

**To the
U.S. TRADE REPRESENTATIVE**

In re: NAFTA Negotiations

**Written Comments and Notification of Intent to Testify Of
Organization for Transformative Works**

The Organization for Transformative Works (OTW) is a nonprofit organization established in 2007 to protect and defend fanworks from commercial exploitation and legal challenge. The OTW is a U.S. nonprofit whose members reside worldwide. Although a majority of our members are U.S. nationals, a portion of our membership is drawn from Canada and Mexico, among others. The OTW's nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 770,000 registered users and receives over 115 million page views per week. We represent artists who make works commenting on and transforming existing works, adding new meaning and insights—from reworking a film from the perspective of the “villain” to retelling the story as if a woman, instead of a man, were the hero. Based on the OTW's expertise in the field of copyright policy, these comments address “(i) Relevant trade-related intellectual property rights issues that should be addressed in the negotiations.”

We appreciate the opportunity to submit these comments and intend to testify [per FR Doc. 2017-10603 Filed 5-22-17.] However, we note that the short timeline for submitting comments and notices of intent to testify—which gives stakeholders just three weeks to prepare comments and testimony on matters of enormous economic and social import—raises some concerns about the openness and inclusiveness of the process. We urge the USTR to seek out, and take seriously, the interests of everyday creators, consumers, and the public at large whose voices may be underrepresented in a process that caters to the largest and best-resourced interests. We also urge the USTR to be open and transparent about the negotiation process and any proposed treaty revisions. Copyright policy, and many of the other policy matters at stake in the upcoming NAFTA negotiations, affect every individual. Every individual creates, consumes, and re-creates copyrighted material. Matters of such broad impact should be subject to public comment and participation and we encourage the USTR to provide opportunities for public input at all stages of the process, including draft text.

I. Importance of Copyright Limitations and Exceptions

Intellectual Property law strikes important balances—it must give creators access to exclusive markets while ensuring that commerce, innovation, and creators' expressive freedoms are not unduly hampered by exclusive rights. The balance in this system depends not only on the

granting of exclusive rights, but also on subjecting those rights to meaningful limitations and exceptions. The USTR should be cautious of calls for enforcement mechanisms, lengthy protection terms, and rigid protections that privilege the private interests of IP owners over those of other participants in the IP system, such as users, consumers, intermediaries, technology developers, and fellow creators. The USTR should insist upon meaningful and enforceable provisions that *require* signatories to foster balance in copyright and related rights systems by providing not only thorough protections, but also robust limitations and exceptions.

Copyright limitations and exceptions are crucial for free expression as well as the development of growing markets.¹ For example:

- The doctrine of fair use enables creators to critique and comment upon copyrighted works in ways that are demonstrably beneficial to society. For example, remix creation is a large and growing part of culture worldwide. Substantial percentages of Americans online create remix, and millions more enjoy the results.² Remix empowers new speakers and allows them to develop skills and build creative communities.³ It provides a particularly valuable tool for underrepresented speakers to provide political and cultural insights,⁴ and enables speakers to engage in compelling political and personal expression.⁵ Commercialization and licensing have an important place in the creative ecosystem, but cannot substitute for the benefits that fair use and similar doctrines provide.⁶
- The doctrine of fair use also enables the growth of numerous technological markets, such as Internet-based businesses and the markets for audio and video recording and editing

¹ See Capital Trade, *Fair Use in the U.S. Economy*, <http://www.ccianet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf> (industries that benefit from fair use and other copyright limitations generate \$4.5 trillion in annual revenue and employ 1 in 8 U.S. workers).

² See Organization for Transformative Works, *Comments to the National Telecommunications and Information Administration and the U.S. Patent and Trademark Office*, Nov. 13, 2013, § II, <http://www.transformativeworks.org/wp-content/uploads/old/Comments%20of%20OTW%20to%20PTO-NTIA.pdf>.

³ See *id.* at § III.B-C.

⁴ See *id.*

⁵ See, e.g., St01en Collective, “*Fellowship of the Ring of Free Trade*” YouTube (March 27, 2011), <https://www.youtube.com/watch?v=GnN54ctPwtQ> (which adds subtitles to clips from the popular movie *The Lord of the Rings* to comment on the recent history of international free trade agreements and the efforts to oppose them).

