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Washington, DC 20009

June 26, 2012

Barbara Weisel  
Office of the United States Trade Representative  
600 17th Street NW  
Washington, DC 20508

Regarding Copyright provisions in the TPPA

Dear Ms. Weisel:

Knowledge Ecology International (KEI) provides the following comments on the copyright proposals tabled by the United States in the negotiations for a Trans-Pacific Partnership Agreement (TPPA). References to articles are based on the leaked copy of proposals from February 2011.<sup>1</sup>

**The TPPA IPR text is too restrictive as regards temporary reproductions**

Article 4.1 would provide copyright holders the right to prohibit all reproductions, including temporary reproductions and temporary storage in electronic form. Temporary copies are essential in our digital age, used for proper functioning of computers and the Internet. The right to prohibit even temporary reproductions goes beyond U.S. law and would greatly impact use of digital tools, harming U.S. firms that provide Internet based services, and the businesses, non-profit organizations, families and individuals that use those services.

**The TPPA IPR text should not ban parallel of importation of copyrighted works**

Article 4.2 would provide copyright holders with the right to control parallel trade, authorizing right holders to prohibit the importation of copies of the work made outside the Party's territory. However, current U.S. law is unsettled as to the issue of the rightholder's ability to control importation or parallel trade.

The Supreme Court will hear this issue in the case *Kirtsaeng v. Wiley & Sons* this fall and USTR should not seek to prejudice the outcome of the case or lock-in provisions considered controversial in the U.S. Three different circuits have each come to a different conclusion, relying on different interpretations of Title 17 of US law.

The right to control parallel trade is a controversial and unsettled issue in the U.S. Normally, it is a matter for our courts to interpret and Congress to legislate to determine the best policy for the U.S., and it is particularly inappropriate for USTR to negotiate such a policy in secret.

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<sup>1</sup> We would have been unable to make comments on the text if there had not been such a leak.

KEI recognizes the rationale for some restraints on parallel trade. In particular, some limited barriers to parallel trade in copyrighted consumer goods from low income countries to high income countries may be a reasonable and desirable policy, in order to facilitate differential pricing. Examples of where such differential pricing may be appropriate would be for consumer uses of recorded music, cinematographic products, textbooks or computer games, where prices in high income markets may be unaffordable in a developing country – creating both a barrier to access in the developing country and incentives for piracy of copyrighted works. That said, there are other types and uses of copyrighted works for which differential pricing may not be in the U.S. interest. For example, there may be copyrighted works, including both text and software, that are used by businesses engaged in manufacturing of goods that move in international trade. In those cases, differential pricing may inappropriately undermine US competitiveness. Additionally, there is no clear benefit to restricting parallel trade in copyrighted works between high income countries, even for consumer goods.

USTR proposed sweeping barriers to parallel trade that go beyond the more limited barriers to trade that may be appropriate, is doing so in secret, and without an appreciation of how its proposal can undermine consumer welfare and the global competitiveness for the United States.

### **The TPPA should not legislate the term of copyright protection.**

KEI opposes Article 4.5 which details the length of copyright terms. This provision is unnecessary. The minimum length of such terms set by the TRIPS is already excessive and contrary to the public interest. The 1996 WIPO Copyright Treaty also eliminated the possibility of a 25 year copyright term for photographs.

In the TPPA, the U.S. has proposed extending the international standards for copyright terms to life plus 70 years, when calculated on the basis of a life of a natural person, and not less than 95 years for corporate owned works-for-hire, and 120 years for unpublished works. What public interest is actually served by such excessive terms of protection, and what small number of copyrighted works would actually bother to exploit these commercial rights? What damage is done to scholarship and access to knowledge by locking away works for which authors have been dead for seven decades?

Among other harms, by extending copyright terms, the U.S. will diminish the revenues available to living artists, since collection society revenues for certain types of works will be divided among both living and dead artists in a manner that will be to the disadvantage of living artists. While some post-death term may be appropriate, 70 years is absurd, and no real advantage to granting corporations 95 years of protection exists, when investor time horizons are far less. Why should the makers of a movie be granted nearly five times the period of protection for a patented invention? What is the benefit to society in extending copyright protection for movies made more than 50 years ago?

### **The TPPA should not create a separate cause of action for circumvention of a TPM**

The U.S. proposal regarding anti-circumvention of technological protection measures (TPMs) is concerning, particularly because of the scope of protection provided.

The U.S. has proposed language that would prevent the circumvention of TPMs even for non-infringing uses of the work. By creating a “separate cause of action, independent of any” underlying copyright violation, USTR seeks to expand rights for owners of works, allowing them to circumvent existing copyright limitations and exceptions simply through the use of a TPM.

We note that this is an unsettled area in U.S. law and a circuit split exists as to whether a person must violate copyright in order to be found liable for the circumvention of a TPM. While the Ninth Circuit reads the DMCA to provide for a separate cause of action, the Federal Circuit has disagreed noting in *Chamberlain Group Inc., v. Skyling Technologies* that a “critical nexus” must exist to underlying copyright infringement and that “a reasonable relationship to the protection that the Copyright Act otherwise affords copyright owners . . . is the only meaningful reading of the statute.”

### **The TPPA should not require “substantial evidence” for legitimate limitations and exceptions to TPMs**

We note our concerns that the limitations and exceptions to the provisions regarding TPMs are narrowly drawn and places a heavier burden on parties requesting an exception to the anti-circumvention measures than currently exists under U.S. law. The DMCA provides for a rule-making procedure where parties may apply for an exception, but Article 4.9(d)(viii) of the U.S. proposal places a “substantial evidence” burden not found under the plain language of the DMCA.

