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Modernizing International Agreements to Combat Copyright Infringement

by

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Introduction and Summary

Intellectual property is a critical driver of economic prosperity. But there is a serious problem that our government needs to address to enhance the protection of IP and, thereby, to spur even further IP's contribution to the economy and job growth. Several foreign countries insufficiently protect Americans' copyrighted works. The Trump Administration – and, indeed, successive administrations – should ensure that stronger protections for Americans' creative works are included in new trade agreements and treaties that account for the realities of the Digital Age. Indeed, this needs to be a central focus in trade negotiations going forward, and this paper contains specific recommendations for achieving more favorable trade agreement outcomes.

According to a widely cited U.S. Department of Commerce study, intellectual property-intensive industries comprised over 38% of the entire U.S. economy in 2014, amounting to a $6.6 trillion contribution. The same study found that IP-intensive industries directly accounted for 27.9 million jobs and indirectly accounted for an additional 17.6 million jobs, or about 30% of all U.S. employment.

Much digital piracy and online infringement takes place in foreign countries. Cyberlocker websites and stream-ripping websites make infringing content available to Internet users through

downloading and streaming. Individuals access infringing content through illicit streaming devices. Digital piracy continues to cause copyright owners steep financial losses. A report by Frontier Economics found that "the global value of digital piracy in movies, music and software in 2015 was $213 Billion." The report forecasts that the global value of digital piracy in 2022 will range between $289-$644 billion for movies and $53-$117 billion for music. According to a 2017 Organization for Economic Cooperation and Development report, the global value of international and domestic trade in counterfeit and pirated goods in 2013 was between $710 billion and $917 billion.

Protection of intellectual property against piracy and theft is crucial to maintaining a healthy U.S. economy in our information-dependent Digital Age. Strong copyright protections are also a constitutional imperative. The Intellectual Property Clause, or Copyright Clause, contained in Article I, Section 8, declares that Congress shall have power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

The IP Clause is premised on the understanding that copyrights and patent rights are property rights grounded in the intellectual and physical labors of authors and inventors. As we explained in our *Perspectives from FSF Scholars* paper, "The Logic of International Intellectual Property Protection," the same natural law understandings regarding IP rights informed passage of the first U.S. law to secure overseas protections for Americans' copyrighted works – the International Copyright Act of 1891. By the 1891 Act, the U.S. obtained copyright protections for American authors and creative artists from foreign nations in exchange for U.S. recognition of domestic copyright protections for works by foreign authors and creative artists.

Over the course of the 20th Century, the U.S. negotiated and implemented treaties and trade agreements to secure foreign copyright protections for Americans' creative works. This includes the North American Free Trade Agreement of 1994 (NAFTA). But NAFTA pre-dates economy-transforming advancements in digital technology and Internet connectivity. Consequently, it fails to protect adequately Americans' creative works on a number of fronts.

The Trump Administration has negotiated a replacement for NAFTA, the United States-Mexico-Canada Agreement (USMCA). In several respects, the proposed USMCA modernizes and strengthens copyright protections and enforcement for Americans' creative works in Canada and Mexico. For instance, under USMCA, each member nation would secure:

- Full enjoyment of exclusive rights of reproduction, distribution, and public performance for copyright owners and public performers of sound recordings.

- Protection terms for creative works, performances, and sound recordings for the life of the author plus 70 years, aligning with current copyright law in the U.S.

- Contractual liberty and opportunity for copyright holders to reap full value for their creative works through voluntary transfers of their rights.

- Stronger remedies in civil copyright infringement cases, including injunctive relief, damage awards for lost profits, statutory damages, and attorney fees.

- Authorization for border officials to pursue, seize, and destroy pirated goods.

- Stronger criminal penalties for willful copyright infringement, such as fines or imprisonment, for "camcording" movies in theaters.

- Criminal penalties and civil remedies for manufacturing or distributing equipment used in receiving cable and satellite programming without authorization.

