



November 30, 2017

Ambassador Robert Lighthizer  
United States Trade Representative  
600 17<sup>th</sup> Street NW  
Washington, D.C. 20006

Dear Ambassador Lighthizer:

As representatives of America’s creative and innovative sectors, we write to you regarding the ongoing North American Free Trade Agreement (“NAFTA”) modernization negotiations.

The American Creative, Technology & Innovative Organizations Network for Trade (“ACTION for Trade”) is a coalition of business associations and companies that seeks to advance creativity and innovation-based growth, and the protection of intellectual property (“IP”) that sustains such growth, in the U.S. trade agenda.

In these diverse, creative, and innovative industries – which span audiovisual, music, and literary content development, production, publication, and distribution; biopharmaceutical manufacturing; technology and software development – companies rely on the strong protection of their IP around the world, new market access opportunities, and fair international trading rules in order to make their significant contributions to the American economy. These sectors currently contribute substantially to the U.S. economy and exports, which we recognize this Administration seeks to expand further. And these creative and innovative companies are primed to expand this role, with the help of strong IP enforcement provisions in NAFTA. For example, according to the “Intellectual Property and the U.S. Economy: 2016 Update” published by the U.S. Department of Commerce:

- IP-intensive industries account for \$6.6 trillion in value added and more than 38 percent of the U.S. GDP, and
- These industries also support directly over 27 million jobs, and indirectly 17 million additional U.S. jobs, for a total of 45.5 million jobs (equal to 30 percent of all U.S. employment).

The use of IP rights accounted for the largest U.S. digital trade surplus of all services categories (\$88.2 billion) in 2014, and the second-largest export of any category (\$130.3 billion), In addition:

- the U.S. biopharmaceutical sector added \$1.3 trillion to the U.S. economy in 2016;
- the U.S. software industry generated over \$1 trillion for the U.S. economy in 2014; and
- the “core” copyright industries in the U.S. generate over \$1.2 trillion in economic output per year which includes \$26 billion in net revenue by the U.S. book and journal

publishing industry in 2016, \$15 billion in revenue by the U.S. recording industry in 2015; and \$10.3 billion in revenue by the film industry in 2015.

## **Strong IP Protections and Robust Enforcement Key to Create American Jobs and Exports**

Central to our companies' ability to create new American jobs and export opportunities is the fair valuation and protection abroad of American creativity and innovation. Unfortunately, the final texts of past U.S. free trade agreements have not always fully reflected this goal.

Therefore, a successfully modernized NAFTA must include strong IP protections, robust enforcement measures, and a level playing field for American companies to compete in the ever challenging international market.

Congressional support for these objectives is found in the *Bipartisan Congressional Trade Priorities and Accountability Act of 2015* ("TPA"), where Congress directed that trade agreements include strong commitments on intellectual property, legitimate digital trade, and regulatory practices.

Likewise, the Administration's 2017 Trade Policy Agenda commits to "[e]nsuring that U.S. owners of intellectual property (IP) have a full and fair opportunity to use and profit from their IP." Further, the Administration's NAFTA negotiating objectives released on July 17, 2017, also note the commitment to "effective protection of intellectual property rights" through, among other means, "prevent[ing] or eliminat[ing] discrimination with respect to matters affecting the availability, acquisition, scope, maintenance, use, and enforcement of intellectual property rights."

We would like to draw your attention to four priority issue areas that we believe are critical for achieving a successfully modernized NAFTA that will promote American jobs and exports via American creativity and innovation, including:

### **1. Copyright**

Copyright protection and enforcement are vital to the motion picture, television, music, publishing, and software industries. In turn, strong copyright protections and enforcement, which fuel American creativity, are a critical engine that drive U.S. economic growth, job creation, and trade competitiveness. U.S. free trade agreements (FTAs), including the current NAFTA modernization negotiations, offer a tremendous opportunity to generate American prosperity, employment, and trade surplus, and to secure such protections and enforcement in critical markets around the world.

