



**MOTION PICTURE ASSOCIATION
OF AMERICA, INC.**

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Ed Gresser
Chair of the Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, DC 20508

Re: Request for comments on Negotiating Objectives Regarding
Modernization of the North American Free Trade Agreement with
Canada and Mexico

Dear Mr. Gresser:

The Motion Picture Association of America (MPAA) offers the following comments in response to USTR's Federal Register notice inviting submissions from the public on negotiating objectives with respect to the modernization of the North American Free Trade Agreement (NAFTA). The MPAA represents the six largest producers and distributors of filmed entertainment in the world: Walt Disney Studios Motion Pictures; Paramount Pictures Corporation; Sony Pictures Entertainment; Twentieth Century Fox Film Corporation; Universal City Studios LLC and, Warner Bros. Entertainment Inc.

The U.S. motion picture and television industry is a major U.S. employer that supported two million American jobs and \$134 billion in total wages in 2015. Jobs in the core business of producing, marketing, manufacturing and distributing motion pictures and television shows are high quality jobs, with an average salary of \$93,000 – 75 percent higher than the average salary nationwide.

The industry is comprised of a nationwide network of small businesses; with nearly 88,000 businesses in total located in every state, with 85 percent of these businesses employing fewer than 10 people. While some of these small businesses may not directly conduct business internationally, with 70 percent of global box office and a growing share of TV revenues coming from overseas markets, their success relies on a healthy and fair global marketplace.

Furthermore, the U.S. film and television industry made nearly \$43 billion in payments to over 300,000 local businesses in 2015. The industry also generated \$19.9 billion in public revenues and contributed \$131 billion in sales to the overall economy, up five percent from 2014.

Importantly, the U.S. film and television industry is one of the most highly competitive in the world; one of the few that consistently generates a positive balance of trade in virtually every country in which it does business. Engaged in over 130 countries, it registered \$17.8 billion in exports worldwide in 2015. The industry also had a positive services trade surplus of \$13.3 billion in 2015, or five percent of the total U.S. private sector trade surplus in services. For comparison purposes, exporting four times what it imports, the industry runs a trade surplus larger than each of the surpluses in the advertising, telecommunications, information, and health-related services sectors. The U.S. motion picture and television industry has a \$156 million services trade surplus with Mexico and a \$1.194 billion services trade surplus with Canada.

There is every indication that our industry's aforementioned trade surplus will grow under expanded trade in North America. NAFTA laid an important foundation to foster economic integration. The U.S. film and television industry has benefited from this economic integration and the trade rules and market openings accomplished in NAFTA. There is, however, room for improvement.

Perhaps the most notable development since NAFTA's entry into force is the prominence of the digital marketplace. MPAA members have taken full advantage of the opportunities created by the growth and build-out of digital trade and this is reflected in our services trade surplus (\$1.35 billion) with both countries. However, the potential of this critical marketplace has been restrained by the rampant theft of creative content online: almost one-quarter of global internet bandwidth is dedicated to copyright infringement. NAFTA, in its current form, is not equipped to effectively tackle the challenges of today's online marketplace nor harness the opportunities.

The U.S. and our NAFTA partners could benefit from modernizing the NAFTA intellectual property provisions, incorporating digital trade rules into the NAFTA, and building on the market access achieved in 1994, consistent with the negotiating objectives of Trade Promotion Authority. This undertaking should retain the three-party framework and ensure that there is no erosion of the protections and access that exist today. Below is MPAA's initial assessment of negotiating objectives with regard to NAFTA modernization.

