



**NAFTA Negotiations**  
**Federal Register Volume 82, Number 98 (Tuesday, May 23, 2017)**  
**Regulations.gov Docket No. USTR-2017-0006**  
**Comments of the Recording Industry Association of America (RIAA)**  
**June 12, 2017**

The Recording Industry Association of America (RIAA) is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85 percent of all legitimate recorded music produced and sold in the United States. Our membership includes several hundred companies, including the major record labels and repertoire of small-to-medium-sized enterprises (SMEs) distributed by the major record labels.

The RIAA welcomes this opportunity to provide information to the Trade Policy Staff Committee (TPSC) in order to assist the Office of the United States Trade Representative (USTR) as it develops its negotiating objectives and positions for the North American Free Trade Agreement (NAFTA). In response to this *Request for Comments on Negotiating Objectives Regarding Modernization of the North American Free Trade Agreement with Canada and Mexico* (Federal Register Volume 82, Number 98 (Tuesday, May 23, 2017)), RIAA provides the following comments regarding matters relevant to the modernization of the NAFTA.

These comments address matters enumerated in the Federal Register Notice, including “(h) [r]elevant digital trade issues that should be addressed in the negotiations”, and “(i) [r]elevant trade-related intellectual property rights issues that should be addressed in the negotiations”. Given our significant SME membership, RIAA also urges the TPSC to consider the following comments as addressing “(o) [i]ssues of particular relevance to small and medium-sized businesses that should be addressed in the negotiations”. The RIAA notes here that it also associates itself with the comments submitted to the TPSC by the International Intellectual Property Alliance and the Copyright Alliance in response to this Federal Register Notice request.

## **NAFTA and the American Recording Industry**

### ***Yesterday's NAFTA: The Need for Modernization***

The American recording industry strongly supports strengthening and modernizing NAFTA to reflect the significant commercial and technological changes that have taken place since the Agreement entered into force in 1994, including the emergence of the streaming economy as a driver of U.S. jobs, growth and trade competitiveness. We support modernizing NAFTA to advance systemic trade priorities with respect to digital trade and intellectual property rights (IPR) protection and enforcement as well as to address specific recording industry concerns in both Canada and Mexico. As Ambassador Lighthizer's letter of May 18, 2017 to Congressional leadership stated:

Many chapters [of NAFTA] are outdated and do not reflect modern standards. For example, digital trade was in its infancy when NAFTA was enacted. In addition, and consistent with the negotiating objectives in the Trade Priorities and Accountability Act, our aim is that NAFTA be modernized to include new provisions to address intellectual property rights....”

The priority and proximity of digital trade and IPR in the Ambassador's letter underscore the great extent to which the American recording industry resides precisely at the fulcrum point of the Administration's NAFTA modernization agenda. Our industry is both digitally-intensive and IPR-reliant, and the business models that deliver American music to the world today were not anticipated during the negotiations of the original Agreement. The U.S. economy and its trade competitiveness have also been transformed. NAFTA should reflect the importance of copyright protection and enforcement to driving digital growth and the substantial contributions of the American creative sectors such as the recording industry to U.S. economic growth, job creation and trade competitiveness.

### ***Today's North American Music Market: Driving U.S. Trade Surplus***

NAFTA modernization should unleash the full potential of U.S. trade competitiveness, including to advance the Administration's objective of driving down trade deficits. Critical to this objective will be to dismantle barriers faced by U.S. sectors driving positive trade balances with Canada and Mexico, including the American sound recording industry.

The American sound recording industry is a trade surplus generator, driving digital product and digital services exports, resulting in considerable trade surpluses. For example, according to the Bureau of Economic Analysis, the use of IPR accounted for the largest U.S. digital trade surplus

of all services categories (\$88.2 billion) in 2014, and the second-largest export of such categories (\$130.3 billion), behind travel services (i.e., \$177.7 billion).<sup>1</sup> From 1999-2014, U.S. services exports with respect to the use of IPR grew from \$47.7 billion to \$130.4 billion, which was among the largest increases of the information and communications technology (ICT)-enabled services export categories over the course of this period.<sup>2</sup> During the period from 2006-2014, services related to the use of IPR experienced an annual growth rate of 6.7 percent. Likewise, the Bureau of Economic Analysis found that the use of copyrights with respect to audio-visual and related products accounted for U.S. exports valued at \$19.4 billion, with a trade surplus of \$11.7 billion, in 2014.<sup>3</sup>

Beyond these direct contributions to generating U.S. trade surplus, the recording industry powers considerable additional contributions to the U.S. trade balance. Music helps to fuel our nation's leading technologies and digital services, catalyzing the up-take of broadband access, ICT devices, and Internet platforms. Smartphone adoption, as a result of its appeal as a platform for music services in particular, is a key digital technology benefit. One consumer survey reports that smartphones are progressing toward becoming the most common devices for music consumption, especially in developing country markets.<sup>4</sup> Smartphones have already become the most commonly used device among paid streaming users. For instance, 55 percent of Internet users listen to music on a smartphone, with more than two out of three Internet users using their smartphones for music in Mexico (77 percent).

Smartphone uptake in turn drives data flows, including on a cross-border basis. One forecast projects that mobile data traffic worldwide grew 63 percent in 2016, and grew 18-fold over the past five years.<sup>5</sup> Consistent with this trend, the same study found that almost half a billion (429 million) mobile devices and connections were added in 2016, with smartphones accounting for the great majority of that growth.<sup>6</sup> As with Internet protocol traffic generally, video (including music videos) accounts for a significant share of total mobile data traffic, i.e., 60 percent of total mobile data traffic in 2016.<sup>7</sup> The profound importance of the sound recording industry as a new digital technology and services driver is further exemplified by the introduction and increasing

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<sup>1</sup> Grimm, Alexis; "Trends in U.S. Trade in Information and Communications Technology (ICT) Services and in ICT-Enabled Services"; Bureau of Economic Analysis, Economics and Statistics Administration, U.S. Department of Commerce; May 24, 2016; p.1, available at <http://www.esa.doc.gov/economic-briefings/new-bea-estimates-international-trade-digitally-enabled-services>.

<sup>2</sup> Grimm, Alexis; p.4 and 6.

<sup>3</sup> Grimm, Alexis; p.1.

<sup>4</sup> *Music Consumer Insight Report 2016*; p. 8-9.

<sup>5</sup> CISCO; *Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016-2021*; 2017; p. 1; available at: <http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/mobile-white-paper-c11-520862.pdf>.

<sup>6</sup> CISCO; *Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016-2021*; 2017; p. 1.

