. If it were ever attainable, this productivity would cease. The 'lack' in Lacanian ontology, therefore, is a *constitutive* lack. The rupture in our identities is both what makes them impossible *and* what stimulates their constant drive to overcome impossibility – thus making identification itself possible in the first place (Stavrakakis 1999).

These initial summary comments already indicate that for Lacan, psychoanalysis is not merely a tool for treating individual cognition and perception, but is, rather, a theoretical lens for examining how 'reality' itself is constituted (Žižek, 2006). In this way, Lacan's approach permits a confluence between psychoanalysis and political analysis – and it is here in the political application that Laclau chiefly focuses his work

(Laclau 1990, 2005; Laclau and Mouffe 1985). Laclau adopts the logic of a negative ontology and applies it beyond subjectivities to political discourses, social movements, and society itself. Indeed, to explicate Laclau's famous 'impossibility of society' statement (1991, 24), society is impossible because it can never be totally represented and thus its meaning is in a constant state of flux and change. However, it is precisely this state of dislocation that makes new forms of the social possible. Without its inherent lack, society would be unchanging and could not exist – but, contradictorily, with its lack, it can never be totally achieved and is technically 'impossible'. The radical lack is both the *entry condition* of any possibility and *impassible limit* to full possibility, marking the central paradox of the negative ontology.

It is important to emphasise, however, that this does not mean that all identities and political discourses are always in a state of *total* flux (Laclau 1990). That would be a chaotic realm, without any measure of coherence, and, more importantly, without any power relations structuring representation. Far from a disinterest in power relations, Laclau is centrally concerned with the respective interplay of hegemonic projects seeking to attain dominance and repress their opponents within a field of un-fixity. For Laclau, hegemonic projects are attempts to fix meaning by constructing chains of equivalence between concepts, and situating them in opposition to a shared antagonistic Other. Hegemonic projects thus seek to fix meaning by *naturalising* a specific and contingent interpretation of the Real as the universal and total representation. However, as such total representation and fixity is impossible, hegemonic projects are at best only temporary and unstable fixations of meaning. They are constantly open to rupture and dislocation from without – for instance, from counter-hegemonic projects and the intrusive return of elements excluded in their formation – and from within, by their own haunting lack of closure. Thus, while all identities and political discourses are impossible and unfixed, they also waver between various states of 'relative structuration' (Laclau 1990, 43). The contest between these states is the fabric of political contestation.

### **The Impossibility of Free Trade**

The above illustration of Lacan and Laclau is by no means an attempt to exhaust all possible discussion of their ideas, and is inadequately brief to explore the many nuances of their negative ontology. However, by focusing on the concept of ontological lack and the inaccessibility of the Real, it has set the tone for the following historico-contextual analysis of FTAs and IPRs. In the first instance, it must be noted that FTAs and IPRs are purely social constructions. There is no reality to FTAs or IPRs external to how they are discursively constructed, no natural law dictating their symbolisation. There may be material consequences as a result of an FTA – for example, a farmer's productivity relative to seed prices, or an HIV/AIDS patient's ability to access antiretroviral medicine – but an FTA itself is not a material thing. It is purely symbolic, existing only in language – and as language is partial and open to contestation and change, for FTAs there is no

escape beyond language, beyond ideology, or beyond a constant state of contestation and transformation.

Secondly, contemporary FTAs have come to include a myriad of other demands not typically considered part of ‘trade’ negotiations, such as financial regulations, environmental protections, and intellectual property rights (Kelsey 2010). In a Laclauian sense, the chain of equivalence constituting the hegemonic project of a contemporary FTA has been widely extended. IPRs are particularly interesting in this sense, because of the multiple and contradictory meanings ascribed to IPRs – for instance, as rights, privileges, monopolies, protectionist measures, and also as free trade mechanisms promoting competition. Given this, the inclusion of IPRs in FTAs demonstrates the contingency of meaning allowable within hegemonic projects. There is no *necessary*, self-evident way that IPRs and FTAs must be configured; rather, there are only *possible* ways. A historical analysis of just some of the ways this has been done reveals the un-fixity and ‘impossibility’ of identity formation.

This section will now use four historic moments to illustrate this ‘impossibility’, and to highlight specific points of Lacanian and Laclauian thought. It first examines the nineteenth-century dispute between free trade and patent protectionism to observe the internal contradictions of FTAs. Second, it examines the re-framing of patents as ‘rights’ rather than ‘privileges’ to observe the performativity of linguistic constructions. Third, it examines the late-twentieth century dispute between different interpretations of patent moderation as ‘piracy’ or as legal, to observe the role of constitutive outsides, antagonism, and the return of the repressed in identity formation. Finally, it considers the twenty-first century reaction against FTAs by Donald Trump to observe excessive over-identification and fetishistic disavowal. Through these moments, the role of mediation – both linguistic and journalistic – is considered, before moving to the article’s final section examining the incommensurability between Lacanian negative ontology and journalistic realism.

### *1. Free Trade vs. Protectionism*

The first modern nation state’s intellectual property law arrived with the 1623 English Statute of Monopolies. However, the basic concepts of patents and IP protection had been emerging in various European centres since the fourteenth century (Machlup and Penrose 1950). Before 1623, patents were configured as ‘grants of privilege’ (Sell and May 2001, 476), conferred by the sovereign upon preferred subjects, and protecting their trade through the creation and regulation of monopoly control (Drahos and Braithwaite 2002). Historic IPRs were, in short, *protectionist* and *monopolist* in character.