Despite this potential, some FTA provisions have allowed for local implementation or misuse that achieves the opposite effect, sheltering companies that profit from American creativity *at the expense of American creators*. Such provisions include overbroad copyright safe harbors and exceptions that promote the theft of American creative content overseas and that fundamentally undermine the ability of "U.S. owners of intellectual property (IP) [to] have a full and fair opportunity to use and profit from their IP", which was enumerated as a top priority in the

President's 2017 Trade Policy Agenda. A U.S. digital trade policy built on such dubious foundations would harm America's national interest by undermining the leading category of U.S. digital services trade surplus – IP licensing.

Of utmost concern in this regard is the inclusion of overly-broad safe harbor provisions that effectively immunize certain global Internet platforms from liability for copyright theft, claiming that the rules of the digital road do not apply to them. Under such overly-broad safe harbors, user uploaded content (UUC) platforms have been able to claim that they are not liable for copyright infringing content that they profit from and actively make available to the public. Further, these platforms claim that they are exempt from any requirements to commercially license such content as uploaded by users to the Internet service. Such overbroad safe harbor provisions result in a structural barrier that denies rights holders the ability to license their copyrighted material with the largest and most-used UUC services. Such abuse of the safe harbor rules have cost the music industry between \$650 million and \$1 billion per year, according to one admittedly conservative analysis even with the ineffective “notice and takedown” system that is currently in place. Other sectors face similar financial losses each year, which leads to an overall lower trade balance with neighboring countries.

Our concern in NAFTA is the significant extent to which any safe harbor provisions fail to accurately reflect basic aspects of U.S. law, such as the absence of secondary liability (on which the U.S. safe harbor regime is premised). At the same time, we are also concerned that, like the text of the Trans-Pacific Partnership, any such provisions would also provide massive copyright carve outs for Canada and Mexico, whose laws are inconsistent with even the minimum standards of U.S. law. Without strong language in NAFTA, Mexico and Canada could become “safe havens” for increased piracy and other forms of illegal content at the behest of a few global Internet companies.

Likewise, we are very concerned about the policy direction signaled in recent NAFTA negotiation communications singling out copyright exceptions and limitations among the Administration's new IPR objectives. This represents a significant and troubling departure from prior U.S. trade policy precedent, and suggests a new hierarchy of rights based on the relative priority given exceptions to such protections.

We welcome the Administration's efforts to promote strong copyright protection and enforcement in NAFTA, and look forward to continuing to work with USTR and other agencies to ensure that the IPR Chapter advances the interests of American creators. To do so, it is critical that the final language avoid extensive and detailed loopholes contained in any safe harbor provisions that would negate the pro-creativity gains achieved elsewhere in the NAFTA text.

## **2. Valuing Innovation through Market-based Systems, Transparent Processes, and Accountability**

The extensive upfront, high-risk investments in innovation made by companies in the creative and innovative sectors are enabled by their ability to commercialize the protected products. Appropriately valuing those products through market-based mechanisms and free from restrictions that artificially lower their prices ensures that future investments in new innovation

will continue. Harmful policies like reference pricing and *ad hoc* price cuts are especially prevalent in government regulation of innovative medicines and treatments. For example, current initiatives to update pricing regulations, particularly by Canada to its Patented Medicines Prices Review Board, will only serve to further undervalue innovative U.S. medicines.

Pricing policies that promote biopharmaceutical innovation are transparent, efficient, and accountable, and follow market-based principles. This includes requirements for governments to publish rules affecting pricing with a meaningful opportunity for stakeholders to submit comments prior to the rule's finalization, the ability to appeal such rules, and the completion of these rulemaking processes in a timely manner. Regulatory processes that are transparent, efficient, and accountable foster private sector innovation and investment. A properly modernized NAFTA will contain provisions that address these dynamics.

### **3. Patents and Regulatory Data Protection**

The United States has the most innovative biopharmaceutical and technology industries in the world. However, unfair practices by trading partners have stifled innovation by depriving U.S. businesses of the full value of their efforts. These unfair practices include restrictive patentability criteria, long patent application backlogs, unreasonable localization requirements, compulsory licensing edicts, and failures in the area of data protection.