<sup>7</sup> CISCO; *Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016-2021*; 2017; p. 2.

popularity of home devices such as the Amazon Echo and Apple HomePod for music streaming.

The NAFTA region reflects these global trends. This regional market is critical to the sound recording industry, which is likewise critical to U.S. trade competitiveness with Canada and Mexico. North America is the largest music market in the world, accounting for 37 percent of total global revenues in 2016. With respect to digital, the North America market is also the largest music market, and is responsible for 52 percent of total global digital revenues. The NAFTA market also leads in terms of music streaming, generating 44 percent of total global digital revenues. Streaming was responsible for more than one-third (33.5 percent) of the total market across North America, growing from less than one-fifth (19.7 percent) in 2015.<sup>8</sup>

Canada is the sixth-largest market for the music industry in the world, up from seventh in 2015. Canada is also the sixth largest digital music market globally, with digital accounting for 63 percent of the music industry's revenues in the Canadian market. Canada also ranks ninth in streaming as a percentage of total music industry revenue at 35 percent.<sup>9</sup>

Regarding digital services trade generally, the United States had a \$31.2 billion trade surplus in ICT services and potentially ICT-enabled services with Canada in 2014.<sup>10</sup> Canada was the third largest digital services export market in 2014, for potentially ICT-enabled services exports from the United States, with U.S. IPR services (i.e., revenue from the use of IPR) exports to that country amounting to \$8.7 billion. Canada also had compound annual average growth in ICT-enabled services exports of 5.6 percent from 2006 to 2014. United States had a \$7.7 billion surplus in IPR licensing services exports with Canada in 2014, with a compound annual average growth rate for potentially ICT-enabled services of 6.9 percent from 2006 to 2014.<sup>11</sup>

Mexico is the 15<sup>th</sup>-largest market for the music industry in the world, up from 17<sup>th</sup> in 2015. Mexico is also the 14<sup>th</sup> largest digital music market globally, where digital accounts for 66 percent of the music industry's revenues in the Mexican market. Streaming propelled this growth, increasing by 60.7 percent in 2016. Streaming comprised the majority of industry revenue in Mexico – 53.5 percent in 2016 compared to 41.1 percent in 2015.<sup>12</sup>

Regarding digital services trade generally, Mexico was the 16<sup>th</sup> largest digital services export market in 2014, for ICT-enabled services exports from the United States, with U.S. IPR services (i.e., revenue from the use of IPR) exports to that country amounting to \$3.1 billion. Mexico also had compound annual average growth in ICT-enabled services exports of 6.9 percent from 2006 to 2014. United States had a \$2.4 billion surplus in IPR services exports with Mexico in

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<sup>8</sup> IFPI; *Global Music Report 2017*; pp. 65-66; available at: <http://www.ifpi.org/downloads/GMR2017.pdf>.

<sup>9</sup> IFPI; *Global Music Report 2017*; pp. 65-66, and 80; available at: <http://www.ifpi.org/downloads/GMR2017.pdf>.

<sup>10</sup> Grimm, Alexis; p. 8.

<sup>11</sup> Grimm, Alexis; p. 11 and 17.

<sup>12</sup> IFPI; *Global Music Report 2017*; pp. 65-66, and 102; available at: <http://www.ifpi.org/downloads/GMR2017.pdf>.

2014, with a compound annual average growth rate for potentially ICT-enabled services of 6.5 percent from 2006 to 2014.<sup>13</sup>

Despite the extensive contributions of the America sound recording industry to U.S. trade competitiveness in North America and to generating trade surplus with Canada and Mexico, the NAFTA music market has not reached its full potential because of numerous trade barriers, including inadequate IPR protection and digital market access impediments. Likewise, NAFTA lacks several key provisions necessary to protect and promote such trade competitiveness.

### ***Tomorrow's NAFTA: Promoting the Future of U.S. Trade Competitiveness***

We support strengthening and modernizing NAFTA to reflect today's reality and to safeguard tomorrow's future for the American recording industry. Our industry is a driving force for trade in NAFTA and globally. Our industry is digitally intensive and technologically innovative. Record companies are technology companies that invest heavily in creativity and innovation adapted to the digital age, including 16.9 percent of their global revenues in artists and repertoire (A&R; the industry's research and development equivalent).<sup>14</sup> Record companies also make significant investments in developing digital products as well as technology systems to provide artists with information about how their music is consumed online and the revenues that result.

Likewise, sound recordings are digital products that fuel digital growth through a diverse array of online and cloud-based music services, including increasingly streaming as well as downloads and e-commerce purchases of compact discs (CDs) and vinyl records. In fact, the music industry is the leader in terms of sectors for which e-commerce is the dominant channel for trade.<sup>15</sup> We have become a pioneer in the provision of digital products and services through both B2B and B2C channels and work closely with our digital partners to promote digital growth. The music industry has transformed its-self from a predominantly physical goods industry to a predominantly digital industry in ten years. We have revolutionized our business model, from production to distribution, retail and other digital services, to help pioneer disruptive changes to e-commerce that promote economic growth, create quality jobs, and expand legitimate access to music.

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<sup>13</sup> Grimm, Alexis; p. 11 and 17.

<sup>14</sup> *Investing In Music: The Value of Record Companies*; International Federation of the Phonographic Industry (IFPI) and Worldwide Independent Network (WIN); p.11; available at: <https://www.riaa.com/wp-content/uploads/2017/01/ifpi-iim-report-2016.pdf>. (The proportion of revenue invested in A&R remains higher than the equivalent spent on research and development by any other sector: Pharmaceuticals (14.4%); Software & Computer Services (10.1%); Technology Hardware & Equipment (8.0%); Leisure Goods (5.8%); Aerospace & Defense (4.5%); Electronic & Electrical Equipment (4.5%); and Automobile & Parts (4.4%).)

<sup>15</sup> Van Heel, Bas; *et al*; "Cross-Border E-Commerce Makes the World Flatter"; Exhibit 1.

Moreover, music populates the Internet and brings users online generally. For example, visitors to [www.musicfuels.com](http://www.musicfuels.com) can see how musicians are some of the key drivers of social media worldwide, making up nearly all of the top ten most-followed individuals on Facebook, Instagram, Twitter and YouTube.<sup>16</sup> In terms of video, 28 of the top 30 most watched on YouTube are music videos.<sup>17</sup> Our ability to license our content on commercial terms to our digital partners contributes to U.S. digital services exports, which help power the U.S. digital services trade surplus. In fact, music companies license over 40 million sound recordings to over 360 digital music services worldwide.<sup>18</sup> Enabled by strong protection and enforcement of intellectual property rights, the digital products and services of the U.S. recording industry help fuel digitalization at home and around the world.

