Government of Canada
Public consultations on the renegotiation of the North American Free Trade Agreement (NAFTA) with the United States and Mexico

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Comments of 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.

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Introduction: Our Digital Rights Are Not for Sale (or Trade)

OpenMedia is pleased to provide its comments to the Government of Canada's *Public consultations on the renegotiation of the North American Free Trade Agreement (NAFTA) with the United States and Mexico*. As a community-based, non-profit organization that works to keep the Internet open, affordable, and surveillance-free, OpenMedia would like to ensure that preserving and upholding Canadians' digital rights are one of the key considerations at the forefront of the NAFTA renegotiations.

Canadians' experience with the Trans-Pacific Partnership (TPP) has made many wary of what may be traded away on behalf of the Canadian public, without their knowledge or consent, in another multilateral, high-level trade agreement that will include many of the same issues, such as intellectual property law and e-commerce. In light of that, much of this submission will focus on the negotiation process around the TPP, and lessons that the federal government might learn and apply from that when it comes to the NAFTA renegotiations.

As a digital rights advocacy group, OpenMedia is most concerned with the impact that revised or new provisions in NAFTA will have on the Internet, and on everyday citizens' ability to use the Internet to engage with their communities, participate in public discourse, exercise their right to free expression, and related activities that copyright laws in particular have often threatened to curtail, particularly through free-trade agreements such as the TPP.

Our submission below will focus on five issues in particular, to ensure that Canadians' digital rights do not get lost amidst the many important issues that the Canadian government will be addressing throughout the NAFTA renegotiations. They include the following:

1. Ensuring an open, transparent, inclusive, and meaningful consultation process that will keep Canadians informed and involved throughout the NAFTA renegotiation process;
2. Prioritizing free expression online, in particular, by ensuring that the text of the revised NAFTA agreement includes positive language to affirm fair dealing rights and the importance of the public domain;
3. Protecting Canadians' privacy, by resisting requests to compromise established laws and privacy rights regarding subscriber data and data localization;
4. Defending Canada's net neutrality laws, which are considered currently some of the best in the world; and
5. Removing the Chapter 11 investor-state dispute settlement provisions from NAFTA.

Over 8,200 Canadians have sent in their own submissions in a letter to this consultation calling on the Government of Canada to act on the above recommendations. The full text of that letter is at <act.openmedia.org/nafta>.

The common thread unifying the above issues, beyond the prioritization of Canadians' digital rights, is the critical notion that NAFTA represents a trade agreement that may impact rights, values, and interests that go far beyond and may be valued above trade itself. Trade is not necessarily the most suitable lens through which to capture and address non-financial and non-commodity rights 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 right to determine the laws that one lives under in an open and democratic process. OpenMedia's main goal in this submission is to advance a forward-looking vision that centres digital rights and Internet governance in Canada, to ensure that a renegotiated NAFTA is in the best interests of Canada's digital future.

I. NAFTA Renegotiation Process Must Be Open, Transparent, and Inclusive

OpenMedia cannot emphasize enough the importance of openness, transparency, and inclusivity with regards to the process through which the Government of Canada manages the NAFTA renegotiation. The federal government must implement the hard lessons learned from the TPP negotiation process, and ensure that it does not repeat the same mistakes that gave rise to well-founded concerns over undue secrecy,[1] blatant disregard for Canada's democratic institutions,[2] and overwhelming corporate influence at the expense of civil society and the public interest.[3]

We are deeply concerned with reports that the TPP may be used as a starting point for NAFTA renegotiation, particularly regarding the intellectual property law chapter. The Canadian government should not allow this to happen. To use the TPP as a starting point would be to perpetuate policies that were arrived at through a deeply flawed process, in which industry lobbyists had the ear of the government while civil society was excluded — flying in the face of any commitment whatsoever to a meaningful consultation process with Canadians.

Not only that, but the TPP included provisions that even Canada's own negotiators had no say in, including chapters that the other countries closed before Canada joined, and provisions on which Canada alone objected, such as increasing criminal sanctions for DRM circumvention. This would not have been a process, or an agreement, that would have served Canadians' interests well, if at all. The NAFTA renegotiations process is a chance for Canada—and its government—to do better, and OpenMedia looks forward to systemic changes to the trade negotiation process that would enable this.

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1 Jesse Brown, "Why are the Conservatives keeping Trans-Pacific Partnership negotiations secret?" *Maclean's* (28 August 2014) online: <http://www.macleans.ca/society/technology/why-is-the-trans-pacific-partnership-such-a-secret/>; Michael Geist, "Why the secrecy on Canadian trade talks? Because there's something to hide: Geist" (4 July 2014) online: <https://www.thestar.com/business/2014/07/04/why_the_secrecy_on_canadian_trade_talks_because_theres_something_to_hide.html>; Maira Sutton, "TPP Negotiations Go Further Underground with Unprecedented Secrecy Around Meetings in Canada" *EFF* *8 July 2014) online: <https://www.eff.org/deeplinks/2014/07/tpp-negotiations-unprecedented-secrecy-around-ottawa-meetings>.

2 "Trans-Pacific Partnership text won't be available before election" *CBC News* (14 October 2015), online: <http://www.cbc.ca/news/politics/canada-election-2015-tpp-text-release-delay-1.3270806>; Council of Canadians, "Public input on Trans-Pacific Partnership ignored by Liberal government" (18 April 2017), online: <https://canadians.org/blog/public-input-trans-pacific-partnership-ignored-liberal-government>.

3 Lee Drutman, "How Big Pharma (and others) began lobbying on the Trans-Pacific Partnership before you ever heard of it" *Sunlight Foundation* (13 March 2014) online: <https://sunlightfoundation.com/2014/03/13/tpp-lobby/>; Sujata Dey, "The Trans-Pacific Partnership Erodes Public Policy to Benefit the World's Rich and Powerful" *Canadian Perspectives* (2016) online: <https://canadians.org/sites/default/files/publications/cp-spring16-tpp.pdf>.

A. Let's Talk TPP Citizens' Report: Rebuilding Public Trust in Trade Processes

In March 2017, OpenMedia published a signature crowdsourced report titled *Let's Talk TPP Citizens' Report: Rebuilding public trust in trade processes*.[4] The report was the culmination of several years of advocacy and public engagement on OpenMedia's part,[5] regarding the TPP and its harmful implications for citizens' digital rights and our democracy more broadly. It drew on the input of nearly 28,000 Canadians who submitted their perspectives and concerns to the House of Commons Standing Committee on International Trade (CIIT), during the CIIT review of the TPP. The report focused on five key issues: digital rights and innovation, corporate overreach and democratic accountability, healthcare and public services, the environment, and the economy.

Overridingly, however, the contents of the 28,000 submissions to CIIT revealed one common concern that united Canadian citizens across their specific areas of focus. The author of the *Let's Talk TPP Citizens' Report*, Meghan Sali, noted the following:

> What we found from reviewing comments made by Let's Talk TPP participants was, far from being siloed into issue-specific buckets, Canadians were broadly concerned about the impacts of the TPP on *democratic decision-making as a whole, and how we as a nation decide on policies that affect us all*.
>
> But perhaps the most important takeaway is that *Canadians have lost trust in the process* — in no small part because the TPP's negotiation was conducted in extreme secrecy. *Transparency is an essential accountability mechanism in any democratic society*, and without it citizens have become deeply skeptical that the results of trade processes will be to the benefit of the majority of Canadians.[6]

In light of the above, and given the federal government's public commitments to "set a higher bar for openness and transparency in government", including in the mandate letter addressed to the Minister of International Trade,[7] we hope that the Government of Canada will take to heart the recommendations presented in the rest of this section, rooted in the findings from the *Let's Talk TPP Citizens' Report*. OpenMedia's recommendations in this section are presented in two parts: openness and transparency of process; and broad, meaningful, inclusive consultation with civil society and representatives of the public interest.

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

5 "OpenMedia's work on the Trans-Pacific Partnership (TPP) began in 2012 and spans five years — the longest sustained intervention in our history as an organization. We became involved in the conversation about the TPP because we were concerned that the negotiations were being used as a vehicle to advance policies, through an internationally-binding agreement, that would have a negative impact on the ability of Internet users to share, collaborate, and express themselves freely online. Our work focuses on engaging citizens in working towards informed and participatory digital policy, and as such the TPP presented both an opportunity and a challenge for our organization." Sali, *supra* note 4 at page 5.

6 Meghan Sali, "It's here! Our TPP Citizens' Report explores how we can rebuild public trust in trade processes" (2017) *OpenMedia.org* online: <https://openmedia.org/en/its-here-our-tpp-citizens-report-explores-how-we-can-rebuild-public-trust-trade-processes> (emphasis added).

7 "We have also committed to set a higher bar for openness and transparency in government. It is time to shine more light on government to ensure it remains focused on the people it serves. Government and its information should be open by default. If we want Canadians to trust their government, we need a government that trusts Canadians. It is important that we acknowledge mistakes when we make them. Canadians do not expect us to be perfect – they expect us to be honest, open, and sincere in our efforts to serve the public interest." Office of the Prime Minister, Minister of International Trade Mandate Letter, online: <http://pm.gc.ca/eng/minister-international-trade-mandate-letter>.

B. Ensure the NAFTA Renegotiation Process Is Open and Transparent

The *Let's Talk TPP Citizens' Report* highlighted three main issues that Canadians identified as most important to them, when it came to process surrounding the TPP negotiations, which was bitterly disillusioning for many. Canadians most took exception to the issues, summed up as report headings, expressed in the following observations about how the Government of Canada conducted its trade negotiations:

1. We wanted transparency; instead, we got secrecy.
2. We wanted fairness; instead, we got inequity.
3. We wanted an independent analysis; instead, we got lack of scrutiny.[8]

This section will focus on the first item and provide recommendations to help ensure that the NAFTA renegotiation process provides genuine openness and transparency for Canadians, instead of the secrecy and undemocratic and opaque decision-making that the current government has ostensibly disavowed.

First, the Canadian public must know throughout the process exactly what the government is negotiating for, and above all, what the government is negotiating *away*, purportedly on the public's behalf. Transparency in the specific contents and implications of any new NAFTA agreement is critical in this respect, including the contents of and changes between each iteration of negotiating texts. This also means providing the who, when, where, what, why, and how of every NAFTA renegotiation round, and providing thorough briefs for every major issue that concerns the public interest and, in particular, financially disinterested civil society groups.

As the TPP demonstrated, Canadians cannot and will not support agreements made in secret,[9] through processes that are not only divorced from but hostile to their input and perspectives. By ensuring that Canadians are aware of the full extent of what is on the table and at stake throughout every stage of the renegotiations, Canada is more likely to end up with an agreement that more positively impacts its citizens, and is more positively received by the public at large.

