



**BEFORE THE
U.S. TRADE REPRESENTATIVE**

NAFTA NEGOTIATIONS

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to respond to the Office of the U.S. Trade Representative's request for comments on *Negotiating Objectives Regarding Modernization of the North American Free Trade Agreement with Canada and Mexico* as set forth in the Federal Register notice dated May 23, 2017.¹

Background

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

What unites these individuals and organizations is their reliance on copyright law to protect their freedom to pursue a livelihood and career based on creativity and innovation and to protect their investment in the creation and dissemination of copyrighted works for the public to enjoy. Copyright law is critical not only to their success and prosperity, but also the short and long-term success of the U.S. economy.²

Importance of Copyright to Promoting Free and Fair Trade

Copyright is a critical factor in the contributions of U.S. creative industries to the economy and to jobs. According to the most recent *Copyright Industries in the U.S. Economy* report,³ the core copyright industries added \$1.2 trillion to the U.S. GDP and

¹ 82 Fed. Reg. 23699.

² Our members have interests in other negotiating objectives besides copyright, but our submission will focus exclusively on "Relevant trade-related intellectual property rights issues that should be addressed in negotiations."

³ Stephen Siwek, Int'l Intellectual Property Alliance, [Copyright Industries in the U.S. Economy: The 2016 Report](#) (2016).

employed nearly 5.5 million men and women. These core copyright industries also contribute significantly to the U.S. trade balance, particularly in fueling the U.S. trade in services surplus through IP licensing. From a global perspective, sales of U.S. recorded music, television, video and motion pictures, software, newspapers, books and periodicals in foreign markets amounted to \$177 billion, which exceeds exports of major U.S. industries such as chemicals, aerospace, agricultural, electrical, and pharmaceuticals.

U.S. policymakers have long recognized the critical role that protection of intellectual property, like copyright, plays in promoting free and fair trade. A 1986 statement from the U.S. Trade Representative noted that foreign infringement “severely distort[s] international trade and deprive[s] innovators, creators and inventors of rewards and opportunities that are rightfully theirs.”⁴ It went on to note that intellectual property plays a foundational role in fostering creativity and know-how, encouraging investment in research and development and in new facilities; stimulating economic growth, increasing employment, and improving the quality of life; and promoting U.S. competitiveness as well as freer and fairer global trade.

If anything, effective copyright protections are an even more vital part of free and fair trade policy today than when NAFTA was first negotiated more than 25 years ago. At that time, the internet was still in its commercial infancy, and copyrighted works were largely distributed as physical goods. All creative sectors of the economy have since moved online, and are at the forefront of delivering news, entertainment, and information to consumers both in the U.S. and to our trading partners in cutting edge formats. In fact, the success of the internet and other new media is grounded largely in the availability of professionally created films and television programs, music, journalism, photographs, and other creative works. The internet itself has also benefited from technologies developed by and for the creative industries.

Nearly anything that can exist in a digital format, such as photography, music, audiovisual works, literary works, news and magazine articles, software and video games, and beyond, is available to users in a variety of formats and distribution channels, to access on a multitude of devices—when they want it, where they want it, and how they want it. Attached as Appendix A is just a sample of the increasing availability and diversity of content online via legitimate channels, drawn from our recent filing to the U.S. International Trade Commission for its report on Global Digital Trade.

Likewise, the transformative and positive impact on copyright-protected content on U.S. economic growth, job creation and trade competitiveness, including with respect to U.S. digital trade exports, is seriously threatened by numerous trade barriers. In its 2017 Trade Policy Agenda, the Administration outlined as its key objectives to aggressively combat such barriers, including those that deprive “...U.S. owners of intellectual property (IP) [of the ability to] have a full and fair opportunity to use and profit from their IP.”⁵ The Copyright Alliance strongly supports the Administration’s

⁴ Office of the United States Trade Representative, Administration Statement on the Protection of U.S. Intellectual Property Rights Abroad, April 7, 1986.

⁵ Office of the United States Trade Representative; *2017 Trade Policy Agenda and*

commitment to dismantling such barriers, which include piracy (such as the alarming increase in stream-ripping),⁶ and other forms of unfair competition that distort free markets and legitimate trade.

Negotiating Objectives

Modernization of NAFTA presents an opportunity to reiterate the foundational role of copyright, update the Agreement's provisions on copyright to reflect changes in technologies and markets, and establish a blueprint for future free trade agreements. It is our hope that the U.S. uses this opportunity to continue its long tradition of pursuing strong and effective copyright protections in free trade agreements (FTAs).

Effective copyright protections in conjunction with meaningful enforcement help protect creators and innovators from theft while incentivizing the creation of new creative works and stimulating the development of legitimate markets for creative works. The inclusion of such copyright standards in FTAs helps U.S. copyright industries participate and compete in foreign markets and spurs the growth of domestic creative industries in those markets. By helping the development of local creative industries in partner countries, the agreement opens opportunities for U.S. direct investment in those industries and benefits U.S. consumers by increasing cultural diversity.

