KEI comments on TTIP provisions:
October 1, 2014

Knowledge Ecology International (KEI) is a not for profit non governmental organization headquartered in Washington DC. KEI is a research and advocacy group searching for better outcomes, including new solutions, to the management of knowledge resources. KEI is focused on social justice, particularly for the most vulnerable populations, including low-income persons and marginalized groups.

Contact: Manon Ress
manon.ress@keionline.org

- **Secrecy is not transparency**
- **Increased damages for infringements of patents, copyrights and other intellectual property rights and ISDS: Two wrongs that will amplify the risks to governments and consumers, and contribute to ever worsening inequality.**

Secrecy is not transparency

It is Orwellian to claim that a secret negotiation is transparent. It is a denial of truth. Secrecy is secrecy, and that is the opposite of transparency. For the public, this is secret, but for the 1 percent, for the people with money, for big corporations, for big campaign donors, for the well connected, of course, this negotiation is not secret. The secrecy is asymmetric, and that asymmetry is designed to make the powerful more powerful, and to make the public less powerful.

The Congress only accepts this asymmetric secrecy because they are largely controlled by the same corporate interests that benefit from the asymmetry. That is to say, the same corporations that see taxpayers and consumers as their enemy, to exploit and plunder.

USTR has invited consumer and public interest groups to submit names of persons who could serve on an advisory board. Under this proposal, an NGO could at best hope to have one person serve on an advisory board, and see some of the negotiating texts currently shared with all countries in the negotiation, and the hundreds of advisory board members from corporations, trade associations and corporate law firms. However, this one person would not be able to

share the information with the NGO's own staff, and could not share the information with the public. This restrictions on sharing information with the public are backed up with threats of prison terms and fines. Under the USTR proposal, information would remain secret from the public, but the public interest and consumer groups would be co-opted, and manipulated by the USTR to join a conspiracy against real transparency.

If USTR and DG-Trade want a secret negotiation, they should have the decency to stop pretending the negotiations are transparent. They are secret, and this secrecy is an appalling undermining of democracy and accountability. This secrecy, which would never be allowed at the national policy making level, is now proudly embraced by Ambassador Michael Froman, his backers in the White House, and most members of the corporate controlled Congress. But the secrecy is nothing to be proud of. It is a shameful *stain that will never be removed*, and will undermine the legitimacy of this agreement, forever.

Damages for infringement of intellectual property rights

One of many areas where the negotiation secrecy is completely indefensible concerns the negotiations over norms for damages for the infringement of intellectual property rights. How on earth can USTR claim the secrecy on this topic is matter of national security?

In two other trade negotiations, the TPP and ACTA, the United States has sought new global norms for damages associated with the infringement of patents, copyrights and other intellectual property rights. Among other things, these new norms include a requirement that judicial authorities have the right to consider the suggested retail price of goods in considering damages.

A norm for damages that includes the suggested retail price is contrary to several intellectual property statutes in Europe and the United States. The TPP and ACTA norms on damages (as well as norms we expect the United States to propose for TTIP) are extremely aggressive, and undermine many of the current reform efforts for patents and copyrights, including but not limited to areas where reforms seek to deliberately reduce damages.

For copyright, for example, there are proposals to reduce damages for orphaned copyrighted works, and to implement liability rules for the infringement of works in other areas. For example where high transaction costs make the resolution of damages problematic, or where society wants to reduce the risks and consequences of infringement, for certain types of activities it values, but does not want to provide an exception to exclusive rights that does not involve compensation to rights holders.

Copyright reforms that create liability rules -- allowing a use subject to reasonable remuneration or compensation, can be implemented outside of the copyright three step test in the Berne and WCT treaties or the WTO TRIPS Agreement, if they are framed as limitations on remedies (Part

III of TRIPS), rather than limitations on rights (Part II of TRIPS). However, the US proposals on damages in the TPP and ACTA are problematic for such reforms.

For patents, the problem often concerns extraordinary thickets, such as those associated with standards in information technologies, including software and mobile computing devices. There are also patent thickets in the area of medical devices and diagnostics, such as those associated with the hepatitis C virus (HCV) diagnostics, HER2+ breast cancer diagnostics, or the use of HCV drugs in combination with each other. One response to the challenge of patent thickets is for courts to refuse to grant injunctions even where infringement has been established. In these cases, U.S. courts have used "running royalties" for ongoing infringements as the preferred remedy for patent holders. For this approach to work, the court has to have flexibility in setting damages.

US courts have routinely sought to curb efforts by patent holders to base damages from infringement on the entire market value of the products, when the patents only cover a small part of the value added components. For example, in a September 16, 2014, opinion, the US Court of Appeals for the Federal Circuit (CAFC) ruled that in VIRNETX v Cisco, that:[1]

> The law requires patentees to apportion the royalty down to a reasonable estimate of the value of its claimed technology, or else establish that its patented technology drove demand for the entire product. . .
>
> Thus, when claims are drawn to an individual component of a multi-component product, it is the exception, not the rule, that damages may be based upon the value of the multi-component product. LaserDynamics, Inc. v. Quanta Computer, Inc., 694 F.3d 51, 67–68 (Fed. Cir.2012). . .
>
> These strict requirements limiting the entire market value exception ensure that a reasonable royalty "does not overreach and encompass components not covered by the patent." LaserDynamics, 694 F.3d at 70; see also Garretson, 111 U.S. at 121. . .
>
> . Additionally, we have also cautioned against reliance on the entire market value of the accused products because it "cannot help but skew the damages horizon for the jury, regardless of the contribution of the patented component to this revenue." Uniloc USA, Inc. v. Microsoft Corp., 632 F.3d 1292, 1320 (Fed. Cir. 2011).

