The Internet Association

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Re: Request for Comments Concerning Proposed Transatlantic Trade and Investment Agreement (Docket No. USTR-2013-0019)

The Internet Association appreciates the opportunity to provide written comments regarding its view on the proposed United States (U.S.) and European Union (EU) trade agreement, known as the Trans-Atlantic Trade and Investment Partnership (TTIP). As the United States Trade Representative works with U.S. government agencies and consults with Congress in developing a strategic proposal for the TTIP agreement, we hope our comments will serve as a guide for USTR to ensure that this agreement includes 21st century provisions that promote innovation, jobs, and democratic discourse.

Our association is the unified voice of the Internet economy, representing the interests of leading Internet companies. We are dedicated to advancing public policy solutions that strengthen and protect Internet freedom, foster innovation and economic growth, and empower users.

In the past two decades, the Internet industry has transformed the nature of communications, culture, and commerce throughout the world. Currently, approximately two billion users have access to innovative, online tools and services provided by our companies. In 2016, this number is expected to grow to three billion users. More than 500 million people in the U.S. and the EU rely on the Internet for daily interactions that touch every aspect of their lives.

The Internet Association strongly supports the negotiation of a trade agreement between the world's two largest economies, the United States and the European Union. TTIP affords an opportunity to reduce barriers between these two economies, benefiting consumers and businesses on both sides of the Atlantic. The Internet's continued growth as a global channel for

innovation, trade, and commerce depends on trade policies that promote the free flow of information. Therefore, any agreement should eliminate unnecessary obstacles to the flow of this information. Despite differing histories and legal traditions, the U.S. and EU both have a clear interest in protecting consumers and Internet businesses. Ultimately, greater interoperability and rationalization of legal frameworks will benefit both economies and societies.

As the digital economy continues to bolster the global economy, we believe that TTIP must incorporate certain elements to ensure that the Internet industry continues to thrive as a significant economic driver. In particular, the Internet industry supports the inclusion of policies that: (i) facilitate digital trade, (ii) export the full balance of U.S. intellectual property law - encompassing both statutory and common law elements and reflecting the flexibility that exists in the U.S. copyright and trademark systems, and (iii) promote interoperability of existing privacy frameworks between the U.S. and E.U.

I. OBJECTIVES FACILITATING DIGITAL TRADE

Support digital trade. The 2011 ICT Principles recognized that future trade agreements should address 21st century issues such as cross-border information flows and regulatory transparency.[1] The TTIP should promote a single, global digital information marketplace, reflecting a commitment to free flow of information as a key driver of the digital economy. Internet companies recognize that this is a relatively new topic in trade negotiations and appreciate the U.S. Government's efforts to include Internet-friendly provisions in the Trans-Pacific Partnership (TPP) Agreement. Building on that work, the U.S. Government in TTIP should seek to encourage the free flow of information by addressing the following interrelated policy issues:

- **Intermediary Liability.** In areas outside of intellectual property, both the U.S. and EU have frameworks for limiting the liability of intermediaries – Section 230 of the Communications Decency Act in the U.S. and the E-Commerce Directive in the EU. U.S. Internet companies and their executives have nonetheless found themselves subject to civil claims and criminal prosecutions for the actions of third parties. While we understand that the EU has different traditions with respect to freedom of expression, TTIP provides an opportunity for the strengthening of the legal protections provided in the EU to online platforms for third party content.

[1] Bureau of European and Eurasian Affairs, European Union-United States Trade Principles for Information and Communication Technology Services, *available at* http://www.state.gov/p/eur/rt/eu/tec/171020.htm (Apr. 4, 2011).

- **Data Protection**. Internet companies operate in multiple jurisdictions and thus depend on the ability to manage cross-border data flows. Unfortunately, Internet companies face inconsistent data protection regulations that impact their ability to share information across borders and operate multi-nationally. In Section III below, we provide additional information on steps USTR can take to facilitate the global free flow of information while respecting internationally recognized data protection principles.

- **Cloud Computing.** Cloud computing has enormous economic potential by enhancing a user's ability to access her information for business or personal use. A recent study found companies that adopt cloud-computing services could realize more than $625 billion in savings over the next five years.[2] Additionally, the study projected that cloud computing investments will create about 213,000 new jobs both in the United States and abroad within five years. TTIP should eliminate impediments to the development of cloud computing infrastructures, such as prohibitions on cross-border data flows, data storage taxes, or data localization requirements.

