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RE: Copyright issues in the TPP

Dear Maria, Shira and Nancy,

We are writing to ask that you and your agencies/offices address the issues in the TPP intellectual property chapter that relate to access to certain copyright issues, with a focus on orphan works, and uses by governments.

As you know, trade negotiators from a dozen countries will meet in Maui, Hawaii this month to make yet another attempt to settle outstanding issues in the TPP negotiations. Among the U.S. priorities are new IP obligations on the TPP members, including the United States, to extend copyright protections, and enhance the enforcement of those rights. As part of the intellectual property chapter, USTR has proposed to mandate TPP member states extend the term of copyright from life plus 50 years to life plus 70 years, **[Intellectual Property [Rights] Chapter Consolidated Text, Article QQ.G.6]**.

USTR has also proposed extensive obligations as regards copyright in the enforcement section of the TPP IP Chapter, including very high standards for damages. This includes the general standards for damages for all intellectual property rights referenced in Articles 9 through 39 of

the TRIPS Agreement (copyright, related rights, industrial designs, compilations of data, semiconductor designs, trademarks, geographical indicators and undisclosed information), plus a number of special provisions for copyright and some other types of intellectual property rights.

In the 2014 draft text, Articles QQ.H.1 through QQ.H.11 cover a large number of topics, many of which are relevant to access to copyright protected works, related rights, industrial designs, compilations of data, and undisclosed information. Given the advanced state of the negotiations, I would like to call your attention to only a few of the issues that we believe are significant, harmful, and contrary to US legal norms and/or interests, focusing mostly on three areas: (1) access to orphaned copyrighted works, (2) limits on remedies for the infringement of works and data under 28 USC § 1498(b) and 28 USC § 1498(e), and (3) how the TPP proposes to create taxpayer liability for acts now protected by state sovereign immunity.

KEI will discuss briefly the widely stated objections to the placement of long copyright terms in a trade agreement. We will then focus on the provisions in the TPP on remedies including damages and costs, and show how these provisions are directly at odds with the recommendations of the copyright office for limitations on the damages and other remedies with regard to the infringement of orphan works. In addition these provisions are contrary to U.S. law on access to works under 28 USC § 1498(b) and 28 USC § 1498(e), when the works are “infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government”, and contrary to U.S. law when state governments, state universities and other state agencies infringe copyrights (or other intellectual property rights).

The Orphan Works Issue

On June 16, 2015, the U.S. Copyright Office released its long awaited report on Orphan Works and Mass Digitization. (<http://www.copyright.gov/orphan/>). The report addressed an issue of profound importance, the barriers to access and the predictable loss of older works, still protected by copyright, but “orphaned” because there is no easy or feasible way to establish ownership and clear rights.

There is a very large literature about the orphan works problems, and a variety of initiatives in the United States, the European Union, Japan, Canada, Australia, Mexico and many other countries to address some of the issues related to orphan works.

In the United States, the Report of the Register of Copyright explained the problem as follows:

The uncertainty surrounding the ownership status of orphan works does not serve the objectives of the copyright system. For good faith users, orphan works are a frustration, a liability risk, and a major cause of gridlock in the digital marketplace.¹⁵³ The consequences of this uncertainty reverberate through all types of uses and users, all

types and ages of works, and across all creative sectors.¹⁵⁴ By electing to use a work without permission, users run the risk of an infringement suit resulting in litigation costs and possible damages. By foregoing use of these work, a significant part of the world's cultural heritage embodied in copyrighted protected works may not be exploited and may therefore fall into a so-called "20th century digital black hole."¹⁵⁵ [footnotes omitted]

Copyright Term

The proposals by various TPP negotiating parties, including the United States, that insist on national copyright terms exceeding the 50 years required by the Berne Convention or the WTO TRIPS Agreement in Article QQ.G.6 of the TPP IP Chapter are designed to lock in a well-known mistake in U.S. policy.

