TRANS-PACIFIC PARTNERSHIP AGREEMENT: POSSIBLE IPR IMPLICATIONS FOR ICT

TRPC Forum: Trans-Pacific Partnership (TPP): Trade, ICTs and the Internet
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IPR and Trade

- WTO TRIPS Agreement
- Bilateral FTAs
  - EU FTAs
  - US FTAs
- Multilateral FTAs
  - TPP FTA
  - RCEP?
IPRs Covered by the TPPA

**Copyright**
- Creative Works
  - Literary, Artistic, Musical Works
  - Films, Sound Recordings

**Patents**
- Inventions
  - Products
  - Processes and Methods

**Trademarks**
- Distinguishing Marks
  - Graphics
  - Words, Names, Phrases

**Confidential Information / Trade Secrets**

**Industrial Designs**
- Aesthetic Aspects of Articles
  - 3-D or 2-D

**Geographical Indications**
- Signs used on Goods of Specific Origin

**Other IPR**
- Layout-Designs of Integrated Circuits
- Plant Varieties
- Genetic Resources
- Traditional Knowledge
- Traditional Cultural Expressions
Select Issues Relating to ICT

- Liability of Internet Intermediaries
- Temporary Copies
- Extended Copyright Duration
- Limitations & Exceptions - “Three-Step Test”
- Technological Protection Measures
- Trademark Registration
Liability of Internet Intermediaries

Provision

• Detailed provisions on safe harbours for Internet intermediaries
  • Covers functions of transmission, routing, caching, storage, and hyperlinking
• On storage and hyperlinking, “notice-and-takedown” regime proposed

Comments

• (-) Safe harbour rules will be enshrined in countries’ laws
• (+) Provides a familiar environment for Internet companies to operate
Temporary Copies

Provision

“Each Party shall provide that authors, performers, and producers of phonograms have the right to authorize or prohibit all reproductions of their works, performances, and phonograms in any manner or form, permanent or temporary (including temporary storage in electronic form)”

Comments

• (-) Treats temporary reproductions of copyright works without copyright holders’ authorisation as copyright infringement

• (+) Provides clarity on copyright status of temporary copies

• Provision does not appear to preclude the use of limitations and exceptions by countries
Extended Copyright Duration

Provision

“Each Party shall provide that, where the term of protection of a work (including a photographic work), performance, or phonogram is to be calculated:
(a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author’s death; and
(b) on a basis other than the life of a natural person, the term shall be:
   (i) not less than 95 years from the end of the calendar year of the first authorized publication of the work, performance, or phonogram, or
   (ii) failing such authorized publication within 25 years from the creation of the work, performance, or phonogram, not less than 120 years from the end of the calendar year of the creation of the work, performance, or phonogram.”

Comments

• (-) Extends duration of copyright works
• (+) Harmonisation of copyright duration
Limitations and Exceptions

Provision

• “With respect to this Article [(Article on copyright) and Article 5 and 6 (which deal with copyright and related rights section and the related rights section)], each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.”

Comments

• (-) Fair use being put at risk?

• (+/-) Necessary, in view of enhanced rights in TPPA, to provide for language on limitations and exceptions?
Technological Protection Measures

Provision

- Detailed provision requiring countries to protect against unauthorised circumvention of technological protection measures, even where no copyright infringement involved
- Limited exceptions for research/study and security/law enforcement
- Further exceptions can be enacted:
  - Actual/likely adverse impact on non-infringing uses must be demonstrated
  - Non-evergreen – subject to automatic expiry after 3 years (renewable)

Comments

- (-) Requires rewriting of some laws in the region, e.g. AU laws that exclude region-coding on movies
- (+) Important for there to be such protection in the online environment
Trademark Registration

Provision

• Detailed provisions around registration process:
  • reasons for office refusal of trademark registration must be provided in writing
  • opportunity for opposition
  • decisions in opposition and cancellation proceedings must be reasoned and in writing

• Parties to provide a:
  • system for electronic application for, and electronic processing, registering and maintenance of trademarks
  • publicly available electronic database, including an online database, of trademark applications and registrations

Comments

• (+) Offers greater transparency and ease of access to the trademark registration systems of countries
Overall Transparency of Negotiations

- Negotiations thus far shrouded in secrecy
- Limited leaked texts
- Negotiators are caught in middle:
  - public calling for greater transparency
  - the need for an efficient negotiation process / politics
- Trade negotiations generally complex matter:
  - Many different factors to take into account
  - Trade flows and economic benefits generally primary focus
  - Consumer welfare also important
  - Trade-offs sometimes need to be made after weighing balance of benefits/costs
- Trade negotiators have been consulting industry bodies, cross ministry
- Should more be done?
THANK YOU