



18 July 2017

NAFTA Consultations
Global Affairs Canada
Trade Negotiations – North America (TNP)
Lester B. Pearson Building
125 Sussex Drive
Ottawa, ON K1A 0G2

RE: NAFTA Consultations: CIPPIC Comments regarding *Consultations on the renegotiation and modernization of the North American Free Trade Agreement, Canada Gazette Part I, Vol. 151, No. 22 (June 3, 2017)*

The Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC) is a legal clinic based at the Centre for Law, Technology & Society at the University of Ottawa's Faculty of Law in Canada. Founded in 2003, CIPPIC's mission is to contribute to public policy debates on technology law issues, ensure balance in policy and law-making processes, and provide legal assistance to under-represented organizations and individuals on matters involving the intersection of law and technology.

CIPPIC welcomes the opportunity to provide comments on the Government of Canada's objectives regarding the renegotiation of the North American Free Trade Agreement (NAFTA). Our primary purpose in responding is to ensure that an updated NAFTA does not hamper Canada's ability to shape domestic digital policy in the best interest of Canadians. We are particularly wary of attempts to include prescriptive intellectual property and digital trade rules that may impede trade and innovation, while simultaneously undermining other important policy objectives, including consumer privacy, security research, the free flow of information, and net neutrality and open communications systems. Canada must continue to push for a digital policy agenda that benefits Canadians.

CIPPIC urges the Government of Canada to: (i) act transparently and actively consult with Canadians throughout the entire negotiation process, (ii) recognize that NAFTA is an inappropriate forum for legislating Canada's intellectual property and digital rights frameworks, and (iii) reject unbalanced substantive copyright provisions that are contrary to Canada's interest.

Transparency

The process for renegotiating NAFTA should be manifestly open, transparent, and inclusive of citizens and civil society. The Canadian public is a key stakeholder in the NAFTA negotiation process because digital policy has significant and far reaching effects on the livelihoods of Canadians. Digital issues such as copyright, net neutrality, and data transfer protections touch on fundamental rights of privacy and freedom of expression. Intellectual property rights play a key role in stimulating the creation of diverse cultural works, enriching learning and education, and fostering innovation and economic prosperity. Meaningful public participation should thus be a requirement of the NAFTA renegotiation process.

The Standing Senate Committee on Foreign Affairs and International Trade expressed concern about the lack of transparency in trade negotiations in its recent study on the benefits and challenges of Free Trade Agreements.¹ Opaque negotiations, such as those undertaken in the Trans-Pacific Partnership (TPP), are particularly troubling because the effect of such agreements on domestic policy is often tremendous. The Committee notes that public confidence in international trade is increasingly important as other developed nations experience rising protectionist sentiment, from which “Canada is not immune.”² A lack of transparency may contribute to “a perception that [FTAs] are not necessarily negotiated in the public interest, and to scepticism about [their] economic benefits.”³ As such, the Committee recommends that the Government of Canada engages Canadians more actively and more directly in consultations.

CIPPIC agrees with these recommendations, and calls on the Government to establish a formal consultation process that (1) defines the negotiating mandate, (2) continues consultations throughout the negotiation process, (3) provides timely updates that are open to all relevant stakeholders, including the public, and that include consolidated texts after each negotiating round, and (4) leads to the identification of measures for the implementation of the agreement.

NAFTA is not a policy-making forum

Free trade agreements such as NAFTA are not the proper forum for setting digital policy. Trade negotiations are not democratic forums; they do not allow for full participation from all stakeholders, especially considering the lack of transparency noted above. Democratic nations establish substantive laws through legislative bodies that are responsible to the electorate. Substantive digital policies and laws ought not to be imposed by executive negotiation at the trading table. Indeed, Canadian policy-makers have long recognized that domestic digital policy interests are best served by multilateral negotiations, which set international minimum standards through consensus, but allow for flexible implementation. NAFTA should not be the forum through which Canada concedes to prescriptive rules on intellectual property and digital rights.

¹ Senate, Standing Committee on Foreign Affairs and International Trade, *Free Trade Agreements: A Tool for Economic Prosperity* (February 2017).

² *Ibid* at xii.

³ *Ibid* at x.

Intellectual Property

According to the Government of Canada's own trade and IP agenda, its strategy is "to develop IP rules at home and then seek to reflect these outcomes in multilateral forums."⁴ This approach allows Canada to maintain a balanced intellectual property framework that fosters innovation and creativity, while also ensuring appropriate access to end users.