In 2002, the New York Times published an editorial, titled "Abuse of Copyright," which read in part:

Artists are entitled . . . to a property interest in their work for a reasonable period of time. But the public also has an interest in seeing that copyrights eventually lapse, and that creative work enters the public domain with no need to pay royalties. Contemporary artists are then free to borrow from these older works, a creative tradition that dates back to the ancients. . . . it is a highly reluctant artist -- and one with extraordinary concern for his heirs -- who will not create unless his work is protected for a full 70 years after his death. The purpose of the 1998 Congressional extension was not protecting artists, but enriching media companies that hold property rights in their creations, virtually in perpetuity.

The 2002 New York Times editorial reminds us that the producers of knowledge goods benefit from access to older works, and the freedom to use them. Many book publishers support shorter copyright terms because a shorter term would make it cheaper and easier to reuse historical photographs and documents. Singers and producers of recorded or live music would not have to pay royalties to perform songs that enter the public domain.

The extended copyright term, in the context of the elimination of formalities and automatic renewal, has worsened the orphan works problem. The June 2015 report by the Register of Copyrights on Orphan Works and Mass Digitization (<http://copyright.gov/orphan/reports/orphan-works2015.pdf>), offers this commentary:

The Copyright Office published its first Report on Orphan Works in January 2006 . . . [and] noted that the orphan works problem was exacerbated by a series of changes in U.S. copyright law over the past thirty-plus years.¹³ Those changes gradually but steadily relaxed the obligations of copyright owners to assert and manage their rights and removed formalities in the law that had provided users with readily accessible

copyright information. Significant among those changes were the elimination of the registration and notice requirements, which resulted in less accurate and incomplete identifying information on works, and the automatic renewal of copyrighted works that were registered before the effective date of the 1976 Copyright Act.¹⁴ Subsequent amendments, such as the Sonny Bono Copyright Term Extension Act of 1998, extended the duration of copyright and thus increased the likelihood that some copyright owners would become unlocatable.¹⁵ [pages 9-10, footnotes omitted]

We, as many producers and users of knowledge goods, share the Copyright Office assessment of the combined effect of these changes in copyright laws.

Furthermore, no U.S. trade negotiator that we have spoken to defends the U.S. term of copyright as good public policy. Who, if anyone, can seriously argue that the heirs of authors or the corporate holders of rights should have a monopoly on works 70 years after the death of an author, or that the extended term has not had a devastating impact on the preservation of and access to older works? The fact that the USTR is pushing this in a trade agreement is an embarrassment.

USTR and other US agencies have received several letters objecting to the extended copyright terms, from academics, consumer groups and others. (See, for example, <http://keionline.org/node/1849>, and <https://www.eff.org/document/letter-tpp-copyright-term-extension-proposals>, and TACD Resolution DOC No. IP 10-09 on the [Terms of Protection for Copyright and Related Rights, and Measures to Expand Access to Works not Exploited by Copyright Owners](#)).

During the TPP negotiations some countries have attempted to mitigate the harm from the extended terms by proposing language that explicitly permits the extended terms to be restricted to cases where copyright holders register works, something that can be implemented in a manner similar to the way patents are extended in the United States, Europe and some other countries, with differential status and rights. Even this compromise has not been accepted by the USTR and USTR continues to propose to lock in the life+70 year term in the TPP. By doing so a mistake made by one Congress cannot be reformed by a different Congress, and the mistake is also permanently forced into the national law of a dozen countries. This is a terrible legacy for everyone associated with the TPP.

Remedies to Infringement

Over a period of several years, we have written extensively about the damages section of the TPP, and about the same issues during the negotiations on the Anti-Counterfeiting Trade Agreement (ACTA). Annex A of this letter provides titles, dates and links to 22 blogs and letters that KEI has written discussing the impact of the ACTA or TPP standards for copyright damages on access to orphaned works, including most recently, on June 4, 2015, "US Copyright office proposes limits on damages, injunctions, for Orphan Works, contradicting TPP language."

KEI has also called attention to the importance of limitations on other remedies, including those relating to injunctions, the award of court costs and attorney fees, and the destruction of infringing goods. While such remedies are often appropriate, they are not always appropriate. The United States has nuanced laws regards remedies that include more exceptions than do any other country in the TPP negotiation.

