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## THE UNITED STATES-MEXICO-CANADA AGREEMENT: THE NEW NAFTA AND WHAT IT MEANS FOR TECH COMPANIES' LIABILITY FOR USERS' CONDUCT ONLINE

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## I. Introduction

This is an issue that has been hotly contested nearly since the time of its inception. At twenty-five years old, the North American Free Trade Agreement (NAFTA) could be replaced with the United States-Mexico-Canada Agreement (USMCA). The purpose of the USMCA is to update and revamp the older, highly contested NAFTA. One of the areas that has received a major update, and has now become a source of confusion, is the intellectual property (IP) chapter. With new terms and provisions come new challenges. To tackle these challenges, it is important to understand where the United States, Canada, and Mexico, as a collective, have been.

Currently, trade between the United States, Mexico, and Canada is governed by NAFTA. It was enacted in 1994<sup>1</sup> as a way to enhance and encourage trade amongst the United States, Canada, and Mexico.<sup>2</sup> The intention was to create a fair market between the three countries<sup>3</sup> but as the provisions of the agreement came to maturity, they were not quite what the countries expected. The United States and Mexico became some of NAFTA's biggest critics. Primarily, the United States criticizes the loss of manufacturing jobs and Mexico criticizing the exploitation of Mexican workers.<sup>4</sup>

Although the issues the countries had with NAFTA were not fixed, the United States entered into negotiations with four countries bordering the Pacific Ocean in 2008.<sup>5</sup> The United States goal in these negotiations was to expand its trade abilities to larger economic areas.<sup>6</sup> These negotiations led to an agreement between a total of twelve countries, including the United States.<sup>7</sup> The agreement was referred to as the Trans-Pacific Partnership (TPP) and was submitted to the

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<sup>1</sup> *North American Free Trade Agreement (NAFTA)*, Office of the United States Trade Representative, <https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> (last visited Sept. 28, 2018).

<sup>2</sup> The North American Free Trade Agreement, U.S.-Mex.-Can., art. 102, Dec. 8, 1993 [hereinafter NAFTA] available at <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement?mvid=1&secid=5a1b5f25-8904-4553-bf16-fef94186749e>.

<sup>3</sup> NAFTA, *supra* note 2.

<sup>4</sup> Anne Sraders, *What is NAFTA? History, Purpose and What It Means in 2018*, TheStreet (Jul. 18, 2018, 10:08 AM), <https://www.thestreet.com/politics/nafta-north-american-free-trade-agreement-14651970>.

<sup>5</sup> Jen Kirby, *USMCA, The new trade deal between the US, Canada, and Mexico, explained*, Vox (Oct. 2, 2018, 2:30 PM EDT), <https://www.vox.com/2018/10/2/17923638/usmca-trump-nafta-trade-agreement>.

<sup>6</sup> James McBride, *What Is the Trans-Pacific Partnership (TPP)?*, Council on Foreign Relations (May 15, 2018), <https://www.cfr.org/background/what-trans-pacific-partnership-tpp>.

<sup>7</sup> James McBride, *supra* note 6.

legislatures of the twelve countries for approval.<sup>8</sup> However, before the legislatures had the chance to ratify the TPP, the United States withdrew from the agreement in early 2017.<sup>9</sup>

Later that year, negotiations began between Mexico and the United States to make changes to their trade agreement. Canada joined the negotiations not long after.<sup>10</sup> The negotiations between the three countries were ongoing for a year and a half before an agreement was reached and the USMCA was drafted.<sup>11</sup> The USMCA language provides greater protections than NAFTA and is nearly identical to that of the TPP.<sup>12 13</sup> The biggest difference between the USMCA and the TPP is that the USMCA made more drastic changes to the IP chapter than those proposed in the TPP.<sup>14 15 16</sup> The USMCA also carried forward the basic copyright and trademark protections provided in NAFTA, but brought them into the twenty-first century<sup>17</sup> and created a uniform standard across the United States, Mexico, and Canada. Additionally, the USMCA now includes provisions for online conduct and IP rights within the online realm (NAFTA did not contain any provisions that referenced the internet).<sup>18</sup> However, the internet is an ever-growing and evolving entity, and even with the USMCA's new provisions, rules and protections can be slow to catch-up.