- **Facilitate Small Businesses.** The Internet provides small businesses with the means of participating in the global economy. However, considerable barriers in the offline world continue to hamper technology-enabled small businesses from fully taking advantage of global markets. The OECD states:

  > *"Obtaining information about various countries' customs formalities, inspection requirements and administrative procedures is a particular hurdle for small firms entering new markets. Complying with the documentation requirements and testing and certification procedures entails high fixed costs; these disproportionately burden SMEs importing and exporting small amounts. The fixed costs of participating in GVCs [global value chains] can be reduced by making information readily available online and introducing single windows and simplified clearance procedures for small shipments. To promote the insertion of SMEs into GVCs, improving the efficiency of border crossings should be a priority."*[3]

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[2] Sand Hill Group, "Job Growth in the Forecast: How Cloud Computing is Generating New Business Opportunities and Fueling Job Growth in the United States," March 2012, available at http://www.news- sap.com/files/Job-Growth-in-the-Forecast-012712.pdf (*also available at* http://sandhill.com/article/sand-hill-group-study-finds-massive-job-creation- potential-through-cloud-computing/).

[3] Working Party of the Trade Committee, TRADE POLICY IMPLICATIONS OF GLOBAL VALUE CHAINS: CONTRIBUTIONS TO THE REPORT ON GLOBAL VALUE CHAINS , Trade and Agriculture Directorate Trade Committee (Apr. 2013) at 14, *available at* http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP(2012)31/FINAL&docLanguage=En.

Improving customs and duties processes between the U.S. and EU should be a central aspect of the TTIP. One particular method for achieving this goal would be to harmonize the threshold below which goods are not subject to customs treatment between the U.S. and EU (*i.e.,* the de minimis thresholds) at $800 USD. Harmonizing this threshold at $800 USD would lessen the barriers facing technology and enable small businesses transacting low value shipments between the US and EU.

- **Duties.** TTIP should require immediate duty-free treatment for all technology goods. In addition, it should limit the non-tariff barriers that can be imposed on technology and other goods, including by requiring mutual recognition of product standards and certification. Further, the TTIP should make permanent and strengthen the 1998 WTO e-commerce moratorium in which WTO members committed to the practice of not imposing duties on electronic transmissions.

- **Open Content.** Both the U.S. and the EU have adopted policies requiring open access to the results of government-funded research. There also is increasing commitment to the development of open educational resources and programs such as Massive Open Online Courses (MOOCs). These trends facilitate digital trade by increasing demand for the services of Internet companies, improving and lowering the cost of education, and accelerating the rate of innovation. TTIP should include provisions that encourage the creation, dissemination, and use of open content, such as open data formats in government information.

- **Non-discrimination.** TTIP should prohibit discriminatory treatment of digital products. Likewise, TTIP should mandate technology neutrality, in that all technologies are given the chance to compete in the marketplace, and users can access and employ legal services, applications, and devices of their choice. Cross-border commitments should be made on a "negative list" basis, such that any service not specifically excluded is covered. Moreover, the agreement should not carve-out audio-visual services, which could undermine Internet protections.

II. OBJECTIVES RELATING TO INTELLECTUAL PROPERTY

Fix the IP Template. In its free trade agreements and TPP, the U.S. has developed a "template" relating to intellectual property protection. This template likely would be the starting point for a U.S. proposal for an IP chapter for TTIP. Elements of this template, particularly those relating to copyright, reflect certain assumptions about what is in the economic best interest of the United States. The template generally assumes that U.S. firms dominate IP-intensive industries, so that

more protection invariably will lead to more revenue for U.S. companies and more jobs for U.S. workers. The template also assumes without strong protection, U.S. companies will not have an incentive to innovate. Finally, the template assumes that the digital revolution has undermined copyright protection in a manner harmful to the U.S. economy. However, as the recent study released by the National Academies' National Research Council (NRC), *Copyright in the Digital Era: Building Evidence for Polic*y reveals, these assumptions are "poorly informed by objective data and independent empirical research."[4]

This questioning of some of the assumptions that underlie the FTA IP template should not be misconstrued as a challenge to the basic premise that intellectual property protection provides important incentives to innovation. Internet companies rely heavily on copyright, as well as trademark, trade secret, and patents, to protect different aspects of their businesses. Nonetheless, we agree with Chief Judge Alex Kozinski that too much intellectual property protection is as bad as too little.[5] Too much IP protection prevents legitimate competition and frustrates the development of innovative products and services. In the international context, IP laws can be applied in a discriminatory manner and can be used to impede market penetration by U.S. companies. U.S. Internet companies already are the frequent targets of infringement actions by European copyright and trademark owners, and we are concerned about the inclusion in the TTIP of provisions that would encourage even more lawsuits.

