



**Brief Submitted to the House of Commons
Standing Committee on International Trade**
*Priorities of Canadian Stakeholders Having an Interest in
Bilateral and Trilateral Trade in North America, Between
Canada, United States and Mexico*

**OpenMedia Engagement Network
("OpenMedia")**

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*OpenMedia is a community-based organization that works to
keep the Internet open, affordable, and surveillance-free.*

www.openmedia.org

*OpenMedia Engagement Network P.O. Box 21674, 1424 Commercial Dr.
Vancouver, BC, Canada V5L 5G3 // [604-633-2744](tel:604-633-2744)*

Cynthia Khoo
External Counsel

OpenMedia is pleased to provide its comments to the House of Commons Standing Committee on International Trade, and contribute to the Committee's work on *Priorities of Canadian Stakeholders Having an Interest in Bilateral and Trilateral Trade in North America*. As a community-based, non-profit organization that works to keep the Internet open, affordable, and surveillance-free, OpenMedia urges the Government of Canada to ensure that upholding Canadians' digital rights and freedoms remain at the forefront of any renegotiated North America Free Trade Agreement (NAFTA).

Given the United States' expressed objectives regarding intellectual property, e-commerce, and digital trade issues, as set out in the United States Trade Representative (USTR) *Summary of Objectives for the NAFTA Renegotiation* ("USTR NAFTA Objectives"),¹ OpenMedia is most concerned with the impact that revised or new provisions in a rushed and secretive "NAFTA 2.0" will have on the nature and functioning of the Internet as we know it. This includes impacting citizens' everyday ability to use the Internet to engage with their communities; participate in public discourse; and learn, create, and share online.

The Government of Canada and its negotiating representatives must be well versed in digital policy issues and prepared to defend the best interests of Canadians when it comes to our digital rights and freedoms. In view of the above, OpenMedia submits eight recommendations to the Standing Committee, with respect to Canada's priorities in a renegotiated NAFTA:

OpenMedia's Recommendations to the Standing Committee on International Trade: Priorities of Canadians in NAFTA

Intellectual Property

1. Retain Canada's current copyright regime, specifically (a) a commitment to balance through a "made in Canada" approach; (b) notice-and-notice; and (c) current copyright terms (i.e. reject all term extension proposals).
2. Reject any attempts to further criminalize copyright infringement or expand digital rights management (DRM) or anti-circumvention provisions.
3. Ensure positive fair dealing (fair use) obligations are in the text of any new NAFTA, including commitments to uphold and promote the public domain.

Digital Trade

4. Ensure that any provisions regarding data localization preserve Canada's ability to make substantive domestic law protecting Canadians' personal data and privacy rights.
5. Retain Canada's strong net neutrality regime, and reject all attempts to weaken net neutrality in Canada or "harmonize" with the United States on this policy.

Democratic Process

6. Remove Chapter 11 of the current NAFTA (Investor-State Dispute Settlement).
7. Demonstrate genuine and meaningful transparency: (a) Release drafts of any new NAFTA text after each round or every other round, particularly the intellectual property and e-commerce (or digital trade) chapters; and (b) Release all comments submitted to the Global Affairs Canada public consultations on the renegotiation of the North American Free Trade Agreement (NAFTA) with the United States and Mexico.

¹ Office of the United States Trade Representative, "Summary of Objectives for the NAFTA Renegotiation" (17 July 2017), online: <<https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAOBJECTIVES.pdf>>.

Approximately 16,000 Canadians have spoken up in support of these recommendations, through letters submitted to Global Affairs Canada using an online tool available at act.openmedia.org/nafta.

The common thread unifying digital rights as a priority issue is not just the Internet alone, but the interaction of the Internet with Canadians' democratic rights and freedoms, and the former's ability to fundamentally impact the latter, for better or worse. Crafting good, effective, and forward-looking Internet laws and policies in the public interest is challenging in a domestic context; attempting the same in the context of a binding international trade agreement negotiated behind closed doors is difficult to fathom.

NAFTA is a trade agreement. However, its consequences are poised to reach far beyond trade, and substantively affect rights, interests, and fundamental values that are unique to Canada among the three members of NAFTA. Trade is not necessarily the most suitable lens through which to capture and address non-financial and non-commodity rights, freedoms, and values, such as the right to privacy, the right to free expression, access to information, cultivating a robust public domain, the right to communicate as we wish and with whom we wish, and the ability to impact the laws that one lives under.

Knowing the above, it is incumbent upon the Government of Canada and its representatives, on behalf of all of the Canadians who are not at the negotiating table, to ensure that a renegotiated NAFTA prioritizes Canadians' rights and civil liberties—digital and otherwise—and does not directly or indirectly subjugate them to more pecuniary or mercenary interests.

With respect to digital rights issues specifically, including intellectual property and e-commerce or digital trade, there have been growing concerns that the Canadian government has not been as equipped as it should be to defend and advance Canada's priority interests in this area. For example, recent news coverage made the following alarming observations:

Information technology companies and other digital economy insiders say federal negotiators appeared unprepared during this week's third round of talks to counter an American proposal that would forbid the storage of sensitive data in computing facilities on Canadian soil. Some warned that Canada appeared soft on the issue and might concede to the American demands in the interest of horse-trading — to potentially win concessions on higher-profile areas of contention, such as autos and agriculture. [...] One source, who spoke on the condition of anonymity because of the sensitivity of the talks, said industry representatives came away from a meeting this week with Canadian negotiators feeling that they were "not up to speed" on key issues.²

Digital policy in the context of trade is clearly top of mind for the United States and its powerful entertainment lobbies such as the MPAA and RIAA, among others.³ Canadians are trusting Foreign Affairs Minister Chrystia Freeland and her team to safeguard and advance our digital interests just as zealously—alongside, and not as an afterthought to, issues such as dairy and automotive trade (which themselves rely on sound public interest digital policy as well⁴).