With the new standards and protections in place, there is a growing concern about what the USMCA will mean for how business is conducted, specifically online. One of the biggest concerns is the liabilities that internet service providers may incur for the conduct of their users, specifically if that conduct infringes upon copyrighted material. It is important to understand where the provisions of the

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<sup>8</sup> James McBride, *supra* note 6.

<sup>9</sup> James McBride, *supra* note 6.

<sup>10</sup> *NAFTA Modernization: Key Dates Prior to Commencement of Negotiations*, Executive Office of the President of the United States, <https://ustr.gov/sites/default/files/files/agreements/FTA/nafta/NAFTA.pdf> (last visited Oct. 16, 2018).

<sup>11</sup> Jeremy Diamond, Kevin Liptak, Paula Newton, and Donna Borak, *US and Canada reach deal on NAFTA after talks go down to the wire*, CNN Politics (Oct. 1, 2018, 7:24 AM ET), <https://www.cnn.com/2018/09/30/politics/trump-nafta-canada/index.html>.

<sup>12</sup> The United States-Mexico-Canada Agreement, U.S.-Mex.-Can., art. 20, agreed to Oct. 1, 2018, [hereinafter USMCA] *available at* [https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/20\\_Intellectual\\_Property\\_Rights.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/20_Intellectual_Property_Rights.pdf).

<sup>13</sup> The Trans-Pacific Partnership, art. 18, March 8, 2018, [hereinafter TPP] *available at* <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/18.-Intellectual-Property.pdf>.

<sup>14</sup> USMCA, *supra* note 12.

<sup>15</sup> TPP, *supra* note 13.

<sup>16</sup> NAFTA, *supra* note 2.

<sup>17</sup> Jen Kirby, *supra* note 5.

<sup>18</sup> NAFTA, *supra* note 2.

USMCA draw the line when the user and when the provider is held accountable. This is especially true with the rapid advancements of the internet and the growing want of users to be able to have more control over what they are able to post and edit.

Taking a more in depth look at the evolution of the recent trade agreements involving the United States, Canada, and Mexico will provide more clarity as to the countries' rationale for the changes implemented in the USMCA. It will also provide a better idea of the impact those changes will have on the citizens of the countries, pending ratification.

## II. Background

### A. The North American Free Trade Agreement

NAFTA took effect January 1, 1994;<sup>19</sup> however, its inception began almost ten years prior. The idea was presented by President Ronald Reagan during his first campaign for president.<sup>20</sup> During Reagan's presidency in 1986, the United States began negotiations with Canada toward a free trade agreement.<sup>21</sup> In October of 1987, the two countries agreed to the Canada-United States Free Trade Agreement (CUSFTA), which took effect in January of 1989.<sup>22</sup> CUSFTA was one of the first trade agreements to address trade in services and include a means of fair and quick trade dispute resolutions.<sup>23</sup> Similar negotiations commenced between the United States and Mexico in June of 1990.<sup>24</sup> Canada joined the negotiations in 1991, resulting in the trilateral trade agreement of NAFTA.<sup>25</sup> President Bill Clinton signed NAFTA into law on December 8, 1993.<sup>26</sup>

In its text, NAFTA lists six primary objectives: (1) to "eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between"

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<sup>19</sup> *North American Free Trade Agreement*, *supra* note 1.

<sup>20</sup> Kimberly Amadeo, *History of NAFTA and Its Purpose*, The Balance (Oct. 2, 2018), <https://www.thebalance.com/history-of-nafta-3306272>.

<sup>21</sup> *Canada-U.S. Free Trade Agreement*, Government of Canada (Oct. 1, 2018), [http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/united\\_states-etats\\_unis/fta-ale/background-contexte.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/united_states-etats_unis/fta-ale/background-contexte.aspx?lang=eng).

<sup>22</sup> *Canada-U.S. Free Trade Agreement*, *supra* note 21.

<sup>23</sup> *Canada-U.S. Free Trade Agreement*, *supra* note 21.

<sup>24</sup> David Alire and Michael O'Boyle, *The rocky history of NAFTA*, Reuters (Sept. 1, 2017, 1:12 PM), <https://www.reuters.com/article/us-trade-nafta-timeline/the-rocky-history-of-nafta-idUSKCN1BC5IL>.

