Canada's Expression of Interest in the Trans-Pacific Partnership Trade Negotiations

Response to Federal Register Notice: Vol. 76, No. 235: 76480-76481

Knowledge Ecology International
1621 Connecticut Avenue, Suite 500, Washington, DC 20009
http://keionline.org
January 10, 2012

These comments are submitted by Knowledge Ecology International (KEI) in response to the December 7, 2011 United States Trade Representative request for comments on "Canada's Expression of Interest in the Proposed Trans-Pacific Partnership Trade Agreement."

1. Make the Negotiations for TPPA More Transparent

The Trans-Pacific Partnership Agreement (TPPA) is a large-scale regional free trade agreement that is currently being negotiated between nine countries: the United States, Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore and Vietnam. Three other countries have formally stated their interest in joining these negotiations, including Canada, Japan and Mexico. Other countries, including Korea and the Philippines, have also been rumored to have expressed interest in this trade agreement.

The large size of this trade agreement coupled with the intention that the TPPA represent a comprehensive agreement to be used as a template for future agreements highlights its importance. It is appalling that, given the magnitude of the trading area, the public is kept in the dark about the negotiating positions. The negotiations have been conducted in secret and the general public has not been given access to any official negotiating texts.

We note that this lack of access to information is quite unequal. Numerous corporations and special interests have access to the negotiating text through a "cleared advisor" process and it is only the general public that is denied access to information that will affect them.

We would also like to draw your attention to a letter submitted to your office by Senator Sanders (I-VT) on December 1, 2011 calling for the release of the text to the general public. As Senator Sanders noted in his letter, "the public has a right to monitor and express informed views on proposals of such magnitude as the TPP . . . I urge you to make the negotiating text of the TPP available to the public for review and comment. Without access to the actual texts being discussed, in my view the effective input and informed participation of the public is severely curtailed."

Increased transparency will legitimize the process and allow the general public to comment on issues that will affect them. Such public engagement is critical to the democratic political process and is particularly important with an agreement of this nature and size. We believe that USTR should adhere to the recommendations submitted to USTR in 2009 by eight public interest, consumer and public health organizations on transparency in free trade agreements, available here: http://keionline.org/content/view/246/1

We also believe that all countries interested in joining the TPPA should have a voice in the negotiations. It has been reported that efforts have been made to exclude certain countries, including Canada, from

joining the negotiations. Reportedly, the U.S. fears that these countries could influence TPPA negotiations on intellectual property rights and would advocate for a lower standard that the U.S. proposal.

Because of the magnitude of this trade agreement, we believe that all countries that have expressed interest in joining the TPPA should be allowed to negotiate on the issues that will affect them. USTR should not seek to exclude countries that expect to join the TPPA. As a comprehensive regional trade agreement, the TPPA will affect millions of persons across many different sectors and each country should be given the opportunity to provide input and influence the negotiations.

2. In General, Provide Better Protection to Consumers in Intellectual Property Rights Chapter

The United States should be cognizant of the harms that will occur if the TPPA incorporates certain right holder demands for new global norms for intellectual property rights. USTR has proposed several measures that will increase prices of protected works and inventions, restrict access to medicines, and more generally negatively impact innovation and consumer rights.

KEI has previously written about and provided previous comments regarding USTR's proposed TPPA IP chapter, including "USTR New Exclusive Right for Copyright Holders: Importation Provision in the Trans-Pacific Partnership Agreement (TPPA),"[1] "The Right to Privacy in Trans-Pacific Partnership (TPP) Negotiations,"[2] "Patents and Doctors, and the USTR TPP text,"[3] and "Comments for the Record on the Subcommittee on Trade of the Committee on Ways and Means Hearing on the Trans-Pacific Partnership Agreement (TPPA)."[4]

Additionally, several civil society organizations jointly submitted detailed concerns regarding access to medicines and the public health and these comments can be found here: http://keionline.org/node/1138. A complaint to the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health regarding the impacts USTR's proposal will have on the right to health, jointly submitted by eleven public interest advocacy groups and three law professors, is available here: http://keionline.org/node/1099

We incorporate the concerns contained in the aforementioned documents into this response by reference.

Certain elements of the proposed IP chapter are not even consistent with US legal traditions. Some of these inconsistencies are described here: http://keionline.org/node/1216.

In addition to the concerns expressed earlier, we would also like to comment on two specific intellectual property issues that should be incorporated into the TPPA.

3. Cross-border Sharing of Accessible Formats of Protected Works under Copyright Exceptions

USTR should propose language on the cross-border sharing of accessible format works for persons who are visually impaired or have other disabilities, when the copies are made under copyright exceptions.

