

Session I: Keynote Panel, Describing the Legal Landscape*

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Thank you so much for that kind introduction, June. A warm welcome this morning. Thanks to the whole team at the Kernochan Center for inviting me to attend. It is an honor for me to be here, among so many distinguished panelists and you, friends, in the audience.

Trade has certainly been in the news lately. That would be an understatement. And particularly trade and intellectual property. The last eighteen months have been a really historic time in U.S. trade policy. From the passage of Trade Promotion Authority last summer, in the summer of 2015,¹ to the conclusion and ultimate signing of the Trans-Pacific Partnership,² it's been a momentous time for the trade agenda.

And it's not a surprise that intellectual property issues are important to the trade agenda—the stakes are huge. According to the WTO, international IP revenues totaled \$325 billion in 2013, counting IP royalties and license payments, as well as AV services.³ Of this, \$131 billion, or 41%, went to U.S. inventors, artists, brands, and other IP holders.⁴ This is vastly above the share any other leading country has in any major economic sector. In contrast, for example, China: their share of the manufacturing sector is only 18%, which again shows you how much of a comparative advantage IP is for the U.S. economy.⁵ It's not only that, but also the U.S. runs tremendous surpluses in all major forms of IP. So I won't spend time this morning listing their statistics, but in 2014, we recorded a positive trade balance of \$88 billion in total for IP.⁶

So there is obviously a huge demand for our IP intensive goods and services. They constitute a significant number of US jobs and exports. But not all countries have the same incentives to provide robust, fair, and effective IP systems. And that's a problem for the development of art and scientific progress around the world, and it's a problem for the U.S. economic industries. The stakes, of course, are tremendous.

* These remarks are a transcript of a talk that was given on October 14, 2016, at the Kernochan Center Annual Symposium at Columbia Law School.

1. See, e.g., Jonathan Weisman, *Trade Authority Bill Wins Final Approval in Senate*, N.Y. TIMES, June 24, 2015, <http://perma.cc/4NCD-T7TH>.

2. *Trans-Pacific Partnership Ministers' Statement*, USTR.GOV (Feb. 4, 2016), <http://perma.cc/K4UA-KJUB>.

3. World Trade Organization, *World Trade Statistical Review 2016* at 122 (2016), available at <http://perma.cc/VLN8-HSWM>.

4. *Id.*

5. *Id.* at 105.

6. INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, U.S. EXP. FACT SHEET: DEC. 2014 EXP. STAT. RELEASED FEB. 5, 2015 (2015), <http://perma.cc/95UR-MFVY>.

Systematically weak and inadequate protection of IP in other markets threatens the livelihood of U.S. inventors and creators, but also threatens the development of global solutions to global challenges. The development of green technology, medicine, digital media, the creation and dissemination of creative content—there is a reason why the Framers included IP protection in the U.S. Constitution.⁷ You can therefore understand why appropriately strong and effective IP systems are important to the United States with respect to our trading partners. And concomitantly why it's important for our trade agreements.

Today I was asked to explain a little bit how USTR develops our trade agenda on copyright, and some of the latest updates on the landscape for international copyright and trade agreements, which of course includes the recently concluded Trans-Pacific Partnership. And of course I want to leave plenty of time for questions and a robust dialogue.

So let me start with what USTR is and what we do. The US trade representative, Ambassador Mike Froman, is the President's chief trade advisor on trade and chief trade negotiator as well. He is a member of the Cabinet, and he represents the United States in international negotiations.⁸ USTR, my agency, is a small White House agency with a little more than 200 people, mostly housed in Washington, D.C. and Geneva.⁹ We represent, as I said, the United States before the World Trade Organization and in any related disputes that come under that,¹⁰ most relevant to this group being any TRIPS Agreement disputes. We also negotiate on behalf of the United States with respect to free trade agreements, whether they are plurilateral or bilateral, and we also ensure that these commitments are enforced, so that the United States retains the benefit of trade agreements that are already negotiated.¹¹ And we also work with our counterparts every single day to resolve trade problems before they arise and to make sure that we're getting, again, the benefits of the bargain.¹²