In short, these provisions in USMCA would better secure Americans' copyrighted works in North America, and they are worthy of support by the public and by Congress.

However, the proposed USMCA has room for improvement. The proposed USMCA incorporates provisions mirroring Section 512 of the Digital Millennium Copyright Act of 1998 that are problematic. Under Section 512, copyright holders are entitled to give notice to an online service provider when infringing content is posted on its website. A provider receives immunity if it "responds expeditiously to remove, or disable access to, the material that is claimed to be infringing." But Section 512 is outdated and ineffective in protecting digital music and video content from massive online infringement on today's popular user-upload websites like YouTube.

Moreover, judicial interpretations of Section 512 have widened the circumstances in which online providers can claim lack of knowledge of infringing activity and thereby receive immunity. Also, court precedents make it burdensome to pursue takedowns when infringing uses of the same content take place across multiple web pages on the same website. Thus, Section 512 needs to be reformed and updated. As currently written, inclusion of Section 512-like language in international agreements such as USMCA is more likely to freeze in place an inadequate framework for combating online infringement than it is to secure protections for Americans' copyrighted works in the Digital Age. Similar language should be omitted from future treaties and trade agreements. Congress should be committed to reforming and updating Section 512 to combat online infringement.

It is imperative that the U.S. presses for meaningful protections for copyrighted goods and other IP in all future treaties and trade agreements. For instance, pro-copyright provisions should be an objective of upcoming U.S. bilateral trade negotiations with Japan, the European Union, and the United Kingdom. Further, the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) is outdated and needs to be replaced with modernized copyright provisions. The Trump Administration withdrew the U.S. from the Trans-Pacific Partnership (TPP) trade agreement that was intended to replace TRIPS. But the Administration now may be reviewing the proposed TPP, with an eye towards renegotiating its terms or entering into bilateral agreements with nations that negotiated TPP. Either diplomatic course provides the U.S. with an opportunity to better secure copyrights for American creative works.

Congress should also support efforts to modernize international protections for Americans' copyrighted goods by promptly approving pro-copyright trade agreements and passing implementing legislation. Trade Promotion Authority (TPA) procedures provide a "fast track" for Congressional approval and implementation of trade agreements submitted to it by the President. Pro-copyright implementing legislation subject to TPA should receive "fast track" passage by both chambers of Congress. The Senate, which is responsible for treaty ratification, must also be hospitable to future pro-copyright treaties with foreign nations.

For the Trump Administration and for Congress, the value of copyrighted goods to the U.S. economy and the Constitution's imperative to secure full copyright protections for Americans' creative works should form the starting point for all efforts to modernize and strengthen protections accorded to copyrighted works in foreign nations.

When it comes to specific trade agreement or treaty terms, practical judgments by the Trump Administration regarding what is achievable are inevitable. But a bedrock goal of negotiations should be to ensure foreign nations provide the same copyright protections that the U.S. secures for creative works within its borders.

Further, in establishing future trade agreements and treaties, the Trump Administration and Congress should resist inclusion of over broad exemptions or carve-outs for certain types of copyrighted works. The Administration and Congress also should ensure that such agreements and treaties do not tie the hands of Congress regarding future domestic policy. The U.S. ought to retain freedom to undertake future reforms that modernize and bolster domestic protections for copyrighted works and enable creative artists to fully reap the proceeds for their creative labors.

The U.S. can curb harmful international piracy and infringement in foreign nations by pursuing trade agreements and treaties to modernize copyright protections for Americans' creative works. USMCA marks a step in the right direction. Additional international cooperative efforts to bolster copyrights should follow. By better securing American creative artists' rights to receive the financial returns for their creative labors from overseas, the Trump Administration – and successive administrations – and Congress not only would advance America's economic interests, but also fulfill copyright's constitutional mandate.