² "Canada urged to do more to protect data from U.S. during NAFTA talks" (29 September 2017), online: *National Post* <nationalpost.com/pmnl/news-pmnl/canada-news-pmnl/canada-needs-to-do-more-to-protect-data-from-u-s-in-nafta-talks-industry>. See also Barrie McKenna, "Is Ottawa ready for a New Economy version of NAFTA?" (4 June 2017), online: *Globe and Mail* <<https://beta.theglobeandmail.com/report-on-business/rob-commentary/is-ottawa-ready-for-a-new-economy-version-of-nafta/article35199086/?ref=http://www.theglobeandmail.com&>>.

³ Torrent Freak, "MPAA & RIAA Demand Tough Copyright Standards in NAFTA Negotiations" (21 June 2017), online: <<https://torrentfreak.com/mpaa-riaa-demand-tough-copyright-standards-in-nafta-negotiations-170621/>>; Mike Masnick, "Hollywood Using Trump to Undermine The Internet In NAFTA Talks" (2 October 2017), online: *Techdirt* <<https://www.techdirt.com/articles/20171001/01200438323/hollywood-using-trump-to-undermine-internet-nafta-talks.shtml>>.

⁴ See, for example, Pat Jileson, "CRTC gets it right: farmers need high speed internet access (2017)" *Ontario Federation of Agriculture*, online: <<https://ofa.on.ca/media/news/crtc-gets-it-right-farmers-need-high-speed-internet-access>>; and results from a survey conducted by OFA as part of the Canadian Federation of Agriculture's submission to a review of basic telecommunications services at the Canadian Radio-television and Telecommunications Commission: "Results showed 94% of respondents believed access to the internet is important to their farm operations, and the majority of those indicated their business would suffer without reliable internet access. More than 50% of respondents believed better internet access would boost their bottom line by opening opportunities for domestic and international markets, and keeping pace with new innovations, technology and overall competitiveness." Brent Royce, "OFA members weigh in on rural internet issues (2015)" *Ontario Federation of Agriculture*, online: <<https://ofa.on.ca/media/news/ofa-members-weigh-in-on-rural-internet-issues>>.

For a renegotiated NAFTA that benefits Canadians more than it harms them, Canada must advance a forward-looking vision that centres digital rights and progressive Internet policies that militate towards the public interest. This includes preserving the government's ability to approach substantive, non-trade issues flexibly within domestic law, unfettered by a binding international agreement that has overreached into domestic policy. This is how the Government of Canada may ensure that the current renegotiations result in a truly modernized NAFTA, that does not threaten but protects and advances Canadians' shared digital future.

Intellectual Property

1. Retain Canada's current copyright regime, specifically (a) commitment to balance through a "made in Canada" approach; (b) notice-and-notice; and (c) current copyright terms (i.e. reject all term extension proposals).

(a) Commit to Balanced Copyright and "Made in Canada" Approach

Canada's current copyright legal regime is the result of years of national consultation, deliberate balancing of disparate interests and perspectives, and a considered approach now heralded as a "made-in-Canada" gold standard that other countries look to as a model.⁵ This is a significant achievement, and Canadian copyright policy must not be sacrificed at the altar of free trade.

Maintaining balanced and sensible copyright policy is particularly critical in light of the fundamental connection between copyright law and the ability to exercise free expression online—through sharing knowledge, research, and art; participating in public and political discourse; contributing to the cultural commons; and inspiring, and building upon creativity. If Canada succumbs to pressure from the United States for more off-kilter copyright laws, then copyright will just as easily become the death knell of online free expression, creativity, knowledge, and culture, rather than the champion it was intended to be.⁶

If Canada's own internal values, systems, and laws do not provide enough of a foundation, then we should look to international standards, such as multilateral treaties under the World Intellectual Property Organization (WIPO),⁷ which Canada's current copyright system already meets and in some cases exceeds. This would happily be in accordance with Minister Freeland's clarion call to "robustly support the rules-based international order, and all its institutions, and seek ways to strengthen and improve them."⁸

(b) Keep Notice-and-Notice

Canada should under no circumstances agree to change its notice-and-notice regime or move towards that of the notice-and-takedown system as seen in the United States. For one thing, the United States already agreed with notice-and-notice as an acceptable measure under the TPP. More importantly, however, notice-and-notice is an effective system that achieves objectives with respect to copyright infringement, while mitigating (albeit not completely) the harms that arise from notice-and-takedown. Michael Geist, Canada Research Chair in Internet and E-commerce Law, set out the following evidence behind the effectiveness of Canada's notice-and-notice system, in his submission to an earlier Government of Canada consultation on the TPP:

Rogers Communications, one of Canada's largest Internet providers, advised a House of Commons committee that it processed 207,000 notices in 2010, sending those notices to about five percent of its customer base. Of the households that receive notices, only 1/3 receive a second

⁵ "The innovative provisions from the 2012 reforms – the so-called "made in Canada" solutions – have also made a mark. The unique protections for noncommercial, user-generated content such as music remixes or video mashups have been discussed in Hong Kong as a potential model for ensuring that political free speech is not curtailed by copyright." Michael Geist, "What's next, after the 2012 copyright overhaul?" (12 June 2017), online: *Policy Options* <policyoptions.irpp.org/magazines/june-2017/whats-next-after-the-2012-copyright-overhaul/>.