<sup>25</sup> David Alire, *supra* note 24.

<sup>26</sup> History.com Editors, *NAFTA signed into law*, History (Aug. 21, 2018), <https://www.history.com/this-day-in-history/nafta-signed-into-law>.

the United States, Mexico, and Canada; (2) to “promote conditions of fair competition in the free trade area”; (3) to substantially increase investment opportunities in the United States, Mexico, and Canada; (4) to provide protection and enforcement of IP rights; (5) to create procedures for the application of NAFTA, its joint administration, and dispute resolution; and (6) to “establish a framework for further trilateral, regional and multilateral cooperation to extend and enhance the benefits of” NAFTA.<sup>27</sup> The principles and rules of national treatment, most-favored-nation treatment, and transparency help develop these objectives.<sup>28</sup> Many of these objectives have been met since NAFTA’s inception; intra-North American trade has more than tripled, and the United States, Canada, and Mexico have all experienced increased trade, economic growth, and higher wages.<sup>29</sup>

Although the United States, Canada, and Mexico have experienced benefits from NAFTA, it has received mass amounts of criticism. For example, many blame NAFTA for the decrease in United States manufacturing workers, as well as lower wages of those who were able to maintain manufacturing jobs.<sup>30</sup> Some critics also claim NAFTA unfairly favors Mexico and Canada because it creates trade deficits for the United States with both countries.<sup>31</sup> However, the criticism of NAFTA is not limited only to the United States, it receives criticism from Mexico as well. Critics argue that the maquiladora programs, which are foreign-controlled manufacturing plants that process or assemble duty-free imported components for export<sup>32</sup>, are exploiting Mexican workers.<sup>33</sup> Canada’s criticism of NAFTA, however, has been relatively minor, as Canada enjoys mostly benefits from the agreement. The criticism that does exist comes from those who believe the agreement has led to a loss of jobs because of lower Mexican labor costs.<sup>34</sup>

As economic conditions continued to worsen, particularly with respect to the 2007-2008 recession, NAFTA became a controversial issue in political

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<sup>27</sup> NAFTA, *supra* note 2.

<sup>28</sup> NAFTA, *supra* note 2.

<sup>29</sup> Anne Sraders, *supra* note 4.

<sup>30</sup> Anne Sraders, *supra* note 4.

<sup>31</sup> Joy Blenman, *NAFTA: What it is and how it benefits Canada*, Sun Life Financial (Sept. 15, 2017),

[https://www.sunlife.ca/ca/Learn+and+Plan/Money/Financial+planning+tips/NAFTA+What+it+is+how+it+benefits+Canada+part+1?vgnLocale=en\\_CA](https://www.sunlife.ca/ca/Learn+and+Plan/Money/Financial+planning+tips/NAFTA+What+it+is+how+it+benefits+Canada+part+1?vgnLocale=en_CA).

<sup>32</sup> Mike White, *NAFTA and the Maquiladora Program*, Team NAFTA (April 18, 2016), <http://teamnafta.com/manufacturing-resources-pages/2016/4/18/nafta-and-the-maquiladora-program>.

<sup>33</sup> Anne Sraders, *supra* note 4.

<sup>34</sup> Joy Blenman, *supra* note 31.

campaigns and elections.<sup>35</sup> In 2008, President, then candidate, Barack Obama blamed NAFTA for the growing unemployment rate<sup>36</sup> and suggested that NAFTA's terms may need to be renegotiated to incorporate higher labor and environmental standards.<sup>37</sup> During his tenure, President Obama proposed engaging in the TPP,<sup>38</sup> which would treat the market similar to that of the European Union for the countries involved in the agreement.<sup>39</sup> The TPP was never ratified by the United States Congress and, therefore, never went into effect.<sup>40</sup>

President Donald Trump has proven to be one of NAFTA's biggest opponents. Throughout his campaign, President Trump constantly criticized NAFTA, blaming the agreement for destroying United States manufacturing.<sup>41</sup> He has even gone so far as to call the agreement the "worst trade deal ever made".<sup>42</sup> On August 16, 2017, negotiations to modernize NAFTA began between the United States, Canada, and Mexico.<sup>43</sup> Negotiations between the three countries ended on September 30, 2018. The result was a whole new agreement – the USMCA – to replace NAFTA.<sup>44</sup> Although agreed upon by the United States, Mexico, and Canada, the USMCA cannot go into effect before 2020, as each of the countries respective legislatures must first ratify the agreement.<sup>45</sup>

## B. The Trans-Pacific Partnership

Even though the United States Congress did not ratify the TPP, it is still important to understand its intentions, language, and background, as the USMCA

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<sup>35</sup> Andréa Ford, *A Brief History of NAFTA*, TIME (Dec. 30, 2008), <http://content.time.com/time/nation/article/0,8599,1868997,00.html>.