By the end of the twentieth century, however, patents had become integrated into the architecture of global free trade, through the World Trade Organisation (WTO) and other bilateral and regional FTAs (Correa 2007). This move from protectionism to free trade has been cited as an ‘uneasy marriage’ (Panagariya 1999, 291) and ‘one of the

great ironies of the recent drive to global free trade' (Weissman 1996, 1069). Indeed, the integration of IPRs within the free trade agenda exhibits the central paradox structuring the identity of contemporary IPRs and FTAs: monopolistic protections embedded within an apparatus dedicated to free competition.

IPRs' move from protectionism to free trade, however, was not an automatic or self-evident process, but rather emerged through contestation, strategic linguistic framing, and the contingent interaction of competing hegemonic projects. Indeed, at various historic junctures, the protectionist nature of IPRs was regarded by pro-free trade advocates as sufficient reason to vigorously oppose the very existence of patent protections at all. In the nineteenth century, for example, a vociferous dispute between British pro-patent and pro-free trade lobby groups emerged (Machlup and Penrose 1950). The pro-free traders viewed patent protections as an unjustified hindrance to the functioning of the free market. The pro-patent side viewed such protectionism as necessary for the existence of key trades and markets.

From the 1850s to the 1870s, the free traders enjoyed the upper hand in the dispute. Supported by some of the leaders of nineteenth-century capitalism – including *The Economist* newspaper, Vice-President of the Board of Trade, and members of Parliament – the pro-free trade/anti-patent campaign gained momentum to the point where a reform bill passed in the House of Lords considerably minimising patent protections, while further leading statesmen argued for the total abolishment of all patents (Machlup and Penrose 1950).

In response, the pro-patent campaign mobilised, enacting a 'mighty counteroffensive' using 'techniques of propaganda ... quite remarkable for the time':

New societies for patent protection were formed, resolutions were drafted and distributed to the daily press, speakers were delegated to professional and trade association meetings, floods of pamphlets and leaflets were released, articles were planted in trade journals and reproduced in daily papers, public competitions were announced with prizes for the best papers in defense of the patent system. (Machlup and Penrose 1950, 5-6)

In short, a contest between opposed hegemonic projects seeking to universalise their own particular interpretation of IPRs' and free trade's identity was dramatically enacted through the symbolic realms of media and parliamentary debate. The pro-free traders opposed patents for their monopolistic and protectionist distortion of free competition. In response, the pro-patent campaign sought to strategically de-couple patent protection from monopolies in particular and from free trade in general – and instead to articulate patent protection as an example of natural law, the law of private property, and a Rousseauian social contract between inventor and society (Machlup and Penrose 1950). Against a backdrop of nineteenth-century depression in Europe, and diminishing public enthusiasm for free trade in general, the pro-patent argument ultimately won the

contest of ideas. By 1874, the British patent reform bill was withdrawn in the House of Commons, and patent protection resumed its position as status quo.

This nineteenth-century dispute demonstrates the contested and contingent nature of the relationship between IPRs and free trade, and it is not the only historical example. In particular, the USA's evolution of IPR and free trade policy is characterised by a continual ebb and flow between strong and moderate patent protection, and between concerns about monopoly power and competitive marketplaces (Sell and May 2001). Through much of the nineteenth century the USA had 'lax IP policies' (Sell 2001, 521). As a net importer of both technology and artistic creations, the USA argued it was freely entitled to copy European literature in order to further its own social and economic development (United States Congress 1986), while building much of its industrial prowess using British technology (Sell and May 2001). This approach changed in the mid-nineteenth century as the USA started producing inventions of its own, and by the turn of the twentieth century, the USA enacted exceptionally strong patent protections called 'tying arrangements' (Sell and May 2001). However, echoing the nineteenth-century British dispute, in 1917 the US Supreme Court reversed the tying laws, citing such strong patent protection as monopolistic and against the principle of free competition (Sell and May 2001).

Continuing the ebb and flow, the USA's twentieth-century anti-monopoly approach reversed again in the 1980s, when US courts stopped referring to patents as 'monopolies' (Sell 2003), and celebration of the 'information society' began to place greater importance on ownership protection of abstract knowledge (Sell and May 2001). This 1980s turn towards stronger patent protection culminated in the 1995 formation of the World Trade Organisation (WTO), with IPRs deeply embedded into the free trade agenda through the WTO's Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement (Correa 2007). With TRIPS, IPRs were not a subsidiary component of the trade agreements, but rather an intrinsic central component of them (Matthews 2002). Furthermore, TRIPS established an unprecedented level of IP protection for all WTO members, effectively outlawing 'softer' IP protections for many nations that had been previously legal (Sell 2003). With TRIPS, a particular interpretation of IPRs and FTAs was naturalised and globalised, and the transition of IPRs from protectionism to free trade was complete.<sup>1</sup>

In sum, the historical relationship between patent protections and free trade has been a constantly evolving, contingent process deeply influenced by the strategic agendas of political and economic interests. There is no self-evident, objective, or 'natural' manner in which IP protections and free trade exist together. They have been at times characterised as contradictory and antithetical, and at other times as harmoniously compatible and mutually reinforcing. Such flexible instability demonstrates the incomplete condition at the core of a negatively constituted Lacanian/Laclauian identity, where identity is not characterised by its positive coherence, but rather by its inherent failure to achieve coherence.