Second, to advance the above objective, key texts and materials of the NAFTA renegotiations must be made available to the public as well as to Members of Parliament from other parties, in a timely manner. For example, it was unacceptable that during the TPP negotiations, the public's best source of information regarding the agreement's text was through leaks, rather than open public disclosure by the government to its own citizens and key constituencies.[10] In Canada, not only were citizens barred from seeing the full text, but even our elected representatives in Parliament were prevented from fulfilling their roles in holding the then-Conservative government to account.[11]

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[8] Sali, *supra* note 4 at pages 12-16.
[9] *Ibid*., at page 7.
[10] Jeremy Malcolm and Maira Sutton, "Release of the Full TPP Text After Five Years of Secrecy Confirms Threats to Users' Rights" (5 November 2015), online: <https://www.eff.org/deeplinks/2015/11/release-full-tpp-text-after-five-years-secrecy-confirms-threats-users-rights>.
[11] Alex Hern and Dominic Rushe, "WikiLeaks publishes secret draft chapter of Trans-Pacific Partnership" *The Guardian* (13 November 2013), online: <https://www.theguardian.com/media/2013/nov/13/wikileaks-trans-pacific-partnership-chapter-secret>.

The *Let's Talk TPP Citizen's Report* noted:

> The repeated failure of the government to address concerns spurred on by leaks of the draft text only served to further alienate members of the public and civil society, who repeatedly demanded access to the text throughout the negotiations.
>
> At over 5000 pages long, the TPP represents the most extensive trade agreement Canada has ever been a party to, yet MPs only gained access with the rest of the public after the text was released on November 5, 20159 — a mere three months before it was signed in Auckland.
>
> For Let's Talk TPP participants, this represented a compound betrayal, as the agreement was approved in principle in the middle of a federal election campaign — the text still secret — denying voters the information they needed to make an informed decision on election day.[12]

This level of withholding information not only the Canadian public, but put Canada itself in a worse negotiating position. This was because it meant that Canada did not avail itself of the full range of trade policy and related expertise available to the government, while other countries did.[13] One particularly egregious instance of this approach was when the federal government barred the full text of the agreement and access to the negotiations from NDP Member of Parliament Don Davies, the *Official Opposition Critic for International Trade*.[14]

Such obstruction and secrecy flies in the face of dearly fought for and maintained principles such as electoral representation and democratic oversight. The current federal government should be proud to eschew such practices and move boldly in the opposite direction when it comes to making publicly available, by releasing online, materials from each round of the NAFTA renegotiations, such as drafts and full texts of the agreement as they are created.

Third, transparency and openness cannot occur if everyday citizens are not given the same level of access to the renegotiations process and materials as parties who are more powerful and better-resourced to influence the renegotiations, such as corporate entities and industry lobbyists and representatives. The *Let's Talk TPP Citizens' Report* states, "While citizens and elected representatives were excluded from the process, and denied even the most high-level information about Canadian negotiating objectives, over 600 corporate lobbyists did have access to the working text—in many cases representing companies seeking to benefit directly from TPP provisions."[15]

To remedy this undemocratic collaboration of wealth with power, the Government of Canada should assign staff to keep track of precisely what meetings, materials, key negotiations personnel, and information are made available or open to corporate entities or their affiliates and industry representatives, and to what extent. The government should then use that information to ensure that civil society and public interest groups receive functionally the same level of access to these same meetings, personnel, materials, and information, in degree and kind.

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[12] Sali, *supra* note 4 at page 13 (footnotes omitted).

[13] Lenore Taylor, "Australian MPs allowed to see top-secret trade deal text but can't reveal contents for four years" *Guardian* (2 June 2015), online: <https://www.theguardian.com/business/2015/jun/02/australian-mps-allowed-to-see-top-secret-trade-deal-text-on-condition-of-confidentiality>.

[14] Mike Masnick, "Canadian Member Of Parliament, Responsible For Opposition Trade Policy, Denied Access To TPP Negotiations" *Techdirt* (29 August 2013) online: <https://www.techdirt.com/articles/20130828/16494724344/canadian-member-parliament-responsible-opposition-trade-policy-denied-access-to-tpp-negotiations.shtml>; "Trans-Pacific Partnership: Canadian MPs Have No Access To Drafts U.S. Pols Can See, NDP Says" (29 August 2013) *Huffington Post* online: <http://www.huffingtonpost.ca/2013/08/29/trans-pacific-partnership-canada-tpp_n_3838000.html>.

[15] Sali, *supra* note 4 at page 15; Elizabeth Palmberg, "The Insider List" (29 June 2012), online: *Sojourners* <https://sojo.net/articles/insider-list>.

Fourth, openness and transparency involves keeping the public regularly and robustly informed at each stage of the renegotiations, with respect to both content and process. OpenMedia finds it encouraging that the current NAFTA consultations website states: "The Government of Canada plans to provide periodic updates and summaries of the consultations, including stakeholders consulted, where consultations took place, and what topics were discussed during the consultations."

That is a promising start. However, it would be appropriate for the Government of Canada to provide not only periodic updates and summaries of the consultations, but regular updates and summaries, if not direct and less mediated access, to the renegotiation talks and meetings themselves, throughout each stage of the process. This is especially the case if industry groups and corporate entities will have access to such meetings and talks, though in no way should this occur without civil society and public interest groups also receiving the same level of access, as mentioned above. Moreover, the public must be able to access such materials, summaries, and updates in a timely manner, far enough in advance of each subsequent stage or meeting of the renegotiations process, such that the materials may meaningfully inform the public's views and further engagement in time to contribute meaningfully in each later stage.

Fifth and lastly, all reasonable efforts should go towards ensuring that Canadians who are not trade policy or related specialists understand the materials that are being released, both their contents and their implications. As the *Let's Talk TPP Citizens' Report* points out,

> The government itself made little effort to explain the agreement's key components, or to educate the public about its effects, contenting itself with bland talking points about the importance of trade. […]
>
> Notably [in Table 1], Canada stands far behind both the EU and the U.S. in almost all key areas for improving communication with citizen-stakeholders. Canadians have clearly and repeatedly demanded their government not only consult after the agreement is completed, as is being done with the TPP, but proactively engage citizens throughout the duration of the negotiation.[16]

This applies even more so now to NAFTA, with Canadians still reeling and skeptical from their experience with how the former government chose to manage the TPP negotiations process. Table 1 in the *Let's Talk TPP Citizens' Report*, reproduced here, indicates gaps that should be filled in the upcoming NAFTA process.[17]

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[16] *Ibid*., at page 13.
[17] *Ibid*., at page 14.

	US	EU	Canada
Release of negotiating mandate / negotiating objectives	No FTA-specific negotiating mandate Broadly defined objectives under trade promotion authority	**Release of negotiating mandate** since 2014 [CETA and TTIP negotiations]	No
Impact assessments and reviews	**Ad hoc** for Congressional hearings; **More systematic** for environmental reviews	**Systematic** for comprehensive ex-ante studies	**Ad hoc** for parliamentary reports Environmental impact assessments required only after final deal reached
Negotiating texts	Negotiating texts available only to cleared members of trade advisory committees	Position papers and negotiating texts increasingly available online, eg. TTIP and EU-Tunisia FTA	No
Information on negotiation rounds	Short and irregular ex-ante briefings on agenda of negotiations, and short chief negotiator reports after rounds	Extensive reports on the content of negotiations leaving out certain specific positions	No
Online consultation: release of public comments	Public comments received on negotiating objectives for TPP and TTIP, but not on specific text proposals	Limited to summary of statistical results	Ongoing for CETA Ongoing for TPP
Investor-state dispute settlement	Private hearings; release of documents conditioned to approval by all parties; New commitments to transparency under TPP regarding proceedings and documents and third-party participation through amici curiae	UNCITRAL [2014] transparency rules in CETA: open hearings and release of documents conditioned to approval by all parties	UNCITRAL [2014] transparency rules in CETA: open hearings and release of documents Subject to approval of disputing parties and redaction of confidential commercial information

A strong commitment to transparency will begin to rebuild Canadians' trust and counteract the deep-seated impact of the mishandled TPP talks, in which "the opaque negotiation process served to erode trust between the government, elected Members of Parliament, and the public."[18] Tom from Nepean, ON, stated in the *Let's Talk TPP* report:

[18] *Ibid.* at page 7.

> The process followed to develop the TPP does not match with the principles of transparency and participation, which are core Canadian values upon which the current government was elected. Trust of Canadians cannot be taken for granted - trust is renewed and maintained by repeated efforts to earn our trust.[19]

Canadians want to trust their government; but the government must give us a reason to do so. The NAFTA renegotiations, through implementing the recommendations above, is a prime opportunity for the current Government of Canada to make good on this particular promise.

C. Engage in Meaningful and Inclusive Consultation with Civil Society and Public Interest Groups

GAC Page "Information on consultations": Engaging with Canadians will be an important factor in informing the Government's positions and proposals in any renegotiation of NAFTA. It will also serve to determine Canada's objectives and approach to the negotiations.

GAC page "Consulting with Canadians": The Government of Canada is listening to Canadians from across the country and from all sectors and backgrounds about trade. This includes conversations with the provinces and territories, industry, unions, civil society, think tanks, academics, Indigenous peoples, women, youth and the general public.

Transparency ensures that Canadians know what the Government of Canada is considering and the direction in which the government is moving, with respect to the NAFTA renegotiations. However, it is only through meaningful, inclusive, and broad consultation that the Government of Canada may in turn know the perspectives, needs, and interests of Canadians, for the purposes of ensuring that the renegotiated NAFTA truly serves the Canadian public. However, the process must also ensure that Canadians are not taking the time and energy to contribute to the NAFTA renegotiations in vain; the government must also fully consider and take into account the views of citizens across different sectors of civil society, such that the final agreement may truly reflect the interests of all Canadians, and not the narrow interests of those who stand to benefit financially from specific policies and initiatives contained therein.

Similarly to transparency and openness, the TPP negotiation process provides a clear template of what not to do. It should be understood, however, that even avoiding the clear missteps of the TPP process would bring the standard of meaningful consultation up to a minimal floor. OpenMedia would encourage the Government of Canada to aim higher.

The following incidents, summarized in the Let's Talk TPP Citizens Report, should guide the Government of Canada in designing a baseline set of consultation principles when it comes to renegotiating NAFTA.

First, the government at the time of the TPP negotiations deliberately excluded not only citizens by elected representatives from every aspect of the process, including high-level objectives; timely knowledge of when or where the negotiating parties were holding each round of negotiations or associated talks or meetings; and as mentioned, the text of the agreement itself, throughout several revisions, over a period of five years. Conversely, in the NAFTA renegotiation, the Government of Canada should, conversely, should ensure that all of the above and any additional relevant materials are available online for Canadians from all corners and levels of the population are able to remain informed and give feedback to the government in turn.

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[19] *Ibid.*, at page 12, citing Electronic Frontier Foundation, "Trade for the Digital Age" (January 2017), online: <https://www.eff.org/files/2017/01/10/trade_for_the_digital_age_download.pdf>, at pages 4-5.

