

**REQUEST FOR COMMENTS CONCERNING THE PROPOSED  
TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP  
AGREEMENT**

**Docket No. USTR-2013-0019**

**COMMENTS OF PUBLIC KNOWLEDGE**

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Public Knowledge (PK) commends the Office of the United States Trade Representative (USTR) for inviting public comments on this important matter. PK hopes this invitation marks the beginning of an open and inclusive process that informs the Transatlantic Trade and Investment Partnership Agreement (TTIP). These comments will provide some suggestions for achieving that objective. With respect to the substantive aspects of the agreement, these comments will focus on copyright matters.

Copyright policy has been the subject of much debate in the United States (U.S.) The Library of Congress recently rescinded its earlier decision to permit a majority of cell phone owners to unlock their phones in order to use it on a different carrier's network. That decision sparked significant public outcry prompting lawmakers to propose amendments to the law. However, some expressed concerns that these amendments would be incompatible with certain U.S. free trade agreements (FTAs). The cell phone unlocking debate demonstrates that international agreements, such as the proposed TTIP, can have an impact on the domestic policy space. As it negotiates the TTIP, PK urges the USTR to be aware of this impact and to therefore negotiate an agreement that preserves maximum policy flexibility for Congress. PK believes that the complexity of copyright issues militates against their inclusion in trade agreements. However, if the USTR decides to include a chapter on copyright, that chapter should provide for high-level principles and leave the details of implementation to the U.S. Congress and the national legislatures in European countries. Such an approach would also ensure compatibility with the distinct copyright regimes present in the U.S. and the European Union (E.U.).

**I. The USTR must conduct the TTIP negotiations in an open and inclusive manner.**

- a. Open and inclusive negotiations will ensure that the TTIP benefits from the expertise of a broad range of stakeholders and will reduce public outcry against it.*

In conducting the TTIP negotiations, the USTR must seek broad public input at all stages of the negotiation. This would include: soliciting broad input before formulating negotiating objectives and crafting treaty language; sharing U.S. proposed treaty language with all stakeholders including representatives of industry and public interest organizations; and releasing proposed treaty text for public comment before the treaty is finalized.

Such an inclusive approach is important because modern trade agreements regulate many matters that, at their core, are matters of national policy. Thus, they frequently regulate issues such as Intellectual Property (IP), privacy, health policy, environmental policy and telecommunications policy. Rules affecting these policies should be crafted in a democratic manner with the participation of all stakeholders, including public interest representatives.

There are two benefits to this approach. First, an open and inclusive approach will ensure that the considered expertise and perspectives of a broad range of stakeholders, including public interest representatives, academics, and business representatives, inform the TTIP resulting in an agreement that protects and promotes the interests of all Americans. Many of these stakeholders are currently unable to participate in formulating U.S. trade agreements.

With respect to copyright, this broad range of input would ensure that the TTIP protects rights of copyright owners and many user communities including libraries, archives, museums, technology companies, and the public. As explained in greater detail below, this approach will ensure both economic development and preservation of cherished domestic values such as free expression.

Second, failing to use an open and inclusive approach will create an outcry against the agreement among members of the public. The mass protests against the Anti-Counterfeiting Trade Agreement (ACTA) in Europe demonstrated the negative impact of negotiations conducted in secret. ACTA's secrecy and exclusion of public interest perspective from the negotiation process aggravated the fear that the agreement would harm the public interest.<sup>1</sup> This fear led to popular protests against the agreement making it politically infeasible for the European Parliament to ratify it. A more inclusive approach that took views of the public into account might have averted this reaction.

*b. The USTR should provide detailed information, including treaty text, to a broad range of stakeholders, and seek their input throughout the negotiation process.*

A transparent and inclusive process should, at a minimum:

- solicit public input before the start of negotiations;
- develop negotiating positions based on this input;
- share that position, including any treaty language, with all domestic constituencies, including public interest representatives;
- provide information, including treaty language, and seek public input throughout the negotiating process; and
- publish treaty language for comment with sufficient time before conclusion to ensure some renegotiation based on public comments.

The USTR's invitation of public comment is the start of this. The USTR should follow this initial comment process with a more sustained engagement with all U.S. stakeholders, including public interest representatives. Furthermore, it should also release negotiating texts periodically and seek input from all stakeholders.

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<sup>1</sup> See Dave Lee, *Acta Protests: Thousands Take To Streets Across Europe*, BBC News, February 11, 2012, <http://www.bbc.co.uk/news/technology-16999497>; Charles Arthur, *Acta Criticized After Thousands Protest in Europe*, The Guardian, February 13, 2012, <http://www.guardian.co.uk/technology/2012/feb/13/acta-protests-europe>.