⁶ See Organization for Transformative Works, *Comments to the National Telecommunications and Information Administration and the U.S. Patent and Trademark Office*, Nov. 13, 2013, § IV, <http://www.transformativeworks.org/wp-content/uploads/old/Comments%20of%20OTW%20to%20PTO-NTIA.pdf>.

devices and software.⁷ The sector of the economy benefitting from the doctrine of fair use is vitally important and growing, with increasing exports and worker productivity.⁸

- Exemptions to the Digital Millennium Copyright Act's (DMCA) "anticircumvention" provisions allow free expression such as video commentary and documentary filmmaking to thrive, and enable markets in technology repair.⁹ Those provisions, indeed, have proved no barrier to true pirates, while putting substantial barriers in the way of legitimate researchers, educators, and creators; anticircumvention requirements should be left out of international agreements, or at a minimum protective exemptions should be required.
- The "safe harbor" provisions of the Digital Millennium Copyright Act and Section 230 of the Communications Decency Act allow free expression and e-commerce to thrive by allowing online service providers to host user content without being considered the "speaker" of that content. Without these safe harbors, social media platforms, cloud services, search engines, and other businesses will suffer.¹⁰ The USTR should insist that signatories incorporate similar protections for online service providers, without imposing restrictions or content discrimination.

Rights holders who claim that new technologies enable infringement or argue for increased scope or length of intellectual property protections ignore the unintended economic and expressive consequences of increasing exclusivity without correspondingly increasing exceptions and limitations. The profits of the motion picture, video game, and software industries continue to grow; more books are being published than ever; and new platforms for text, video, music, and images have created a more diverse expressive ecosystem than ever before.¹¹ U.S. industries

⁷ See Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 *FORDHAM L. REV.* 1831 (2006) (explaining that the safe harbor created in favor of time shifting by the Supreme Court's decision in *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984) enabled the introduction of devices such as iPods, MP3 players, DVRs and many others to the market).

⁸ See Capital Trade, *Fair Use in the U.S. Economy*, <http://www.ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf> (industries that depend on fair use and other copyright limitations increased U.S. exports by 21% between 2010 and 2014 and increased productivity by 3.2%).

⁹ See U.S. Copyright Office, *Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights* (October 2015), <https://www.copyright.gov/1201/2015/registers-recommendation.pdf>.

¹⁰ See Internet Association, *Modernizing NAFTA For Today's Economy*, <https://internetassociation.org/wp-content/uploads/2017/06/Modernizing-NAFTA-White-Paper.pdf> (78% of investors are less likely to invest in these industries without safe harbors).

¹¹ Reply Comments of Writers Guild of America, West, Inc., before the Federal Communications Comm'n, In the Matter of Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42, & Commercial Availability of Navigation Devices, CS Docket No. 97-80, at 2-3, 9-10.

that rely on fair use and related intellectual property limitations and exceptions (such as Internet services) continue to grow at a higher rate than industries facing greater international competition, such as manufacturing.¹²

In ensuring the continued existence of robust limitations and exceptions to intellectual property exclusivities, the USTR should take into account not only U.S. doctrines such as fair use, but also allow for the continued vitality of similar limitations and exceptions in treaty partners' laws. For example, Canadian limitations such as fair dealing and the "UGC exception" operate somewhat differently from U.S. fair use but provide similar benefits,¹³ and should not be forced into a U.S. mold.

II. Importance of Avoiding Unintended Chilling Effects

The abuse of intellectual property law can also harm the public.¹⁴ For example, rights holders overstate the scope of their rights when they demand that non-infringing fair uses of their works be stopped, or use trademark law to attempt to silence criticisms of their products.¹⁵ This chills

¹² See Capital Trade, *Fair Use in the U.S. Economy*, <http://www.ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf> (highlighting benefit of fair use and other safe harbor treaty provisions to U.S. trade).