Second, the fact that everyday Canadian citizens could not access the text or the TPP negotiation process itself was exacerbated by the fact that at least 600 corporate lobbyists in the United States alone did receive ongoing access.[20] This sets up a fundamental inequity between the haves and have-nots, for an agreement that ostensibly should benefit all Canadians, and not just the wealthy or socio-politically powerful ones. The Government of Canada may remedy this gross inequality of access by ensuring that whatever the level and kind of access corporate entities and industry groups or their representatives or lobbyists enjoy, at every stage of the NAFTA renegotiations, that access is also granted to civil society groups, public interest advocates, and everyday individual Canadians.

Third, the number of industry lobbyists who were directly involved in or allowed to influence the TPP negotiations in Canada is unknown. This is because the government at the time created a special "Consultation Group", the details of which were kept a secret. This secrecy covered who was in the group; when, why, or how the group was created; and how one could be eligible for the group. In fact, Canadians became aware of the very existence of the group again only due to a leak, when someone sent an email to OpenMedia in error.[21]

Both the existence of this group and the secrecy around its existence were unacceptable for the TPP, and are unacceptable for NAFTA. As Michael Geist, Canada Research Chair in Internet and E-commerce Law, wrote at the time, “A TPP insider group raises a host of concerns including questions about who has privileged access, whether civil society groups will also have access and be invited to join, and the extent of behind-the-scenes consultations with industry groups.” Even where the government granted access to the text of the TPP agreement, participants had to sign a Declaration of Confidentiality and Undertaking of Non-Disclosure agreement, ensuring that information was restricted to the greatest extent possible.[22]

Rather than any insider group at all for NAFTA, the Government of Canada should conduct open written and in-person consultations throughout the country, similarly to Minister Mélanie Joly's undertaking for the Canadian Heritage Consultation on Canadian Content in a Digital World.[23] There might also be online participatory channels for those who would prefer to make their voices heard at an in-person event rather than via a written process, but who cannot physically attend one of the in-person events.

However, to reiterate, there should be no event or meeting open to corporate entities, industry groups, or affiliated lobbyists or representatives, that is not also and equally open to civil society groups, public interest advocates, and a cross-section of the everyday Canadians who will have to live with the results of the renegotiated NAFTA for years to come. If absolutely necessary, such as for the sake of efficiency and expertise (which the government should vet and also draw

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[20] Daniel Tencer, “Trans-Pacific Partnership (TPP): Canada Creating Secret 'Insider Group' Of Lobbyists, Observers Say” *Huffington Post* (30 November 2012), online: <http://www.huffingtonpost.ca/2012/11/30/trans-pacific-partnership_n_2218417.html#anyword>; “While citizens and elected representatives were excluded from the process, and denied even the most high-level information about Canadian negotiating objectives, over 600 corporate lobbyists did have access to the working text1 — in many cases representing companies seeking to benefit directly from TPP provisions.” Sali, *supra* note 4 at page 15.

[21] See note 21.

[22] *Ibid*.

[23] Government of Canada, “Canadian content in a digital world”, online: <https://www.canada.ca/en/services/culture /consultations.html>.

from a wide and diverse pool) on a narrow issue, then the process should disclose beforehand, and immediately after if not known beforehand, the identities and affiliations of those involved in any such closed group or meeting, akin to current lobbyist registries.

Fourth, the final of three major process issues that Canadians identified with the TPP was the lack of independent analysis and failure to take into account disinterested expert scrutiny of the contents of the agreement. For example, while Dan Ciuriak, former deputy chief economist at Foreign Affairs and International Trade Canada, estimated merely a 0.1% GDP gain by 2035 as a result of the TPP, the Chief Economist of the Canadian government concluded the TPP would result in our GDP growing 0.127% by 2040, in a report published seven months after Canada had already signed the agreement, and which "was widely panned by civil society, labour, and trade experts".[24]

Fifth, each round of consultations must occur far enough in advance, before each subsequent key stage of negotiations, that the results may meaningfully inform the Canadian government's approach and decisions. This is especially the case if any commitments made in the relevant stage would require considerable efforts to reverse or modify at a later point.

II. Copyright Law Must Stay "Made in Canada": Protect Free Expression and Affirm the Public Domain

A. Ensure Copyright is a Catalyst for Free Expression in a Digital World

The open Internet is likely one of the greatest things that has happened for freedom of expression in democratic societies, since Gutenberg's printing press. This may be a trite observation today, but is one worth keeping at the forefront of the Canadian government's mind as it enters the NAFTA renegotiations. Carys J. Craig—Academic Director of the Osgoode Professional Development LLM Program in Intellectual Property Law, Editor-in-Chief of the Osgoode Hall Law School SSRN Legal Studies Research Paper Series, and a founding member of IP Osgoode (Osgoode's Intellectual Property Law & Technology Program)[25]—notes in the introduction to her book *Copyright, Communication and Culture Towards a Relational Theory of Copyright Law*: "Digital technologies…have the potential to alter and subvert power structures by changing the ways in which we access, engage with, and participate in the creation of these resources."[26]

Justice Abella of the Supreme Court of Canada, dissenting in the case *Robertson v. Thomson Corp.*, has emphasized the importance of ensuring that Canadian copyright law adapts to and facilitates, rather than obstructs, new technological modes of expression and Canadians' ability to fully benefit from them:

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[24] Sali, *supra* note 4 at page 16.

[25] "Carys J. Craig", Osgoode Hall Law School, York University, online: <http://www.osgoode.yorku.ca/faculty-and-staff/craig-carys-j/>.

[26] Carys J Craig, "Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law," Osgood Hall Law School Comparative Research in Law & Political Economy Research Paper Series, Research Paper No. 23/2011, at page 1.

> The *Copyright Act* was designed to keep pace with technological developments to foster intellectual, artistic and cultural creativity. In applying the *Copyright Act* to a realm that includes the Internet and the databases at issue in this case, courts face unique challenges, but in confronting them, the public benefits of this digital universe should be kept prominently in view. As Professor Michael Geist observes: The Internet and new technologies have unleashed a remarkable array of new creativity, empowering millions of individuals to do more than just consume our culture, instead enabling them to actively and meaningfully participate in it.[27]

In the context of NAFTA, the Internet, as the cornerstone infrastructure of much of these digital technologies, must remain open and unhindered in its unprecedented ability to foster creativity, artistic and other expression, new and previously marginalized or hidden perspectives, and the speaking of truth to power.

The Canadian government must be particularly sensitive to attempts to make our copyright laws even more restrictive and expansive than they already are, with respect to owners' rights, while ever narrowing the public domain and users' rights. Copyright law all over the world has grown increasingly imbalanced as a result of industry entertainment groups and outmoded cultural production lobbyists attempting to seek rents from new, digital innovators, rather than themselves adapt to the changing digital world and new behavioural norms that result in more creativity and consumer surplus than ever before.

In fact, one scholar reviewed copyright law consultations in the European Union, United Kingdom, Ireland, and Australia, all of which examined the question of whether these countries should move from their current legal basis of fair dealing—which is also Canada's system—to the fair use model that the United States uses. In her research, the author found the following:

> Many commentators, including the authors of all the reviews of copyright law [conducted in the European Union, United Kingdom, Ireland, and Australia], accept that the copyright regulatory scheme, and especially its system of limitations and exemptions, is the main regulator of the digital economy. There is also much agreement, from most constituents, that copyright laws must create a better balance between the protection and encouragement of both technological innovation and content creation while discouraging free-riding or piracy. Many of the submissions to the reviews agreed that the rights of copyright holders have been strengthened over the last few decades and that this strengthening of rights has started to act as a barrier to the growth of certain types of technology businesses. Several submissions argued that it is important to avoid "chilling" the introduction and growth of new technology since it is such a major driver of economic growth.[28]

Renowned intellectual property law scholar David Vaver—a member of the Order of Canada, Emeritus Fellow of St Peter's College at the University of Oxford, former longtime professor at Osgoode Hall Law School, and former Director of the Oxford Intellectual Property Research Centre—also noted earlier in 2012:

> Since a copyright law first appeared on early 18th century English statute rolls, legislatures worldwide have succumbed to a seemingly irresistible impulse to protect more and more for longer and longer, and ask less and less from beneficiaries in return.
> […]

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[27] *Robertson v. Thomson Corp.*, 2006 SCC 43, cited in Carys J Craig, "Technological Neutrality: (Pre)Serving the Purposes of Copyright Law," in Michael Geist (ed.), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright* (Ottawa: University of Ottawa Press, 2013).

[28] Susanna Monseau, "Copyright and the Digital Economy: Is it Necessary to Adopt Fair Use?" (10 March 2015), available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576436>, at page 40 (footnotes omitted).

> As ever smaller bits of data get protected, users find their liberty of action curtailed as ever smaller dealings are correspondingly called "substantial" and fall within copyright's control. The logic is inexorable: if something as insubstantial and evanescent as a newspaper headline can sit alongside The Stone Diaries or The Gutenberg Galaxy as an original literary work, why should equally insubstantial or evanescent takings be any the less under copyright control? Legislators usually demand solid justification for restricting individual liberty and competition; yet these enclosure movements have occurred with little in ethics or empirical evidence to support them. The effects on individual freedom and socially useful cultural practices can self-evidently be serious.[29]

What emerges from the above scholarship, as well as from observing the growing force of copyright lobbying and clashes with free expression in Canada, the United States, and elsewhere, is that copyright law may just as easily signal the death knell of, rather than catalyze, the unleashed creativity and diversity of expression the Internet has brought us since its inception, if legislators, the judiciary, and other decision-makers are not careful. As Craig points out,

> [I]ntellectual property laws have the capacity to shore up existing power structures and limit creative practices by enforcing and expanding traditional proprietary norms in the digital environment. Networked technologies present unprecedented opportunities for creative expression and participation in public discourse; but these technologies, and the activities they facilitate, are subject to legal regimes that allocate exclusive rights over information resources, restricting their creation, dissemination and development.[30]

In fact, the potential threat that misshapen copyright law poses to free expression has caused legal scholars to examine copyright in the context of the *Canadian Charter of Rights and Freedoms*—specifically section 2(b): "Everyone has the following fundamental freedoms: … (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[31] Graham J. Reynolds, for example, has specialized in this area and argued "that based on current copyright and Charter jurisprudence, a Canadian court could determine that provisions of Canada's *Copyright Act* unjustifiably infringe the Charter right to freedom of expression."[32] Similarly, Bita Amani has argued that "to meaningfully update the existing, flawed fair dealing doctrine, we must take seriously the ways in which copyright law contravenes Canada's Charter of Rights and Freedoms – significantly, rights to freedom of expression."[33]

In light of all of the above, OpenMedia suggests that copyright law should in fact be off the table altogether when it comes to renegotiating NAFTA. The Electronic Frontier Foundation (EFF) submitted this position in its comments to the USTR NAFTA Consultation:

> EFF does not believe that intellectual property rules are a good fit for trade agreements such as NAFTA. Prescriptive IP rules usually fail to account for developments in technology such as the Internet, or changes in business and social practices such as the sharing economy. Including such rules in trade agreements could inhibit the United States from modernizing its own intellectual property rules in the future. […]

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[29] David Vaver, "Harmless Copying," Intellectual Property Journal (December 2012) 25 IPJ 19, at pages 1-2.
[30] Craig, "Relational Theory," *supra* note 26 at page 1.
[31] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, s 2(b).
[32] Reynolds continues, "In so doing, this paper adds to the voices of those who have argued that Canadian courts should reconsider the relationship between copyright and the Charter right to freedom of expression, including David Fewer, Jane Bailey, Carys Craig, and Bita Amani." Graham J Reynolds, "Reconsidering Copyright's Constitutionality," *Osgoode Hall Law Journal*, Vol 53(3), 2016.
[33] "Introducing Dynamic Fair Dealing: Creating Canadian Digital Culture". In R. J. Coombe, D. Wershler and M. Zeilinger (eds.) Dynamic Fair Dealing: Creating Canadian Culture Online (Toronto: University of Toronto Press, 2014), 3-43, at page 14.

