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Mr. Edward Gresser
Chair of the Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Re: **NAFTA Negotiations: IIPA Comments regarding *Negotiating Objectives Regarding Modernization of North American Free Trade Agreement with Canada and Mexico*, 82 Fed. Reg. 23699 (May 23, 2017)**

I. INTRODUCTION

The International Intellectual Property Alliance (IIPA) provides these comments in response to the above-captioned Federal Register Notice (FRN) requesting written submissions on negotiations with Canada and Mexico regarding modernization of the North American Free Trade Agreement (NAFTA).¹ Among other things, the FRN requests comments addressed to “[r]elevant digital trade issues” and “[r]elevant trade-related intellectual property rights issues that should be addressed in the negotiations.”

IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA include Association of American Publishers (www.publishers.org), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association of America (www.mpaa.org), and Recording Industry Association of America (www.riaa.com). Collectively, IIPA’s five member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world. These include entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music, records, CDs and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.

In December 2016, IIPA released the latest update of its comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2016 Report*, prepared by Stephen E. Siwek of Economists Inc. According to the report, the “core” copyright industries in the U.S. generated over \$1.2 trillion of economic output in 2015, accounting for 6.88% of the entire economy. The core copyright industries also employed over 5.5 million workers in 2015, accounting for 3.87% of the entire U.S. workforce, and 4.57% of total private employment in the U.S. These are good jobs: copyright industry workers earn on average 38% higher wages than other U.S. employees. The core copyright industries also outpaced the U.S. economy, growing at an aggregate annual rate of 4.81% between 2012 and 2015, while the U.S. economy as a whole grew by 2.11%. When factoring in other industries that contribute to the copyright economy (which together make up the “total” copyright industries), the numbers are even more compelling, as

¹IIPA will file under separate cover a Notice of Intent to Testify at the June 27, 2017 public hearing on NAFTA Negotiations.



detailed in the report. Finally, the report highlights the positive contribution of selected copyright sectors to the U.S. overall trade balance. In 2015, these sectors contributed \$177 billion in foreign sales and exports, exceeding that of many other industry sectors, including chemicals, aerospace products and parts, agricultural products, and pharmaceuticals and medicines.² Studies such as this amply demonstrate the contribution of creators, and the copyright-based industries that support them, to the American economy. They also highlight what is at stake if those creators and industries have to face the additional hurdles and costs associated with obstacles such as copyright piracy and discriminatory market barriers.

II. RELEVANT DIGITAL TRADE ISSUES

When the NAFTA was negotiated more than a quarter century ago, the Internet was embryonic and digital trade in copyrighted works was essentially non-existent. Today, the global marketplace for goods and services protected by copyright is overwhelmingly a digital marketplace, characterized by licensing and transfer of digital materials in the online environment. Indeed, to a significant and growing extent, digital trade *is* trade in products (i.e., copyrighted works) and services protected by copyright law; and, the dependence of the enormous and growing U.S. copyright sector on sound rules and practices for digital trade is also growing rapidly, and likely exceeds that of nearly any other sector of the U.S. economy.

Recent technological advances have allowed for the dissemination of all types of copyrighted works. As a result, every sector of the copyright industries is increasingly engaged in digital trade. Content industries and their licensed partners continue to explore new ways to deliver content to consumers, launching new legitimate businesses, services, and apps. The result: more movies, music, TV shows, video games, and published materials are available to more consumers in more countries and in more diversified and flexible ways than ever before. These innovative new services help drive the legitimate digital economy. For example, there are more than 450 online services around the world providing high-quality video-on-demand content to consumers. The music industry services over 360 music platforms, including Amazon, Apple, Deezer, Pandora, Spotify, and TIDAL, among others,³ and provides access to 40 million sound recordings globally via digital platforms.⁴ In the first half of 2016, 78 percent of recorded music revenues in the United States were digital, up from 61 percent in the first half of 2012. Trade publishing houses continue to partner with content delivery platforms such as Amazon (its Kindle reader), Apple (iBook), and Kobo, allowing consumers to read on the device or platform of their choice; and virtually all Scientific, Technical and Medical (STM) journals are now available online, including digitized versions of early hard-copy materials. Consumers can now access video games across a variety of platforms ranging from personal computers (including tablets), game consoles (including handhelds), to smartphones and other wireless devices.