We recognize that some of the provisions we object to are part of the ACTA and some other trade agreements, and some have been out of brackets in the TPP since 2014. What we do not understand is why the subject matter experts on copyright have not objected to these provisions, when they clearly conflict with two recommendations from the US Copyright Office for limitations on remedies for orphaned copyrighted works, the most recent of which was published by the Register of Copyrights in June 2015, as well as existing limitations on remedies to copyright in U.S. law. Given the fact that the standards for remedies can be litigated under Investor State Dispute Resolution (ISDS) in the TPP, the conflict with current or future US legal norms is important, and potentially costly for U.S. taxpayers.

At the risk of repeating what was said in our June 4, 2015 blog, and in countless earlier communications on this issue (See Annex A), it bears repeating that the primary recommended policy intervention by the Library of Congress to the Orphan Works issue is to limit the remedies for copyright infringement, including all relevant remedies addressed in the TPP, such as monetary damages, costs, injunctions and the destruction of goods.

We have other concerns over TPP enforcement provisions, including, for example, the provisions in U.S. regarding use by and for the federal government, the risks posed to U.S. educational and research institutions now protected from damages under our doctrine of state sovereign immunity.

28 USC § 1498(b)

The United State uses works protected by copyright. When those works are infringed, there are limits on the remedies available to copyright holders. Specifically, according to 28 USC § 1498(b):

whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive action which may be brought for such infringement shall be an action by the copyright owner against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 504(c) of title 17, United States Code

In a May 4, 2005 blog titled "The U.S. Government and Copyright," copyright expert William Patry described U.S. law as follows:

Until 1960, the doctrine of sovereign immunity seemed to preclude recovery against the United States for infringement. This changed on September 6, 1960 when President Kennedy signed into law an act creating a new Section 1498(b) in title 28. This waiver of sovereign immunity came with attached strings: one can only recover "reasonable and entire recovery for such damages, including minimum statutory damages," no injunctive relief is available, nor attorney's fees. . . . The reference to minimum statutory damages should scare off copyright owners from thinking they can get the enhanced amounts of up to \$150,000 per work. In short, monetary recovery is slight, injunctive relief and attorney's fees impossible; litigation against the federal government is not an attractive option. <http://williampatry.blogspot.com/2005/05/us-government-and-copyright.html>

The United States has relied upon the limitations on remedies for copyright infringement in a variety of areas, including, for example, until recently¹, to publish the World News Connection (WNC), which offered information gathered from "thousands of foreign media sources, including political speeches, television programs and radio broadcasts, and articles from newspapers, periodicals, and books," translated into English. The federal government continues to create such compilations and translations for its international uses. The United States government publishes countless abstracts, services, training and educational materials, and uses blueprints, photographs, designs, and other copyright protected works with more freedom than most non-federal actors.

The flexibility of the United States has under 28 USC § 1498(b) was protected in the TRIPS Agreement, by the provisions in Article 44.2 of the TRIPS on injunctions. In the TPP, on the other hand, the extensive TRIPS-plus obligations for copyright remedies place the federal government in a position where states and copyright owners can seek costly dispute resolution for non-compliance with the TPP norms on injunctions, attorney fees, and destruction of infringing goods.

State Sovereign Immunity

The TPP contains provisions that expose the federal government to costly dispute settlement arbitration from copyright holders, when state governments, including universities, assert their rights to sovereignty from federal copyright litigation, under the 11th Amendment to the U.S. Constitution.

As you know, following the June 23, 1999 U.S. Supreme Court decisions in the two *Florida Prepaid* cases, a series of courts in jurisdictions across the country, including at the Court of

¹ CIA Halts Public Access To Open Source Service, *SECRECY NEWS*, FAS Project on Government Secrecy, Volume 2013, Issue No. 87, October 8, 2013

Appeals level, have held that state government are not subject to damages for infringement of several types of intellectual property rights under federal copyright law.

Patents: Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank. No. 98-531. Decided June 23, 1999

Trademarks: College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, No. 98-149. Decided June 23, 1999

The TPP does not recognize this exception to remedies. The fact that the TRIPS does not recognize exceptions for remedies is one thing, but the TPP makes things much worse by raising the trade agreement standards for damages and other remedies, and also creating the opportunity for private parties to use the TPP Investor State Dispute Settlement mechanism to pursue financial damages from the United States government.