⁶ In fact, scholars have examined some aspects of copyright laws as potential constitutional violations of section 2(b), the free expression right, of the *Canadian Charter of Rights and Freedoms*: Graham J Reynolds, "Reconsidering Copyright's Constitutionality," *Osgoode Hall Law Journal*, Vol 53(3), 2016.

⁷ World Intellectual Property Organization, "WIPO-Administered Treaties" online: <www.wipo.int/treaties/en/>.

⁸ Government of Canada, "Address by Minister Freeland on Canada's foreign policy priorities," (6 June 2017), online: <https://www.canada.ca/en/global-affairs/news/2017/06/address_by_ministerfreelandoncanadasforeignpolicy_priorities.html>.

notice. Of those that receive a second notice, only 1/3 of those receive a third notice. The Rogers data suggests that 67% of recipients (which is already only five percent of subscribers) do not repeat infringe after receiving a notice and 89% cease allegedly infringing activity after a second notice. Within two notices, about 99% of Rogers subscribers are not receiving infringement notifications.

Those numbers are very similar to data from the Entertainment Software Association of Canada, which found that 71% of notice recipients did not place an infringing file back on BitTorrent systems. Similarly, the Business Software Association told the CBC in 2007 that the notice-and-notice approach has "been most effective."⁹

In contrast, notice-and-takedown spurred numerous significant problems, including: widespread false positives, through online intermediaries such as YouTube setting up imperfect automated takedown systems;¹⁰ severe chill on free expression online, due to legal uncertainty and fear of liability; shockingly high numbers of fraudulent claims;¹¹ censorship through abuse and misuse of the system to take down content for non-copyright reasons, such as reputational concerns or to quash news reporting, criticism, or political dissent;¹² lack of due process;¹³ and potentially increased Internet access costs, if Internet service providers (ISPs) pass on the costs of regularly processing such requests to their customers.

While notice-and-notice certainly has its own flaws—such as lack of prescriptive regulations that have opened up the doorway to rampant abuse¹⁴—they are best addressed through Canada's upcoming *Copyright Act* review, and in any case not solved by abandoning notice-and-notice for an even more flawed system. The safe harbour that Internet intermediaries may avail themselves of through notice-and-notice is critical to the Internet's many functions and benefits, and to Canada more generally. For example, a recent study by the Internet Association in the United States found that safe harbour for online intermediaries account for 4.25 million jobs and \$440 billion USD in GDP every ten years.¹⁵

(c) Reject All Copyright Term Extensions

Canada's current copyright term is 50 years after the author's death. In other words, any work with copyright does not enter the public domain until 50 years after its author dies. In view of copyright's core purpose—a bargain that awards temporary exclusive rights to creators for the value that their work would add to society, for the purpose of incentivizing the creation of more new works—50 years after the creator can presumably no longer create is more than ample to fulfill this bargain. For additional perspective, the duration of copyright terms when first established in the United States was 14 years, with an option to renew for another 14 years.¹⁶ The Canadian government, then, should reject out of hand any proposal to extend copyright terms even further, knowing that current Canadian copyright terms are already on solid footing with international copyright treaties and in view of effective policy-making.

⁹ Michael Geist, "Deadline Day to Speak Out on TPP's Copyright Term Extension," (14 February 2012), online: <www.michaelgeist.ca/2012/02/deadline-on-tpp-consult/>.

¹⁰ Fruzsina Eordogh, "YouTube's New Copyright Bot Pwns Gamers," (16 December 2013), online: Motherboard <https://motherboard.vice.com/en_us/article/bmj8mz/youtubes-new-copyright-bot-pwns-gamers>.

¹¹ Torrent Freak, "Pirate Site With No Traffic Attracts 49m Mainly Bogus DMCA Notices," (19 February 2017), online: <<https://torrentfreak.com/pirate-site-with-no-traffic-attracts-49m-mainly-bogus-dmca-notices-170219/>>; Timothy Geigner, "Google Report: 99.95 Percent Of DMCA Takedown Notices Are Bot-Generated Bullshit Buckshot," (23 February 2017), online: <<https://www.techdirt.com/articles/20170223/06160336772/google-report-9995-percent-dmca-takedown-notices-are-bot-generated-bullshit-buckshot.shtml>>.

¹² Alex Hern, "Revealed: How copyright law is being misused to remove material from the internet," (23 May 2016), online: Guardian <<https://www.theguardian.com/technology/2016/may/23/copyright-law-internet-mumsnet>>; Daniel Nazer and Mich Stoltz, "Copyright Shouldn't Be a Tool of Censorship," (19 January 2017), online: EFF <<https://www.eff.org/deeplinks/2017/01/copyright-shouldnt-be-tool-censorship>>.

¹³ Jennifer Urban, Joe Karaganis, and Brianna Schofield, "Notice and Takedown in Everyday Practice," (2016), online: The American Assembly <americanassembly.org/publications/notice-and-takedown-everyday-practice>.

¹⁴ Michael Geist, "Copyright Misuse Emerges as a Political Issue: QP Questions on Notice-and-Notice Abuse," (9 June 2017), online: <www.michaelgeist.ca/2017/06/copyright-misuse-emerges-political-issue-qp-questions-notice-notice-abuse/>; Howard Knopf, "Once more into the copyright breach" *Policy Options* (19 June 2017), online: <<http://policyoptions.irpp.org/magazines/june-2017/once-more-into-the-copyright-breach/>>.

