



IP and the TTIP

The TPP Experience

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Outline

Background

- Substance

- Process

Recommendations

- How to Include IP in a Trade Agreement

- Conclusion



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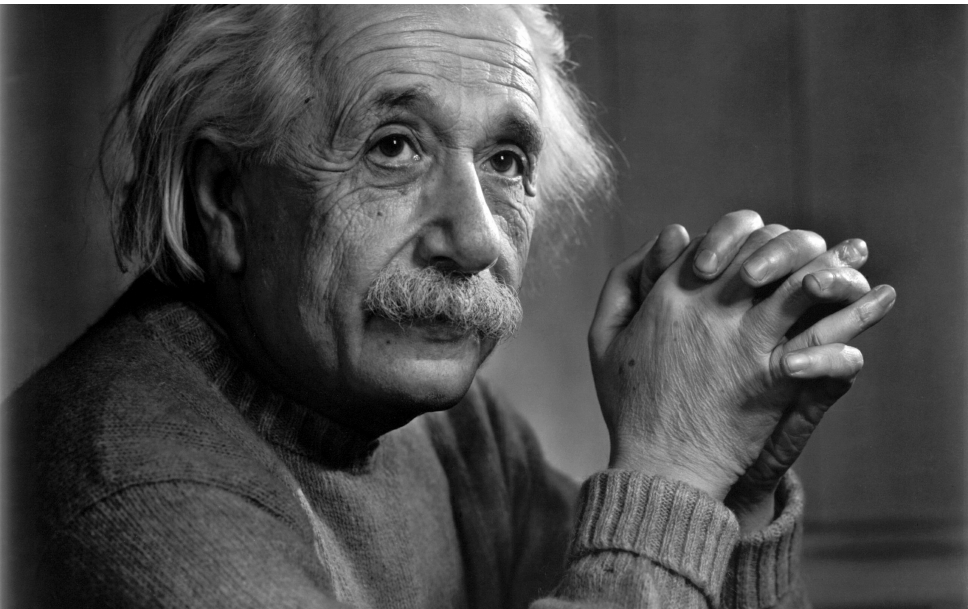


IP in Trade Agreements

- IP first added to WTO/GATT in 1994 with TRIPS on the theory is that failure to protect IP is an unfair trade barrier
- However IP is *itself* often a trade barrier

Examples

- **Patents:** The Apple-Samsung patent dispute has affected trade in smartphones and tablets between the USA and Korea.
- **Trademarks:** The use of “UGG” as a trademark for sheepskin boots created a trade dispute between the USA and Australia.
- **Geographical indicators:** prevent United States vignerons from marketing champagne and cognac under those names.
- **Copyright:** The most iconic image of Albert Einstein is in the public domain in Canada, but cannot be exported to the USA.





Status Quo of IP in TPP

Leaked information – but nothing is agreed until everything is agreed

In?

WCT-like
anti-circumvention
ACTA-like IP
enforcement
Restatement of three
step test

Out?

Limitations on
parallel importation
Pre-grant patent
opposition ban
Protection of
temporary copies

In dispute?

Extension of
copyright term
Notice and takedown
regime
Investor-state dispute
settlement

Overall issues relevant to IP

Transparency
Local content quotas
Regulatory coherence
Investor State Dispute Settlement



IP in TTIP

In?

Geographical Indicators
Patentability
Trade secrets

Out?

IP enforcement
Intermediary liability
Data protection

Unknown

Copyright term
Seeds
Trademarks

Overall issues relevant to IP

Transparency
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Investor State Dispute Settlement



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Transparency

- The TPP has been notorious for its lack of transparency, which TTIP emulates
 - No release of negotiating texts
 - Limited and uncoordinated release of background materials
 - Individual countries may conduct their own own briefings
 - Some allowed cleared advisers access under NDA
- It is false to claim that negotiating texts are not released in other IP venues
 - WIPO releases negotiating texts and allows civil society observers
 - The proposed Free Trade Area of the Americas (FTAA) text was released as a draft in 2001



Participation

- No observers are allowed to attend negotiations
- Until last year negotiation rounds included open space for presentations and/or receptions with negotiators

Civil society groups are planning a side meeting for negotiators during the next round in ~~Vancouver~~ Ottawa. Officials are refusing even to tell us the name of the conference centre.



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- Emerging global norms require multi-stakeholder participation in development of policies that affect the Internet
 - Internet governance should be built on democratic, multistakeholder processes, ensuring the meaningful and accountable participation of all stakeholders*
 - NETmundial Multistakeholder Statement, 2014*



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If IP is in, What Should it Look Like?

Example text that could be used for an “IP lite” chapter:

*The parties affirm their existing rights and obligations . . .
nothing in this Chapter shall derogate from existing rights
and obligations under [TRIPS, etc]*



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The Parties recognise the need to achieve a balance between the rights of right holders and the legitimate interests of users and the community with regard to protected subject matter.



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The Parties recognise the need to achieve a balance between the rights of right holders and the legitimate interests of users and the community with regard to protected subject matter.

The Parties may establish limitations and exceptions in their domestic laws as acceptable under the Berne Convention, the TRIPS Agreement, the WCT and the WPPT.



This Text Comes From the (Former) TPP!

P4 (TPSEP – Trans-Pacific Strategic Economic Partnership)

- The TPP's predecessor signed in 2005 and entered into force in 2008
- Parties are Singapore, New Zealand, Chile and Brunei
- Not superseded by the TPP – will continue in effect regardless
- Includes chapters on goods, services, IPR, SPS/TBT, competition and procurement



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If TTIP will include IP, the P4 provides a better model.



Process Recommendations

- Stakeholders should have ongoing access to the text without non-disclosure obligations
- Parties to the negotiation should publish the draft text of the agreement before any final agreement is signed with sufficient time to enable effective legislative scrutiny and public debate
 - <http://www.TPPMPsforTransparency.org>
- Venues of negotiation rounds should be released to the public at the same time as they are revealed to negotiators
- All negotiation rounds should include accessible, open public engagement events



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Summary

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- A better approach to IP in trade agreements is to
 - *Affirm existing international obligations* from specialised bodies
 - *Emphasize flexibilities* that support rather than inhibit trade



Summary

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- A better approach to IP in trade agreements is to
 - *Affirm existing international obligations* from specialised bodies
 - *Emphasize flexibilities* that support rather than inhibit trade
- As trade agreements move away from tariff negotiation, past practices of secrecy are no longer appropriate
 - Transparency requires *release* and *active dissemination* of text and briefings
 - Participation requires *access* to rounds and the ability to *observe and comment*
- Process shortcomings common to TPP and TTIP may undo both