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Leaked document suggests new opportunities

In the dizzying array of leaked documents that seems to be the norm for diplomatic relations in the Internet Age, last week saw the release of another confidential draft of a potential future intellectual property treaty. The release may be good news for local businesses. The draft treaty in question is the Trans-Pacific Partnership (TPP). The next round of negotiations is scheduled to begin Monday in Singapore. When the treaty is concluded it may provide additional protections and incentives for local businesses who seek to expand their trade with the Asia-Pacific Region. More critically, the TPP may give IP owners a chance to raise IP standards on a regional basis. Patent owners will find the TPP particularly useful. If the draft is accepted, the TPP will allow them to apply to patent infringement some of the same practical steps to enforcement established by the Anti-Counterfeiting Trade Agreement (ACTA) for copyright and trademark owners. Those who oppose the constant advance in IP protection internationally will be even less happy with the TPP since the draft raises protection standards even higher.

Recent events in Japan, and their impact on U.S. businesses, underscore how tightly the global economy is woven. According to information released by the Department of Commerce, in 2009 Illinois exported \$26.7 billion in goods to Asia-Pacific countries. Although Japan is not currently participating in the TPP negotiations, other strong market participants include Australia, Chile, Malaysia, New Zealand and Singapore. Emerging developing countries such as Brunei Darussalam, Peru and Vietnam are also participating in the negotiations.

Since 2001, the United States has 12 negotiated free trade agreements (FTAs) with 17 countries. Each of these FTAs has had a separate "chapter" dealing with IP protection. Over time these chapters have grown. In the first negotiated FTA for the 21st century, with Jordan, the IP chapter was five pages and contained articles dealing with trademarks, geographic indications, copyright and related rights, patents, enforcement and restrictions on the use of confidential data for marketing approval. By contrast, the IP chapter in the latest negotiated treaty, with South Korea, is 34 pages and contains articles covering such additional topics as "domain names on the Internet," "protection of encrypted program-carrying satellite and cable signals" and "understandings regarding



Global IP

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certain public health measures" (dealing with access to patented pharmaceuticals). Beyond these additional topics, individual subject matter articles have been greatly expanded. Thus, for example, the copyright article includes such additional issues as anti-circumvention and rights management protection, while the enforcement section includes obligations governing Internet service provider liability, alternative dispute resolution and expanded seizure and customs measures, among others.

Even the coverage of patent rights, given relatively short shrift in ACTA, is expanded well beyond its earlier treatment in the Jordan FTA. In the South Korean FTA, the patent articles require patent protection for qualifying new uses of known products, a one-year grace period for information disclosed by the patent applicant prior to the relevant application date, and detailed definitions for such critical application issues as "clear and complete" disclosures, utility (referred to as "industrial applicability" in the FTA) and enablement.

These obligations, and many others which appear in increasing number in various FTAs, go well beyond the standards required by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), the multinational IP treaty established in 1994 that is the acknowledged floor for IP protection globally. The leaked TPP draft continues the trend of increasing IP protection in U.S. FTAs. Many commentators have referred to previous advances as TRIPS plus, in the sense of making mandatory certain actions that

were optional in TRIPS, such as the obligation to destroy seized counterfeit goods. But many of the new provisions in the TPP are actually TRIPS beyond. They change the standards of protection in TRIPS in ways that eliminate agreed-upon differential domestic treatment. For example, for patents of diagnostic, therapeutic and surgical methods for the treatment of humans or animals, the TPP not only removes the express right of countries to refuse patent protection, it obligates the extension of patent protection to such inventions. Bracketed areas of the text suggest that additional TRIPS beyond provisions will be added, including patent term extension and Internet retransmission (webcasting) provisions.

It is currently unclear whether the final TPP will as strongly enhance TRIPS as the current leaked draft suggests. The presence of bracketed additional provisions, without suggested text, indicates that this draft may truly be a rough draft. Earlier leaked documents from New Zealand and Chile suggest that at least these two participants reject the need for any IP standards beyond those established in TRIPS. Instead, New Zealand stressed that the TPP should seek to improve cooperation among the member countries, as opposed to creating new rights or raising IP standards.

On one level, the negotiation of the TPP has been as secret as the earlier FTAs and ACTA. If the leaked draft is accurate, however, it places the TPP within the traditional model of earlier FTAs, building on the most recent FTA (South Korea), so that the general public has some broad knowledge of the provisions at issue. Moreover, the U.S. trade representative, who has lead negotiating responsibility, has been actively seeking industry participation in the TPP. Unlike earlier FTAs, it has a dedicated website containing briefings on the negotiation sessions. As part of its Open Government Flagship Initiative, it has also invited IP stakeholders to provide on-site presentations during negotiation sessions, and has reportedly even allowed stakeholders to make presentations in the negotiating room to other parties. This industry out-reach appears ongoing. It presents an excellent opportunity for local business and civil societies to participate in the process and assure that their interests are adequately protected. For those seeking further information on participation possibilities, they should consult the website at ustr.gov/tpp.