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Trade Agreements Should Strengthen Copyright Protections Against Piracy

by

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As we fast approach 2020, online infringement of copyrighted movies, TV shows, and music is pervasive. And there is evidence that such online infringement of copyrighted content is growing. Video streaming via illegal Internet Protocol Television (IPTV) services and "piracy boxes" is reportedly now the predominant means for accessing infringing video content. As a result, copyright owners are suffering significant financial and opportunity losses – and these losses reduce incentives to produce new creative works.

Unfortunately, lackluster copyright enforcement in many foreign countries perpetuates online infringement operations that harm copyright owners in the United States. The Trump Administration and Congress must press for stronger protections for copyrighted works in trade agreements with foreign nations. In this regard, the U.S. should take care not to export through trade agreements with other countries any weaknesses in our own laws, such as those that may now exist in the Digital Millennium Copyright Act's "notice and takedown" regime.

In the past, pirated video streams generally were of poor quality and viewable primarily on PCs. But now infringing video content can be streamed in high quality formats and be viewed on widescreen TVs in living rooms. Unauthorized IPTV services collect massive libraries of copyrighted content from legitimate video services as well pirate websites and then make that content available for a low up-front or monthly fee. Unlawful streaming channel selections

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include live sports events as well as premium content like HBO. These fraudulent services sometimes feature professional-looking video channel menu screens. Some are branded and marketed to appear legitimate. According to Sandvine's September 2019 *Global Internet Phenomena Report*, illegally repackaged IPTV services offer a wider selection for lower prices than consumers pay for legitimate video services.

Additionally, some illegal IPTV operators sell purpose-built video set-top boxes for accessing pirated content. Many viewers of infringing content use so-called "illicit streaming devices" or "pirate boxes" that look like commonly used consumer video devices. Others use devices from legitimate manufacturers that are installed with "Kodi" apps. These apps enable viewing of illegal IPTV streams stored on pirate sites and content delivery networks (CDNs).

By many accounts, Internet-based streaming of high-quality movies and TV episodes has surpassed digital downloading as a means of accessing infringing video content. According to the *Impacts of Digital Piracy on the U.S. Economy*, a June 2019 study published by the Global Innovation Policy Center (GIPC), "more than 80% of piracy is attributable to streaming." Also, "approximately 26.6 billion viewings of U.S.-produced movies and 126.7 billion viewings of U.S.-produced TV episodes are pirated digitally each year, mostly from outside the U.S." Concerning IPTV services and Kodi services, Sandvine's report finds that "their network usage is of the same order of magnitude as many live TV streaming services." Sandvine's report also observed: "[W]e have seen anywhere from 4-25% of subscribers partaking in at least one illegal stream on a weekly basis in networks surveyed in North America, Europe, and the Middle East." Furthermore, Sandvine's 2017 *Global Internet Phenomena Report* estimated that about 9% of U.S. households had access to a "Kodi box."

Moreover, there is evidence that illegal download traffic is also rising, particularly in Europe, the Middle East, and Africa (EMEA). According to Sandvine's latest report: "Last year, we were shocked to see BitTorrent hit 31% on the upstream and, in 2019, it crushed that number with almost 45% of upstream volume being consumed by file sharing. Those kind of numbers have not been seen for years, especially in EMEA." In terms of 2018 global Internet traffic, "file sharing grew significantly from the year before, with BitTorrent alone representing 2.46% of downstream and 27.58% of upstream traffic." Although file-sharing and downloading technologies such as BitTorrent have non-infringing uses, Sandvine's report states: "As new original content has become more exclusive to other streaming services, consumers are turning to file sharing to get access to those exclusives since they can't or won't pay money just for a few shows."

Growing online infringement of video content inflicts increasing financial harms on copyright owners. Mass infringement reduces revenues to copyright owners, devalues their creative works, and undermines incentives and opportunities for creating new works. GIPC's study estimated annual global online piracy costs to the U.S. economy. It found that "digital video piracy conservatively causes lost domestic revenues of at least \$29.2 billion and as much as \$71.0 billion annually, representing a revenue reduction between 11% and 24%." A separate analysis published in November 2017 by Digital TV Research concluded that "the amount of revenue lost to piracy has skyrocketed from US\$6.7 billion in 2010 to nearly US\$31.8 billion last year. The figure will hit nearly US\$52 billion in 2022."

Unfortunately, many foreign countries have inadequate copyright laws. And even if laws are on the books, many countries fail to devote sufficient resources to enforce existing laws. American copyright owners need to be better protected from overseas online infringement operations. So, future trade agreements between the U.S. and foreign nations must contain stronger protections for copyrighted works.

In many important respects, the proposed United States-Mexico-Canada Agreement (USMCA) would strengthen copyright law and enforcement. Under the USMCA, for example, each member nation would be required to provide stronger civil copyright enforcement remedies. These include judicial authority to issue injunctive relief to stop infringing works from entering the market, as well as statutory damages and attorneys' fees for prevailing copyright holders in civil infringement cases. The USMCA also requires each member nation to provide criminal penalties for willful copyright infringement. Fines and imprisonment serve to penalize wrongdoers and deter future criminal infringement operations.

Regarding video, the proposed USMCA provides that manufacturing or distributing devices for unauthorized reception of encrypted copyrighted cable or satellite video signals would be subject to criminal penalties and civil remedies for willful infringement. And each member nation must provide criminal penalties for unauthorized "camcording" of movies in theaters. These forms of infringement supply online piracy operations with unauthorized content for wider distribution.

The pro-copyright provisions contained in the proposed USMCA merit a vote of approval by Congress. But future trade agreements can also improve on the USMCA.

As pointed out in my April 2019 *Perspectives from FSF Scholars* [paper](#), "the proposed USMCA takes a decidedly un-modern approach to online copyright infringement that occurs on user-upload websites" such as YouTube, Vimeo, and Dailymotion. Users of these sites upload massive amounts of copyrighted movies, TV episodes, and music to their websites without authorization. Unfortunately, the USMCA contains language similar to the "notice and takedown" provision in U.S. copyright law that dates back to 1998. The existing notice and takedown system fails to adequately curb the high volumes of online infringement.

The U.S. Trade Representative should affirm that the USMCA's notice and takedown provision is confined to that specific agreement. And future trade agreements negotiated by the U.S. should not export the now outdated notice and takedown system. In the meantime, in light of the dramatic changes in the Internet ecosystem over the last two decades, Congress needs to modernize the notice and takedown system to make online platforms more responsive to widespread infringement on their sites.

It's time to halt the growth of online copyright infringement by illegal IPTV services, Kodi boxes, and other methods. To uphold the rights of American copyright owners, the Trump Administration and Congress need to strengthen international protections for creative works.

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Further Reading

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Randolph J. May, "[Trade Agreements Should Not Export Ineffective Copyright Laws](#)," *FSF Blog* (August 8, 2019).

Seth L. Cooper, "[Trade Agreements Should Include Stronger Online Copyright Protections](#)," *Perspectives from FSF Scholars*, Vol. 14, No. 12 (April 25, 2019).

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).

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