

CreativeFuture

Creativity. Innovation. Tomorrow.

December 20, 2018

Ms. Lisa R. Barton
Secretary to the Commission
United States International Trade Commission
500 E Street, SW
Washington, DC 20436

Submitted Electronically via EDIS and in Copies to the Commission, Investigation No. TPA-105-003

Dear Ms. Barton,

CreativeFuture appreciates the opportunity to respond to the U.S. International Trade Commission's (ITC) request for comments on *"United States-Mexico-Canada Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors,"* as set forth in the Federal Register notice dated October 16, 2018.

CreativeFuture is a coalition of over 540 organizations and companies and over 220,000 individuals. Whether we work in film, television, publishing, music, or photography, our ability to engage in core expressive and culturally important activities in the digital environment is under siege from the rampant, illicit activity of digital piracy.

It is essential that the United States always seeks to achieve a gold standard for copyright and intellectual property protections in all free trade agreements (FTAs). Strong copyright protections are precisely what give our creative communities the freedom to pursue their art as a career, not just as a hobby. In today's borderless digital and global marketplace, copyright works stolen in one country have a ripple effect, causing harm across the globe.

Thus, foreign governments' protection of intellectual property is now more important to the American creative community than ever before. These protections ensure that the years of uncompensated work that creatives invest in the creation of songs, publications, films, or coding a program have a real opportunity of a meaningful return – a return that may then be used to pursue the next work, continuing to enrich our culture and economy.

America's creative industries are an important economic driver, contributing more than \$1.3 trillion to our nation's Gross Domestic Product and employing 5.7 million Americans. U.S. core copyright industries are leading exporters, with total foreign sales eclipsing those of other major U.S. industries – including aerospace, agriculture, and pharmaceuticals.¹ When consumers in other countries enjoy American-made creative products through legitimate distributors, job creation and economic growth occur here at home. But rampant online piracy diminishes the value of the creative economy around the world, adversely affecting our favorable trade balance and American jobs.

¹ International Intellectual Property Alliance, *Copyright Industries in the U.S. Economy*, 2018

For these reasons, strong copyright protections are always important in local laws around the world and, as such, must be a crucial part of any FTA. Our free trade agreements should *only* support the most effective policies for the digital age, embracing the best of copyright principles and practices from the United States and other nations. Unfortunately, powerful corporate interests in Silicon Valley are threatening decades of U.S. leadership and progress in negotiating trade agreements with strong copyright protections. These corporate interests seek to protect their business model and legal immunities at the expense of every American who relies on copyright to make an honest living. As a result of this, our creative economy is under siege from digital piracy, exacerbated by platforms like Facebook and Google that hide behind legal immunities and fall short in taking the responsibility necessary to stop criminals from depriving creatives of fair compensation.

New Attacks on Copyright in Trade Agreements

Until the negotiation of the Trans Pacific Partnership (TPP) by the previous Administration, the United States had been working toward the goal of constantly improving the intellectual property chapters of its trade agreements. Over several decades, the U.S. had steadily and sensibly increased the level of copyright protection in these chapters.

Unfortunately, during the TPP negotiations, this positive trend changed. Big Tech made an aggressive push to weaken the IP chapter of the agreement. They and their constellation of lobbyists and aligned interest groups launched an all-out assault on the agreement's copyright protections, using the tired and disproven argument that copyright "stifles innovation." For the first time, the United States Trade Representative (USTR) considered weakening what had been a hallmark of American trade agreements for two decades – strong copyright and IP protections. Due to the withdrawal of the US from the TPP, these provisions were never considered or ratified by Congress.

The U.S. – Mexico – Canada Agreement

CreativeFuture applauds the Administration for achieving high standards for copyright protection in the USMCA, reflecting or building upon provisions from the last U.S. treaty with strong copyright language – the U.S.-Korea FTA. Many of these provisions are notable and hold the promise of meaningful protections for our creative economy:

- The USMCA ensures protection for the full range of rights covered by copyright, including internet age distribution and public performance rights, and requires a term of protection consistent with the global norm.
- The USMCA ensures implementation of the World Intellectual Property Organization (WIPO) Internet Treaties, which included strong technological protection measures (TPMs). These protections against circumvention of "digital locks" are important because they allow U.S. copyright holders to distribute their works globally, while also protecting from infringement. For example, without TPMs, content owners would not be able to offer a lower priced digital "rental" for a fixed period of time alongside a digital purchase; nor would they have confidence in the security of their content on popular subscription video-on-demand (SVOD) services like Netflix.
- The USMCA provides a variety of strong criminal, civil, and customs remedies against copyright infringement, including liability language for aiding and abetting and legal remedies for digital piracy the same as for physical goods.

