

TPP Intellectual Property Negotiations
Prepared by the IP Task Force of the U.S. Business Coalition for TPP

Key Goals and Objectives

The Intellectual Property (IP) Task Force of the U.S. Business Coalition for TPP (“IP Task Force”) urges the U.S. Government to include the key negotiating elements set forth in this paper in the Trans-Pacific Partnership Agreement (TPP), which are the minimum necessary to achieve a commercially meaningful TPP negotiating outcome that could ultimately serve as a template for future trade agreements in the Asia-Pacific region. In particular, the TPP must:

- seek the highest possible IP protections from TPP negotiating parties that results in effective and transparent enforcement of IP rights;
- build upon, and not diminish, existing FTAs with TPP partners in order to address effectively the emerging challenges to and evolving business models of the IP industries, using the United States - Korea Free Trade Agreement as a baseline;
- secure critical and specific IP commitments that address IP issues from all innovative and creative industries from countries with no existing U.S. FTA;
- eliminate any discrimination against U.S. right holders by any of our trading partners;
- ensure that IP protection and enforcement standards keep pace with rapid changes in technology, including establishing that right holders have the appropriate legal and technological means to exercise their right to authorize distribution and making available of and apply limitations to the use of their works through the Internet and other global communication media, and to prevent the unauthorized use of their works;
- ensure that the protection of geographical indications does not undermine the rights of trademark holders nor prevent the use of common names in international commerce;
- provide the full range of protections for patented innovations;
- provide for effective and enforceable data exclusivity and confidentiality provisions for highly regulated industries;
- ensure that disciplines are clear, specific, and enforceable which will foster compliance and the economic benefits of the TPP;

- secure deterrent enforcement against piracy, counterfeiting, cyber squatting and other infringements through significant improvements in civil and criminal remedies and penalties;
- ensure full implementation of the substantive and enforcement obligations of the TRIPS Agreement;
- prohibit explicitly industrial policies that discriminate against foreign IP right holders, including local investment and manufacturing requirements, which threaten U.S. jobs and exports;
- provide that IP rights should not be undermined by other government pricing and regulatory mechanisms that significantly devalue IP protection, or in some cases, render it of little economic value; and
- establish a standstill among the TPP parties on implementing new policies that impede market access for innovative and creative products while the negotiations are in process.

In addition, we urge the U.S. negotiators to ensure that any existing FTA obligations with the United States or WTO accession issues be addressed as part of the negotiations before considering new commitments. Moreover, for IP-based industries to be able to compete successfully overseas, it is critical that strong IP disciplines are matched by equally strong market access openings, which are discussed in other industry coalition papers.

The Importance of Strong Protection and Enforcement of IP Rights

IP promotes economic growth and competitiveness, fosters innovation and creativity, and creates high paying jobs. Today's global IP rights system is designed to incentivize individuals and businesses small and large, to invest in the advancements—from life saving medicines and environmental-friendly technologies to first class entertainment such as books, movies, and music—that make our lives better.

IP is a driver of U.S. economic growth and jobs. In particular, studies have shown that:

- U.S. IP is worth between \$5.0 trillion and \$5.5 trillion—more than the nominal gross domestic product (GDP) of any other country.

- IP-intensive industries accounted for approximately 60 percent of total U.S. exports rising from \$665 billion in 2000 to \$910 billion in 2007. In that time period, American firms exported an annual average \$405.5 billion of IP-intensive products versus \$278.1 billion of non-IP-intensive products.
- Industry spending on R&D in the United States accounts for approximately 72 percent of total R&D spending, totaling nearly \$1.2 trillion, an average of \$145 billion annually. During 2000-07, IP-intensive industries spent almost 13 times more on R&D per employee than in non-IP-intensive industries.
- IP-intensive industries employ 18 million Americans across all 50 states. IP jobs include all educational levels, skills levels, demographics, and industrial sectors.
- During 2000-07, the annual salary of all workers in IP-intensive industries averaged about 60 percent higher than the workers at similar levels in non-IP-intensive industries. Meanwhile, annual salaries of low-skilled workers in IP-intensive industries averaged about 40 percent higher than in non-IP-based industries.

