IP issues in TPP

18 September 2013
Agenda

- Where are we today?
  - WTO: TRIPS
  - RCEP: IP impact
- Where might TPP take us?
  - TPP Objectives
  - Trade flows and existing FTAs
  - US TRIPS+ position?
  - IP issues in TPP
- Some final thoughts
TRIPS Overview

• Agreed in 1994 at end of Uruguay round, Doha declaration
• MFN: national treatment
• Sets standards for IP protection:
  • Minimum standards: subject matter, rights conferred, permissible exceptions, minimum duration
  • By reference to most recent version of Paris (Industrial Property) and Berne (Literary and Artistic Works) Conventions with additions
• Sets rules for enforcement:
  • General, civil procedures and remedies, provisional measures, border measures, criminal procedures
• Preservation of ability to deal with anti-competitive IP licensing
• Provides for dispute resolution between member states
TRIPS Subject Matter

- Copyright and Related Rights (computer programs, databases, rental rights, performance, production and broadcasting rights)
- Trademarks
- Geographical Indications
- Industrial Designs
- Patents
- Layout-Designs (Topographies) of Integrated Circuits
- Protection of Undisclosed Information
• Regional Comprehensive Economic Partnership
• Under negotiation between ASEAN 10 and FTA partners (Australia, China, India, Japan, Korea and New Zealand)
• Aims to be concluded by end 2015
• Differing interests means ‘lowest common denominator’, not ‘high-standard’
• Will not materially address IP or go beyond TRIPS
2011 TPP Leaders Statement

- **Comprehensive Market Access**—Removal of both tariff and non-tariff barriers is “comprehensive and ambitious in all areas.”

- **Regional Agreement**—Fully regional agreement that facilitates trade and the development of production and supply chains among TPP members.

- **Cross-Cutting Trade Issues**—Holistic, agreement-wide approach to specific areas: regulatory coherence, competitiveness and business facilitation, small- and medium-sized enterprises, and development.

- **New Trade Challenges**—Addresses emerging trade issues such as those caused by new technology (e.g., cloud-computing).

- **Living Agreement**—Agreement will “evolve in response to developments in trade, technology or other emerging issues” and expand “to include other economies from across the Asia-Pacific region.”

- 29 chapters under negotiation: much wider than traditional FTAs
Trade flows and existing agreements

Total trade labeled in $billions

Positive trade balance
Negative trade balance

**Encompassed Regional Trade Agreements**

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**United States**

- Total U.S. Imports from TPP Countries: $843.6 billion
- Total U.S. Exports to TPP Countries: $689.0 billion
- Total U.S. Trade Balance with TPP Countries: -$154.6 billion

**Trans-Pacific Partnership**

- TPP countries
- Bilateral FTAs
- Regional FTAs

- $1,151.3 billion Covered by NAFTA
- $471.9 billion Not covered by FTAs
- $386.6 billion Covered by other FTAs

(2012, $billions)
TRIPS+ and the US position

- Last US trade promotion authority in effect (2002-2007) had objectives:
  - Apply IP protection to digital media
  - Negotiate trade agreement that provide similar IPR protection to US
  - Basis for TRIPS+ approach, detail subject to lobbying

- Where can we look to understand where TPP may end up?
  - US TPP negotiating position
  - Agreed bi-lateral FTA
    - Korean US Free Trade Agreement (KORUS)
  - Agreed multi-lateral agreement
    - Anti-Counterfeiting Trade Agreement (ACTA)

- TPP is a negotiation: final outcome highly unlikely to reflect negotiating position
TPP IP issues (1)

- Source: *Congressional Research Service report to US Congress, 21 August 2013*
- Criminal penalties for:
  - ‘willful’ trademark counterfeiting
  - Copyright piracy ‘on commercial scale’ (leak) / for ‘financial gain’ (ACTA)
- Internet providers:
  - US domestic position: ISPs vs content providers
  - Proposes copyright exemptions consistent with ‘three-step’ test:
    1. consistent with domestic law
    2. does not conflict with normal exploitation of work
    3. does not unreasonably prejudice rights holder
  - whether this is restriction or liberalisation depends on where you start from…
TPP IP issues (2)

- Trade Enhancing Access to Medicines
  - Controversial issue: may have stalled
  - Encourage early market introduction in return for enhanced IP protections
  - Impact on timing of market entry for generics
- Biologics (medical preparations derived from living organisms)
  - US proposal to include as protected subject matter with 12 year protection term
- Trade secrets / tech transfer
  - ‘indigenous innovation’ polices
  - Control of forced sharing of proprietary information or tech transfer
- Geographic Indications
  - i.e. Champagne
  - Compound / non-compound issue
TPP issues (3)

• Other issues
  • Notice and takedown procedure
  • Temporary copies
  • P2P and piracy
  • Duration of copyright terms
  • Prohibition of circumvention of technological protection measures
• Parallel imports
• E-commerce
  • Online services subject to same protections as off-line
  • Prohibition of blocking of cross-border data flows
    • Also dealt with in Financial Services chapter
    • Interplay with data protection laws
Some final thoughts

- Sometimes we see domestic debates pursued through international means
  - Much of the commentary is aimed at other audiences
  - Be aware of who is paying for the opinion being offered
- TPP is a negotiation
  - Positions taken allow trading
  - Final outcome is always a compromise
- US Trade Promotion Authority
  - Expired, so will need to be renewed
  - Debate on objectives, and more lobbying

- Everyone loves a good conspiracy theory…
- …but it doesn’t make it true
Thank you for listening

For more information please contact:

Rob Bratby
+65 9832 2898
rob.bratby@olswang.com
Tw @rbratby
Blog Watching the connectives