



**Written Submission of the Recording Industry Association of America
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The Recording Industry Association of America (RIAA) is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85 percent of all legitimate recorded music produced and sold in the United States. Our membership includes several hundred companies, many of which are small-to-medium-sized enterprises (SMEs).

The RIAA welcomes this opportunity to provide this written submission to the United States International Trade Commission (the Commission) in response to 83 Fed. Reg. 52232 (October 16, 2018) with respect to Investigation No. TPA-105-003, *United States-Mexico-Canada Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors*, for the purpose of preparing the second and third of three reports requested by the Office of the United States Trade Representative (USTR) on January 13, 2017 under section 332(g) of the Tariff Act of 1930 (19 U.S.C. §1332(g)). Given our significant SME membership, this submission reflects the interests and priorities of U.S. sound recording industry SMEs.

Introduction

As a threshold matter, the strength of trade in U.S. recorded music in North America relies heavily on legal and market conditions that: advance creativity and innovation through strong copyright protection and enforcement; power digital trade through music licensing; secure market access for digital products and services; promote fair competition between online music services; and ensure digital platform accountability.

The following analysis of the United State-Mexico-Canada Agreement (USMCA) is based on these priorities and is framed in the context of the importance of the North American market to our industry and, in turn, our industry's contributions to the U.S. economy, as set forth below.

The North American Market is Critical to the U.S. Recording Industry

The North American market – the largest music market in the world, accounting for nearly 37 percent of total global revenues in 2017 – is critical to the U.S. sound recording industry. The North American market is also the world’s largest digital music market, representing over 50 percent of total global digital revenues. Within digital, the North American market also leads in terms of music streaming, generating over 44 percent of total global digital revenues.¹

Canada was the seventh-largest market for the music industry in the world in 2017. Canada is also the seventh-largest digital music market globally, with digital accounting for 65 percent of the music industry’s revenues in the Canadian market. Canada also ranks ninth globally in terms of streaming, where streaming accounted for 53.6 percent of total sales in that market.²

Mexico was the 18th-largest market for the music industry in the world in 2017. Mexico is also the 13th largest digital music market globally, where digital accounts for 79 percent of the music industry’s revenues in the Mexican market. Streaming propelled this growth, increasing by 60.7 percent in 2016. Streaming comprised the majority of industry revenue in Mexico at 72.5 percent of total sales in the market.³

U.S. Recording Industry’s Contributions to the U.S. Economy, Jobs and Competitiveness

Therefore, the North American trade relationship is a high priority for the U.S. sound recording industry. Our industry is highly trade-intensive and relies heavily on international commerce with Canada and Mexico supported by strong disciplines that promote creativity and that ensure fair and legitimate trade in creative goods and services.

Supported by such disciplines, our industry makes considerable contributions to U.S. economic growth, high-quality American jobs, and U.S. trade competitiveness. For example, the industry contributed \$143 billion annually in value to the U.S. economy in 2016 and created, directly or indirectly, 1.9 million U.S. jobs across a very wide variety of fields.⁴ Likewise, copyright-intensive industries, including the music industry, contributed \$1.3 trillion to the U.S. economy

¹ IFPI; *Global Music Report 2018*; pp. 69-70, 74; available at: <http://www.ifpi.org/downloads/GMR2018.pdf>.

² IFPI; *Global Music Report 2018*; pp. 49-51, 54, and 85; available at: <http://www.ifpi.org/downloads/GMR2018.pdf>.

³ IFPI; *Global Music Report 2018*; pp.49-51, 54, and 108; available at: <http://www.ifpi.org/downloads/GMR2018.pdf>.

⁴ Siwek, Stephen; *The U.S. Music Industry: Jobs & Benefits*; April 2018; pp. 5, 7; available at: <http://www.riaa.com/wp-content/uploads/2018/04/US-Music-Industries-Jobs-Benefits-Siwek-Economists-Inc-April-2018-1-2.pdf>

in 2017, and grew at an aggregate annual rate of 5.23 percent from 2014 to 2017, compared with average annual growth rate of 2.10 percent for the U.S. economy generally.⁵ These industries supplied 5.7 million U.S. jobs in 2017,⁶ and the compensation paid in the copyright-intensive industries far exceeds that of U.S. workers overall – amounting to a compensation premium of 39 percent over the average U.S. annual wage.⁷

