



**ELECTRONIC FRONTIER FOUNDATION**

Protecting Rights and Promoting Freedom on the Electronic Frontier

June 9, 2017

The Honorable Robert Lighthizer  
U.S. Trade Representative  
600 17th St. NW  
Washington, DC 20006

Dear Ambassador Lighthizer,

The Electronic Frontier Foundation (EFF) is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. We work to ensure that rights and freedoms are enhanced and protected as our use of technology grows.

Thank you for the opportunity to provide our input on the agency's negotiating objectives and positions for a modernization of the North American Free Trade Agreement (NAFTA). We support the concept of a NAFTA that supports increased digital trade between the United States, Canada and Mexico, provided that it also reserves those countries adequate policy space to protect other important interests that are not well captured by trade advisory processes, including the interests of Internet users in freedom of expression, privacy, and open innovation.

As such, in addition to providing comments below on the intellectual property rights issues and the electronic commerce issues that have been proposed for inclusion in NAFTA, we also address how the transparency and inclusiveness of the negotiation processes could be improved, so that NAFTA can address these issues in an holistic manner where appropriate, or leaves them to be addressed in other fora that are better suited to considering the interests of all sectors of the U.S. economy and society.

## **1. *Intellectual property***

EFF does not believe that intellectual property rules are a good fit for trade agreements such as NAFTA. Prescriptive IP rules usually fail to account for developments in technology such as the Internet, or changes in business and social practices such as the sharing economy. Including such rules in trade agreements could inhibit the United States from modernizing its own intellectual property rules in the future.

Moreover because the strict level of intellectual property protection demanded by the United States recording, motion picture, and pharmaceutical industries are so contentious amongst our trading partners, insisting upon these prescriptive rules requires the expenditure of extraordinary amounts of political capital. This weakens America's

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position on other issues, benefiting a single industry sector at the expense of other sectors of the U.S. economy.

The original NAFTA did not contain such prescriptive intellectual property rules. Instead it largely tracked the requirements of TRIPS. For example, it required a minimum 50 year term of copyright protection, and omitted provisions on more specific topics such as technological protection mechanisms and camcording in movie theatres.

This minimalist approach has meant that the NAFTA parties have not been locked into outdated 1994-era intellectual property laws where they have become irrelevant or harmful. For example, if NAFTA had included a detailed codification of the law of copyright as the law stood in 1994, it would have required temporary copies in computer memory to be protected by copyright. However, appellate court decisions in the years following that date have clarified that in many cases such copies are not protected by copyright. Enshrining an opposite rule in NAFTA would have caused not only a disconnect between U.S. law and U.S. trade commitments, (possibly rendering it liable to dispute settlement proceedings), the existence of such a rule might have discouraged the emergence of innovative technologies that routinely make such temporary copies in the course of their normal operations.

### **No IP in NAFTA**

Therefore, our general position is that intellectual property rules should not be included in NAFTA at all, but should instead be addressed in more open multilateral fora such as WIPO. If the minimal set of intellectual property rules already included in NAFTA, are retained, they certainly should not be expanded to create new, more detailed and onerous restrictions.

Having said that, if the renegotiated agreement does contain new or strengthened intellectual property provisions in favor of rightsholders, specifically on copyright, then it is imperative that these are balanced with provisions that also protect the interests of users and innovators. Principal among these is the need to establish the fair use exception to copyright as a minimum standard.

Together with the DMCA and CDA 230 safe harbors (see below), fair use is one of the keys to the success of America's successful tech companies, allowing them to make new, innovative uses of existing content such as search engines, social media applications, news aggregators, and many others. American media companies also depend on fair use, for purposes as diverse as parody, mashup, news reporting, and criticism.

### **Mandatory Fair Use in Any Copyright Rules**

As a member of the Re:Create Coalition (a non-partisan, multi-stakeholder coalition of creators and consumers for balanced copyright), we recently released a statement explaining how the inclusion of fair use in trade agreements would make them more balanced than they are now. The statement, issued by Re:Create's Executive Director Joshua Lamel, says:

If NAFTA is renegotiated and if it includes a chapter on copyright, that chapter must have mandatory language on copyright limitations and exceptions, including fair use. The United States cannot export one-sided enforcement provisions of copyright law without their equally important partner under U.S. law: fair use.

Although Canada's fair dealing exception offers broadly equivalent protection to American innovators, we are concerned that Mexico's copyright law does not. This places American companies at risk, should they wish to offer goods or services that depend upon fair use to Mexican consumers. To increase certainty and predictability for these companies, the fair use exception should be harmonized within the NAFTA region.

## **2. *Electronic commerce***

Given the abandonment of the Trans-Pacific Partnership (TPP) and the pendency of the Trade in Services Agreement (TISA), there has not yet been a concluded trade agreement that has comprehensively addressed electronic commerce issues such as data localization, intermediary liability, net neutrality, domain names, encryption, and access to software source code.

The inclusion of such novel issues in new trade agreements therefore needs to be treated with caution, and only after broad public consultation among affected stakeholders, including those who are not traditional participants in trade policymaking, such as computer security professionals, software developers, and user groups such as EFF.

