[date], 2013

President of the United States

Members of Congress

Ambassador Michael Froman

Dear President Obama, 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 with 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 US 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 pubic 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 Marrekesh 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 immediately release for public comment 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;
- Second, that the Administration 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; cease withholding related information under the national security exemption of FOIA; and 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 the above requested disclosures as a matter of course , and require the USTR disclose to the public any documents previously shared with select industry advisers under the ITAC system (e.g. through application of FACA to the ITAC process).

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,[1]

David S. Levine, Elon University School of Law
Sean Flynn, American University Washington College of Law
Jorge Contreras, American University Washington College of Law
Susan K. Sell, George Washington University
Brook Baker, Northeastern University School of Law
Frank Pasquale, University of Maryland School of Law
Peter Yu, Drake University School of Law
Brendan Butler, American University Washington College of Law
Peter Jaszi, American University Washington College of Law
Srividhya Ragavan, University of Oklahoma College of Law
Mark P. McKenna, Notre Dame Law School
Mary LaFrance, University of Nevada, Las Vegas, Boyd School of Law
Cynthia Ho, Loyola University Chicago School of Law
Betsy Rosenblatt, Whittier Law School
Jerome Reichman, Duke University School of Law
Dan Hunter, New York Law School and Queensland University of Technology
Jessica Silbey, Suffolk Law School
Michael A. Carrier, Rutgers Law School
Barton Beebe, New York University School of Law
Lea Shaver, Indiana University McKinney School of Law

[1] Affiliations are listed for identification purposes only.

Ira Steven Nathenson, St. Thomas University School of Law
Lawrence Lessig, Harvard Law School
Rebecca Tushnet, Georgetown Law
Deirdre K. Mulligan, UC Berkeley School of Law
Jonathan Zittrain, Harvard Law School
Eric Goldman, Santa Clara University School of Law
Annemarie Bridy, University of Idaho College of Law
Deborah Halbert, University of Hawai`i at Manoa
Tyler T. Ochoa, Santa Clara University School of Law
Andrew Chin, University of North Carolina School of Law
Mark Lemley, Stanford Law School
Margaret Chon, Seattle University School of Law
Jennifer M. Urban, UC Berkeley School of Law
Alex Leavitt, Annenberg School for Communication & Journalism, USC
Margo Bagley, University of Virginia School of Law
Edward Lee, IIT Chicago-Kent College of Law
Paul Edward Geller, *International Copyright Law and Practice*
Jake Linford, Florida State University College of Law
Amy Kapczynski, Yale Law School
Rita Heimes, University of Maine School of Law
Samuel E. Trosow, University of Western Ontario
Robert A. Heverly, Albany Law School of Union University
Jonathan Weinberg, Wayne State University
H. Brian Holland, Texas A&M University School of Law
Timothy K. Armstrong, University of Cincinnati College of Law
Jim Gibson, University of Richmond School of Law
Gabriel J. Michael, George Washington University
David W. Opderbeck, Seton Hall University School of Law
Michael Risch, Villanova University School of Law
Eric Fink, Elon University School of Law
Brian Rappert, University of Exeter
Dan Burk, University of California, Irvine School of Law
Lisa Ramsey, University of San Diego School of Law
Eric E. Johnson, University of North Dakota
Margot Kaminski, Yale Law School Information Society Project
Yaniv Heled, Georgia State University College of Law
Michael Rich, Elon University School of Law
Irene Calboli, Marquette University Law School
Jon M. Garon, North Kentucky University School of Law

Yvette Joy Liebesman, St. Louis University School of Law
Alasdair Roberts, Suffolk University Law School
Frances Burke, Suffolk University
Larry Catá Backer, Penn State Law School
Thomas C. Ellington, Wesleyan College
Katherine J. Strandburg, New York University School of Law
Aaron Perzanowski, Case Western Reserve University School of Law
Amy Landers, University of the Pacific McGeorge School of Law
Jeremy Hunsinger, Wilfred Laurier University and Virginia Tech
Jorge R. Roig, Charleston School of Law
Rebecca Giblin, Monash University
Jessica Litman, University of Michigan Law School
Zoe Argento, Roger Williams University School of Law
Llewellyn Joseph Gibbons, University of Toledo College of Law
Hiram A. Meléndez-Juarbe, University of Puerto Rico Law School
Julie Ahrens, Center for Internet and Society, Stanford Law School
Anupam Chander, University of California, Davis School of Law
Madhavi Sunder, University of California, Davis School of Law
Christopher Wong, Engelberg Center, NYU School of Law
Sarah Burstein, University of Oklahoma College of Law
Mark Bartholomew, SUNY Buffalo Law School
David Olson, Boston College Law School
Seda Gurses, Department of Media, Culture and Communications, NYU
Brian Rowe, Seattle University Law