

September 8, 2012

Ambassador Ronald Kirk  
Office of the United States Trade Representative  
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Dear Ambassador Kirk:

We appreciate having had the opportunity to meet recently with members of the Administration regarding the position the United States has taken concerning limitations and exceptions in copyright law as part of the Intellectual Property chapter of the proposed Trans Pacific Partnership Agreement (TPP). We write to follow up by expressing our views on language the United States could propose that we believe would help it answer some of the criticisms that the U.S. position is insufficiently attentive to the public interest.

While we appreciate the time that Administration officials were able to set aside for a private meeting, we continue to believe that setting substantive international intellectual property obligations through the closed door negotiating process developed for the negotiation of trade tariff and quota concessions is antithetical to the democratic values our country holds dear, as well as to the public interest concerns that intellectual property policy should promote. Without the ability to read the actual U.S. proposals for the TPP, we cannot provide specific views to the Government or to the public on the details of the proposals and their potential implications for public interest concerns. We have made these points before (see <http://infojustice.org/archives/21137>), and without belaboring the point, we simply state here our opinion that the Administration's response to these procedural concerns has not been satisfactory. All international intellectual property law making should be conducted through public and transparent processes.

Pursuant to meetings with multiple members of the U.S. government on its copyright

proposals in the TPP negotiation, we have come to the following understandings with regard to the U.S. position:

- Consistent with other Free Trade Agreements, the U.S. proposal would likely "confine" limitations and exceptions to exclusive rights under copyright "to certain special cases which do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder." (Chile-US FTA). This language, on its face, would apply to limitations and exceptions that are currently not subject to the similarly worded three step test in Article 9 of the Berne Convention for the Protection of Literary and Artistic Works. The United States considers, however, that these so-called Berne "small exceptions" for quotations and other purposes are in compliance with the three-step test in its TPP proposal, were it to be applied to them.
- The United States intends its proposals in the TPP and other trade agreements to be fully consistent with the World Intellectual Property Organization Internet Treaties (i.e. the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty), including all of the Agreed Statements. The U.S. specifically affirms and supports the Agreed Statement to WCT article 10, reading:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention
- The goal of the United States in proposing an obligation in the TPP concerning limitations and exceptions is not to further limit policy discretion to devise and implement limitations and exceptions at the national level that comply with the existing multilateral treaties on copyright, but rather to expand this discretion through a new provision that would oblige TPP Members to "seek to achieve balance" through adoption of limitations and exceptions.
- The United States is not categorically opposed to the adoption of Agreed Statements as part of the TPP, although it has not done so for other free trade agreements, and it does not have a position on this matter at present. The more common model would be to include any agreed interpretations in the text, e.g., through footnotes.
- The United States proposed three-step test would apply only to limitations and

exceptions to exclusive rights granted to copyright owners rather than to provisions that delineate the scope of such rights. For example, the absence of an exclusive right of private performance of a copyrighted work in U.S. law would not be a limitation or exception subject to the three-step test.