Someone with authority and knowledge of copyright laws and court decisions in the United States should talk to USTR about this issue.

Conclusion

USTR has been tasked with negotiating a very complex trade agreement. Intellectual property rights are only one of dozens of chapters in the TPP, and copyright is only one of the many types of intellectual property rights in the TPP chapter on intellectual property. The small USTR staff working on the intellectual property rights issues in the TPP have to address a very wide range of issues, and to maintain an odd and biased type of secrecy that allows copyright holders to be consulted on the technical details of the draft, and keeps the general public and nearly all academic experts in the dark. Each of you have decades of experience in copyright law -- collectively more than 70 years. Unlike the general public, your voice really matters in this negotiation. If the TPP ends up making all of the mistakes that we have identified in this letter, do not let it be because none of you mobilized your own agencies to educate the USTR about U.S. copyright law, took a stand on the copyright term issue, or did anything to protect the flexibility of a future Congress to fix the orphan works issue.

Sincerely



James Love
Knowledge Ecology International

cc: Alexander Macgillivray, OSTP; Timothy Reif, USTR; Elizabeth Kendall, USTR; Probir Mehta, USTR; Joseph Whitlock, USTR; Karyn Claggett, LOC.

Attached are Annex A, B and C.

Annex A: Selected KEI blogs and letters on provisions in ACTA, TPP and other trade agreements on copyright damages and access to orphan works.

2009

June 15, 2009, James Love, *Damages, Injunctions and Transparency Key Issues in ACTA Negotiations*. Available at <http://keionline.org/blogs/2009/06/15/thoughts-acta-negotiations>

July 31, 2009, James Love, *ACTA and Changes in Global Norms for Damages and Injunctions (For Enforcement of Intellectual Property)*. Available at <http://keionline.org/blogs/2009/07/31/acta-injunctions>

2010

April 6, 2010, James Love, *ACTA Provisions on Injunctions and Damages*. Available at <http://keionline.org/node/826>

July 14, 2010, James Love, *ACTA's Article 2.2.1, on damages:the July 1, 2010 text*, <http://keionline.org/node/888>

August 10, 2010. KEI Staff, *Letter to President of Mexico regarding ACTA*, <http://keionline.org/node/913>

October 9, 2010. *Areas where the Oct 2, 2010 ACTA text is inconsistent with U.S. law*, <http://keionline.org/node/970>

October 20, 2010, James Love, *Access to Orphan Works, and ACTA Provisions on Damages*. Available at <http://keionline.org/node/980>

October 22, 2010. James Love. *USTR's implausible claim that ACTA Article 1.2 is an all purpose loophole, and the ramifications if true*, <http://keionline.org/node/990>

October 25, 2010, James Love, *KEI Letter to the European Parliament regarding ACTA, October 25, 2010*. Available at <http://keionline.org/node/992>

November 16, 2010, James Love, *A KEI Note to Library of Congress About ACTA Text*. Available at <http://keionline.org/node/1021>

November 17, 2010, James Love, *Non-responsive Letter from David Kappos of USPTO to Senators Sanders and Brown Regarding ACTA Consistency with US Law*. Available at <http://keionline.org/node/1022>

2011

April 26, 2011, James Love, *Senator Wyden Releases redacted version of October 29, 2010 CRS report on ACTA*. Available at <http://keionline.org/node/1123>

August 31, 2011. Krist Cox. KEI comments on inconsistencies between USTR proposal for the TPPA and current US law. <http://keionline.org/node/1216>

September 30, 2011, James Love and Krista Cox, *Two Areas Where ACTA is Inconsistent with US Law, Injunctions and Damages*. Available at <http://keionline.org/node/1289>

2012

February 26, 2012, James Love, *What's (Still) Wrong with ACTA, and Why Governments Should Reject the Illegitimate Agreement*. Available at <http://keionline.org/acta>

2013

May 2, 2013. James Love. USTR "listening session" for public interest groups on TTIP trade negotiations. <http://keionline.org/node/1714>

August 1, 2013. Manon Röss, Quick look at the Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy. <http://keionline.org/node/1781>