## 2. Rights vs. Privileges

To return briefly to Lacan and Laclau's general points on language, we, as social actors, have no unmediated access to the Real. Our access is through language, and language is incomplete; thus, our significations of things are partial and ever-changing. Whatever language is used to describe something, therefore, has great connotations and consequences for how that thing is then understood and responded to by other social actors. There is thus great incentive for social actors with vested interests to construct specific linguistic choices favourable to them.

For IPRs and free trade, a key site of linguistic contestation concerns the respective labeling of IP as a 'right' versus a 'privilege'. In the centuries before 1623, patents 'grew directly out of system of royal privileges' (Machlup and Penrose 1950, 2). Precursors to patents – grants of privilege, letters of patent, and less formal favours from the sovereign to preferred subjects – were practiced across Europe, un-beholden to formal legislative process, and wholly subject to the 'vagaries of political power and personal relationships with the holders of such power' (Sell and May 2001, 479). Early IP, therefore, is best understood as a conditional *privilege*. By the 1995 WTO TRIPS Agreement, however, the concept of intellectual property *rights* had become the mainstream accepted definition (Weissman 1996).

For Sell (2003) the alternate framings of 'rights' versus 'privileges' are important for establishing different obligations from the respective social actors. While a 'privilege' suggests a temporary and unstable *luxury gift* from the sovereign, granted at their discretion, a 'right' suggests something the sovereign is *duty-bound* to uphold, thus making a 'great deal of difference in terms of what is and is not considered legitimate' (Sell, 2003, 5). Weissman continues the point, noting that defining something as a 'right' effectively 'immunise[s] it from challenge both in practice and in the realm of ideas' (1996, 1087):

To transgress a right is to 'violate' it, to commit a wrong. To define something as a right is to remove it, more or less, from political challenge. Even if it is not considered a 'natural' right; in moral terms, a right is supposed to be somewhat inviolate. (1087)

These points illustrate the Lacanian notion that linguistic articulations are also performative statements, constructing relations of trust and engagement. Performatives are speech acts that accomplish the act they state – for instance, the statement 'this meeting is closed' effectively closes the meaning. For Lacan, performatives go beyond this to also establish social power relations (Žižek 2006). For instance, when a patent protection is a 'privilege', the power is with the sovereign to gift a limited monopoly to an individual or corporation. When it is a 'right', the power is with the individual or corporation to demand the monopoly protection from the sovereign, who is duty-bound to grant it. Defining a patent protection as a 'right' thus reverses the power dynamic from the original conceptions of intellectual property.



Because different linguistic significations are possible, and their consequences important, different social actors compete to instigate their preferred particular definition as the naturalised 'common sense' universal definition. For Laclau, such efforts are referred to as *hegemonic projects*. Importantly, once a hegemonic project is successful, and a particular interpretation assumes the status of universal one, the contingency and historical alternatives are concealed. Thus, when intellectual property 'rights' were elevated as the hegemonic definition their prior historical definition as 'privileges' was concealed.

Furthermore, once naturalised, the internal incoherence and negative impossibility of any given definition is also concealed. With the 'rights' definition for IP, Weissman (1996) identifies several inconsistencies that were effectively concealed once the term assumed hegemonic status. For instance, a patent is granted only when an individual or corporation applies for it – which the state can refuse if the requirements are not met (that it is new, useful, and non-obvious). The state can thus choose to not grant the patent at all – something obfuscated in the notion of a 'right' as something that is already granted by default. Secondly, patents are only limited monopolies, meaning that the benefit to exclusivity ends after a set period, which may be shortened or lengthened – inconsistent with the idea of a 'right' being granted in perpetuity. The benefits granted under a patent, therefore, are best described as contingent, something obscured in their definition as a 'right'.

In summary, linguistic labels are not neutral objective descriptors, but rather tools that can be wielded strategically to establish specific power relations. Once naturalised as the default term, the hegemonic project appears as the natural and self-evident description, with its strategic nature, historical contingency, and internal contradictions effectively concealed.

### 3. Piracy and Constitutive Outsides

A further example of linguistic contestation in relation to FTAs and IPRs is the conflict over patent moderations – such as generic medicines – as either legal instruments or as 'piracy' and theft. To explore this aspect, this section draws upon Laclau's concepts of *antagonism* and *constitutive outsides* to demonstrate the stabilising function of exclusion in political discourse. Laclau builds upon Lacanian analysis to examine how contingent political discourses attain a semblance of stability within their overall changing nature. He focuses chiefly on hegemonic formation, where identity is stabilised by articulating together a chain of demands posed in opposition to a shared antagonistic other. The antagonistic element thus provides the function of 'constitutive outside', signalling the margins of the identity by demarcating the boundaries of acceptability (Laclau and Mouffe 1985).

However, while the constitutive outside performs a stabilising function, its role is itself precariously balanced between inclusion and exclusion. For Laclau, identity is articulated by contingently linking together various elements pulled from a field of

infinite meaning – the field of heterogeneity, or field of unrepresented elements. To function as a constitutive outside, however, the antagonist cannot remain unrepresented, and thus, must be explicitly included within the field of representation. On the other hand, to also function as constitutive outside, it must be excluded as the Other within the field of representation. In short, it must be expelled, but not entirely, and included, but only beyond a barrier, or ‘cordon sanitaire’ (Mouffe 2005). Antagonistic Others thus remain precariously at the margins marking the constant threat of return. Antagonistic identification, therefore, is a *continual* process of exclusion.