In recent years, US courts have also sought to limit the granting of patents, including recently the U.S. Supreme Court restrictions on DNA patents in the Myriad gene patent case, and restrictions on software patents in *Alice v. CLS Bank International.*[2]

[1] VIRNETX, Inc.., and Science Applications International Corporation, v CISCO Systems, Inc., and Apple Inc., No. 2013-1489, September 16, 2014. http://patentlyo.com/media/2014/09/Virnetx-v-Cisco.pdf

[2] Alice Corporation Pty. Ltd. v. CLS Bank International, et al. Docket no. 13-298, Decided June 19, 2014.

Investor-state dispute settlement (ISDS)

Ambassador Froman, formerly with Citibank, wants private investors to have the right to sue the United States government, or governments in the European Union, when they are subject to "indirect" expropriation, including for cases where an investor disagrees with the outcome of copyright, patent and other intellectual property right cases.

If the TTIP includes an ISDS provision, companies that believe they have not been given high enough damages for copyright or patent infringement, or, that they were denied the grant of a patent,[3] can sue a government, such as the United States, and demand huge damages. If the TTIP includes the ACTA/TPP proposals on damages, that can make things worse, particularly if the court must consider damages based upon the suggested retail prices of products.

In general, the combination of ISDS and aggressive norms on damages for infringement will create risks of expensive private sanctions, imposed outside of national court systems, for adopting pro-consumer exceptions to intellectual property rights. This will make it more difficult to address areas where intellectual property rights are associated with high prices and unequal access to intellectual property right protected goods and services. The shrinking of exceptions will make society less equal and less fair.

Consider a few cases where the damages and ISDS provisions can come into play. The pharmaceutical drug company Gilead is expected to charge nearly $100,000 for a two drug combination that will cure the hepatitis C virus. Roche is charging $134,000 or more per year for a combination of Herceptin and Perjeta to treat HER2+ breast cancer. If the United States decides that federal or state governments or private parties may infringe those patents to obtain lower cost generic versions, the patent holders will be able to sue the United States under ISDS, and compare the compensation to the new norms for damages in the TTIP.

[3] To appreciate the magnitude of potential liability, consider litigation over the Alice decision. See: Joff Wild, "Big US tech companies face major patent losses in the post-Alice world, IAM research reveals," *IAM Magazine*, September 27, 2014. "The potentially catastrophic effects of the Alice v CLS Supreme Court decision on the patent holdings of the US's biggest technology companies are laid bare by the IAM blog today. Research undertaken by IP data company ktMINE on behalf of the blog reveals that tens of thousands of assets owned by the likes of IBM, Microsoft, Apple, Oracle, Google and Cisco could be threatened by the judgment, which was handed down in June and has since led to a series of software patent rights being overturned by lower courts."
http://www.iam-magazine.com/blog/detail.aspx?g=2028b324-2d4a-4523-9f0d-f0773b8b3fa1

Concerns about the liability for limiting the availability of patent monopolies was made more concrete when Eli Lilly filed a $500 NAFTA investor case against Canada, following a court decision rejecting patents on two Lilly drugs.[4]

The text reportedly put forward by the United States for TTIP may make the patent cases more likely.

It hardly matters where the companies are located, since they can find a way to sue the United States under ISDS. Gilead is a US company, but holds its HCV patents in a subsidiary located in Ireland, to avoid taxes. Abbott and several other US companies are involved in corporate inversions to claim they are located in various European countries, also to avoid US taxes.[5] When Philip Morris wanted to sue Australia over a law that required plain packaging of tobacco products, a public health measure widely endorsed by public health officials, the suit was brought by Philip Morris Asia, under a 1993 Australia/Hong Kong agreement on the protection of investments.[6]

States faces a particular risk from ISDS, because they are currently immune from damages for patent or copyright infringement, under the U.S. Supreme Court rulings on state sovereign immunity doctrine.[7] USTR seeks to expose the federal government to massive fines from private companies, for activities by state governments that are now effectively sanctioned by the U.S. Supreme Court, including non-voluntary use of patents by state universities for research purposes, and extensive use of copyrighted information for educational and research purposes by state universities.

In conclusion:

1. Secrecy is not transparency and negotiators should not pretend it is. It is insulting and counter productive.

2. Higher norms for damages for infringements of patents, copyrights and other intellectual property rights combined with ISDS creates two wrongs that collectively amplify risks to governments, harm consumers on both side of the Atlantic and contribute to ever worsening inequality.

---

[4] Kazi Stastna, Eli Lilly files $500M NAFTA suit against Canada over drug patents: Compensation sought for Federal Court's invalidation of Straterra, Zyprexa patents CBC News, September 13, 2013. http://www.cbc.ca/news/business/eli-lilly-files-500m-nafta-suit-against-canada-over-drug-patents-1.1829854.

[5] http://taxfoundation.org/blog/abbott-labs-corporate-inversions, also, Andrew Pollack, Drug Patents Held Overseas Can Pare Makers' Tax Bills, New York Times, September 29, 2014, http://www.nytimes.com/2014/09/30/business/patents-put-overseas-can-pare-tax-bills.html

[6] http://www.ag.gov.au/tobaccoplainpackaging.

[7] See: James Love, Non-voluntary use of patents for drugs to treat the Hepatitis C Virus in the United States: Mechanisms available to the Federal Government, State Governments and Private Actors, *KEI Policy Brief* 2014:1. July 18, 2014