



October 5, 2017

The Honorable Robert Lighthizer
United States Trade Representative
600 17th Street NW
Washington, D.C. 20006

Dear Ambassador Lighthizer:

As you undertake the task of renegotiating the North American Free Trade Agreement (NAFTA), we write to express our serious concerns about positions the Administration is reportedly considering that will have profound negative impacts on our economy, employment and free speech.¹ If NAFTA is going to include provisions on copyright then it is imperative that the agreement include critical rights and protections under U.S. law, including both limitations and exceptions to copyright such as fair use and clear safe harbors for internet platforms.

Re:Create is a coalition founded in 2015 to educate policymakers on the positive impact the Internet has had on creativity and innovation over the last 25 years. Collectively, the members of Re:Create operate over 100,000 libraries visited by the public 1.5 billion times per year; fight censorship from repressive regimes around the world; provide platforms that enable music and video content to reach a global audience; create new and interesting works of art, literature and video enjoyed by wide audiences; invest in new startups and entrepreneurs; and generate billions of dollars in revenue for the motion picture, recording, publishing and other content industries. While our individual organizations maintain diverse views of specific issues, we are united in our overarching respect for copyright and concern for its future.

Our members are the American Library Association, Association of American Law Libraries, Association of Research Libraries, Center for Democracy and Technology, Computer and Communications Industry Association, Consumer Technology Association, Electronic Frontier Foundation, Engine, FreedomWorks, Harry Potter Alliance, New America's Open

¹ See, e.g., "U.S. Floats Nafta Proposal That Could Erode Copyright-Liability Protection," Wall Street Journal, <https://www.wsj.com/articles/u-s-floats-nafta-proposal-that-could-erode-copyright-liability-protection-1506460138>; "NAFTA IP chapter suggests USTR could favor content industry approach," Inside U.S. Trade. <https://insidetrade.com/daily-news/sources-nafta-ip-chapter-suggests-ustr-could-favor-content-industry-approach>.

Technology Institute, Organization for Transformative Works, Public Knowledge, and R Street Institute. Many of these members have individually or jointly filed comments in Docket No. USTR-2017-0006, and we refer you to all of their comments. We are also sending this letter on behalf of the coalition as a whole.

We have serious and fundamental concerns regarding the recent U.S. proposal on copyright in NAFTA as reported in the media. First, NAFTA must include strong provisions on limitations and exceptions to copyright, such as fair use, that reflect U.S. law.² The economic implications of failing to include strong fair use protections are profound, particularly if NAFTA includes strong copyright protection and enforcement measures. The Internet Association, in a recent white paper, said:

A strict regime of strong copyright protection and enforcement - without limitations and exceptions like the 'fair use' of copyrighted material - would doom the internet economy and U.S. innovation leadership.³

We agree with the Internet Association. Fair use adds \$2.8 trillion to the U.S. economy or approximately 16% of G.D.P.⁴ Fair use benefits 18 million workers, which is 12.5% of the American workforce.⁵ In 2014, America exported \$368 billion in fair use-based goods and services, a 21% increase from 2010.⁶ Simply put, the fair use-based economy is one of the largest and fastest growing parts of the American economy, and has become a cornerstone of not just our global digital leadership, but the United States' global economic leadership as well.

The Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA) requires that the intellectual property chapter of a U.S. trade agreement "reflect a standard of protection similar to that found in United States law."⁷ Fair use is, of course, an essential component of the overall standard of U.S. copyright protection, and it must be reflected in NAFTA for the agreement to meet that TPA requirement. Congress further directed that U.S.

² See 17 U.S.C. § 107.

³ "Modernizing NAFTA for Today's Economy," Internet Association. June 6, 2017. At p. 2.

⁴ Computer & Communications Industry Association, Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use (CCIA: 2017) at p. 3.

⁵ Id.

⁶ Id.

⁷ H. Rep. No. 114-100 (2015).

trade agreements “should contain copyright provisions that . . . foster an appropriate balance in copyright systems, inter alia by means of limitations and exceptions.”⁸

Second, if copyright language is included, NAFTA must also include safe harbor protections reflecting those in Section 512 of the Digital Millennium Copyright Act (DMCA) that also should respect the notice and notice system in Canada. Much like fair use, safe harbors are a key part of U.S. law and are required under Trade Promotion Authority.⁹ They have played an essential role in the development of the Internet - without them, sites like YouTube, Facebook, Instagram, Reddit and so many others would simply never have developed. It is not hyperbole to say that the entire Internet economy depends on these safe harbors. Economists estimate that enabling countries to weaken intermediary liability protections would cost the U.S. over 425,000 jobs, while decreasing GDP by \$44 billion annually.¹⁰

Unfortunately, one sector in the United States appears to be using the NAFTA renegotiation to put its thumb on the scales at the expense of another sector. And they are doing so by perpetuating misleading notions about the purpose of the law and by painting a distorted picture of how creativity is actually occurring in our society.