¹⁵ Internet Association, "Eliminating Internet Safe Harbors Would Hurt the Economy" (2017), online: <<https://cdn1.internetassociation.org/wp-content/uploads/2017/06/NERA-Intermediary-Liability-Two-Pager.pdf>>.

¹⁶ United States Copyright Office, "A Brief Introduction and History," online: <<https://www.copyright.gov/circs/circ1a.html>>.

Numerous studies have demonstrated that extending copyright terms at this point would only result in economic harm, let alone the harm to the public domain, cultural commons, education, academic research, and Canadians' ability to share, learn, create, inspire, and express themselves and collaborate and engage with each other online. For example, a New Zealand study found that extending their copyright terms from 50 years (after author's death) to 70 years would result in average losses of about \$55 million per year.¹⁷ Howard Knopf, an esteemed Canadian intellectual property lawyer and law professor who writes at the blog *Excess Copyright*, extrapolated from these findings to determine the impact of extending copyright terms by 20 years in Canada: an average annual cost of \$454 million per year.¹⁸ A study commissioned by Industry Canada "concluded that extending the term simply does not create an additional incentive for new creativity,"¹⁹ and the C.D. Howe Institute also found that copyright term extensions would result in more costs than benefits to Canada.²⁰

Such proposals have additionally attracted critique from some publishers themselves,²¹ one of many reminders that the line between "creators" and "users" of works is often thinner, more fluid, and less existent than many copyright lobbyists and rights-holders would tend to acknowledge. The public domain and intellectual commons is the greatest resource from which Canadian creators, students, researchers, musicians, filmmakers, commentators, writers, publishers, artists, and educators from all sectors, backgrounds, regions, and paths may draw upon to produce their own creations—as it was meant to be. The Government of Canada should ensure that it does not restrict works from this public good for longer than absolutely necessary, through excessive and purpose-defeating copyright terms, and ensure that copyright advances fulfillment of the classic bargain between creators and society, rather than erodes it.

2. Reject any attempts to further criminalize copyright infringement or expand digital rights management (DRM) or anti-circumvention provisions.

The Government of Canada must reject any and all attempts to further criminalize any forms of copyright infringement, expand digital rights management or anti-circumvention provisions, or generally make Canada's copyright regime more punitive and weighted towards rightsholders' narrow interests than it currently is. This includes repudiating out of hand the extreme and, frankly, shocking proposal put forward by BCE Inc. (Bell Canada) to the Standing Committee in its presentation on September 20, 2017.²²

Two of Bell's recommendations stood out as particularly beyond the pale: that the government establish a tribunal to administer website blocking by Internet service providers (ISPs); and that the government criminalize "any infringement of copyright" including "facilitating and enabling piracy where it's undertaken for a commercial purpose".²³ These provisions on their own are untenable, due to the lack of judicial oversight and vast potential for online censorship; the fact that a wide range of everyday non-commercial activities may be criminalized if they have commercial impact; and the fact that particularly with the Internet and technological advancement, grey areas often exist for periods of time while the law catches up with technology, with innovation and human potential always hanging in the balance.²⁴

¹⁷ Concept Economics, "Analysis of the impact on New Zealand of extending copyright term," online: <<https://www.tpp.mfat.govt.nz/assets/docs/TPP%20-%20Analysis%20of%20Copyright%20term%20extension,%20explanatory%20cover%20note.pdf>>.

¹⁸ Howard Knopf, "The Cost of Canadian Copyright Term Extension Capitulation in the TPP - Estimates Based Upon New Zealand Study," (17 November 2015), online: *Excess Copyright* <<https://excesscopyright.blogspot.ca/2015/11/the-cost-of-canadian-copyright-term.html>>.

¹⁹ Michael Geist, "Five Ways NAFTA Talks Can Level the Innovation Playing Field" in *NAFTA 2.0 and Intellectual Property Rights*, ed. Centre for International Governance Innovation (September 2017), online: <<https://www.cigionline.org/sites/default/files/documents/NAFTA%20Special%20Report%20WEB.pdf>>, at page 9.

²⁰ Daniel Schwanen and Aaron Jacobs, "Patents, Copyright and Competition: Assessing the Impact of Trade Deals on Canada" (2017) CD Howe Institute Commentary No. 474.

²¹ Don Lapan, "Copyright, the TPP, and the Canadian Election," (14 October 2015) online: *Animals, etc.* <<https://donlepan.blogspot.ca/2015/10/copyright-tpp-and-canadian-election.html>>.

²² Standing Committee on International Trade, No. 076, 1st Session, 42nd Parliament, Evidence (20 September 2017), online: <www.ourcommons.ca/DocumentViewer/en/42-1/CIIT/meeting-76/evidence> ["CIIT Evidence"].

²³ *Ibid.*

²⁴ Robert S Schwartz, "It's the 30th Anniversary of the Supreme Court's Monumental Decision About Betamax," (17 January 2014) online: *Slate* <www.slate.com/blogs/future_tense/2014/01/17/betamax_supreme_court_opinion_anniversary_the_decision_has_had_long_reaching.html>.