<sup>36</sup> Kimberly Amadeo, *supra* note 20.

<sup>37</sup> Andréa Ford, *supra* note 35.

<sup>38</sup> Anne Sraders, *supra* note 4.

<sup>39</sup> *TPP: What is it and why does it matter?*, BBC News (Jan. 23, 2017), <https://www.bbc.com/news/business-32498715>.

<sup>40</sup> *Trans-Pacific Partnership (TPP)*, Public Citizen, <https://www.citizen.org/our-work/globalization-and-trade/nafta-wto-other-trade-pacts/trans-pacific-partnership> (last visited Sept. 28, 2018).

<sup>41</sup> Patrick Gillespie, *Trump hammers America's 'worst trade deal'*, CNN Business (Sept. 27, 2016, 11:44 AM ET), <https://money.cnn.com/2016/09/27/news/economy/donald-trump-nafta-hillary-clinton-debate/?iid=EL>.

<sup>42</sup> Nathaniel Parish Flannery, *Is Donald Trump Right About NAFTA?*, Forbes (Aug. 28, 2017, 08:50 AM), <https://www.forbes.com/sites/nathanielparishflannery/2017/08/28/is-donald-trump-right-about-nafta/#604e47ba42e7>.

<sup>43</sup> David Alire, *supra* note 24.

<sup>44</sup> Kimberly Amadeo, *supra* note 20.

<sup>45</sup> Kimberly Amadeo, *Why NAFTA's Six Advantages Outweigh its Six Disadvantages*, The Balance (Oct. 2, 2018), <https://www.thebalance.com/nafta-pros-and-cons-3970481>.

is modeled off of the TPP.<sup>46</sup> Negotiations for the TPP were initiated by the countries of Brunei, Chile, New Zealand, and Singapore in 2005. The United States joined the negotiations in 2008. By 2009, there were a total of twelve countries engaged in the negotiations, including Canada and Mexico.<sup>47</sup> All of the involved countries are located along the Pacific Ocean and comprise nearly forty percent of the world's economic output.<sup>48</sup> An agreement was reached amongst the twelve countries in 2015, was signed in 2016, and was submitted to the legislatures of the twelve countries for ratification. However, before Congress had the chance to ratify, President Trump withdrew from the agreement in January of 2017. The remaining eleven countries decided to continue forward with the agreement, making minor changes and renaming it the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP).<sup>49</sup>

The intention behind the original TPP agreement was to establish uniform rules for global investment and to fully integrate the economic area of the involved countries.<sup>50</sup> There were several notable provisions, such as the elimination or reduction of tariffs, investment rules, e-commerce guidelines, and labor and employment standards. However, the most notable provision was the IP protections, which included patent enforcement, copyright term lengths, trade secret and technology protections, and protection for certain prescription drugs. Opposition to the TPP arose from fears that it would be a repeat experience of NAFTA – specifically regarding the criticism of the loss of manufacturing jobs.<sup>51</sup>

Ironically, the language of the USMCA is nearly identical to that of the TPP. However, there are a few minor differences, including: the exclusion of the patent filing provision in the TPP and the inclusion of a non-prejudicial disclosures/grace period, an electronic industrial design system, and a fifteen-year term of protection for industrial designs in the USMCA. Additionally, the USMCA includes trade secrets as its own section in the IP chapter.<sup>52 53</sup>

## C. The United States-Mexico-Canada Agreement

### i. What is the USMCA?

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<sup>46</sup> Jen Kirby, *supra* note 5.

<sup>47</sup> James McBride, *supra* note 6.

<sup>48</sup> *TPP: What is it and why does it matter?*, *supra* note 39.