> Therefore, our general position is that intellectual property rules should not be included in NAFTA at all, but should instead be addressed in more open multilateral fora such as WIPO. If the minimal set of intellectual property rules already included in NAFTA, are retained, they certainly should not be expanded to create new, more detailed and onerous restrictions.[34]

OpenMedia would submit that the same applies to Canada, with the addition that intellectual property rules might be more appropriately addressed domestically as well, such as in the upcoming *Copyright Act* review, given the plethora of non-trade values engaged in the effects of such laws, such as health care and cultural expression. A trade-focused multilateral negotiation in a highly politicized and uncertain geopolitical climate is not an appropriate or suitable venue to decide what will ultimately be enshrined as on-the-ground rules with far-reaching, long-term, and non-trade implications on Canada's citizens and sociocultural landscape. These implications are not in the realm of trade, but in the realm of human rights, or what Canada as a country considers justice or fairness. This includes Canadians' ability to exercise their right to free expression in a digital world, and the potential that the federal government will end up criminalizing its own citizens for engaging in everyday activities as a matter of course while living in today's digital society.

The Government of Canada must hold its ground and ensure that Canadian copyright law prioritizes and promotes free expression in the Internet age, rather than allow it to be used as an agent of the latter's decline. The NAFTA renegotiations should leave alone Canada's copyright laws as a domestic matter, particularly given the historical and continued importance placed on Canadian culture and heritage, which goes directly to building and promoting a strong public domain that allows Canadians to share and exchange their knowledge, ideas, creativity, and culture online. This includes rejecting censorship (whether it occurs directly or indirectly), protecting and affirming fair use and fair dealing, promoting Internet access and affordability as the primary platform of today's creators, and ensuring that Canadians have clear, understandable, and balanced laws that govern citizens' online activity as they engage in acts of creation, communication, and self-expression every day.

B. Government of Canada Must Resist Industry Lobbying

There will be immense pressure on the Canadian government and its designated negotiators to change Canada's copyright laws, from the United States government, U.S. entertainment industry groups and their representatives or lobbyists, and from Canada's own copyright-zealous cultural production industry. All of these groups have signalled as much through various public statements and documents, including the USTR NAFTA objectives released on 17 July 2017,[35] submissions from the MPAA and RIAA to the USTR NAFTA consultations, and op-eds in Canadian publications.[36]

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[34] Jeremy Malcolm and Ernesto Falcon, Submission of the Electronic Frontier Foundation to USTR NAFTA Consultation (9 June 2017), online: eff.org <https://www.eff.org/files/2017/06/11/submission_on_negotiating_objectives_for_nafta.pdf>. EFF continues: "The original NAFTA did not contain such prescriptive intellectual property rules. Instead it largely tracked the requirements of TRIPS. For example, it required a minimum 50 year term of copyright protection, and omitted provisions on more specific topics such as technological protection mechanisms and camcording in movie theatres. This minimalist approach has meant that the NAFTA parties have not been locked into outdated 1994-era intellectual property laws where they have become irrelevant or harmful," at page 2.

[35] 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>.

[36] John Degen, "Reviewing copyright? Check the glossary" Policy Options (13 July 2017), online: <http://policyoptions.irpp.org/magazines/july-2017/reviewing-copyright-check-glossary/>.

For example, the MPAA submission emphasizes strengthening restrictions and enforcement for intellectual property rights even more under a renegotiated NAFTA, including the increasing criminalization of activities found to be copyright infringement. The RIAA, on the other hand, seems to focus on attacking the principle of intermediary liability and related safe harbour provisions, which roughly translates into their wanting a renegotiated NAFTA to include laws that allow one to shoot the messenger.[37]

Within Canada, cultural production industry groups have also called for increased copyright restrictions and enforcement, to address what they feel is an excess of consumer surplus provided by digital technologies. However, many of the purported losses or declines fuelling such groups' acrimony towards critical and inherent principles such as fair dealing and the public domain have also appeared not to be based in fact, or at least enjoy some level of hyperbole.

For instance, Michael Geist points out that contrary to overblown claims from entertainment industry groups, the "Canadian music market has leaped past Australia to rank 6th in the world, while music collective SOCAN is generating record earnings."[38] Similarly, sales of music recordings in the United States now trend upwards,[39] and in a separate article, Professor Geist explains why declining business in educational publishing has little to do with fair dealing, and would not be reversed by simply strengthening copyright, while the latter would lead to broader detrimental consequences outside of publishers' own interests.[40]

Given all of the above, the Government of Canada must remain steadfast throughout NAFTA renegotiations concerning intellectual property, rooted in the knowledge that Canada's current copyright regime is already the result of careful balancing after a national consultation, moreover with knowledge of another national consultation imminent. Our copyright regime needs no further weighting towards the narrow financial interests of copyright owners.

C. "Made-in-Canada" Copyright Law Should Stay Canadian

Canada is an international leader when it comes to a balanced and comprehensive copyright law regime. While it certainly has room for improvement—and OpenMedia looks forward to elaborating on this during the *Copyright Act* review later this year—compared to other countries, and particularly compared to the United States, most acknowledge that Canadian copyright law is "widely regarded as one of the most innovative in the world."[41] In fact, Hong Kong is currently discussing our law regarding user-generated content as a model to ensure their copyright law does not hinder free expression.[42] While the United States must impose its intellectual property law regimes on other countries through the economic power of free trade agreements (such as with Australia, in the AUSFTA, and Singapore, in the USSFTA), other countries are freely looking to copy Canada's.

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[37] Andy, "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/>.

[38] Michael Geist, "What's next, after the 2012 copyright overhaul?" Policy Options (12 June 2017), online: <http://policyoptions.irpp.org/magazines/june-2017/whats-next-after-the-2012-copyright-overhaul/>.

[39] Shira Ovide, "The Music Industry's Still Off Key" (3 July 2017) *Bloomberg* online: <https://www.bloomberg.com/news/articles/2017-07-03/music-industry-didn-t-learn-from-its-digital-destruction?curator=MusicREDEF>.

[40] Michael Geist, "Fictional Claims: Why Kids Are Not Suffering With Canada's Copyright Fair Dealing Rules" (23 June 2016), online: <http://www.michaelgeist.ca/2016/06/fictional-claims-why-kids-are-not-suffering-with-canadas-copyright-fair-dealing-rules/>.

[41] Geist, "What's next", *supra* note 38.

[42] *Ibid*.

This may come as no surprise to those with firsthand knowledge of the extensive national consultations that the Canadian government conducted, leading up to the *Copyright Modernization Act* in 2012. Not only did this country-wide process lead to the copyright legal framework we have today, but the Supreme Court of Canada in addition to subsequent amendments and decisions have also bolstered the marked emphasis on balance between owners' rights and creators' rights, when it comes to copyright law.[43]

Given the extensive amount of work and care taken to craft a nuanced and balanced (to the legislators, at the time) copyright framework that best suits Canada's unique cultural and legal context and values, the Canadian government should under no circumstances compromise on our own copyright legal regime for the sake of "America First" motivations. This occurred once already, when "Canadians discovered that officials in the Harper government were taking instruction from US officials representing industry interests in lengthening and expanding copyright protections" (Geist 2011). Once again, it would appear that copyright reform in Canada was being driven by foreign interests and corporate agendas."[44]

The Canadian government would do well in this particular context to heed the words of Minister Chrystia Freeland's own speech to Parliament on 6 June 2017, regarding Canada's place and priorities in the newly emerging world order. Given the turning inward of the United States across a broad range of policies, including that of free trade, human rights, and global cooperation, Minister Freeland emphasized a renewed focus on strengthening Canada's role in multilateral forums and the international liberal world order.

This suggests that if Canada were to depart from its nationally and extensively considered copyright regime, and is to do so outside the context of the 2017 statutory review of the *Copyright Act*, then the first port of call in terms of an example to follow would not be the United States. It would be international intellectual property laws such as those enshrined in the *Berne Treaty*—which current Canadian copyright law already meets. There is no reason to go beyond this for the sake of US industry-driven interests, particularly when there will be no clear benefit, and more likely clear harms, to Canadian creators, students, researchers, entrepreneurs, educators, artists, and everyday Internet users.

D. Ensure NAFTA Renegotiations Do Not Pre-empt Full Review of Canadian *Copyright Act*

OpenMedia notes that the NAFTA renegotiations process will likely coincide in late 2017 with the Canadian government's statutorily mandated review of the *Copyright Act*. This review will be the first opportunity that Canadians and the Government of Canada has to assess the impact and effects of the first modernization of Canada's copyright laws since 1997. Until that occurs, the Canadian government should not risk restricting our ability to amend and create Canadian copyright laws in a way that best advances Canada's digital future.

According to Michael Geist, the upcoming review "should be used as a benchmarking exercise, enabling the many stakeholders to give their perspectives on what is working well and what needs to be reviewed…. [Despite room for "modest reforms"], a radical overhaul would do more harm than good, as the full implications of the 2012 reforms and recent court rulings are still being sorted out." If that is the case for Canada's own internal *Copyright Act* review, then that should go even more strongly for the NAFTA renegotiations, where what is in the best interest

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[43] See, e.g. *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, and *Théberge v Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34.

[44] Coombe, Wershler and Zeilinger, *supra* note 33 at page 39.

of Canada's digital future may get lost among the divergent interests and values of our trading partners, particularly the United States.

