

December 20, 2018

**Submitted Electronically via EDIS and in Copies to the Commission, Investigation No. TPA-105-003**

Lisa R. Barton  
Secretary to the Commission  
United States International Trade Commission  
500 E Street, SW  
Washington, DC 20436

Re: Written Submission of the International Intellectual Property Alliance (IIPA)  
Related to: *United States-Mexico-Canada Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors; Institution of Investigation and Scheduling of Hearing, Investigation No. TPA-105-003*, 83 Fed. Reg. 52232, October 16, 2018

Dear Madam Secretary:

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to present its views regarding the impact of the United States-Mexico-Canada Agreement (USMCA) on the industry sector it represents: the U.S. copyright industries. We believe that USMCA's overall impact is uncertain, and will depend on how it is implemented. If fully and properly implemented and vigorously enforced, certain of the provisions in the USMCA will enable creators, publishers, and distributors of U.S. music, movies, TV programs, videogames, books, journals, databases, and other creative works to reach more listeners, viewers, readers, gamers and other consumers in Mexico and Canada, and will allow this sector to enhance its already substantial contribution to U.S. economic growth, foreign sales and exports, and overall U.S. global competitiveness. On the other hand, some of the provisions in the USMCA, most notably the exception for Canada's cultural industries, and limitations on liability for online service providers, could potentially undermine many of the benefits of this agreement for the copyright industries.

I. Introduction

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 \(www.publishers.org\)](http://www.publishers.org), [Entertainment Software Association \(www.theesa.com\)](http://www.theesa.com), [Independent Film & Television Alliance \(www.ifta-online.org\)](http://www.ifta-online.org), [Motion Picture Association of America \(www.mpa.org\)](http://www.mpa.org), and [Recording Industry Association of America \(www.riaa.com\)](http://www.riaa.com). Collectively, IIPA's five-member association represents over 3,200 U.S. companies producing and

distributing copyrightable content, so, strong copyright laws and enforcement regimes worldwide are essential to the success of these companies. The materials produced and distributed by these IIPA-member companies 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 2018, IIPA released the latest update of its comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2018 Report*, prepared by Stephen E. Siwek of Economists Inc. According to the report, the “core” copyright industries in the U.S. generated over \$1.3 trillion of economic output in 2017, accounting for 6.85% of the entire economy. The core copyright industries also employed approximately 5.7 million workers in 2017, accounting for 3.85% of the entire U.S. workforce, and 4.54% of total private employment in the U.S. These are good jobs: copyright industry workers earn on average 39% higher wages than other U.S. employees. The core copyright industries also outpaced the U.S. economy, growing at an aggregate annual rate of 5.23% between 2014 and 2017, while the U.S. economy as a whole grew by 2.21%. 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 2017, these sectors contributed \$191.2 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.<sup>1</sup> 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.

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<sup>1</sup>See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2018 Report* (December 6, 2018) 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](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](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](http://www.theesa.com/wp-content/uploads/2014/11/VideoGames21stCentury_2014.pdf).

Based on IIPA's three decades of experience with the role of U.S. trade agreements in opening up markets to U.S. goods and services protected by copyright, we believe that the potential positive impacts of these agreements on U.S. jobs, economic growth, and access to open markets are as significant today as they have ever been. In sum, agreements that: (i) incorporate evolving global norms and best practices for copyright protection and enforcement; (ii) include other provisions aimed at dismantling barriers to U.S. participation in digital marketplaces around the world; (iii) are faithfully implemented by our trading partners; and (iv) have obligations that are vigorously enforced—play a critical role in U.S. exports and foreign sales, and will continue to do so in the future.

IIPA finds that the USMCA is likely to produce important results in several respects, particularly regarding protection of technological protection measures (TPMs) and enforcement against camcording; however, certain aspects of the USMCA are disappointing and could undercut many of these benefits. The positive aspects of the agreement could contribute to more good-paying U.S. jobs and result in even greater contributions from the copyright sector to U.S. economic growth and global competitiveness. This will only occur so long as these important obligations taken on by Mexico and Canada are promptly and properly implemented in the statutes, regulations and policies of these countries, and if the U.S. Government maintains careful vigilance and active enforcement of compliance with these obligations. For these benefits to be realized however, Canada and Mexico must not exercise some of the provisions in the agreement, such as the exception for Canada's cultural industries and the flawed text on safe harbors, to undermine the positive aspects of the agreement and introduce new impediments to the Mexican and Canadian marketplace for U.S. creative content.