In response to concerns raised in the past by Internet companies about the IP template, the U.S. Government has argued that the template is consistent with U.S. law. There are three problems with this position:

- **Balance**. The template lacks the nuanced balance of interests present in U.S. law. The Copyright Act has strong enforcement provisions such as statutory damages, but also has extensive exceptions and limitations, such as fair use. U.S. trademark law also has statutory and common-law fair use principles. This balanced IP framework has been essential to the growth of the Internet economy, and is a major reason why U.S. companies lead the industry globally. The template, however, contains the IP laws' enforcement provisions but not their exceptions. We are pleased that the U.S. government has, for the first time in a free trade agreement, sought the inclusion of some balancing language in the context of the TPP. We hope this language ultimately is part of the final text of the TPP agreement. We further urge these types of balances to be included in the copyright and trademark provisions of TTIP.

[4] Stephen A. Merrill and William J. Raduchel, Editors; Committee on the Impact of Copyright Policy on Innovation in the Digital Era; Board on Science, Technology, and Economic Policy; Policy and Global Affairs; National Research Council (2013).
[5] *Vanna White v. Samsung Electronics America,* 989 F.2d 1512 (1993).

At the same time, it bears emphasis that the TPP still does not reflect other critical limitations, such as the first sale doctrine. Moreover, there is opportunity for exporting more of the flexible elements and balances that are included in the US copyright system, whether codified in the act or in the case law, and are integral to growth and innovation. Thus, as far as we can determine, the TPP does not reflect the balance of U.S. IP law.

- **Flexibility**. The template may make it difficult for Congress to amend the IP laws in the future. This is not just a hypothetical problem. The template provides that countries shall confine the permanent exceptions to the circumvention prohibition to seven specific situations. Any additional exceptions can last no more than three years. The Register of Copyrights, in the recent DMCA rulemaking, refused to renew an exemption for cell phone unlocking. Members of Congress called for legislation that would make the exemption permanent, only to learn that a permanent exception would be inconsistent with the FTAs.

The template poses an even more significant problem with respect to copyright term. The template contains a copyright term of the life of the author plus 70 years, far longer than the economic value of the vast majority of copyrighted works. The long term is a root cause of a variety of systemic problems in the copyright system, such as orphan works. The Register of Copyrights recently called for Congress to begin discussions about the "next great copyright act," and one of her suggestions involved procedures that affect the last twenty years of the copyright's term. These proposals may well be inconsistent with the template.

Indeed, the U.S. has joined a variety of international IP agreements such as the Berne Convention, TRIPS, and the WIPO Copyright Treaty, which limits Congress's ability to make meaningful changes to the copyright system. The IP template should be amended to more closely reflect the balance in U.S. law, while at the same time preserve the flexibility for Congress to change the IP laws in the future.

Safe Harbors. Although Internet companies have serious concerns about some features of the template, we are strongly supportive of others. In particular, Internet companies recognize the importance of the provisions that track the DMCA's safe harbors for Internet companies. Any TTIP IP chapter must include copyright safe harbors for intermediaries. These safe harbors must be broad enough to resolve favorably the clear conflict between the EU's obligation under the Berne Convention to permit quotations, including by search engines, and Germany's new ancillary copyright law, which effectively prohibits such quotation.

Does TTIP Need an IP Chapter? Several factors argue against inclusion of an IP chapter in TTIP.

- **Evidence**. As noted above, the NRC concluded that there was a dearth of evidence supporting many of the assumptions upon which the template in particular, and our copyright policies in general, are based. Hence, rather than enter into yet another international IP agreement, it may make sense for the U.S. Government first to sponsor objective, non-partisan research to determine what level of copyright protection is appropriate to achieve our national objectives.