September 28, 2013, Krista Cox, *Evolving Copyright and the Relationship With the Trans-Pacific Partnership Agreement (TPP)*. Available at <http://keionline.org/node/1802>

November 13, 2013. James Love, KEI analysis of Wikileaks leak of TPP IPR text, from August 30, 2013, <http://keionline.org/node/1825>

November 20, 2013, James Love, *KEI TPP Note: Damages Language in IP Chapter Conflicts with US Copyright Law, Blocks Green Paper Reforms*. Available at <http://keionline.org/node/1829>

2014

March 17, 2014, Claire Cassedy, *Discussion on Orphan Works and Mass Digitization at US Copyright Office, March 10-11, 2014*. Available at <http://keionline.org/node/1978>

2015

June 4, 2015. James Love, US Copyright office proposes limits on damages, injunctions, for Orphan Works, contradicting TPP language, <http://keionline.org/node/2240>

Annex B: Some articles on Orphan Works

Laura N. Bradrick, *COPYRIGHT — Don't Forget About the Orphans: A Look at a (Better) Legislative Solution to the Orphan Works Problem*, 34 W. NEW ENG. L. REV. 537 (2012). Available at: <https://drive.google.com/file/d/0B-JRe4olwPqibDN1eE1tSnNWcmc/view?usp=sharing>

Jerry Brito & Bridget Dooling, *An Orphan Works Affirmative Defense to Copyright Infringement Actions*, 12 MICH. TELECOMM. & TECH. L. REV. 75 (2005). Available at: <http://repository.law.umich.edu/mttlr/vol12/iss1/2>

Brianna Dahlberg, *The Orphan Works Problem: Preserving Access to the Cultural History of Disadvantaged Groups*, 20 S. CAL. REV. L. & SOC. J. 275 (2011). Available at: <https://drive.google.com/file/d/0B-JRe4olwPqidHJDM3JMUDZHWnc/view?usp=sharing>

Katharina de la Durantaye, *Finding a Home for Orphans: Google Book Search and Orphan Works Law in the United States and Europe*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 229 (2011). Available at: http://www.fordhamiplj.org/wp-content/uploads/2013/09/C01_Durantaye_20110315.pdf

Jane C. Ginsburg, *Recent Developments in US Copyright Law: Part I — “Orphan” Works*, Columbia Public Law & Legal Theory Working Papers, Paper 08152. Available at: http://lsr.nellco.org/columbia_pllt/08152

Stef van Gompel & P. Bernt Hugenholtz, *The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It*, 8 POPULAR COMM.: INT'L J. MEDIA & CULTURE 61-71 (2010). Available at: <http://ssrn.com/abstract=1986876>

David R. Hansen et al., *Solving the Orphan Works Problem for the United States*, 37 COLUM. J. L. & ARTS 1 (2013). Available at: <http://ssrn.com/abstract=23239454>

Peter B. Hirtle, *Unpublished Materials, New Technologies, and Copyright: Facilitating Scholarly Use*, 49 J. COPYRIGHT SOC'Y U.S.A. 259 (2001). Available at: http://www.section108.gov/docs/Hirtle_OSU_paper.pdf

Olive Huang, *U.S. Copyright Office Orphan Works Inquiry: Finding Homes for the Orphans*, 21 BERKELEY TECH. L.J. 265 (2006). Available at: <http://scholarship.law.berkeley.edu/btlj/vol21/iss1/21>

Maria A. Pallante, *Orphan Works & Mass Digitization: Obstacles & Opportunities*, 27 BERKELEY TECH. L.J. 1251 (2012). Available at: <http://www.copyright.gov/regstat/2013/Pallante-OrphanWorks.pdf>

Christopher Jon Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004). Available at: <http://ssrn.com/abstract=578502>

Hal R. Varian, *Copyright Term Extension and Orphan Works*, 15 INDUST. & CORP. CHANGE 965 (2006). Available at: <http://people.ischool.berkeley.edu/~hal/Papers/2006/copyright-policy.pdf>

ANNEX C: Brian Yeh's 2010 CRS memo on ACTA

In 2010, Senator Wyden asked the Congressional Research Service (CRS) to look at the "Potential Implications for Federal Law Raised by the 2010 Draft of the Anti-Counterfeiting Trade Agreement (ACTA)." Specifically, CRS was asked if the October 2, 2010 draft of ACTA would "diverge from federal law or impede current or future legislative efforts in the area of reform of damage for patent infringement or access to orphaned copyrighted works."