## II. Exception for Canada's Cultural Industries Creates Uncertainty

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 with regard to the Canadian market—a sector that contributes over \$1.3 trillion to US GDP and nearly 5.7 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 (and the precedent U.S.-Canada trade agreement), 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 Canada to discriminate against these critical industries by denying them access to the Canadian marketplace, and/or denying them intellectual property rights and other protections that would otherwise be guaranteed by the agreement. As a result, virtually all of the benefits of the agreement for the copyright industries with respect to Canada are uncertain because they depend on Canada actually implementing the obligations, notwithstanding this very concerning carve-out.

### III. IPR Obligations of USMCA

Although Canada and Mexico have enjoyed free trade status with the U.S. for more than 20 years under NAFTA, the copyright and enforcement provisions of that agreement are severely outdated, and do not reflect the current international norms of protection and enforcement in the digital age. Online infringement remains widespread in Canada, hampering the growth of the legitimate digital marketplace and damaging U.S. creators' investment in the production of copyrightable content. In addition, expanded exceptions to copyright protection that were the hallmark of the Copyright Modernization Act in Canada have already caused serious damage to Canada's educational publishing market, and have ratcheted up the level of market uncertainty for the creative industries in Canada. In Mexico, the legal regime is antiquated for the digital age, and enforcement efforts are inadequate and ineffective.

#### A. New and Strengthened Legal Protections and Enforcement Tools

As a result, when Canada and Mexico come into full compliance with their USMCA obligations, the U.S. copyright industries will benefit from certain new legal protections and enforcement tools that will be introduced into those legal regimes, or will strengthen or expand existing legal protections already in place in those countries. For example, the USMCA includes obligations that would require Mexico to fully implement the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)), including the rights of distribution and communication to the public and explicit coverage of electronic copies. The USMCA also includes strong rules on the presumptions of ownership, criminal remedies for cable and satellite signal theft, the protection of Rights Management Information (RMI), as well as criminal, civil, and border enforcement. The USMCA defines "commercial scale" to clarify that infringing acts without a profit motive or commercial purpose are actionable, properly addressing a long-standing enforcement challenge in Mexico. The USMCA also provides for criminal procedures and remedies for aiding and abetting infringement, and includes the full application of enforcement procedures and obligations to the online environment. For the most part, disciplines in these areas meet or exceed the standards of prior FTAs, and the strong enforcement obligations should be of particular value in pursuing the massive online infringers whose activities are so inimical to the development of legitimate digital trade in copyrighted materials.

The USMCA also provides rigorous and 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. While Canada presently provides protections for TPMs, Mexico does not. In today's networked digital environment, virtually all segments of the copyright industries depend upon TPMs to manage licensed access to their works and sound recordings. TPMs are thus a fundamental enabling technology for legitimate digital trade in copyrighted materials, and specifically have been indispensable to the proliferation of licensed online delivery of content that has transformed the entire copyright marketplace. Greater legal security against those who make it their business to negate these measures will encourage greater investment in new content services and delivery channels, bringing more U.S. works to broader audiences in Mexico, thus benefitting U.S.

publishers, producers and creators. These protections are an important improvement over the obligations found in the TPP.

Article 20.63 of the USMCA requires a minimum term of protection of life of the author plus 70 years, or 75 years from publication for products whose terms are not measured by the life of the author. While this provision will not have an impact in Mexico, which already provides a term of protection that exceeds this standard, if faithfully implemented, it will have positive impacts in Canada. Canada extended the term of protection for sound recordings in 2015 to 70 years from publication, but the duration of protection for most other works in Canada is life of the author plus 50 years, or 50 years from publication. Accordingly, when Canada comes into compliance with Article 20.63, the duration of protection for sound recordings will be extended an extra 5 years, and the duration of protection for other works will be extended an extra 20 years. This extended protection will generate licensing and sales revenues to U.S. copyright owners that would otherwise be lost if the works fell into the public domain.

Furthermore, it is important to note that the USMCA enshrines 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 the USMCA does not enable the governments of Mexico and Canada to undercut important protections.