Strong IP protection and enforcement provisions are essential ingredients to incentivizing the development of original works and new technologies, promoting America's continued competitiveness, and driving U.S. export growth. For U.S. companies to retain high-quality knowledge-based jobs in the United States, and for the U.S. to further develop its comparative advantage in the global trading arena, it is imperative that the U.S. Government ensure that the TPP IPR provisions reflect the highest standards. Strong IPR provisions in the TPP will foster legitimate commerce, advancing implementation of the TPP goods, e-commerce, services, and investment chapters. As the most innovative and creative economy in the world, the United States has the most to lose from weak IP standards. A lack of commitment to protect U.S. IP will encourage further IP infringement – thereby impairing U.S. exports and job growth and weakening the TPP's overall effectiveness.

Effective IPR protection plays a critical role in building market-based incentives for innovation and creativity, the benefits of which are shared with consumers and patients around the world. A lack of commitment to protect U.S. IP around the world could impair future R&D investment and could discourage the capital investments critical to developing new technologies that can save and/or enhance lives and create jobs for millions of Americans.

Key Elements of TPP IP Chapter

Trademark Protections and Geographical Indications:

Protect Famous Trademarks. Among the recently concluded negotiations, the U.S.-Korea FTA has the strongest provisions protecting famous trademarks as it provides for protection of unregistered famous/well-known trademarks in cases involving dissimilar goods and services. It also permits owners of famous/well-known trademarks to oppose the registration of marks that are identical or similar to a famous/well-known mark or to seek the cancellation of a mark that is identical or similar to a famous/well-known mark. The TPP should provide similar protections.

Trademark License. The TPP should include a provision that eliminates the requirement that trademark licenses must be recorded in order for the trademark owner or the licensee to enforce trademark rights against an infringer.

Promote systems for the registration of geographical indications (GIs) which provide protection for legitimate GIs while respecting the rights of trademark holders and preserve the ability of operators to use common names for products produced outside the protected region. In particular, the agreement should:

- Ensure that parties to the TPP accord protection for products other than wines and spirits only to compound indications with a geographical component and permit third-party use of components of compound indications;
- Ensure that terms that are generic or are likely to cause confusion with a trademark are ineligible for protection as single-term GIs. Establish guidelines for determining whether a proposed term is generic and an indicative list of generic names;
- Ensure that a term that is the common name for a product produced in significant quantities outside the proposed protected region or traded in significant quantities internationally is ineligible for protection as a GI; and
- Ensure that applications for GI registration, as well as GIs proposed for registration pursuant to an agreement with a government, are published for opposition by interested parties prior to registration, and that notification of such publication is sent to TPP countries.

Copyright and related rights protections:

It is critical that the TPP provide the highest levels of protection for not only the trade in physical copyright-protected products but also for protections in the ever-growing online environment. Among the essential copyright protections that should be included in the TPP are:

Protection of temporary copies. In light of the ever-increasing economic importance of such copies in the digital networked environment, in which the making and use of such temporary copies is rapidly becoming the primary means by which many copyright works are consumed by the public. Temporary copies are not per se infringing of underlying rights. But, it is critical that the TPP include clear language to clarify that temporary copies are fully subject to the reproduction right.

Full and effective implementation of the WCT and WPPT. The WIPO Internet treaties provide the global minimum standards for healthy electronic commerce. The treaties provide, among other things, critical protections against the unlawful circumvention of technologies (both copy controls and access controls) that right holders use to prevent theft of their creations and recognition of the rights of copyright owners to control distribution of copies and a right to control communications of a work, as well as the making available right and protection against circumvention of TPMs. The TPP must oblige all parties to fully implement these treaties.