<sup>49</sup> James McBride, *supra* note 6.

<sup>50</sup> James McBride, *supra* note 6.

<sup>51</sup> James McBride, *supra* note 6.

<sup>52</sup> USMCA, *supra* note 12.

<sup>53</sup> TPP, *supra* note 13.

The USMCA “establishes a legal framework of minimum standards for the protection and enforcement of IP rights in North America.”<sup>54</sup> On May 18, 2017, President Donald Trump notified Congress that the United States would be engaging in negotiations with Canada and Mexico to modernize and renegotiate the terms of NAFTA.<sup>55</sup> Negotiations began on August 16, 2017<sup>56</sup> and lasted for over a year. An agreement was reached on September 30, 2018.<sup>57</sup> If ratified by the legislatures of the United States, Canada, and Mexico, the USMCA will replace NAFTA as the governing law of trade between the three countries.

The majority of the language contained in NAFTA was incorporated into the USMCA, but with some changes. An example of one such change regards the country-of-origin rules, which state that at least seventy-five percent of cars or trucks must be manufactured in the United States, Canada, or Mexico to qualify for zero tariffs. The intent is to increase manufacturing in North America by forcing companies to use parts manufactured in the United States, Canada, and Mexico rather than parts manufactured abroad.<sup>58</sup> Another example includes an increase in labor protections. These protections are mostly targeted at Mexico, requiring the minimum wage to be raised to be more competitive with the United States and Canada. The labor protections also allow the United States, Canada, and Mexico to sanction each other if any labor violations that impact trade occur.<sup>59</sup>

The USMCA also included terms that Canada implement less regulation of its dairy market. This was an item that was a big contention point between the United States and Canada. Although Canadian dairy farmers were not in support of this provision, the Canadian government agreed to increase the market access for dairy, poultry, and eggs from the United States. In return, the United States agreed to increase market access to dairy, peanuts and peanut products, and a limited amount of sugar from Canada.<sup>60</sup> Another change is that investors may no longer sue the United States, Canadian, or Mexican governments regarding changes to policies they believe will harm future profits. The USMCA also implemented tariffs that are imposed against Canada and Mexico by the United States for trade.

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<sup>54</sup> *Intellectual property chapter summary*, Government of Canada, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/ip-pi.aspx?lang=eng> (last updated Nov.29, 2018).

<sup>55</sup> *NAFTA Modernization*, *supra* note 10.

<sup>56</sup> *NAFTA Modernization*, *supra* note 10.

<sup>57</sup> Jeremy Diamond, *supra* note 11.

<sup>58</sup> Jen Kirby, *supra* note 5.

<sup>59</sup> Jen Kirby, *supra* note 5.

<sup>60</sup> Katie Lobosco, Donna Borak, and Tami Luhby, *What's new in the US, Canada and Mexico Trade Deal*, CNN Politics (Oct. 1, 2018) <https://www.cnn.com/2018/10/01/politics/nafta-usmca-differences/index.html>.



However, the major change from NAFTA is the increase in IP protections.<sup>61</sup> Since NAFTA was negotiated before the growth of the internet, the United States, Canada, and Mexico did not consider the effect it would have when talking about IP rights when drafting NAFTA.<sup>62</sup> In the recent negotiations, the United States, Canada, and Mexico considered the language of the TPP, adjusted it, and included it in the USMCA to ensure that the agreement is as up to date as possible.

The USMCA also implemented a “sunset” clause, where the United States, Canada, and Mexico agreed that the terms of the USMCA will expire after sixteen years.<sup>63</sup> However, the clause included that the USMCA will be submitted for review every six years, allowing the countries to extend the agreement if they so choose.<sup>64</sup>

Now that the USMCA has been agreed upon by the leaders of the United States, Canada, and Mexico, it must be approved by the respective legislatures of each country.<sup>65</sup> In the United States, the USMCA is submitted to Congress for review. Once submitted, Congress will have 60-days to either approve or deny the agreement. During this time, Congress is able to suggest changes it would like to make to the USMCA.<sup>66</sup> However, due to the conclusion of the negotiations occurring in close proximity to the 2018 midterm elections and the lengthy government shutdown, the USMCA likely will not be discussed in Congress until later in 2019. Therefore, the USMCA, if approved, will not go into effect until 2020.<sup>67</sup>

## ii. Changes to the IP chapter in the USMCA from NAFTA

Specifically looking at the changes incorporated into the USMCA IP chapter, for the most part, the United States, Mexico, and Canada are already in compliance with many of the provisions. However, Canada appears to be the country that will experience the most change. The USMCA retains NAFTA’s core protections for areas of IP such as trademarks, copyrights, and patents, but has updated the terms so that they are more applicable to the world today.<sup>68</sup> “The IP

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<sup>61</sup> Jeremy Diamond, *supra* note 11.