From the above list of issues, we have identified some that we do not believe are ripe for inclusion in NAFTA, as well as some that possibly could be included, if a sufficiently open and inclusive consultation process were developed that allowed adequate public input and review of any proposals.

### **No Rules on Net Neutrality, Domains, Encryption or Software Source Code**

One issue that we do not believe is mature enough for inclusion in a trade agreement is net neutrality. Although EFF is firmly committed to the principles of net neutrality, which prohibit data discrimination by Internet providers, the devil is in the detail, and the detailed implementation of net neutrality principles even in U.S. law is far from mature. Given the many impacts of net neutrality rules on non-trade issues, a trade agreement is not the right place to deal with this issue at a multilateral level.

Rulemaking related to domain names is also an inappropriate topic for trade agreements, for similar reasons. There are already dedicated multi-stakeholder bodies at the international and domestic level (namely ICANN and the national country-code domain registries) that are responsible for setting policies pertaining to domain name registration and dispute resolution. It would be inappropriate for NAFTA, which has a much narrower advisory system, to preempt these more open and transparent processes.

Finally, rules on encryption standards and on the mandatory disclosure or review of software source code are also inappropriate for inclusion in trade agreements, as such rules implicitly have impacts on cybersecurity and other areas of government policy, and cannot be dealt with adequately in isolation from that broader context. To give an example, prohibiting countries from mandating software source code disclosure would eliminate a policy option for responding to the poor state of security in home routers and Internet of Things (IOT) devices. At a time when the security threats to American users and companies from vulnerable digital devices has never been higher, this would be rash in the extreme.

Rather than including prescriptive, one-size-fits-all rules on such topics in NAFTA, a

recommended alternative is to discuss these issues within soft law fora such as the OECD and the Internet Governance Forum (IGF), which are better equipped to consider a range of different perspectives and where there is less risk that wrong decisions will have negative long-term effects for our country.

### **Technology-Neutral Facilitation of Digital Transactions**

Trade agreements should not themselves be used for technical standard setting, but there is a respectable history of multilateral agreements being used at a high level to promote the interoperability of digital transactions. These rules should be technology-neutral, and avoid specifying particular certificate formats. For example, the Trans-Pacific Partnership (TPP) contains provisions requiring parties to have a domestic electronic transactions framework in conformity with either the UNCITRAL Model Law on Electronic Commerce 1996 or the United Nations Convention on the Use of Electronic Communications in International Contracts.

### **Platform Safe Harbors**

On the topic of intermediary liability, the USTR has proposed a rule for TISA based on Section 230 of the Communications Decency Act (CDA 230), that would require countries to protect Internet intermediaries from liability for a broad range of user speech. In principle such a rule is deserving of consideration for NAFTA, however it is imperative that this take place with input from all affected stakeholders, including Internet platforms and users. This cannot be done without significant reforms to transparency and consultation practices, as outlined below.

Section 230 does not deal with copyright content, which is treated separately in U.S. law under section 512 of the Digital Millennium Copyright Act (DMCA). If this topic is to be addressed in NAFTA, we would support the inclusion of rules providing online service providers with safe harbors from copyright liability, provided that these rules are flexible enough to permit all parties to model their safe harbor schemes along the lines of Canada's well-functioning "notice and notice" system. We do not support the TPP's approach which merely "grandfathered in" support for Canada's system.

### **Measures to Address Data Protectionism Must Not Undermine Privacy**

Finally, there may be room to consider the inclusion in NAFTA of provisions to subvert data localization laws such as rules that require data on citizens to be stored and processed on servers located in their own country. On the one hand, these can prevent countries from distorting Internet traffic flows and imposing unnecessary costs on platform operators—so they do have the potential to protect free expression and access to information on the Internet. On the other hand, these same rules could be used to undermine consumer protections for personal data. For example, these kinds of provisions could be used to unravel national efforts to pass legal requirements around how companies handle citizens' sensitive medical data.

It is therefore imperative that any text on this topic also be the subject of wide, open public consultation with all affected stakeholders, as described in section 3 below, in order to ensure that the resulting rules are not over-prescriptive and do not have unforeseen impacts. Consideration should be given to the use of other instruments,

besides trade agreements, to address the problem of data protectionism.

### **Extraterritorial Orders**

We take note of a proposal from the Internet Association<sup>1</sup> that aims to address the problem of overseas courts issuing injunctions to enforce their domestic content laws, purportedly with extra-territorial effect on Internet platforms that are not parties to the dispute. Although the Internet Association submission implicitly makes reference to the case of *Google v. Equustek*, currently under appeal at the Supreme Court of Canada, we note with concern that similar injunctions have been issued in other countries that are not parties to NAFTA, including France and Austria.

Although an ideal solution would therefore be to address this issue at a fully multilateral level, there may be merit in the Internet Association's proposal to address it in NAFTA. Should the USTR concur, we would welcome the opportunity for an open and inclusive public consultation to be held to explore possible solutions to the problem in greater depth.