Services and Investment

Mexico

The NAFTA, like other U.S. FTAs, has a ratchet clause which captures and binds autonomous liberalization post entry into force. Since 1994, Mexico has unilaterally liberalized its film and television sector and this post entry into force liberalization should serve as the starting point for modernizing NAFTA services obligations. For example, although Mexico has a non-conforming measure (NCM) for a 30 percent screen quota, over the years, this quota has been lowered to ten percent. Because of the ratchet clause, Mexico cannot raise its screen quota above ten percent;

this is the appropriate starting point for modernization negotiations. The same is true of Mexico's NCM requiring that the majority of each day's live broadcast programs must feature Mexican nationals; this impractical market access limitation is no longer reflected in Mexican law. The U.S. should work with Mexico to update its Annexes to reflect today's marketplace.

In addition to updating its annexes, MPAA hopes NAFTA will ensure Mexico revises the advertising limitations imposed on foreign broadcasters under the 2012 Federal Telecommunications and Broadcasting Act. This Act aims to promote domestically-made programming through incentives and restrictions on advertising. Foreign broadcasters, which are less likely to exhibit domestically-made content, are forced to abide by both daily and hourly advertising limits while their domestic and free-to-air counterparts are allowed almost twice the daily advertising limit and are not subject to hourly caps. Furthermore, a channel that dedicates 20 percent of its programming to independent domestic content qualifies for an additional five percent bonus in advertising time. This unfair treatment bluntly interrupts existing business models and makes it more difficult to distribute foreign content within Mexico, suppressing U.S. industry's trade surplus.

Further, MPAA recommends that the U.S. use NAFTA modernization as an opportunity to increase foreign ownership of broadcast networks in Mexico. Mexico currently maintains a 49 percent foreign equity cap for broadcast networks. The U.S. FCC recently permitted foreign entities to hold up to 100 percent of a broadcaster, subject to a case-by-case review. The U.S. should seize NAFTA modernization as an opportunity to further improve the investment climate in Mexico for U.S. persons.

Canada

Canada, much unlike Mexico and the United States, did not take any commitments in the NAFTA for film or television services and investment. Rather, Canada carved out the cultural industries from the scope of their NAFTA obligations (other than tariffs) via NAFTA Annex 2016. This means that the U.S. cultural industries, including the U.S. motion picture and television industry, do not benefit from the market opening disciplines of NAFTA with regard to the Canadian market, while Canadian industries have full access to the U.S. market. The NAFTA is the only U.S. trade agreement currently in force that includes a cultural carveout.

Such a carveout is inconsistent with the principles of free and fair trade. Cultural promotion and open markets are compatible and complementary. MPAA is committed to the promotion and protection of cultural diversity and firmly believes that NAFTA parties in the modernization negotiations can effectively rely on the flexibilities built into free trade agreements, including permissible support programs, to promote their cultural interests.

MPAA places high priority on ensuring non-discrimination in the online marketplace. Given the nature of the online marketplace – including essentially unlimited capacity, immense diversity, and rapid change – NAFTA should ensure non-discrimination in the online marketplace. The Canadian government has acknowledged that imposing quotas and other discriminatory measures online is unnecessary and would limit consumer choice.

In light of the effect of various distortions in its market, MPAA supports Canada's simultaneous substitution of advertising to broadcasts, including special events, which helps offset some of these distortions while also helping Canada's industry. Simultaneous substitution provides the Canadian broadcaster an independent source of revenue, increasing the value of broadcasts for Canadian broadcasters. NAFTA should affirm that simultaneous substitution is permitted without exception.

Another priority for MPAA is the elimination of foreign direct investment limitations in the pay-television market. Canada currently limits foreign ownership in the pay-television market to 20 to 46.7 percent, depending on the specific circumstances. Neither the U.S., nor Mexico, nor any other developed market in the world, maintains such discriminatory foreign investment limitations. NAFTA modernization negotiations should aim to improve the opportunities for U.S. foreign direct investment in Canada's pay-television market.

