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 protest 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 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.D). 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 many 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.13), which has already raised a firestorm of protest due to its 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.13).

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 proceedings. 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 provisions support for the TPP.

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