



**Written Submission to the United States International Trade Administration
Federal Register Volume 83, Number 52232 (October 16, 2018)
Investigation No. TPA-105-003
December 20, 2018**

The USAAlliance for Music is a coalition of music organizations representing the overwhelming majority of U.S. songwriters, lyricists, composers, recording artists, record companies, music publishers, managers and collecting societies. We are small and large businesses, employing millions, and contributing significantly to U.S. GDP and trade surplus. We are united in our resolve that strong copyright protection for creative industries should be a top priority for the U.S. trade agenda.

We appreciate this opportunity to provide written comments to the United States International Trade Commission on the likely impact of the United States-Mexico-Canada Agreement (USMCA) on the American music industry in response to 83 Fed. Reg. 52232, published on October 16, 2018. We believe that the USMCA presents important opportunities for our industry, with several key provisions presenting potentially very positive impacts on our community and its contributions to the U.S. economy. However, several provisions also raise serious concerns in terms of their negative impacts on the music industry, on its contributions to the U.S. economy, and on the positive aspects of the agreement, in terms of negating or otherwise diminishing those positive aspects.

The American Music Industry's Positive Impact on the U.S. Economy

The American music industry is an engine for economic growth and copyright protection is critical to fueling our industry's contributions to the U.S. economy. In 2017, the American creative sector, including the music industry, contributed \$1.3 trillion to the U.S. economy. In the same year, the creative sector supported 5.7 million U.S. jobs. Notably, the compensation paid in the creative sector far exceeds that of U.S. workers overall, amounting to a compensation premium of 39 percent over the average U.S. annual wage. From 2014 to 2017, the creative sector grew at an

aggregate annual rate of 5.23 percent. By way of comparison, the U.S. economy overall grew at average annual growth rate of 2.10 percent during the same period.¹

With respect to trade, the sale of U.S. copyright products in third countries around the world amounted to over \$191 billion in 2017. Notably, in the same year, these foreign sales surpass the sales of other major U.S. industries, including electronic equipment, appliances and components, with sales of \$174 billion; agricultural products, with sales of \$138 billion; chemicals (excluding pharmaceuticals & medicines, with sales of \$137 billion; aerospace products and parts, with sales of \$134 billion; and pharmaceuticals and medicines, with sales of \$55.8 billion.² In terms of U.S. services trade, intellectual property rights licensing, including copyright licensing of music, is the second largest services export category among all U.S. services trade categories, valued at \$128 billion in 2017, which accounts for 16 percent of total U.S. exports of services, and which accounted for a \$77 billion trade surplus that year.³

The USMCA's Potential Impact on the American Music Industry

The American music industry welcomed negotiations to modernize NAFTA to maintain and grow trade in music products and services in North America. Canada and Mexico are both important markets for our industry, but have not reached their potential because of critical weaknesses in their respective copyright protection and enforcement systems, which prevent our ability to license music in those markets on commercial terms and promote the proliferation of piracy, particularly online. The following assessment of specific USMCA provisions below flows from our threshold priority around growing music trade in these important markets and addressing the weaknesses in each that not only constrain such growth, but also that harm our industry.

- **Copyright Term** (Chapter 20, Article 20.63): The American music industry supports the USMCA's outcome on the term of protection for copyright and related rights. Article 20.63 provides for a minimum term of protection of life of the author plus 70 years, or 75 years from publication for products whose terms are not measured by the life of the author. The practical positive impact of this provision for the music industry will be in Canada where an additional

¹ Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2018 Report*; Economists Incorporated; Prepared for the International Intellectual Property Alliance; p. 3; available at:

<https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf>

² Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2018 Report*; Economists Incorporated; Prepared for the International Intellectual Property Alliance; p. 3; available at:

<https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf>

³ 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>

20 years of additional protection will be provided (based on the life of the author), and an additional five years of protection will be provided (based on publication, when not measures by the life of the author). This additional protection is particularly beneficial to songwriters and music publishers. While these terms are below those in the United States and Mexico, this provision is an improvement over the original NAFTA and sets an important precedent as part of an emerging global consensus on copyright term.