Intellectual Property Rights

Copyright is the lifeblood of the U.S. motion picture and television industry. As such, MPAA places high priority on securing strong protection and enforcement disciplines in the intellectual property chapters of trade agreements. Negotiated before the advent of the internet and the proliferation of online commerce, NAFTA's IP chapter is significantly out of date. A TRIPS-era agreement, NAFTA was negotiated prior to the negotiation of the 1996 WIPO internet treaties and the passage of the US Digital Millennium Copyright Act (DMCA). Consequently, NAFTA cannot address the serious challenge of online copyright theft confronted by the motion picture and television industry. Today almost one-quarter of the world's global bandwidth is dedicated to copyright infringement.

The U.S. Department of Justice (DOJ) and U.S. courts have also assessed the impact of online piracy in particular cases on the U.S. motion picture and television industry. In July 2016, the DOJ arrested and charged the owner of Kickass Torrents, an illegal file-sharing website, for distributing over \$1 billion of copyrighted materials. And, in January 2012, the DOJ charged the operators of MegaUpload.com with "running an international organized criminal enterprise allegedly responsible for massive worldwide online piracy of numerous types of copyrighted works, through MegaUpload.com and other related sites, generating more than \$175 million in criminal proceeds and causing more than half a billion dollars in harm to copyright owners."

While the U.S. motion picture and television industry is highly competitive, revenues from legitimate sales are undeniably suppressed because of massive online copyright theft. NAFTA must be modernized to effectively tackle this problem.

The U.S.-Korea Free Trade Agreement (KORUS) offers a number of good disciplines to inform a modernized NAFTA IP chapter. KORUS for the first time included a provision to criminalize unauthorized camcording in theaters, as well as civil and criminal remedies for satellite and cable signal theft. The KORUS also includes a strong framework for technological protection measures and uncompromised civil and criminal enforcement remedies.

The one KORUS provision that the MPAA would oppose incorporating into a modernized NAFTA is a rote recitation of Section 512 of the U.S. Digital Millennium Copyright Act (DMCA). Section 512 reflects an intent to foster a system of shared responsibility between copyright owners and service providers to deal with the problem of widespread infringement occurring over the internet. In a number of important areas that delineate this shared responsibility, however, the courts have strayed from the intent of the language and the overall purposes underlying section 512, to the detriment of content holders. Moreover, we have in recent years seen other countries more effectively and nimbly respond to online piracy in their markets through site blocking, notice-and-stay-down, and injunctive relief. As such, we recommend a new approach to this important trade policy provision by moving to high-level language that establishes intermediary liability and appropriate limitations on liability. This would be fully consistent with U.S. law and avoid the same misinterpretations by policymakers and courts overseas. In so doing, a modernized NAFTA would be consistent with Trade Promotion Authority's negotiating objective of "ensuring that standards of protection and enforcement keep pace with technological developments."

MPAA believes that a modernized NAFTA should build upon what was achieved in KORUS by harvesting discreet provisions from other negotiations and incorporating new disciplines to tackle online content theft. For example, subsequent trade negotiations have included a provision requiring aiding and abetting liability for all criminal copyright offenses. NAFTA could be modernized by ensuring that rightsholders have fully effective injunctive relief, as provided by Rule 65 of the U.S. Code of Civil Procedures.

One element of NAFTA that does not need updating is its article on exceptions and limitations to copyright. Similar to KORUS, NAFTA includes a clean recitation of the three-step test, providing both rightsholders and users a familiar and widely understood and accepted framework for exceptions and limitations to copyright. The three-step test, which is the time-tested standard reflected in TRIPS, the Berne Convention and the 1996 WIPO Internet Treaties, remains a flexible and broadly supported mechanism that supports appropriate exceptions, including in the digital environment.

In addition to these cross-cutting recommendations, MPAA offers the following market-specific observations.

Mexico

In several notable ways, Mexico's legal and enforcement regime falls short of an effective and modern copyright enforcement regime and falls short of meeting Trade Promotion Authority objectives. These include implementation of the WIPO Internet Treaties, criminalizing the act of unauthorized camcording, criminal sanctions for commercial scale infringement, civil enforcement procedures, statutory damages, criminal and customs enforcement remedies.

