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April 15, 2013

Hon. Teresa Stanek Rea
Acting Under Secretary of Commerce for Intellectual Property
and Director of the U.S. Patent and Trademark Office
600 Dulany Street
P.O. Box 1450
Alexandria, VA 22313

Re: WIPO VIP Treaty and Related Patent Law Concerns

Dear Director Rea:

Intellectual Property Owners Association (IPO) thanks the USPTO for its steadfast commitment to maintaining strong intellectual property (IP) protection for American businesses, which are among the leading innovators, manufacturers, and energy producers in the world. IPO submits these comments in advance of the April 18 meeting of the World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights, which will discuss the proposed treaty on limitations and exceptions (L/E) to copyright for visually impaired persons with print disabilities (VIP treaty).

IPO is a trade association representing companies and individuals in all industries and fields of technology who own, or are interested in, intellectual property rights. IPO's membership includes more than 200 companies and more than 12,000 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members.

IPO supports international action that addresses the needs of the visually impaired in meaningful ways, but we are concerned about the VIP treaty as currently drafted, focused exclusively on L/Es and not on the rights holders whose copyrights are at stake. We are also concerned about the potentially negative, precedential effect that a one-sided, exceptions-focused VIP treaty may have on parallel developments at WIPO and in other international negotiations. We outline our key concerns below and urge you to take these into account as you prepare for the April 18 VIP treaty negotiating session.

Copyright-Related Concerns about the VIP Treaty

Our main concern about the VIP treaty, as currently drafted, is that it addresses L/Es to copyrights in isolation, without parallel provisions addressing IP holders' rights. The proposed VIP treaty would create specific L/Es to copyright protection, with the aim of broadening access to print works for the visually impaired. However, it would not reflect the importance of protecting the copyright of those who created the work. Under U.S. law, L/Es are available to support access to copyrighted works by the visually

impaired, but they co-exist and are reflected jointly with the fundamental protections afforded to copyright owners to which such L/Es apply. By treating L/Es in isolation, the draft VIP treaty would fail to strike an appropriate balance and constitutes an overly broad way of achieving its stated goals. A balanced approach to copyright protection cannot exist when rights and exceptions are treated separately.

To achieve this objective, we have three recommendations:

- (1) Incorporate the Berne Convention's "three step test" into the VIP treaty. This can be done directly or explicitly "by reference." If the three step test is not incorporated, however, limitations and exceptions may apply, while basic copyright protections do not.
- (2) Delete the VIP treaty's expansion of fair use. As you know, many WIPO member countries do not have proper legal and institutional mechanisms in place that would allow them to implement fair use effectively and fairly.
- (3) Ensure that there is an exception to L/Es for situations where a copyrighted work is commercially available and accessible.

Implementing these three recommendations would help ensure that the VIP treaty serves the actual, specific interests of the visually impaired while avoiding the unintended consequence of undermining or weakening existing copyright protection. Properly anchoring the VIP treaty within the broader, global framework of copyright and other IP protections will be a critical and minimum requirement in this respect.

Broader IP Policy Concerns Raised by the VIP Treaty Negotiations

By isolating L/Es from the IP holders' rights, the VIP treaty negotiations could also set a dangerous precedent for other areas of IP law, particularly patent law. The U.S. advanced manufacturing industry continues to face the threat of erosion of patent rights in a range of international fora and negotiations. Other countries could refer to the WIPO VIP treaty as precedent for establishing broad exceptions and limitations to patent rights without adequate protections for innovators.

This threat is not merely theoretical; it is real. This February, the WIPO Standing Committee on the Law of Patents agreed to initiate a work program focused specifically on the exploration of an L/E approach to patent rights. In fact, later this year, the Committee will hold a special conference to discuss "countries' use of health-related patent flexibilities." This is a concerning first step, and the discussion of expansion of limitations could easily bleed into other areas of patent protection, for example, clean technologies, energy, medical technologies, and advanced manufacturing in general. Such competitive strategies are specifically being pursued by several leading emerging economies.

INTELLECTUAL PROPERTY OWNERS ASSOCIATION

Patents and other industrial property rights continue to be under fire at the United Nations Framework Convention on Climate Change (UNFCCC), World Health Organization (WHO), and at the World Trade Organization (WTO) as well. Despite substantial differences between copyrights and patent protection and the regulatory frameworks and balance of rights and obligations on which they are based, the WIPO VIP treaty developments could pose a real and much broader IP-policy risk.

U.S. Government Response and Next Steps

The U.S. Government's strong support and leadership have been critical in addressing constant threats against advanced manufacturing innovation, technology, and IP rights. Developments such as the WIPO VIP treaty and the work program now pursued regarding patent L/Es threaten to upset the fundamental balance on which our US and global IP system is based. Some of our member companies have already been discussing the broader policy and negotiating issues with your office and the U.S. Trade Representative's office for some time. In particular, we wish to recognize and thank Shira Perlmutter and her team for their excellent engagement. We are happy to discuss these issues further as you prepare for the WIPO VIP treaty negotiating session.

Sincerely,



Richard Phillips
President

cc: Hon. Victoria Espinel,
IP Enforcement Coordinator

Hon. Michael Froman,
Assistant to the President of the United States and Deputy National Security
Advisor for International Economic Affairs

Hon. Robert Hormats,
Under Secretary of State for Economic Growth, Energy, and the Environment

Hon. Cameron Kerry,
General Counsel, U.S. Department of Commerce

Hon. Demetrios Marantis,
Acting U.S. Trade Representative