- **Copyright Exceptions** (Chapter 20, Article 20.65): The American music industry also supports the Administration’s position on copyright exceptions and limitations as reflected in the USMCA. Our industry very much welcomes the clear articulation of three-step test, which both upholds the established U.S. position on exceptions and limitations, and preserves the three-step test as the internationally-recognized standard. Moreover we applaud what the USMCA omits, i.e., proposals to expand exceptions and limitations through open-ended fair use provisions, that would have introduced considerable legal uncertainty in Canada and Mexico as to the scope of copyright protection and enforcement. Such fair use proposals would have imposed potentially very significant negative economic impacts on the America music community in Canada and Mexico, and would have been an extremely detrimental precedent globally.
- **National Treatment of Copyright** (Chapter 20, Article 20.8): The American music industry supports the USMCA obligation to provide full national treatment for all categories of intellectual property covered in the agreement, including copyrights and related rights. This obligation represents a significant advancement *vis-à-vis* the original NAFTA, which did not extend full national treatment to the rights of performers in respect of secondary uses of sound recordings.⁴ The potential positive impact of this obligation is particularly important to our industry with a view to ending Canada’s decades-old discriminatory treatment of U.S. musical repertoire. However, given Canada’s long-running denial of national treatment to our industry, implementation and enforcement of this obligation will be of critical importance in order for its potential benefits to be realized in fact.
- **Copyright Safe Harbors** (Chapter 20, Article 20.89, and Annex 20-A): The USMCA provisions on legal remedies and safe harbors with respect to copyright infringement raise serious concerns for the American music industry. These provisions do not contain critical protections for copyright holders found in U.S. law – e.g., secondary liability, public designees to receive notices, and for caching, compliance industry standard technology and expeditious removal or disablement of access upon notice. Moreover, these provisions promote further

⁴ See NAFTA, Article 1703(1). Here we note that countries should grant music producers and performers full exclusive communication to the public and broadcasting rights.

departures from U.S. law by Canada and Mexico. For example, by omitting secondary liability in the agreement, Mexico is free to continue to deprive our industry of this critical remedy for copyright enforcement. Moreover, the agreement authorizes Mexico to balance its copyright protection obligations under the safe harbor provision against open-ended constitutional considerations, including to mandate additional government intervention into the already ineffective notice and takedown process. Regarding Canada, much of Article 20.89 does not apply. Instead, Canada's current flawed system is grandfathered in, thereby further entrenching its notice and notice obligations – thereby permitting infringing content to remain online and piracy to flourish. As a result, digital platforms that actively make user uploaded music available to the public without the authorization of the right holder can use these provisions in Canada and Mexico as a shield against copyright liability and avoid licensing music on commercial terms as other digital service do.

- **USMCA Non-Application to Cultural Industries** (Chapter 32, Article 32.6): The American music industry also finds Article 32.6 of Chapter 32 highly troubling. Under this provision, nearly all USMCA obligations do not apply to Canada with respect to actions it takes regarding our industry, including specifically: the production, distribution, sale, or exhibition of audio or video music recordings; the publication, distribution, or sale of music in print or machine readable form; and radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services. This virtually complete carve out of our industry could have significant negative economic impacts on our industry, including to undermine positive benefits of the agreement, including those cited above.
- **Accountable Digital Trade** (Chapters 19 and 20): American music industry continues to strongly supports the inclusion of platform accountability as a priority for U.S. digital trade policy and is concerned by provisions in the USMCA, e.g., over-broad safe harbors, that diminish rather than strengthen that priority. While we share the strong support for digital trade chapters that promote economic growth online – as we both benefit from and contribute significantly to such growth – our industry also faces fundamental systemic challenges, with significant negative economic impacts, posed by certain user-upload music platforms. As digital trade chapters establish the rules of the road for digital trade, those chapters must also provide critical guard rails to combat these challenges, particularly given the highly-dynamic nature of the digital environment and the U.S. law that is ever-adapting to it.

Conclusion

The American music industry once again thanks to the ITC for this opportunity to provide written comments on the potential economic impacts of the USMCA. We look forward to the continuing to work with the ITC on trade matters generally and the USMCA in particular.

Sincerely,

American Association of Independent Music
American Federation of Musicians
The Americana Music Association
Association of Independent Music Publishers
Church Music Publishers Association
Christian Music Trade Association
Gospel Music Association
The Living Legends Foundation, Inc.
Music Managers Forum, U.S.
National Music Publishers' Association
National Songwriters Association International
Recording Industry Association of America
The Recording Academy
Rhythm & Blues Foundation
Screen Actors Guild-American Federation of Television and Radio Artists
Society of European Stage Authors and Composers
SoundExchange
USAlliance for Music