It is with no shortage of uneasiness that Canadians consider the impact that trade agreements could have on their digital rights, particularly if we as citizens are given no awareness and no say in the contents or process of the final agreements. The *Let's Talk TPP Citizens' Report* describes a finding that copyright in particular raised apprehension among Canadians:

> Given the increasing ubiquity of Internet use in Canada, it's difficult to understate just how concerned Canadians were about how the TPP could impact their digital rights. For example, in 2015 when speaking at a panel organized by the Centre for International Governance Innovation, Professor Michael Geist referenced an early 2011 consultation on entry into the TPP undertaken by the Conservative government. Although he reports that the results of the consultation were never made public, documents obtained through an access to information request revealed that copyright was, by a large margin, the issue raised most widely by Canadians.[45]

Canadians want to be directly involved in shaping the copyright laws and policies that will fundamentally impact their lives, in how they may create, share, learn, and communicate with each other now and in the future. As stated in the letter that over 8,200 Canadians submitted to this consultation through OpenMedia's online tool:

> As one of the key levers that controls expression online, Canadians are deeply concerned about being able to shape their own copyright policy. As we head into a mandatory 2017 copyright review, we should not accept any rules under NAFTA that would restrict us from fully evaluating and updating these policies in the best interest of Canadians.[46]

The best place to involve everyday Canadians from all sectors of society in shaping Canadian copyright law and policy would be through a national consultation held for the upcoming *Copyright Act* review. In that vein, the Canadian government's primary goal with respect to copyright in the NAFTA renegotiations should be to preserve our current "made in Canada" regime, akin to Canada's caretaker convention during federal elections, until we have a chance to fully assess and review our own copyright laws and policies, without permitting NAFTA to restrict our ability to make any needed changes to craft the best copyright system possible for Canada.

E. Stand Strong on Notice-and-Notice

Canada's current notice-and-notice system, through which ISPs must pass on notices of alleged copyright infringement from copyright holders to users who have purportedly posted infringing content online, is a key feature of our "made in Canada" copyright regime. While there is room for improvement, notice-and-notice was a good-faith attempt by legislators at the time to land on a more nuanced and balanced approach than the harsher notice-and-takedown regime in the United States, while still providing an avenue of recourse for copyright holders who identified instances of copyright infringement online. OpenMedia expects that the United States, driven by entertainment industry groups, will pressure the Government of Canada to change its notice-and-notice system, and perhaps adopt the notice-and-takedown system instead.

There are many reasons to avoid adopting the notice-and-takedown system. First, the system would lead to myriad more false positives in the way of overzealous content takedowns, resulting in widespread chill of free expression on the Internet.

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[45] Sali, *supra* note 4 at page 18.
[46] OpenMedia, "NAFTA: Don't trade away our digital rights" online: <https://act.openmedia.org/NAFTA>.

Second, given that Canadians already witness many instances of abuse of the notice-and-notice system, in which everyday users are threatened with lawsuits and asked to pay exorbitant settlement fees, a harsher notice-and-takedown system would only exacerbate the abuse.

Third, notice-and-takedown encourages Internet service providers and other online intermediaries to err on the side of caution, lest they find themselves the target of litigation, legitimate or otherwise. Rather than expend resources or harm their bottom line to uphold free expression or their users' rights, many ISPs may simply take down the identified content to make the problem go away, without first investigating whether or not the content in fact infringes any copyright.[47]

Fourth, as the above demonstrates, notice-and-takedown results in a complete lack of due process, in which a targeted user is presumed guilty unless proven innocent—and in fact, they often would not even have a chance to demonstrate innocence before the intermediary perfunctorily takes down the identified content. However, there may be any number of reasons driving a takedown request that have nothing to do with preserving an author's legitimate copyright, including the desire to quash political dissent, or fear of reputational harm. One would expect the content to be legal and should stay online in these cases, but there is no way to assess that before the content is taken down, short of an ISP risking its own legal standing in order to protect a user or uphold free expression rights.

On the other hand, notice-and-notice provides a remedy to copyright owners while releasing ISPs from having to choose between fulfilling the role of deputized copyright law enforcers, or risk legal liability:

> Critics of the notice and takedown system have advocated a move to a system involving greater due process or, better yet, a system where the Internet service providers' role as policemen is removed entirely. Canada's approach, referred to as "notice and notice", is a good example of this. According to Canada's *Copyright Act*, service providers only have an obligation to pass notices of claimed infringement on to offending users. From there, the dispute is essentially between the user and the copyright holder. Crucially, service providers' immunity is not contingent on their participation in the process. Though they retain discretion to remove offending material, they do not risk liability if they do not. Given the evidence of abuse within the DMCA, there is a strong argument in favour of systems like Canada's, and one that is bolstered by the recognition of the Internet as a human right.[48]

Safe harbour for intermediary liability is critical for a number of reasons to do with smooth functioning of the Internet as well as preserving free expression. However, a recent study by the Internet Association in the United States also found that eliminating such safe harbour would cost the United States "4.25 million jobs and $440 billion in GDP every 10 years".[49] Rather than compromise Canada's own careful and nuanced standards in its approach to online copyright

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[47] "The irony here is almost too obvious to mention: an entity dedicated to monitoring the potential "chilling effects" of DMCA takedown notices is censoring itself. Chillingeffects.org has now removed itself from search results, making those notices harder to find. … Many copyright owners and the Copyright Alliance had complained that Chilling Effects defeated the purpose of takedown notices and had effectively become a search engine for pirated content. Just as Google would remove the disputed links, Chilling Effects republished them in a searchable database. That use case was disputed by Chilling Effects' defenders." Greg Sterling, "DMCA Takedown Database ChillingEffects.org Takes Itself Out Of Search Results" (12 January 2015), online: *searchengineland.com* <http://searchengineland.com/anti-censorship-database-chilling-effects-censors-removing-domain-search-212567>.

[48] Michael Karanicolas, "Understanding the Internet as a Human Right" (November 2012) 10 Can J L & Tech 263, at page 74.

[49] 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>.

infringement, the Canadian government should maintain its notice-and-notice course, and then make some much needed amendments to it during the 2017 *Copyright Act* review. For example, the laws greatly need supplementary regulations to curtail mass abuse of the system by copyright trolls,[50] through illicit settlement demands, which leads to its own form of chilling effects on Canadians' free expression online.[51]

F. Maintain Current Copyright Terms: Term Extensions Will Harm Canadian Interests

There have been indications that the United States—and perhaps Mexico as well, given its copyright terms of life plus 100 years—will pressure Canada (again) to increase its own copyright terms. Similarly to other requests that OpenMedia expects the United States to make of the Canadian government, we should resist this request as well, for several reasons.

First, Canada's current copyright terms for most works are the life of the author plus 50 years, with the exception of sound recordings and performances (plus 70 years). This is arguably already more than sufficient and many would argue excessive. In addition, our current terms are already in keeping with international law under the *Berne Treaty*. There is no reason to go beyond this without clear benefit to Canadian creators who must live and work under Canada's copyright regime, regardless of whether it truly benefits anyone beyond copyright owners.

Second, term extensions will harm Canada's economic interests. A recent study modelled what the economic impact would be in New Zealand if it extended its current copyright terms from 50 to 70 years after the life of the author, the change that Canada may be asked to make. The study found that this change would cost approximately $55 million per year.[52]

Even a generally pro-TPP report by the C.D. Howe Institute admitted that term extensions would result in more costs than benefits to Canada, and pointed to other areas of the TPP that had nothing to do with copyright, to make up for that loss.[53] That is not how sound policy should work, particularly when many argued that the TPP itself would nevertheless constitute a net loss for Canada, both in terms of economics and arguably higher values such as health policy, environmental law, and citizens' rights to freedom of expression.

Third, term extensions only diminish the public domain,[54] by withholding works for an additional time, beyond any corresponding incentive to create new works.[55] For example, after an author

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[50] "The system is being abused by some companies that attach inappropriate and sometimes absurd settlement demands (even referring to American law) to the notices that ISPs believe must be forwarded to subscribers. Most – but not all – recipients of such notices have learned they can safely ignore these demands, and do not respond. Without a court order, an ISP cannot disclose a customer's identity. Even the government tells subscribers that they don't need to respond to these notices, and some responsible ISPs do provide this government link to their subscribers or otherwise inform them of their rights." 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/>.

[51] *Ibid.*

[52] Henry Ergas, Concept Economics, "Economic Modelling on Estimated Effect of Copyright Term Extension on New Zealand Economy," available online: <https://www.tpp.mfat.govt.nz/assets/docs/TPP%20-%20Analysis%20of%20Copyright%20term%20extension,%20explanatory%20cover%20note.pdf>.

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

[54] Among other potential threats, expansions in intellectual property protection (for instance by increasing the term of copyright) risk harming the public domain by placing more material under the control of rights-holders for longer periods of time. Graham J Reynolds, "The Precautionary Principle and its Application in the Intellectual Property Context: Towards a Public Domain Impact Assessment" (Draft) in Teresa Scassa, Mistrale Goudreau, Courtney Doagoo & Madelaine Saginur, *Intellectual Property for the 21st Century: Interdisciplinary Approaches* (Toronto: Irwin Law), at page 4.

has been dead for fifty years, they are not likely to be in a position to create new works simply because their work now has a twenty-year longer monopoly. Meanwhile, however, artists, writers, creators, researchers, and others who would use the work if it were in the public domain, cannot use it, thereby preventing the creation of new works. In this way, any term extensions in Canadian copyright at this point would contravene the very purpose of copyright law.

Many in the United States itself are dissatisfied with their own copyright terms, as the popular Public Domain Day demonstrates. This day is marked every January 1, the date on which new works would have entered the public domain in the United States, were it not for one of its many copyright term extensions. A website[56] lists the specific works each year, and points to where else in the world these works have entered the public domain and are available to the citizens of that country.

G. Reject All Attempts to Increase Criminalization or Digital Rights Management in Copyright Law

The USTR NAFTA Renegotiation Objectives suggest that the United States will also ask the Canadian government for increased criminal penalties for the circumvention of digital rights management (DRM) technologies. This is another measure that the Government of Canada may soundly reject, in the best interests of Canadians and their right to free expression.

First, Canadian copyright law already incorporated strict measures in its 2012 *Copyright Act* as a result of U.S. pressure, and it would likely not serve Canadians well to increase the severity of our copyright laws further, beyond what it seems the federal government was initially inclined to do before the United States got involved. More recently, Canada was forced to compromise our commitment to a balanced copyright framework again, as part of the TPP negotiations. The TPP involved increasing further criminal sanctions around digital rights management, and Canada was the sole member of the negotiations to oppose this. However, Canada eventually relented, due to its disadvantageous negotiating position and having given up its right to veto terms in order to join the TPP at the late stage that it did.[57]

Second, the notion of digital rights management itself remains of questionable benefit to a healthy, robust, and balanced copyright framework that promotes the creation of new works as much as it protects their creators. Many academics, scholars, practitioners, and creators themselves have argued against DRM and pointed out the ways in which it may impair rather than advance the objectives of copyright.

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[55] "[A]t a certain point, it can be assumed that the incentive function mentioned above will cease to operate. At this point, expanding intellectual property protection will not result in the creation and dissemination of any new works (works that would not have been created or disseminated absent the expanded intellectual property protection). Said differently, any expansion of intellectual property protection at or past this point will not provide any benefit to the public domain. Instead, it will only result in a contraction of the public domain." *Ibid.*, at page 11.