In the 1980s’ return to strong patent protection, culminating in TRIPS and the WTO, intellectual property ‘violators’ provided the antagonistic constitutive outside to strong patent protection (Owen 2013). Such ‘violation’ was often expressed as ‘piracy’, marking its characterisation as criminal, despite the fact that much reported violation was legal in the countries where it was practiced. Many leaders in the corporate campaign for FTA-enabled stronger IPRs came from major pharmaceutical companies – so-called Big Pharma (Owen 2014). For Big Pharma, the key ‘pirates’ were manufacturers of generic medicines, who copied patented drugs through such legal mechanisms as compulsory licensing (Owen 2013). In negotiations culminating in TRIPS, US government officials also adopted the ‘pirate’ metaphor – like former-US Trade Representative, Clayton Yeutter, reflecting on negotiations,

[M]any of our trading partners wanted weak or non-existent global intellectual property standards, generous exemptions for developing countries, or the indefinite postponement of multilateral rules so that their local pirates could continue copying American pharmaceuticals, films, sound recordings, software, and books. Fortunately, the outcome was a disappointment for the ‘purveyors of piracy’. (Yeutter, cited in Halbert 2005, 92)

In these ways, pirates, generics, and IP violators were positioned as the antagonistic external threat to economic performance – both establishing a constitutive outside to sound IP policy, and justifying the existence for stronger IP and its enforcement in FTAs (Owen 2013). As a linguistic label, ‘piracy’ was especially effective, associating the routine practice of generic medicines with images of savage outlawry (Drahos and Braithwaite 2002). In addition, by characterising the practice as illegal and – importantly - immoral, the metaphor created a ‘moralised discourse’ (Halbert 2005, 87), foreclosing rational consideration of generics as a legitimate policy option.

Generic medicines were thus situated through linguistic labeling as the antagonistic Other: the constitutive outside to strong IPR protection. However, this signification positioned generics in the liminal balance of inclusion/exclusion, necessarily both expelled and retained at the margins. This is illustrated by the fact that despite Big Pharma’s comprehensive anti-generics rhetorical campaign (built around ‘piracy’), provisions for generic medicines remained within TRIPS (Correa 2007). Indeed, the dispute over exactly what generics provisions existed within TRIPS was the central

point in transnational – and highly mediatised – disputes over IPRs and global access to HIV/AIDS medicines from 1999 to the mid 2000s (Owen 2013, 2014, 2015).

The medicines-access dispute culminated in 2003 with the ‘Doha Declaration’, an addition to the TRIPS Agreement clarifying that generics could indeed be accessed through ‘compulsory licensing’ in the case of public health emergencies (Correa 2007). Following this, however, the pro-patent campaign then continued to repress generics by lobbying for stronger IPRs in bilateral and regional FTAs (Sell 2011). Known as ‘TRIPS-Plus’ FTAs – for their IPR provisions even stronger than the WTO’s – these FTAs further impeded generics (Baird 2013). Much like the ongoing tension between protectionism and free trade sensibilities within IPRs and FTAs, the antagonistic exclusion of generic ‘pirates’ is never stable, but is a *continual* act of *incomplete* expulsion. This illustrates the paradoxical nature of antagonistic identification. The positively defined identity must perpetually banish its negative Other, but such banishment can never reach the point of success, because if it did, the positively defined identity would cease to achieve the meaning it only achieves through its distinction against the negative Other.

#### 4. *Excessive Over-Identification: Trump and the TPPA*

One high profile ‘TRIPS-Plus’ FTA of the 2010s is the Trans-Pacific Partnership Agreement (TPPA), and when newly elected US president Donald Trump withdrew the USA from the TPPA negotiations in 2017, he exhibited another feature of identity failure in Lacanian thought: *excessive over-identification*. Since the ‘GATT strategy’ and the WTO, FTAs have come to include protectionist elements, such as intellectual property protection. However, this element was concealed, present but hidden, with patents articulated within their strategic framing – forged in the nineteenth-century disputes – as non-protectionist, non-monopolist, and consistent with free trade principles. Within this strategic frame, public officials could endorse both FTAs and IPRs without apparent contradiction. Trump’s overtly protectionist ‘America First’ stance, however, made such an approach untenable. That is, by positioning ‘free trade’ as the antagonistic enemy-Other to protectionism, Trump excessively over-identified with the free trade nature of FTAs, thus denying their concealed protectionist elements, and in effect, dismantling a protectionist-friendly FTA in the name of protectionism.

To return to Lacan’s basic points, total identification is impossible due to the impassable gulf between symbolisation and the Real. This means that all identities and discourse are not ‘true’, in a strict sense, but are in fact only partial fictions that may at best point in some way to an external Real truth. However, in order to function coherently within a symbolic order, we must act *as if* full identification were complete, as if the fiction were indeed the truth. Far from a disengagement from authentic truth-seeking, for Lacan seeking the truth within the fiction is the most earnest pursuit of truth we can achieve, given that actual full truth is eternally unattainable.

For Lacan, this means that in the social world we follow Freud’s concept of *fetishistic disavowal*, acting as if the symbolic order and the rules it entails were more real than

other versions of reality we may otherwise perceive. To follow Žižek's illustration of the point about a citizen standing before a judge,

I know very well that things are the way I see them, that the person in front of me is a corrupted weakling, but I nonetheless treat him respectfully, since he wears the insignia of a judge, so that when he speaks, it is the law itself that speaks through him. . . . This apparently absurd logic renders perfectly the functioning of the symbolic order in which *the social mask matters more than the direct reality of the individual who wears it.* (Žižek, 2006, 33; emphasis added)

Žižek's example illustrates the routine social functioning where we act as if the fiction were true, because the fiction contains the truth we are looking for and because identifying explicitly the negative lack in the fiction (that is, treating it as a lie) would render social life chaotic and inaccessible. Put another way, identity stability requires a level of denial, but while one may know this to be true, one is best placed to pretend that it is not. 'Words lie,' says Lacan, and those who refuse to acknowledge this and instead cling to the literal truth fall into the paradoxical position Lacan referred to as *Les non-dupes errant* (those in the know who are in error). The 'knowers', in this sense, are those who refuse to believe the symbolic fiction, and instead insist on pointing out the literal truths that prove the fiction false. Such 'knowers', for Lacan, are in error, for they miss the essential role played by the symbolic fiction in structuring our social reality.