- **IP Protection in the EU**. In many respects, the EU provides more protection for IP than the U.S. The EU provides: strong protection for moral rights; resale rights for certain visual works; and *sui generis* protection for databases. It also permits fewer and less flexible exceptions. Given the high level of existing protection in the EU, the usual rationale for our negotiating IP agreements – increasing IP protection to U.S. standards – is absent. Moreover, Internet companies would strongly oppose any effort to include the features such as database protection in the TTIP. At the same time, the EU likely would resist any language – permissive or mandatory -- concerning flexible exceptions. Because neither side would agree to any substantive changes in its IP laws, an IP chapter in the end probably would be a high level statement of only symbolic significance.

- **Controversy**. As the defeat of ACTA demonstrates, IP policy is highly controversial in the EU; indeed, probably even more controversial than in the U.S. It would be most unfortunate if the TTIP were dragged down by the inclusion of largely symbolic provisions.

III. OBJECTIVES RELATING TO DATA PROTECTION

Both U.S. and EU businesses are challenged by regulatory complexity, inconsistency, redundancy and fragmentation. The U.S. and EU should work together to strengthen and clarify the mechanisms for interoperability of privacy rules across the two continents. Interoperability mechanisms like the U.S. Safe Harbor agreement, consistent with internationally accepted data protection principles, must remain available to Internet businesses in the future.

Within the context of the TTIP, there is a need to reinforce the viability of interoperability as between the *existing* EU regime and the *existing* U.S. regime as they are. There must not be an assumption of any omnibus substantive changes in U.S. law, nor a presumption that the EU would by necessity remove any and all expectations for protection of cross-border flow of

personal data. Achieving this objective will require an improved understanding of the U.S. system on the part of the EU negotiators. There is a strong need for the U.S. Government to educate on the U.S. approach to privacy and its robustness: comprehensive consumer protection law (FTC Act) reinforced by sectoral statutes (HIPPAA, GLBA, FCRA, COPPA, CAN-SPAM) and multi-stakeholder self-regulatory initiatives, all subject to enforcement.

The TTIP provides an opportunity to reduce, eliminate, or prevent unnecessary differences in regulatory requirements consistent with President Obama's Executive Orders, including Executive Order 13609 "Promoting International Regulatory Cooperation" and Executive Order 13563, "Improving Regulation and Regulatory Review." Collectively, these Executive Orders suggest removing regulatory requirements that may be redundant, inconsistent or overlapping and called for greater co-ordination to promote simplification and co-ordination.

One of the current regulatory challenges for digital commerce is the differing application of EU Data Protection regulations within different EU countries. This creates legal uncertainty, fragmentation and challenges particularly for start-ups and other small innovative businesses.

Similar to the commitments achieved in other Free Trade Agreements where trade partners committed to reform to achieve coherence in specific sectors, we believe the TTIP can develop specific agreements and standards that can promote simplified and interoperable regulation on these issues and avoid inconsistent or overlapping requirements for privacy and data protection. The goal of negotiations in this area should be substantive and procedural commitments by both the EU and U.S. that are durable over time so as to increase regulatory predictability and business certainty. For example, one opportunity to lower regulatory barriers is for the US to promote support the concept of a "lead" data protection regulator in Europe. This is consistent with both the current proposal of the European Commission for a reformed EU Data Protection Regulation and with the international regulatory principles outlined in Executive Orders 13609 and 13563.

This "lead" data protection regulator or "one stop shop" for U.S. multinationals undertaking business throughout the EU would reduce inconsistent or overlapping requirements resulting from different Data Protection Authorities asserting jurisdiction. A simplified, coordinated approach would reduce the potential for discrimination against U.S. entities and remove potential regulatory barriers to trade. As part of this undertaking, the U.S. Government should work to ensure that U.S. companies are not held to higher or different standards under EU law than those actually enforced against European companies.

IV. OBJECTIVES RELATING TO PROCESS

Transparency. Internet companies believe the TTIP negotiations should be as open and transparent as possible. While discussions on traditional trade issues such as tariffs and subsidies may have to be closed, there is no reason for deliberations on digital trade and intellectual

property to be closed. In addition, all proposed drafts, negotiating texts, and position papers should be made available online. The standard for openness should be the WIPO, not TPP.

V. CONCLUSION

With the growth of the digital economy, new and challenging issues will emerge in international trade agreements. The Internet Association appreciates the opportunity to comment on this important issue. We believe that policies that facilitate digital trade, recognize the full balance of U.S. intellectual property law, and encourage interoperability between the U.S. and E.U. privacy frameworks will lead to a successful transatlantic relationship, ultimately benefitting both economies and societies.

Respectfully submitted,

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