A U.S. NAFTA trade policy that promotes the creative sector, in turn, benefits the U.S. economy, and its businesses, its workers and its consumers. In 2015, for example, copyright-intensive industries contributed \$1.2 trillion to the U.S. economy, and grew at an aggregate annual rate of 4.81 percent from 2012 to 2015, compared with average annual growth rate of 2.11 percent for the U.S. economy generally.<sup>19</sup> Likewise, copyright-intensive industries supplied 5.6 million jobs in 2015,<sup>20</sup> and the compensation paid in the copyright intensive industries far exceeds that of U.S. workers overall – amounting to a compensation premium of 38 percent over the average U.S. annual wage.<sup>21</sup> Regarding exports, the sale of U.S. copyright products outside of the United States was valued at \$177 billion in 2015.<sup>22</sup> Likewise, licensing of copyright and other intellectual property rights is among the largest contributors to the U.S. trade surplus in digital services.<sup>23</sup>

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<sup>16</sup> See <http://www.musicfuels.com/>.

<sup>17</sup> RIAA research.

<sup>18</sup> *Investing In Music: The Value of Record Companies*; p. 14.

<sup>19</sup> Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2016 Report*; Economists Incorporated; Prepared for the International Intellectual Property Alliance; 2016; p. 2; available at: [http://www.iipawebsite.com/copyright\\_us\\_economy.html](http://www.iipawebsite.com/copyright_us_economy.html).

<sup>20</sup> U.S. Economics and Statistics Administration and U.S. Patent and Trademark Office; *Intellectual Property and the U.S. Economy: 2016 Update*; 2016; available at: <https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf>.

<sup>21</sup> Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2016 Report*; p. 2.

<sup>22</sup> Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2016 Report*; p. 2.

<sup>23</sup> Grimm, Alexis; “Trends in U.S. Trade in Information and Communications Technology (ICT) Services and in ICT-Enabled Services”; Bureau of Economic Analysis, Economics and Statistics Administration, U.S. Department of Commerce; May 24, 2016; p.2, available at <http://www.esa.doc.gov/economic-briefings/new-bea-estimates-international-trade-digitally-enabled-services>.

## **Modernizing NAFTA**

Several trade barriers in Canada and Mexico impede the ability of the sound recording industry to power U.S. economic growth, American jobs and trade competitiveness. To address these barriers, we have organized our priorities into two categories:

- Promoting strong IPR protection and enforcement; and
- Advancing digital market access for legitimate digital music products and digital music services, including charges for the use of copyright, in our trading partners.

A key objective for the United States in modernizing NAFTA should be overcoming barriers to these two trade priorities.

### ***Threshold Issues***

In addition to our detailed comments regarding the recording industry's priorities with respect to the substantive provisions of a modernized NAFTA, we have also provided the following threshold considerations with respect to negotiating modalities.

- Text. Negotiations with Canada and Mexico should build off of the IPR Chapter of the United States-South Korea Free Trade Agreement (KORUS), with certain exceptions. The KORUS IPR Chapter is in force, was negotiated on a bilateral basis, and contains modern high-standard provisions on IPR protection and enforcement consistent with U.S. legal principles. We would encourage the Administration to engage in extensive consultations with stakeholders regarding the textual template for NAFTA modernization, and we will endeavor to identify provisions, including below, in other trade agreements that we support or that raise concerns.
- Digital Trade. We welcome the Administration's inclusion of digital trade among its NAFTA priorities, including with respect to modernizing the Agreement's disciplines on IPR, services, investment and e-commerce. While these disciplines are distinct, they are fundamentally interconnected. There cannot be one without the other. We urge the Administration to engage in transparent and meaningful consultations with all interested stakeholders, including the sound recording industry, on digital trade issues to ensure that U.S. digital trade policy generally, and NAFTA's digital trade provisions specifically, are inclusive, promote digital trade that is legitimate and sustainable, and do not entrench false dichotomies between IPR protection and technological advancement or benefit some digital sectors to the detriment of others.

- Efficiency and Efficacy. We support the Administration’s interest in finding the right equilibrium between moving quickly and achieving concrete results. Here we find Ambassador Lighthizer’s letter of May 18, 2017 to Congressional leadership instructive, which stated in relevant part that “[w]e are committed to concluding these negotiations with timely and substantive results...”. While we understand the negotiating calculus of expediency in the context of NAFTA modernization, we encourage the Administration to ensure that efficiency and good outcomes are mutually supportive, and do not work at cross purposes.

### ***Substantive Priorities***

At a threshold level, NAFTA modernization should put the United States in the best position possible to promote U.S. economic growth, job creation and trade competitiveness. To advance this objective, the recording industry has the following priorities for the modernization of NAFTA:

- Increased Intellectual Property Rights Protection and Enforcement.
  - Copyright Protection. NAFTA should provide for strong exclusive rights for all copyright owners, including for communication to the public, making available, and full national treatment for terrestrial public performance; re-enforce the three-step test and not promote over-broad exceptions and limitations; and include effective protections against the circumvention of TPMs that control access to copyrighted content, as well as prohibitions on manufacturing, importing, offering to the public, providing or otherwise trafficking in such circumvention products or services.
  - Copyright Enforcement. NAFTA should contain effective tools for combatting piracy updated to reflect the digital age, such as stream ripping. This includes: clear primary and secondary liability for copyright infringement; injunctive relief, including preliminary injunctions, available against all intermediaries, such as online service providers, search engines, advertisers and payment providers; and deterrent damages, including statutory damages.
  - Fair Competition. NAFTA should promote our digital future, rather than entrench outdated provisions from the distant dial-up past. Any copyright infringement safe harbor provisions should be limited to passive platforms that do not possess the requisite knowledge of infringement on their networks, are not actively engaged in communicating to the public or the delivery and monetization of content, promote responsible business practices and digital partnerships, prevent the earning of advertising or other revenue

from pirated content, strengthen free markets, and ensure fair competition between music services such as user-uploaded music services and subscription services (rather than subsidizing the former over the latter).

A modernized NAFTA should be consistent with U.S. law, including its original intent, to ensure that U.S. copyright infringement safe harbors are inapplicable to services actively engaged in communicating to the public. The United States should ensure that NAFTA safe harbor provisions can accommodate clarifications to U.S. law and policy on this issue, including as a result of current and future reviews of safe harbor rules (*see e.g.*, the on-going United States Copyright Office public study to evaluate the impact and effectiveness of the safe harbor provisions contained in Section 512 of title 17, United States Code),<sup>24</sup> and should not support interpretations that no longer reflect today's digital economy and threaten the future of legitimate and sustainable digital trade.