To return to Trump and the TPPA, the fiction was that FTAs could include protectionist measures, such as IPRs, and still function without contradiction as 'free trade'. Previous US Presidents Obama, Bush and Clinton explicitly advocated free trade while ensuring FTAs protected US industry. They endorsed the fiction. Trump, on the other hand, identified so explicitly with US protectionism that he positioned it in antagonistic opposition to globalist FTAs, over-identifying with both protectionism and the 'free trade' identity of FTAs. In a sense, he sought a more direct truth, treating FTAs for what they manifestly were signified to be (free trade) without recognising their latent identity as protectionist, and thus effectively dislocating the TPPA FTA's ability to realise US protectionism. He could not see the truth within the fiction, and so dismantled the fiction.

To connect these points to the overall argument of the article, free trade is 'impossible' in the Lacanian sense in that its identity is contingent, un-fixed, paradoxical, and continually changing. In particular, the combination of IPRs and FTAs signal a central contradiction at the core of FTAs, where protectionist and free competition elements are inscribed together within a free trade agreement. The 'fiction' is that FTAs can harmoniously contain IPRs – and while this fiction is historically contingent and has been variously contested at different historical junctures, it has been endorsed by global leaders since the 1990s, linguistically facilitated by labeling IP as a 'right' instead of a 'privilege', and sustained by the constitutive outside and continual expulsion of 'pirate' IP violators. Despite ongoing transnational political challenge to FTAs, ultimately it was

a US president who effectively dislocated the TPPA in particular, and multilateral free trade consensus in general. Through a Lacanian/Laclauian negative ontological lens it is possible to see this dislocation as the result of excessive over-identification by Donald Trump, refusing to perpetuate the symbolic fiction within which the greater truth lay. The hegemonic order was thus not dislocated via external political challenge, but rather through the internal destabilising of its precariously balanced and negatively constituted identity.

### **Mediating the Real in Mainstream Journalism**

This article has demonstrated the unfixed, contradictory and contingent nature of FTAs and IPRs, captured in the overly simplistic and, if unqualified, somewhat misleading statement that ‘free trade is impossible’. Using a Lacanian/Laclauian lens and historico-contextual analysis, the article has rendered visible the contradictions and changing nature of FTAs and IPRs. Mainstream contemporary journalism, on the other hand, does not tend to adopt a Lacanian perspective. Rather, journalism tends to assume a realist position, situating itself as beyond ideology and with a direct access to ‘truth’ (Phelan 2014). This final section briefly explores the incompatibility between these two approaches and argues that realist journalism is ill equipped to accurately capture the nuances of key contemporary political concepts such as FTAs and IPRs. As an alternative to realism, however, the article suggests that journalism may indeed adopt a measure of Lacanian contingency through Marchart’s (2005) concept of ‘mediality’. This section first compares Lacanian and realist approaches, briefly applies Lacan to the concept of ‘fake news’, and, finally, considers how journalism may overcome its realist limitations.

Mainstream contemporary journalism’s cultural capital is its ability to act as truth-teller. Journalistic ordering of reality thus revolves around the vocation’s ‘God-terms’ of ‘truth’, ‘fact’, ‘reality’, and ‘objectivity’ (Zelizer 2004, 186). In committing to these terms, journalism adopts realist ontology, positioning itself as able to capture the direct truth beyond ideology and bias (Phelan 2014). In terms of its actors and audience, realist journalism presupposes rational choice subjects, capable of making the correct decisions if only they are provided the correct information.

Lacanian thought, on the other hand, argues that reality is structured as a fiction, and that true fact – residing in the Real – is inaccessible to human thought, as necessarily mediated through the distorting filters of language and representation. Lacan and Laclau thus allow no escape from ideology, as we are all ‘always-already’ operating within contingent, unfixed, and partial discourses. Furthermore, in terms of social beings and subjectivities, Lacan posits that subjectivity is never total or fixed. Far from rational, subjects are driven by Freudian unconscious desires, but even this unconscious is inaccessible to the subject (Stavrakakis 1999), since the unconscious is not an objective mechanism regulating experience but rather the inaccessible desire, primordially repressed (Žižek 2006). Taken together, these differences exhibit the

fundamental incommensurability between realist journalism and Lacanian approaches to social reality.

As this article has demonstrated, FTAs provide a useful demonstration of the Lacanian impossibility of identity, with FTAs and IPRs interacting in contingent, changing, and often-contradictory formations. A realist analysis focused on rational, coherent, and fixed identity tends to miss such contingency. As Sell and May argue, the historical evolution of FTAs and IPRs has not been linear, inevitable, or directed solely towards the fulfillment of optimal social functionality; rather, it has swung between pro-patent and pro-public sensibilities, involving a 'complex interplay of ideational, institutional and material forces' (2001, 473). The 'contested history' (473) of IPRs and FTAs, Sell and May continue, reveals a 'contingency and contestation' (486) that is excluded within a realist approach, revolving instead around a 'limited focus on the state as legislator', and assuming 'that the forces and interests that play out in contest over intellectual property have produced a series of "rational" settlements or "improvements"' (470).