A Brief History of U.S. Efforts to Secure Copyright Protections Through International Agreements

The Intellectual Property Clause or Copyrights Clause, contained in Article I, Section 8, declares that Congress shall have power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The IP Clause is premised on the understanding that copyrights are property rights grounded in the intellectual and physical labors of authors and creative artists. As we explained in our *Perspectives from FSF Scholars* paper, "The Logic of International Intellectual Property Protection," the same natural law understandings regarding IP rights informed passage of the first U.S. law to secure overseas protections for Americans' copyrighted works – the International Copyright Act of 1891. By that act, the U.S. obtained copyright protections for

American authors and creative artists from foreign nations in exchange for U.S. recognition of domestic copyright protections for works by foreign authors and creative artists.

Pursuant to a series of presidential proclamations, the U.S. recognized individual foreign nations whose legal treatment of creative works by American authors satisfied the terms of the 1891 Act. In turn, creative artists from compliant foreign nations secured domestic copyright protections for their works. For instance, a Proclamation issued by President Benjamin Harrison on July 1, 1891, found "satisfactory official assurances have been given that in Belgium, France, Great Britain and the British possessions, and Switzerland the law permits to citizens of the United States the benefit of copyright on substantially the same basis as to the citizens of those countries." President Harrison thereby proclaimed that Section 13 of the 1891 Act was satisfied with respect to citizens or subjects of those nations, who were then accorded the protections secured by U.S. copyright law. Presidential proclamations also were issued pursuant to the Copyright Act of 1909, including proclamations recognizing individual foreign nations that conferred protections on musical compositions by American composers and securing similar domestic protections for foreign composers.

The U.S. did not participate in the initial Berne Convention for the Protection of Literary and Artistic Works that initially was agreed to by many foreign nations in 1886. However, during the years following the 1891 Act, the U.S. separately negotiated and entered into bilateral treaties – or treaties between two nation states – that included copyright protections for American authors and creative artists overseas.

Significantly, in a July 13, 1914 proclamation, President Woodrow Wilson announced the United States' adherence to the Buenos Aires Convention of 1910. The Buenos Aires Convention is a multilateral convention – that is, a convention between several nation states. It protects "Literary and Artistic Works" such as books, writings, dramatic works, musical compositions, drawings, paintings, and photos. Under the terms of the Convention:

> The acknowledgement of a copyright obtained in one State, in conformity with its laws, shall produce its effects of full right, in all the other States, without the necessity of complying with any other formality, provided always there shall appear in the work a statement that indicates the reservation of the property right.

The Buenos Aires Convention was retained by the Universal Copyright Convention (UCC) of 1952. The U.S. adopted implementing legislation for the Universal Copyright Convention in 1954, and President Dwight Eisenhower proclaimed U.S. adherence to the UCC on September 16, 1955. The UCC was intended to secure between each contracting state copyright protections "in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture." Article II of the UCC provided that published and unpublished works by nationals of any contracting state would enjoy in other contracting states the same protections that the other states provide for their own nationals.

The UCC served as an alternative to the Berne Convention – the latter of which provided for single copyright protection terms lasting the life of the copyright holder and did not require formalities such as registration to secure copyright protections. Rather, Article III of the UCC

recognized the rights of contracting states to secure fixed-year protection terms and to require copyright renewals for copyright holders seeking extensions. UCC Article III also recognized the rights of contracting states to require observance of administrative or legal formalities such as registration, deposit, and notice as pre-conditions for obtaining copyright protection. Further, UCC Article IV included default minimum protection terms for the life of the creative artist plus twenty-five years after his or her death. But it grandfathered in contracting states that already limited protection terms for certain classes of works to a period computed from the first date of publication and allowed grandfathered states to extend those fixed-period protection terms to other classes of works.

The UCC was revised in Paris on July 24, 1971, and President Richard Nixon proclaimed the United States' adherence to the revised UCC on July 18, 1974. Many Berne Convention states also became contracting states to the UCC, thereby securing protections for their nationals' creative works in non-Berne nations.