To make our objection concrete, we note that in the U.S., the DMCA exception for persons with disabilities requires frequent ruling making, every three years, in an environment where the beneficiaries of the exception find the DMCA rule-making burdensome and repetitive. There is no evidence that such exceptions have led to abuses.

### **Robust user rights are needed for the placeholders for limitations and exceptions**

Article 4.8 provides placeholders for copyright limitations and exceptions. We note that proposals in this area should preserve the flexibility to create an apply such limitations and exceptions that are consistent with the Max Planck Declaration on “A balanced interpretation of the three-step test.”

KEI notes that under current obligations to the WTO, not all copyright limitations and exceptions are subject to the three-step test. For example, there are many areas of the TRIPS referenced sections of the Berne Convention where the three-step test is not used to limit limitations and exceptions, and within the WTO TRIPS agreement itself, the three-step test does not limit the use of the first sale doctrine (Article 6), the control of anticompetitive practices (Article 40), the use of liability rules (Article 44.2), or the Appendix to the Berne Convention. Therefore, KEI strongly opposes language in the TPPA that would require all copyright limitations and exceptions be subject to the three-step test.

Furthermore, we encourage USTR to propose a provision to permit the cross-border exchange of accessible format works for persons who are visually impaired or otherwise disabled. U.S. copyright law permits the creation of accessible format works without permission of the right holder, but because of the territorial nature of copyright it can be difficult to exchange works across borders even where similar limitations and exceptions exist. Permitting cross-border exchange of these works would expand the availability of accessible format works. In addition, it would increase the availability of accessible format works in other languages.

### **TPPA should not propose TRIPS plus damages for copyright**

As KEI has noted earlier, the provisions in the TPPA for copyright infringement damages are excessive. The provisions (1) ignore certain US exceptions for general rules on damages, (2) reduce the flexibility to fashion new limits on remedies to expand access to orphan copyrighted works and accomplish other legitimate public interests, and (3) are excessive when applied in countries that do not have U.S. fair use

defenses from copyright infringement claims. Taken as a whole, the damages provisions are anti-consumer and anti-innovation for information services, harming the public by presenting an unnecessary and unwise barrier for access to orphaned copyrighted works, and increasing the business risks for new Internet services, many used or owned by U.S. residents.

There is no evidence that the current TRIPS standards for damages for copyright infringement are harmful to U.S. copyright holders or businesses that disseminate copyrighted works. Merely having the power to coerce countries into accepting new norms for copyright infringement does not justify the types of inflexible norms included in the TPPA intellectual property chapter.

### **General Provisions**

With respect to the **General Provisions** and the treaties to which parties must sign, KEI has the following comments:

KEI expresses no position on the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974); Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989); Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1977), as amended in 1980; and the Singapore Treaty on the Law of Trademarks (2006).

KEI opposes inclusion of a requirement to ratify or accede to the Patent Cooperation Treaty (1970), as amended in 1979.

We similarly oppose the inclusion of the Paris Convention for the Protection of Industrial Property (1967). We note that the relevant provisions of this agreement are referred to in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and therefore its inclusion in the TPPA is unnecessary.

We oppose the inclusion of the Berne Convention for the Protection of Literary and Artistic Works (1971) in the TPPA. We note that its inclusion in an trade agreement such as the TPPA could result in multiple, differing interpretations on the meaning of its provisions. An existing and developing WTO jurisprudence exists on the Berne Convention which could come into conflict with the outcome of any dispute resolution under the TPPA. Furthermore, the U.S. does not enforce provision *6bis* of the Berne Convention; the inclusion of this Agreement under the General Provisions section of the IP chapter of the TPPA could thus be problematic.

KEI believes that the standards under TRIPS are sufficient with respect to protection for new varieties of plants. We are therefore opposed to the inclusion of the International Convention for the Protection of New Varieties of Plants (1991) (UPOV Convention) as sufficient alternatives to the standards set forth in UPOV exist.

We oppose the inclusion of the WIPO Internet Treaties--the WIPO Copyright Treaty (1996) and WIPO Performances and Phonograms Treaty (1996)--in the TPPA. If the WCT is to be included, we recommend the inclusion of reference to the Max Planck Declaration on the three-step test and also note that the U.S. should express reservations to the copyright term of photographs found in the WCT.

KEI also has concerns to Article 1.4, requiring parties to accept the Protocol amending the TRIPS Agreement done on December 6, 2005. The 2005 Amendment represents an imperfect solution and the

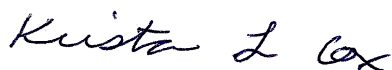
U.S. should not require parties to notify acceptance of the protocol which it has not even implemented.

Finally, with respect to Article 1.5, we believe it is inappropriate for the U.S. to propose requiring parties make “all reasonable efforts [to] ratify or accede” to the Patent Law Treaty (2000) and the Hague Agreement Concerning the International Registration of Industrial Designs (1999). The U.S. has not ratified the Patent Law Treaty and is not even a signatory to the Hague Agreement. The U.S. should not place demands on other parties with which it has not even complied.

Sincerely,

A handwritten signature in black ink that reads "James P. Love". The signature is written in a cursive style with a large, looping initial 'J'.

James Love, Director

A handwritten signature in black ink that reads "Krista L Cox". The signature is written in a cursive style with a large, looping initial 'K'.

Krista Cox, Staff Attorney

A handwritten signature in purple ink that reads "Manon Anne Ress". The signature is written in a cursive style with a large, looping initial 'M'.

Manon Anne Ress, Director of Information Society Projects