The push from intellectual property intensive economies to disregard multilateral forums and use trade agreements to impose strict IP laws on trading partners is inconsistent with Canada's trade and IP strategy. During TPP negotiations, American industry interests successfully advocated for restrictive IP rules including excessive copyright term length, and increased criminalization of infringements. The TPP intellectual property provisions were stricter than existing international standards, and would have required changes to Canadian IP law upon implementation.

Imposing substantive IP laws through trade negotiations is problematic for a number of reasons. First, as mentioned above, the free trade agreements are not a democratic policy setting forum. While certain industry groups have broad access to the negotiation process, many domestic stakeholders are left in the dark as to any proposed rules. In order to maintain Canada's carefully balanced intellectual property policy, stakeholder consultations should include creator groups (such as musicians and software developers), rights-holder groups (including groups such as documentary filmmakers and academic creators) and user communities (such as consumer groups and security researchers), as well as intermediaries (such as Internet Service Providers and consumer electronics innovators). Further, intellectual property standards should only be adopted through evidence-based policy, which is difficult to achieve through trade negotiations.

Second, Canada is a net importer of intellectual property and will be harmed economically by stronger intellectual property rights protections. In trade discussions, concessions occur as part of a give and take. Net-importer nations of IP like Canada might be expected to accept trade obligations that exacerbate its trade deficit in return for concrete gains in other sectors of the economy in which it enjoys a competitive advantage. Critics of the TPP pointed to specific provisions like copyright term extension that would benefit intellectual property intensive economies at Canada's expense.

Third, prescriptive intellectual property rules in NAFTA will limit Canada's flexibility to shape a domestic policy agenda appropriate for technological changes and the evolving needs of the Canadian economy. Using NAFTA to set intellectual property rules that exceed existing international standards could freeze the evolution of Canadian intellectual property law and create conflicts with other trade partners.

Novel digital rights issues

NAFTA is also an inappropriate forum for addressing novel digital rights issues. The TPP included restrictions on data localization requirements, bans on data transfer limitations, restrictions on mandatory source code disclosures, and a limited net neutrality framework. These

⁴ Michael Geist, "Canadian Officials Admit TPP IP Policy Runs Counter to Preferred National Strategy" (26 April 2016), *Michael Geist* (blog), online: <www.michaelgeist.ca/2016/04/canadian-officials-admit-tpp-ip-policy-runs-counter-to-preferred-national-strategy/>.

digital rights issues affect important values that are not properly addressed through trade agreements, such as protection of consumer safety and privacy, the promotion of access to information and freedom of expression. While increased cross-border data flow and the codification of open internet principles are laudable goals, these issues should not be addressed solely or predominantly through the lens of trade.

Substantive Policy

Despite the inappropriateness of the forum, CIPPIC acknowledges that prescriptive intellectual property rules are likely to be advanced by our negotiation partners during NAFTA discussions. CIPPIC is particularly concerned about specific copyright provisions that were included in the TPP, which may be used as a starting point for the United States negotiating position. Canada should reject TPP style provisions that extend copyright term, increase criminalization of copyright law, and lead to a loss of policy flexibility for future Canadian copyright reforms. The NAFTA renegotiation represents an opportunity for Canada to take a leadership role in resisting asymmetric copyright rent-seeking and advocate for balanced copyright policies that support innovation and new forms of creativity.

Do not extend copyright term of protection

CIPPIC does not support the inclusion of a clause mandating a copyright term extension. The already lengthy life of the author plus an additional 50 years required by the Berne Convention adequately protects the economic interests of rights holders and their families. Term extension harms the current balance in Canada's copyright policy by restricting access and competition with virtually no gain in innovation or creativity.⁵

Term extension creates harm by reducing Canadians access to works entering the public domain. A robust public domain is a rich source of content for innovative and upstart Canadian publishers. The public domain represents an opportunity to breathe new life into old works. By facilitating this creative process, the public domain enriches the public life of all Canadians. Default market conditions require competition. It must always be remembered that copyright is a necessary exception to that default condition. Copyright's limited term restores the default condition of competition to the marketplace.

Term extension disproportionately benefits the US economy at Canada's expense. New Zealand, like Canada a net-importer of IP, has estimated that an extension from 50 years to 70 years will cost its economy NZ\$55 million per year.⁶ A draft report from the Australian government's Productivity Commission pointed to estimates of AU\$88 million per year for term extension.⁷ Canadians might expect a similar economic burden.

Moreover, term extensions would add to the problem of "orphan" works and damage the long-

⁵ Michael Geist, "The Trouble with the TPP's copyright rules" (July 2016) Canadian Centre for Policy Alternatives, online: <www.policyalternatives.ca>.