Such rational, realist, and state-focused representations of FTAs can be easily found in contemporary journalism. Consider, for instance, an article from *The New Zealand Herald* headlined 'Twelve-nation trade deal took a long journey':

The Prime Minister 25 years ago ... saw a trade deal with the United States as a way of helping to repair the relationship in the wake of the anti-nuclear laws, as well as boosting the economy. (Young 2016, A007)

Here, the FTA is presented as the result of a series of rational deliberations by nation-state actors, whose motivations are inter-state relationship-building and national economic gain (the article continues to list key developments between New Zealand and US governments). The state actors are represented as coherent, positively defined identities, and the various hegemonic contestations by non-state actors (such as lobby groups and corporations) are ignored. Ideology is not considered, and the ebb and flow of contested FTA discourses is concealed behind a narrative of consistent linear TPPA development, driven by – and leading towards – optimal social functionality.

This is not to say that conflict and contestation are not considered in realist journalism, where indeed, conflict is a common news value. However, when identities are assumed as coherent, fully formed entities, social conflict is in turn represented as the opposition between one or more positively constituted positions, whose respective truth claims may be measured against an objectively given Real. Consider, for instance, an article from *The Dominion Post*:

Throughout the back and forth about the Trans-Pacific Partnership Agreement, one of the biggest concerns has been how the deal could affect Kiwis' access to medicines.

The worry was that drug companies would invent new treatments but be allowed to keep the recipe to themselves for many years. That would prevent competition and allow the companies to keep prices much higher.

...

So will we pay jacked-up prices for antibiotics and life-saving medications? Not quite. (Sachdeva 2016, 2)

Here, the first positively defined coherent identity is the opposition to the TPPA, concerned that it will raise medicine prices. The second is the writer's endorsement of the TPPA, claiming that no, it will not. Such positive declarations of the respective positions appear coherent, but in effect conceal the problematic internal incompleteness of each. In the representation of TPPA opposition, for instance, patent ownership is conflated with product invention, thus de-emphasising the role of patents as property, and over-emphasising their role in innovation. Secondly, monopoly protections are confused as something the TPPA creates, rather than as the very core function of patents in the first place. Thus, these apparently coherent statements of fact conceal a deeper incoherence, effectively concealing the power relations constituting the conflict that is represented.

Furthermore, with the statement 'not quite', the article exhibits its presupposition of an objective attainable truth. According to the article, the truth is that TPPA will not raise medicine prices, and thus the opposition to the FTA is incorrect. With a presupposed objective Real, this realist presentation of conflict is only between those who have access to the Real and those who do not. Ideological contestation is reduced to group A (who are right) versus group B (who are wrong). When viewed through a negative ontological lens, however, facts are not so simple. Stating a fact as 'truth', therefore, and simultaneously positioning objections to that fact as false, is an *ideological* act; it naturalises a contingent, incomplete, partial statement of opinion (a negatively constituted identity) as if it were an absolute objective complete truth (a positively constituted identity). For Phelan (2014, 83), this is mainstream journalism's 'anti-ideology ideology'. That is, contrary to the realist claim to access a direct truth, such statements of 'fact' are *deeply ideological* by the very nature that they assume their own escape from ideology.

For Lacan and Laclau, there is no escape. Laclau's contribution to ideological analysis was to elevate ideology from the epistemological plane to the ontological (Glynos 2001). That is, rather than a Marxist 'false consciousness' approach, where ideology consists in the misrecognition of a positive essence, in Laclau's negative ontology, ideology consists in the 'non-recognition of the precarious character of any positivity, of the impossibility of ultimate suture' (Laclau 1991, 27). In Lacanian terms, ideology is the 'lack in the symbolic Other' (Glynos 2001, 197) that inescapably plagues all identities and discourses. From this perspective, articulating a realist false consciousness position that claims to have revealed the truth beyond the ideology can only ever reproduce ideology, not critique it.

This point has gained salience in recent years through Donald Trump's critique of mainstream journalism as 'fake news', and Lacanian analysis is useful for engaging with such claims. For Lacan, news was always fake, in the sense that it was never the Real,

but rather a limited symbolic fiction attempting (with inevitable failure) to represent the Real. Journalism assumes an important democratic social function as truth-teller, but this role can only be realised if audiences engage in *fetishistic disavowal*. That is, to appropriate Žižek's (2006) earlier example, 'I know very well that the news report in front of me is not objective and not completely true, but I nonetheless treat it as if it were true since it has been published by an official news outlet, and official news outlets are the socially recognised form of providing me with facts and information'. To function coherently within society and respect the news as truth and fact is to engage in fetishistic disavowal and treat the fiction as if it were truth. Again playing the role of a *non-dupe errant*, Trump refused to engage in fetishistic disavowal and instead articulated a criticism that news is false.