This approach is in marked contrast to the recent ACTA negotiations, which took place in extreme secrecy. While USTR officials did not engage in a frank public discussion about the reasons for this secrecy,<sup>2</sup> officials at the USTR have, on rare occasion, publicly stated that they cannot take many of the steps mentioned above. It is conceivable that trade negotiations are sensitive and complete openness about every detail may not be possible. Yet the need for some secrecy has to be balanced against concerns that secret and exclusive processes result in agreements that do not benefit all citizens. The comprehensive nature of trade agreements calls for a more robust engagement on this issue.

Should such an engagement reveal that a completely transparent process for all aspects of the agreement is not possible, the USTR must at a minimum, ensure that it consults with a broad range of stakeholders, including public interest representatives. Furthermore, each stakeholder community must have the same access to information and the same ability to influence negotiators as other stakeholder communities with an interest in the same subject matter.

Precedent proves that this approach is possible. For instance, the World Intellectual Property Organization (WIPO) negotiates IP treaties openly. Negotiating texts are released during the course of negotiations. Public interest representatives, content owner representatives, and many others are able to comment on these texts even as countries negotiate the treaties. This diverse input strengthens the ability of the agreement to balance competing interests. IP chapters of trade agreements regulate the same subject matter and concern the same issues as those addressed by many WIPO treaties. Therefore, these chapters could successfully follow the WIPO's more transparent and inclusive approach.

The U.S. government's conduct of domestic consultation in the lead up to the World Conference on International Telecommunications (WCIT) and its approach to the constitution of the U.S. delegation provides another model for an open, inclusive process. In the lead up to the WCIT negotiations, the U.S. government maintained an email list and permitted a wide variety of stakeholders to subscribe to it. Subscribers were given access to a variety of documents relating to the WCIT negotiations and provided their input to the government. The government also invited members of the public to apply for membership on the U.S. delegation as "private sector advisers." The delegation subsequently constituted included many representatives from civil society and a variety of business interests with a stake in the WCIT outcome. All members of the delegation had access to all negotiating documents and equal opportunities to influence government positions.

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<sup>2</sup> A number of articles posted on various websites noted the lack of secrecy and the apparent lack of a justification for the same. In contrast, there is hardly any official justification for this approach. See Nate Anderson, *Adding up the Explanations of ACTA's 'Shameful Secret'*, Ars Technica, January 15, 2010, <http://arstechnica.com/tech-policy/2010/01/actas-shameful-secret/>; Michael Geist, *ACTA Guide, Part Three: Transparency and ACTA Secrecy*, January 27, 2010, <http://www.michaelgeist.ca/content/view/4737/125/>.

Following the WCIT model, the USTR must consult with multiple and diverse public interest and business representatives. Further, both should be able to access negotiating texts and provide their expertise on the same terms.

Finally, any fair process has to expand the composition of tier three trade advisory committees to include public interest representatives. The Trade Act gives the USTR ample discretion to call for such a composition. The legislative history of the Federal Advisory Committees Act supports such inclusion.<sup>3</sup> Furthermore, public interest representatives must not be relegated to a minority on any industry trade advisory committee.

## **II. Any copyright chapter in the TTIP must balance the interests of owners and users and respect Congress' primary role in crafting U.S. copyright policy.**

As a general matter, copyright chapters in trade agreements may call for some harmonization of exclusive rights of copyright owners to ensure easier movement of copyrighted products across national borders. Such harmonization may be perceived as necessary where trading partners provide very different levels of protection in their own domestic laws. However, both the U.S. and E.U. copyright regimes provide for similarly strong exclusive rights. Therefore, the TTIP does not need to have a copyright chapter.

Furthermore, the U.S. is witnessing a debate about copyright policy and Congress' role in crafting that policy. Policy makers have called for a review of copyright law to determine whether it suits the needs of the digital age.<sup>4</sup> The Register of Copyrights has opined that the U.S. should lead the world in such a modernization effort.<sup>5</sup> At this moment, the USTR should refrain from negotiating a copyright chapter in the TTIP that would impede Congress' flexibility in crafting copyright law and policy. If, the USTR decides to negotiate a copyright chapter, it should be guided by the following principles:

- i. The copyright provisions of the TTIP should be balanced, protecting the rights of both copyright owners and users.
- ii. The copyright chapter of the TTIP must preserve domestic policy flexibilities and respect differences in U.S. and E.U. laws

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<sup>3</sup> *Northwest Ecosystem Alliance v. Office of the United States Trade Representative*, 1999 U.S. Dist. Lexis 21689, 20 (W.D.Wash.1999).