Online piracy is a serious and widespread problem in Mexico. There are a vast amount of infringing websites popular across Latin America, many of which are specifically targeting the Mexican market. For example, Pelis24.com, a streaming linking site, offers more than 150,000 links to more than 10,000 infringing films and television programs.

Having acceded to the WIPO Internet Treaties in 2002, Mexico has failed to fully implement these treaties. These treaties are fundamental to the legal infrastructure of digital trade providing, among other things, critical protections against the unlawful circumvention of technological protection measures (TPMs) and criminalizing trafficking in circumvention devices. TPMs enable the functionality of most online business models and contribute to the diversity of offerings and price-points consumers demand. Copyright owners use TPMs to authorize the distribution and making available of their works online and to prevent the unauthorized use of their works. As noted above, a modernized NAFTA would include the KORUS FTA anti-circumvention provisions..

These treaties also recognize that certain exclusive rights of copyright owners are critical to online commerce in the internet era, including the right to control the distribution of copies (including “making available”) and the right to control the manner in which their works are communicated to the public. The NAFTA must oblige all parties to implement these treaties fully. Both the U.S. and Canada have implemented these treaties; Mexico remains the outlier. Further, implementation of these treaties is imperative to meeting TPA’s objective of “ensuring that rightsholders have the legal and technological means to control the use of their works through the Internet and other global communication media.”

Moreover, a modernized NAFTA should include KORUS’ explicit recognition of copyright in temporary copies. Temporary copies have an increasing economic importance in the digital networked environment. The making and use of temporary copies is core to a variety of methods of consuming copyrighted works. It is critical that trade agreements include clear language to clarify that temporary copies are fully subject to the reproduction right in accordance with U.S. law.

The unauthorized camcording of films in Mexican theaters continues to cause significant harm to the U.S. motion picture industry. Eighty-five audio and video recordings of MPAA member company films were linked to Mexican theaters in 2016 placing Mexico as the most egregious foreign market globally for unauthorized camcording of MPAA member company films. Over 90 percent of online piracy during a movie’s theatrical run is driven by illegal camcords. Unlike the U.S. and Canada, Mexico has not criminalized the act of unauthorized camcording of films in theaters. Criminalizing the act of unauthorized camcording of films in theaters would assist not just U.S. rights holders whose films are being stolen, but also local theater owners and legitimate online and physical markets that are having to unfairly compete with the illegal sites that distribute these infringing camcords. As noted, KORUS included an effective camcording provision.

Currently in Mexico criminal sanctions for commercial scale infringement are only available if the infringement is for profit. This has hampered enforcement against the above-discussed camcording problem but also against online infringement, such as peer-to-peer piracy, that may be on a scale that is immensely harmful to U.S. rightsholders but nonetheless occur without profit by the infringer. The modernized NAFTA like other U.S. bilateral free trade agreements

must provide for criminal sanctions against commercial scale infringements without proof of profit motive.

Civil enforcement in Mexico is hampered because of limitations in the Telecommunications Law that prohibit ISPs from disclosing customer's personal information to rights holders seeking civil recourse against alleged infringers. MPAA and its member companies place the highest priority on securing both the legal and practical tools necessary to protect intellectual property rights in the digital age. As discussed above, a modernized NAFTA should include provisions that support legal frameworks which promote accountability and the rule of law and create incentives for intermediaries to cooperate with rights holders in combating this serious ongoing problem.

A modernized NAFTA should include a provision requiring deterrent-level statutory damages – a staple of U.S. free trade agreements since NAFTA. Although the U.S. Copyright Act has always provided for statutory damages, this provision is lacking in Mexico. Statutory damages compensate copyright holders for infringement when actual damages are difficult or impossible to calculate. In many cases of infringement, especially online, the fact of harm – even massive harm – is certain, but the amount of harm is difficult to quantify. Statutory damages provide a deterrent remedy against infringers and ensure that running an infringement-based business does not pay. For these reasons, this remedy is critical to our free trade agreements.

