



COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE ON THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel.

LCA welcomes this opportunity to comment on the proposed Transatlantic Trade and Investment Partnership (TTIP). LCA has long been engaged in trade matters, submitting comments on many of the free trade agreements, TPP, and GATS.

At this preliminary stage, we offer a few brief recommendations. First, we strongly urge that the TTIP include provisions aimed at harmonizing public access to the results of government-funded research. In February of this year, John P. Holdren, Director of the White House’s Office of Science and Technology Policy, issued a memorandum directing federal research funding agencies with research and development budgets of \$100 million or more to develop a plan within six months to support increased public access to the results of research funded by the federal government. LCA supports this policy, which builds on the existing public access policy of the National Institutes of Health. The European Union has similar initiatives under way. TTIP offers an opportunity for the establishment of consistent approaches for public access in the two jurisdictions that provide the most public funding for research. This will accelerate the rate of innovation in many scientific fields, particularly medicine, to the benefit of people around the globe.

Second, we question the appropriateness of attempting to negotiate an intellectual property chapter in TTIP. The European Union generally provides higher levels of protection for copyright and related rights, including features that probably violate the U.S. Constitution. The Database Directive, for example, provides “sweat of the brow” protection for collections of facts, a theory the U.S. Supreme Court in *Feist v. Rural Telephone* found to be inconsistent with the Constitution’s intellectual property clause. The adoption of the Database Directive in the EU triggered a lengthy and heated debate in Congress, which ultimately decided not to adopt a sui generis regime. Although its own internal studies have shown that the Database Directive has failed from a policy perspective, the EU nonetheless in its free trade negotiations has demanded that its trading partners adopt the Database Directive. An IP chapter would provide the EU with an opportunity to attempt to impose the Database Directive on the United States. The EU might also attempt to require the U.S. to provide additional protection for moral rights, resale rights, broadcast rights, and geographical indicators.

Further, the Information Society Directive circumscribes the exceptions member states can adopt, and the laws of numerous EU member states contain features that require payment for activities that are free in the U.S. For instance, many European countries have a public lending right, under which libraries have to pay publishers an annual fee for

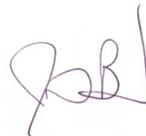
the right to lend books. By contrast, in the U.S., this activity is permitted under the first sale doctrine. European countries also have a complex system of compulsory licenses and duties, so that consumers in effect must pay to make copies allowed in the U.S. under the fair use doctrine. The EU could very well attempt to use the IP chapter as a means for rolling back exceptions such as fair use in the U.S. and fair dealing in three of its member states: the UK, Ireland, and Cyprus. The diminution of fair dealing could then be leveraged onto other countries, such as India. *See* [Fair Use/Fair Dealing Handbook](#) indicating the many countries with fair use or fair dealing provisions.

The overly solicitous attitude in the EU to rights holders comes as no surprise. It results in part from the Continental authors' rights tradition that views copyright as a natural right, in contrast to the utilitarian Anglo-Saxon approach where copyright is treated as a means of incentivizing authors to create. It also results in part from the lobbying power of rights holders in Europe. As [this study](#) demonstrates, many of the largest firms in IP intensive industries are European-owned.

Even if after a long negotiation the EU ultimately agrees on an IP chapter that does not require the U.S. to ratchet up protection, this concession on the part of the EU surely will come at a price. The U.S. will have to give the EU something it wants, either in the IP chapter or elsewhere in the agreement. Stated differently, the U.S. has nothing to gain and much to lose from an IP chapter in TTIP. The U.S. will be in a defensive posture, and will have to make concessions to the EU in order to maintain the status quo in the United States. Accordingly, TTIP should not address intellectual property.

We would be happy to discuss our views in greater detail.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'J. Band'.

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