



ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

**REQUEST FOR COMMENTS CONCERNING THE PROPOSED
TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP AGREEMENT**

Docket ID: USTR-2013-0019

Comments of the Electronic Frontier Foundation

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The Electronic Frontier Foundation (EFF) is a digital civil liberties organization that defended technology users' rights for over 23 years. We primarily take the fight to court, but also engage in global advocacy campaigns and direct public action towards lawmakers to ensure digital policies uphold the public interest. We have over 18,000 active paying members worldwide.

The EFF submits this document in response to the United States Trade Representative's solicitation for comment listed in the Federal Registry on April 1, 2013, regarding the coming negotiations over the coming US-EU trade agreement, now called the Transatlantic Trade and Investment Partnership (TTIP).

We have been following international trade negotiations for over a decade since they began to carry provisions that extended copyright and patent enforcement to the digital environment. Time and again, we have seen how the standards for intellectual property enforcement that are enshrined within these trade agreements do not reflect the diverse needs and interests of technology users, students, researchers, people with reading and learning disabilities, creators, and others. Instead, the provisions impose harsh burdens on the public, the consequences of which we have been manifested in the U.S. and countries around the world.

The USTR has continued to claim that the regular disclosure of draft texts would prevent the conclusion of trade agreements. However, we have witnessed countless negative consequences resulting from copyright policies written into U.S. trade agreements that were negotiated without any transparency. As long as the process shuts out democratic oversight, then it will be impossible for users' rights and interests to be addressed.

Specifically, we are concerned about the following consequences that may arise from copyright enforcement provisions:

- *Internet Service Providers Turning Into Copyright Police:* If ISPs are held liable for their users' activities, they will be encouraged to filter and block online content. This can lead to ISPs extra-judicially terminating accounts of subscribers alleged to have engaged in repeat copyright infringement.
- *Violation of Privacy and Due Process:* Any requirements that may increase pressure to facilitate processes for copyright holders to gain access to infringers' info in order to punish individuals would be pose a great risk to users' privacy.
- *Restrictive Digital Locks on Content:* Language that would require signatories to enact legal protections against circumvention of digital rights management (DRM, also known as technological protection measures or TPMs), even if the reason for breaking the digital lock is not to make an infringing copy. Such provisions inflict a wide range of harmful effects for anyone who tries to change or interact with legally purchased content or devices.

- *Greater Civil and Criminal Penalties for Copyright Infringement:* Any expansion on the definition of infringement in a way that could even include non-commercially-motivated infringement, requiring countries to have criminal penalties for aiding and abetting copyright infringement would be dangerously overbroad. US law already carries such provisions in the DMCA, but it will restrict Congress' ability to engage in law reform in this area even if it seeks to do so in the future.

Unfortunately these kinds of copyright enforcement provisions have been written into trade agreements before. They reflect the narrow interests of certain private industries that seek to benefit from such over-restrictive terms. The implication of such policies is that restrictions on users' access to the Internet and technology are acceptable and necessary costs to the enforcement of copyright. Yet such policies are a regulatory overreach that infringe upon users' civil liberties, and they have even come to undermine their own purpose to promote and incentivize innovation and creativity.

In light of these issues, we strongly urge the USTR to commit to the following:

FIRST, publish the working draft texts of TTIP after each round of negotiations. Representatives of foreign governments have a chance to review proposed rules to which the United States, future Congresses and state legislatures and all of us in our daily lives may be indefinitely bound — the American public, Congress, and state legislatures deserve no less;

SECOND, publish the reports on U.S. positions and proposals that are currently given only to Industry Trade Advisory Committee members under confidentiality agreements. Congress and the public must have that information if we are to ensure that USTR's proposals represent all of us, not only industry interests;

THIRD, formulate U.S. positions to be taken to TTIP negotiations via on-the-record notice and comment rulemaking under the Administrative Procedures Act, which requires an explanation for which views have and have not been included in a proposed policy;

FOURTH, open Trade Advisory Committee briefings and processes to the public so that all who will live with the results of TTIP have the same opportunity to participate in the process and have access to USTR negotiators;

FIFTH, commit that if the above steps are not taken, Intellectual Property Rights provisions will not be included in this US-EU trade pact.

These guidelines will go along way to ensure that policymaking in the trade context adheres to fundamental democratic precepts. Rules governing technology and

culture should be debated in US Congress and other transparent forums where all stakeholders can be heard—not in closed negotiations that give privileged access to certain private industries.

We strongly urge you to please adopt a new standard of transparency in your negotiations over this US-EU trade pact.

Thank you for your attention.

Attachment 1: Joint declaration that we have signed with over 40 other Internet freedom and public health groups from the U.S. and EU nations.

Attachment 2: Unintended Consequences, 15 years under the DMCA

Attachment 3: Overview of provisions in the Trans-Pacific Partnership agreement which pose particular threats to the digital economy.