### **3. *Transparency and inclusiveness***

On May 18, we wrote to your office with five very specific and actionable recommendations on the improvement of the transparency of U.S. trade negotiations and their accessibility to a diverse range of expert stakeholders. Those recommendations, which flow out of a multi-stakeholder meeting that EFF and OpenTheGovernment.org hosted in Washington D.C. in January, are as follows:

#### **1. Publish U.S. textual proposals on rules in ongoing international trade negotiations**

USTR should immediately make available on its website the textual proposals related to rules that it has already tabled to its negotiating partners in the context of the TTIP, TiSA, and any other bilateral, regional, or multilateral trade and investment negotiations it undertakes.

#### **2. Publish consolidated texts after each round of ongoing negotiations**

USTR should impose as a prerequisite to any new or continuing trade negotiations that all parties agree to publish consolidated draft texts on rules after each negotiating round, including negotiations conducted on the entire agreement or a specific element or chapter and among trade ministers or other officials of every party to such negotiations or of a subgroup of the parties to such negotiations.

#### **3. Appoint a "transparency officer" who does not have structural conflicts of interest in promoting transparency at the agency**

USTR should immediately appoint a transparency officer who does not have any structural conflicts of interest in promoting transparency at the agency.

<sup>1</sup> *Modernizing NAFTA For Today's Economy*, June 2016, available at <https://internetassociation.org/wp-content/uploads/2017/06/Modernizing-NAFTA-White-Paper.pdf>.

#### **4. Open up textual proposals to a notice and comment and public hearing process**

USTR should initiate on-the-record public notice and comment and public hearing processes—at least equivalent to that normally required for other public rulemaking processes—at relevant points during the generation of government positions.

#### **5. Make Trade Advisory Committees more broadly inclusive**

If proposed U.S. texts and draft texts from negotiations are made publicly available, the main official advantage of the Trade Advisory Committee system – access to that information – would disappear. However, if Trade Advisory Committees are to be retained in addition to public notice and comment and public hearing processes, then resources must be devoted to making membership and effective participation in these committees more accessible to all affected stakeholder groups, including non-industry groups.

Much of the backlash against the failed Trans-Pacific Partnership (TPP) both from the public and from members of Congress was caused by the lack of transparency and inclusiveness of the TPP negotiations. The above reforms would prevent similar charges being laid against NAFTA. We therefore take this opportunity to reiterate those recommendations, which also enjoy the support of the Sunlight Foundation, the Association of Research Libraries, and OpenTheGovernment.org.

We readily concede that the reforms that we recommend would mark a significant shift in the way that trade negotiations have been conducted by the USTR until now. However, that is not to say that they are untested by other agencies and other trade administrations. For example, since 2014 the European Commission has published its textual proposals on rules in ongoing international trade negotiations. Likewise, rules on digital trade and intellectual property are already made in an open and inclusive process by other international organizations such as ICANN and WIPO.

The time for these recommendations to be put into action is now, before the NAFTA renegotiations commence. Experience with the Trans-Pacific Partnership Agreement (TPP) indicates that once the negotiating partners have agreed on the modalities for citizen engagement and access to information, it becomes difficult to subsequently alter those arrangements.

### ***Conclusion***

The increasing importance of the digital economy to economic growth means that we cannot ignore digital issues in trade agreements. However, not every rule or regulation that affects trade in digital products and services is protectionist. Some such rules—such as those requiring the disclosure or review of source code, data protection laws that limit where and how data is stored, and net neutrality rules, may have important non-trade policy justifications, such as the protection of consumer safety and privacy, and the promotion of access to information and freedom of expression. For this reason, the USTR

should exercise caution in including rules on these topics in NAFTA, where such topics are viewed only or predominantly through the lens of trade.

Similar caution should be exercised in raising the standards of intellectual property protection in NAFTA, which also have significant non-trade impacts throughout the economy. While the motion picture and recording industries are very well represented in the U.S. trade advisory processes, other stakeholders affected by intellectual property rules are poorly represented, and this is reflected in rulemaking that lacks balance. Exceeding TRIPS standards of intellectual property protection also reduces the policy space for future U.S. administrations to reform and improve our law.

We therefore recommend that if any new rules on copyright are to be included in NAFTA, these must include mandatory language on copyright limitations and exceptions, including fair use. Likewise if the agreement is to include provisions on platform safe harbors, these should be in the broadest terms possible, modeled on Section 230 of the Communications Decency Act, which has been a prime enabling force behind the success of American Internet companies throughout the world.

Most fundamentally, we urge that whatever new provisions on intellectual property or electronic commerce may be included in NAFTA, these should be transparently and openly discussed with the American public at every stage of the negotiations from agenda setting (the present consultation on negotiating objectives) through to textual drafting.

This can be done by releasing U.S. textual proposals, releasing consolidated draft texts following negotiation rounds, conducting a notice and comment and public hearing process on textual proposals, and by making trade advisory committees more inclusive of all affected stakeholders.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Jeremy Malcolm', written over a white background.

ELECTRONIC FRONTIER FOUNDATION  
Jeremy Malcolm  
Ernesto Falcon