The CRS response, written by Brian T. Yeh, is relevant because several elements in TPP relating to the enforcement of intellectual property rights are based upon the ACTA language, including the ACTA provisions on damages.

On the top of page 3 of his memo, Yeh draws a distinction between exceptions to intellectual property rights and exceptions to remedies to those rights.

[ACTA] allows a Party to have domestic laws that contain exceptions, limitations and conditions concerning the "availability, acquisition, scope and maintenance" of IPR. It does not, however, appear to apply to a Party's domestic laws that provide exceptions to the *remedies* that are available to intellectual property holders that seek to enforce their IPR. Yet it may be difficult in certain circumstances to draw a distinction between a Party's domestic laws that establish rights and those that provide for remedies for violation of those right; if the domestic law clearly concerns the latter, then this provision does not appear to be relevant. For example, a law that specifies that "injunctive relief is not available. . ." for certain acts of infringement, appears more clearly to be a limitation on available remedies. However, a law that specifies that "it is not an act of infringement to perform a specific action/12/ could be considered a limitation on remedies, or it could also be regards as an exception, limitation or condition regarding the availability and scope of IPR.

Yeh's October 29, 2010 memo stated:

"Depending on how broadly or narrowly several passages from the ACTA draft text are interpreted, it appears that certain provisions of the federal intellectual property law could be regarded as inconsistent with ACT"

subject to

"several caveats and language that appear to provide . . . a certain degree of discretion and flexibility in meeting the obligations set forth in the agreement."

Yee cited in particular the language in ACTA which states

"Each Party shall be free to determine the appropriate method of implementing the provisions of this Agreement within its own legal system and practice,"

and explored the USTR argument that this language provided space for flexibility in terms of implementing ACTA.

In commentary on Yeh's 2010 memo, KEI noted that nearly every country in WTO TRIPS dispute has cited identical language from Article 1 of the TRIPS to defend inconsistencies with TRIPS obligations, with decidedly limited success. This includes the largely unsuccessful efforts by both the United States and the government of China, in separate proceedings. (See: "USTR's implausible claim that ACTA Article 1.2 is an all purpose loophole, and the ramifications if true," October 22, 2010, <http://keionline.org/node/990>; Mike Masnick, "US Basically Says It'll Ignore Anything In ACTA That It Doesn't Like... So How About Everyone Else? from the ignore-away dept," *TechDirt*, October 25, 2010; and "USTR positions in China WTO TRIPS dispute at odds with talking points on ACTA flexibility," October 27, 2010, <http://keionline.org/node/9970>).

On pages 8 and 9 of the Yeh memorandum, he discussed the conflict between the ACTA provisions on damages and the conflicts with proposals for reforms in the area of orphan works. Yeh makes the following observations:

Congress could continue to consider legislation in the area of reform to damages in patent litigation or access to orphaned copyrighted works that resemble approaches in the 110th and 111th Congresses. Such approaches specify methods of calculating monetary damages in patent cases and call for limitations on damages and injunctive relief in cases involving orphan works. [footnotes omitted]

Yeh said ACTA was "an executive agreement that reportedly will not be submitted to Congress for approval" and "Congress may not be compelled to take into account the requirements of an agreement that it had no formal role in approving." Even with the non-binding nature of the agreement, Yeh speculated that "it may well be that Members of Congress might be reluctant to consider legislative approaches that would alter federal law in a manner that might make the United States in default of its ACTA obligations. The seriousness of such a concern may turn on the extent to which the United States may be held accountable for ignoring its ACTA obligations, or how successful the United States is in convincing other ACTA Parties of its compliance with the ACTA commitments even with such legislation."

TPP is similar to ACTA in terms of the provisions on damages, but it quite different in terms of its binding nature. The TPP will be a trade agreement negotiated under the fast track trade promotion authority, and the norms will be enforceable both via state to state dispute resolution, but also by private parties, in the TPP provisions for Investor State Dispute Settlement (ISDS).