Strong copyright regimes help drive U.S. sound recording industry exports and surplus of goods and services. For instance, the sale of U.S. copyright products in third countries around the world amounted to \$191.2 billion in 2017. Notably, these foreign sales surpass the sales of other major U.S. industries, including electronic equipment, appliances and components (\$174.2 billion), agricultural products (\$138.2 billion), chemicals (excluding pharmaceuticals & medicines) (\$137.0 billion), aerospace products and parts (134.4 billion), and pharmaceuticals and medicines (\$55.8 billion).⁸ As for services, intellectual property rights (IPR) licensing, including copyright licensing with respect to sound recordings, is the second largest services export category valued at \$128 billion in 2017 (representing 16 percent of total U.S. exports of services), and which accounted for a \$77 billion trade surplus that year.⁹

Moreover, the U.S. sound recording industry is digital trade intensive, with digital accounting for 90 percent of our revenues in the United States, and streaming accounting for 75 percent of revenues. The licensing of copyright that protects sound recordings is a digital service that fuels trade in sound recordings, which are digital products that can be streamed or downloaded. The profound importance of the provision of such services to the U.S. economy is exemplified by the considerable contributions of IPR to the U.S. digital services trade surplus. IPR licensing

⁵ Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2018 Report*; Economists Incorporated; Prepared for the International Intellectual Property Alliance; 2016; p. 3; available at: <https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf>

⁶ Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2018 Report*; Economists Incorporated; Prepared for the International Intellectual Property Alliance; 2016; p. 3; available at: <https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf><https://www.uspto.gov/sites/default/files/documents/IPAndtheUSEconomySept2016.pdf>.

⁷ Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2018 Report*; Economists Incorporated; Prepared for the International Intellectual Property Alliance; 2016; p. 3; available at: <https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf>

⁸ Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2018 Report*; Economists Incorporated; Prepared for the International Intellectual Property Alliance; 2016; p. 3; available at: <https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf>

⁹ Allen, Shari; Grimm, Alexis; and Steiner, Christopher; “U.S. International Services: Trade in Services in 2017 and Services Supplied Through Affiliates in 2016”; *Survey of Current Business, The Journal of the U.S. Bureau of Economic Analysis*; Volume 98, Number 10; October 2018; available at: <https://apps.bea.gov/scb/2018/10-october/1018-international-services.htm>

remained a key driver of the U.S. digital services exports and surplus. For example, in 2017, IPR licensing accounted for \$129 billion in digital services trade exports and generated a \$78 billion digital services trade surplus, which was second only to financial services by a narrow margin.¹⁰

Likely Impacts of the USMCA on the U.S. Recording Industry

On so many issues, the U.S Trade Representative and his team are stalwart defenders of American music creators and the American music marketplace is better for it. We are grateful. We also understand that USTR must navigate a complex trade landscape, and we appreciate the hard work of USTR and the U.S. interagency in negotiating the USMCA. The agreement contains several positive provisions for our industry, as well as provisions of concern. We enumerate these key provisions below and have endeavored to include an assessment of the likely impact of those provisions.

National Treatment

RIAA welcomes Article 20.8 of the USMCA, which provides for full national treatment with respect to all categories of intellectual property covered in the agreement, including copyrights and related rights. This provision improves upon the national treatment provision of NAFTA, which did not extend full national treatment to all categories of intellectual property, i.e., the rights of performers in respect of secondary uses of sound recordings.¹¹

Article 20.8 of the USMCA is of particular importance to the U.S. recording industry given Canada's longstanding discriminatory treatment of U.S. sound recordings. Specifically, while Canada provides for terrestrial public performance royalties for Canadian repertoire, it denies such royalties to U.S. repertoire. Canada's discriminatory treatment results in losses of approximately \$20 million per year to the U.S. recording industry. The negative impact of this failure to provide full national treatment is particularly significant in Canada, which is second only to Germany in terms of total time spent listening to music from broadcast radio.¹²

RIAA strongly urges Canada to fully implement Article 20.8 and end its discriminatory treatment of the U.S. sound recording industry. RIAA further asks the U.S. government to

¹⁰ Allen, Shari; Grimm, Alexis; and Steiner, Christopher; "U.S. International Services: Trade in Services in 2017 and Services Supplied Through Affiliates in 2016"; *Survey of Current Business, The Journal of the U.S. Bureau of Economic Analysis*; Volume 98, Number 10; October 2018; available at: <https://apps.bea.gov/scb/2018/10-october/1018-international-services.htm>

¹¹ See NAFTA, Article 1703(1)

¹² IPSOS Connect and IFPI, Music Consumer Insight Report 2017, available at <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2016.pdf>

actively monitor and enforce Canada’s compliance with its commitments to provide full national treatment, including with respect to measures of equivalent commercial effect in response to any discriminatory action by Canada against the U.S. recording industry as a cultural industry under the agreement.

