The Honorable Robert Lighthizer
United States Trade Representative
600 17th Street, NW
Washington, D.C. 20006

The Honorable Kevin Brady and Richard Neal
Committee on Ways and Means
United States House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

Ambassador Lighthizer, Chairman Brady and Ranking Member Neal,

The purpose of the North American Free Trade Agreement (NAFTA) is, and should remain, to ensure free trade among the parties to the agreement. Revisiting the provisions regarding intellectual property—and copyright in particular—is appropriate in light of the manner in which the digital revolution has changed the commercial landscape. The administration should be commended for taking the lead in this process, and we seek to contribute to its efforts to create a NAFTA that will continue to foster the continued evolution of the digital commerce revolution the United States has led over the last few decades.

We should exercise caution by not becoming, for example, bogged down with heightened intellectual property provisions, especially when these provisions serve a limited segment of interested groups, rather than all Americans. Instead, negotiators must strive to implement the kind of frameworks enshrined in U.S. law that have historically proved to promote innovation and economic growth.

In light of this general framework, R Street and FreedomWorks urge United States Trade Representative negotiators and policymakers in Congress to consider the following objectives as NAFTA negotiations and oversight continue:

A light touch should be taken when approaching Intellectual Property (“IP”) provisions in any agreement primarily aimed at ensuring free trade. More appropriate fora exist, such as domestic law or international intellectual property agreements, to take up the broad questions of IP and its limits. To the extent that IP must be incorporated into NAFTA modernization, negotiators should take care to ensure protections adhere to the U.S. model. IP provisions should not asymmetrically place stringent obligations on parties to protect narrowed IP rights. Trade negotiators should seek limitations and exceptions to allow for new entrants, such as derivative works, to enter the market.

With respect to copyright, current U.S. law incorporates fair use standards that should form the basis of NAFTA's copyright provisions.[1] The four factor test for fair use provides a basis for protecting creators without stifling future innovation and economic growth. It may be unrealistic to simply codify this text in NAFTA, but NAFTA could include language similar to TPP's call for parties to "endeavor to achieve balance" in copyright, which may include exceptions such as fair use. While fair use is not without its critics, if a content holder believes the work does not fall within the four factor test, a judge is within her discretion to rule it as an infringing work. This fair use test has increased in popularity around the world. While each country has its own set of factors, fair use has become a customary and effective means of protecting both new entrants and rights holders. Weakening this provision would stifle innovation and leave rights holders vulnerable to onerous litigation with decisions on whether a work is infringing left to the discretion of judges.

U.S. law also includes notice and takedown provisions that allow for cooperative approaches to address potential infringement without imposing costly burdens on either party or on platforms.[2][3] This system was created to place an equal burden on both creators and users. While it may be time consuming on the part of creators to seek out what they believe to be infringing content, a separate burden is placed on the alleged infringer to provide evidence their work is protected under an exception in U.S. law. This system is not perfect, but any alteration may upset the current internet ecosystem.

NAFTA provisions should enshrine a general notice and takedown framework while allowing parties enough flexibility to address future challenges through the legislative process. In this way, proposed changes would be subject to public comment and congressional hearings. Similar comment submissions have been requested by the Copyright Office, which found the majority of respondents requested the current system remain intact. The United States should seek to maximize the flexibility for American lawmakers to make reforms as they seek to secure innovators' rights and preserve the unique and vital functions of the internet, rather than tying their hands with overly rigid international agreements.

The United States has hitherto recognized that not all uses of copyrighted material are equal, and flexible standards are best equipped to efficiently protect legitimate claims while allowing for certain limitations and exceptions as articulated under the Copyright Act of 1976, as amended. Rigid obligations on both rights holders and users can have the effect of locking in requirements that will not be able to adapt to emerging technologies and application of protected works in future market conditions.

Blocking websites and imposing intermediary third party liability for infringement are perfect examples of overly rigid standards. This approach, advocated for in a recent letter from the

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[1] 17 USC § 107
[2] 17 USC § 512
[3] U.S. Copyright Office *Section 512 Study* (2016) (available at https://goo.gl/521CkE).

Motion Picture Association of America,[4] would be disastrous for U.S. economic growth and would represent a departure from current U.S. law, which rejects such intermediary liability. The colossal costs on legitimate online commerce, combined with a chilling effect on speech, would severely stifle future innovation and threaten the internet as a crucial pillar of America's economic future.

The administration has expressed interest in expanding the use of digital rights management (DRM) to lock out users from accessing copyrighted materials even for non-infringing uses. This would cause a decline in consumers wanting to purchase and use emerging technologies, such as smart assistants, automobiles and even digital readers. Likewise, it would prevent researchers from finding vulnerabilities in such systems. By locking these technologies from repair or resale, we risk creating burdensome monopolies and an almost foregone secondary market. While the U.S. has a system in place for applying for exemptions to unlock DRM, we cannot be sure Mexico and Canada will follow suit. Even within in the United States, debates over DRM have not been completely resolved. For these reasons, updating NAFTA should not involve adding provisions related to the circumvention of "technological protection measures."

Thank you for your time and consideration, please do not hesitate to contact us with questions or concerns.

Respectfully,

R Street Institute
FreedomWorks

[4] Anissa Brennan, *Letter from MPAA Re: Request for comments on Negotiating Objectives Regarding Modernization of the North American Free Trade Agreement with Canada and Mexico*, June 12, 2017 (available at https://goo.gl/A2gYiK) 4-5.