However, rather than see this as a heroic attempt to escape the illusion and attain a greater contact with the Real, a Lacanian analysis encourages us to view this as the complete opposite: an attempt to delve even deeper into fiction. Summarising Lacan's ideas, Žižek (2006) notes that in art we often encounter attempts to escape the façade and 'return to the Real' – for instance, a film character breaking the fourth wall and addressing the audience; or a brutal theatrical event drawing actual blood in order to highlight the physical reality of the stage. Žižek (2006) argues that counter to bringing audiences out of the fiction and closer to the Real, such efforts only *delve further into illusion* – in a similar way to realism's claims to escape ideology and engage directly with objective truth. We cannot ever truly see behind the curtain of fiction/ideology/rhetoric etc., and so exaggerated attempts to do so only pull us deeper into ideology, precisely because they promise an escape from it. By 'pulling back the curtain' of fake news, Trump promised a truth beyond, but only guided his audience deeper into another fiction.<sup>2</sup>

To recap the above arguments, mainstream journalism tends to adopt a realist position incommensurate with Lacanian negative ontology; such realism is ill equipped to capture the contingencies of FTAs and IPRs; and neither realist claims to positive coherence, nor critical challenges to reach beyond illusion, can ever actually escape ideology, and in effect only go deeper into it. Given this, what role then can journalism play within a Lacanian negative ontology?

One response to this is that while capturing the Real is unattainable, journalism can still engage in *ideology critique*. For Lacan and Laclau, ideology critique is not the statement of an alternative positive ideological position, but rather the analysis of how *any* ideological position is negatively constituted. The goal of ideological analysis, therefore, is not to determine which ideology is false and which correct, but to examine where any ideology, discourse, identity, or structure is rendered incomplete and negatively constructed by its own ruptures and antagonisms (Glynos 2001). Such an approach has been criticised for its *normative deficit*, in that it can critique ideology, but cannot point to which ideologies are 'better' than others (Critchley 2004). For Laclau, however, such analysis is a crucial moment in progressive social change. It is only by revealing the



contingency and strategic construction of hegemonic regimes that the possibility for change can be fostered, and alternative positions legitimised. Laclau (1990) refers to this as ‘reactivation’, where the contingent processes leading to the naturalisation of a hegemonic form are rendered visible – for instance, through detailed historico-contextual analysis of the strategic social projects involved in its formation (Glynos 2001).

Furthermore, for Glynos (2001) and Marchart (2011), a proper negative ontological critique must go beyond reactivation and focus not just on contingency, but on the *impossibility* of the discourse, that is, on the forces rendering the discourse incomplete. For Marchart, media representation can indeed achieve this in moments of ‘mediality’, where media focus on the fundamental antagonism within social practice, and are ‘touched by the mediality of antagonism’ (2011, 78). Quoting Leonard Cohen – ‘a crack in everything – that’s how the light gets in’ – Marchart argues that ideological critique can only occur when media focus explicitly on the ruptures and breaches structuring social formations (2011, 78). Indeed, he argues, it is only when media focus on the fundamental antagonism underlying all social practice that they can create a true public sphere, facilitating both the ‘public’ itself, and the means for political contestation.

In this view, journalism can indeed enact ideology critique and escape the naturalisation of hegemonic discourses, but only when it is attuned to the ‘cracked’, or incomplete, nature of all social formations. Such an approach, if applied to FTAs and IPRs, would focus not on the positively expressed aspects – the laws, administrations, and negotiating forums – but on the competing definitions of key terms, the strategic campaigns to naturalise meaning, the multiple social actors engaged in such definition, and the inconsistencies and contradictions concealed within naturalisations. In short, it would focus not on the positively manifest aspects of how things ‘fully are’, but on the negatively latent forces preventing aspects from ‘ever fully being’.

## **Conclusion**

Lacan’s and Laclau’s core contribution to philosophical inquiry is their negative ontology focusing on the impossibility of full closure in identities and discourses. There is no escape from ideology and fiction in this view, only greater or lesser degrees of sensitivity to the relative structuration and competing hegemonic projects constituting symbolic reality. There is no complete capture of the Real. This approach is at odds with mainstream journalism’s realist ontology, and presents an uncomfortable challenge to ‘truth-telling’ in general in an age of multiple realities and ‘post-factual’ political discourse.

This article has used four historical junctures in the construction of FTAs and IPRs to illustrate Lacanian/Laclauian negative ontology and the ‘impossibility’ of ‘free trade’. It has then outlined the realist ontology of mainstream journalism and argued that such an approach conceals contingency and further naturalises hegemonic meaning. Far

from engaging critically with ideology, such realism only reproduces and reinforces dominant ideologies. However, as this article has demonstrated, a negative ontological approach can be usefully applied to reactivate key contemporary political concepts – such as IPRs and FTAs – at the very least through a detailed historico-contextual account of their formation. Finally, it has argued that despite its incommensurability with realist ontology, the Lacanian/Laclauian approach can indeed be articulated within journalistic discourse through moments of ‘mediality’ specifically attuned to the inescapable contingency and antagonism of social forms. By retrieving historical concealments and reactivating naturalised discourses, mainstream journalism can indeed capture the fundamental antagonisms shaping social phenomena, and facilitate a critically engaged public sphere providing the possibility for social change.

## Notes

1. As with the nineteenth century British pro-patent campaign, TRIPS did not emerge self-evidently, but was contingently constructed by social actors seeking to build strategic hegemonic projects. Indeed, the story of how corporate leaders from IP-intensive industries aggressively lobbied for stronger patent protections in the 1980s and 1990s has been well documented as an exemplary instance of the power of corporate activists to influence government policy (Drahos and Braithwaite 2002; Matthews 2002; Owen 2015; Sell 2003).
2. Much can be said about Donald Trump’s relationship with media and ‘fake news’, and this article does not begin to exhaust the possibilities. Rather, these brief comments are included to further illustrate the nuances of Lacanian ontology, as applied to news analysis.