Copyright Term

The U.S. recording industry also welcomes Article 20.63 on copyright term, which provides for not less than 70 years on the basis of the life of a natural person, and not less than 75 years from the end of the calendar year of the first authorized publication. This provision also improves upon the NAFTA copyright term provision. While the terms in Article 20.63 are below those in the United States and Mexico, they do represent improvements with respect to Canada, benefitting songwriters and music publishers in particular. Article 20.63 also sets an important global precedent.

Copyright Exceptions

RIAA supports Article 20.65 of the USMCA on copyright limitations and exceptions, which preserves the internationally recognized three-step test.¹³ We applaud the Administration’s re-affirmation of the longstanding U.S. position on limitations and exceptions, and its rejection of prior flawed proposals on open-ended “balance” and fair use provisions. Article 20.65 is consistent with NAFTA. While this provision is less an example of positive economic impact, than of negative economic impact avoidance, it is nonetheless welcome. Economic literature supports this conclusion, i.e., that open-ended fair use exceptions – particularly those without the strong copyright protections and enforcement provided in U.S. law, supported by 150 years of jurisprudence – may have significant negative economic impacts.¹⁴

¹³ See USMCA, Article 20.65.1 (providing “...each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.”).

¹⁴ See e.g. PWC; *The Expected Impact of the ‘Fair Use’ Provisions and Exceptions for Education in the Copyright Amendment Bill on the South African Publishing Industry*; July 2017; available at: www.publishsa.co.za/file/1501662149slp-pwcreportonthecopyrightbill2017.pdf; See e.g., PWC, *Understanding the Costs and Benefits of Introducing a ‘Fair Use’ Exception*; February 2016; available at: <https://static-copyright-com-au.s3.amazonaws.com/uploads/2016/02/R01501-PwC-FairDealing-CBA.pdf>; See e.g., Ford, George S., *The Economic Impact of Expanding Fair Use in Singapore: More Junk Science for Copyright Reform*, Phoenix Center Policy Perspectives; No. 16-01; February 16, 2016; available at: <https://ssrn.com/abstract=2837315>.

Moreover, the alleged economic benefits of fair use asserted by some have been largely unsupported and un-sustained.¹⁵ As one study states, “Searching for some economic justification for liberal application of fair use, advocates often claim that highly permissive fair use policies stimulate economic activity. Yet, no evidence exists to support such claims; all attempts to demonstrate such effects have been riddled with numerous and fatal errors.”¹⁶ For example, while the Computer & Communications Industry Association claims that fair use is responsible for 16 percent of U.S. GDP, that claim rests precariously on the assertion that all of “...the jobs, value added, and sales in broad economic sectors are claimed to depend *entirely* on fair use.”¹⁷

Digital Platform Immunities for Copyright Infringement

The U.S. sound recording industry continues to have deep concerns with Article 20.89 on legal remedies and safe harbors, which provide overbroad limitations on liability for online Internet Service Providers (ISPs) for copyright infringement. The provision omits critical aspects of U.S. law, and provides significant discretion to Canada and Mexico to depart from Article 20.89 to the detriment of the U.S. recording industry. As a result, digital platforms that actively make user uploaded music available to the public without the authorization of the right holder can use

¹⁵ See e.g., Barker, George; *Claims to Expand Copyright Exceptions Driven by “Bad Science”*; Australian National University; London School of Economics; Law and Economics Consulting Associates Ltd; June 2016; available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795498; Charles Rivers Associates; *Assessing the economic Impacts of Adapting Certain Limitations and Exceptions to Copyright and Related Rights in the EU* (European Union, 2013, ISBN: 978-92-79-29919-3); available at: http://knjiznica.sabor.hr/pdf/E_publicacije/Assessing_the_economic_impacts.pdf; Barker, George, *Estimating the Economic Effects of Fair Use and Other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore*; November 26, 2012; available at: SSRN: <https://ssrn.com/abstract=2180769> or <http://dx.doi.org/10.2139/ssrn.2180769>; Barker, George; *Agreed Use and Fair Use: The Economic Effects of Fair Use and Other Copyright Exceptions in the Digital Age*; 2013 Annual Congress of the Society for Economic Research on Copyright Issues (SERCI) held in MINES ParisTech, Paris (France); July 9, 2013; available at: SSRN: <https://ssrn.com/abstract=2298618> or <http://dx.doi.org/10.2139/ssrn.2298618>