Additionally, the U.S. joined the Geneva Phonograms Convention, which entered into force in the U.S. on March 10, 1974, based on a proclamation by President Nixon. The Geneva Phonograms Convention required member nations to prohibit both unauthorized reproductions of sound recordings and the importation of infringing copies of sound recordings and to impose sanctions on infringers.

The United States finally opted for a less formalistic approach to copyright protections when on March 1, 1989, Congress passed the Berne Convention Implementation Act of 1988 and the U.S. Senate ratified the Berne Convention. Berne Convention Article 7(1) provides that enjoyment of copyright protections "shall not be subject to any formality," but instead "shall be independent of the existence of the protection in the country of origin of the work." Moreover, the Berne Convention establishes the principle of national treatment regarding copyright protections of authors from foreign countries. Berne Article 5(1) provides that with respect to protected works outside their country of origin, covered "[a]uthors shall enjoy . . . the rights which th[e] respective laws [of Berne members] do now or may hereafter grant to their nationals." Among its other provisions, the Berne Convention obliges its members to provide more extensive minimum protections for copyrighted works, including terms that run for the life of the author plus fifty years.

Mutual copyright protections for creative artists from the United States, Canada, and Mexico have also been secured by the North American Free Trade Agreement of 1994 (NAFTA). President Bill Clinton signed the North American Free Trade Agreement Implementation Act on December 8, 1993, and NAFTA went into effect at the beginning of 1994. Article 1701 of NAFTA provides that each party nation agreed to "provide in its territory to the nationals of another Party adequate and effective protection of intellectual property rights, including, at a minimum, effect to the substantive provisions of [the Geneva Convention 1971 and] the Berne Convention." Under NAFTA Article 1703, each party agreed to "accord to nationals of another Party treatment no less favorable than that it accords to its own nationals with regard to the protection and enforcement of all intellectual property rights" – subject only to narrow exceptions, including certain limits on secondary uses of sound recordings.

Additionally, the United States secured overseas copyright protections for American creative artists pursuant to the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). President Clinton signed the Uruguay Round Agreements Act that implemented the TRIPS agreement on December 8, 1994, and TRIPS went into effect in early 1995. TRIPS is administered by the World Trade Organization. It is the most wide-ranging multilateral trade agreement to which the U.S. is a party. Much of its copyright protections are based on the Berne Convention.

And, on December 20, 1996, the U.S. signed two additional World Intellectual Property Organization (WIPO) treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Among its provisions, the WCT required member nations to recognize the exclusive rights of authors and creative artists to authorize the reproduction and sale of their copyrighted works, as well as the right to transfer their copyrights. The WCT also recognized the exclusive rights of copyright holders in movies and computer programs over the authorizing of public rentals of copies of their works. And the WPPT recognized the exclusive rights of producers and performers in authorizing the reproduction, distribution, and commercial use of their sound recordings, including authorizing of public commercial rentals of copies of their sound recordings. President Clinton signed the Digital Millennium Copyright Act, which contains provisions implementing the WIPO treaties, and the two WIPO treaties went into effect in the spring of 2002.

Significantly, the bilateral United States-South Korea Free Trade Agreement (KORUS), which was signed by President Barack Obama and went into force on March 15, 2012, includes several modernized copyright provisions. For instance, KORUS includes minimum protection terms for the life of the author plus seventy years for copyrighted works, including sound recordings. KORUS also requires both member nations to provide criminal sanctions for so-called "camcording" of copyrighted movies in theaters. However, KORUS does contain language that effectively mirrors Section 512 of the Digital Millennium Copyright Act of 1998 (DMCA). As stated previously, the DMCA is outdated and ineffective in protecting copyrighted works from massive online infringement. As will be discussed further, inclusion of Section 512-like language in international agreements is more likely to freeze in place an inadequate framework for combating online infringement than it is to secure protections for Americans' copyrighted works in the Digital Age.