²See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2016 Report* (December 6, 2016) available at http://www.iipawebsite.com/copyright_us_economy.html. Core copyright industries are those whose primary purpose is to create, produce, distribute, or exhibit copyright materials. The link between copyright protection and economic growth is well documented by the World Intellectual Property Organization (WIPO) in its report, *2014 WIPO Studies on the Economic Contribution of the Copyright Industries: Overview*, available at http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf, and the WIPO website now provides links to 49 country studies employing virtually the same agreed-upon methodology, see <http://www.wipo.int/copyright/en/performance/>. These national studies provide the economic underpinnings for efforts to reform copyright law, improve enforcement, and lower market access barriers. The Motion Picture Association Asia Pacific has issued a series of "Economic Contribution of the Film and Television Industry" studies. The most recent editions of these studies include: China (2015), Australia (2015), Hong Kong (2015), Japan (2015), Malaysia (2014), India (2013), Taiwan (2013), Shanghai (2012), New Zealand (2012), Indonesia (2012), Thailand (2012), and South Korea (2012). See Motion Picture Association Asia-Pacific, *Research and Statistics*, available at <http://mpa-i.org/research-and-statistics/>. See also UK Music's *The Economic Contribution of the Core UK Music Industry (2013)* available at http://www.ukmusic.org/assets/general/The_Economic_Contribution_of_the_Core_UK_Music_Industry_WEB_Version.pdf, and PWC's *Economic contribution of the New Zealand music industry, 2012 and 2013* (2014), available at <http://www.wecreate.org.nz/wp-content/uploads/2014/07/PWC-Music.pdf>. See also Economists Inc.'s *Video Games in the 21st Century: The 2014 Report* (2014), available at http://www.theesa.com/wp-content/uploads/2014/11/VideoGames21stCentury_2014.pdf.

³See www.whymusicmatters.com, which was developed by RIAA and the Music Business Association (Music Biz) as a resource for music fans about the many authorized digital music models and services in today's marketplace.

⁴See *Investing in Music*, p. 13, available at <https://www.riaa.com/wp-content/uploads/2017/01/fipi-iim-report-2016.pdf>.



Furthermore, digital goods and services produced by the creative industries drive much of the consumer activity on social media and other digital platforms. To illustrate this phenomenon, the music industry has developed a website (www.musicfuels.com) that identifies the most followed personalities and viewed content across YouTube, Facebook, Instagram, and Twitter. Among the findings, nine of the top ten most viewed YouTube videos of all time are music videos (works protected by copyright), and seven of the top ten most followed personalities on Twitter and Facebook are musicians (whose celebrity depends directly on their engagement with copyrighted works). In addition, Americans are spending more on entertainment apps, especially mobile games, than ever before. In 2016, for example, more than 80% of the Apple App Store revenue (in the United States) was generated by games.⁵ Further, competitive video gaming (i.e., eSports) reached an estimated global audience of 1.1 billion people in 2016.⁶ Gameplay streaming service Twitch attracts 100 million users per month (Twitch viewers watch live video broadcasts of others playing video games and interact with their fellow gamers).⁷ Video game companies, such as Microsoft Xbox, are introducing services that offer viewers real-time participation in live game streams, as well as the ability to stream live gameplay in more places on more platforms.⁸

The copyright industries' significant contribution to digital trade is illustrated in the Bureau of Economic Analysis (BEA) trade statistics, which show licensing of IP as a significant contributor to U.S. trade in digitally enabled services.⁹ For example, in 2014, IP licensing accounted for the largest digital trade surplus (\$88.2 billion) of the services categories included in the BEA's analysis, and the second largest category of exports (\$130.3 billion) behind travel services. From 1999-2014, U.S. services exports of IP licensing grew from \$47.7 billion to \$130.4 billion, which was among the largest increase of digital services export categories over the course of this period; and, from 2006-2014, IP licensing experienced annual growth of 6.7%. IP licensing, including of copyright, is therefore critical to U.S. economic growth, job creation and trade competitiveness.

