

Chicago Daily Law Bulletin®

Volume 161, No. 124

Trans-Pacific Partnership talks affect IP enforcement

Leaked documents. Secret meetings among powerful leaders in exotic locales. Outside agitators. Illegal drugs. Misinformation. Plot elements in the latest James Bond movie? Maybe. But it is also the reality of current negotiations surrounding the Trans-Pacific Partnership.

The TPP is the most recent in a string of free-trade agreements that have changed the face of global intellectual property enforcement standards. Involving 12 countries, including the United States, Canada, Australia, Japan and Vietnam (but not China), the TPP will impact 40 percent of the world's global trade. Like its predecessors, the TPP has an intellectual property chapter designed to raise international IP enforcement standards.

By Congress granting fast-track authority, the lawmakers can either accept or reject a free-trade agreement, but cannot amend it. Every president since 2000 has had such authority, resulting in 14 FTAs between the U.S. and 20 other countries.

Without such authority, the use of FTAs to raise IP enforcement standards globally will effectively be over. In the absence of effective alternative avenues for securing such improved enforcement, even those who seek greater public access to private intellectual property will find their efforts stymied.

Before we celebrate the end of the FTA era, it's worth considering what this means for international IP protection.

The most famous FTA is the Agreement on Trade-Related Intellectual Property Rights. TRIPS is the most significant IP treaty of the 20th century. It redefined trademark and patent protection. Most significantly, TRIPS required countries to provide "effective enforcement" for IP rights (Article 41). Countries could no longer comply with treaty obligations by simply having IP laws on the books.

Effective enforcement under TRIPS included ex parte restraining and seizure orders, criminal penalties for trademark counterfeiting and copyright piracy, and border-control measures. Despite its forward-looking approach in 1994, when it was finalized, TRIPS has several critical loopholes. It does not deal with digital piracy nor prohibit the export of counterfeit or pirated goods, nor require the destruction of illegal products.

There has been no similar plurilateral IP enforcement treaty since TRIPS. Quite simply, in today's environment, it is impossible to reach accord at such a level. The most recent effort, the much-flawed Anti-Counterfeiting Trade Agreement, involved only 10 countries and the European Union, and collapsed in the face of an organized online campaign against it.

FTAs were used to fill the void. The European Union has been as aggressive as the United States in pursuing FTAs to bring international standards in line with its own domestic norms. American FTAs are known for containing so-called TRIPS-plus provisions aimed at enhancing IP enforcement mechanisms. EU FTAs, by contrast, focus on enhancing the protection of geographic indications, such as "Champagne" for sparkling wine. Such differing foci

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guarantee that a country could enter into FTAs with conflicting provisions.

Despite the potential conflicts between diverse FTAs, the intellectual property chapters of American FTAs have consistently raised enforcement protections.

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Trans-Pacific Partnership are accurate, the IP chapter is designed to close many enforcement loopholes left by TRIPS. It expressly requires that "effective enforcement" obligations apply to the Internet. It obligates signatories to enforce anti-circumvention measures to protect copyrighted works against digital piracy.

It even contains heightened trade secret protections that seek criminal penalties for willful misappropriation or disclosure of a trade secret "for purposes of commercial advantage or financial gain."

What the TPP lacks is any kind of transparency. I have to write about "leaked" versions because there is no official draft available to the general public as I write. That is the largest problem with FTAs — and why they are currently on a death-watch.

IP-focused treaties negotiated before the World Intellectual Property Organization, such as the WIPO Copyright Treaty, are subject to a transparent process. Drafts are publicly available at WIPO.org. Nongovernmental organizations, such as the Electronic Frontier Foundation, are accredited to attend the negotiating sessions of the diplomatic

process. None of this transparency exists for FTAs.

Since the negotiation of TRIPS, FTAs have been subject to procedures that prize secrecy over transparency. They are strictly government-to-government negotiations. Governments decide whether, and to whom, to disclose draft versions. All such disclosures are made subject to strict confidentiality provisions. In the era of social media and the Internet, such secrecy only heightens public suspicions that deals are being made that are contrary to its interest.

ACTA suffered from such suspicions. Negotiated as an FTA, with no publicly available drafts, ACTA was the subject of a successful online campaign that ultimately convinced the involved countries, including the European Union, to reject it.

Unfortunately, with its collapse, the public lost a first-time, express guarantee that enforcement must preserve "fundamental principles such as freedom of expression ... and privacy." IP owners also lost much-needed improvements in cross-border enforcement.

Enforcement has always been difficult internationally. With the advent of global digital piracy, the growing divide between have and have-nots in the information age, shifting diplomatic relations, and the significance of information as a product of trade, countries disagree vehemently on the scope of any such enforcement standards.

FTAs are not a perfect solution to the lack of multilateral enforcement treaties to update TRIPS protections. But currently they are the only viable stopgap measure. However, we are well past the time for transparency practices to be adopted. Transparency does not mean the governments must accept the criticisms directed to particular provision, but it would make fast-track authority more palatable and would ensure that FTAs do not become one-sided ultra-protectionist vehicles.

Ultimately, transparency would send James Bond plots back to the movies where they belong.