The treaties and trade agreements entered into by the U.S. increasingly, if unevenly, have provided broader and stronger protections for Americans' copyrighted works. Yet continuing advancements in markets and technologies call for corresponding updates in international agreements to secure protections for creative works. Copyright provisions contained in NAFTA, as well as other international agreements such as TRIPS, pre-date economy-transforming advancements in digital technology and Internet connectivity. Consequently, existing international copyright protections fail to adequately protect Americans' creative works from piracy and infringing activities.

Piracy and Online Infringement in Foreign Nations Harm U.S. Copyright Holders

Much digital piracy and online infringement takes place in foreign countries. Cyberlocker websites and stream-ripping websites make infringing content available to Internet users through downloading and streaming. The U.S. Trade Representative's 2018 Section 301 Report identifies "stream-ripping" as "a dominant method of music piracy, causing substantial economic harm to music creators and undermining legitimate online services." Stream-ripping involves the conversion of digital files from licensed streaming websites into pirated copies that can be streamed or downloaded without authorization. According to the U.S. Trade Representative's 2018 Report: "Stream-ripping is reportedly popular in countries such as Canada, Mexico, the Netherlands, Saudi Arabia, Sweden, and Switzerland."

Individuals access infringing content through illicit streaming devices (ISDs) and, of course, this harms licensed streaming live and on-demand video programmers and service providers. The U.S. Trade Representative's 2018 Report pointed out that: "Stakeholders continue to report rampant piracy through ISDs, including in Argentina, Brazil, Chile, China, Hong Kong, Indonesia, Mexico, Peru, Singapore, Taiwan, and Vietnam."

Further, the U.S. Trade Representative has recognized: "The proliferation of 'camcords' continues to be an urgent trade problem." Indeed, the 2018 Report deems illicit camcording "the primary source of unauthorized copies of newly released movies found online." Unlike the days of bootlegged movies shot in theaters with shaky hand-held camcorders and copied onto VHS tapes, today's digital pirates make unauthorized high quality 'camcords' of popular movies and stream them via the Internet. What's more, these unauthorized streams take place while those movies are still playing in theaters or are available exclusively through over-the-top video services. Such unauthorized recordings and transmissions of expensively-produced movies harm copyright owners, theater owners, and online video services that contract for exclusive rights to publicly perform or display them. Reportedly, illegal camcords significantly increased in 2017, including in Russia and China. Stakeholder reports to the U.S. Trade Representative indicate "Mexico is now the second largest foreign source of illegally recorded films."

These and other types of piracy and online infringement have caused copyright owners steep financial losses. A report by Frontier Economics found that "the global value of digital piracy in movies, music and software in 2015 was $213 Billion." The report forecasts that the global value of digital piracy in 2022 will range between $289-$644 billion for movies and $53-$117 billion for music. According to a 2017 Organization for Economic Cooperation and Development report, the global value of international and domestic trade in counterfeit and pirated goods in 2013 was between $710 billion and $917 billion.

Losses resulting from piracy and infringement of copyrighted goods are due in part to inadequate legal protections and lax enforcement in many foreign countries. The U.S. Trade Representative's 2018 Section 301 Report observed: "Several countries, including China, Mexico, Russia, Ukraine and Vietnam, have not addressed the continuing and emerging challenges of copyright piracy." Further: "Online piracy remains a challenging copyright enforcement issue in many trading partner markets, including Canada, China, India, the Netherlands, Romania, Russia, Switzerland, Taiwan, Ukraine, and elsewhere."

USMCA Would Modernize and Strengthen International Copyright Protections

One vital way to address the problem of copyright piracy and foreign countries' lack of protections and enforcement is to negotiate international agreements containing modernized and strengthened copyright provisions.