In view of the copyright industries' substantial contribution to digital trade, any NAFTA modernization should ensure the American creative industries can compete on a level playing field in the digital marketplaces of Mexico and Canada. NAFTA modernization must address the single-most damaging barrier to digital trade faced by the creative industries: digital piracy. Content industries are forced to face unfair competition, including from those who engage in piracy as a high-profit, low risk enterprise. Today, legitimate businesses built on copyrighted content are facing increased threats, as they must compete with the massive proliferation of illegal services unencumbered by costs associated with either producing copyrighted works or obtaining rights to use them (as well as other services that avoid fair licensing and claim no legal responsibility for the copyrighted works distributed on their sites). Mexico's copyright regime is woefully outdated, and meaningful reform of the Copyright Law and related laws has been long-stalled. In short, the Mexican legal regime is completely inadequate for the production and distribution of digital copyrighted works in Mexico, even as Internet access in Mexico has grown exponentially in recent years. In addition to legal reforms and enforcement improvements to address digital piracy, market access barriers to digital commerce in works protected by copyright also should be targeted as part of NAFTA modernization in Mexico and Canada. Under NAFTA, Canada maintains a "cultural exception," which it uses to deny market access to the creative industries. Such market access barriers should be eliminated or modified as necessary to improve market access for the U.S. copyright industries.

The current size and scope of digital piracy and its impact on the digital marketplace is substantial, although the full costs of copyright piracy are difficult to quantify. RIAA estimated that in 2016 there were over 137.3 billion

⁵Sensor Tower, "U.S. iPhone Users Spent an Average of \$40 on Apps in 2016", Feb. 20, 2017, available at <https://sensortower.com/blog/revenue-per-iphone-2016>.

⁶Sports Illustrated, "Tracking Company: 427 million people will be watching esports by 2019", May 11, 2016, available at <https://www.si.com/more-sports/2016/05/11/esports-427-million-viewers-projected-future-gaming-growth>.

⁷Sarah E. Needleman, "Twitch's Viewers Reach 100 Million a Month" in *The Wall Street Journal*, Jan. 29, 2015, available at <http://blogs.wsj.com/digits/2015/01/29/twitchs-viewers-reach-100-million-a-month/>.

⁸See Microsoft Xbox Mixer at <http://www.xbox.com/en-US/mixer>.

⁹See New BEA Estimates of International Trade in Digitally Enabled Services, available at <http://www.esa.doc.gov/economic-briefings/new-bea-estimates-international-trade-digitally-enabled-services>.



visits globally to websites dedicated to copyright infringements. A 2013 NetNames study found that almost one quarter of the world's Internet bandwidth was dedicated to copyright infringement. A recently released study "estimate[d] that the commercial value of digital piracy in film in 2015 was \$160 billion," while the corresponding estimate for the music industry was \$29 billion. The study also spells out methodological reasons why "it is most likely that the value of total digital piracy exceeds our estimates by a considerable amount."¹⁰ This study does not include a comparable estimate for video games but discusses briefly how such an estimate might be prepared. The study also attempts to quantify the broader social and economic costs of piracy. Another recent study by Carnegie Mellon, which is focused on movie piracy, determined that if piracy were eliminated in the theatrical window, then box-office revenues would increase by 15% or \$1.3 billion per year.¹¹

Rampant piracy not only impedes the evolution of legitimate channels for distribution, but also threatens to permanently damage or displace existing and authorized distribution channels, which are unable to compete with infringing business models. Moreover, by undermining the U.S. copyright industries, piracy significantly impairs one of the key drivers of U.S. trade surplus. This is also true of the other market distortions that prevent the commercial licensing of copyrighted materials. The NAFTA negotiations must therefore address the problem of digital piracy, along with other impediments to the digital marketplace, including such market distortions arising from unfair competition, to enable the production and distribution of legitimate creative content in Canada and Mexico.