[56] Center for the Study of the Public Domain, Public Domain Day 2017, online: <https://law.duke.edu/cspd/publicdomainday/>.

[57] Michael Geist, "The Trouble with the TPP, Day 6: The Price of Entry" (11 January 1016), online: <http://www.michaelgeist.ca/2016/01/the-trouble-with-the-tpp-day-6-the-price-of-entry/>.

For instance, even though proponents of DRM argue that the technology only means to impede illicit copyright, rather than access, in practice DRM often bars both at the same time.[58] This especially impacts users with disabilities, who must sometimes circumvent DRM in order to make the contents of the work accessible. In this case, there is either no copying involved, or the copying would fall under fair dealing or fair use, and not constitute infringement. However, the DRM technology would not be able to tell the difference, and would bar all access or all copying, even when the access and the copying would be legal. While the *Marrakesh Treaty* remedies this issue to some extent for those who are blind or visually impaired, those with other disabilities may continue to find their access limited or barred altogether by DRM, unless the law makes additional express provisions for them.[59]

Third, expanding the criminalization of DRM circumvention will further discourage people from freely using and creating materials that are either part of the public domain or in ways that would constitute fair dealing, for fear of getting it wrong and incurring criminal sanctions. This would lead to an overall drop of creativity, expression, and innovation throughout the country, and drastically knock Canada's copyright framework off course in the way of achieving balance. As Professor Craig writes, "By focusing on the perceived threat to copyright owners presented by digital technologies, Canada's legislature has enacted technology-specific laws that overcompensate owners and tip the balance in their favour." Similarly, the authors of *Introducing Dynamic Fair Dealing: Creating Canadian Digital Culture* observed the following:

> Digital rights management (DRM) systems, which encrypt content in order to limit access to it, present a "technological fix" to this problem, enabling producers to physically control and manage digitally distributed information by using contract law to enforce these limitations. The emerging digital landscape is increasingly governed by privately generated norms backed up by legislative bodies, privileging private ordering and displacing public deliberations around the scope of copyright and its limits: "the immediate outcome of this process is to turn large chunks of what was once in the public domain into private goods (Elkin-Koren 2001: 192).[60]

Digital rights management systems and technologies easily cross the line from legitimately protecting copyright owners' interests to simply violating everyday users' rights, whether that is the right of fair dealing, the right of access to information, or the right of free expression. One way that the Canadian government should resolve this problem is to expressly provide for affirmative rights to circumvent DRM under appropriate circumstances, such as in order to make the contents of a work accessible to someone with a disability. Otherwise, "[b]y privileging digital locks and their protection over user rights and the public interest, the new rules [i.e. DRM and anticircumvention laws] disrupt the traditional copyright balance, 'sacrificing user rights and privileges to the ultimate power of technical control'.[61]

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[58] Many works with both access and copy protection contain a single TPM that regulates both access and copying. A user may circumvent such a TPM only in order to bypass its copy controls for a fair dealing purpose, however because the access and copy control TPM are one and the same this user would be guilty of bypassing an access control TPM, even if only incidentally. DDD 83

[59] Maira Sutton, "TPP Undermines User Control and That's Disastrous for Accessibility" (27 July 2015), online: <https://www.eff.org/deeplinks/2015/07/tpp-undermines-user-control-and-thats-disastrous-accessibility>.

[60] Coombe, Wershler and Zeilinger, *supra* note 33 at page 19.

[61] Craig, "Technological Neutrality", *supra* note 27 at page 296.

Other public interest advancing and public domain-protecting measures that the Canadian government should negotiate for in NAFTA include:

- expressly stating in the text of the agreement that students and teachers may copy and paste or otherwise make more accessible and processable DRM-locked e-books without violating anticircumvention laws, in fair dealing circumstances;[62]
- inserting strong, plain language text that makes explicit that "fair dealing exceptions are 'always available,' even where circumvention of TMPs is involved";[63]
- inserting language that expressly exempts libraries and librarians from DRM anticircumvention rules under certain circumstances in the course of their work;[64] and
- adding text that expresses a commitment to maintaining a balance between the private rights that DRM privileges, and the public interest and public domain, including regular reviews and amendments if the former unduly restricts or diminishes the latter.

H. Fight for Fair Dealing, Uphold Users' Rights, and Champion the Public Domain

The Government of Canada must prioritize fair dealing and the public domain in any talks regarding copyright and intellectual property. This is more critical now than ever in today's digital society,[65] where a disproportionate amount of attention paid to digital locks and ways to regulate and take down online content threatens to dim the potential of a dynamic and enriching public domain that a free and open Internet would cultivate and preserve. If Canada is to ensure that its democratic values and freedoms are not bargained away for trade purposes, particularly in the form of Canadians' digital rights such as online free expression, then the Canadian government must be alert to and be prepared to reject any requests that threaten citizens' ability to exercise their right to fair dealing or to benefit from, build upon, and contribute to Canada's public domain.

The public domain is not simply a negative space comprising all works left over after copyright owners claim what is theirs.[66] The public domain is a positive arena in its own right, comprising entire works that are not subject to copyright, and for many it also conceptually encompasses the myriad uses of copyrighted works that constitute fair dealing.[67] Not only is the public domain

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[62] Geist, "What's next", *supra* note 38.
[63] Knopf, *supra* note 49.
[64] Victoria Owen, "Libraries and the copyright (balancing) act" *Policy Options* (14 June 2017), online: <http://policyoptions.irpp.org/magazines/june-2017/libraries-and-the-copyright-balancing-act/>.
[65] "Many of the digital activities newly made possible, or which may be invented in the future, rely on exploiting the exceptions and limitations to copyright law. Whether it is the internet and Web 2.0 enterprises provision of image search, or social networking platforms, or the ability for the end user to use tools to remix copyright content, exceptions are 'often the only aspect of copyright law that makes these activities possible.' (Matthew Sag, Predicting Fair Use, 73 OHIO ST. L. J. 49 (2012)" Monseau, *supra* note 28 at page 11 (footnotes omitted).
[66] "If the public domain is regarded as little more than 'a virtual wasteland of undeserving detritus', then the prevailing assumption will be that anything of value within that realm ought to receive the recognition of propertization. After all, as Jane Ginsburg has noted, even the common expression 'to fall into the public domain' pointedly evokes "the devastation of a fall from grace", suggesting a sense of both loss and waste inherent in depropertization. […] Conceptualized negatively, the public domain is situated "outside" of copyright; it is "systematically excluded" 90 from copyright law and largely deprived of normative significance. As Lange observes, this is one of the "least useful or persuasive notions" of the public domain because it fails to attribute to the public domain "an affirmative existence of its own." 91 It has no political capacity to counter the excesses of propertization, because its contents are always susceptible to the privatization rationale. Carys J Craig, "The Canadian Public Domain: What, Where, and to What End?" (January 2010) 7 Can J L & Tech 221, at page 234 (footnotes omitted).
[67] "Copyright's purpose is to create opportunities for people to speak, to develop relationships of communication between author and audience, and to fashion conditions that might cultivate a higher quality of expression. The

more than "what is left" after ownership rights are attributed in copyright, but often the latter cannot occur without the former:

> [S]everal copyright scholars critically examined the "romantic author" who occupied the protagonist's role in copyright discourse, and revealed the significance of "author reasoning" in the diminution and marginalization of the public domain. Stripped of his romance, the author was revealed to be dependent upon others' work for inspiration and material, and the public domain was hailed to be the intellectual commons from which s/he must draw. In other words, without the fiction of original creation, the public domain could be recognized as the domain of creative use in which real authors must be free to play.[68]

In order to preserve and cultivate the robust public domain and cultural commons that creators as well as users and citizens need, the Canadian government must take active steps to assert the presence, value, and overarching importance of the public domain. Simultaneously, the government must also protect this sphere from overly expansive copyright measures, and instead support and facilitate the many ways in which Canadians may benefit from and themselves contribute to the cultural commons. This includes, to start with, strong, unyielding language that affirms and mandates each country's commitment to upholding fair dealing, or fair use, and users' rights.

First, it is important to recognize that fair dealing is an inherent aspect of copyright law[69]—not a "limitation" or "exception" to copyright, but a critical component baked into the very notion and purpose of copyright itself.[70] The Supreme Court of Canada has recognized this notion repeatedly:

> In *Bell*, Abella J explained the significance of the case: "*Théberge* reflected a move away from an earlier, authorcentric view which focused on the exclusive right of authors and copyright owners to control how their works were used in the marketplace…. Théberge focused attention instead on the importance copyright plays in promoting the public interest, and emphasized that the dissemination of artistic works is central to developing a robustly cultured and intellectual public domain. … [B]oth protection and access must be sensitively balanced in order to achieve this goal."[71]

To speak of fair dealing or fair use as afterthoughts to copyright, then, is to assume or imply that the entire scheme of copyright in Canada exists only to protect the private economic rights of authors and creators,[72] rather than encompass a balanced multifaceted policy whose core objective is to promote knowledge, ideas, expression, and other forms of communications in view of the public good and a vibrant, dynamic commons of knowledge and culture. This again applies especially in the context of digital technology.[73] Susanna Monseau observes:

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public domain that is irreducibly central 118 to the copyright system protects the cultural space in which this happens." *Ibid.*, at page 238.

[68] *Ibid.*, at page 234 (footnotes omitted).

[69] "[C]opyright contains within it the norms and aspirations that not only permit but necessitate the development of a robust cultural landscap3 in which citizens freely participate – a social space made more open, accessible, democratic and vital by the advances of network technologies." Craig, "Relational Theory," *supra* note 26 at page 2.

[70] "Fair dealing, as the Supreme Court now clearly stated, is perhaps more properly understood as an integral part of the *Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively" (para. 48)." Coombe, Wershler and Zeilinger, *supra* note 33 at page 10.

[71] Craig, "Technological Neutrality", *supra* note 27 at page 292 (footnotes omitted).

[72] "[T]he role that copyright plays as a cultural and social policy tool is rarely appreciated. Rather, copyright is widely regarded as a system whose purpose is the protection of private, proprietary rights." *Ibid.*, at pages 2-3.

[73] "Without exceptions to allow some uses of copyright content without permission neither users nor technology companies would be legally able to undertake many common digital activities that manipulate existing copyrighted

> In order to adapt a copyright regime to the increasingly "technological fair uses" made of copyright material in the digital realm there should be a refocus on the purpose of copyright law which is not simply to provide strong protections to authors and creators but to do so in order to benefit the public interest. In order to encourage social and cultural goals copyright law needs to continue to protect rights holders but it should also provide space for secondary users, promote fair access to content and the growth of new technologies.[74]

As such, OpenMedia would recommend that the Canadian government discuss and use language regarding fair dealing not as a "limit" or "exception" to copyright, but as one of the many rights that the set of rights known as "copyright" encompasses, in the sense of the right of reproduction, right of publication, right of performance, and the right of fair dealing, for instance. Someone who uses a work in fair dealing is not "limiting" the author's right of reproduction; the author still has that right fully and exclusively, and rather, the user is *also* exercising their simultaneous and equally affirmative right of fair dealing.