- The USMCA includes copyright exceptions such as fair use, but thankfully eliminated the harmful “balance” Trojan horse language inserted in the TPP by Big Tech’s lobbyists. That language alone could have undercut all of the other copyright provisions.
- The USMCA has a strong provision criminalizing the act of camcording in movie theaters, one of the most devastating methods of copyright infringement for U.S. creatives. Camcording has long been a method used by pirates to illegally obtain copies of new movies. This is normally done within the first few days of release – a time of maximum consumer appetite, as well as an important stage in the profitability of the film. This theatrical window is key to production companies, distributors, and financiers recouping their initial investments and is crucial to the long-term prospects for any film.

There are, however, key omissions and disheartening additions to the USMCA that can be tied to Big Tech’s continued assault on copyright protections. These include surprising efforts to extend safe harbor immunities in current U.S. law to foreign territories. At the same time, many policymakers are highlighting the role that these very immunities play in illegal activities being facilitated on these platforms – everything from child sex-trafficking to illegal opioid sales to massive copyright infringement.

We believe that the treaty falls short in dealing with the realities of intellectual property in the digital age. Specifically, we respectfully take issue with the following provisions:

- One key omission is the lack of a provision requiring secondary liability for copyright infringement. Such liability is a core aspect of American copyright law that has proven essential for policing infringement in a digital world. Most, if not all, of the major enforcement actions involving large-scale digital piracy operations have relied upon secondary liability.
- Additionally, the USMCA’s copyright safe harbor language has two large problems. First, it is less protective than U.S. law – a legal framework that we have argued above is terribly flawed already. To make matters worse, it is also less protective than many prior FTAs. How can we export legal concepts when the basic model on which they are based is flawed?

Painful experience has demonstrated that the U.S. Digital Millennium Copyright Act (DMCA; See Footnote #2) “notice and takedown” approach has become an ineffective “whack-a-mole” exercise, rather than an effective solution against digital piracy. As well, it is an exercise that has already (and only) benefitted internet platforms, making them some of the largest and most unregulated companies in the world. This language appears to be very similar to that negotiated during the TPP at the behest of Big Tech.

The DMCA’s “notice and takedown” regime is essentially useless for small and medium-sized creative companies, without the resources for this endless game. It is untenable for individual creatives battling a worldwide, illegal distribution network facilitated by American companies.

Moreover, as a result of the perplexing decision to use the TPP language as a starting point (after the President had withdrawn from the TPP, calling it a “terrible deal”), the new USMCA essentially grandfathers Canada’s utterly ineffective “notice and notice” system into the agreement. Any state-of-the-art agreement should have both a strong secondary liability obligation *and* an effective regime for dealing with innocent ISPs.

- The USMCA also allows Canada to continue its “cultural carve-out” that was created in the original NAFTA. As an organization representing the U.S. industries impacted by this carve-out, we must point out that this outcome is an unfortunate flaw in the new agreement. Canada maintains one of the most discriminatory sets of policies in the audiovisual sector in the world, and probably the most discriminatory among all developed countries. This would not be acceptable in any other arena. Canada should not be allowed to hide behind the dubious theory that Canadian consumers’ entertainment and artistic interests in American content are a threat to their culture.

We acknowledge that the new agreement does include the backstop of U.S. government retaliation for discriminatory actions taken by the Canadian government under this carve-out. While a threat of retaliation may be useful, the bottom line is that the carve-out creates uncertainty with no reliable promise of market access. Even if Canada never carries out or expands its discriminatory policies, the carve-out’s very presence creates precisely the instability that FTAs normally resolve.

Additionally, such a broad carve-out could have serious negative precedential effects. Audiovisual services are already an area with weak international market access commitments – a trend that began with Canada’s original cultural carve-out. We urge the Administration to publicly state its intent to never again accept an agreement with such a destructive provision.

- Finally, we have serious concerns about language that would create an almost wholesale export of the overbroad and outdated safe harbor immunities contained in the Communications Decency Act of 1996 (CDA; See Footnote #2). This statute is currently being debated domestically and is at the heart of many of the problems that currently plague the internet.

The bottom line is that the USMCA promotes a theory of “internet exceptionalism” that is two decades old and has allowed Big Tech to avoid accountability in the U.S. Just as the U.S. is grappling with the flaws in this system, it is difficult to understand why we would suddenly start exporting it through an FTA.

We very much appreciate the opportunity to share our comments and the perspective of our communities. America’s creative industries produce content that the world loves. All we ask is that our government ensure that we have the legal tools and market access to be compensated fairly for our work – wherever it is enjoyed. Every dollar spent abroad on our content supports an American industry that creates millions of jobs from coast to coast.

We respectfully ask the ITC to ensure that its analysis of the digital trade policies in the USMCA helps promote innovation and commerce online, including by recognizing the importance of strong copyright protections and enforcement tools here and abroad.

Sincerely,



Ruth Vitale