Bell's proposals met with swift reaction and immediate opposition among media outlets and the public. For example, over 6,400 people submitted letters to the Global Affairs NAFTA consultation (copying this Committee) in direct response to Bell's presentation, through OpenMedia's online tool mentioned above. Professor Geist, who broke the story,²⁵ has continued documenting Bell's apparent abdication of its role as a reliably neutral conduit, or common carrier, of its subscribers' communications, to a media entity "barely distinguishable from the RIAA or MPAA" and more aggressive even than the Canadian Anti-Counterfeiting Network.²⁶

Bell's positions cannot be characterized as normal or expected, even given the unpopularity of major telecommunications companies.²⁷ Rogers, for example, recommends any changes to Canadian copyright law be considered "under the auspices of the Copyright Modernization Act review" and "done holistically, given the careful balance that was arrived at in our Copyright Act between users and rights holders."²⁸ It is also worth noting that when Quebec proposed a bill that requiring ISPs to block certain online gambling websites, the Canadian Wireless Telecommunications Association—of which Bell is a member—sued the Government of Quebec in a constitutional challenge,²⁹ while the Public Interest Advocacy Centre secured a declaration from the CRTC that such a provision would violate federal telecommunications law.³⁰

Furthermore, reports of piracy and death of the entertainment industry have been greatly exaggerated.³¹ Recode notes that "Canadian performing rights organization SOCAN had a *record year in 2016*, generating an estimated \$330 million CAD (\$253.4 million USD) in total revenue, an 8 percent bump from 2015. Notably, SOCAN's streaming revenues were up more than *460 percent* with \$13 million (\$10 million USD)."³² In addition, the United Kingdom recently issued a report correlating the rise of convenient, affordable (i.e., not free), legal streaming services with lowering copyright infringement,³³ suggesting that a more appropriate solution would be to make it possible for more Netflix- and Hulu-like services to operate in Canada, with broader selections of content that are currently available in other countries.

As for Canada's approach to piracy, a 2016 report by the Business Software Alliance showed that piracy rates in Canada were at a historic low (24%) as well as below both global and European averages.³⁴ Professor Geist has also consistently documented how Canada has already implemented some of the globally toughest copyright laws in rightsholders' interests over the past several years,³⁵ often at the behest of the United State, such as conceding to some criminal provisions for copyright under the TPP

²⁵ Michael Geist, "Bell Calls for CRTC-Backed Website Blocking System and Complete Criminalization of Copyright in NAFTA" (22 September 2017), online: <www.michaelgeist.ca/2017/09/bell-calls-crtc-backed-website-blocking-system-complete-criminalization-copyright-nafta/>.

²⁶ Michael Geist, "An Industry Divided: How Bell Broke with the Telecom Sector on Copyright" (25 September 2017), online: <www.michaelgeist.ca/2017/09/bellcopyrightpolicy/>.

²⁷ Sophia Harris, "Rogers, Bell hike overage fees at time when customers thirst for wireless data" (9 July 2017), online: *CBC News* <www.cbc.ca/news/business/bell-rogers-wireless-data-overage-fee-1.4195410>; Jamie Sturgeon, "Rogers, Bell, Telus wireless customers face 'substantial' price hike" (27 January 2016), online: <<https://globalnews.ca/news/2480259/rogers-wireless-customers-face-substantial-price-hike-next-month/>>.

²⁸ CIIT Evidence.

²⁹ "Wireless lobby sues Quebec over law banning access to some online gaming sites" (27 July 2016), online: *CBC News* <www.cbc.ca/news/canada/montreal/quebec-wireless-lobby-ban-online-gaming-websites-1.3697902>.

³⁰ Telecom Decision CRTC 2016-479, Public Interest Advocacy Centre – *Application for relief regarding section 12 of the Quebec Budget Act* (9 December 2016).

³¹ Michael Geist, "Fake Data on Fakes: Digging into Bell's Dubious Canadian Piracy Claims" (3 October 2017), online: <www.michaelgeist.ca/2017/10/fake-data-fakes-digging-bells-dubious-canadian-piracy-claims/>.

³² Peter Kafka, "The music business is growing again — really growing — and it's because of streaming" (20 September 2017), online: *Recode* <<https://www.recode.net/2017/9/20/16339484/music-streaming-riaa-spotify-apple-music-youtube-2017-revenue-subscription>> (emphasis added); Karen Bliss, "Canada's SOCAN Announces 8 Percent Growth in Revenue, Huge Jump in Streaming" (31 January 2017), online: *Billboard* <www.billboard.com/biz/articles/news/legal-and-management/7676228/canadas-socan-announces-8-percent-growth-in-revenue>.

³³ United Kingdom Intellectual Property Office, *Online Copyright Infringement Tracker: Latest wave of research Mar 16 - May 16: Overview and key findings* (2016), online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/546223/OCI-tracker-6th-wave-March-May-2016.pdf>.

³⁴ Business Software Alliance, "Seizing Opportunity Through License Compliance" (May 2016), online: <globalstudy.bsa.org/2016/downloads/studies/BSA_GSS_US.pdf>, at page 7.

³⁵ Michael Geist, "My NAFTA Consultation Comments: Promoting Canadian Interests in the IP and E-commerce Chapters" (18 July 2017), online: <www.michaelgeist.ca/2017/07/nafta-consultation-comments/> ["Geist NAFTA Comments"].

and otherwise going beyond international standards as established through multilateral forums,³⁶ and when the former Harper Government unilaterally snuck through a 20-year term extension (from 50 to 70 years after the creator's death) for sound recordings, as a favour to copyright lobbyists.³⁷

Ariel Katz, Innovation Chair in Electronic Commerce at the University of Toronto Faculty of Law, notes:

The evidence from most reliable studies currently available fails to provide support to the claim that the expansion of IP has contributed to greater innovation, productivity or growth. Moreover, some signs indicate that the expansion of IP has already contributed to global economic stagnation, accelerated inequality and depressed wages, and that it already hampers governments' ability to implement measures for countering those trends. The consensus emerging from the best available scientific theory and evidence strongly suggests that our current international IP system already overshoots the mark.³⁸

Perhaps sensing this, the United States has in fact been *removing* digital locks in certain circumstances, "introduce[ing] exceptions for innovative activities such as automotive security research, repairs, and maintenance, archiving and preserving video games, and for remixing videos from DVDs and Blu-Ray sources."³⁹ Canada must stay the course in pursuing progressive copyright law and policies, or risk defeating its own Innovation Agenda and hindering Canadians' ability to imagine, build on, remix, create, share, contribute to, and cultivate our own cultural commons.