NAFTA, which was negotiated in 1992 and ratified in 1994, pre-dates economy-transforming advancements in digital technology and Internet connectivity. Its provisions therefore offer insufficient protections to Americans' creative works on a number of fronts. Ambassador Robert Lighthizer, U.S. Trade Representative, acknowledged the shortcomings of NAFTA in a May 2017 letter to congressional leaders:

> Many chapters are outdated and do not reflect modern standards. For example, digital trade was in its infancy when NAFTA was enacted… [O]ur aim is that NAFTA be modernized to include new provisions to address intellectual property rights....

Under the Trump Administration, representatives of the U.S. engaged in renegotiations of NAFTA with representatives of Mexico and Canada. On October 1, 2018, the Administration made available the text of the proposed United States-Mexico-Canada Agreement (USMCA). If approved by a majority of both chambers of Congress and acceded to by Canada and Mexico, USMCA would replace NAFTA. In several respects, the proposed USMCA modernizes and strengthens copyright protections and enforcement for Americans' creative works in Canada and Mexico:

- **National Treatment** – Article 20.A.8 reaffirms the principle that "each Party shall accord to nationals of another Party treatment no less favorable than it accords to its own nationals with regard to the protection of intellectual property rights," including copyrights. In other words, each member nation must secure the same copyright protections to foreign citizens that it provides to its own citizens.

- **Full Enjoyment of Exclusive Rights of Reproduction, Distribution, and Public Performance** – Article 20.H.2 - .6 requires each member nation to secure copyright holders' exclusive rights to control whether and when reproductions of sound recordings may be made, sold to the public, and publicly performed. This includes the exercise of those exclusive rights in and through digital formats.

- **Protection Term Lengths Equivalent to U.S. Copyright Law** – Article 20.H.7 requires each member nation to provide protection terms for creative works, performances, and sound recordings for not less than the life of the author plus 70 years, aligning with current copyright law in the U.S. And when the life of a natural person is not the basis of measurement, strong protection term minimums also apply – such as 75 years from the end of the year of the first authorized publication of a creative work, public performance, or sound recording.

- **Recognition of Rights to Transfer Copyrights by Contract** – Article 20.H.10 secures contractual liberty and opportunity for copyright holders to reap full value for their creative works through voluntary transfers of their rights. Each member nation is required to provide that any person acquiring or holding any economic right in a creative work, public performance, or sound recording "may freely and separately transfer that right by contract," while not inserting or affecting the exercise of conceptually dubious "moral rights." Also, any person acquiring an economic right in a work, performance, or sound recording through a contract, including a work for hire agreement, "shall be able to exercise that right in that person's own name and enjoy fully the benefits derived from that right."

- **Stronger Civil Enforcement Remedies** – Article 20.J.4 requires each member nation to authorize its judicial authorities to issue injunctive relief in civil copyright infringement cases to prevent pirated works or infringing uses from entering or taking place in commercial channels. It also requires availability of civil penalties in the case of willful infringement, including damage awards for lost profits. Member nations must establish statutory damages for copyright infringement that are available at the election of the copyright holder, and also make available prevailing party awards for court costs and attorney fees incurred in the course of civil litigation.

- **Border and Customs Enforcement Authority** – Article 20.J.6 requires each member nation to provide that its border authorities may undertake measures, on their own initiative or upon the application of a copyright holder, against suspect pirated copyright goods, and to destroy infringing goods that are seized.

- **Stronger Criminal Penalties, Including for Camcording** – Article 20.J.7 requires each member nation to provide criminal penalties for willful copyright infringement intended to result in commercial financial gain or with a result of substantial prejudicial impact on a copyright holder's interest in the market. Such penalties must include fines and imprisonment, be proportional to the gravity of the crime, and serve as deterrents to future criminal copyright activity. Importantly, each member nation must also provide criminal procedures and penalties in the case of willful copyright infringement by camcording.

- **Protections for Cable and Satellite Signals** – Article 20.J.8 requires each member nation to provide criminal penalties and civil remedies for willful infringement through the manufacturing or distributing of equipment to be used in the unauthorized reception of any encrypted copyrighted video program-carrying cable or satellite signal.