¹⁶ Ford, George S.; “Fair Use and the Economy: A Review of CCIA’s Estimate”; *Perspectives*; Phoenix Center for Advanced Legal & Economic Public Policy Studies; June 27, 2018; p. 1; available at: <http://phoenix-center.org/perspectives/Perspective18-05Final.pdf>. See also See, e.g., G.S. Ford, *The Vanishing Benefits of Fair Use: A Review of the Flynn-Palmedo Study on “User Rights” in Copyright Law*, Phoenix Center Policy Perspective No. 17-12; December 18, 2017; available at: <https://ssrn.com/abstract=3138855>; Ford, George S.; *The Lisbon Council’s 2015 Intellectual Property and Economic Growth Index: A Showcase of Methodological Blunder*; Phoenix Center Policy Perspectives No. 15-03; June 29, 2015; available at: <https://ssrn.com/abstract=2837319>;

¹⁷ Ford, George S.; “Fair Use and the Economy: A Review of CCIA’s Estimate”; *Perspectives*; Phoenix Center for Advanced Legal & Economic Public Policy Studies; June 27, 2018; p. 2; available at: <http://phoenix-center.org/perspectives/Perspective18-05Final.pdf>.

these provisions in Canada and Mexico as a shield against copyright liability and avoid licensing music on commercial terms as other digital service do.

Specifically, Article 20.89.1 provides in relevant part that the USMCA framework of legal remedies and safe harbors shall include both legal incentives and copyright infringement limitations for Internet service providers. However, the remainder of the provision is focused primarily on those limitations, while omitting key legal remedies relied on by rights holders that provide such incentives for ISPs to cooperate with those rights holders to deter piracy. Critically, the USMCA does not require the deeper spectrum of remedies offered by U.S. law, including in particular an obligation to provide for secondary liability.

Additionally, the safe harbor provision creates an overly-broad exception to the limited remedies set forth in the USMCA. Not only does the USMCA extend the current ineffective notice and takedown system, it also grants to Mexico and Canada expansive carveouts so that their own safe harbor systems will depart significantly from (and further expand the copyright safe harbor in) the USMCA provision itself.¹⁸ Specifically, Mexico will be permitted to continue to fail to provide secondary liability remedies to American copyright holders, and footnote 119 permits Mexico to depart from the standards in Article 20.89 on the basis of undefined constitutional considerations, including the imposition of additional government intervention into the already ineffective notice and takedown process. Chile's implementation of the safe harbor provisions in its trade agreement with the United States exemplify these concerns in terms of how such government intervention can render notice and takedown systems effectively unworkable.

Likewise, Canada is exempted from the key obligations in Article 20.89, and instead can simply continue with its existing and highly-problematic system, which includes only notice and notice obligations – thereby permitting infringing content to remain online and piracy to flourish. Thus, digital platforms in Mexico and Canada face little incentive (and less than in the United States) to combat piracy and pay fair value for creative content.

The commercial impact of these provisions is considerable. For example, the recording industry losses between \$650 million and \$1 billion in the United States annually as a result of the misapplication of this U.S. law by user uploaded content platforms.¹⁹ While Canada will simply maintain its ineffective notice and notice system, resulting in the continued prevalence of music

¹⁸ USMCA, footnote 118. See also Annex 20-A, i.e., Annex to Section J.

¹⁹ Beard, Ford, and Stern, "*Safe Harbors and the Evolution of Music Retailing*," Phoenix Center for Advanced Legal & Economic Public Policy Studies, Policy Bulletin No. 41, March 2017, available at <http://phoenix-center.org/PolicyBulletin/PCPB41Final.pdf>

piracy in its market, the negative commercial impact of Article 20.89 will be particularly significant in Mexico. This is because Mexico has the highest reach of YouTube²⁰ for music (99% of users surveyed), and the largest increase in stream ripping piracy (predominantly from YouTube) of any country (66% growth from 2015 of users surveyed). Mexico has the highest percentage of pirate-site users of any country (71% of users surveyed), and users in Mexico are among the most likely of any country to turn to YouTube when pirate sites are unavailable. Users in Mexico are also the most likely to turn to stream ripping from YouTube when pirate sites are unavailable.²¹

Finally, RIAA supports the views of both the Labor Advisory Committee (LAC) and International Trade Advisory Committee on Intellectual Property (ITAC-13) with respect to Article 20.89 of the USMCA. For example, the LAC report finds that:

While NAFTA 2018 strengthens some of the original NAFTA’s copyright protections for creative sector workers who rely on strong copyright protections for their residuals income, its rules further incentivize internet service providers and online content platforms to shirk responsibility for copyright infringement and other unlawful acts by exporting controversial U.S. copyright safe harbor and platform immunity standards.²²

Likewise, the ITAC-13 report states that “the Committee believes that the text is missing important elements (e.g., explicit principles of secondary liability for infringement) or uses text that should not be the model moving forward (e.g., ISP safe harbors).”²³ The report concludes:

ITAC-13 is concerned by the inclusion of detailed prescriptive provisions on copyright safe harbors for online service providers that incorporate highly-contentious issues into this Agreement. Effective safe harbors are necessary for a legitimate online ecosystem, but the proper interpretation and application of those safe harbors is very complex with many different and strongly-held views on all sides. The operation of the system for safe

²⁰ YouTube claims immunity from copyright infringement under U.S. law on safe harbors and uses such immunity as a shield against negotiating music licenses on commercial terms.

²¹ IPSOS Connect and IFPI, Music Consumer Insight Report 2017, available at <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2016.pdf>

²² The Labor Advisory Committee on Trade Negotiations and Trade Policy; *Report on the Impacts of the Renegotiated North American Free Trade Agreement*; September 27, 2018, page 10; available at: <https://ustr.gov/sites/default/files/files/agreements/FTA/AdvisoryCommitteeReports/Labor%20Advisory%20Committee%20on%20Trade%20Negotiations%20and%20Trade%20Policy%20%28LAC%29.pdf>

²³ ITAC 13, *Report to USTR on the USMCA*, page 17; available at: <https://ustr.gov/sites/default/files/files/agreements/FTA/AdvisoryCommitteeReports/ITAC%2013%20REPORT%20-%20Intellectual%20Property%20Rights.pdf>

harbors in the United States, which dates back two decades, is constantly changing due to rapid changes in technology, judicial evolution, and shifting business conditions. At the same time, increasing questions are being raised whether such detailed provisions reflect the “state of the art” in this complicated area.²⁴

This provision should not be replicated in U.S. trade agreements moving forward.

Digital Trade

As we have stated in previous filings, platform accountability should be a central feature of U.S. digital trade policy. We note that platform accountability is not reflected in Chapter 19. While the Internet presents opportunity for legitimate commerce, there are also significant and copious challenges to such commerce. Such challenges include illicit content, whether copyright infringing or other illegal content, but is not limited to such content. Many other threats to economic and national security as well as individual security and democratic institutions also proliferate in the digital ecosystem.

Internet platforms must be accountable with respect to addressing illegal material on their platforms and do a better job in ensuring that they are not used for infringing or other illegal activity. The argument that someone else initiated the illegal activity should not absolve platforms from the reality that, but for their services, the third party may not have been able to engage in the illegal act in the first place. Digital trade policy should not automatically promote safe harbors and platform immunities as the *sine qua non* for Internet growth.

This is particularly true of trade agreement provisions, which often are simply incapable of fully reflecting the complexity, extent and nuance of U.S. law, including its jurisprudence, and where the drafting of such provisions present a significant risk that they will not be adequately transposed and will be implemented or interpreted in a manner inconsistent with U.S. law. Moreover, in view of the fact that the United States is currently reviewing several aspects of U.S. law, and either has made or is actively considering several future changes to law, with respect to platform accountability, including such provisions in trade agreements presents considerable risk of exporting outdated law and significantly circumscribing congressional legislative prerogative regarding changes to that law.

²⁴ ITAC 13, Report to USTR on the USMCA, page 18-19; available at: <https://ustr.gov/sites/default/files/files/agreements/FTA/AdvisoryCommitteeReports/ITAC%2013%20REPORT%20-%20Intellectual%20Property%20Rights.pdf>

Cultural Carveouts

RIAA is also concerned with Article 32.6 on cultural industries (Chapter 32 on Exceptions and General Provisions), which exempts Canada from all of its obligations – except for customs duties and programming services – under the USMCA with respect to cultural industries, including the U.S. recording industry. While RIAA notes the reciprocity (Article 32.6.3) and retaliation (Article 32.6.4) provisions available to the United States, this cultural industry carve out could have significant negative economic impacts on the U.S. recording industry and should not be replicated in agreements moving forward.

Conclusion

RIAA welcomes this opportunity to provide these comments to the ITC regarding the likely economic impacts of the USMCA on the U.S. recording industry. RIAA looks forward to continuing to engage with the ITC on this and future U.S. trade agreements.