Specifically, the Copyright Alliance supports building on the standards of existing U.S. FTAs that help ensure that our trading partners, whose IP rights are fully respected in U.S. law, are providing a reciprocal level of protection:

- Establish commitments for the protection and enforcement of copyright, including those that reflect minimum standards established by global consensus (including duration of copyright protection).
- Include effective provisions on technological protection measures and rights management information, which are critical for the growth of legitimate digital distribution models, and only narrow and predictable exceptions to these provisions.
- Ensure effective protection of copyright on the internet, including by:

2016 Annual Report of the President of the United States on the Trade Agreements Program; pp. 1-2; available at: <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf>. (“Ensuring that U.S. owners of intellectual property (IP) have a full and fair opportunity to use and profit from their IP” appeared as the fourth of the Administration’s eleven enumerated key trade objectives, and “provide adequate and effective protection and enforcement of U.S. intellectual property rights” appeared in the third of the Administration’s top priorities for trade).

⁶ For example, according to RIAA analysis of Similar Web data, stream ripping accounted for 55 percent of piracy in 2016, followed by bitorrent sites (22 percent), locker sites (16 percent), and MP3 sites (7 percent). Stream-ripping has increased substantially over the past two years, accounting for 15 percent of piracy in 2014. Likewise, according to IFPI and IPSOS data, 49 percent of 16-14 year olds have stream ripped in the past six months.

- ensuring adequate rules for secondary liability for copyright infringement similar to those provided by U.S. law;
- ensuring the same rules for enforcement against physical goods apply online;
- ensuring conditional safe harbors for internet intermediaries that incentivize cooperation with rights holders in addressing infringement through their services.

To be clear, we do not think that U.S. copyright law needs to be incorporated wholesale into FTAs. We recognize that other countries protect intellectual property in different ways. We should respect those different approaches when they have proven to be effective while also ensuring that our trading partners with preferred access to the U.S. market meet minimum standards to provide adequate and effective copyright protection.

NAFTA was completed before the World Intellectual Property Organization (WIPO) completed two landmark treaties addressing copyright issues in the digital era—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). A requirement to ratify or accede to these two treaties, and specific provisions helping implement them, have been standard provisions in FTAs since then. We support a requirement to ratify or accede to both treaties in NAFTA and related provisions to implement them in fact.⁷

We also remain concerned about the broad education-related exception to copyright that was recently established in Canada. These concerns were highlighted in the U.S. Trade Representative’s 2017 Special 301 Report, which placed Canada on its Priority Watch List, explaining, “The United States also remains deeply troubled by the broad interpretation of an ambiguous education-related exception to copyright that has significantly damaged the market for educational publishers and authors. The United States urges Canada to reform this aspect of its copyright regime, during the Copyright Modernization Act review this year, to ensure that creators are fully compensated for their works.” We hope these issues can be resolved during upcoming trade discussions.

Finally, we note that the Trans-Pacific Partnership diverged from earlier FTAs by including specific language calling for “balance” in copyright systems. While we believe in a “balanced” copyright system, the use of this term means different things to different people and different countries. This concept of “balance” is actively being twisted and used as a vehicle for weakening copyright protections and expanding exceptions beyond the scope of the well-established three-step test found in the TRIPS Agreement and the WCT and WPPT. This has sometimes distorted and undermined the market for copyrighted works and decreased the effectiveness of enforcement. For example, this so-called attempt at “balance” has negatively impacted the market for educational publishers and authors in Canada, as noted above. In various other countries, the “balance” mantra is

⁷ We note that U.S. Trade Representative placed Mexico on its Watch List in its 2017 Special 301 Report, in part because it has yet to fully implement these two treaties.

used to push policies that would erode the rights of U.S. creative exporters. Therefore, particularly in an environment of massive infringement and difficulty obtaining effective enforcement for rights, we are very skeptical about including this type of language in a trade agreement, and are concerned that doing so may in fact prejudice U.S. interests.

Conclusion

We thank the U.S. Trade Representative for the opportunity to comment and are pleased to answer any further questions the Office may have about our statement or provide any additional information it may find helpful.

Respectfully submitted,

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Appendix A

Excerpt from Copyright Alliance comments to U.S. International Trade Commission, *Global Digital Trade I: Market Opportunities and Key Foreign Trade Restrictions*, Investigation No. 332-561 (filed April 21, 2017), illustrating the increasing availability and diversity of content online via legitimate channels.