<sup>4</sup> Press Release, Chairman Goodlatte Announces Comprehensive Review of Copyright Law, April 24, 2013, [http://judiciary.house.gov/news/2013/04242013\\_2.html](http://judiciary.house.gov/news/2013/04242013_2.html).

<sup>5</sup> Testimony of Maria A. Pallante, Register of Copyrights, U.S. House of Representatives Committee on the Judiciary, March 20, 2013, Live Recording, <http://www.ustream.tv/recorded/30129016>, (1:27:02)

- a. *The copyright provisions of the TTIP must balance the interests of copyright owners and users.*

A balanced copyright law is essential to promote creativity and innovation. Strong rights allow owners to benefit from their creative works, giving them an incentive to create. Limits to these rights are essential to promote education, innovation, and free expression.<sup>6</sup> However, copyright provisions in U.S. FTAs have, so far, only provided for protection of exclusive rights and not limits to these rights. While the introduction of provisions on limitations and exceptions in the Transpacific Partnership Agreement (TPP) marked a change in his practice, based on publicly available information, many public interest organizations, including PK, believed that that change did not go far enough in ensuring a balanced copyright chapter. Specifically, these provisions did not clarify existing uncertainties surrounding the three-step test and permit countries to confidently introduce limitations and exceptions.<sup>7</sup>

In negotiating the TTIP, the USTR must follow a more balanced approach to copyright and call for protection of rights of owners and users by including provisions on limitations and exceptions as well as exclusive rights.

Incorporating such limitations and exceptions would have both economic and non-economic benefits for the U.S. The economic benefits would flow from the ability of Internet and consumer electronics companies to make and market their products in European markets. These companies make products and services that use copyrighted materials. For instance, products such as MP3 players permit users to record copyrighted music for playback at a later time. Search engines copy entire webpages to facilitate search.<sup>8</sup> These uses rely on robust limitations and exceptions to exclusive rights. Protecting and promoting these exceptions is essential to ensure that U.S. companies are not encumbered in their ability to sell their products in Europe. To the extent that there is a need for harmonization between U.S. and E.U. copyright laws, this is the area most suited for harmonization.

Long-term economic benefits will also flow from exceptions that facilitate other uses of copyrighted works. For instance, exceptions that facilitate educational uses promote an educated citizenry – a key factor in economic growth.<sup>9</sup> Similarly, exceptions that permit uses of copyrighted works by follow-on creators, such as filmmakers or news

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<sup>6</sup> For a more detailed explanation of provisions in U.S. law that provide limitations and exceptions, see Comments of Public Knowledge and the Electronic Frontier Foundation, *In the Matter of 2010 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974*, 2-3, Docket No, USTR-2010-0003, <http://publicknowledge.org/pdf/pk-eff-special-301-20100218.pdf>.

<sup>7</sup> For more explanation see Rashmi Rangnath, *Defining Your Rights to Participate in Culture; How the USTR's Attempts on Limitations and Exceptions are Half Hearted*, August 14, 2012, <http://www.publicknowledge.org/blog/defining-your-rights-participate-culture-how->.

<sup>8</sup> Jonathan Band, *Google and Fair Use*, 3 J. Bus. & Tech. L. 1 (2008).

<sup>9</sup> Margaret Chon, Copyright and Capability for Education: An Approach 'From Below', in INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT: CURRENT TRENDS AND FUTURE SCENARIOS, Chapter 6, 5, available at: [http://www.piipa.org/index.php?option=com\\_content&view=article&id=99](http://www.piipa.org/index.php?option=com_content&view=article&id=99), (citing Prof. Ruth Okediji, William L. Prosser Professor of Law, University of Minnesota).

organizations, enable additional industries to thrive, thereby facilitating economic growth.

The non-economic benefits of appropriate limits to copyright include promotion of free expression and cultural enrichment. Limitations and exceptions promote free expression by permitting uses of copyrighted works for purposes such as criticism, commentary, news reporting, parody, and caricature. Limitations and exceptions for the benefit of educators, libraries, archives, and museums promote learning and cultural enrichment. Furthermore, limitations and exceptions, such as fair use, also promote cultural enrichment by permitting follow on creators, such as documentary filmmakers and appropriation artists to create new works of art.<sup>10</sup> These values are important both to American and European societies and must not be hurt by an unbalanced copyright chapter in the TTIP.

