



June 12, 2017

The Honorable Robert Lighthizer
U.S. Trade Representative
600 17th St. NW
Washington, DC 20006
RE: Docket ID: USTR-2017-0006

Dear Ambassador Lighthizer,

Creative Commons is a 501(c)(3) 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.

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 negotiating objectives regarding the modernization 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 intellectual property in general—and copyright specifically—are fair for users and the public interest, in addition to authors and rights holders.

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. Given little consideration are the safety valves on the exclusive rights enjoyed by copyright holders—essentially, limitations and exceptions to copyright. The public

interest and the rights of users to take advantage of protected works under limitations and exceptions to copyright are downplayed, or not present at all.

It's crucial that these rights be recognized and protected, as digital technology and the web has turned everyone with a digital footprint into a copyright user on a daily basis. User rights are incredibly important, and support not only freedom of speech and access to information, but also educational activities, creative remix, and economic activity.

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. The interests of major rightsholder groups have already been well heard, and served. Yet organisations advocating on behalf of the public interest are rarely given a seat at the negotiating table.

If the 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.

Transparency and public participation in negotiations

It's imperative that NAFTA negotiations be transparent and participatory. The secrecy demonstrated in the recent 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 have had their interests fully considered. The NAFTA negotiations should be made 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 U.S. trade negotiations and their accessibility to a diverse range of stakeholders (see <https://www.eff.org/trade>). Increased transparency and meaningful public participation will lead to better outcomes. These are included below.

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

USTR 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 the TTIP, TiSA, and any other bilateral, regional, or multilateral trade and investment negotiations it undertakes.

2. Publish consolidated texts after each round of ongoing negotiations

USTR 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 negotiating 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

USTR 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

USTR 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.

5. Make Trade Advisory Committees more broadly inclusive

If proposed U.S. texts and draft texts from negotiations are made publicly available, the main official advantage of the Trade Advisory Committee system – access to that information – would disappear. However, if Trade Advisory Committees are to be retained in addition to public notice and comment and public hearing processes, then resources must be devoted to making membership and effective participation in these committees more accessible to all affected stakeholder groups, including non-industry groups.

Thank you for the opportunity to provide comments on the negotiating objectives regarding the modernization of 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,

Timothy Vollmer
Public Policy Manager
Creative Commons