The RIAA and other music industry groups attempt to create a false narrative that the courts have misinterpreted the safe harbors, leading to “the abusive expansion of those safe harbors beyond their intended purpose.”¹¹ This is simply not the case - RIAA opposes the language of Section 512 as it was actually written. Their claim that that there is a hidden legislative intention behind safe harbors, not present within the text, is not a reasonable or valid argument. And in fact, in terms of original intent, DMCA 512 was designed not to limit the growth of internet services but instead to “facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.”¹²

⁸ Id[?]. See Judge Pierre Leval, *Toward a Fair Use Standard* (noting that fair use is “a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law”).

⁹ H. Rep. No. 114-100 (2015) (requiring “limitations on the scope of remedies available against service providers for copyright infringements they do not control, initiate, or direct”).

¹⁰ “Economic Value of Internet Intermediaries and the Role of Liability Protections” by Christian M. Dippon, PhD, June 5, 2017.

¹¹ RIAA et al. Letter to Amb. Lighthizer (no date on letter).

¹² S. Rep. No.105-190, at 1-2 (1998).

RIAA also argues that safe harbors “ha[ve] been devastating for the music industry, leading to a wholesale theft of creative property and a devaluation of creative content.” Actually, U.S. wholesale revenues from music (which RIAA’s Vice President has said is the best metric for measuring value) grew by 9.3% in 2016, the fourth year of consistent revenue growth for music industry. The *decrease* in levels of infringement over the last several years is largely due to increase in availability of lawful online services.¹³ Rogue sites have found no shelter in the DMCA’s safe harbors. Instead, this activity has successfully been driven out of the United States. The vast majority of the remaining rogue sites have moved offshore, and are not located in Canada or Mexico, the two other parties to this agreement.

Further, RIAA wrote that, “it remains fundamentally unclear why the United States would seek to lock our Congress, our trading partners, and our creators into a two-decade old system, with all its imperfections and inequities, in an updated NAFTA.” For us, it remains unclear why the United States would want to disrupt the carefully negotiated bargain of the DMCA, which includes safe harbors as well as prohibitions on the circumvention of technological protection measures. The DMCA’s bargain, in which RIAA participated, has been reflected in agreements with sixteen U.S. trading partners. To upset the DMCA’s balance threatens the entire NAFTA renegotiation exercise.

By seeking to remove DMCA 512 from U.S.-led trade agreements, RIAA is encouraging other countries to tinker with their industrial policy frameworks to increase regulation, liability, and outright blockage of U.S. services. This will harm not just the tech industry and U.S. creators, but also a wide range of traditional U.S. businesses and small and medium-sized businesses that leverage U.S. platforms to export to a global audience. And again, like in previous statements, RIAA claims the mantle of representing the views of all creators when in fact there are millions of Internet-based creators that depend on safe harbors and fair use to be able to reach and interact with their audiences every day.

Contrary to the claims of the entertainment industry, safe harbors are far *more* critical to the growth of startups than they are to large internet companies. Startups lack the legal and

¹³ See, e.g., Ho, Michael et. al., “[The Carrot or the Stick. Innovation vs Anti-Piracy Enforcement](#),” Copia Institute, Oct. 2015.

technical resources to adapt to more aggressive monitoring requirements. This is why VC investors consistently highlight the existence of safe harbors as a prerequisite to investing in startups. 81% of VC investors said they would be more likely to invest in a digital content platform under a weak economy *with* safe harbor rules than in a strong economy that lacked limitations on intermediary liability. In other words, safe harbors have a stronger impact than economic conditions on whether VCs decide to invest in startups.¹⁴ One of Re:Create's members, Engine, represents the interests of the startup community and strongly disagrees with this portrayal of the impact on startups by Creative Future.

Finally, we want to encourage the USTR to have a more inclusive and transparent process that brings all stakeholders to the table, including the public at large. The closed nature of the negotiation of trade agreements creates an environment of public distrust. Past agreements have included provisions that often favor incumbent and legacy interests in the copyright industries, to the detriment of small business, startups, libraries, consumers, and users -- which only increases this distrust. Most Americans are using the internet and interacting with copyright law on a daily basis. Even beyond economic issues, rules affecting the internet influence our fundamental rights under the Constitution, especially the freedom of speech. The public has the right to know, comment on and be involved in the process of drafting such provisions that will have a profound impact on these rights.

Sincerely,

Joshua Lamel
Executive Director
Re:Create

¹⁴ "The Impact of U.S. Internet Copyright Regulations on Early Stage Investment, A Quantitative Study," by Matthew Le Merle et. al., Booz&Co., 2011.