It is critical that our North American neighbors recognize the importance of preventing counterfeit trademark or pirated copyright goods from entering the channels of commerce, whether in the domestic market or intended for foreign markets. As such, Mexico should provide its customs authorities the ability to act *ex-officio* against imports, exports, goods in transit, and goods in free trade zones. Moreover, criminal penalties for counterfeiting and piracy, including providing the authority to order seizure of suspected infringing goods, forfeiture or destruction of such goods and destruction of material and implements used in their creation, and seizure of assets derived from infringements – should be part of the NAFTA IP chapter.

Canada

In addition to the cross-cutting intellectual property issues highlighted above, it is imperative that Canada extend the term of protection for all works measured by the life of the author to life plus 70 years. Extension of the term of protection for copyrighted works has a direct benefit to the creators of these works, as well as consumers. An extended term creates entrepreneurial opportunities, encouraging investment in new creative works, as well as the preservation, restoration and reissuing of older works in exciting new formats. This provides consumers more choice and preserves our cultural heritage. More than 90 countries around the world agree that extending copyright terms to the global minimum standard is necessary and appropriate in today's highly inter-connected world with simultaneous distribution of a wide variety of copyright-based products. U.S. FTAs after NAFTA have ensured that our trading partners move towards reciprocity for copyright term. Extending Canada's term of protection will ease the disparity of protection between Canada and its NAFTA partners, facilitating trade in copyrighted works across North America.

Digital Trade

The legitimate online marketplace for film and television content continues to expand and diversify. Today there are more than 450 legitimate online services around the world providing high-quality video on demand content to consumers. It is high-quality content that drives the success of these platforms and technological developments to respond to this demand.

Consider the following: Sandvine recently reported that in the U.S. “streaming audio and video now accounts for 71% of evening traffic in North American fixed access networks. Sandvine expects this figure will reach 80% by 2020.” Cisco estimates that by 2020, there will be one million minutes of video content crossing global IP networks each minute. And the U.S. Chamber of Commerce Global IP Center’s 2017 IP Index found a high correlation between strong copyright protection and innovative technologies for enjoying content. The Index also found that countries with high levels of copyright protection had wider and more convenient access to video content – more than double the level of advanced and easy access home entertainment.

Establishing disciplines that recognize the integral role of content in the online ecosystem, as discussed in the above intellectual property and services sections, is critically important to facilitating legitimate digital trade. Also important are provisions to ensure the free flow of data between markets and to prevent localization barriers. Finally, a modernized NAFTA should prohibit the assessment of duties on digital products delivered by electronic commerce.

Goods and Customs

MPAA member companies export a range of filmed entertainment products to Mexico and Canada delivering U.S. produced content to theaters, video rental stores and retail establishments, and free and pay television operators. These products fall under tariff lines 3706.10 and 3706.90 (cinematographic film) and 8523 (discs, tapes, digital cinema packs --hard drives used to distribute films to theaters globally – and other media, including matrices and masters for the production of discs).

It is noteworthy that Mexico’s Most Favored Nation tariff rate on digital cinema packs, DVDs and Blu-ray discs is 35 percent. It is important that there is no erosion of the current preferential zero tariff rate in the modernization negotiations.

Closing

The six major studios of the MPAA distribute film and television content throughout North America, maintaining a healthy trade surplus with both Canada and Mexico. Notwithstanding this singular achievement, there are serious disparities between the level of market access and intellectual property protections offered by the U.S. as compared to its closest neighbors.

Significant market access barriers as well as the inability to effectively protect and enforce intellectual property rights restrain the competitiveness of the U.S. motion picture and television industry. Modernizing the NAFTA as described above will allow this iconic U.S. industry to more fairly compete and further drive the U.S. trade surplus.

MPAA appreciates the opportunity to comment on NAFTA modernization and is ready to provide further information or answer questions as required.

Sincerely,

/Anissa Brennan/

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