The USMCA improves upon the Trans-Pacific Partnership Agreement (TPP) obligations by criminalizing the unauthorized camcording of movies in theaters. While the U.S. and Canada already criminalize this activity, Mexico does not. To date in 2018, at least 77 U.S. films have been illicitly recorded in Mexican theaters. These illicit copies are uploaded to the Internet and distributed around the world. A 2016 study by Carnegie Mellon focusing on movie piracy, determined that if piracy was eliminated in the theatrical window, box-office revenues would increase by 15% or \$1.3 billion per year.<sup>2</sup>

#### B. Safe Harbors Could Undermine Benefits of the Agreement

Unfortunately, Article 20.89 on Legal Remedies and Safe Harbors holds the potential to undermine many of the benefits of the USMCA outlined above. 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

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<sup>2</sup>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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946).

conditions. At the same time, increasingly questions are being raised on whether such detailed provisions reflect the “state of the art” in this complicated area.

A significant problem with the USMCA 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 can 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.<sup>3</sup> Furthermore, Article 20.89 includes several new elements 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.<sup>4</sup>

Making matters worse, the USMCA effectively exempts Canada’s clearly inadequate notice-and-notice system from even the weak requirements of the core safe harbor rules. This concession resulted from the detailed and prescriptive approach on safe harbors, which, as noted above, fails to reflect the standards found in U.S. law. 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. The granular approach to language on legal remedies and safe harbors is fraught and made it impossible for negotiators to reflect the standards found in U.S. law. On this highly technical issue, therefore, a general, high-level approach that articulates key principles, while providing flexibility would have been most effective. That is because Internet and online business models have changed dramatically even in the past few years, and will continue to change. This

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<sup>3</sup>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.

<sup>4</sup>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.

provision should have reflected this reality, rather than attempting to export in detail what is now widely agreed to be an outdated model.

Accordingly, with the carve-out for Canada's flawed notice-and-notice system, the copyright industries do not expect to reap any benefit in Canada from Article 20.89. This provision, therefore, is a missed opportunity to improve Canada's serious online piracy problem. Mexico currently does not provide proper legal remedies including secondary liability, nor does its legal regime include safe harbors. Thus, the concerns and uncertainties outlined above need to be addressed by proper implementation in Mexico to yield any benefits, and alternatively to avoid introducing new impediments to online dissemination of U.S. creative content. There is a very real risk however, that Mexico's implementation of this provision will further erode online enforcement there.

#### IV. Digital Trade Obligations of USMCA

As evidenced by the growth of and now reliance on revenues from digital distribution, 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.<sup>5</sup> 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.<sup>6</sup>

As a result, the U.S. copyright industries, as much as any industry, depend on strong rules and practices for digital trade. In particular, such rules and practices 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).

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<sup>5</sup>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).

<sup>6</sup>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>.

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 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 considerable amount.”<sup>7</sup> 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.

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 or which hamper investment in the production and distribution of content (which often maximizes revenue through exclusive distribution deals). Trade agreements 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.

The USMCA Digital Trade Chapter (Chapter 19) includes several critical provisions that will help foster legitimate digital trade. First, the agreement provides that electronic transmissions between the parties are duty free. Second, Mexico is not permitted to discriminate against U.S. intangible digital products. Third, the agreement allows for the free flow of data.

While the USMCA otherwise includes a strong Digital Trade Chapter, IIPA is concerned that two new articles, which have not appeared in prior FTAs could undermine the effective protection and enforcement of copyright. First, Article 19.17 on Interactive Computer Services is a novel provision that attempts to export the principles of Section 230 of the Communications Decency Act. While this provision does include an IP carve-out, IIPA is concerned that the article’s untested language may complicate online copyright enforcement. Likewise, IIPA is concerned that Article 19.18 on Open Government Data could diminish adequate and effective protection and enforcement of copyrights if implemented in an overly broad manner that sweeps copyrighted content into its directive for expanded access.

## V. Conclusion

In sum, if fully and properly implemented, the new and enhanced copyright protections and enforcement tools in the USMCA should provide many positive benefits, particularly in the Mexican market. But these benefits could be potentially counteracted by the uncertainties introduced by some of the USMCA provisions, including the exception for Canada’s cultural industries, as well as language on safe harbors for online service providers.

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<sup>7</sup>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>.



Thank you for this opportunity to present the views of the IIPA. We look forward to further engagement with your investigation as it progresses.

Respectfully submitted,

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