III. RELEVANT TRADE-RELATED INTELLECTUAL PROPERTY ISSUES

The copyright provisions of the North American Free Trade Agreement are long overdue for updating to reflect the current international norms of protection and enforcement in the digital age. As noted above, the marketplace for copyrighted works has changed dramatically since the NAFTA was first negotiated a quarter century ago, and important multilateral treaties and norms have developed since the NAFTA was completed to improve trade in copyrighted content across borders. The copyright standards and obligations taken on by Canada, Mexico and the United States in NAFTA, are reflective of the times in the early 1990's. But the language and obligations in that agreement fall far short of guaranteeing that the American creative industries can compete on a level playing field in Mexico and Canada today.

It is critical that NAFTA modernization includes commitments for high standards of copyright protection and enforcement. These standards, today, include provisions that account for technological changes and reflect the global consensus on minimum standards of protection including the duration of protection, and effective legal protection of technological measures used by copyright owners to control access to and copying of their works; comprehensive obligations regarding copyright enforcement with a panoply of criminal penalties and civil remedies, including liability for aiding and abetting; and enforcement measures addressing online infringement that mandate deterrent civil and criminal remedies, and provide incentives for online service providers to cooperate with right holders. An excellent starting point for negotiating such obligations can be found in the copyright-related provisions of the Korea-U.S. Free Trade Agreement (KORUS FTA), negotiated during the George W. Bush Administration, which entered into force in 2012.

Negotiations to modernize the NAFTA provide an important opportunity for the U.S. to address inadequate legal protections and insufficient enforcement policies against widespread copyright infringement, which remain the leading barriers to full access for the U.S. copyright industries in both Mexico and Canada. Below is a description of the copyright industries' specific concerns and recommended legal reforms regarding each country. It is critical for the NAFTA negotiations to address these important issues.

¹⁰Frontier Economics, *The Economic Impacts of Counterfeiting and Piracy* (February 2017), at pp. 23-39, available at <http://www.inta.org/Communications/Pages/Impact-Studies.aspx>.

¹¹Ma, Liye and Montgomery, Aland and Smith, Michael D., *The Dual Impact of Movie Piracy on Box-Office Revenue: Cannibalization and Promotion*, Carnegie Mellon University (Feb 24, 2016) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946.

Mexico

There are two significant impediments stifling the development of a vibrant legal marketplace in Mexico for consumers of music, films, video games and books online. First, the Mexican IPR legal regime is, as noted, antiquated for the digital age. For example, Mexico has not yet fully implemented the 1996 World Intellectual Property Organization (WIPO) Digital Treaties, much less the full panoply of legal provisions and procedures commonplace in most countries. Second, Mexican enforcement authorities continue to focus on hard goods, not digital piracy. The copyright industries report continued good cooperation with some of the Mexican federal authorities in efforts against hard copy piracy. And, some agencies have developed infrastructures for addressing Internet piracy, but resources in key spots remain woefully short for effective enforcement. Budget cuts in 2016 directed to various agencies nationwide (including several IPR enforcement agencies) will only worsen these problems.