Film and television. While theatrical releases of film and the distribution of television programs via broadcast and cable providers continues to remain strong, online distribution of these works grows in popularity. There are over 100 online services in the U.S. providing film and television programs online, and close to 500 worldwide. The number of multi-territory services continues to grow, with “broad and expanding geographic coverage.”⁸

Software and video games. Cloud computing, where software applications and other services are delivered online rather than housed internally by a user, is, according to a 2016 Forrester Research report, “the biggest disruption in the tech market in the past 15 years”, and it continues to grow rapidly.⁹

Entertainment software companies have long embraced the internet for a wide variety of content. Along with offering online access to video games, downloadable game content, and features like online multiplayer gaming, many video game consoles also operate as general-entertainment portals, offering access to film and television shows, music, and other software applications. In 2017, the Entertainment Software Association reported that the U.S. video game industry generated more than \$30.4 billion in overall revenue, with consumers spending \$24.5 billion on software, downloadable content and subscriptions, up 6% from 2015.¹⁰ In 2016, sales of digital content (including subscriptions, full digital download games, digital add-on content, mobile apps and social network gaming) outpaced sales of video game content in physical format, constituting 74% of total game sales.¹¹ In 2013, consumer spending on game content delivered in innovative formats stood at \$9 billion; by 2015, that number had reached \$11.2 billion.¹²

Literary works. The internet has provided publishers with increased flexibility in making their works available. Publishers are taking advantage of this flexibility by, for

⁸ Julia Jenks, [The Number of Online Services Continues to Expand, Benefitting Consumers and Creators](http://www.mpa.org/the-number-of-online-services-continues-to-expand-benefiting-consumers-and-creators/#.WOWFBdLyuUI), Motion Picture Association of America, <http://www.mpa.org/the-number-of-online-services-continues-to-expand-benefiting-consumers-and-creators/#.WOWFBdLyuUI>.

⁹ Jennifer Adams, Andrew Bartels, Dave Bartoletti, and John R. Rymer, [Forrester Data: Public Cloud Services Forecast, 2016 To 2020 \(Global\)](https://www.forrester.com/report/Forrester+Data+Public+Cloud+Services+Forecast+2016+To+2020+Global/-/E-RES136524), Forrester (Nov. 9, 2016), <https://www.forrester.com/report/Forrester+Data+Public+Cloud+Services+Forecast+2016+To+2020+Global/-/E-RES136524>.

¹⁰ See the 2017 Essential Facts About the Computer and Video Game Industry, p. 15, available at <http://essentialfacts.theesa.com/mobile/>.

¹¹ See 2017 Essential Facts at p. 14.

¹² 2016 Essential Facts About the Computer and Video Game Industry, p. 12, available at <http://essentialfacts.theesa.com/Essential-Facts-2016.pdf>.

example, embedding multimedia, developing interactive courseware, improving functionality for the visually impaired, and embracing social media to connect authors to new audiences.

News media. In 2016, the Newspaper Association of America, the premier trade association for news publishers, changed its name to the News Media Alliance to highlight the news media industry's evolution to multi-platform, digitally-savvy businesses and premium content providers. In the past three years, news audiences have grown 66% on mobile. The popularity and presence of online and mobile news is evidenced by that fact that 96% of Millennial digital news readers get their news from mobile, and 36% of them only get their news from mobile.¹³

Music. Music has long been available online. In 2016, the RIAA reported that digital revenues of the U.S. music industry accounted for over three-fourths of total revenue.¹⁴ Over half of all revenues came from streaming alone, a category that accounted for only 9% of the market in 2011.

Scholarly Publishers. Beginning in the 1990s, scholarly journal publishers have shifted to digital distribution of their articles. Since then, they have invested \$100s of millions in scanning, archiving and making digital versions of their articles accessible online.¹⁵

Visual arts. Photographs, illustrations, and other works of visual arts are ubiquitous online, and visual artists are on the forefront of using online tools and platforms to promote and distribute their work. To provide just one example of how visual artists are providing works online, in 2014, Getty Images, the largest U.S. stock photography agency, made 35 million of its images free to end users for noncommercial purposes through an embed tool that it had developed.¹⁶

¹³ Adam Lella, The State of Mobile News Audiences in 3 Charts, Comscore (July 8, 2016) <https://www.comscore.com/Insights/Blog/The-State-of-Mobile-News-Audiences-in-3-Charts>.

¹⁴ Joshua P. Friedlander, News and Notes on 2016 RIAA Shipment and Revenue Statistics, Recording Industry Association of America, <http://www.riaa.com/wp-content/uploads/2017/03/RIAA-2016-Year-End-News-Notes.pdf>.

¹⁵ Adam Mossoff, How Copyright Drives Innovation: A Case Study of Scholarly Publishing in the Digital World, <http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1129&context=lr>.

¹⁶ Olivier Laurent, Getty Images Make 35 Million Images Free to Use, British Journal of Photography (Mar. 5, 2014) <http://www.bjp-online.com/2014/03/getty-images-makes-35-million-images-free-in-fight-against-copyright-infringement/>.