In short, these provisions in USMCA would better secure Americans' copyrighted works in North America, and they are worthy of support by Congress.

USMCA's Shortcomings on Online Infringement and Safe Harbors for Intermediaries

The main copyright-related deficiency in the proposed USMCA is its provisions regarding online infringement and safe harbors for third-party intermediaries. The proposed USMCA contains language that may hinder efforts to combat online copyright infringement and instead enable massive infringing activity to take place on popular user-upload websites for the foreseeable future.

Article 20.J.11 states each member nation is to provide for safe harbor immunity from copyright infringement for third-party online intermediaries similar to that which is provided in Section 512 of the DMCA. Under Section 512, copyright holders are entitled to give notice to an online service provider when infringing content is posted on its website. A provider receives immunity if it "responds expeditiously to remove, or disable access to, the material that is claimed to be infringing." This is sometimes called the "notice-and-takedown" provision. But as we explained in our *Perspectives from FSF Scholars* paper, "Modernizing Civil Copyright Enforcement for the Digital Age Economy: The Need for Notice-and-Takedown Reforms and Small Claims Relief," Section 512 is outdated and ineffective in protecting copyrighted works from massive online infringement. Today's user-upload websites like YouTube make massive amounts of music and video content available – including far too much infringing content.

Moreover, judicial interpretations of Section 512 have widened the circumstances in which online providers can claim lack of knowledge of infringing activity and thereby receive immunity. Also, court precedents make it burdensome to pursue takedowns when infringing uses of the same content take place across multiple web pages on the same website.

Aspects of USMCA appear to mirror the restrictive judicial interpretations that have contributed to Section 512's inadequacies in combatting massive infringement on user-uploaded sites. For instance, Article 20.J.11.3(a) provides that, to receive immunity, online service providers would only have to expeditiously remove infringing content from their websites "upon obtaining actual knowledge of the copyright infringement or becoming aware of facts or circumstances from which the infringement is apparent, such as through receiving a notice of alleged infringement from the right holder or a person authorized to act on its behalf."

Section 512 needs to be reformed and updated. Inclusion of Section 512-like language in international agreements such as USMCA is more likely to freeze in place an inadequate framework for combating online infringement than it is to secure protections for Americans' copyrighted works in the Digital Age.

U.S. policymakers and copyright holders may take some consolation in Article 20.A.5's proviso that member nations may "provide more extensive protection for, or enforcement of, intellectual property rights under its law than is required by this Chapter, provided that such protection or enforcement does not contravene this Chapter." Further: "Each Party shall be free to determine the appropriate method of implementing the provisions of this Chapter within its own legal system and practice." Thus, even if the USMCA enters into effect with provisions mirroring Section 512, Congress still should adopt reform legislation that will make it less costly and

burdensome for copyright holders to pursue takedowns of infringing content on user-upload sites.

Future International Agreements Should Modernize and Strengthen International Copyright Protections

The Trump Administration – and indeed future administrations – should work to further strengthen copyright protection in international arenas beyond USMCA. It is imperative that the U.S. continues to press for meaningful protections for copyrighted goods and other IP in all future treaties and trade agreements.

On October 16, 2018, U.S. Trade Representative Robert Lighthizer announced the Trump Administration's intentions to enter into bilateral trade negotiations with Japan, the European Union, and the United Kingdom. The inclusion of pro-copyright trade provisions should be an objective of those bilateral negotiations.

As described earlier, the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) is outdated and needs to be renegotiated or replaced with modernized and more protective copyright provisions. The U.S. and eleven foreign nations negotiated the comprehensive Trans-Pacific Partnership (TPP) trade agreement as an effective replacement for TRIPS. Released in late 2015, the proposed TPP contained several provisions that, for the most part, would have modernized and strengthened protections for Americans copyrighted works. The Trump Administration withdrew from TPP. But the Administration now may be reviewing the proposed TPP, with an eye toward renegotiating its terms or entering into bilateral agreements with nations that previously negotiated TPP.