<sup>62</sup> Jen Kirby, *supra* note 5.

<sup>63</sup> Jen Kirby, *supra* note 5.

<sup>64</sup> Jen Kirby, *supra* note 5.

<sup>65</sup> *United States-Mexico-Canada Agreement*, Office of the United States Trade Representative, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (last visited Oct. 15, 2018).

<sup>66</sup> Jeremy Diamond, *supra* note 11.

<sup>67</sup> Jen Kirby, *supra* note 5.

<sup>68</sup> Ian F. Fergusson and M. Angeles Vilarreal, *Proposed U.S.-Mexico-Canada (USMCA) Trade Agreement*, Congressional Research Service (Oct. 5, 2018), <https://fas.org/sgp/crs/row/IF10997.pdf>.

chapter builds on existing international IP agreements such as the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and certain treaties administered by the World Intellectual Property Organization (WIPO).”<sup>69</sup>

To further those means, the trademark section of the IP chapter includes language that each country must ratify the Madrid Protocol.<sup>70</sup> The Madrid Protocol is an international treaty that allows a trademark owner to register their mark in any country that is a member of the treaty.<sup>71</sup> The trademark owner need only to file an international application with the International Bureau of the WIPO in Geneva, Switzerland.<sup>72</sup> However, it is important to note that although the application is registered, it does not create a universally effective trademark. The individual member countries of the Madrid Protocol must apply their own trademark standards to determine if the mark may be protected in that jurisdiction.<sup>73</sup> The language requiring the ratification of the Madrid Protocol was not a substantial change; the United States and Mexico were members before the commencement of the USMCA negotiations, and Canada was already moving toward becoming a member.<sup>74</sup>

The USMCA adopted the copyright standards of the United States, whose terms are similar, if not the same, as the European Union.<sup>75</sup> The term of protection for a copyright created by a living author has now been extended to seventy years beyond the death of the author. This is a change from the fifty years allotted under NAFTA. Further, the USMCA states that the minimum amount of protection provided is seventy years beyond the natural life of the author, but that a longer term may be allowed by any individual member country.<sup>76</sup> For example, in Mexico, the amount of protection provided would be for one hundred years rather than seventy because one hundred years beyond the life of the author is Mexico’s current copyright term.<sup>77</sup> However, in the event that the term of protection is not based on the author’s natural life, such as where the author is a corporation, the USMCA has

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<sup>69</sup> *Intellectual property chapter Summary*, *supra* note 54.

<sup>70</sup> Lizerbram Law, *What are the Intellectual Property Impacts of USMCA – The New NAFTA?*, David Lizerbram & Associates (Oct. 5, 2018), <https://lizerbramlaw.com/2018/10/05/what-are-the-intellectual-property-impacts-of-usmca-the-new-nafta/>

<sup>71</sup> Lizerbram Law, *supra* note 70.

<sup>72</sup> Lizerbram Law, *supra* note 70.

<sup>73</sup> Lizerbram Law, *supra* note 70.

<sup>74</sup> Lizerbram Law, *supra* note 70.

<sup>75</sup> Mark Evans and David Schwartz, *USMCA v. NAFTA: What’s changed and what it means for IP in Canada*, Smart & Biggar Fetherstonhaugh (Oct. 2, 2018), [http://www.smart-biggarc.ca/en/articles\\_detail.cfm?news\\_id=1463](http://www.smart-biggarc.ca/en/articles_detail.cfm?news_id=1463).

<sup>76</sup> USMCA, *supra* note 12, at art. 20.63, n.59.

