

November 14, 2013

President of the United States  
Members of Congress  
Ambassador Michael Froman

Dear President Obama, Honorable Members of Congress and Ambassador Froman:

The United States Trade Representative (USTR) has declared that it is in the final stages of negotiating the Trans Pacific Partnership Agreement (TPP) – an expansive international treaty that would bind U.S. intellectual property policy to a series of controversial standards. The agreement proposes many of the same standards as the failed Anti-Counterfeiting Trade Agreement (ACTA). ACTA failed, in large measure, because the public rejected the process and substance of an international agreement kept secret from it but made open to a handful of select industry representatives. Despite the broad public interest in and the effect of similar proposals in the TPP, TPP is following a process even more secretive than ACTA, which is amplifying public distrust and creating an environment conducive to an unbalanced and indefensible final product.

**We, the undersigned intellectual property law academics and scholars, write to ask you to support immediately changing the secretive TPP negotiation process in law and in practice, and follow instead the example set by the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, as explained below.**

Intellectual property law is incredibly far reaching in its impact – implicating everything from the price of medicines and textbooks to the ability to exercise free expression and create new business models on the Internet. The TPP's intellectual property chapter would restrict Congress's ability to legislate on these key issues, and would do so without public input. Indeed, reported proposals in the TPP would foreclose many policy proposals currently under consideration, including proposals to reform copyright law proposed by the Library of Congress, proposals to reform "data exclusivity" periods for biologic medicines included in the President's budget, and proposals to amend exceptions for the circumvention of technological protection measures to promote interoperability of cell phones proposed by the Administration itself.

We take no position on the particular proposals that are reported to have been made in the TPP negotiation; indeed, even in light of yesterday's release by WikiLeaks, doing anything beyond speculation would be impossible since there has not been any official release of text. Nor does yesterday's leaked text solve the problem of transparency and accountability since it is both unofficial and perhaps out-of-date. It should be (and remains) the role of our government, and not leakers, to create public dialogue by sharing the accurate and current informational foundations required for meaningful public input.

The undersigned are unified in our belief that the public interest that intellectual property law seeks to promote can be furthered only through broad and inclusive processes that allow meaningful input not just from large entertainment and

pharmaceutical interests, but also from large and small creators, producers, distributors, intermediaries, consumers and others affected by intellectual property laws. Unfortunately, TPP is not being negotiated through an inclusive process. On the contrary, the Administration has taken extraordinary efforts to keep these deliberations secret from the general public. The United States reportedly promoted and signed an agreement with the other TPP member countries that precludes official release of any proposals for the text of the agreement until four years after it is concluded.

This secrecy has been problematically selective, as demonstrated by the operation of the USTR's Industry Trade Advisory Committees (ITACs). A few hundred ITAC members receive advance copies of all U.S. proposals and a structured process to give input. The ITAC specifically designated to advise on intellectual property matters has just 16 representatives -- all of whom are corporate advisers, a majority of whom represent pharmaceutical companies or large entertainment companies, and none of whom represent consumers. These are the only people outside the government in the United States that can offer meaningful, official, real-time input to the negotiators.

Moreover, the Administration has actively avoided subjecting its proposals to public light or input under existing U.S. laws and processes. It has avoided the public notice and comment process on its proposals required of most agency rulemaking by the Administrative Procedures Act (APA), *see* 5 U.S.C. 553(a)(1) (permitting exemption from notice and comment for any "foreign affairs function"); it has sweepingly exempted Industry Trade Advisory Committee deliberations from the transparency provisions of the Federal Advisory Committee Act (FACA), *see* 19 U.S.C. 2155(f)(2)(A) (permitting exemptions for trade advisory committees on a case by case basis); and it has claimed that all documents relating to U.S. proposals in TPP and other trade agreements are exempt from the Freedom of Information Act (FOIA) to protect national security, *see* 5 U.S.C. 552(b)(1) (permitting exemptions for information that is "properly classified").

**This process is inconsistent with core United States democratic values; the process should be changed.**

There is a better way. Rather than repeating the failures of ACTA, the United States should be following the example of the last *successful* international intellectual property agreement negotiation: the recently signed and broadly praised Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The Marrakesh Treaty was negotiated with unprecedented transparency for an international agreement – including real time public releases of all proposals considered and the ability of all stakeholders to witness most negotiation forums either in person or through audio feeds. The successful outcome of the Marrakesh Treaty's highly open process disproves any notion that transparency inhibits resolution.

We ask you to support basic and important process changes that, even at this late date, might increase the potential of the TPP process to reach a balanced and successful outcome, and bolster the public's trust in that and future trade negotiations. Specifically, we request:

- First, that the Administration work with other negotiating parties to (a) immediately release the current official full text of the TPP intellectual property and

related chapters, as was done for ACTA in April 2010, over a year before that agreement was concluded, and (b) invite public comment on the proposals therein;

- Second, that the Administration (a) voluntarily release to the public all future U.S. negotiation positions in the intellectual property and related chapters of the TPP at the same time as that information is shared with Industry Trade Advisory Committee members; (b) cease withholding related information under the national security exemption of FOIA; and (c) cease exempting ITAC meetings and deliberations from FACA open government requirements;
- Third, that Congress draft, and the Administration promote and endorse, language in any future Trade Promotion Authority legislation that would require (a) the above requested disclosures as a matter of course, and (b) the USTR disclose to the public any documents previously shared with select industry advisers under the ITAC system.

We believe that these proposals would greatly improve the TPP and other trade negotiations to promote informed public input and fuller consideration of the broad range of opinions surrounding the appropriate contours of intellectual property law.

Thank you for your time and consideration. You may address any reply or correspondence to the organizers of this letter: David S. Levine (dlevine3@elon.edu) and Sean Flynn (sflynn@wcl.american.edu). Links to background documents on the issues referenced in this letter may be found at <http://infojustice.org/tpp>.

Sincerely,

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