⁶ Henry Ergas, "Economic Modelling on Estimated Effect of Copyright Term Extension on New Zealand Economy" (2009) online: <www.tpp.mfat.govt.nz/assets/docs/TPP%20-%20Analysis%20of%20Copyright%20term%20extension,%20explanatory%20cover%20note.pdf>.

⁷ Australian Government Productivity Commission, *Intellectual Property Arrangements: Draft Report* (August 2016).

term availability of works transitioning to the public domain.

Term extension is a touchstone copyright issue for many Canadians and represents an important opportunity for Canada to push back against unbalanced copyright policies that run counter to the public interest.

Resist stricter anti-circumvention provisions and criminalization

Despite Canada's already strict anti-circumvention provisions – often referred to as digital lock rules – the TPP would have locked Canada into an even more restrictive anti-circumvention framework. The TPP required Canada to include criminal liability as a potential remedy for rights management information and technological protection measures infringements. Additionally, the TPP made it more difficult for countries to create new anti-circumvention exceptions, a key feature Canada's current domestic copyright law.

NAFTA should reflect existing international norms for anti-circumvention enforcement mechanisms, and not create new, far-reaching remedies that have the potential for misuse or to tip the balance inherent to intellectual property law's existing allocation of rights among stakeholders.

Maintain innovative Canadian copyright solutions

The Government of Canada should resist any attempts to modify innovative made-in-Canada copyright reforms that reflect domestic innovation and creation policies.

Notice and Notice system

Notice and Notice is a “finely balanced,”⁸ made-in Canada solution to online copyright infringement that should be preserved. A result of a decade-long copyright reform process, Notice and Notice was chosen by Parliament because it struck the appropriate balance between the competing interests of copyright holders, users, and intermediary Internet Service Providers. On the other hand, an American-style Notice and Takedown regime was deliberately rejected because it would favour rights holders, allowing them “to achieve remedies against individual consumers without a court ever determining that rights have been infringed.”⁹ Allowing Notice and Takedown to be imposed on Canadians through NAFTA would fly in the face of clear democratic will.

UGC exception

Canada has created a unique protection for non-commercial, user-generated content. This provision carves out an important area for new forms of creativity and new kinds of authors, and extends to the platforms that support this creative work. Canada should safeguard this important element of its 2012 reforms.

⁸ House of Commons, Special Committee, *House of Commons Debates*, 40th Parl, 3rd Sess, No 3 (25 November 2010) at 930 (Hon Tony Clement).

⁹ *Ibid.*

Protect research and innovation

Fair dealing's core protection of research is essential to Canadian innovation and creation policy. Whether the research involves the creation of a new literary work or the evolution of an artificial intelligence algorithm, Canada should be at pains in these negotiations to ensure that its existing copyright framework supporting research and innovation does not come under attack, and that new rights, or substantive legal changes lengthening or strengthening rights or enforcement powers, do not undermine this framework.

Create exception for transformational dealings

Strong provisions on limitations and exceptions, like Canada's fair dealing framework and the United States' fair use, are essential to a balanced copyright framework. These provisions are a spur to innovation and are vital to the digital economy. In the United States, industries that benefit from copyright limitations generate \$4.5 trillion in annual revenue and employ 1 in 8 U.S. workers.¹⁰

Canada could use the NAFTA negotiations as an opportunity to create a specific exception for transformational dealings. This could involve the expansion of fair dealing to include the American fair use protection for transformational use, or a specific exception that recognizes that new works are often built on the works of others.

Reform Canada's Copyright Collectives Mechanisms.

Canada has embraced collectives as a useful tool for enhancing the value of copyrights and promoting access to works. This mechanism has not quite lived up to its promise. NAFTA offers an opportunity to set standards for the operations of copyright collectives and for the administrative tribunals that oversee them. These standards ought to target key elements of the operation of the collective system, such as:

- Standards of transparency for collectives
- Limitations on the scope of operations of collectives (prohibiting the diversion of members assets into, for example, lobbying activities)
- Standards for governance and representation of stakeholders
- Limits on retention of collective revenue and mandated flow-through
- Rules for administrative tariff-setting and hearings

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¹⁰ Computer & Communications Industry Association, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use*, (2017) online: <www.cciainet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>.

We thank you for the opportunity to provide you with these comments. We hope you find them helpful. We look forward to engaging with you on these issues throughout the NAFTA negotiation process.

Yours truly,

A handwritten signature in black ink that reads "David Fewer". The signature is written in a cursive, flowing style.

David Fewer
Director, CIPPIC