¹³ See Betsy Rosenblatt & Rebecca Tushnet, *Transformative Works: Young Women's Voices on Fandom and Fair Use*, in *EGIRLS, ECITIZENS: PUTTING TECHNOLOGY, THEORY AND POLICY INTO DIALOGUE WITH GIRLS' AND YOUNG WOMEN'S VOICES* 385, 393–96 (2015); Teresa Scassa, *The UGC Exception: Copyright For the Digital Age* (Oct. 7, 2013), http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=142:the-ugc-exception-copyright-for-the-digital-age (explaining relationship between Canadian UGC Exception and Fair Dealing).

¹⁴ In general, knowingly false claims about the scope of legal rights can be forms of fraud or extortion. At times, IP abuse-specific causes of action, defenses, and violations have been identified. 17 U.S.C. § 506(c) (criminal liability for false copyright notice); *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948) (copyright abuse can prevent recovery against infringement); Kevin J. Greene, *Abusive Trademark Litigation and the Incredible Shrinking Confusion Doctrine*, 27 HARV. J.L. & PUB. POL'Y 609 (2004).

¹⁵ For example, in *Lenz v. Universal Music Corp.*, No. 13-16106 (9th Cir. Sep. 14, 2015), Universal Music sent a notice claiming that a 29-second home video of a toddler dancing (taken by the toddler's mother and posted on YouTube for her friends and family to see) violated copyright because a Prince song was playing in the background. The Lumen Database helps track similar copyright abuses; see <http://www.chillingeffects.org/about>. Additional examples of the abuse of trademark law, which is intended to prevent "passing off" and other forms of consumer confusion, to limit speech pop up frequently. See, e.g., Paul Alan Levy, *Apparently, Citizens United Doesn't Believe in Free Speech for the Anti-Corporate Side*, Public Citizen Consumer Law & Policy Blog, <http://pubcit.typepad.com/clpblog/2010/03/apparently-citizens-united-doesnt-believe-in-free-speech-fortheanticorporate-side.html> (Citizens United using trademark law to prevent criticism of the recent Citizens United Supreme Court decision); Paul Alan Levy, *Trademark Abuse by Jones Day to Suppress Free Speech*, Public Citizen Consumer Law & Policy Blog, <http://pubcit.typepad.com/clpblog/2008/09/trademark-abuse.html> (law firm Jones Day using trademark law to prevent it from being mentioned by a news and consumer information website); *Katz. v. Google, Inc.*, 2015 WL 5449883 (11th Cir. Sept. 17, 2015) (court upholds finding of

free, non-infringing expression and hinders the development of markets and technologies associated with it. Thus, the USTR should consider provisions requiring enforcement measures designed to reduce the harms caused by abuse of intellectual property law.

In addition, the USTR should take great care in analyzing provisions that target online service providers and other intermediaries and platforms rather than infringers. Provisions that target such services can not only harm blameless service providers; they can also cut off services to other customers wholly unconnected with any infringing activity. Moreover, they can have significant chilling effects on noninfringing uses by providing incentives for intermediaries to overlook limitations and exceptions such as fair use, or compelling intermediaries to comply with procedures that permit intellectual property owners to remove access to noninfringing content without due process. Opponents to various anti-piracy proposals, such as the “Stop Online Piracy Act” (SOPA) and “PROTECT-IP Act” (PIPA), demonstrated that measures intended to facilitate intellectual property enforcement, if formulated without adequate attention to due process of law, can unduly hinder not only noninfringing expression, but also the basic operation of the Internet.¹⁶

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Respectfully submitted,

ORGANIZATION FOR
TRANSFORMATIVE WORKS



Elizabeth Rosenblatt
3333 Harbor Boulevard
Costa Mesa, CA 92626
(323) 822-4033
legal@transformativeworks.org

fair use where subject of critical blog posts purchased copyright in photo of himself for the express purpose of sending takedown notices.).

¹⁶ See, e.g., Julie Ahrens, *Stop Censorship: The Problems with SOPA*, Stanford Law School Center for Internet & Society Blog (Nov. 16, 2011), <http://cyberlaw.stanford.edu/blog/2011/11/stop-censorship-problems-sopa>.