Extended term of protection for copyrights to match US law. There is an unmistakable global trend toward extending the term of copyright protection. The TPP must reflect this reality, preventing a potential irritant to international trade that results from divergent terms among trading partners.

Exclusive rights for sound recording. Inclusion of such an obligation in the TPP should help promote a robust legitimate market for sound recordings across new media.

Contractual rights. The TPP should affirm that all right holders are allowed to exercise economic rights in their own names and that any person acquiring or holding such economic rights by virtue of a contract must be able to exercise those rights and enjoy fully the benefits derived from those rights.

Protection for Encrypted Signals:

Protection for encrypted signals. The TPP must provide both civil and criminal remedies against the theft of satellite and cable signals and criminalize those situations where a cable or satellite signal is lawfully decrypted but then retransmitted without authorization of the legal signal distributor.

Patent Protections and Other Support for Innovation:

Support Innovation. Several recently-concluded U.S. FTAs acknowledge the importance of supporting innovation, including specific commitments to regulatory transparency, accountability and objectivity, with respect to the drug approval and drug reimbursement processes. Non-tariff regulatory barriers in this sector can have the effect of delaying or restricting access to innovative medicines to patients, and sometimes subjecting the innovative bio-pharmaceutical industry to budgetary restrictions that are disproportionate to its share of health care expenditures. The U.S.-Korea FTA, for example, affirms the importance of promoting the development of high-quality patented and generic pharmaceutical products as a means to improve public health as well as the need to appropriately recognize the value of patented products in setting reimbursement amounts. Securing agreement on the need to adequately recognize the value of innovation in health care policies should be a key part of the U.S. Government's TPP negotiating objectives. Such policies will help ensure timely patient access to advanced life-saving medical discoveries, support improvements in quality of life and productivity, and serve as an engine for future economic growth.

Enhance transparency. Policy and regulatory procedures and decisions regarding how medicines are approved and regulated in the market, procured and made available to patients should be governed by transparent and verifiable rules guided by science-based decision making. There should be meaningful opportunities for input from manufacturers and other stakeholders to health authorities and other regulatory agencies and a right of appeal to an independent, objective court or administrative body. This is a matter affecting innovative and generic industries alike, and one which should be addressed in the TPP negotiations.

Provide Robust and Effective Protection of Innovators' Data. Innovative industries, including biopharmaceutical and agrochemical companies, expend tremendous effort and resources conducting research to demonstrate the safety and efficacy of their life-saving and life-enhancing inventions. Patent protection, which runs concurrent with data protection, does not protect the effort and investment needed to prove safety and efficacy of these products. Unless the data developed to prove a product's safety and efficacy is effectively protected, companies are unable to recoup the significant investment required to generate the data and the costs of launching a product. As such, it is critical that the TPP ensure the robust and effective protection of innovators' data.

Empower patients and healthcare providers. As key stakeholders, patients and physicians and other health care providers should have access to the regulatory and policy decision-making process and to information necessary to allow them to make informed decisions. Healthcare providers including doctors' and nurse practitioners' specialized expertise and therapeutic judgment should be respected. Doctors should have the freedom to prescribe medications that best address patients' needs.

Strong Patent Protection Fosters Innovation. Patents incentivize innovation and are an invaluable asset to facilitate ongoing R&D, resulting in new products that benefit all of society.

For example, in order for innovators that develop and commercialize software products to realize the full value of their innovations, it is imperative that they be able to protect their inventions in a way that provides the most effective and efficient form of enforcement against infringement. This will enable them to either prevent others from diminishing their market share, or alternatively receive reasonable compensation (or other quid pro quo) for their innovations by way of patent license agreements. If they cannot, then they will be discouraged from protecting their inventions and enforcing their patents, resulting in erosion of their markets, product prices and return on investment. This will in turn stifle further R&D, stagnate further innovation and negatively impact economic growth.