To successfully bring valuable new innovations to market, including technology and medicines, innovators must be able to secure patents on all inventions that are new, have an inventive step, and are capable of industrial application, as international rules require. The expansion of protections for algorithms is a welcome step toward improving intellectual property for technology companies, especially in the emerging technologies that will improve future U.S. economic competitiveness. Yet, national laws, regulations, or judicial decisions that prohibit patents on certain types of biopharmaceutical inventions or impose additional patentability criteria, only serve to restrict such access and undermine investments for future treatments and cures. Moreover, once a patent application is submitted, unreasonable delays in the review and approval of the application can directly reduce the value of the patents by truncating the time the patent can be used commercially because the term of a patent begins not on the day the patent is granted, but on the day the application is filed. Also, once a patent is granted, exclusive ownership without conditions is necessary. To condition a patent on local manufacturing or technology transfer of valuable intellectual property to domestic competitors is not true patent protection, and it only hurts U.S. innovators.

In addition, it is important to establish regulatory data protection (“RDP”) within our trading partners’ legal regimes that is consistent with the high standard found in U.S. law. To meet that standard, America’s trading partners must provide at least 12 years of RDP for biologic medicines and at least 5 years for small molecule treatments. RDP complements patent protection for innovative medicines. By requiring temporary protection for the comprehensive package of test data biopharmaceutical innovators must submit to regulators to demonstrate the safety and efficacy of a new medicine, RDP provides additional incentives for investment in new treatments and cures. Unfortunately, some U.S. trading partners do not provide RDP, contrary to WTO rules – which require protection of such test data against both disclosure and unfair

commercial use. Many others do not provide a level of protection that meets the standard found in U.S. law. Ensuring these patent and related protections is critical for a modernized NAFTA and the continued U.S. comparative advantage in innovation for new treatments and cures.

#### **4. Enforcement**

Finally, it is no surprise that counterfeiting and commercial piracy causes a significant drain on the U.S. economy, leading to lost sales for legitimate IP owners, as well as lost tax revenues and duties to the U.S. Government. This results in decreased U.S. employment, and diminishes investments in capital improvements and research and development. For example, a 2014 study estimated that cyber-crimes have cost the global economy some \$400 billion in annual losses through consumer data breaches, financial breaches, market manipulation, and theft of IP. Further, a 2016 OECD study found that international trade in counterfeit and pirated goods represented up to 2.5 percent of world trade, valued at as much as \$461 billion in 2013. In Fiscal Year 2016, U.S. Customs and Border Protection seized over 30,000 shipments, valued at nearly \$1.4 billion, of counterfeit and pirated goods entering the country. Such seizures account for only a small fraction of the overall volume of counterfeit and pirated goods entering the U.S. market. Counterfeiting and piracy now impact virtually every product and service industry, raising the stakes higher than ever before.

With the growth of the digital economy, online enforcement has emerged as a significant challenge for rights holders. In many countries, legislation against the Internet sale of illicit goods lags behind the growth of the online marketplace, and as a result, enforcement agencies are often reluctant or unable to devote the necessary time and resources to IP-related crimes.

It is estimated, for instance, that:

- there were over 137.3 billion visits globally to websites dedicated to music piracy in 2016;
- the commercial value of digital piracy in film in 2015 was \$160 billion; and
- digital piracy in the music industry in 2015 was \$29 billion.

Needless to say, there is a critical need to push U.S. trading partners to develop mechanisms to effectively monitor and enforce against illicit online activity.

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With the most robust creative and innovative businesses in the world, the United States should prioritize rules in trade agreement negotiations to protect IP and related rights in both actual and virtual marketplaces around the world. This will ensure that the United States maintains its global lead in these industries and will help the U.S. to grow its trade surplus. We look forward to continuing to work with you to achieve these goals as NAFTA modernization talks move forward.

Sincerely,

ACTION for Trade

Cc: Secretary Wilbur Ross, Department of Commerce  
Senator Orrin Hatch, Chairman, Senate Finance Committee  
Senator Ron Wyden, Ranking Member, Senate Finance Committee  
Representative Kevin Brady, Chairman, House Ways and Means Committee  
Representative Richard Neal, Ranking Member, House Ways and Means Committee