- **Digital Market Access.** NAFTA should be updated to advance U.S. digital trade priorities, including to: oppose duties on, and discriminatory treatment of, digital products; combat data flow restrictions and server localization while preventing piracy across borders; promote incentives for creativity, innovation, and legitimate digital growth, including with respect to streaming; ensure freedom of contract; tackle investment and cross-border services limitations, including to ensure market access for cultural industries, including the sound recording industry; advance digital security and development of online payment systems; and promote transparency and meaningful engagement with stakeholders in government processes.

## **Intellectual Property Rights**

### ***Systemic Priorities***

Strong IPR protection and enforcement are critical trade priorities for the music industry. With IPR, we can create good jobs, make significant contributions to U.S. economic growth and security, invest in artists and their creativity, and drive technological innovation. By promoting strong and up-to-date IPR protection and enforcement, U.S. trade policy can sustain and grow IPR licensing services, which continue to drive U.S. digital services trade.<sup>25</sup> Without strong and

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<sup>24</sup> U.S. Copyright Office; "Section 512 Study"; available at: <https://www.copyright.gov/policy/section512/>.

<sup>25</sup> For a detailed assessment of specific trading partners and IPR-related barriers they may impose with respect to copyright-intensive digital products, including sound recordings, RIAA also refers the Commission to the submission of the International Intellectual Property Alliance for the 2017 Special 301 Report, which is available at: <http://www.iipawebsite.com/special301.html>.

up-to-date IPR protection and enforcement for copyright-intensive industries, including for the recording industry, these many contributions are imperiled.

The importance of IPR has long been recognized as a well spring of innovation and creativity from which U.S. and global economic growth and many other benefits flow. The music industry strongly supports the priority placed on IPR protection and enforcement in the President's 2017 Trade Policy Agenda.<sup>26</sup> Specifically, the music industry relies on copyright protection for sound recordings, including as digital products, to be licensed as a digital service. Several rights are critical for the continued growth and viability of the global digital music market.

### Copyright Protection

NAFTA should provide for strong exclusive rights for all copyright owners, including:

- Communication to the Public Right. For example, producers and performers should be granted full exclusive communication to the public rights, instead of the remuneration rights. If there ever was a justification for granting sound recording right holders remuneration rights instead of full exclusive rights for the use of their recordings, that justification has disappeared with the technological and market development. Record companies and performers should also be granted full national treatment with respect to terrestrial public performance rights.
- Making Available Right. The exclusive making available right is the essential right underpinning much of online commerce in content. Record companies have successfully licensed their exclusive rights, resulting in broad availability of legitimate content on a diverse array of music platforms around the world. The exclusive making available right granted to record producers and performers under the WIPO Performances and Phonograms Treaty (WPPT) should be formulated and interpreted in a harmonized and broad manner across territories, to cover (1) all transmissions that entail an element of interactivity, and (2) all acts of providing access to copyright content regardless of the technology used and including direct participation or intervention in the activity.

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<sup>26</sup> Office of the United States Trade Representative; *2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program*; pp. 1-2; available at: <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf>. (“Ensuring that U.S. owners of intellectual property (IP) have a full and fair opportunity to use and profit from their IP” appeared as the fourth of the Administration’s eleven enumerated key trade objectives, and “provide adequate and effective protection and enforcement of U.S. intellectual property rights” appeared in the third of the Administration’s top priorities for trade).

- TPMs. Increasingly, technological protections measures (TPM), which are protected by a separate right under U.S. law, and which are used to protect access to copyright-protected sound recordings, include encryption technologies and password protection, are critical for Internet services, such as cloud-based services. Strong protections against the circumvention of TPMs, that control access to content, as well as prohibitions on manufacturing, importing, offering to the public, providing or otherwise trafficking in such circumvention products or services should also continue to be a core aspect of U.S. digital trade policy.
- National Treatment. Full national treatment rights are the cornerstone of a modern U.S. free trade agreement. In order to prevent discrimination against U.S. intellectual property rights holders, U.S. free trade agreements should ensure that American copyright holders are accorded treatment no less favorable than copyright holders in Canada or Mexico in those markets. The national treatment carve out contained in the second sentence of Article 1703(1) of the NAFTA IPR Chapter should be removed.
- Implementing International Agreements. A modernized NAFTA should reflect that U.S. free trade agreements have evolved considerably since the original NAFTA was concluded in terms of their commitments regarding the implementation of international IPR agreements and that they could evolve further still with respect to affirmative IPR obligations contained in international agreements that contain copyright protection and enforcement provisions.

### Copyright Enforcement

Strong copyright protection in isolation, however, is of limited value without robust enforcement, particularly in the digital environment. Likewise, the absence of adequate and effective IPR enforcement tools constitute serious impediments to digital music trade.

- Primary and Secondary Liability. A strong copyright enforcement framework is predicated upon clear legal basis for liability, including both primary and secondary civil liability, such as contributory and vicarious infringement as well as inducing infringement, and for aiding and abetting criminal infringement. Such liability should include user upload content services and linking sites.
- Injunctive Relief. Remedies for copyright infringement are also essential features of a digital trade policy, including injunctions and damages. Injunctive relief should provide relief against infringing services, covering the catalogue of the claimants, including both the current and future catalogue. Injunctions should also be available against all types of intermediaries, (including ISPs, search engines, advertisers, payment providers), and should be dynamic, i.e., covering future domain changes. Preliminary injunctions should also be

available. Furthermore, injunctions should be able to be obtained expeditiously and in a non-burdensome manner.

- Damages. Damages are also particularly critical in promoting a legitimate and sustainable digital music trade. The music industry places particular importance on the availability of statutory damages given the difficulties in proving numbers of infringements or obtaining financial records from infringers. In the alternative, damages should be based on the harm caused to right holders and/or profits obtained by the infringer. Damage calculations should take into account deterrence for future infringers and should adequately compensate right holders.
- Digital Environment. The enforcement provisions of U.S. FTA IPR chapters should be reflect the digital age. This includes ensuring that such enforcement provisions, including civil and administrative procedures and remedies, provisional measures and criminal procedures and penalties, shall be available with respect to acts of copyright and related rights infringement in the digital environment.
- Additional Enforcement Tools. Other enforcement priorities for the recorded music industry include the presumption of ownership, a right of information against all intermediaries, and the absence of burdensome requirements to submit evidence into courts, e.g., no notary reports required.

