The Washington Post

Here's why Obama trade negotiators push the interests of Hollywood and drug companies

By: Timothy B. Lee – November 26, 2013

Earlier this month, the transparency organization WikiLeaks leaked the "intellectual property" chapter of the Trans-Pacific Partnership, a trade agreement that is being negotiated in secret by Pacific Rim nations. The draft text showed that the positions taken by U.S. negotiators largely mirrored the provisions of U.S. law, but the U.S. negotiating position also had an unmistakeable bias toward expanding the rights of copyright and patent holders.

Those positions are great for Hollywood and the pharmaceutical industry, but it's not obvious that they are in the interests of the broader U.S. economy. To the contrary, critics contend that the rights of copyright and patent holders have been expanded too much. Those concerns do not seem to have swayed the trade negotiators in the Obama administration.

Two major factors contribute to the USTR's strong pro-rightsholder slant. An obvious one is the revolving door between USTR and private industry. Since the turn of the century, at least a dozen USTR officials have taken jobs with pharmaceutical companies, filmmakers, record labels, and technology companies that favor stronger patent and copyright protection.

A more subtle factor is the structure and culture of USTR itself. In its role as a promoter of global trade, USTR has always worked closely with U.S. exporters. That exporter-focused culture isn't a problem when USTR is merely seeking to remove barriers to selling U.S. goods overseas, but it becomes problematic on issues like copyright and patent law where exporters' interests may run directly counter to those of American consumers.

USTR's enthusiasm for stronger copyright and patent protections could become a liability for the Obama administration's broader trade agenda. Last year, grassroots copyright activists blocked the ratification of one trade agreement by the European Union over its copyright provisions. There's a risk that a similar fate could befall the TPP.

This is your USTR on drugs

On May 3, 2004, the United States and Australia signed a bilateral trade agreement. The agreement included a section on intellectual property that had numerous provisions favorable to pharmaceutical manufacturers. For example, it barred generic drug makers seeking approval for their drugs from citing safety or efficacy information originally submitted by brand-name drug makers for a period of five years after the information is submitted, making it more difficult for generic drug makers to enter the market.

The lead American negotiator was Ralph Ives, who was promoted to Assistant USTR for Pharmaceutical Policy soon after the negotiations concluded. He was aided by Claude Burcky, Deputy Assistant USTR for Intellectual Property. Less than three months after the Australia agreement was signed, the Sydney

Morning Herald reported that both men would take jobs at pharmaceutical or medical device companies. Their new employers stood to benefit from some of the pro-patent-holder provisions of the treaty. Ives took a job at AdvaMed, a trade group representing medical device manufacturers. Burcky moved to the pharmaceutical and medical device company Abbott Labs.

Since then, Abbott has hired two other USTR veterans, Andrea Durkin and Karen Hauda, according to the women's LinkedIn pages. Another USTR official, Kira Alvarez, has gone through the revolving door twice over the last 15 years. Her LinkedIn profile indicates that she served at USTR from 2000 to 2003, spent four years at the pharmaceutical giant Eli Lilly, and then returned to USTR in 2008 as Deputy Assistant USTR for Intellectual Property Enforcement. She was there for five years before she took a job at AbbVie, a pharmaceutical firm that spun off from Abbott earlier this year.

According to his official biography at the site of the Biotechnology Industry Associaiton, Joseph Damond "was chief negotiator of the historic U.S.-Vietnam Bilateral Trade agreement" during his 12 years at USTR. He then spent five years at the Pharmaceutical Research and Manufacturers of America before moving to BIO. Justin McCarthy went through the revolving door in the other direction. According to a USTR press release, McCarthy was responsible for intellectual property issues at the pharmaceutical company Pfizer from 2003 to 2005 before he was hired at USTR. He now works at a lobbying firm.

Some USTR critics argue that the close ties between USTR and large pharmaceutical and medical device companies has a corrupting influence on the agency.

"What's the next job that everyone at USTR has," asks Jamie Love. "It's working for some industry trade group." Love is the director of Knowledge Ecology International, a group that seeks to liberalize patent law in order to expand access to medicines in developing countries. Love believes the revolving door gives industry groups undue influence over U.S. trade negotiators.