3. Ensure positive fair dealing (fair use) obligations are in the text of any new NAFTA, including commitments to uphold and promote the public domain.

It has been alarming and disappointing to see reports that the United States not only put forward text similar to the TPP for the intellectual property chapter of NAFTA, but moreover seems poised or at least inclined to leave off the one token clause addressing fair dealing / fair use, the public domain, and balancing private rights with the public interest.⁴⁰ The Canadian government should not only insist that balancing language remain in the text, but that the renegotiated NAFTA in fact expand on and bolster this provision. For example, while intellectual property rights provisions placed hard obligations on members in the TPP text, through the use of the term "shall", provisions protecting the public interest in fair dealing / fair use and the public domain used the much softer "may" or "shall *endeavour*"⁴¹—making the term weak and unenforceable at best, and completely discretionary and meaningless at worst.

Balance requires equally substantive, meaningful, and robust protections for fair dealing, users' rights, and the public domain, as are given to exclusive rights in copyright. Without equally formal, binding, and enforceable recognition of fair dealing rights, a renegotiated NAFTA would bind Canada to a harmful copyright system that systemically privileges private interests of rights-holders over the legal rights of everyday citizens. Even from a monetary perspective, however, a recent study found that fair use is responsible for \$2.8 trillion of the U.S. economy, or about one-sixth of the U.S. GDP.⁴²

Fair dealing, fair use, and users' rights are not simply "limitations", "exceptions", or "carve-outs" from copyright—the public domain is not negative space. Rather, they are fundamental concepts inherent to

³⁶ Michael Geist, "Canadian Officials Admit TPP IP Policy Runs Counter to Preferred National Strategy" (16 April 2016), online: <www.michaelgeist.ca/2016/04/canadian-officials-admit-tpp-ip-policy-runs-counter-to-preferred-national-strategy/>; Michael Geist, "The Trouble with the TPP, Day 6: The Price of Entry" (11 January 2016), online: <<http://www.michaelgeist.ca/2016/01/the-trouble-with-the-tpp-day-6-the-price-of-entry/>>.

³⁷ Michael Geist, "Harper Letter to Music Canada on Budget Day Confirms Copyright Extension the Product of Industry Lobbying" (15 May 2015), online: <www.michaelgeist.ca/2015/05/harper-letter-to-music-canada-on-budget-day-confirms-copyright-extension-the-product-of-industry-lobbying/>.

³⁸ Ariel Katz, "No Time for Tinkering" in *NAFTA 2.0 and Intellectual Property Rights*, ed. Centre for International Governance Innovation, online: <<https://www.cigionline.org/sites/default/files/documents/NAFTA%20Special%20Report%20WEB.pdf>>, at page 4.

³⁹ Geist NAFTA Comments.

⁴⁰ Jeremy Malcolm, "Defending Users in NAFTA 2.0: Who Are We Up Against?" (4 October 2017), online: *EFF* <<https://www.eff.org/deeplinks/2017/10/defending-users-nafta-20-who-are-we-against>>.

⁴¹ See generally *Trans-Pacific Partnership, Chapter 18: Intellectual Property*, online: <<https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>>.

⁴² Computer & Communications Industry Association, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use* (2017), online: <<https://www.cciainet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>>. See also

copyright itself, for such a system to function and truly benefit society in facilitating the flourishing of new works, creative, scholarly, or otherwise. The public domain is a positive arena in its own right; it constitutes Canada's cultural, creative, academic, and sociopolitical commons, and the Canadian government must respect, protect, and cultivate this invaluable shared resource as such.

Digital Trade

4. Ensure that any provisions regarding data localization preserve Canada's ability to make substantive domestic law protecting Canadians' personal data and privacy rights.

Canadians care strongly about their privacy and value it highly, as demonstrated by the Office of the Privacy Commissioner of Canada (OPC) in its *2016 Survey of Canadians on Privacy: Final Report*:

Roughly nine in 10 Canadians expressed some level of concern about the protection of their personal privacy, including 37% who said they are extremely concerned. Only 8% indicated that they are not concerned about the protection of their personal privacy. Over time, there has been a gradual increase in Canadians' concern about protecting their personal privacy, from 42% who rated their level of concern as high (scores of 6 or 7) in 2012 to 57% this year.⁴³

That a renegotiated NAFTA may threaten Canadians' privacy rights and personal data has become a forefront issue in recent days,⁴⁴ and for good reason. When it comes to how private corporations may treat their customers' personal data, particularly infrastructural, utility-like entities such as ISPs, it is safe to say that Canadian and U.S. laws diverge.

