



May 16, 2013

Mr. Robert Hormats
Under Secretary of State for Economic,
Energy, and Agricultural Affairs
U.S. Department of State
2201 C Street NW
Washington, DC, 20520

Transatlantic Trade and IPR Leadership Needed in WIPO Treaty Negotiations

Dear Under Secretary Hormats,

We wish to draw your urgent attention to treaty negotiations underway at the World Intellectual Property Organization (WIPO). Urgent, transatlantic leadership is needed to change the course of these negotiations, which threaten to undermine years of effort to protect American and European competitiveness, support jobs, and maintain our robust innovation and technology infrastructures.

At WIPO, the U.S., EU, and other nations are in the final rounds of negotiations on a treaty to improve access by visually-impaired persons and persons with print disabilities to copyrighted works ("VIP Treaty").¹ A WIPO Diplomatic Conference has been scheduled for 17-28 June 2013 in Morocco, at which WIPO Members plan to finalize negotiations and sign the treaty.

Improving access to copyrighted works by persons who are visually impaired or suffering from print disabilities is a worthy objective. We support, in general, efforts by the U.S., the EU, and the international community to find effective solutions to the challenges faced by these groups. In particular, we support conclusion of a balanced and workable international agreement that effectively addresses their needs. This is not the treaty on the table. As currently drafted, the VIP Treaty would set a negative precedent, reversing years of joint U.S. and EU efforts to prevent the erosion of global Intellectual Property Rights (IPR) and undermining the U.S. and EU negotiating positions in a range of other global IPR and trade negotiations.

Urgent, transatlantic leadership is needed, including a clear leadership decision that conclusion of the VIP Treaty in June would be premature. In any event it is critical that USTR and DG Trade officials are represented in person at any further meetings to secure redlines and ensure that agreed text is aligned with existing public international law, including TRIPS and free trade agreements.

¹ WIPO Treaty to Improve Access by the Visually-Impaired and Persons with Print Disabilities to Copyrighted Works ("VIP Treaty").



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Agreement of the VIP Treaty on the basis of this text (or anything approximating it) could negatively affect U.S. and EU IP-related negotiating positions across global forums for years to come. The risk of contagion is not limited to copyright issues alone, but spans the entire range of IPR issues, including also patents, trade secrets, and trademarks. U.S. and EU positions in the ongoing debates at WIPO, the World Trade Organization (WTO), the UN Framework Convention on Climate Change (UNFCCC) – where IPR issues have been a politically divisive issue for years – and the World Health Organization (WHO) would certainly be undermined.

As you know, patents, trade secrets, and other forms of IPR that protect and differentiate brands are critically important for U.S. and European advanced manufacturing and technology industries and the broader business community. The value of such IPR assets is hard to overstate, as is the shared interest between the U.S. and EU in ensuring effective systems for IPR protection around the world. IP-intensive industries are linked to 35% of U.S. GDP and nearly 30% of all U.S. employment. The EU is no less reliant on innovative, advanced manufacturing and technology industries for its competitiveness, economic recovery, and for European jobs.

Time between now and the June Conference is unfortunately too short to resolve all or even most of the critical problems with the VIP Treaty text. Joint EU and U.S. leadership is urgently needed to: *first*, fix the many remaining problems in the current text (background paper attached); *second*, ensure that an appropriate balance between rights and exceptions – consistent with existing U.S., EU and international IPR law – is maintained; and, *third*, ensure that the long-term interests of the visually-impaired and people with print disabilities are properly served. Given the deficiencies in the current text, and the risk of failure at the Diplomatic Conference, it would seem prudent to take more time. Conclusion of the VIP Treaty in June would be premature.

We look forward to discussing these issues further with you or any of your services, and are of course available for any questions that you or they may have.

Sincerely,

Tim Bennett
Director General
Transatlantic Business Council



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Background on VIP Treaty Negotiations

May 7, 2013

According to the World Health Organization, there are more than 314 million visually impaired people worldwide. Of these, 45 million are blind, 90 percent of whom live in developing countries.¹ In wealthier countries, only a small fraction of published books are made in accessible formats for the visually impaired. Even fewer works are available in low income countries, resulting in a “book famine,” depriving the visually impaired access to education, culture, and entertainment.

Most accessible books are made by specialist, non-profit agencies. In many cases these organizations use copyright exceptions available in national law. However, relatively few countries have such exceptions, and the scope of existing exceptions varies considerably.² Even when exceptions exist, since copyright is a creature of national law, the provided exceptions cannot be used to benefit those in other countries. As a result, efforts to make books accessible are often duplicated, expending the limited resources of these agencies.

