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November 26, 2018

Submitted via regulations.gov Docket No. USTR–2018–0034

Mr. Edward Gresser
Chair of the Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th Street, N.W.
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Re: Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement, 83 Fed. Reg. 54164 (October 26, 2018)

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 Japan for a U.S.-Japan Trade Agreement (Agreement). The FRN requests for comments "with regard to objectives identified in section 102 of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (19 U.S.C. 4201)." Among other things, these objectives include principal negotiating objectives regarding intellectual property rights and digital trade. The FRN specifically invites comments on a non-exhaustive list of issues, including "[r]elevant barriers to trade in goods and services between the United States and Japan" and "[o]ther measures or practices that undermine fair opportunity for U.S. business, workers, farmers, and ranchers."

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 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.[1] 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. NEGOTIATING OBJECTIVES, RELEVANT BARRIERS, OTHER PRACTICES

The negotiations with Japan provide an opportunity to reach a high standard agreement on intellectual property rights and digital trade that can be a model for future U.S. trade agreements. While it may be tempting to look to the recently concluded U.S. Mexico Canada Agreement (USMCA) as a model, that agreement was negotiated under unique and challenging circumstances that do not apply here. USMCA is a trilateral agreement, which required the U.S. to negotiate with two different trading partners, each with its own unique priorities. In particular, Mexico, a developing country, has very different challenges and priorities regarding the

[1] *See* Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2016 Report* (December 6, 2016) available at https://iipa.org/reports/copyright-industries-us-economy/. 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.

protection and enforcement of intellectual property rights than does a country such as Japan, which already provides a relatively high level of protections. Also, due to political concerns that are not present here, USMCA was negotiated under an extremely ambitious timeframe. Moreover, the USMCA was the result of a renegotiation of an existing agreement, which created unique obstacles to achieving a high standard agreement mainly because both Mexico and Canada already had access to the U.S. market. For at least these reasons, the USMCA, while it achieved positive outcomes in certain areas, also included provisions that are flawed in important respects. Because none of these countervailing circumstances are present in this negotiation, IIPA is hopeful that the U.S.-Japan negotiations will build on the positive achievements of the USMCA, while departing from its flawed outcomes, and reach even higher standards in areas including intellectual property rights and digital trade, resulting in an Agreement that can be used as the model for future U.S. agreements.

A. Intellectual Property Objectives

It is critical that the Agreement 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; 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.

Like the USMCA, the Agreement should include obligations that would fully implement the WIPO Internet Treaties, including the rights of distribution and communication to the public and explicit coverage of electronic copies. Express protection for electronic copies is not currently provided in Japan's law. In addition, Japan's law does not provide producers with remuneration for the broadcast of sound recordings that were published only online in digital form. The Agreement should address these deficiencies by requiring Japan to provide copyright holders with a full panoply of exclusive rights in the digital networked environment.

The Agreement should also build on USMCA's strong rules on camcording, presumption of ownership, Rights Management Information, and criminal, civil, and border enforcement. In particular, two areas of Japan's enforcement regime should be addressed. First, because rights holders in Japan are required to file a complaint to prosecute acts of criminal copyright infringement, the Agreement, like the USMCA, should provide criminal authorities with authority to take action, *ex officio*, against all acts of criminal copyright infringement, and against aiding and abetting such acts. On civil enforcement, Japan does not provide for pre-established damages, which are critical because in many cases of infringement, especially online, the harm is substantial, but amount of harm is difficult to quantify. As a result, pre-established (statutory) damages are needed for adequate and effective civil enforcement. This Agreement should improve upon the USMCA provision on pre-established damages, which is permissive, to ensure that it is explicitly required.

The USMCA also provides important protections relating to technological protection measures (TPMs), which are critical protections for enabling business models that have fostered many of the innovative products and services available online. A major reason why so much legitimate creative content is now available to consumers, and in so many formats and platforms, is because of the widespread use of TPMs by content producers and (licensed) services. Japan's protections for TPMs are inadequate, so it will be critical to include in the Agreement protections that are at least as strong as those in the USMCA. Importantly, exceptions to TPMs protections should be confined to those provided in U.S. law. One flaw in the USMCA text, however, is the lack of an explicit requirement for regular review of additional exceptions. This requirement was included in the Korea-U.S. FTA and is a key aspect of U.S. law needed to ensure that additional exceptions remain appropriate for changing technologies and the evolving marketplace. It should be included in the Agreement.

The Agreement should also build on the USMCA's requirement to bring the global consensus term of protection closer to that provided to works created in the U.S. (life-plus-70 years, or 95 years from date of publication for works not measured by the life of a person). This will help to ensure reciprocity of protection for creative works, and provide producers with a stronger incentive to invest in Japan's creative industries, spurring economic growth and tax revenues, and enabling producers to continue offering content to Japan's consumers in the latest formats. The Agreement should provide at least a standard of protection commensurate with the USMCA, which requires a minimum term of protection of life of the author plus 70 years, or 75 years from publication.