To ensure that these values are promoted, any copyright chapter must call for both the protection of exclusive rights as well as limits to these rights. Provisions that provide for limitations and exceptions must go beyond a mere recitation of the three-step test. Rather they should spell out specific limits to exclusive rights. The scope and strength of these limits has to match the scope and strength of exclusive rights that the TTIP would provide.<sup>11</sup>

This approach is necessary to overcome the uncertainty and controversy surrounding the three-step test. The three-step test provides a mechanism to determine whether national limitations and exceptions comply with provisions of particular agreements. Whether the test gives flexibility to countries in crafting limitations and exceptions is subject to controversy. The one World Trade Organization (WTO) Dispute Settlement Panel that adjudicated on this issue took the view that the three-step test did not provide much domestic policy flexibility. It ruled that an exception in U.S. law that allowed bars and restaurants to play music under extremely specific conditions, without payment of compensation to copyright owners, did not comply with the test as set out in the Agreement on Trade Related Aspects of Intellectual Property Rights.<sup>12</sup> Scholars point out that<sup>13</sup> the panel's interpretation did not leave room to consider public interest purposes that may animate national limitations and exceptions. The precedential value of this decision is unclear. Prominent scholars have assailed its approach and called for a

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<sup>10</sup> See e.g. *Cariou v. Prince*, 2013 U.S. App. LEXIS 8380 (2d. cir. 2013)(holding that an appropriation artist's use of another artist's photographs in creating collages was transformative fair use); and *Brownmark Films, LLC. V. Comedy Partners*, 682 F. 3d 687 (7<sup>th</sup> Cir. 2012) (holding that a television show's parody of a music video was fair use.)

<sup>11</sup> For a detailed explanation of this approach, see Public Knowledge, *Options for Incorporating Limitations and Exceptions in the Transpacific Partnership Agreement*, September 2012, <http://www.publicknowledge.org/files/PKCopyrightLimitsExceptions.pdf>.

<sup>12</sup> United States – Section 110(5) of the US Copyright Act, Dispute Settlement: Dispute DS160, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds160\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm).

<sup>13</sup> See eg. Annette Kur, *Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and limitations Under the Three Step-Test?*, 30-13, Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 08-04. Available at SSRN: <http://ssrn.com/abstract=1317707> or <http://dx.doi.org/10.2139/ssrn.1317707>

more flexible interpretation that gives greater freedom in crafting limitations and exceptions that would achieve the following purposes: promotion of competition, promotion of human rights and fundamental freedoms, and achievement of scientific progress and cultural, social, and economic development.<sup>14</sup>

Many existing treaties, including some U.S. FTAs, contain language that could be used in crafting provisions on limitations and exceptions. Because the exact nature of the TTIP's copyright chapter is not known, these comments do not provide further details on limitations and exceptions provisions. If the TTIP were to contain a copyright chapter, PK would look forward to providing suggested language.

*b. The TTIP must respect Congress' primary role in formulating U.S. copyright policy.*

The USTR must ensure that the provisions of the TTIP do not interfere with the evolution of copyright policy in the U.S. Policy makers in the U.S. are announcing plans to consider changes to U.S. copyright law. They should have complete flexibility in making any changes unimpeded by provisions of trade agreements.

The recent cell phone unlocking debate demonstrates that concerns about trade agreements impeding Congress' policy flexibility are not theoretical. That debate began when the Library of Congress refused to renew an exemption to the Digital Millennium Copyright Act (DMCA) that allowed people to circumvent Technological Protection Measures (TPMs) on their cell phones in order to take their phones to another carrier. Consumers and consumer representatives called upon Congress to address the situation created by the Library of Congress' ruling. When lawmakers introduced bills to amend the DMCA and provide for a permanent exception that permitted phone unlocking, many expressed concerns that such an amendment could violate provisions of the U.S. Korea FTA and other FTAs.<sup>15</sup>

Similarly, other proposed changes to U.S. law, including measures to shorten copyright term or introduce formalities, are likely to raise concerns about compliance with international agreements.

Congress, however, retains sole power to draft U.S. law, and the ability to adapt copyright law to the present landscape. However, to avoid controversies and renegotiations designed to address non-compliance, the copyright chapter in the TTIP must preserve maximum policy flexibility for Congress.

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<sup>14</sup> Max Planck Institute for Intellectual Property and Competition Law, *Declaration on the "Three-Step-Test"*, <http://www.ip.mpg.de/en/pub/news/declaration-threestepetest.cfm>.

