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September 20, 2012

Ambassador Ron Kirk
United States Trade Representative
Executive Office of the President

Dear Ambassador Kirk:

Thank you for meeting with me to discuss the Trans Pacific Partnership (TPP). I share your desire to see the TPP agreement generate economic growth and foster innovation. However, I remain concerned with the transparency of the TPP negotiating process and the risks the TPP's intellectual property (IP) enforcement provisions may pose to innovation and free expression. Lack of transparency and overbroad IP enforcement requirements have held back other international trade agreements in the recent past – these same issues are now undermining the results you seek to achieve with TPP.

During our meeting, you told me that you welcomed feedback on how to mitigate these concerns. I have several suggestions, detailed below. Most of these suggestions have already been made to USTR on many other occasions, but USTR has thus far failed to respond to them adequately.

1) USTR should make the trade proposals offered by the U.S. government – or, at minimum, detailed summaries of those proposals – available to the public. I understand that USTR and other TPP negotiators sign a confidentiality agreement that restricts participants from disclosing the negotiating text or proposals to unauthorized parties. However, the model TPP confidentiality agreement does not appear to prevent USTR from disclosing detailed summaries of its trade proposals to the public.¹ The model confidentiality agreement also does not prevent USTR from disclosing its draft proposals to the public prior to formally submitting them to the TPP negotiations. USTR should justify its decision to withhold this information from the public in greater detail.

2) USTR should ensure that TPP's IP enforcement requirements are on equal footing with

¹ New Zealand Ministry of Foreign Affairs & Trade, TPP Talk: Content of confidentiality letters, Nov. 29, 2011, <http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/1-TPP-Talk/0-TPP-talk-29-Nov-2011.php>.

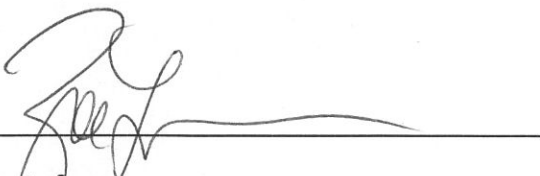
limitations and exceptions, such as fair use. Without strong limitations and exceptions to balance strong IP enforcement requirements, TPP could promote policies that pose risks to free expression and the industries that depend on fair use for innovation – a critical portion of the U.S. economy.

It is positive that, in prior negotiating rounds, USTR proposed limitations and exceptions to the IP enforcement provisions of TPP. However, based on the leaked TPP text, those limitations and exceptions are weaker than U.S. law and TPP's IP enforcement provisions. Article QQ.G.16, paragraph one, of the leaked TPP draft negotiating text suggests the limitations and exceptions would be subject to a burdensome "three-step test" restricting the scope of limitations and exceptions that countries party to TPP are permitted to adopt. The TPP text should make clear that countries party to TPP have the discretion to adopt any limitations and exception that are not inconsistent with their domestic laws and other treaty obligations. The TPP should also not require participant countries to apply legal pressure to service providers to actively monitor their networks for infringing material. Such obligations would threaten online free speech, privacy, and innovation.

3) USTR should balance the International Trade Advisory Committee for IP (ITAC-15) to ensure it represents a variety of perspectives on IP – particularly how the TPP's IP provisions would affect digital services and free expression. I understand that individuals can apply for membership to ITAC-5, but USTR should make an effort to proactively recruit prospective members that could balance the committee. I recommend USTR reach out to civil society groups and legal scholars that are already active on IP in the context of TPP and encourage them to consider membership in ITAC-15.

I appreciate that USTR's end goal with TPP is to open new markets and create economic opportunity. However, the TPP's IP provisions must not undermine the free expression of Internet users, the ability to share and create content online, the free and open character of the Internet, or the freedom of digital service providers to innovate. I strongly urge USTR to act on the recommendations I and others have made to make TPP more transparent and balanced.

Sincerely,



Zoe Lofgren
Member of Congress