The Agreement must enshrine the concept that limitations and exceptions to copyright protection are confined to those that are consistent with the longstanding "3-step test." This touchstone of global copyright norms—which is found in the Berne Convention for the Protection of Literary and Artistic Works, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), and numerous other international agreements that include copyright obligations—is the gold standard against which copyright exceptions and limitations should be measured. Like every trade agreement into which the U.S. has ever entered, the USMCA provides a clean repetition of the 3-step test to confine the scope of exceptions and limitations to copyright protection. This is critical to ensure that our FTA partners do not undermine important protections, and the Agreement should likewise include a clean repetition of the 3-step test to confine exceptions and limitations.

Regarding safe harbors for online service providers, negotiators should not use the USMCA as a model. It is unfortunate that the USMCA included detailed prescriptive provisions on safe harbors for online service providers that unnecessarily incorporate highly-contentious issues into that agreement. Effective safe harbors are necessary for a legitimate online ecosystem, but the proper interpretation and application of those safe harbors is very complex with many different and strongly-held views on all sides. The operation of the system for safe harbors in the United States, which dates back two decades, is constantly changing due to rapid changes in technology, judicial evolution, and shifting business conditions. At the same time, increasing questions are being raised whether such detailed provisions reflect the "state of the art" in this complicated area.

A significant problem with the USMCA as well as prior FTA text on safe harbors is that the text does not adequately reflect important aspects of U.S. law that are necessary for adequate and effective protection and enforcement. For example, an important feature of U.S. law is the set of secondary liability doctrines under which service providers could be held responsible for infringements carried out by third parties using their services or networks. Secondary liability provides the legal incentives for cooperation in the U.S. system. Not only is an explicit secondary liability standard missing in the text, the USMCA actually includes a number of new provisions that could undercut USTR's efforts to ensure U.S. trading partners provide adequate "legal incentives" through secondary liability principles.[2] This concern is heightened in these negotiations because Japanese law does not provide a clear basis for secondary liability. Furthermore, the USMCA text on safe harbors includes several new provisions that do not appear to be consistent with U.S. law, and omits certain important conditions for safe harbor eligibility that are part of U.S. law.[3]

Making matters worse, the USMCA effectively exempts Canada's inadequate notice-and-notice from even the weak requirements of the core safe harbor rules. This concession resulted from the inflexible, detailed and prescriptive approach on safe harbors, which, as noted above, fails to reflect the standards found in U.S. law. Japan's safe harbor framework is also inadequate in many respects, and Japanese negotiators will no doubt request a similar carve-out for their system. Exempting a party from core obligations in a trade agreement sets a deeply troubling precedent that will have far ranging consequences not only for ISP safe harbor obligations, but also for other areas of U.S. trade policy. This mistake should not be repeated in these negotiations.

For these reasons, as illustrated by the USMCA, a granular approach to language on legal remedies and safe harbors is fraught and will make it impossible for negotiators to reflect the standards found in U.S. law. On this highly technical issue, therefore, these negotiations should take a general, high-level approach that articulates key principles, while providing flexibility.

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[2]For example, unlike in prior FTAs, the text includes an option to "take other action to deter the unauthorized storage and transmission of copyrighted materials." While the intent of this language is not clear, one interpretation is that it provides broad flexibility in additional measures Parties may choose to take to address online piracy and frame limitations on liability, undercutting the "legal incentives" obligation. The text also states that "the failure of an Internet Service Provider to qualify for the limitations in paragraph 1(b) does not itself result in liability," highlighting the absence of an explicit secondary liability obligation – many ISPs face no threat of liability without secondary liability concepts, meaning in that context that the conditions imposed on the safe harbors are essentially voluntary.

[3]For example, USMCA for the first time authorizes parties to "prescribe in its law conditions for ISPs to qualify" for safe harbors, or, "alternatively, shall provide for circumstances under which ISPs do not qualify" for safe harbors. This language could be interpreted, contrary to U.S. law, to allow parties to shift the burden such that, rather than requiring ISPs to affirmatively meet certain conditions to qualify for the safe harbor, parties may provide ISPs a blanket entitlement to a safe harbor, and the rights holder would have the burden of proving the ISP did not qualify. In addition, while prior FTAs required that safe harbors "shall be confined" to the four functions listed, USMCA does not explicitly include this limit. This raises the potential for parties to provide additional safe harbors for additional functions, which again would not be consistent with U.S. law. Footnote 118 regarding the "appropriate role for the government" also raises questions regarding consistency with the U.S. framework. Lastly, unlike prior FTAs, the USMCA does not include certain conditions for safe harbors that are part of U.S. law, including the requirement to publicly designate a representative to receive notifications, and, for eligibility for the caching safe harbor, the requirements to comply with industry standard technology or refreshing rules and to expeditiously remove or disable access to cached material upon notice that the original source of the material has been taken down.

The Internet has changed dramatically and will do so again. This Agreement should reflect this reality, rather than attempting to export in detail what is now widely agreed to be an outdated model.