Either diplomatic course provides the U.S. with an important opportunity to update and better secure copyrights for American creative works.

Coinciding with the negotiation of trade agreements and treaties that address copyright protections, Congress ought to support efforts to modernize and improve international protections for Americans' copyrighted goods. Pursuant to Trade Promotion Authority (TPA) provisions in federal law, trade agreements submitted by the President to Congress requires prompt introduction of legislation implementing such trade agreements by congressional leaders, with prompt committee and floor consideration. The implementing legislation submitted to Congress by the President is subject to an up-or-down vote by each chamber of Congress, and it cannot be amended. Regardless of the procedural aspects of TPA, Congress is responsible for voting on the merits of trade agreements, and it should exercise its discretion by supporting pro-copyright implementing legislation. The Senate, which is solely responsible for treaty ratification, should be hospitable to future pro-copyright treaties with foreign nations. And both the U.S. House and Senate likewise should promptly pass legislation to implement pro-copyright treaties.

For the Administration and for Congress, the value of copyrighted goods to the U.S. economy and the Constitution's imperative to secure full copyright protections for Americans' creative

works should form the starting point for all efforts to modernize and strengthen protections accorded to copyrighted works in foreign nations.

Specific trade agreement or treaty terms doubtless depend on many factors specific to the nations with which the U.S. negotiates. Practical judgments by the Trump Administration regarding what is achievable are inevitable. But a bedrock minimum goal of negotiations should be to ensure foreign nations provide the same copyright protections that the U.S. secures for creative works within its borders. By securing copyright protections to foreign nationals on terms equal to those provided to Americans, the Administration and Congress can better secure protections for Americans' creative works overseas.

Further, in establishing future trade agreements and treaties, the Trump Administration and Congress should resist inclusion of over broad exemptions or carve-outs for certain types of copyrighted works. Lax enforcement and vague standards should be avoided. The Administration and Congress must also ensure that such agreements and treaties do not tie the hands of Congress regarding future domestic policy. The U.S. must retain freedom to undertake future reforms that modernize and bolster domestic protections for copyrighted works and enable creative artists to fully reap the proceeds for their creative labors.

Conclusion

Intellectual property is a critical driver of economic prosperity in the U.S. But several foreign countries insufficiently protect Americans' copyrighted works. Copyright provisions contained in NAFTA as well as other international agreements such as TRIPS pre-date economy-transforming advancements in digital technology and Internet connectivity. Consequently, existing international copyright protections fail to adequately protect Americans' creative works from piracy and infringing activities.

The Trump Administration should ensure that stronger protections for Americans' creative works are included in new treaties and trade agreements that are attuned to the Digital Age. The proposed United States-Mexico-Canada Agreement (USMCA), in particular, would modernize and strengthen copyright protections and enforcement for Americans' creative works in Canada and Mexico. If ratified by Congress, USMCA would secure full enjoyment of exclusive rights in sound recordings, ensure longer protection terms, and provide stronger civil remedies and criminal penalties for copyright infringement.

However, the proposed USMCA has room for improvement. Its inclusion of outdated Section 512-like language in international agreements, such as USMCA, is more likely to freeze in place an inadequate framework for combating online infringement than it is to secure protections for Americans' copyrighted works in the Digital Age. Similar language should be omitted from future treaties and trade agreements. And Congress should remain undeterred in reforming and updating Section 512 to better combat online copyright infringement.

The Trump Administration should work to further strengthen copyright protection in other international arenas. Congress must also support efforts to modernize and improve international protections for Americans' copyrighted goods, including by promptly approving pro-copyright

trade agreements and passing implementing legislation. By better securing American creative artists' intellectual property rights to receive the financial returns for their creative labors from overseas, the Trump Administration and Congress would also fulfill copyright's constitutional mandate.

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