Moreover, the Canadian government should also ensure that language affirming fair dealing or fair use rights, users' rights, and protection of the public domain in any updated version of NAFTA is equally strong as the language used to affirm ownership rights under copyright. For example, throughout the intellectual property chapter of the TPP, provisions that bound the member countries to ensure and enforce intellectual property ownership rights consistently used the word "shall". Provisions that affirmed public interest activities, however, often used the weaker and optional form, "may". In the seemingly one instance where "shall" is used to uphold a public interest right, the full term is "shall *endeavor* to", which again amounts to a lack of force or commitment behind the provision.[75]

Robust fair dealing rights and an active, dynamic public domain will not only preserve free expression and access to knowledge in Canada, but it will also significantly advance Minister Navdeep Bains's Innovation Agenda. For example, the Computer and Communications Industry Association in the United States found that fair use, their legal equivalent of Canada's fair dealing, is responsible for $2.8 trillion of the U.S. economy, or 16 percent—over *one-sixth*—of their current national GDP.[76] A submission to the Australia Productivity Commission, by members of the Global Expert Network on Copyright User Rights, cited similarly favourable findings regarding fair use's contribution to a country's economy. In Singapore, one study "concludes that the gains to industries that relied on copyright exceptions more than made up for the slower growth experienced by the copyright industries, yielding a net positive impact on the Singapore economy."[77]

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content in some new way. "Much of our economic and communicative action would constitute infringement of those rights but for the defense of fair use. It is the ill-defined and unpredictable point of flexibility, the 'dangerous supplement,' that makes the rest of our copyright law possible-and bearable." Susanna Monseau, "Copyright and the Digital Economy: Is it Necessary to Adopt Fair Use?" (10 March 2015), available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576436>, at page 11.

[74] *Ibid.*, at page 2.

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

[76] Andrew Szamosszegi and Mary Ann McCleary, Computer and Communications Industry Association, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use*, Report (2017), online: <https://www.ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>.

[77] Another study compared industry performance in "fair use" and "non-fair use" countries, including the United States, Singapore, Israel, Taiwan, Malaysia, Korea, and the Philippines, and found that all "firms in each industry group in fair use countries report significantly higher net sales & revenues, assets, and employees versus like firms in countries in non-fair use countries." Additionally, an earlier study by the CCIA found that "fair use industries" grew 36% revenue-wise between 2002 and 2007. Peter Jaszi, *et al.*, "Evaluating the Benefits of Fair Use: A Response to the PWC Report on the Costs and Benefits of "Fair Use," PIJIP Submission to the Australia Productivity Commission (15 April 2016), at pages 9-10.

Given the overwhelming importance of fair dealing and the public domain to various key aspects of Canada's digital economy and digital society, OpenMedia recommends that the Government of Canada consider implementing Public Domain Impact Assessments (PDIA) as one of the terms in a renegotiated NAFTA. This idea, put forth in a paper by Graham J. Reynolds, is rooted in applying the precautionary principle from environmental law to the ecosystem comprising copyrighted works, fair dealing and users' rights, and the public domain.

In summary, a PDIA would be "a process through which proposals for intellectual property reform, prior to their enactment, are evaluated by an independent review panel in order to determine their potential impact on the public domain."[78] In this case, the Government of Canada could strike an independent review panel to conduct a PDIA on intellectual property provisions proposed throughout the NAFTA renegotiations, in addition to inserting a PDIA clause within the text of NAFTA itself.

III. Defend Canadians' Privacy

A. NAFTA Must Uphold Internet Subscriber Privacy

Internet users in Canada and the United States operate under diverging circumstances when it comes to their privacy rights. Canadians currently enjoy a robust and higher standard of privacy when it comes to the data that their Internet service providers handle in the course of providing Internet access. In contrast, residents of the United States recently lost this protection shortly after the US Federal Communications Commission (FCC) implemented it under former chair Tom Wheeler.[79]

The Government of Canada must resist pressure from the United States and from the Canadian telecommunications industry to change this. One of the government's primary objectives must be to ensure that a renegotiated NAFTA does not in any way affect the established subscriber data privacy protections that citizens across Canada rely on.

Multiple privacy-specific laws at both the federal and provincial level apply to Internet service providers (ISPs) to ensure the protection of Canadians' personal information and data. To start with, the Office of the Privacy Commissioner of Canada (OPC) administers and enforces the *Personal Information Protection and Electronic Documents Act* (PIPEDA), which ISPs fall under as commercial entities.[80]

The OPC upheld Canadians' privacy against an ISP most notably in a case involving Bell's Relevant Ads Program (RAP), which would have used subscribers' browsing data to serve them targeted ads, without first properly obtaining adequate consent, due to using an opt-out rather than opt-in model of consent.[81] After noting that their office had "received an unprecedented

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[78] Reynolds, "Public Domain Impact Assessment", *supra* note 54 at page 15.

[79] 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>.

[80] Office of the Privacy Commissioner of Canada, "The *Personal Information Protection and Electronic Documents Act* (PIPEDA)" online: <https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/>.

[81] 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/>.

number of public complaints" as a result of the RAP, the OPC initiated its own complaint, and concluded the following:

> We found that Bell was not, via its opt-out model, obtaining adequate consent for the RAP. We are disappointed that Bell has refused to implement our recommendation that it give customers an express choice regarding whether or not they wish to participate in the RAP.
>
> In coming to our determination that express, opt-in, consent is required, we considered two principle factors:
>
> **Sensitivity of Information:** Bell is using sensitive URLs for the purpose of generating customer profiles. Furthermore, in our view, the sheer breadth of information being used or contemplated for the RAP (including internet, telephone and television network usage information, as well as account/demographic information) renders such information more sensitive when compiled. Bell should obtain express consent for the use of sensitive information.
>
> **Reasonable Expectations of Bell Customers:** We determined that Bell Customers would reasonably expect Bell to obtain opt-in consent in light of all the contextual factors surrounding the RAP, when considered in combination and in concert with each other. More specifically, we considered that Bell:
>
> a. began using information it already collected for the purposes of delivering its primary services for the new secondary purpose of delivering behaviourally targeted ads;
>
> b. delivers paid services, for which customers may pay up to hundreds of dollars per month;
>
> c. is enabling the delivery of third-party ads; and
>
> d. is a telecommunications service provider to whom users *must entrust vast amounts of their sensitive personal information in order to gain access to mobile, internet, telephone and television communications in Canada*.[82]

The above affirmed that, in Canadian law, an Internet service provider may not use the vast amounts of sensitive data that Canadians have no choice but to give the ISP as a matter of course—the alternative being to simply not use the Internet at all—for the commercial activity of sending consumers targeted ads.

It is also notable that until the OPC complaint, if customers found a way to opt out of the default-opt-in RAP,

> Bell was not allowing its customers to withdraw their consent to the RAP. More specifically, upon receiving a customer's opt-out request, Bell would cease serving the customer "relevant ads" **but** continued to track the customer and augment the customer's profile, in case the customer were to change his or her mind in the future, and opt back in to the program.[83]

The fact that all of the above activities would have continued were it not for the OPC's initiative suggests a very high need for subscriber privacy laws such as those that Canadians rely on as they go about their daily lives online today.

Other Canadian laws also demonstrate the importance that we as a country place on the privacy of one's Internet activity. For example, sub-section 7(i) of Canada's *Telecommunications Act* expressly states as a Canadian telecommunications policy objective:

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[82] *Ibid.*, "Bell Fails to Obtain Adequate Consent — Well–Founded" (bold emphasis in original; italics emphasis added).
[83] *Ibid.*, "Bell Customers Unable to Withdraw Consent to the RAP" (emphasis in original).

> It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives … (i) to contribute to the protection of the privacy of persons.

Our Internet Traffic Management Practices Framework (the ITMP Framework), one of the pillars of Canada's net neutrality laws, also highlighted subscriber data privacy as a key concern:

> In light of the above, the Commission finds it appropriate to establish privacy provisions in order to protect personal information. The Commission therefore directs all primary ISPs, as a condition of providing retail Internet services, not to use for other purposes personal information collected for the purposes of traffic management and not to disclose such information.

Finally, the Supreme Court of Canada asserted in the landmark case of *R. v. Spencer* that Internet subscribers do have a reasonable expectation of privacy in their Internet activity, for the purposes of determining if a police request for subscriber information is constitutional:

> In my view, in the totality of the circumstances of this case, there is a reasonable expectation of privacy in the subscriber information. The disclosure of this information will often amount to the identification of a user with intimate or sensitive activities being carried out online, usually on the understanding that these activities would be anonymous.[84]

Canadians value their privacy highly[85] and rely on current Canadian laws to uphold and enforce respect for their privacy online, both in commercial and law enforcement contexts. The Government of Canada must ensure its citizens' privacy rights are not harmed as a result of the NAFTA renegotiations. In fact, OpenMedia would encourage the Government of Canada to negotiate for positive language expressly protecting Internet users' privacy rights and asserting the sovereignty of domestic privacy laws in the updated version of NAFTA.

In contrast to Canada, the United States has no unified federal privacy law when it comes to protecting their citizens' personal data. Rather, subscribers are vulnerable to piecemeal laws, regulations, and industry guidelines at the federal and state level, each of which may have a data privacy component that captures a particular kind of data (e.g. health, financial) or a specific activity (e.g. telemarketing).[86] Moreover, the United States has no dedicated privacy watchdog such as the OPC; instead, consumer protection in this respect falls primarily under the broad umbrella of the "unfair or deceptive practices" clause in the *Federal Trade Commission Act*, with responsibility for investigation and enforcement lying with the Federal Trade Commission.[87]

As for subscriber data privacy, not only does the United States lack laws protecting citizens online, but the U.S. Senate recently repealed a new law that would have offered this protection. The law, which the FCC had implemented under former chair Tom Wheeler, "would [have] require[d] broadband providers such as Verizon, Comcast, and AT&T to obtain explicit consent

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84 *R v. Spencer*, 2014 SCC 43, at para 66.

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

86 Ieuan Jolly, "Data protection in the United States: overview" (1 July 2016) online: *Thomson Reuters Practical Law* <https://uk.practicallaw.thomsonreuters.com/6-502-0467?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1>.

87 *Ibid*.

before selling their customers' web-browsing histories, app-usage data, and other personal information to advertisers and other third-parties."[88] Now, they do not need consent at all.

In light of the above developments, the United States as well as telecommunications lobbyists will likely pressure Canada to move towards the United States' weak framework, which, unlike the OPC, offers citizens no direct protection at all against commercial use of sensitive data generated as a result of simply using the Internet, *without consent*. The Canadian government must resist all such attempts to weaken Canadian privacy law throughout the NAFTA renegotiations. To reiterate, trade should be about lowering barriers to the sale of commodities—not to the sale of citizens' rights.