Abbott and AbbVie declined to comment for this story. Neither BIO nor Justin McCarthy's lobbying firm responded to e-mails seeking comment. But AdvaMed disputes an accusation from Love that it has been lobbying USTR on patent issues. "Neither AdvaMed nor Ives has ever provided USTR comments on a provision of the TPP IP chapter," an AdvaMed spokeswoman stated by email.

In an e-mailed statement, a spokeswoman for USTR also denied that the revolving door with industry groups affected her agency's independence. "USTR implements a strict set of ethics policies including recusals where there are potential conflicts of interest and post-employment restrictions," she said. "U.S. negotiating positions reflect Administration policies and U.S. law that are the result of years of work by a huge variety of elected officials and policymakers."

A pro-Hollywood tilt

For the most part, it's true that the provisions sought by USTR mirror U.S. law. But critics say it's a bit of a funhouse mirror: not all provisions of U.S. law are exported with equal enthusiasm. When it comes to provisions of U.S. law that are favorable to rightsholders, American negotiators have sought to require

other countries to ape U.S. law in great detail. But, when it limits copyright or patent holders' rights, the language favored by the United States tends to be more abstract and open-ended.

For example, U.S. copyright law has a particularly broad concept of fair use, as highlighted by a recent ruling finding that the Google Book Search project was legal under the fair use doctrine. But the leaked TPP draft makes no attempt to export this innovation-friendly portion of U.S. law. The language favored by American negotiators merely states that nations "shall endeavor to achieve an appropriate balance" in their copyright systems by adopting "limitations or exceptions" such as a right to comment and criticism. The details are left up to individual member states, leaving room for them to adopt a narrower concept of fair use than exists in the United States, or to decide that their existing laws already fit the bill.

There are also at least two cases where U.S. negotiators have proposed TPP language that runs contrary to the rulings of American courts. In a March ruling, the Supreme Court ruled that American textbook publishers could not use copyright law to bar customers from purchasing textbooks abroad (where they are often cheaper) and reselling them in the United States. Yet the August TPP draft shows the United States still proposing that authors have "the right to authorize or prohibit the importation" of books that had been produced overseas. Margot Kaminski, a copyright scholar at Yale, believes this provision runs directly counter to the Supreme Court's interpretation of the law.

Another example: U.S. courts are split on whether "temporary copies" of works stored in computer memories for brief periods of time can trigger copyright liability. The Obama administration has sought to enshrine into America's international agreements the principle that temporary copies *do* trigger copyright liability, without waiting for the courts to clarify US law. If a future Supreme Court ruling holds that temporary electronic copies do not trigger copyright liability, the US could suddenly be in violation of its treaty obligations.

"Very polite"

Kaminski argues that this pro-rightsholder bias reflects the one-sided way that USTR seeks advice on copyright and patent issues. The agency has established 16 industry trade advisory committees to provide advice about the complex issues USTR deals with in the course of its negotiations. As the name suggests, the ITACs are designed to gather feedback from industry groups. There are no public interest groups, academics, or other non-industry experts on ITAC 15, which focuses on "intellectual property" issues.

And that matters because groups with ITAC seats have access to confidential information about the U.S. negotiating position that isn't available to the public. Sherwin Siy, an attorney at the advocacy organization Public Knowledge, has had multiple meetings with USTR representatives during the course of the TPP negotiations. But he says it was difficult to give USTR meaningful feedback because he didn't know what positions U.S. negotiators were advocating.

"They're willing to sit in a room with us and listen to our objections and our issues and be very polite," Siy says. But "whether or not that actually means anything is at best a black box."

When USTR wants technical advice on transposing U.S. law into international agreements, it naturally turns to the industry representatives on the ITACs. And it stands to reason that the advice the agency receives in response would be a bit one-sided. Where U.S. law is ambiguous, industry groups naturally gravitate toward interpretations of U.S. law that favor their employers' interests. And because public interest groups and independent experts aren't allowed to see proposed language (aside from occasional leaks), the agency may not even realize that it is exporting a warped interpretation of U.S. law.