B. Digital Trade Objectives

As evidenced by the growth of revenues, the copyright industries have embraced all means of digital technologies to produce and distribute their works and recordings, including launching new businesses, services, and apps to meet consumer demand. More legitimate copyrighted material is now available to consumers, and in more diversified ways and with more flexible pricing than at any time in history.[4] This consumer appetite for copyrighted materials does not stop at our borders. To meet worldwide demand, the copyright sector, more than any other in the U.S. economy, has moved aggressively to digitally deliver its products and services across borders, inextricably linking "digital trade" with trade in copyright-protected material.[5]

As a result, the U.S. copyright industries, as much as any industry, depend on strong rules and practices for digital trade. The Agreement should therefore ensure the American creative industries can compete on a level playing field in Japan's digital marketplace. In particular, the Agreement 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).

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 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 2017 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

[4]For example, there are now over 40 million tracks and hundreds of digital music services now available according a 2017 study: IFPI, *Music Consumer Insight Report 2017*, available at http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf. For more information on the proliferation of services, see, e.g., https://www.mpaa.org/watch-it-legally/ (movies and TV content); http://www.whymusicmatters.com and http://www.pro-music.org/ (music); and http://www.theesa.com/purchasing-legitimate-digital-copies-games/ (video games).

[5]A January 2018 Department of Commerce study, using the latest available year (2016) data, found that charges for the use of intellectual property, which includes copyrighted content, accounted for $124.5 billion of a total of $403.5 billion of potentially ICT (information and communications technology)-enabled services exports, or 31%. It also found that charges for the use of intellectual property accounted for $80 billion out of a total trade surplus of $159.5 billion of potentially ICT-enabled services, or over 50%. See, Department of Commerce "Digital Trade in North America" at 4, available at: https://www.commerce.gov/sites/commerce.gov/files/media/files/2018/digital-trade-in-north-america.pdf.

considerable amount."[6] 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. A 2016 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.[7]

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 U.S.-Japan 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 Japan.

While the USMCA otherwise includes a strong Digital Trade chapter, IIPA is concerned that two new articles, which have not appeared in prior FTAs, may not be consistent with U.S. law and could undermine the effective protection and enforcement of copyright. First, Article 9.17 on Interactive Computer Services includes an IP carve-out that ensures it does not "apply to any measure . . . pertaining to intellectual property, including measures addressing liability for intellectual property infringement" or is "construed to enlarge or diminish [the] ability to protect or enforce an intellectual property right." This language is different than the IP carve-out in Section 230 of the Communications Decency Act (the section of U.S. law on which Article 9.17 is based), raising questions regarding scope of the carve-out and its consistency with U.S. law. Moreover, notwithstanding the IP carve-out, IIPA is concerned that implementation of any limitation of liability contemplated by Article 9.17 will diminish adequate and effective protection and enforcement of copyright, because such implementation could undermine the implementation of other provisions of the agreement, particularly those addressing liability for online intermediaries for copyright infringement on their networks. Likewise, IIPA is concerned that Article 9.18 on Open Government Data could diminish adequate and effective protection and enforcement of copyrights if it is implemented in an overly broad manner that sweeps copyrighted content into its directive for expanded access. These two Articles, which are not called for by the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, should not be included in this Agreement.

[6]Frontier 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.
[7]Ma, 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.

C. No Exception for "Cultural Industries" or for New Services

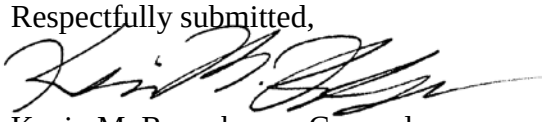
One major problem with the USMCA is the exception for Canada's obligations regarding the "cultural industries." This carve-out threatens to undermine many, if not all of the benefits of that agreement for the copyright sector, a sector that contributes over $1.2 trillion to US GDP and over 5.5 million American jobs, and is a key driver of U.S. trade surpluses. It is extremely disappointing that this anachronistic provision, a vestige of the original NAFTA, is part of the USMCA. At best, such an exception denies the copyright industries the certainty that is a core benefit of a trade agreement. At worst, it permits U.S. trading partners to discriminate against these critical industries by denying them access to their marketplace and/or denying them intellectual property rights and other protections that would otherwise be guaranteed by the agreement. There should be no exception for cultural industries in this Agreement or any other future U.S. trade agreement.

IIPA firmly believes that the Agreement should secure market access for evolving business models, including in the digital marketplace. The best way to accomplish this is to utilize the negative list format. Notably, however, during the Trans-Pacific Partnership (TPP) negotiations Japan did reserve the right to discriminate in new services not technically feasible upon entry into force; this type of non-conforming measure undercuts one of the fundamental benefits of the negative list structure. The United States should resist such a measure in this Agreement.

III. CONCLUSION

For the reasons set forth above, IIPA welcomes negotiations with Japan, which offer the potential to produce a high standard trade agreement with one of the U.S.'s most important trading partners. The digital marketplace offers great opportunities for the copyright industries to thrive in Japan for the benefit of American creators and producers. But, to do so, requires improvements in Japan's legal and enforcement regimes. The U.S. should embrace the opportunity to build on the USMCA and correct its flaws to achieve a high standard agreement that can be used to further open the Japanese market for the U.S. copyright industries and that will serve as a model for future U.S. trade agreements. 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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