This article seeks to answer what should be a very basic question: “when is it time to publicize a draft international intellectual property law negotiating text?” Because the recent answer to that question is “never,” this article assesses the need for and parameters of that answer. It assesses secrecy, both as a value and as a tool. It seeks to find the right time for meaningful and knowledgeable public discussion of proposed laws to begin.

Much of the high-profile and controversial lawmaking in the past few years has been focused on addressing intellectual property infringement (also known as piracy, depending on one’s perspective). In the process of offloading intellectual property legislative activity from the national to the international sphere, a mode of lawmaking has been revealed as ineffective and counterproductive. The experience of the international Anti-Counterfeiting Trade Agreement (ACTA), which is all but dead, the domestic Stop Online Piracy Act (SOPA), a testimony to a failed attempt by Hollywood and Pharma to craft intellectual property law in its own image, and now the ongoing negotiations of the Trans Pacific Partnership Agreement (TPP), has, in tandem, revealed the fallacy of a belief in the need for ironclad secrecy in intellectual property lawmaking negotiations in the face of ongoing leaks and strong public interest. Indeed, the recent 15th round of TPP negotiations was heralded by a nearly 150 page, 906 numbered-paragraph report by the Canadian firm Grey, Clark, Shih and Associates entitled The Trans-Pacific Partnership: NAFTA 2.0 or Doha Revisited? Cracks, Crevices and Imbalances in the Trans Pacific Partnership Negotiations. The sources for this report were leaked information and texts gathered from sources like Knowledge Ecology International, Inside US Trade and “from officials and others whose identities cannot be revealed.” Is this secrecy? Is this useful secrecy? Is this the basis for intelligent public discussion of proposed laws?

Leaks are the stuff upon which fiction and fantasy is built, not lawmaking. Or, at least, this article posits that it should not be. Indeed, the endless cavalcade of leaked information, if not timely drafts, has lead observers of TPP to note that “fortunately, while an imperfect solution to excessive secrecy, leaks have revealed a significant part of what we should
know.” The word “fortunately” is important to note, as these same experts accept that “by necessity, negotiations are conducted behind closed doors.” If leaks are considered “fortunate” even as secrecy is deemed “necessary,” this article seeks to address the limits of that need for secrecy.

The combined experience of ACTA, SOPA and now TPP has revealed that there might be a tolerable level of transparency in international trade negotiations that can be incorporated into the negotiation process without compromising the ability of the negotiators to bargain in good faith and conclude a deal. The proverbial door can remain closed, as needed, in order to effectuate the negotiation and horse-trading necessary to conclude a deal. There is a time and place for secrecy.

But that door does not have to be sealed shut, not does it always have to be closed, as inflexibility has been followed by failed legislative efforts. Indeed, the current situation of excessive efforts at ironclad secrecy countered by leaks and off-the-record conversations has created a war of attrition in which the biggest losers are the public at large. As I’ve written elsewhere, leaks and/or Wikileaks are not a system of public transparency. We can no more rely on leaks to create the optimum levels of secrecy than we can on the random and uncoordinated acts of strangers and intermeddlers to maintain our safety and security as a nation. We would not, nor sould we, tolerate such chaos in those arenas, but we appear to be tolerating, and even encouraging it, in the arena of international lawmaking.

Indeed, the TPP negotiations appear to elevate secrecy to a value rather than a means to achieve a desired end. That reality needs to be taken seriously. To the extent that secrecy is not merely a tool of lawmaking, but rather a value like accountability or equity, it has heretofore not been defined as such. If it is a value, then we need to rethink secrecy more broadly and consider how to insert other counter-majoritarian values into the lawmaking process.

Simultaneously, from a policy perspective and as I’ve written elsewhere, secrecy as a useful tool is on the wane. The notion that one can maintain a secret for the period of time necessary to derive significant social value from maintaining a given piece of information as secret – what I call “effective secrecy” – is increasingly threatened. The threats to effective secrecy are many and varied, but operate at the nexus of technology and its intellectual property and the human desire to innovate and change. Primary among the threats are the pervasiveness of powerful communication mediums like the Internet and hand-held computers like smart-phones and the resultant expectation that information will be free flowing and available in real-time, the advent of constant and pin-point

†††††† The focus on secrecy as a value is the subject of a separate article but is introduced here.
surveillance whether in the form of Google Street View or United States government and military drones, the slow erosion of strong privacy values through the increasing utilization and acceptance of social media, and an ever-expanding belief that there is no real privacy or security online. The logical extension of this pincer attack on effective secrecy is that there are, in reality, fewer and fewer effective secrets.

