



July 18, 2017

NAFTA Consultations
Global Affairs Canada
Trade Negotiations – North America (TNP)
Lester B. Pearson Building
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[Creative Commons](#) (CC) is a nonprofit organization that stewards simple tools to make it easier to share and build upon the creativity of others, consistent with the rules of copyright. CC provides standard, free, open licenses and other legal tools to mark creative work with the freedoms the creator wants it to carry. Authors have applied CC licenses to over 1.2 billion copyrighted works of every type: from photos and video, to scholarly research, data, and educational resources. [CC Canada](#) is the Canadian affiliate of Creative Commons, focusing on Canadian-specific issues and activities.

In addition to providing copyright licenses and tools, we support and promote domestic and international copyright law reform in support of our vision to realize the full potential of the internet—including universal access to research and education and full participation in culture to drive a new era of development, growth, and productivity.

Thank you for the opportunity to provide comments on the renegotiation of the North American Free Trade Agreement (NAFTA). Our primary interest in responding is to ensure that the aspects of NAFTA having to do with copyright are fair for users and the public interest, in addition to authors and rights holders. We are also concerned about the transparency of the negotiations, and the ability for ongoing public participation in this process.

Copyright

NAFTA uses as its baseline existing and widely-acceded international copyright treaties, which already contain extensive requirements that ensure the protection and enforcement of copyright and related rights. Therefore, the NAFTA copyright provisions should not be expanded to create new (and likely more onerous) rules than those that already exist in the

agreement. The recent negotiation of the Trans-Pacific Partnership (TPP) showed that when intellectual property is put on the table, there's a significant push to drastically increase enforcement measures for rights holders, lengthen copyright terms, and demand harsh infringement penalties. Under the TPP, Canada was prepared to accept copyright terms that would exceed its current standard by 20 years, thus diminishing the public domain and making it harder for artists and authors to create new works. In the NAFTA renegotiations, Canada should oppose any copyright term extension.

Typically in trade negotiations where intellectual property is discussed, the demands of rights holders are specially attended to, but there's little consideration given to the rights of the public. Limitations and exceptions to copyright tend to be downplayed, or not present at all. It's crucial that these important user rights be recognized and protected, as digital technology and the web has turned everyone with a digital footprint into a copyright user (and content creator) on a daily basis. Protecting and promoting these user rights supports not only freedom of speech and access to information, but also educational activities, creative remix, and innovation. Re-negotiating the NAFTA provisions having to do with copyright would do more harm than good if there's not a significant shift in the balance in favor of the rights for users and the public to reflect the reality of today's digital users.

If the NAFTA copyright provisions will be reconsidered, a negotiating objective should be to advocate for stronger protections for copyright limitations and exceptions, and to endorse the expansion of a flexible exception such as fair use. User rights should be recognized as a legitimate and productive aspect of the copyright environment, and granted a mandatory and enforceable standing alongside the rights of authors. Canadian negotiators should be sure to protect both Canada's fair dealing provisions, as well as the Notice and Notice copyright warning system.

Also, we know that this year Canada is entering into a mandatory review of its own copyright law. In light of this, Canadian negotiators should not accept any rules under NAFTA that would restrict the government from fully evaluating and updating its own copyright policies in the best interest of all Canadians.

Transparency and public participation in negotiations

It's imperative that NAFTA negotiations be transparent and participatory. The secrecy demonstrated in the negotiation of the TPP left civil society organizations like Creative Commons and the broader public at an extreme disadvantage, as only a privileged few stakeholders invited into the closed negotiation circle had their interests fully considered. The NAFTA negotiations should be conducted through procedures that are transparent to the public and which include all stakeholders.

We agree with the specific and actionable recommendations put forward by the Electronic Frontier Foundation and OpenTheGovernment.org to improve the transparency of trade

negotiations and their accessibility to a diverse range of stakeholders (see <https://www.eff.org/trade>). While these recommendations were created in the context of U.S. involvement in trade negotiations, they apply equally for Canada. Increased transparency and meaningful public participation will lead to better outcomes. The recommendations (modified for the Canadian context) are included below.

1. Publish Canadian textual proposals on rules in ongoing international trade negotiations

Global Affairs Canada and other relevant agencies involved in the negotiations should immediately make available on its website the textual proposals related to rules that it has already tabled to its negotiating partners in the context of NAFTA and any other bilateral, regional, or multilateral trade and investment negotiations it undertakes.

2. Publish consolidated texts after each round of ongoing negotiations

Global Affairs Canada and other relevant agencies involved in the negotiations should impose as a prerequisite to any new or continuing trade negotiations that all parties agree to publish consolidated draft texts on rules after each negotiation round, including negotiations conducted on the entire agreement or a specific element or chapter and among trade ministers or other officials of every party to such negotiations or of a subgroup of the parties to such negotiations.

3. Appoint a "transparency officer" who does not have structural conflicts of interest in promoting transparency at the agency

Global Affairs Canada and other relevant agencies involved in the negotiations should immediately appoint a transparency officer who does not have any structural conflicts of interest in promoting transparency at the agency.

4. Open up textual proposals to a notice and comment and public hearing process

Global Affairs Canada and other relevant agencies involved in the negotiations should initiate on-the-record public notice and comment and public hearing processes—at least equivalent to that normally required for other public rulemaking processes—at relevant points during the generation of government positions.

Thank you for the opportunity to provide comments on the renegotiation priorities for NAFTA. To reiterate, we believe the NAFTA copyright provisions should not be expanded to create new (and likely more onerous) rules than those that already exist in the agreement. If the copyright provisions will be reconsidered, a negotiating objective should be to advocate for stronger protections for copyright limitations and exceptions. User rights should be granted a mandatory and enforceable standing alongside the rights of authors. All negotiations should be

made through procedures that are transparent to the public and which include all stakeholders, especially the public.

Sincerely,

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