A software split

The pharmaceutical industry isn't the only industry that has snapped up former USTR officials. BSA, a software industry group that counts Microsoft, Adobe, and Oracle among its members, has hired two former USTR officials. According to his LinkedIn page, Emory Simon worked at USTR from 1984 to 1993. He now works at BSA. Earlier this year, the BSA brought in another USTR veteran, Victoria Espinel, as its new president. She served at USTR, including as Assistant USTR for Intellectual Property and Innovation, from 2001 to 2007. Then, in 2009, she was nominated to be the nation's first "IP Czar," responsible for coordinating the executive branch's enforcement efforts, a post she held until she moved to the BSA in September.

Former USTR officials have also taken jobs at IBM, Microsoft, and Apple.

Copyright and patent issues divide the technology sector. Internet companies such as Google, open source companies such as Red Hat, and many tech startups favor less restrictive copyright and patent rules. Older, more established companies, especially those that sell packaged software, tend to favor stronger legal protections. For example, BSA, IBM, and Microsoft have been three of the leading opponents of a US legislative proposal to expand a program designed to invalidate low-quality patents.

USTR isn't as well connected to the portions of the technology sector that favor less extensive copyright and patent protections. Our research didn't turn up any examples of former USTR officials who have taken jobs at companies or trade groups that fall on this side of the debate. Those companies also seem under-represented in USTR's advisory process for copyright and patent issues.

For example, the Computer and Communications Industry Association represents companies such as Google and Red Hat whose businesses are harmed by broad patent protection and aggressive anti-piracy efforts. Earlier this year, CCIA nominated a copyright lawyer named Andrew Bridges to ITAC 15, the advisory panel focused on intellectual property. Bridges, who has made a career out of defending innovators against copyright lawsuits, would have provided a counterweight to the views of ITAC 15 members such as the Recording Industry Association of America and the Entertainment Software Association.

But the Obama administration rejected Bridges's nomination, suggesting that he instead be seated on ITAC 8, which focuses on "Information and Communications Technologies, Services, and Electronic Commerce." But Bridges is an expert on copyright law, not telecommunications or e-commerce. He felt

his skills would be wasted on ITAC 8, and declined the seat. Today, Cisco is the only Silicon Valley company on the 16-member ITAC 15.

"They see it as part of their job"

Content companies have also hired USTR veterans. According to his LinkedIn page, Greg Frazier worked at USTR from 2000 to 2001. In 2004, he took a job at the Motion Picture Association of America. The MPAA declined to comment for this story and says Frazier no longer works at the trade group. Joe Papovich's LinkedIn page says he served at USTR for two decades, before taking a job at the Recording Industry Organization of America. He left the RIAA after eight years to start his own lobbying firm. RIAA declined to comment on Papovich's role at the organization.

Hollywood, the recording industry, the pharmaceutical industry, and the packaged software industry represented by BSA all have something in common: they're in the business of shipping physical objects—pills, CDs, DVDs, and Blu-Ray disks—whose contents are protected by copyright or patent law. That business model makes it a natural fit for USTR's approach to policy issues.

"USTR sees itself as an advocate for U.S. exporter interests," says Bill Watson, a trade expert at the Cato Institute. "It's trying to negotiate market access for particular U.S. industries that ask for it. That bias leads USTR to think that because U.S. companies want more IP protection abroad, it's in their interest to negotiate that."

But the interests of specific exporting industries are not necessarily the same as the interests of the U.S economy as a whole. Excessive copyright and patent protection can stifle innovation and raise costs for consumers. And imposing U.S. law on other countries also limits the flexibility of lawmakers here in the United States, who might want to make the law less friendly to rightsholders sometime in the future.

Kaminski argues that USTR needs to fundamentally rethink how it approaches these issues. "USTR looks at IP from the perspective of 'we're sending out goods into the world,'" she says. "Somebody needs to educate them that this is not about exporting goods, it's about governing information infrastructure."

A USTR spokeswoman says the agency has been working hard to make the negotiating process more transparent. "We have significantly increased our stakeholder outreach to stakeholders on all sides on trade-related IP issues over the past five years," she said in an e-mailed statement.

"Of course, we are always looking to do better," she added. "We are currently in the final stages of considering a new ITAC member representing a major internet company, for example, and we will continue to look to expand membership."