Thus, the professed secrecy and ensuing leaks don’t optimally, or even minimally, create the circumstances in which the public and its experts could offer much meaningful input to policymakers, much less have confidence in the process of lawmaking itself. Because leaked information is often dated, incomplete and/or received without context, it is released into the wild with marginal chance to be useful standing alone. Its usefulness comes only in the Internet’s ability to disseminate it, hopefully to those people who could put it to good use. And as the Internet is pretty good at that task, and therefore has become the greatest engine of leaks the world has ever seen, it is past time that we consider how to grapple with the reality that secrecy as a mode of lawmaking is (or should be) on the decline.

In a word, secrecy as a default position in international intellectual property lawmaking should not be sacrosanct. Like privacy and transparency, it has limits that are delineable, if not already delineated. Moreover, once those limits are understood, secrecy can be deployed in a justified and beneficial manner. As it stands now, it is a broad brush used to shield as much information as possible from public scrutiny, with unclear benefits to all involved. It is time to look more critically at when we actually need secrecy.

Therefore, this article begins its analysis from the perspective that we need to think in terms of what information is needed so as to improve public input, rather than based upon the abstract and debatable “right to know.” By asking questions that aim to ascertain where control of information is needed in the public’s interest, versus when it is not needed or is counterproductive, we can get to a better balancing of interests. Most importantly, we can begin to rethink the need for public information in a technologically-advanced, modern democracy.

Built upon these observations, the narrower focus of this article is to begin to ascertain principles and guideposts to determine when the time has come to open up a lawmaking process to public scrutiny, questions, and most importantly, input. When is it time to release a draft text? If collective interests like how information will flow through the Internet are at stake, when is broad public input needed to balance the interests of all concerned parties? In that sense, by beginning to articulate principles to

§§§§§ §§§§§ This theoretical reorientation of freedom of information and access is developed in a separate article currently titled The Input Society: Reconfiguring Freedom of Information as Freedom of Input.
be applied in order to determine when it is time to publicly provide a draft international intellectual property agreement text, this article seeks to introduce a theoretical shift in the way that we think about legislative secrecy that is increasingly incorporated into how we think about related concepts like privacy and transparency.

This article is ripe, as a forced shift in thinking should be underway. Aside from the experience of TPP, the United States State Department has prohibited its staff from utilizing the hundreds of thousands of documents leaked to and hosted by Wikileaks. If these pronouncements are to be taken seriously, these policies reflect nothing more than wishful thinking. They reflect merely a hopefulness that human beings will not act as humans, but rather as robots and code, programmed to act in a certain way regardless of its counter-intuitiveness or lack of logic. And we shouldn’t want that wishful thinking imported into the newest international trade negotiation announced by President Obama in his February 2013 State of the Union address: the Transatlantic Free Trade Agreement, also known as the Transatlantic Trade and Investment Partnership.

Therefore, the secrecy game needs to be reconsidered. We’ve played it, and the ongoing TPP negotiations are showing its dangerous consequences. This article embraces the reality of the inevitably changing contours of secrecy, both what is theoretically justified and practically possible. Moreover, it incorporates the impact of such waning secrecy on the negotiating parties and their publics. Based upon those interests, it proposes new theoretical and practical guideposts to be employed in order to decide when to release a draft text, and thereby turn what appears to be a troublesome development into a positive aspect of modern lawmaking. In that sense, it begins to conceive the policy contours of secrecy as a value.

This article proceeds by briefly examining the state of the TPP negotiations and the impact of the imperfect but nonetheless powerful secrecy on the lawmaking process in Part II. In Part III, models for ascertaining what principles should animate this decision based upon Congress and international lawmaking bodies like WIPO, are examined. Part IV lays out the theoretical and practical guideposts to be utilized when deciding when to officially reveal draft texts and thereby open the lawmaking process to the public at large, including the initial conception of secrecy as a value. It concludes in Part V.