#### Barriers to Copyright Protection and Enforcement that Distort Legitimate Trade

Copyright protection and enforcement, and the contributions described above that flow from them, face three critical trade distortions that significantly impede legitimate and sustainable digital trade in music. These impediments are:

- Overbroad safe harbors with respect to copyright infringement;
- Overbroad application by trading partners of copyright exceptions and limitations that allow free or unrestricted use of American works; and
- Copyright piracy, including illegal TPM circumvention.

*Service Provider Safe Harbors and the Value Gap*

As a threshold matter, safe harbors with respect to copyright infringement cannot exist in a vacuum. Instead, strong and clear primary and secondary liability for such infringement must be a condition precedent in the laws of our trading partners. This sequenced approach, which relies fundamentally on building a strong foundation of liability first before subsequent articulation of limitations is initiated, is critical to ensuring legitimate and sustainable global digital trade. There is substantial risk that our trading partners take an *à la carte* approach to copyright protection that is highly selective by over-implementing safe harbors, while under-implementing foundational copyright protections.

With that baseline, and turning to safe harbors themselves, overbroad safe harbors with respect to copyright infringement impose a monumental impediment on the digital music economy. Such overbroad safe harbors exempt video-streaming service from requirements to commercially license the music uploaded by users to that service. This exemption results in a massive structural barrier to global digital music trade, by denying right holders the ability to commercially license their copyrights with the largest and most-used global music service, which has over 1 billion users, 82 percent of which use it for music.<sup>27</sup>

As described in the International Federation of Phonographic Industry's (IFPI) *Global Music Report 2017*,<sup>28</sup> overbroad safe harbors create a massive Value Gap, which describes the growing mismatch between the value that user upload services extract from music and the revenue returned to the music community – those who are creating and investing in music. The value gap is the biggest threat to the future sustainability of the music industry.

Inconsistent applications of online liability laws have emboldened certain services to claim that they are not liable for the music they make available to the public. Today, user-uploaded content services, which have developed sophisticated on-demand music platforms, use this as a shield to avoid licensing music on fair terms like other digital services, claiming they are not legally responsible for the music they distribute on their site.

The music ecosystem is dependent on record companies investing in music and in artists. Music must be valued fairly and those that invest in it and create it must be properly remunerated. If services that are not recognizing the true value of music are allowed to attract users from other, fairly licensed, services and therefore drain revenues from the system, then it becomes

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<sup>27</sup> *Music Consumer Insight Report 2016*; IPSOS Connect and IFPI; p.10; available at: <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2016.pdf>

<sup>28</sup> IFPI; *Global Music Report 2017*; pp. 24-27; available at: <http://www.ifpi.org/downloads/GMR2017.pdf>.

unsustainable. The situation also creates unfair competition. Services such as Apple Music, TIDAL, Amazon, and Spotify are forced to compete with services that claim they are not liable for the music they distribute.

According to one recent report, this safe harbor exemption acts as an enormous subsidy to the dominant incumbent video-streaming service, a subsidy worth approximately \$650 million to \$1 billion annually.<sup>29</sup> This company-specific industrial policy places one incumbent service at a fundamentally unfair advantage over other legitimate music services, which do not receive this enormous discount that was never intended by the legislative drafters, and instead negotiate commercial licenses with rights holders.

To combat this problem, including to avoid its perpetuation through these NAFTA negotiations, and to address a critical sound recording industry priority, the United States should advance the following position with Canada and Mexico:

- **Protect the Original Intent:** Pursue a concise, high-level and high-standard service provider liability provision with respect to copyright infringement that is consistent with the intent of U.S. law, (i.e., that safe harbors are only available to passive intermediaries without requisite knowledge of the infringement on their platforms, and inapplicable to services actively engaged in communicating to the public). The United States should ensure that NAFTA safe harbor provisions can accommodate clarifications to U.S. law and policy on this issue, including as a result of current and future reviews of safe harbor rules (*see e.g.*, the on-going United States Copyright Office public study to evaluate the impact and effectiveness of the safe harbor provisions contained in Section 512 of title 17, United States Code pursuant to a request from Congress),<sup>30</sup> and should not support interpretations that no longer reflect today's digital economy and threaten the future of legitimate and sustainable digital trade.
- **Modernize the Model:** The recording industry strongly opposes provisions that could perpetuate the Value Gap through U.S. FTAs or other international engagement. We also urge the Administration not to include provisions in a modernized NAFTA from past U.S. FTAs with respect to liability for services providers and limitations, and further oppose expansions of U.S. FTA safe harbor provisions. It critical to avoid possible interpretations of U.S. FTA safe harbor provisions that effectively provide an unintended subsidy from the U.S. government to foreign service providers seeking to profit from the American sound

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<sup>29</sup> Beard, T. Randolph; Ford, George S.; and Stern, Michael; *Safe Harbors and the Evolution of Music Retailing*; Phoenix Center Policy Bulletin No. 41; Phoenix Center for Advanced Legal and Economic Public Policy Studies; March 2017; available at: <http://www.phoenix-center.org/PolicyBulletin/PCPB41Final.pdf>.

<sup>30</sup> U.S. Copyright Office; "Section 512 Study"; available at: <https://www.copyright.gov/policy/section512/>.

recording industry without consent or commercial negotiations. Exporting such provisions would appear clearly inconsistent with the Administration’s *2017 Trade Policy Agenda*, including with respect to “[e]nsuring that U.S. owners of intellectual property (IP) have a full and fair opportunity to use and profit from their IP”.<sup>31</sup>

*Overbroad Copyright Exceptions and Limitations*

Copyright exceptions and limitations do not exist in a vacuum. In the United States, such exceptions and limitations exist in the context of strong affirmative copyright protections and limited application, as well as a well-established intellectual property rights system, a history of respect and reliance on such rights, and a strong mechanism for the enforcement of such rights. While a strong copyright ecosystem does exist in many of our trading partners, this is not necessarily the case with respect to each and every country with which the United States engages globally.

Too often, efforts to address exceptions and limitations in other countries do not proceed from the starting point of a strong foundation of copyright protection and enforcement. Frequently, these exceptions threaten to swallow the rule – in terms of the law and practice of some U.S. trading partners – to the detriment not only of the U.S. music industry and creative industries, generally, but also of creators in those economies. In turn, these developments impose profound and negative systemic impacts on the digital potential of that country to drive economic growth and development as well as on the legitimacy and sustainability of global digital trade as a whole.

Moreover, copyright exceptions and limitations are subject to international norms, including the three-step test. This fundamental norm is woven tightly into the fabric of international copyright law, including the Berne Convention, the WIPO Internet Treaties, and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights. Preserving the integrity of the boundaries of the three-step test is critical.

