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## PUBLIC STATEMENT ON THE U.S. PROPOSAL FOR A LIMITATIONS AND EXCEPTIONS CLAUSE IN THE TRANS-PACIFIC PARTNERSHIP

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The Office of the United States Trade Representative made a public announcement through its website on July 3, 2012, during the San Diego round of Trans-Pacific Partnership (TPP) negotiations, that it was proposing, for “the first time in any U.S. trade agreement,” a provision “that will obligate Parties to seek to achieve an appropriate balance in their copyright systems in providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research.” We offer the following points of analysis as academics interested in the role of copyright limitations and exceptions in providing enabling conditions for important social and economic purposes in all countries.

The USTR’s proposal to require ‘balance’ in copyright systems can be seen as a first response by the U.S. to the growing chorus of calls for increased attention to the need for international harmonization of mandatory minimum limitations and exceptions to intellectual property rights. The Washington Declaration on Intellectual Property and the Public Interest, for example, recorded the views of hundreds of intellectual property scholars and other experts that limitations and exceptions are important “in countering expansive trends in intellectual property,” but are “under threat, especially from efforts to recast international law as a constraint on the exercise of flexibilities in domestic legislation.” As explained in the Washington Declaration, limitations and exceptions are a vital component of any intellectual property doctrine, and often serve the same innovation and creativity enhancing purposes as intellectual property itself:

*“Limitations and exceptions are positive enabling doctrines that function to ensure that intellectual property law fulfills its ultimate purpose of promoting essential aspects of the public interest. By limiting the private right, limitations and exceptions enable the public to engage in a wide range of socially beneficial uses of information otherwise covered by intellectual property rights — which in turn contribute directly to new innovation and economic development. Limitations and exceptions are woven into the fabric of intellectual*

*property law not only as specific exceptional doctrines ('fair use' or 'fair dealing,' 'specific exemptions,' etc.), but also as structural restrictions on the scope of rights, such as provisions for compulsory licensing of patents for needed medicines."*

*Washington Declaration on Intellectual Property and the Public Interest (2011)*

To counter the growing trend of using international trade and other agreements to enact highly specific and enforceable proprietor rights standards, with little positive attention to commensurate limitations and exceptions, the Declaration voiced broader calls in the academic and advocacy communities for "efforts to defend and expand as appropriate the operation of limitations and exceptions in the years to come," including through "the development of binding international agreements providing for mandatory minimum limitations and exceptions."

The U.S. proposal may have a number of positive impacts, both for any ultimate TPP agreement and for the general field of intellectual property law. The substance of the U.S. proposal could be beneficial for the pursuit of a better balance in international agreements. The reports that it is being framed as a mandatory requirement could give consumers and businesses dependent on limitations and exceptions an enforceable norm to counter overextensions of proprietary rights. This might help such interests advocate for appropriate limitations and exceptions as a necessary part of free trade agreement implementation legislation, and provide a basis on which to challenge such laws if they fail to promote an appropriate balance of proprietor and user rights. Such a clause could have been helpful in Colombia, for example, where a highly unbalanced implementation of the U.S.-Colombia FTA has led to a constitutional challenge of the law for infringing on free expression and other human rights.

The U.S. proposal may be helpful in countering trends toward restrictive interpretations of the so-called "three-step test" in international intellectual property law. The three-step test emanates from the Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works, which enables national legislation "to permit the reproduction of [protected] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." Recent formulaic interpretations by World Trade Organization have interpreted the clause to require three "cumulative" steps of analysis that restrict domestic authority to grant exceptions to copyright. Following this, questions have been raised by some as to whether the first step of the test – requiring that limitations and exceptions be limited to "certain special cases" – should prevent countries from adopting limitations and exceptions that, like U.S. fair use rights, turn on more abstract and flexible balancing criteria, applied on a case-by-case basis in a wide range of circumstances. Although this interpretation of the three-step test is far from inevitable – or even plausible – it has been enough to discourage many nations from considering this approach. At the same time, the lack of such flexibility (and dynamism) is a real problem in

many countries with “closed list” systems, characterized by specifically-enumerated and often very narrow, limitations. Many such closed lists lack exceptions clearly applicable to the digital age or to evolving technology and practices and also lack a textual basis or interpretative tradition for adapting existing limitations and exceptions to meet new technological, social or cultural circumstances. The U.S. proposal’s encouragement of “balance” in copyright systems, including explicit reference to speech activities that U.S. protects under fair use, provides strong evidence that flexible limitations and exceptions are not intended to be prohibited by the three-step test, at least in the U.S. view.