For example, Canada's federal privacy law protecting citizens' personal data in the context of commercial use by Internet service providers differs from that of the United States in that it exists. In 2014, the Office of the Privacy Commission of Canada applied this law, the *Personal Information Protection and Electronic Documents Act* (PIPEDA) to stop Bell Canada from using subscribers' browsing data without adequately obtaining consent, to serve targeted ads.⁴⁵ In contrast, the United States Congress recently struck down a law that would have provided this exact protection: ISPs in the United States may now use their customers' browsing data for commercial purposes, without consent.⁴⁶ In the context of telecommunications specifically, protecting subscriber privacy is enshrined as a policy objective both in the Canadian *Telecommunications Act* and in key CRTC decisions.⁴⁷

Generally speaking, the United States has no unifying federal privacy law equivalent to PIPEDA, relying instead on a patchwork of industry-specific regulations or voluntary norms, state laws, or the general "unfair or deceptive acts" provision under the purview of the Federal Trade Commission.⁴⁸ Canada, however, recently released a federal cloud computing strategy that requires the federal government to ensure some kinds of data are kept in Canada, while British Columbia and Nova Scotia have passed provincial laws that require public entities to store Canadians' personal data within Canada.⁴⁹

⁴³ Office of the Privacy Commissioner of Canada, "Canadians are concerned about protecting personal privacy" 2016 Survey of Canadians on Privacy: Final Report (December 2016).

⁴⁴ Jim Bronskill, "'Canadians are concerned': Private data on the table in NAFTA negotiations" (2 August 2017), online: *National Post* <nationalpost.com/news/politics/canadians-personal-data-on-the-table-in-nafta-negotiations>.

⁴⁵ Office of the Privacy Commissioner of Canada, PIPEDA Report of Findings #2015-001, Results of Commissioner Initiated Investigation into Bell's Relevant Ads Program (7 April 2015), online: <<https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2015/pipeda-2015-001/>>.

⁴⁶ Jeff Dunn, "House Republicans just voted to let your internet provider sell your browsing history without your permission" (28 March 2017) *Business Insider* online: <<http://uk.businessinsider.com/house-republicans-kill-fcc-broadband-privacy-rules-2017-3?r=US&IR=T>>; Jon Brodtkin, "Senate votes to let ISPs sell your Web browsing history to advertisers" *Ars Technica* (23 March 2017), online: <<https://arstechnica.com/tech-policy/2017/03/senate-votes-to-let-isps-sell-your-web-browsing-history-to-advertisers/>>; Brian Fung, "The House just voted to wipe away the FCC's landmark Internet privacy protections" *Washington Post* (28 March 2017), online: <https://www.washingtonpost.com/news/the-switch/wp/2017/03/28/the-house-just-voted-to-wipe-out-the-fccs-landmark-internet-privacy-protections/?utm_term=.70bd97c0adef>.

⁴⁷ *Telecommunications Act*, SC 1993, c 38, s 7(i);

⁴⁸ Federal Trade Commission, "Division of Privacy and Identity Protection" online: <<https://www.ftc.gov/about-ftc/bureau-offices/bureau-consumer-protection/our-divisions/division-privacy-and-identity>>.

⁴⁹ Government of Canada, Government of Canada Cloud Adoption Strategy (3 October 2016), online: <<https://www.canada.ca/en/treasury-board-secretariat/services/information-technology/cloudcomputing/government->

While cross-border data flow is a laudable and sensible objective in view of an open Internet, access to information, and the ability to exercise free expression by reaching a wider audience, Canada must ensure that any provisions in NAFTA aimed at encouraging cross-border data flow, such as restricting data localization laws, do not conflict with or inhibit the creation and implementation of domestic laws and policies that safeguard Canadians' privacy and personal data. Not only would this contravene Canadian law, but it may also potentially put Canada in breach of its commitments to European partners, given the latter's gold standard privacy laws and the recent fall of the former EU-US Safe Harbour regime.⁵⁰

5. Retain Canada's strong net neutrality regime, and reject all attempts to weaken net neutrality in Canada or "harmonize" with the United States on this policy.

Similar to the situation with privacy and personal data above, Canada is far ahead of its NAFTA trading partners when it comes to net neutrality, also known as the principle of common carriage, or laws that keep the Internet an open, neutral conduit of data and communications. The new chair of the U.S. Federal Communications Commission, Ajit Pai, is famously engaged in undoing his predecessor's Open Internet Order—despite empirical evidence showing that ISP investment in broadband networks rose in the intervening time⁵¹—and discriminatory zero-rating programs, generally banned in Canada, operate unchecked in Mexico.⁵² Minister Freeland and Canadian negotiators should seek to enshrine strong, enforceable net neutrality provisions in NAFTA that match or exceed Canada's current laws in the *Telecommunications Act* and landmark CRTC framework decisions;⁵³ or otherwise reject any proposition that would weaken net neutrality as it currently operates in and is safeguarded by Canadian laws.

Democratic Process

6. Remove Chapter 11 of the current NAFTA (Investor-State Dispute Settlement).

Minister Freeland acknowledged, in her speech mentioned above, that western democracies such as Canada are currently experiencing "an enormous crisis of confidence ... a pervasive sense that too many people have been left behind, betrayed by a system they were promised would make them better off, but hasn't." This is true, and few provisions in NAFTA more starkly justify that concern than the Chapter 11 Investor-State Dispute Settlement (ISDS) mechanism.

The Canadian Centre for Policy Alternatives (CCPA) has researched this issue thoroughly, finding that member states do not use ISDS to fulfill its original purpose, but rather in a way that visits massive negative externalities on the population of Canada specifically:

Unexpectedly, Canada has been the most sued party under NAFTA, having been targeted in 39 claims. This trend is getting worse: 70% of NAFTA claims since 2005 (28 of 40) have been directed against Canada. Canada has lost or settled eight cases, paying out damages to foreign investors of \$215 million. In nine cases, arbitrators found that Canada did not breach the complainant investor's rights in NAFTA. Canadian governments have incurred tens of millions of dollars in unrecoverable legal costs through this process.