In light of the above, efforts to export the American fair use exception are particularly troubling. In the United States, the fair use doctrine stems from the First Amendment of the U.S.

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<sup>31</sup> Office of the United States Trade Representative; *2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program*; pp. 1-2; available at: <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf>. (“Ensuring that U.S. owners of intellectual property (IP) have a full and fair opportunity to use and profit from their IP” appeared as the fourth of the Administration’s eleven enumerated key trade objectives, and “provide adequate and effective protection and enforcement of U.S. intellectual property rights” appeared in the third of the Administration’s top priorities for trade).

Constitution and codified 150 years of American common law precedent. The American fair use doctrine is therefore unique to the United States. Fundamentally, fair use creates uncertainty out of the U.S. context. The fair use doctrine provides for open-ended exceptions, setting out principles which should be considered by the courts when determining whether a use of copyright material is “fair” under our system and, therefore, permitted.

The inherent uncertainty of the scope of fair use creates an uneasy and complicated relationship to the first requirement of the three-step-test, which is limited to “certain special cases”. That is particularly true when fair use is implemented outside U.S. context and history and without the benefit of the 150 years of case law on which U.S. fair use is based. The dependence of fair use on judicial interpretation also highlights that introducing fair use in civil jurisdictions may be particularly problematic, especially when the result is the free use of American products and services outside the United States.

The digital music market offers tremendous potential for commercial and cultural growth. However, much of this potential is lost due to uncertainties about legal responsibility, resulting in an uneven playing field between those “excused” to exploit cultural content and those investing in creating it. Fair use outside of the United States adds further uncertainty into an environment that demands greater certainty for creators, businesses and users alike. Likewise, fair use outside of the United States offers the potential of erecting further barriers to digital trade, including with respect to digital licensing services, rather than enabling its growth and sustainability.

Additionally, it is unclear that there is a need for fair use in foreign jurisdictions. Fair copyright systems have facilitated the creation of new and innovative ways of giving consumers access to music, driving economic growth. Innovation is skyrocketing. Some of the most successful global digital music services were developed and launched in countries that do not have fair use provisions, including Spotify (Sweden), Tidal/WiMP (Norway), SoundCloud (Germany) and Deezer (France). To the extent that the above digital music services that license music on commercial terms are forced to compete unfairly with other Internet services that do not have to license music on such terms as a result of fair use, this exceptions amounts to an effective subsidy and even a company-specific industrial policy that distorts competition, devalues copyright-intensive creativity, and threatens legitimate and sustainable global digital trade.

Therefore, we encourage the Administration to advance the following positions in the NAFTA modernization negotiations:

- Defend the Three Step Test: The United States should preserve the integrity of the three step test, which has long been established as a bedrock principle of copyright protection and

exceptions and limitations, and is consistent with U.S. law.

- Oppose Over-Broad Exceptions: The United States should not support the adoption of over-broad exceptions by our trading partners for the reasons explained above. This includes broad provisions that could diminish, or otherwise generate legal uncertainty with respect to, the three step test.

*Copyright Piracy, TPM Circumvention, and Stream-Ripping*

While the NAFTA digital economy offers many opportunities to U.S. creative industries, online copyright piracy continues to impose a massive distortive impact on legitimate and sustainable digital commerce. U.S. trade policy should promote legitimate and sustainable digitalization entailing cross-border e-commerce that is inclusive, secure, trusted and fueled by creativity enabled by strong IPR protection. Therefore, combatting piracy is both critical to protecting the digitally-intensive U.S. creative sector as well as vital to securing the long-term viability of the global digital economy.

In an increasingly digital, online and mobile marketplace, the scale of and damage caused by piracy is massive, although the full costs of copyright piracy are difficult to quantify. For example, according to RIAA analysis, in 2016 there were over 137.3 billion visits globally to websites dedicated to copyright infringement. Some were visits to torrent sites like thepiratebay, KickAssTorrents and rapidgator that provide access to infringing downloads of a wide array of copyright-protected content – music, movies, games and software – and others are sites like youtube-mp3 and mp3juices that specialize in infringing downloads of music files. Likewise, according to the IFPI, in 2015, an estimated 24 billion individual tracks were illegally downloaded via BitTorrent; 5.5 billion tracks via cyberlockers and 2.5 billion via stream ripping services.<sup>32</sup>

Another recent report estimated very conservatively that the commercial value of digital piracy in the music industry was \$29 billion in 2015, explaining “it is most likely that the value of total digital piracy exceeds our estimates by a considerable amount”.<sup>33</sup> An earlier study estimated that cybercrime costs the global economy some \$400 billion in annual losses through consumer data breaches, financial crimes, market manipulation, and theft of intellectual property.<sup>34</sup>

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<sup>32</sup> See <http://www.ifpi.org/>.

<sup>33</sup> Frontier Economics; *The Economic Impacts of Counterfeiting and Piracy*, A Report Prepared for BASCAP and INTA; February 2017; pp. 23-39, available at: <http://www.inta.org/Communications/Pages/Impact-Studies.asp>.

<sup>34</sup> *Net Losses: Estimating the Global Cost of Cybercrime*; Center for Strategic and International Studies and McAfee; June 2014; available at: <https://www.mcafee.com/us/resources/reports/rp-economic-impact-cybercrime2.pdf>.

While the music industry has fundamentally changed its business model to adapt to and begin to thrive in the digital economy, Internet piracy continues to pose significant challenges. For example, one consumer survey finds that over one third (35 percent) of all Internet users access infringing music, with 30 percent of internet users using stream ripping services (see below), which rises to 49 percent of Internet users using such services among 16-24 year olds.<sup>35</sup>

### Stream-Ripping

A major development in the music copyright infringement world has been the emergence of sites that engage in the unauthorized reproduction and distribution of the popular copyrighted music that appears on music streaming services. These illegal sites violate the terms of use of these services, and circumvent the technological protection measures that such services employ to prevent copying and distribution of music streamed through their service. These stream-ripping sites allow free downloads of these music files copied from streaming services and monetize their infringing activity through advertising.<sup>36</sup>

The distribution of permanent downloads of files from streaming services deprives the record companies and artists of streaming revenue by eliminating the need for users to return to licensed services every time they listen to the music. At the same time, these services damage pay-for-download sites like iTunes, Google Play and Amazon by offering the tracks for free. The overall popularity of these sites and the staggering volume of traffic they attract is evidence of the enormous damage being inflicted on the U.S. recording industry.