B. Protect Data Localization

Under the TPP, Canada would have been forced to restrict laws that could require organizations and companies to keep sensitive data within Canada, such as medical information or financial records, by storing them on Canadian servers only. For example, British Columbia and Nova Scotia both have laws requiring public bodies to store only in Canada personal information that the public body has "in its custody or under its control".[89] The federal government itself articulated the following principle in its 2016 Cloud Adoption Strategy: "To ensure Canada's sovereign control over its data, all sensitive or protected data under government control will be **stored on servers that reside in Canada**. Data in transit will be appropriately encrypted."[90]

The Canadian government is likely to again face similar pressure to weaken its data localization laws from the United States in the upcoming NAFTA renegotiations. This would directly interfere with Canada's ability to make sensible domestic law and policy that protects its citizens' privacy at a standard that Canadians and their institutions have come to expect and rely upon, and have arrived at together as a country.

Data localization is an uncontroversial norm across the European Union, which provides its citizens with a gold standard of data privacy rights. Mandating local data storage has also grown in global popularity in recent years, as Michael Geist notes: "Data localization requirements are popping up around the world with European requirements in countries such as Germany, Russia, and Greece; Asian requirements in Taiwan, Vietnam, and Malaysia; Australian requirements for health records, and Latin America requirements in Brazil."[91]

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[88] Dunn, *supra* note 78; Jon Brodkin, "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>.

[89] *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s 30.1; *Personal Information International Disclosure Protection Act*, 2006, c 3, s 5 (Nova Scotia).

[90] Government of Canada, *Government of Canada Cloud Adoption Strategy* (3 October 2016), online: <https://www.canada.ca/en/treasury-board-secretariat/services/information-technology/cloud-computing/government-canada-cloud-adoption-strategy.html> (emphasis added).

[91] Michael Geist, "The Trouble with the TPP, Day 12: Restrictions on Data Localization Requirements" (19 January 2016), online: *michaelgeist.ca* <http://www.michaelgeist.ca/2016/01/the-trouble-with-the-tpp-day-12-restrictions-on-data-localization-requirements/>.

Not only that, but major companies are already prepared to comply with such requirements. According to Professor Geist, "Microsoft, Amazon, and Google have established or committed to establish Canadian-based computer server facilities that can offer localization of information."[92]

These global trends are in part protective countermeasures in the wake of Edward Snowden's NSA revelations regarding United States surveillance and the increasingly demonstrable lack of privacy protection or respect that the United States' surveillance apparatus attributes to non-U.S. citizens and residents—including Canadians.

In fact, giving in to the United States on this issue may put Canada in direct conflict with European Union law, and endanger our trade and relations with the European Union. Michael Geist points out the risk of this when it comes to data transfer restrictions in particular: "[S]hould the European Union mandate data transfer restrictions as many experts expect, Canada could find itself between a proverbial privacy rock and a hard place, with the EU requiring restrictions and NAFTA prohibiting them."[93]

How to store sensitive, domestic data such as the health details or government records of Canadian citizens, and under which circumstances our data can be transferred in and out of Canada, is a conversation best and most appropriately engaged in between Canadian citizens and institutions, and the Canadian government. We should be able to make our own data privacy policies without the interference or intervention of other state actors, and Canadians' sensitive data and privacy rights must not become a bargaining chip sacrificed for the sake of economic gain.

IV. Uphold Net Neutrality

Canada is considered to have some of the best net neutrality laws in the world, providing the crucial foundation for a level playing field online, to the benefit of everyday Canadians, including marginalized groups who would not have a platform for free expression and influencing public discourse otherwise, as well as small businesses and independent innovators. Canada has steadily asserted its commitment to this principle, sometimes called "the first amendment of the Internet", since 2009, when the CRTC created the Internet Traffic Management Practices Framework (ITMP Framework).[94]

More recently, the CRTC reaffirmed the importance of net neutrality and the principle of equal opportunity online, in its Differential Pricing Practices Framework (DPP Framework).[95] This decision was accompanied by another banning Videotron's "Unlimited Music" program, which triggered the wider proceeding, and follows the Commission's 2015 *Bell Mobile TV* decision, which also condemned the practice of zero-rating and reiterated the importance of net neutrality, or equal treatment online.

The CRTC's decisions banned ISPs' discriminatory pricing schemes known as "zero-rating", which would have severely impaired, on a long-term and possibly permanent basis, the democratic landscape of free expression and innovation across the Internet. This would have

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[92] Michael Geist, "What Would A Digital Economy-Era NAFTA Mean For Canada?" *Unpublished Ottawa* (24 March 2017), online: <http://unpublishedottawa.com/letter/139468/what-would-digital-economy-era-nafta-mean-canada>.
[93] *Ibid*.
[94] Canadian Radio-television and Telecommunications Commission, Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet service providers* (21 October 2009).
[95] Canadian Radio-television and Telecommunications Commission, Telecom Regulatory Policy CRTC 2017-104, *Framework for assessing the differential pricing practices of Internet service providers* (20 April 2017).

been devastating to independent artists, writers, and other creators; myriad civil rights movements and initiatives; small businesses and edge innovators; and ultimately, everyday Canadian citizens who could have benefited as well as contributed to any of the above.

However, the United States has recently moved in the other direction. After pro-Internet advocates' stunning victory in securing Title II classification of Internet service providers in the United States, under the FCC's 2015 Open Internet Order (OIO), the FCC has now taken steps to remove Title II classification and dismantle the consumer protections and democratic principles that net neutrality ensures online.[96] This has resulted in massive and ongoing public outcry in the United States, most recently demonstrated in the record-breaking July 12 Net Neutrality Day of Action.[97]

In addition to the harms that would result from weakening Canada's net neutrality laws, described above, this loss would fly in the face of the Canadian government's objectives under the Innovation Agenda led by Innovation, Science and Economic Development Minister Navdeep Bains; as well as make it harder than ever for Canadian creators to succeed and be discovered in a digital world, one of the key goals of Canadian Heritage Minister Mélanie Joly. For example, a recent study in the United States examined investment levels among Internet service providers since the FCC implemented its Open Internet Order, based on publicly available financial data, and found that capital investment had increased since Title II classification. Specifically, the report found the following, among other observations:

> • The total capital investment by publicly traded ISPs was 5 percent higher during the two-year period following the FCC's Open Internet vote than it was in the two years prior to the vote (see Figure 1).
>
> • Capital investments were higher at 16 of the 24 publicly traded ISP firms (or units) following the FCC's vote. These increases are due primarily to continued core network expansion as well as investments in capital equipment needed to expand lines of business that utilize the same network (e.g., customer-premise equipment such as modems or IP-based video set-top boxes).[98]

As for Canadian Heritage, the Internet Creators Guild (ICG), a non-profit organization "by and for creators who believe that making stuff on the internet is one of the best jobs," makes clear that creative works and authorship are not the sole domain of traditional media and content producers alone. Any time the Canadian government considers the "creators" they are serving, whether through copyright law, broadcasting law, or telecommunications law, that now includes every individual Canadian who has access to the Internet. It is not surprise then that ICG also supported net neutrality, writing an open letter to the FCC on behalf of online creators.[99] In terms of Canadian cultural policy, for Canadian content to succeed in a digital world, all Canadians must have access to that world and the tools of creation and dissemination that it empowers them with. This includes not only affordable Internet, but an equal Internet founded on common carriage principles as enshrined in net neutrality laws.

Under no circumstances should Canada follow the new FCC or weaken its own rules to appease the current United States government on the issue of net neutrality.

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[96] Jon Brodkin, "Ajit Pai announces plan to eliminate Title II net neutrality rules" (26 April 2017), online: <https://arstechnica.com/tech-policy/2017/04/ajit-pai-announces-plan-to-eliminate-title-ii-net-neutrality-rules/>.

[97] Amy Kroin, "A Record-Breaking Day of Action as Millions Join Fight for Net Neutrality" (13 July 2017), online: *Free Press* <https://www.freepress.net/blog/2017/07/13/record-breaking-day-action-millions-join-fight-net-neutrality>.

[98] 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>, at page 4.

[99] Internet Creators Guild, "Creators for Net Neutrality", online: <https://internetcreatorsguild.com/net-neutrality>.

V. Remove Chapter 11 Investor-State Dispute Settlement Mechanism from NAFTA

In 2015, the Canadian Centre for Policy Alternatives published a key report on how Canada had fared under Chapter 11 provisions of NAFTA, or the Investor-State Dispute Settlement (ISDS) mechanism.[100] Simply put, Canada has not fared well. The report, titled *Democracy Under Challenge: Canada and Two Decades of NAFTA's Investor-State Dispute Settlement Mechanism*, confirmed that "foreign investors have used Chapter 11 to target a broad range of government measures, especially in the areas of environmental protection and natural resource management, which allegedly impaired corporate profits."[101]

Moreover, Canada has been the most sued nation under NAFTA, "the target of 35 investor-state claims, significantly more than either Mexico (22 claims) or the U.S. (20 claims), despite the fact that the latter's economy is 10 times larger than Canada's"; this number also includes over 70% of claims since 2005.[102] As of 2015, Canada has paid over $172 million in damages under this provision in NAFTA.[103]

While the report details a number of alarming elements built into the ISDS process, OpenMedia is most concerned with the deficit of democracy that such a mechanism represents. To reiterate our opening concerns regarding narrow trade interests overriding intangible, non-monetary interests such as human rights, preserving democratic institutions, and Canadian sovereignty in the sense of maintaining Canadians' ability to decide our own domestic laws and policies (including environmental law, *Charter* rights, or any of the issues raised in the above sections of this submission), a process such as the ISDS, both in theory and demonstrably in practice, should have no place in Canadian law.

Conclusion: Canada's Shared Digital Future

As the Government of Canada begins the renegotiation of NAFTA with the United States and Mexico, OpenMedia would urge the government to keep the following priorities in mind, on behalf of all citizens, residents, and Internet users in Canada: insert language such that copyright law actively protects and catalyzes free expression and the public domain; defend Canadians' privacy through maintaining our subscriber data protection and data localization laws; protect Canada's strong net neutrality laws to facilitate innovation and preserve equality of online access; remove the ISDS mechanism from NAFTA to restore democratic and sovereign law- and policy-making; and take steps to ensure that the NAFTA renegotiation process is open, transparent, and inclusive of all Canadians. In this way, the Government of Canada will be working towards a NAFTA that may truly benefit the Canadian public, while working in the best interests of Canada's shared digital future.

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[100] Scott Sinclair, *Democracy Under Challenge: Canada and Two Decades of NAFTA's Investor-State Dispute Settlement Mechanism* (Report) (2015), online: *CCPA* <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2015/01/NAFTA_Chapter11_Investor_State_Disputes_2015.pdf>.

[101] *Ibid*, at page 30.

[102] *Ibid*., at page 31.

[103] *Ibid*.