To address these problems, IIPA recommends that a renegotiated NAFTA should obligate the Government of Mexico to undertake at least the following legal reforms and enforcement measures, which would significantly improve market conditions for the U.S. creative industries and allow them to further create and support jobs in the United States:

- **Full Implementation of the WIPO Digital Treaties:** Amend the Copyright, Industrial Property, Criminal, and Criminal Procedural codes to fully implement the WIPO Digital Treaties.
- **Technical Protection Measures (TPMs):** Prohibit acts of circumvention of access controls and trafficking in tools, devices, components, or services that can be used to circumvent TPMs protecting all copyright works (current law applies only to computer software). Add civil and criminal sanctions for the distribution or trafficking, including importation, of circumvention devices. Provide clear liability for stream-ripping, including with respect to apps and other products and services used to circumvent TPMs.
- **Criminal Liability:** Remove the proof of profit standard as a prerequisite to criminal liability. Provide criminal sanctions against commercial scale infringements “carried out for commercial advantage or financial gain” or that “have a substantial prejudicial impact” (current law applies only to infringement “for profit”). Add penalties for aiding and abetting criminal infringement (and, in addition, obligate the NAFTA parties to implement Articles 10 and 11 of the Budapest Cybercrime Convention, which include commitments with respect to criminal copyright infringement and aiding and abetting).
- **ISP Liability:** Amend the ISP liability framework to provide adequate legal incentives for ISPs to cooperate with rights holders, and confine limitations on liability to ISPs that meet certain conditions and do not control, initiate or direct infringements.
- **Rights Management Information (RMI):** Define RMI and provide civil and administrative sanctions for its unauthorized removal or alteration.
- **Camcording:** Outlaw camcording piracy, and eliminate the “for profit” and “intent to distribute” evidentiary requirements.
- **Statutory Damages:** Provide for pre-established (statutory) and/or “additional damages” in civil enforcement proceedings for copyright infringement.
- **Presumption of Copyright Ownership:** Provide clear presumptions of copyright ownership, and of the validity of copyright protections, in civil, criminal and administrative proceedings, absent proof to the contrary.
- **Satellite and Cable Signal Theft:** Outlaw cable signal theft (with both civil and criminal sanctions), and eliminate the “for profit” requirement for criminal enforcement against satellite signal theft for decrypting cable or satellite signals.



- **Right of Communication to the Public:** Provide explicit clarification that the Mexican law protects the exclusive right to make works and sound recordings available to the public (a right of communication).
- **Reproduction Right for Electronic Copies:** Expressly protect the reproduction of electronic copies of sound recordings.
- **Criminal Enforcement:** Require materials and implements used to manufacture infringing goods to be destroyed at the request of rights holders without unwarranted delay or complex processes. Require formal notification to rights holders of seized pirated copyrighted goods.
- **Civil Enforcement:** Ensure reasonable cost of experts in civil infringement proceedings, and allow prevailing parties to recover costs and attorney's fees.
- **Border Enforcement:** Provide customs officers and authorities with *ex officio* authority as well as authority to take action at the border against TPM circumvention devices.
- **Ensure Exceptions and Limitations are Confined to the Three-Step Test:** NAFTA should confine its exceptions and limitations provision to the three-step test, and Mexico must recommit to ensuring that all its copyright exceptions are implemented in accordance with international obligations as codified in the three-step test.

In addition to these legal reforms, Mexico needs to undertake significant improvements in its enforcement regime, including more criminal investigations, raids, and prosecutions; strengthened administrative enforcement; and improved prosecutions and adjudication of piracy cases, resulting in deterrent sentences. For a more detailed discussion of IIPA concerns in Mexico and IIPA enforcement and legal recommendations, see IIPA's 2017 Special 301 filing: <http://www.iipawebsite.com/rbc/2017/2017SPEC301MEXICO.PDF>.

Canada

Online infringement remains widespread in Canada, hampering the growth of the legitimate digital marketplace. Circumvention devices and services (and, increasingly, illicit streaming devices and apps) remain readily available, especially online. Canada's new Copyright Modernization Act clearly provides insufficient incentives for legitimate Internet intermediaries to cooperate with right holders to combat online infringement; nor has its "notice and notice" system changed consumer behavior with regards to infringement. Meanwhile, the greatly expanded exceptions to copyright protection that were the hallmark of the Copyright Modernization Act have already caused serious damage to Canada's educational publishing market; and their ill-defined boundaries, in combination with unfavorable decisions of Canadian courts and the Copyright Board, further ratchet up the level of market uncertainty for creative industries in Canada. Making copyright enforcement a priority for police, prosecutors, and courts, and completing the task of harmonizing duration of Canadian copyright protection with that of its major trading partners, are other major pieces of unfinished business. Canada must recalibrate the course set by the Copyright Modernization Act in order to better confront the challenges of today's digital networked marketplace.

