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Will the Trans-Pacific Partnership help Chicago IP owners?

Secret meetings, confidential agreements among superpowers, leaked documents. Sound like a plotline for "Spectre," the new James Bond movie? Unfortunately, this is the true tale of the Trans-Pacific Partnership.

On Oct. 5, a dozen countries, including the United States, Canada, Australia and Vietnam, announced agreement on the TPP.

This free trade agreement, expected to affect more than 40 percent of the world's trade, has been the subject of high praise from the Obama administration and condemnation by Republican presidential candidates.

It is hard to decide whether this agreement will help or harm Chicago IP owners, because the agreement is still not publicly available. Although I am generally skeptical of the authenticity of leaked negotiating texts, a leaked version of what appears to be the final version of the intellectual property rights chapter contains indications of authenticity that make consideration of its provisions a useful predictive activity.

The document is posted on WikiLeaks at wikileaks.org/tpp-ip3/.

There is no question that the TPP is strongly protectionist in nature. Many of the provisions contained in the leaked text actually reflect present U.S. practices. Notably, the protection for anti-circumvention devices has been expanded from earlier international obligations to require protection for "access" measures and limit fair-use applications (Article QQ.G.10).

These provisions are in keeping with U.S. obligations under Section 1201 of the Digital Millennium Copyright Act.

The TPP similarly imposes the first plurilateral obligation that members adopt "safe harbor" provisions for copyright infringement liability for Internet service providers. The requirement and scope for such protections is virtually identical to Section 512 of the DMCA. These requirements include the adoption of the controversial "notice and takedown" provisions of U.S. law, requiring ISPs to remove allegedly infringing content on notice from the copyright owner (Article QQ.I).

For those who believed the Anti-Counterfeiting Trade Act was dead in 2011, the enforcement provisions of the TPP prove otherwise. Many of the enforcement provisions have been lifted almost verbatim from ACTA. They cover practical issues such as validity presumptions and destruction obligations for counterfeit goods. (Articles QQ.H.2 & QQ.H.4).

But they also include some of the ACTA's more controversial provisions. Among them is granting courts the power to require "identification of the third persons alleged to be involved in the production and distribution of [infringing] goods" (Article QQ.H.4.13), which has already raised a firestorm of protest due to it application to digital infringement and its adverse impact on end user privacy.

The TPP's treatment of Internet liability is certain to raise protests from groups that seek to dilute copyright enforcement on the Internet. In addition to imposing criminal liability for "aiding and abetting" copyright piracy on a "commercial scale," the TPP redefines "commercial scale" internationally to include "significant acts, not carried out for commercial advantage or financial gain, that have a substantial prejudicial impact on the interests of the copyright ... owner in the marketplace" (Article QQ.H.7.3).

This change eliminates any question whether sites such as The Pirate Bay, which do not charge for accessing the pirated works they distribute, are subject to criminal prosecutions.

With regard to substantive protections, however, the TPP presents a mixed bag, at best. On the plus side for patent owners, the TPP requires that patents be extended to "new uses of a known product, new methods of using a known product [and] new processes of using a known product" (Article QQ.E.1.2). It also requires minimum five-year terms of protection for clinical data for pharmaceuticals and biologics (Articles QQ.E.16, QQ.E.20). Such protection lasts even after the patent "terminates" (Article QQ.E.22). These provide significant benefits for local pharmaceutical companies previously unavailable internationally.

GLOBAL IP

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At the same time, however, the TPP gives greater power to traditional knowledge-based challenges to patentability. Article QQ.B.xx.3 exhorts parties to "pursue quality patent examination," which expressly includes training and consideration of traditional knowledge, or TK, as relevant prior art. These provisions will undoubtedly lead to the greater use of TK as a basis for rejection of patentability domestically. Research facilities that rely on bioprospecting will need to adopt new procedures for tracing TK-based inventions. They should also consider strengthening equitable benefit sharing provisions in current material transfer agreements to enhance their rights to continue to use critical TK in future development efforts.

For trademark owners, there are two major changes in protection that simultaneously strengthen protection for Chicago mark holders while also placing unusual strains on international relations. Article QQ.C.1 makes the protection of so-called non-traditional marks, such as sound and motion marks, easier by eliminating a critical stumbling block to their international protection — the requirement that any mark be reducible to a "visually perceptible sign."

This extension is also an explicit rejection of TRIPS. Under Article 15 visual perceptibility is expressly allowed as a registration prerequisite.

With the present emphasis on locally sourced food and agricultural products, geographic indications, such as Champagne, have become important marketing tools. Contrary to present international obligations, the TPP requires any conflicts between geographic indications and trademarks be resolved in favor of the trademark owner (Article QQ.C.3).

It expressly rejects the newly amended Lisbon Agreement that provides significantly stronger protection for geographic indications (discussed in my Sept. 1 column) (Article QQ.D.3). In fact, Article QQ.D.5 requires signatories to notify other members if they are considering any "international agreement" relating to geographic indications to assure compliance with the TPP — an unheard of intrusion into domestic sovereignty.

For copyright owners, the TPP imposes more stringent obligations for protecting performers' rights than currently exist in U.S. law, which only grants performers rights in webcasts.

The TPP requires rights be granted in *all* media and applies the obligation retroactively (Articles QQ.G.6, QQ.G.8). This should not only reignite the battle over royalty divisions between composers and performers; its retroactivity requirements should also give rise to another battle over the removal of "performances" from the public domain.

For those who seek stronger protection for their IP rights, they should contact their representatives in Congress to express their support for the TPP.

Those opposed to such protections should do the same. The clock is ticking.