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Trade Agreements Should Include Stronger Online Copyright Protections

by

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World Intellectual Property Day is April 26, a day to heighten awareness regarding the importance of securing protection for intellectual property rights across the globe. And a day to acknowledge the need for action to better secure protection internationally for Americans' copyrighted works. To its credit, the proposed United States-Mexico-Canada Agreement (USMCA), soon to be taken up by Congress, would generally enhance copyright protections. Nevertheless, the USMCA takes a surprisingly outdated 1990's approach to the problem of mass online copyright infringement.

In passing and implementing the USMCA, Congress and the Administration should make clear that the 1998 Digital Millennium Copyright Act's (DMCA) provisions dealing with online infringement are not a binding precedent for future trade agreements. The USMCA's dial-up Internet era online infringement provisions should not be considered precedential and should not be included in new trade agreements. Going forward, trade agreements should ensure that Congress remains free to pursue modernized copyright enforcement measures.

Copyrighted works are extraordinarily important to America's economy in the Digital Age. An International Intellectual Property Alliance (IIPA) report estimated that core copyright industries contributed over \$1.3 trillion to the U.S. gross domestic product and employed almost 5.7 million workers in 2017. However, U.S. copyright industries are being hit hard by digital piracy

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and online infringement, especially in foreign nations. A report by Frontier Economics found that global digital piracy of movies resulted in economic losses of \$160 billion and piracy of music resulted in losses of \$29 billion in 2015. Due to lax laws and lack of enforcement, many foreign countries fail to adequately protect copyrights on the Internet.

By negotiating for stronger copyright protections and enforcement in international trade agreements, the U.S. can help curb the significant economic losses sustained by American copyright owners. The proposed USMCA, signed by President Trump in October 2018, and likely to be voted on by Congress this year, includes many provisions that would modernize and strengthen protections for Americans' copyrighted works in Canada and Mexico. For instance, under the USMCA, each member nation would be required to secure copyright owners' full enjoyment of exclusive rights in sound recordings and public performances. Each nation would guarantee contractual liberty so that copyright owners can transfer their rights for full value. Also, each nation would make available stronger remedies in civil copyright infringement cases, including injunctive relief as well as statutory damages. And each nation would authorize their border officials to pursue, seize, and destroy pirated goods.

However, the proposed USMCA takes a decidedly un-modern approach to online copyright infringement that takes place on user-upload websites. Article 20.J.11 of the USMCA incorporates provisions based on Section 512 of the DMCA. Section 512 contains a "notice and takedown" provision that addresses when online service providers can receive limited liability protections for infringing content and activity on their websites. When a copyright owner gives notice to an online provider that infringing content is posted on its site, the provider receives immunity if it "responds expeditiously to remove, or disable access to, the material that is claimed to be infringing."

The DMCA was geared to dial-up Internet era technologies. In the late 1990s, the commercial Internet was a new phenomenon. Back then there were far fewer Internet users uploading sound clips and movie stills on platforms such as AOL.com and Geocities.com. Today, user-upload services like YouTube, Vimeo, Dailymotion, and SoundCloud make massive amounts of copyrighted content available. Many users of such sites post entire songs, albums, TV episodes, and movies.

A high volume of takedown notices indicates that online providers are insufficiently attentive to infringement on their sites and that the current system inadequately protects copyright owners. Between 2011 and 2015, the music recording industry sent over 175 million takedown notices to various online service providers. According to the Motion Picture Association of America (MPAA), in 2015 alone, its members sent takedown notices regarding over 104 million specific website addresses.

Judicial interpretations of Section 512 have broadened circumstances in which online providers can claim lack of knowledge of infringement and so gain immunity. Judicial interpretations of the law also require copyright owners to pursue multiple takedowns efforts for the same content posted across multiple pages on the same website.

Regrettably, Article 20.J.11 of the USMCA could perpetuate the significantly under-protective notice and takedown system that prevails in U.S. copyright law. Absent clarification, inclusion of Section 512-like terms in the USMCA also risks limiting Congress' ability to modernize U.S. copyright law to better combat online infringement. (Free State Foundation Randolph May and I addressed the USMCA and online infringement in further detail in our *Perspectives from FSF Scholars* [paper](#), "Modernizing International Agreements to Combat Copyright Infringement.")

Overall, passage of the proposed USMCA likely would help protect Americans' copyrights in Canada and Mexico. At the same time, the Administration and Congress should make clear that the USMCA's online infringement provisions are not precedent for future trade agreements. Statements of administrative action by the U.S. Trade Representative expressly should affirm that Article 20.J.11's provisions are limited to the USMCA itself.

Going forward, Section 512-like terms – as least as long as Section 512 remains un-modernized – should not be included in U.S. trade agreements. In the face of this century's technological advances, the U.S. should not let international agreements bind Congress by chaining copyright enforcement to last century's technological assumptions.

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Further Reading

Seth L. Cooper, "[IP Enforcement Coordinator's Report Spotlights Copyright Protection Progress](#)," *FSF Blog* (March 6, 2019).

Seth L. Cooper, "[IP Commission Recommends Steps to Protect America From International IP Theft](#)," *FSF Blog* (March 1, 2019).

Randolph J. May and Seth L. Cooper, "[Modernizing International Agreements to Combat Copyright Infringement](#)," *Perspectives from FSF Scholars*, Vol. 13, No. 42 (November 16, 2018).

Randolph J. May and Seth L. Cooper, "[Modernizing Civil Copyright Enforcement for the Digital Age: The Need for Notice-and-Takedown Reforms and Small Claims Relief](#)," *Perspectives from FSF Scholars*, Vol. 13, No. 8 (February 28, 2018).

Randolph J. May and Seth L. Cooper, "[Music MegaStars Sing the Right Note on Copyright Reform](#)," *Perspectives from FSF Scholars*, Vol. 12, No. 20 (June 23, 2016).

Randolph J. May and Seth L. Cooper, "[The Logic of International Intellectual Property Protection](#)," *Perspectives from FSF Scholars*, Vol. 11, No. 3 (January 13, 2016).