



COMMENTS OF PUBLIC KNOWLEDGE REGARDING NEGOTIATING OBJECTIVES FOR NAFTA MODERNIZATION

Docket No. USTR-2017-0006

Public Knowledge appreciates this opportunity to share its views regarding appropriate objectives for the renegotiation of the North American Free Trade Agreement (NAFTA). Public Knowledge is a nonprofit organization dedicated to preserving an open Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully.

Public Knowledge does not take a position on NAFTA as a whole, or whether the U.S. should begin the process of renegotiation. To the extent that negotiations address intellectual property and digital trade issues, Public Knowledge urges negotiators to (i) ensure that intellectual property provisions are appropriately balanced, such as by requiring necessary exceptions and limitations to copyright, (ii) advance open internet principles, and (iii) provide sufficient mechanisms for genuine transparency and public feedback during the negotiating process.

Balanced Intellectual Property Obligations

In general, the harmonization of national intellectual property regimes is best addressed in global agreements specific to that purpose, such as the Berne Convention and the Paris Convention (implementation of which is already required of NAFTA

members).¹ When multiple bilateral and regional trade agreements address substantive intellectual property in detail, they run the risk of an inconsistent and complex patchwork of obligations, making harmonization and any future adjustments all the more difficult. However, if negotiators do pursue substantial changes and additions to NAFTA's intellectual property chapter, the United States should pursue the following objectives to protect the interests of American consumers, innovators, scholars, and other IP stakeholders.

Pursue the public interest balance inherent in the U.S. copyright system.

U.S. copyright law is constitutionally rooted in “promot[ing] the Progress of Science and useful arts,”² and “ultimately serves the purpose of enriching the general public through access to creative works . . . by striking a balance between two subsidiary aims: encouraging and rewarding authors creations while also enabling others to build on that work.”³ Any negotiation of copyright provisions in NAFTA should preserve and reflect this balance and fundamental purpose, and recognize the diversity of stakeholders with legitimate and vital interests in the copyright system, such as consumers, technologists, scholars, and educators.

Require limitations and exceptions to copyright, which are essential in modern societies and economies. Copyright law is designed to encourage artistic and intellectual endeavors by rewarding creators with limited exclusive rights. However, too many copyright restrictions can lock down the flow of trade, knowledge, culture, and information. This is why U.S. copyright law includes affirmative protections like fair use, which shields criticism, commentary, and creativity.

The value of limitations and exceptions can be seen in their economic impact. Industries that rely on being able to use copyrighted works under fair use added 2.8

¹ NAFTA 17.01

² U.S. Constitution, Art. 1, Sec. 8, Cl. 1.

³ *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S.Ct. 1979, 1987 (2016).

trillion dollars to the US. economy in 2014, approximately 16% of the total GDP, and generated 5.6 trillion dollars in total revenue.⁴ Revenue from these industries grew at 5% each year from 2010 to 2014, substantially outstripping national growth.

Employment in industries benefiting from fair use and related limitations and exceptions reached 18 million workers by 2014, adding one million workers from 2010 to 2014.⁵

Any copyright system designed to encourage innovation *requires* limitations and exceptions. Unfortunately, past trade agreements have tended to only mandate the restrictive side of copyright law. Like other members of the Re:Create coalition, Public Knowledge believes that, if NAFTA is renegotiated and if the renegotiated version includes a chapter on copyright, that chapter must have mandatory language on copyright limitations and exceptions, including fair use.

Preserve flexibility for national-level reforms to intellectual property regimes. For example, given that all three NAFTA members are already members of the Paris, Geneva, Berne and UPOV conventions, the U.S. should avoid seeking rigid standardization of terms across member states. The U.S., Canada and Mexico all have different copyright terms: life of the author plus 50 years in Canada, life plus 100 years in Mexico, and life plus 70 years in the United States. Excessive copyright term lengths are ripe for reform, and on this and other matters, NAFTA should preserve flexibility for national legislatures to adapt their intellectual property frameworks to changing times.

Protect free expression and the free flow of information by limiting secondary and intermediary liability. The strength of the digital economy relies on the internet's ability to directly connect companies and individuals to each other. For this connection to happen, online service providers, social networks, and other intermediaries must convey the speech and works of others. Should intermediaries find

⁴ See *generally* Computer & Communications Industry Association, "Fair Use in the Economy: Economic Contribution of Industries Relying on Fair Use" (June 2017), <http://www.cciainet.org/wp-content/uploads/2017/06/Fair-Use-in-the-US.-Economy-2017.pdf>.