To address these problems, IIPA recommends that a renegotiated NAFTA should obligate the Government of Canada to undertake at least the following legal reforms and enforcement measures, which would significantly improve market conditions for the U.S. creative industries:

- **Ensure Exceptions and Limitations are Confined to the Three-Step Test:** NAFTA should confine its exceptions and limitations provision to the three-step test, and ensure that all copyright exceptions are implemented in accordance with international obligations as codified in the three-step test. Canada, in particular, must commit to redressing the crisis in the educational publishing market (which has been decimated, in large measure, by the ambiguous "education" exception included in the fair dealing amendment adopted in the Copyright Modernization Act), and in similar fashion, to addressing the broad and globally unprecedented user-generated content exceptions.



- **ISP Liability:** Canada's ISP liability framework should be modified to provide adequate legal incentives for ISPs to cooperate with rights holders, specifically to obligate ISPs to take action when they become aware of infringing activity on their services, and confine limitations on liability to ISPs that meet certain conditions and do not control, initiate or direct infringements.
- **Copyright Duration:** Complete the process of bringing the duration of protection for copyright into conformance with minimum global standards.
- **Collective Management:** Reform the Copyright Board's extremely slow and unpredictable tariff-setting process, especially with regard to music royalties and payments.
- **Broadcasting:** Remove the cap on radio revenue in Canada. Radio stations pay an approved percentage tariff only for revenues in excess of C\$1.25 million (US\$951,000), which has resulted in broadcast revenues significantly lower than in similar economies. This limitation should be removed.
- **Cultural Exception as a Market Barrier:** As noted above, Canada maintains significant market access barriers to U.S. copyrighted materials, relying in substantial measure on the "cultural exception" in NAFTA. Canada has interpreted this exception to be unreasonably broad, even to encompass discriminatory application of its copyright law, and has insisted on this misinterpretation of the exception in similar provisions in other trade agreements. IIPA recommends that such market access barriers be eliminated or modified as necessary to improve market access for the U.S. copyright industries.

In addition to these legal reforms, Canada must improve its criminal enforcement regime, including by directing the Royal Canadian Mounted Police (RCMP) and Crown prosecutors to give high priority to intellectual property rights enforcement, particularly online piracy and the trafficking in illicit streaming devices and other circumvention tools; and by providing police, prosecutors and courts with the resources and training required to implement this priority and impose deterrent penalties on major violators. For a more detailed discussion of IIPA concerns in Canada and IIPA enforcement and legal recommendations, see IIPA's 2017 Special 301 filing: <http://www.iipawebsite.com/rbc/2017/2017SPEC301CANADA.PDF>.

IV. CONCLUSION

For the reasons set forth above, IIPA welcomes negotiations with Mexico and Canada to modernize NAFTA, which was negotiated before the dawn of the digital age that has so dramatically changed the landscape of the marketplace for goods and services protected by copyright. The digital marketplace offers great opportunities for the copyright industries to thrive in Mexico and Canada for the benefit of American creators and producers. But, to do so, requires significant improvements in the legal and enforcement regimes of Mexico and Canada. The U.S. should seize the opportunity to improve the NAFTA and work with the governments of Canada and Mexico to make urgently needed reforms to further open the Canadian and Mexican markets for the U.S. copyright industries. Such market opening steps will increase U.S. jobs and trade competitiveness, and strengthen a critical driver of the U.S. trade surplus.

Respectfully submitted,

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