

Dear Ambassador Lighthizer:

We write to you as trade-intensive American music creators in support of your work to deliver on the Administration's commitment to modernize the North American Free Trade Agreement (NAFTA).

We support a forward-looking trade policy to advance American economic growth, job creation, and trade competitiveness through American creativity. The future of trade in creative products and services, and the creative industries' significant contributions to the U.S. economy, are built on a strong foundation of respect for creativity, reflecting both today's digital economy and tomorrow's digital future.

Unfortunately, as you work to bring NAFTA into the modern age, there are interest groups working for a backward-looking agenda in their own narrow financial interest at the expense of America's national interests – economic, employment and cultural. This harmful agenda is contrary to our country's historic support for true creators and their property rights, and it would prevent fair competition in the digital marketplace.

Specifically, these technology interests' August 31st letter would have you insert into NAFTA vast loopholes in the American copyright system, such as broad copyright exceptions and sweeping immunities for those committing content theft. This would be an open invitation to America's trading partners to act as havens for piracy and refuges for those who illegally infringe American creative content.

These technology groups would risk America's digital future to further their own interests by perpetuating an antiquated system of copyright safe harbors under the Digital Millennium Copyright Act (DMCA), established at the dawn of the Internet and subsequently interpreted well beyond the law's original intent.

Even if it were possible for a trade agreement to fully reflect U.S. law on safe harbors (and recent experiences with the Trans-Pacific Partnership text argue otherwise), it remains fundamentally unclear why the United States would seek to lock our Congress, our trading partners, and our creators into a two-decade old system, with all its imperfections and

inequities, in an updated NAFTA. Such an approach would be antithetical to the core objective of NAFTA modernization.

Creators Create Content – and Drive U.S. Economic and Cultural Benefits
In their August 31st letter, several Internet associations attempt to undermine the concerns – and livelihoods – of thousands upon thousands of creators across the country by adopting their identity, claiming that some Internet companies are "the new faces of the American content industry." But those Internet companies, wearing different masks as they profit from the competitive distortions they perpetuate, do not speak for us. Creators, of course, create content. We are the artists, musicians, songwriters, publishers, producers, managers, promoters, distributors, labels, and countless others – the many true faces of content – who drive users to these companies' sites and services. We dedicate our lives to this passion, making the United States the number one exporter of music in the world and driving new investment and technology, both here at home and overseas.

American Content Industries are Digitally Intensive and Technologically Innovative
Our industry is digitally intensive and technologically innovative. We derive more than 80 percent of our revenue from digital sources (and growing) and license more than 400 services worldwide. Likewise, IP-intensive industries like ours help drive the U.S. competitive advantage in digital trade, with IPR licensing accounting for the largest U.S. digital trade surplus of all services categories ($88.2 billion), and the second-largest export of such categories ($130.3 billion). Over 80 percent of traffic over the Internet and over 60 percent of the traffic over mobile phones is audiovisual, including music videos and music. Music remains one of the key drivers of broadband penetration, information and communication technology (ICT) device uptake, and Internet business development, including in search, social media, cloud and streaming services.

Creators Support Safe Harbors as Intended, But Oppose Abusive Expansion
To be clear, we support safe harbors as they were originally intended, that is limited to passive neutral intermediaries and not platforms that are optimizing or promoting content. But, we oppose the abusive expansion of those safe harbors beyond their intended purpose, and we oppose the importation into NAFTA of ineffective and inaccurate provisions from outdated agreements with vastly different countries. When a few tech associations press you to simply retain the same safe harbor provisions from TPP and export them to Canada and Mexico and beyond through NAFTA, those associations are also asking you to ignore the lessons of the last 20 years of history. Those lessons have taught us that the DMCA safe harbor – explicitly intended for passive, neutral platforms – has increasingly been used to cloak non-passive businesses in the mantle of safe harbor immunity, putting other digital partners at a massive competitive disadvantage and undermining the stability of the online marketplace.

In effect, those few tech associations are asking you to use trade agreements to prevent our Congress from legislating for the future. Just as some tech companies have changed from start-ups to global incumbents, the digital marketplace has also changed. Our trade agreements should also adapt, while not preventing our Congress from clarifying the original intent of U.S.

law to the benefit of U.S. creators. It would be profoundly ironic, let alone fundamentally detrimental, to modernize NAFTA to include an outdated law that reflects a distant digital past, *i.e.*, when NAFTA first entered into force.

And the impact of the DMCA safe harbor abuse is not merely academic. It has been devastating for the music industry, leading to a wholesale theft of creative property and a devaluation of creative content and the copyright protection that sustains it.[1] Indeed, the flawed safe harbor provisions in the TPP would perpetuate the massive value gap created by the DMCA that could cost America $1 billion a year.[2]

Beyond the U.S. experience, our trading partners are simply not in a position to implement U.S. safe harbor law in their own domestic systems, which lack fundamental aspects of the U.S. legal system, including our high-standard intellectual property protections, our case law and our Constitution. Placing flawed safe harbors in the hands of our trading partners would put the U.S. creative industries (which contribute more than $1.2 trillion to GDP and employ 5.5 million Americans) at a dramatic competitive disadvantage.

As with over-broad safe harbor provisions, the call for NAFTA to include over-broad copyright exceptions in the name of "balance" is also highly concerning to American creators. Both U.S. law and international copyright agreements do contain narrow exceptions, but do not include the term "balance." The request for "balance," including an open-ended exception for "fair use" that does not recognize the necessary parameters and guidance of 150 years of U.S. case law, reflects an agenda to undermine copyright protections internationally to the benefit of a few tech companies. Forcing our trading partners to adopt a few associations' preferred and self-serving flavor of "balance" only encourages our trading partners to start with U.S. law and then move backwards, in terms of either under-implementing copyright protections or over-implementing copyright exceptions pursuant to an infinite range of countervailing interests, which will very likely not be to protect U.S. creators.

With NAFTA, the United States stands at a threshold. We can antiquate NAFTA by blessing the harmful and inward-looking practices of our trading partners, condemning our creative industries to a law that has departed from its original intent and has fallen far behind the times. Or we can modernize NAFTA by advancing an inclusive digital trade policy that capitalizes on the contributions of our creators to jobs, growth, and the U.S. competitive advantage in trade. We can look backward and export outmoded laws and past TPP compromises of previous Administrations, or we can look forward to our digital future, which has American creativity as part of its core, fueled by strong copyright protection and enforcement. We look forward to

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[1] *Is It Time to Break Up Google?* Jonathan Taplin; The New York Times; April 22, 2017; available at: https://www.nytimes.com/2017/04/22/opinion/sunday/is-it-time-to-break-up-google.html.

[2] 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.

working closely with you on NAFTA modernization, including to protect and promote our creative industries.

Sincerely,

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