And USTR is not only just about IP. We do that for all types of global trade.¹³ Agriculture, energy, textiles, just about any sort of traded sector—good or service—that you can imagine. We also work very closely with the rest of the Executive Office of the President, and the entire executive branch, including agencies, many of whom have representatives here today—including the Patent and Trademark Office, the State Department, the Department of Commerce, as well as other U.S. government agencies, like the U.S. Copyright Office.¹⁴ We work together to make sure that U.S. intellectual property innovation policy is consistent with our obligations to our trading partners.

My office, the Office of Innovation and Intellectual Property, is charged by Congress for publishing the annual “Special 301” report on the adequacy and

7. See U.S. CONST. art. I, § 8, cl. 8.

8. See *Mission of the USTR*, USTR.GOV, <http://perma.cc/X8F7-VJNT>.

9. *Organization*, USTR.GOV, <https://perma.cc/J4Z7-338L>.

10. *Mission of the USTR*, *supra* note 8.

11. *Id.*

12. *Id.*

13. See *Issue Areas*, USTR.GOV, <http://perma.cc/ZG6T-GDDS>.

14. *Mission of the USTR*, *supra* note 8.

effectiveness of how our trade partners protect IP,¹⁵ and we also publish a related annual “notorious markets” report as well.¹⁶ These reports have been very effective tools to shape our bilateral engagements, to promote compliance with trade agreements. In addition to calling out compliance issues, we also use the reports to document and encourage continued progress in countries that have engaged in legislative and enforcement reforms that are responsive to the concerns expressed in the report.¹⁷

Turning to today’s focused form of IP, copyright—as June noted, IP and copyright have been an essential agreement in trade agreements for more than twenty years. Obviously, the WTO TRIPS agreement was a landmark development in that, as it incorporated much of the preexisting Berne Convention.¹⁸ With the WIPO Copyright Treaty and the Performances and Phonograms Treaty in the 90s, as well as other technological developments, bilateral free trade agreements from [the] late 90s into the 2000s included stepped-up copyright protection and enforcement provisions.¹⁹ Drawn, of course, from U.S. law, as well as commitments in, again, these sort of newer forms of copyright treaties, these included free trade agreements with countries around the world, countries as diverse as Singapore, Morocco, Peru, Korea, and many other countries. And I know Steve will talk a little bit more about our FTA program in a little while.

As the President has noted very frequently, 95% of the world’s consumers live outside the United States.²⁰ And with our comparative advantage being in innovation and creativity, being able to trade that has been a strategic imperative.

The most recent expression of copyright in FTAs has been the Trans-Pacific Partnership.²¹ And I would like to focus the rest of my discussion this morning on that. So, of course there is a lot of interest right now in TPP. And I’m happy to talk about what I can in the area of intellectual property, although the Trans-Pacific Partnership is so much more. It’s thirty chapters covering all aspects of U.S. economic activity.²²

After thirty rounds around the world in more than six years, we worked around the clock last year to close this landmark agreement in Atlanta.²³ The TPP will liberalize trade and investment between twelve very diverse countries, including three of our top five trading partners—Mexico, Canada and Japan—as well as

15. See *Intellectual Property*, USTR.GOV, <http://perma.cc/728S-R97Y>.

16. See, e.g., OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, 2016 OUT-OF-CYCLE REVIEW OF NOTORIOUS MKTS. (2016), <http://perma.cc/TLV2-BUHB>.

17. See *id.*

18. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

19. See World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65; World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76.

20. See, e.g., *National Export Initiative*, TRADE.GOV, <http://perma.cc/R928-VUC4>.

21. Trans-Pacific Partnership Agreement, Feb. 4, 2016 [hereinafter “TPPA”].

22. See *id.*

23. *Transcript of the Trans-Pacific Partnership Atlanta Ministerial Closing Press Conference*, USTR.GOV (Oct. 5, 2015), <http://perma.cc/5T2X-ZN7E>.

Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam.²⁴ These countries comprise more than forty percent of the world economy.²⁵

TPP is a next-generation, high-standard trade agreement in the world's fastest growing region. The Asian middle class, for example, is growing rapidly and will account for nearly two-thirds of the world's middle class and of world consumption by 2030.²⁶ It's key that we ensure that the United States is involved in this region.

Now the IP chapter is close to seventy single-spaced pages, with a lot of footnotes. Not exactly light reading. The full scope of the chapter would far exceed the topic of this panel and, frankly, the interest of this audience. But I can tell you that it raises the bar for IP protection and enforcement around the world in areas that, again, are essential for the U.S. economy. And of course, as everybody knows, there is a tremendous appetite for U.S. content around the world, but in the digital era when copyright infringement can go unchecked, markets for new movies, songs, and video games can be destroyed. This is also against the backdrop of new platforms and distribution models that are providing more access to content than ever before.

To combat this problem, TPP includes strong copyright protections, drawn from international norms like the WCT and the WPPT that I just referenced, to respect the rights of creators, establish a clear protection of works and create strong enforcement methods including, for example, against camcording in movie theaters and commercial-scale copyright piracy.²⁷ TPP provides more consistent regional harmonization towards a standard copyright term. The minimum term for works of authorship is life plus 70 years, and for works whose term is calculated based upon publication date, like movies and sound recordings, 70 years.²⁸ And that again builds on an emerging trend in the region two-thirds of the TPP partners had extended copyright terms. TPP will also require parties to establish copyright safe harbors for internet service providers.²⁹ These safe harbors will allow legitimate providers of computing, user-generated content sites, and other Internet-related services to develop their businesses online, while also insuring that Internet copyright piracy can be addressed in an effective manner.

Additionally—and I think this is a key piece, and I know that some of the other panels will be dealing with this today, as well—for the first time in any U.S. trade agreement or, frankly, any trade agreement to date, TPP will obligate parties to seek to achieve an appropriate balance in their copyright systems.³⁰ Including, by the way, copyright exceptions and limitations, for purposes such as criticism, comment, news reporting, teaching, scholarship, and research. These principles are critical aspects of the U.S. copyright system and we at USTR work very closely with diverse stakeholders, many of whom of course are in this room, in developing this language.

24. *What Is the TPP?*, USTR.GOV, <http://perma.cc/B9X4-E3DQ>.

25. *TPP: What Is It and Why Does It Matter?*, BBC (Jan. 23, 2017), <http://perma.cc/QJ89-JYP6>.

26. Linda Yueh, *The Rise of the Global Middle Class*, BBC (June 19, 2013), <http://perma.cc/HL63-MR6Y>.

27. See TPPA, *supra* note 21, art. 18.77.4.

28. *Id.* at art. 18.63.

29. *Id.* at art. 18.82(1).

30. *Id.* at art. 18.66.

TPP also contains provisions precluding tampering with technological protection measures.³¹ Now, technological protection measures, or TPMs, that can work effectively are important not just for traditional content companies—in other words, studios, labels, authors and performers—but also for those developing new business models for distributing content and services. Spotify. Netflix. Any of these platforms that you use in your daily life also rely on TPMs. And these subscription services must have TPMs in order to function appropriately. Again, these are keys to the digital economy.

To close, TPP also provides comprehensive commitments relating to the enforcement of IP rights. And this includes civil, criminal, and border enforcement measures.³² And this ensures, for us, that other countries have comparable levels of enforcement protection like the means of redress that we have here in the United States. And that's important for right holders to ensure that when they go to another country when they're doing business, they can ensure that these proceedings are adequate, fair, effective, and efficient. Our copyright provisions were designed and we took a lot of time and care working with diverse stakeholders, working with civil society, to ensure that we could promote new business models and distribution models for content that were established over the last five years and beyond. And whether it's TPM circumvention, whether it's promoting licensing and the freedom to contract or effect efficient collective management organizations, we worked hard with other countries to make sure TPP was up to date and could serve as a platform for development in the future.