Therefore, we request that the Administration advance the following positions in the NAFTA modernization negotiations:

- Combat Online Piracy. The United States should press for state-of-the-art provisions to tackle piracy, particularly in the digital environment.
- Tackle Stream-Ripping. The United States should modernize NAFTA to combat stream-ripping, which has become the leading form of piracy, and which poses a significant threat to the emerging streaming economy. Tools to combat stream-ripping include clear provisions regarding the protection and enforcement of TPMs, and that address app-based stream-ripping.

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<sup>35</sup> *Music Consumer Insight Report 2016*; p.14.

<sup>36</sup> See *2016 Out-Of-Cycle Review of Notorious Markets*; p.5 (Describing stream-ripping in the report's Issue Focus as "...an emerging trend in digital copyright infringement that is increasingly causing substantial economic harm to music creators and undermining legitimate services."); available at: <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

## *Canada*

For the sound recording industry, the Canadian digital music market is decidedly mixed. This large and increasingly digital market continues to face challenges as well as present opportunities for improvement. In addition to the systemic priorities enumerated above, the sound recording industry urges the United States to pursue the following priorities with Canada through the NAFTA modernization negotiations.

- National Treatment: Canada should provide full national treatment to U.S. copyright holders. In some important respects, Canada fails to provide U.S. artists and record labels national treatment under the Canadian *Copyright Act*, which raises serious questions regarding Canada compliance with its NAFTA commitments. As a result, U.S. artists and labels face unfair discrimination, and are denied protections afforded to their Canadian counterparts, including for over the air broadcasts, background music and certain other uses of their recordings. This stands in stark contrast to the situation in the United States in which Canadian labels and performers enjoy full national treatment, even with respect to rights that go beyond U.S. international obligations and the protections to be found in Canadian law.

Canada has historically argued that it is able to discriminate against U.S. parties based on the exemption for the cultural industries in Annex 2106 of NAFTA.<sup>37</sup> Although the exemption is worded quite broadly, the exemption must not be construed to permit Canada to abrogate specific intellectual property rights protections it had agreed to in NAFTA.<sup>38</sup> NAFTA

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<sup>37</sup> Annex 2106: Cultural Industries exemption states “Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access - Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the Canada - United States Free Trade Agreement. The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States. “The Canada - United States Free Trade Agreement Art. 2005: Cultural Industries states: “1. Cultural industries are exempt from the provisions of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 1607 (divestiture of an indirect acquisition) and Articles 2006 and 2007 of this Chapter [Retransmission rights and Print-in-Canada Requirement]. The definition of “cultural industries” is very broadly defined in Article 2107 of NAFTA as meaning “ persons engaged in any of the following activities: (a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing; (b) the production, distribution, sale or exhibition of film or video recordings; (c) the production, distribution, sale or exhibition of audio or video music recordings; (d) the publication, distribution or sale of music in print or machine readable form; or(e) radio communications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services;

<sup>38</sup> We note that Canada agreed to a much narrower approach to the cultural exemption in the CETA and TPP which do not have entire exemptions for intellectual property commitments for cultural industries. See Peter Grant, *Does the TPP Protect Canadian Cultural Policy?*, February 7, 2016 available at:

<http://www.barrysookman.com/2016/02/07/does-the-tpp-protect-canadian-cultural-policy/>. Canada currently also relies on the Ministerial Statement adopted when Canada ratified with WPPT to exclude U.S. makers and

includes an unfair provision that allows Canada to derogate from the national treatment principle in respect of U.S. performers under Article 1703 of NAFTA, which requires that U.S. performers only be entitled to equitable remuneration on a reciprocal basis.<sup>39</sup> But no such exemption exists for U.S. sound recording producers. This is a clear indication that NAFTA did not intend to permit any exemptions for U.S. sound recording producers based on the principle of reciprocity. Nor can Canada's discriminatory policies be justified under Article 1703 given that excluding U.S. sound recordings from protection creates incentives for radio stations to play U.S. rather than Canadian sound recordings, thus hurting Canada's cultural industry by reducing their exposure to the Canadian marketplace and reducing equitable remuneration to Canadian makers of sound recordings.

Such discrimination against U.S. interests should not be permitted under an exemption designed to protect Canadian cultural industries, a point underscored by the fact that Canada's cultural industries themselves do not endorse the discriminatory treatment supposedly enacted for their benefit. In a modernized NAFTA, it is critical that the United States secure a clear understanding from Canada that national treatment obligations for intellectual property rights falls outside the scope of any cultural exemption, and eliminate NAFTA Article 1703(1).

- Right of Making Available. Under the WPPT, performers and producers of sound recordings are required to be provided the exclusive right to make their recordings available to the public. This right is the foundation for licensing in the digital marketplace, and central to the ability of labels and performers to enforce their rights against copyright infringers including

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performers of sound recordings from receiving equitable remuneration for the uses specified above, allegedly based on the US not providing Canadians with protection under the U.S. Act. Canada is not, however, entitled to deny equitable remuneration to U.S. makers of sound recordings for the communication to the public of pre-1972 sound recordings under the WPPT for the following reasons:

- Canada is required under the WPPT to act reciprocally by providing US makers the same level of protection given to Canadians. Under the Art 4(2) of the WPPT Canada, can only make a reservation limiting the right to collect equitable remuneration for US pre-1972 recordings if the US does not provide such protections to Canadian pre-1972 recordings.
- While the US does not provide Federal copyright protection for pre-1972 recordings for its nationals, it expressly provides such protection for Canadian recordings first published in Canada (and not published simultaneously (within 30 days) in the US), under s.17 USC § 104A. More than 99% of Canadian recordings are protected by U.S. Federal copyright protection.
- The performance right for pre-1972 recordings is also protected, at least in some States, under common law.

<sup>39</sup> Art. 1703 1 states "Each Party shall accord to nationals of another Party treatment no less favorable than that it accords to its own nationals with regard to the protection and enforcement of all intellectual property rights. In respect of sound recordings, each Party shall provide such treatment to producers and performers of another Party, except that a Party may limit rights of performers of another Party in respect of secondary uses of sound recordings to those rights its nationals are accorded in the territory of such other Party."

pirate sites and services. However, Canada's implementation of this right raises serious questions regarding its compliance with its WPPT obligations, as Canada has made it essentially a right to collect equitable remuneration as right holders must file tariffs with the Copyright Board in order to license the right and because right holders cannot sue for infringement of their rights without the consent of the Minister.<sup>40</sup> Securing Canada's WPPT compliance by removing the impediments to the exercise of exclusive rights should be a U.S. negotiating priority.