The U.S. proposal may have broader effects in ongoing and future international negotiations. The provision signals openness on the part the United States to accepting expansions of mandatory limitations and exceptions in international intellectual property law – a key focus of the “development agenda” in the World Intellectual Property Organization (WIPO). This shift in policy may aid the negotiations of binding treaties on limitations and exceptions for the blind, for libraries, and for educational institutions at WIPO, as well for the inclusion of mandatory limitations and exceptions in other instruments.

It is difficult to provide specific textual commentary on a provision we cannot see. And thus we feel obliged to repeat the request we and others have made numerous times that international intellectual property law restricting domestic policy options be made in the open, under conditions of transparency and broad stakeholder participation at least as open as would be observed in similar negotiations in the World Intellectual Property Organization.

Assuming that USTR has chosen the words in its press release carefully, the provision may only oblige countries to “seek to achieve” balance, rather than actually provide such balance, in its copyright systems. This framing dilutes the positive potential of the clause to blunt over-expansive framing of proprietor rights in specific countries.

One interest not explicitly mentioned in the USTR announcement is that of people with disabilities. KEI has proposed, for example, that TPP include “a provision to permit the cross-border exchange of accessible format works for persons who are visually impaired or otherwise disabled.” It may also be appropriate to list the interest of providing access for people with disabilities as one of the illustrative examples of the kind of activities to be protected by way of the ‘balance’ required by the new clause.

There is a second component of the U.S. proposal that was not described in the USTR announcement, but that we nevertheless expect. Every U.S. FTA IP chapter has included a variation of a clause applying a Berne-style three-step test to, in the words of the U.S. FTAs, “confine” domestic flexibility in crafting limitations and exceptions. This clause, on its face, is applicable to all rights covered by the agreement. One can assume, therefore, that the U.S. will include a similar provision in its TPP proposal.

The inclusion of a U.S.-version of a three-step test in the TPP would cause numerous potential problems for the kind of balance in copyright systems that the new USTR proposal claims to

advance. Including a three step test in the TPP would open many more avenues for attacking domestic limitations and exceptions that exist under multilateral agreements. By virtue of its inclusion in an agreement with its own dispute settlement procedures, the provision would effectively expand standing, venue choices, and causes of action for challenging local limitations and exceptions provisions, including through investor-state disputes by private companies and in “non-violation” complaints, neither of which are available under the World Trade Organization agreement on Trade-Related Aspects of Intellectual Property Rights. Traditionally, moreover, the three-step test has not been applied to features of copyright law that involve the core definition of exclusive rights, as opposed to the limitations superimposed on these rights. The distinction may sometimes be less than perfectly clear, but – for example – the fact that U.S. does not recognize a “private performance right” (in addition to a public one) would generally not be seen as a legislative choice subject to the three-step test. The same could be said of the national legislature’s decision to endorse a “first sale” or exhaustion doctrine as part of its definition of the scope of the distribution right. USTR has an opportunity in upcoming TPP discussion to make clear that its proposal incorporates these long-standing understandings. Another welcome clarification would be a declaration that the U.S. proposed three step test for the TPP does not apply to the so-called “small exceptions” of the Berne Convention (for short quotations, news reporting and illustrative use in teaching), which were not historically subject to the three-step test.

The U.S. proposal misses opportunities to use the TPP to strengthen limitations and exceptions further. It could, for example, clarify that the factors in the three-step test “are to be considered together and as a whole in a comprehensive overall assessment,” as recommended by a declaration of experts organized by the Max Planck Institute. Such a provision could help counter the restrictive and much criticized interpretations of the three-step test by WTO panels discussed above.

It is unclear whether the U.S. proposal will include other positive clarifications of limitations and exceptions found in some FTAs. For example, the United States-Chile Free Trade Agreement includes a restatement of the affirmation in the WIPO Copyright Treaty (WCT) that the FTA, like the WCT, “permits a Party to carry forward and appropriately extend into the digital environment limitations and exceptions in its domestic laws which have been considered acceptable under the Berne Convention,” as well as to “devise new exceptions and limitations that are appropriate in the digital network environment.” The U.S. Chile FTA also includes the important savings clause from the WCT, clarifying that the restatement of the test “neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention, the WIPO Copyright Treaty (1996), and the WIPO Performances and Phonograms Treaty (1996).” This clause displays more sensitivity to the problem of conflict in interpretations between free trade agreements and the multilateral system. The Australia-U.S. FTA contains similar language.