## References

- Baird, S. 2013. ‘Magic and Hope: Relaxing Trips-Plus Provisions to Promote Access to Affordable Pharmaceuticals’. *Boston College Journal of Law & Social Justice* 33 (1): 107–145.
- Correa, C. M. 2007. *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement*. Oxford, England: Oxford University Press.
- Critchley, S. 2004. ‘Is There a Normative Deficit in the Theory of Hegemony?’ In *Laclau: A Critical Reader*, edited by S. Critchley and O. Marchart, 113–22. London: Routledge.
- Drahos, P. and J. Braithwaite. 2002. *Information Feudalism: Who Owns the Knowledge Economy?* London: Earthscan.
- Glynos, J. 2001. The Grip of Ideology: A Lacanian Approach to the Theory of Ideology. *Journal of Political Ideologies* 6 (2): 191–214.
- Halbert, D. J. 2005. *Resisting Intellectual Property*. New York: Routledge.
- Jacquot, B. 1974. *Jacques Lacan: La psychanalyse 1 & 2*. Available from <https://www.youtube.com/watch?v=DIMDwdoNDoQ>

Kelsey, J., ed. 2010. *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement*. Wellington: Bridget Williams Books.

Lacan, J. 1978. *The Seminar, Book XI: The Four Fundamental Concepts of Psychoanalysis*. Translated by Alan Sheridan. New York: W.W. Norton.

Lacan, J. 1991. *The Seminar, Book I: Freud's Papers on Technique, 1953-1954*. Translated by John Forrester. New York: W.W. Norton.

Lacan, J. 2006. *Écrits*. Translated by Bruce Fink. New York: W.W. Norton.

Laclau, E. 1990. *New Reflections on the Revolution of Our Time*. London, England: Verso.

Laclau, E. 1991. 'The Impossibility of Society'. *Canadian Journal of Political and Social Science* 15 (1/3):24-27.

Laclau, E. 2005. *On Populist Reason*. London, England: Verso.

Laclau, E. and C. Mouffe. 1985. *Hegemony and Socialist Strategy*. London: Verso.

Machlup, F. and E.T. Penrose. 1950. 'The Patent Controversy in the Nineteenth Century'. *The Journal of Economic History* 10 (1): 1-29.

Marchart, O. 2005. 'The Absence at the Heart of the Presence: Radical Democracy and the "Ontology of Lack"'. In *Radical Democracy: Politics between Abundance and Lack*, edited by L. Tønder & L. Thomassen, 17-31. Manchester: Manchester University Press.

Marchart, O. 2011. 'From Media to Mediality: Mediatic (Counter-)apparatuses and the Concept of the Political in Communication Studies'. In *Discourse Theory and Critical Media Politics*, edited by L. Dahlberg and S. Phelan, 64-81. New York: Palgrave Macmillan.

Matthews, D. 2002. *Globalising Intellectual Property Rights: The TRIPS Agreement*. London: Routledge.

Mouffe, C. 2005. *On the Political*. New York: Routledge.

Owen, T. 2013. 'From 'Pirates' to 'Heroes': News, Discourse Change, and the Contested Legitimacy of Generic HIV/AIDS Medicines'. *The International Journal of Press/Politics* 18 (3): 259-280.

Owen, T. 2014. 'The "Access to Medicines" Campaign vs. Big Pharma: Counter-hegemonic Discourse Change and the Political Economy of HIV/AIDS Medicines'. *Critical Discourse Studies* 11 (3): 288-304.

Owen, T. 2015. *Patents, Pills, and the Press: The Rise and Fall of the Global HIV/AIDS Crisis in the News*. New York: Peter Lang.

Panagariya, A. 1999. TRIPS and the WTO: An Uneasy Marriage. In *The Next Negotiating Round: Examining the Agenda for Seattle*, edited by J. Bhagwati, 291-302. New York: Columbia University Press.

Phelan, Sean. 2014. *Neoliberalism, Media and the Political*. London, Palgrave Macmillan.

Sachdeva, Sam. 2016. 'How TPPA Will Affect Your Prescriptions'. *The Dominion Post*. 29 January.

Sell, S. K. 2001. 'TRIPS and the Access to Medicines Campaign'. *Wisconsin International Law Journal* 20: 481-522.

Sell, S. K. 2003. *Private Power, Public Law: The Globalization of Intellectual Property Rights*. Cambridge: Cambridge University Press.

Sell, S. K. 2011. 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP'. *Journal of Intellectual Property Law* 18: 447-478.

Sell, S. K. and C. Ma. 2001. 'Moments in Law: Contestation and Settlement in the History of Intellectual Property'. *Review of International Political Economy* 8 (3): 467-500.

Stavrakakis, Y. 1999. *Lacan and the Political*. London: Routledge.

United States Congress. 1986. *Intellectual Property Rights in an Age of Electronics and Information* (Office of Technology Assessment Report OTA-CIT-302, April 1986). Washington, DC: United States Government Printing Office.

Weissman, R. 1996. 'Long, Strange Trips: The Pharmaceutical Industry Drive to Harmonise Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries'. *University of Pennsylvania Journal of International Economic Law* 17: 1069- 1125.

Young, A. 2016. 'Twelve-Nation Trade Deal Took Long Journey'. *The New Zealand Herald*, 1 February, A007.

Zelizer, B. 2004. *Taking Journalism Seriously: News and the Academy*. London: Sage.

Žižek, S. 1989. *The Sublime Object of Ideology*. London: Verso.

Žižek, S. 2006. *How to Read Lacan*. New York: W.W. Norton.