- Collective Management. Canada should reform its Copyright Board's extremely slow and unpredictable tariff-setting process. Tariff rates are routinely set years after they have been proposed, and often after the tariff period has expired. U.S. makers of sound recordings receive 1/10 of the royalties they receive in the United States for webcasting and other non-interactive music services. In the United States, the rates for these services must be based on the "willing buyer/willing seller standard". However, in Canada the Copyright Board in the *Tariff 8 Decision* rejected using U.S. and Canadian market based agreements between record labels and services, as the rate setting standard. This had the effect of depriving U.S. makers and performers of sound recordings of fair/market based royalties for critical online music services markets.
- Notice and Notice. Canada does not require hosting or search providers to remove or disable access to infringing content even when they have such knowledge as long as Canada maintains its "notice and notice" system. Canada is a unique outlier among its trading partners in this respect. This system will inevitably result in cases where rights holders are significantly prejudiced by being unable to have infringing content taken down from Canadian hosted sites and where a Canadian based entity provides hosting serviced for infringing content that is made available to U.S. residents.
- Royalties. Canada should require that royalties be paid fully to sound recording and musical works rights holders for reproductions made by radio stations. Prior to 2012, there was an exemption for making these broadcasting mechanical copies, but this exemption was conditioned on broadcasters paying any applicable tariff. The elimination of this exemption and the application of new exceptions for back-up copies and technical processes means that broadcasters have a right to avoid paying between 23 and 50 percent of royalties, with a potential loss of up to \$12.5 million annually for all rights holders. Canada should remove the exemption and clarify that the new exceptions do not apply to copies made in the course of broadcasting.

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<sup>40</sup> See ss. 67(b), s67.1(4)(b) and 68.2(2)(b).

## *Mexico*

The sound recording industry faces numerous challenges in Mexico and urges the United States to pursue the following country-specific priorities, in addition to the systemic priorities above, through the NAFTA modernization negotiations.

- Right of Making Available. Mexico needs to confirm that its law currently provides a right of making available to the public, which is part of Mexico's obligations under the WPPT.
- Online Copyright Enforcement. Online piracy remains a critical concern for the sound recording industry in Mexico, which is perpetuated by a significant extent by the lack of IPR enforcement with respect to piracy over the Internet. NAFTA modernization should provide for stronger online IPR enforcement tools in Mexico.
- Service Provider Responsibility. Mexico has inadequate rules governing obligations on service providers with respect to copyright infringement, which leaves the sound recording industry with little ability to address piracy and to engage in the digital economy where fair competition prevails. NAFTA modernization should ensure service provider responsibility and fair competition with respect to copyright infringement.
- TPMs. Mexico's law with respect to TPMs is overly narrow, covering only computer software. NAFTA modernization should provide for broader TPM protections in Mexico, including to expand TPM protection to IP-protected industries beyond software companies.

## **Digital Market Access Barriers**

The American sound recording industry strongly supports the inclusion of digital trade provisions in modernized NAFTA. Several types of market access barriers can impose significant negative impacts on digital trade. The following types of barriers can impede trade in digital products and services of the sound recording industry:

- Duties. Customs duties imposed on digital products, including on sound recordings, as well as on ICT products used to access sound recordings legitimately, remain a constant potential barrier to digital trade and the streaming economy. We support continued prohibitions on the application of duties on cross-border trade in digital products, and engagement to eliminate tariffs on such ICT products.

- Discrimination and Quotas. Digital discrimination remains a pervasive potential challenge to digital music trade. U.S. digital products, including sound recordings, should benefit from national treatment from our trading partners, including with respect to streaming.
- Data Flow Restrictions. Many limitations on the cross-border flows of data can significantly impede trade in digital music. For this reason, we urge the United States government to protect the free flow of data across borders, in a manner consistent with intellectual property rights protection and enforcement, including with respect to localization requirements imposed by our trading partners on cloud- and Internet-based digital products and services.
- Investment & Services Limitations. Strong investment and services commitments in third countries are vital to the music industry and our digital partners. Such commitments include, for example, that services with respect to distribution and retail clearly apply to digital products and services.<sup>41</sup> The United States should improve on NAFTA 1994 regarding digital market access for cultural industries, including the sound recording industry, with respect to investment & cross-border trade in services obligations, including regarding online content.
- Security Concerns. Where the Internet is not secure, digital trade cannot thrive. Protecting the digital environment against cybercrime should remain a key priority, including to ensure that the policies and measures of our trading partners provide security in a manner that promotes trust, and fosters creativity. Such disciplines should include prohibitions against circumventing access controls (i.e., technological protections measures) and manufacturing, importing, offering to the public, providing, or otherwise trafficking in such TPM circumvention devices.
- Forced Technology Transfer. Too often, market access for digital service providers is conditioned on technology transfer. Such requirements can have a significant negative impact on U.S. companies, particularly in the technology intensive music industry. Removing such technology transfer requirements, including with respect to source code,

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<sup>41</sup> See WTO Panel Report (DS363); *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*; (In this WTO dispute, Panel found that China’s measures regarding distribution services for electronic sound recordings were inconsistent with China’s market access or national treatment commitments in respect of Articles XVI and XVII, respectively, of the General Agreement on Trade in Services. Specifically, the Panel found, which the Appellate Body affirmed, that the entry “sound recording distribution services” in sector 2.D of China’s GATS Schedule extends to the distribution of sound recordings in electronic form, and thus that China’s measures prohibiting foreign-invested entities from engaging in the distribution of sound recordings in electronic form were inconsistent with the national treatment obligation in Article XVII.); available at: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds363\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm).

encryption keys and other TPMs, as well as other digital technologies, should remain a U.S. digital trade priority.

- Contractual Freedom. IPR licensing is a driving force for digital growth for the sound recording industry, which relies heavily on the right to negotiate and enforce contracts. Our industry strongly supports U.S. engagement that upholds the freedom to contract with respect to copyright and related rights, including the ability to transfer such rights by contract, and to exercise and enjoy fully the benefits derived from such rights that have been transferred.
- Lack of Transparency. Transparency and the rule of law are inextricably linked, and this is no different in the digital environment. Legislative and regulatory processes in our trading partners that impact digital trade should be transparent and provide opportunities for meaningful engagement with creative industries and other stakeholders, including through advanced notice of, and an opportunity to comment on, draft laws, regulations, standards and other measures affecting digital trade.

### **Conclusion**

RIAA welcomes this opportunity to provide these comments to the TPSC regarding the NAFTA music market, the barriers we face in Canada and Mexico, and the priorities we have with respect to promoting U.S. trade competitiveness in North America and globally, where market access and strong IPR protection and enforcement are mutually reinforcing and contribute to the overall welfare of the U.S. economy, and its businesses, workers and consumers. RIAA looks forward to continuing to engage intensively with the TPSC on modernizing NAFTA.