To address these issues, Members of the World Intellectual Property Organization (WIPO) have entered into negotiations on a new treaty to improve access by the visually-impaired and persons with print disabilities to copyrighted works (“VIP Treaty”). The primary objectives of the VIP treaty are to 1) facilitate the creation of accessible format works by harmonizing exceptions and limitations across national jurisdictions and 2) enable cross border sharing of such works.

Status of the Negotiations

A WIPO Diplomatic Conference is scheduled for 17-28 June 2013 in Morocco, with the aim of finalizing the WIPO VIP Treaty. During the most recent round of negotiations, taking place at WIPO’s Standing Committee on Copyrights (SCCR) between April 18-20, a highly bracketed text was tabled. Numerous complications have emerged since then and it appears that none of the stakeholders are satisfied with the text in its current form. At the same time, there is a real risk that the treaty will be concluded in June, because of political pressure on WIPO to “deliver”.

Given the current status of negotiations, the planned Diplomatic Conference is premature and in danger of delivering no treaty at all or a watered down instrument that does not serve its intended purpose. Such a result would not reflect well on the global IP system. Instead, it would be advisable to postpone adoption of a VIP Treaty until a text has been developed that all stakeholders can support and that adequately addresses the core IPR-related concerns discussed

¹ World Health Organization, “Prevention of Avoidable Blindness and Visual Impairment: Report by the Secretariat,” Sixty-Second World Health Assembly, Provisional Agenda Item 12.3 (A62/7), April 2, 2009, http://apps.who.int/gb/ebwha/pdf_files/A62/A62_7-en.pdf

² WIPO. Study on Copyright Limitations and Exceptions for the Visually Impaired. SCCR/15/7. February 2007. Available at: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696



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in further detail below.³ In our view this is necessary but will be politically difficult, given that WIPO's Director General, Francis Gurry, a number of NGOs including the World Blind Union and KEI, and the Africa group in particular, are pushing for the treaty to be signed immediately.

Broader Context

The VIP Treaty negotiations are taking place against the backdrop of broader international efforts, by certain advanced emerging economies and NGOs, to weaken Intellectual Property Rights protection in general, *i.e.*, including copyrights, but also patents, and trade secrets. Such efforts so far have focused in particular on the UN Framework Convention on Climate Change (UNFCCC), where India, China and certain other countries as well as key NGOs have demanded "flexibilities" for clean technology-related IPR; the World Health Organization (WHO); and the World Trade Organization (WTO). The same group of countries, moreover, is also pursuing a range of domestic policies to the same effect. Thus, for example, India specifically calls for compulsory licensing of clean technology patents in its National Manufacturing Policy.

Key Problems with the VIP Treaty (as currently drafted)

International copyright law is fundamentally based on a balance between the rights of copyright owners, and certain Limitations & Exceptions that can be imposed in a very limited set of circumstances. This balance is reflected, *inter alia*, in the so-called "three-step" test. According to this test, any L/E shall be (i) limited to "special cases"; (ii) is only allowed "provided that reproduction does not conflict with a normal exploitation of the [copyrighted] work"; and (iii) when it "does not unreasonably prejudice the legitimate interests of the right holder". Any L/E framework, moreover, only makes sense where copyrights are properly enshrined in international and domestic legal instruments as well. It does not make sense to have an exception without the corresponding basic rule.

The VIP Treaty as currently drafted does not reflect the appropriate balance between copyright protections, on the one hand, and L/E to copyright protection, on the other hand:

- As currently drafted, the VIP Treaty isolates L/E from the basic copyright protections to which they pertain even though many of the eventual signatory countries do not provide any copyright protections whatsoever. In these countries, in other words, Limitations and Exceptions would exist without the related copyrights protections – to which such L/E pertain. It does not make sense to agree to L/E when basic rights are not yet in place.
- The draft VIP Treaty reflects a compromise version of the "three-step" test which is inadequate and likely to cause confusion. At a minimum, therefore, the existing "three-step" test must be spelled out clearly and apply to the entire agreement and to all signatories. The European Union made a proposal to this effect in 2012 that should be revisited and agreed.

³ This does not mean the Diplomatic Conference itself would necessarily have to be postponed; but that it should focus on a Plan B option, rather than agreement on a treaty that is not satisfactory to any of the parties concerned.



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- The VIP Treaty, in its current form, is strongly supported and advanced by the same group of NGOs and advanced emerging economy countries that pursue a general IPR-weakening agenda at WIPO and in other international fora. As currently drafted, the VIP Treaty would create a harmful precedent that could be relied upon by IPR detractors in other talks, including at UNFCCC, WHO, and WTO. Given the highly politicized nature of this broader IPR debate, and the aggressive IPR-weakening agendas of the countries involved, this is a real and immediate risk.