<sup>15</sup> Jonathan Band, *Cell Phone Unlocking: A Legal Primer*, <http://www.districtdispatch.org/wp-content/uploads/2013/03/band-cell-phone-unlocking-08mar13.pdf>; Mike Masnic, *The Government May Want to Legalize Phone Unlocking, But Unfortunately It Signed Away That Right*, March 12, 2013, <http://www.techdirt.com/blog/wireless/articles/20130311/01344922277/government-might-want-to-legalize-phone-unlocking-unfortunately-it-signed-away-that-right.shtml>;

A copyright chapter that outlines high-level principles and leaves the details of implementation to domestic legislatures would achieve that goal. Such a chapter could call for provision of rights that are uncontroversial. For instance, it could call upon countries to provide for a reproduction right without further specifying that that right has to extend to temporary reproductions. That copyright owners should have the right to authorize reproductions is settled. Whether that right extends to all types of temporary reproductions is not. Many instances of temporary reproduction - for instance, reproductions for a transitory duration - may be exempted from the scope of the reproduction right.<sup>16</sup> In such situations, the TTIP's copyright provisions must not pick an answer. Instead, it should let U.S. Congress, European Parliament, and national legislatures within European countries deal with these questions.

Another benefit of providing for high-level principles is that such an approach would respect differences in U.S. and E.U. laws and not require one party to the negotiation to change its laws. While both U.S. and E.U. provide for extensive protections to copyright owners, the details of how these protections are provided and limited are significantly different. For instance, the E.U. explicitly provides exclusive rights to communication<sup>17</sup> and making available<sup>18</sup> in addition to the distribution right, while the U.S. does not.

In addition, the European approach to limitations and exceptions and TPMs is considerably different than the U.S. approach. Most notably, European directives do not provide for a flexible exception to copyright that matches the U.S. fair use exception.<sup>19</sup> With respect to TPMs, U.S. law imposes a blanket ban on circumvention<sup>20</sup> and permits a narrow set of exceptions to this ban.<sup>21</sup> It further provides for a triennial rulemaking procedure to provide for additional, time limited exceptions.<sup>22</sup> Furthermore, U.S. law imposes a ban on trafficking in circumvention devices.<sup>23</sup>

Like the U.S., the E.U. appears to impose a ban on circumvention and trafficking.<sup>24</sup> However, ostensibly based on an understanding that TPMs would interfere with exercise of limitations and exceptions, European law contemplates that rights holders make available to users mechanisms to overcome TPMs in order to make lawful uses.<sup>25</sup> If they fail to do so, the Directive requires European countries to provide these

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<sup>16</sup> See *Cartoon Network LP. V. CSC Holdings*, 536 F.3d 121, 127-131 (2d. Cir, 2008); see also Article 5(1), Directive 2001/29/EC of the European Parliament and of the Council (E-Commerce Directive), May 22, 2001, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>, (providing that temporary reproductions which are transient and which enable transmission between third parties or enable lawful uses are exempt from the reproduction right).

<sup>17</sup> Copyright Directive, Article 3.

<sup>18</sup> Copyright Directive, Article 3.

<sup>19</sup> Contrast 17 U.S.C. § 107 and Article 5, E-Commerce Directive.

<sup>20</sup> 17 U.S.C. § 1201(a).

<sup>21</sup> 17 U.S.C. § 1201 (d)-(k).

<sup>22</sup> 17 U.S.C. §1201(a)(1)(C)

<sup>23</sup> 17 U.S.C. §1201(a)(2) and (b).

<sup>24</sup> E-commerce Directive, Article 6(1) and (2).

<sup>25</sup> E-Commerce Directive, Article 6(4).

mechanisms.<sup>26</sup> With respect to certain limitations and exceptions, this directive is mandatory. And with respect to others, it is optional.

## **Conclusion**

Trade agreements have tended to look at copyright issues in terms of economic benefit to one sector of the economy- large content owners. Copyright, however, is a complex system that affects many other constituencies, including small and independent content creators, technology companies, libraries, archives, museums, and the public. Failure to effectively account for these interests makes trade agreements an improper mechanism to make international copyright rules. To the extent that copyright issues are going to be part of the TTIP, the USTR must ensure that it does not compromise the interests of the various constituencies impacted by copyright. To achieve that goal, it should ensure that any copyright provisions in the TTIP are high-level principles that do not impede Congress' prerogative to formulate copyright law and policy. In addition, it should ensure that any copyright chapter is formulated with the input of all affected constituencies.

Respectfully submitted,

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<sup>26</sup> *Id.*