1 http://keionline.org/node/1176
2 http://keionline.org/node/1164
3 http://keionline.org/node/1093
4 http://keionline.org/node/1340

Under current U.S. law, authorized entities can create accessible format works without the permission of rightholders for the benefit of persons who are visually impaired or have other disabilities. However, because of the domestic focus of our copyright law, these are not shared across borders, leading to unnecessary duplication of accessible format works and waste of valuable resources.

The U.S. government has endorsed new global norms to facilitate cross border sharing of such accessible works in the context of WIPO negotiations on copyright exceptions. The TPPA would be a good place to start, particularly if Canada and Mexico join the negotiations, given the benefits of greater sharing of accessible works in English and Spanish languages.

4. Exports of medical inventions manufactured under compulsory licenses.

USTR should introduce its agreement with Canada under the NAFTA agreement, implementing the WTO General Council decision of August 30, 2003, to explicitly provide for export of medicines and medical devices within the TPPA region where a compulsory license has been issued. In a letter from the U.S. to Canada on July 16, 2004, the Parties agreed that,

> *Where a compulsory license is granted by a Party in accordance with such terms, the Parties agree that, as between themselves, adequate remuneration pursuant to Article 1709(10)(h) of the NAFTA will be paid in the exporting Party taking into account the economic value to the importing country of the use that has been authorized in the exporting Party.*

This agreement between the U.S. and Canada waived the restriction under 1709(10)(f) of NAFTA, that had provided that the use of a patent without authorization from the right holder be must be used predominantly for the supply of the domestic market.

In the context of the TPPA, the U.S. should seek to introduce language to address the export issue. Such an understanding should not be limited to medicines, but should include other objects necessary to improve public health or treat medical conditions, including the use of medical devices.

The existing understanding between the U.S. and Canada can be used as basis of negotiation, but USTR should also consider other approaches, that do not rely upon the WTO August 30, 2003 decision, concerning paragraph 6 of the WTO Doha Declaration on TRIPS and Public Health.

Alternative approaches would include exceptions to exclusive rights under Article 30 of the TRIPS,[5] or the limitations on remedies to infringement under Article 44 of TRIPS.

Article 44 provides a limitation on a patent holder's remedies with respect to an injunction. In *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006), the Supreme Court held that injunctions should not be automatically granted, even in cases of infringement, and that a four-part test[6] should be used to determine whether such an injunction should be applied. *eBay* explicitly requires judges to consider

5 "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties."

6 That the plaintiff has 1) suffered irreparable injury, 2) that remedies available at law, such as monetary damages, are inadequate to compensate for the injury, 3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted, and 4) that the public interest would not be disserved by a permanent injunction.

the granting of judicial compulsory licenses. Since 2006, several courts have used such compulsory licenses, to address various policy objectives.

One recent example concerns the case of *Edwards Lifesciences v. CoreValve, Inc.*,[7] where a U.S. district court denied a permanent injunction and the manufacture of an infringing medical device to treat aortic valve stenosis was permitted. Although the device was manufactured in the United States, it was sold exclusively in the export, thus highlighting one method where a compulsory license is not bound by the restrictions on export under Article 31 of TRIPS or the Paragraph 6 system.

5. Chapter on Access to Knowledge

Access it knowledge is important for innovation, and it is also a trade issue. The United States provides the entire world extensive access to government funded research. USTR should propose a provision in the TPPA to require similar access to research funded by our trading partners, including, for example, the NIH policy for open access to published research papers.

6. Supply of Public Goods

The United States is the leading funder of basic medical research, and the leading funder of treatments for AIDS, malaria and tuberculosis. USTR should propose a chapter in the TPPA on the supply of public goods.

The chapter should include mechanism for a schedule for the supply of public goods. The listing of offers to supply such goods should be voluntary, but binding, modeled after the WTO agreement on the liberalization of services.

7. Minimum Copyright Terms Should Not Extend Beyond the Minimum Terms in TRIPS

KEI opposes any mandatory minimum copyright terms in the TPPA. Each of the parties in the TPPA negotiations are bound by the WTO TRIPS Agreement, which sets forth minimum terms of protection for copyright. USTR has proposed that TPPA parties be required to provide the extensive copyright terms that are found in current US law, such as, the life of the author plus 70 years, or when calculated on a basis other than the life of a natural person, extends to 95 years after authorized publication, or 120 years from the creation of the work where no authorized publication was made within 25 years from the creation of the work.

Although we recognize that the U.S. currently provides for longer copyright terms than required under TRIPS, TPPA parties, including the U.S., should not be held to the longer terms. The U.S. should be free to amend its current copyright law and reduce copyright terms to the minimum required by TRIPS. Should the U.S. require longer minimum terms in a regional trade agreement such as the TPPA, it would be difficult to change current law. The fact that the current copyright terms in the U.S. are too long is widely recognized by many copyright scholars and policy experts. Trade policy should not lock in the most controversial and ill-considered features of our current law.

7 http://keionline.org/node/1218