Now, an important note is also that our TPP proposals provide policy space for law and policy makers to make new exceptions in a digital environment, for example, by permitting legitimate cellphone unlocking. This is an exception that we obviously reflect in U.S. law under our Copyright Office rulemaking as well as other countries like Canada. And so it's important to provide protections for the digital and trade environment while also ensuring that the agreement can stand the test of time. And that was, of course, an endeavor that we spent a lot of time with other countries, with stakeholders, with civil society, and our Congress most importantly. We spent a lot of time talking with members and their staff to ensure that again, we were capturing the important pieces of what we needed for the TPP but also, leaving space for policy makers to develop new rules in the future.

So, just a quick note, TPP of course has rules on copyright, patent, pharmaceuticals, and a myriad of other IP issues, but TPP also focuses on the interests of small and medium enterprises and individual creators. TPP requires parties to maintain efficient and transparent IP systems, such as ensuring that IP decisions, laws, and regulations, as well as applications, are available online and searchable.³³ TPP also promotes cooperation to reduce red tape, and speed up those processes. The TPP provisions that provide enhanced transparency, improved and streamlined examination systems cut red tape. They enhance cooperation; they

31. *Id.* at art. 18.68.

32. *Id.* at art. 18.71.

33. *Id.* at art. 18.9(1).

create more coherent rules. These are really important for small and medium enterprises that may not have all the resources that larger companies or larger institutions have in enforcing their rights overseas. It was really important to us to develop a set of rules that could be very crucial for our small and medium enterprises.

Of course, across thirty chapters of TPP, as I mentioned before, there are groundbreaking provisions across the agreement, in that they will be critical not only to protecting IP but also undergirding the ability of our IP stakeholders, our IP companies, our small and medium enterprises and exporters of IP intensive services, to do business overseas. This includes provisions regarding the digital economy, and sharing the free flow of information, ensuring that services in digital trade can do business more efficiently across borders. These provisions also include streamlined customs procedures: new measures to ensure that, for example, state-owned enterprises, which are a big feature of the Asian economy, play by the rules that we have to play by here in the United States.³⁴

A few minutes about process. We benefited, I think as I mentioned before, greatly by continuous input and expertise that was provided during the rounds, after the rounds, by, again, a range of stakeholders. And I think the TPP is better for it and we are very proud of all the work that we did with stakeholders and civil society. And that was really important to also inform us in the negotiations because the negotiations involve countries, again twelve total countries including the United States, countries from all different development spectrums, sizes, and shapes. It was really important to us that we create a standard that could meet agreement among all of these different countries. So, for example, we had a country like Brunei, which is, you know, essentially 400,000 people. And then we have, that's on one end of the spectrum, on the other end of the spectrum we have the United States, of course, the 280-plus million people, so clearly we needed to find an agreement amongst all these different countries. And this is something that really demanded consensus-building. It was a long and robust negotiation; each of the negotiating parties brought really strong negotiating teams. These are all people who had trained internationally, in the United States often of course, who had trained and been trained by WIPO, who had been participating in international negotiations for many years. It was truly a contest of ideas, and the results reflect a true agreement amongst all the different parties. If a party cannot bring an agreement home, and it's not a win-win solution, then we wouldn't have had agreement.

TPP has heightened standards, and these are important standards that will shape the region for years to come. But the standards are not just important for US companies doing business in these eleven markets, but also in new markets; the TPP is built to be a platform that can expand over time. And one of the, I think, gratifying things we've found already is that many countries have approached us, after TPP was concluded, to join. Now, obviously, there are going to be certain accession procedures and we first do have to get TPP done and enacted in force, but at the same time more than eleven countries have come to us to express interest in joining. And I think that's really important because it's showing that the TPP standards—again,

34. *Id.* at art. 18.78.

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forged among countries from all different levels of development, walks of life—are going to be new guideposts for the improvement of intellectual property systems around the region. With that, let me pause there. I look forward to your questions, and again it's very good to be here today.