⁵ *Id.*

themselves held responsible for the actions of others, their activities would be so restricted as to hobble the flow of information and the public and societal value of their networks. As one study notes, increasing liability for content providers, holding intermediaries liable for their users' content, and relaxing thresholds to prosecution all have a dramatic negative effect on angel investment--an important driver for innovation and economic growth.⁶

If NAFTA's intellectual property provisions are expanded, they should ensure that intermediaries are not required to preemptively police the speech of all those who happen to use their networks. Excessive intermediary and secondary liability would penalize the successful platforms and startups alike--many of which are American; research suggests that 88 percent of venture capital funds would be uncomfortable investing in intermediaries if there was an ambiguous legal framework.⁷ One concrete alternative, based on international human rights instruments and other international legal frameworks, is the Manila Principles, which offer a robust framework for defending freedom of expression and innovation online.⁸

Open Internet Principles

An open internet means that all end users--businesses, workers, startups and consumers alike--are free to access all lawful content and applications, without discriminatory interference by their Internet Service Providers (ISPs). As the U.S. economy increasingly depends on internet-delivered products and services, this principle is fundamental. A truly fair and open digital market for North America--in which

⁶ Matthew C. Le Merle et al., "The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment A Quantitative Study" (2011) at 19, <https://www.strategyand.pwc.com/media/uploads/Strategyand-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>

⁷ Matthew C. Le Merle, Tallulah J. Le Merle, and Evan Engstrom, "The Impact of Internet Regulation on Early Stage Investment" (Fifth Era LLC, 2014) at 7, <http://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/55200d9be4b0661088148c53/1428163995696/Fifth+Era+report+lr.pdf>.

⁸ See <https://www.manilaprinciples.org/>.

internet commerce creates American jobs and delivers American products and services across borders--requires an open internet.

This is particularly important for smaller firms, which drive substantial job creation in the United States. Research by the Brookings Institution reveals that American small and medium-sized enterprises (SMEs) that use the Internet to reach export markets “have higher employment, are more productive, pay higher wages, and are more capital and skill-intensive.”⁹ Such SMEs are especially vulnerable to tolls, entry barriers and other anticompetitive practices by monopoly ISPs.

Article 13.05 of NAFTA already commits member states to ensure that telecommunications monopolies do not use their “monopoly position to engage in anticompetitive conduct in those markets, either directly or through its dealings with its affiliates, in such a manner as to affect adversely a person of another Party.” To the extent that negotiations address other digital trade issues, NAFTA should include open internet principles.

Transparency and Public Participation

Trade agreements have been the subject of intense public dissatisfaction in recent years, with Americans expressing deep concern about both the short- and long-term consequences of free trade agreements such as NAFTA. The closed-door nature of negotiations has only fueled this suspicion and distrust.

Public Knowledge believes that NAFTA negotiations should be as open, inclusive and transparent as possible. To ensure the highest degree of public legitimacy, we urge USTR to make proposed drafts, negotiating texts, and position papers available online

⁹ Joshua P. Meltzer, “Using the Internet to Promote Services Exports by Small- and Medium-Sized Enterprises” (Brookings Institution, February 2015), 4, https://www.brookings.edu/wp-content/uploads/2016/06/Internet-WP_WEB-Final.pdf.

in a timely fashion, to allow for public discussion and feedback before and between negotiating rounds. In addition, civil society and other relevant stakeholders should be consulted on a regular basis during the negotiations to guarantee that NAFTA best reflects the public interest.

Conclusion

Although the digital economy has grown and changed substantially in the past 23 years, the principles that promote innovation remain largely the same. American participation in the modern information economy requires democratic and transparent instruments of governance. Public Knowledge appreciates this opportunity to comment on the renegotiation of NAFTA reform, hoping that it will be one such instrument. Policies that advance a balanced intellectual property ecosystem, open internet principles, and transparency and inclusiveness have the potential to benefit American workers, consumers, and innovators alike.

Respectfully submitted,

Gus Rossi
Meredith Rose
Ryan Clough

Public Knowledge
1818 N Street NW, Suite 410
Washington, DC 20036

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