The most efficient and effective form of enforcement begins with the granting of patents that allow the patent holder to make a claim of direct infringement against the infringer. A computer program product claim is one that provides protection for a computer program in combination with the media on which it is stored or transmitted. Examples include programs on floppy disks, CD's or DVD's, and programs downloaded either over wired or wireless connections. Method claims and embedded software claims may allow the patent holder to make a claim of indirect infringement against the software manufacturer. However, indirect infringement claims are fraught with uncertainty and unpredictability which are undesirable in a strong patent system that fosters innovation and competition. A strong patent examination and enforcement system provides certainty and predictability to the patent holder, as well as users of the patents.

Suggestion:

Using the exact language of the U.S.-Korea FTA with respect to patents for computer implemented inventions only requires that the signatories meet the minimum standards of TRIPS. Many of the signatories to TRIPS, such as China and India, have taken the position, in spite of the language that requires providing patent protection for all fields of technology, that their failure to provide patent protection for computer implemented inventions (especially regarding computer program on media claims) is not in violation of TRIPS. Thus, the language of the TPP agreement needs to be strengthened to specifically require providing patent protection for computer implemented inventions.

Protection for plant science. The TPP must adhere to existing international agreements on intellectual property for plant science, including UPOV 91, as well as other obligations set forth in FTAs to which the U.S. is a party, and U.S. law.

Strong Enforcement:

Availability of statutory damages. Although U.S. law has long provided for statutory damages, this provision is lacking in the laws of many of our trading partners. Statutory damages encourage civil enforcement by providing a predictable and deterrent remedy against infringers. This remedy is critical to the TPP.

Ex-officio authority for law enforcement officials. The TPP should mandate that law enforcement officials have the ability to seize infringing goods even if not specifically named in a warrant and without complaint by a right holder.

Border measures. It is critical that the TPP recognize the importance of preventing counterfeit trademark or pirated copyright goods from entering the channels of commerce, whether in the domestic market or intended foreign markets. As such, the TPP should provide customs authorities the ability to act *ex-officio* against imports, exports, goods in-transit, and goods in free trade zones.

Clearly defined Internet service provider guidelines on liability and applicable limitations. Such provisions provide legal incentives for service providers to cooperate with right holders in deterring piracy and are critical to any effort to combat online copyright infringement.

Outlaw camcording in theaters. The TPP should include this important discipline that addresses the source of approximately 90% of infringing copies of films and tracks U.S. federal law as well as the sentiment of two-thirds of U.S. states.

Availability of civil remedies. Building on the minimum civil remedies set forth in TRIPS, vital tools for effective enforcement include: providing for injunctive relief; ex parte procedures; the seizure and destruction of infringing copies and the materials and implements used to make them; requirement that a party provide judicial authorities the authority to fine, detain or imprison a party to civil litigation that fails to abide by a court order; requirements, in accordance with applicable legal process, for defendants to identify third parties in the production or distribution chain of pirated products; and, the award of costs and attorneys' fees to prevailing parties.

Criminalizing trafficking of illicit labels. It is important that the TPP protect legitimate channels of commerce by providing criminal remedies against individuals that traffic in counterfeit labels, documentation or packaging associated with a pirated product.

Enforcement against Internet piracy. Recognizing the critical role of legitimate electronic commerce in the global marketplace, TPP parties should agree to make internet piracy a law enforcement priority and agree to prosecute not only direct infringers, but also those who purposefully take steps to promote infringement and "profit from developing and maintaining services that effectively induce it." This commitment would allow the TPP to address current problems that impact today's global economy.

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Commercial scale. The TPP must reflect the reality that right holders are harmed when illegal content is posted to the Internet with or without charge to the downloader and acknowledge harm to the infringed party rather than profit motive or the commercial purpose of the infringer.

Software legalization. TPP parties must mandate the use of legal software by government agencies, incorporating the APEC principles that broadly mandate that government agencies not use material infringing copyright.