- The United States takes the position that nothing in existing U.S. copyright law, as interpreted by the federal courts of appeals, would be inconsistent with its proposed three-step test. This would include, for example, the transformative use standard recognized in cases such as *Bill Graham Archives v. Dorling Kindersley Publishing, Inc.*, 448 F.3d 605 (2d Cir. 2006) and the holding in *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), concerning the definition of a "copy."
- It is not the intent of the United States that the Investor-State provisions of the TPP would apply to provide causes of action for investors through the intellectual property chapter that could be used to appeal to an international tribunal fair use or other interpretations of the U.S. Copyright Act by U.S. courts. Compliance with intellectual property obligations in international agreements has been a matter of state-to-state consultation and dispute resolution, and the United States does not intend to alter that process in the TPP.
- The United States intends for provisions that use language from the U.S. Copyright Act in existing bilateral Free Trade Agreements to which the United States is a party, and in the TPP, to be interpreted as they have been by federal courts in the United States. For example, the safe harbor for internet service providers in other FTAs applies only applies to "storage" of information at the direction of a user. But U.S. interpretations of the this same language apply the safe harbor beyond the narrow and literal issue of storage to a broader range of user activity, including, for example, the dissemination of information using the network. It is not the intent of the United States to limit any Party's national safe harbor to one that is literally restricted only to "storage."
- The United States describes its proposals and past FTA language as being "consistent with," and as "coloring within the lines of," U.S. law, even when its proposals constrain Congressional choices on matters that are currently the subject of discussion or concern. For example, the United States has promoted restrictions on parallel importation of copyrighted works, even though such restrictions are not expressly provided in the U.S. Copyright Act, are the subject of a U.S. Supreme Court case in *Kirtsaeng v. John Wiley & Sons*, 654 F.3d 210 (2d Cir. 2011) (cert. granted), and, in the final assistance, may be subject to Congressional action. The United States has also obtained obligations in some FTA's, such as the U.S.-Colombia Free Trade Agreement, to prohibit adoption of

statutory licensing for the retransmission over the Internet of broadcast television signals, even though the U.S. Copyright Act currently contains such licenses for other media (i.e. cable and satellite television), and Congress has held hearings on the potential desirability of similar licenses for internet service providers. Some argue that deciding an open policy question in an FTA is acceptable because Congress can always change the law in ways that violate our international agreements, or that its assent to previous Free Trade Agreements is the equivalent of deciding the issue as a matter of national policy, notwithstanding the provisos in FTA implementing legislation that assert that the obligations therein make no change to U.S. law.

These understandings may be helpful in crafting additional language in the TPP that more fully protects the public interest that copyright law is meant to promote and that recognizes that Congress is better suited to address undecided policy questions concerning the balance of interests between copyright owners and the public. For example, the following types of proposals would appear to be fully consistent with the U.S. position as described above, and would help the U.S. proposal appear more sympathetic to public interest concerns:

- Stating that nothing in the TPP, including in the crafting of its three-step test, further limits Parties' discretion to implement limitations and exceptions that comply with the existing multilateral treaties on copyright, including Berne, WCT and WPPT, including the Agreed Statements to those instruments.
- Making clear that the so-called "small exceptions" in Berne are not subject to, or are fully compliant with, the proposed three-step test and that nothing in the TPP further restricts a Party's right to adopt such exceptions.
- Making clear that the three-step test does not apply to definitions of the scope of rights, as opposed to limitations of an exclusive right already defined.
- Including express protections for limiting principles in the interpretation of U.S. law, such as the interpretation of the fair use doctrine in U.S. law in cases such as *Bill Graham Archives*, and the interpretation of a "copy" in *Cartoon Network*.
- Crafting appropriate exceptions from application of the Investor-State dispute provisions to ensure that there is no private cause of action in an international dispute resolution forum for investors to "appeal" interpretations of limitations and exceptions and other intellectual property substantive law by national courts under the guise that such interpretations work a "taking" of the investor's property.
- Clarifying that if the TPP or any other trade agreement implements language identical to that in the U.S. Copyright Act, the instrument will define such

language to give effect to the interpretation given by the federal courts in the United States, at least as of the time the agreement enters into force.

Finally, we would like to register our concern that the Administration may be proposing restrictions on domestic policy options on topics under current discussion and debate on which Congress should act in the first instance. This includes, as discussed above, areas such as parallel importation and the possibility for statutory licenses for internet retransmission. Such standards restrict Congressional options in the face of currently open questions and interpretations, and the justification that Congress can always choose to enact national legislation that overrides our international legal obligations is inadequate. The fact that such usurpation of Congressional authority over domestic policy is taking place through forums where a full range of potentially interested stakeholders – especially consumers – cannot engage, is all the more troubling. We encourage you to closely analyze all U.S. positions in the TPP for such issues, and to eliminate them from the U.S. proposal.

Sincerely,

Peter Jaszi

Michael Carroll

Sean Flynn