Finally, the threat of an investor–state claim and the influence of negative arbitral rulings, such as in the 2016 Bilcon case (where a tribunal found that a rigorous environmental assessment of a huge

canada-cloud-adoption-strategy.html> (emphasis added); Freedom of Information and Protection of Privacy Act, RSCB 1996, c 165, s 30.1; Personal Information International Disclosure Protection Act, 2006, c 3, s 5 (Nova Scotia).

⁵⁰ Lisa R. Lifshitz, "Shield or sword? The new EU-U.S. Privacy Shield" (15 February 2016), online: *Canadian Lawyer* <www.canadianlawyer.com/author/lisa-r-lifshitz/shield-or-sword-the-new-eu-us-privacy-shield-3172/>.

⁵¹ S. Derek Turner, It's Working: How the Internet Access and Online Video Markets Are Thriving in the Title II Era (May 2017), Report, online: *Free Press* <<https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-ii-era.pdf>>.

⁵² Shannon Liao, "Facebook's Free Basics violates net neutrality and isn't even that good, says report" (27 July 2017), online: <<https://www.theverge.com/2017/7/27/16050446/facebook-net-neutrality-digital-colonialism-internet-org>>.

⁵³ *Telecommunications Act*, SC 1993, c 38, s 36; Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet service providers* (21 October 2009); Telecom Regulatory Policy CRTC 2017-104, *Framework for assessing the differential pricing practices of Internet service providers* (20 April 2017).

quarry in an ecologically sensitive region violated a U.S. investor's NAFTA rights), exert a profoundly chilling effect on legitimate public policy.⁵⁴

The availability of ISDS to foreign corporate entities, as a proven method of undermining democratically achieved and progressive domestic public policies for the sake of financial gain, completely undermines and belies any claim to "progressive trade" that the Government of Canada might make. The CETA model, while a slight improvement, does not address or eliminate this core problem at the heart of ISDS. Foreign investors and corporate entities should not have a greater degree of access to "justice" above and beyond Canada's own laws and courts than the Canadian public does. If the Government of Canada is to truly address Canadians' priorities, eliminating ISDS must be at the top of its negotiating list.

7. Demonstrate genuine and meaningful transparency: (a) Release drafts of NAFTA text at regular intervals (for example, every two rounds), particularly the intellectual property and e-commerce (or digital trade) chapters; and (b) Release all comments submitted to the Global Affairs Canada public consultations on NAFTA renegotiations.

Similar to the issue of ISDS and its undercutting any notion of democratic process or progressive trade, the Government of Canada can make no meaningful claims to transparency without in fact being transparent about what is being negotiated—or negotiated away—for all Canadians, whether or not citizens have consented to or were able to have their input taken into account in the final agreement. Canadians remain scarred by their experience with the TPP and how the federal government handled that trade negotiation and related processes. Over 28,000 of them shared their views, many of which OpenMedia captured in a crowdsourced publication earlier this year, the *Let's Talk TPP Citizens' Report: Rebuilding public trust in trade processes*.⁵⁵

This is a matter of public accountability and closing the democratic deficit that has resulted in the mass disillusionment, cynicism, and bitterness plaguing democratic institutions and the liberal international world order that Minister Freeland noted. The Canadian government simply must release the text: both of the NAFTA agreement, and the text of over 21,000 submissions of Canadians sharing their priorities for NAFTA directly with their government. This is the way to rebuild Canadians' trust in international trade and public confidence that their elected representatives are truly acting on their behalf.

Thank you for this opportunity to comment.

About OpenMedia

OpenMedia is a community-driven organization that works to keep the Internet open, affordable, and surveillance-free. Headquartered in Vancouver, British Columbia, OpenMedia's global community is nearly 500,000 people strong, including over 250,000 supporters in Canada alone. Relying on an approach that "uses the Internet to save the Internet", OpenMedia provides a civic engagement platform to educate, engage, and empower citizens to advance digital rights around the world.

OpenMedia's work is founded on three pillars of advocacy, representing the values and rights the organization works to protect and promote in context of the open Internet: Free Expression, Privacy, and Access. The organization accomplishes its work under these three pillars through empowering everyday Internet users, by educating and engaging them in collaborative online public campaigns, channeling their voices into government processes and legal proceedings such as hearings and consultations, bringing citizens' views to key decision-makers on the issues, and crowdsourcing digital policies that are in the best interest of our shared digital future. For more information, please visit openmedia.org.

⁵⁴ Scott Sinclair, Stuart Trew, and Hadrian Mertins-Kirkwood, "Submission to Global Affairs Canada on the renegotiation and modernization of the North American Free Trade Agreement (NAFTA)" (July 2017), online: *CCPA* <<https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2017/07/CCPA%20NAFTA%20renegotiation%20submission.pdf>>. See also Scott Sinclair, "NAFTA Chapter 11 Investor-State Disputes to January 1, 2015" (14 January 2015), online: *CCPA* < https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2015/01/NAFTA_Chapter11_Investor_State_Disputes_2015.pdf>.

⁵⁵ Meghan Sali, *Let's Talk TPP: Citizens' Report: Rebuilding public trust in trade processes* (March 2017) OpenMedia, online: <<https://openmedia.org/sites/default/files/letstalktppreport-digitalcopy-march10.pdf>>.