<sup>77</sup> Lizerbram Law, *supra* note 70.

provided two additional bases for calculating the term of protection.<sup>78</sup> These are (1) “not less than [seventy five] years from the end of the calendar year of the first authorized publication of the work” or (2) if the copyrighted work has failed to appear in an authorized publication within twenty five years of its creation, then “not less than [seventy] years from the end of the calendar year of the creation of the work”.<sup>79</sup>

The USMCA also adopted language dealing with the issue of technological protection measures for copyrights that are stricter than those proposed in the TPP.<sup>80</sup> However, the USMCA provides “safe harbors” for internet service providers (ISPs) that will protect them from liability for copyright infringement that occurs on their network in certain circumstances. The copyright infringements must be such that the ISP does not control, initiate, or direct the infringement.<sup>81</sup>

As for patents, the USMCA provides an obligation for patent term adjustment to compensate patent applicants when they experience unreasonable delays while their applications are being processed. Additionally, the USMCA includes language regarding the availability of technology field patents, which include criteria for exclusions from patentability, that are similar to those currently imposed by Canada.<sup>82</sup>

Other areas of the IP chapter that experienced changes include pharmaceutical IP (namely biologic drugs), trade secrets, and enforcement. One of the changes to new biologic drugs increases the term of data protection to ten years. This is a change to Canadian law, which currently has a term of eight years.<sup>83</sup> Additionally, as mentioned previously, the USMCA created an independent section for trade secrets in the IP chapter. The USMCA now provides for civil and criminal enforcement and remedies, as well as penalties, for the misappropriation of trade secrets.<sup>84</sup> Finally, the enforcement provisions of the USMCA contain language relating to numerous IP areas. One such area is border enforcement measures, which include applications to allow for the detention of goods suspected to be confusingly similar to registered trademark goods that have already been imported in the member countries. Border officers are also granted the legal authority to detain suspected counterfeit or pirated goods when they are imported, exported, in

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<sup>78</sup> Mark Evans, *supra* note 75.

<sup>79</sup> USMCA, *supra* note 12, at art. 20.63.

<sup>80</sup> Nathaniel Lipkus and Jaymie Maddox, *A need-to-know guide on IP in the U.S.-Mexico-Canada Agreement*, Osler (Oct. 2, 2018), <https://www.osler.com/en/resources/cross-border/2018/a-need-to-know-guide-on-ip-in-the-u-s-mexico-canada-agreement>.

<sup>81</sup> Mark Evans, *supra* note 75.

<sup>82</sup> *Intellectual property chapter summary*, *supra* note 54.

<sup>83</sup> *Intellectual property chapter summary*, *supra* note 54.

<sup>84</sup> *Intellectual property chapter summary*, *supra* note 54.

bonded warehouse, or in transit. Additionally, the enforcement provisions provide rules for the enforcement of IP rights on the internet.<sup>85</sup>

### iii. What are Internet Service Providers?

Under the USMCA, an ISP is “a provider of services for the transmission, routing, or providing of connections for digital online communications without modification of their content, between or among points specified by a user, of material of the user’s choosing, undertaking the function in Article 20.89.2(a); or a provider of online services undertaking the functions in Article 20.89.1(b), Article 20.89.1(c), or Article 20.89.1(d).”<sup>86</sup> Essentially, an ISP is a company that provides users with access to the internet. “An ISP is your gateway to the Internet and everything else you can do online.”<sup>87</sup> For the average person, the ISP is typically a cable company or tv provider.<sup>88</sup> Examples of ISPs include AT&T, Verizon, Comcast, and NetZero.<sup>89</sup>

An ISP is different than someone who has a website. An “ISP maintains miles of cabling, employs hundreds of technicians and maintains network services for its hundreds of thousands of subscribers.”<sup>90</sup> ISPs may transmit access to the internet through being hard wired into a home or business or through wireless signals via satellite.<sup>91</sup> There are three overarching types of ISPs: dial-up services, high-speed internet/broadband, and Digital Service Lines (“DSL”). High-speed internet/broadband is offered by cable companies and DSL is offered by phone companies.<sup>92</sup> The two most popular types of ISPs today are DSL and high-speed internet/broadband. It is very rare for someone to be utilizing a dial-up ISP as it is very slow.<sup>93</sup> Other specific types of ISPs include free/nonprofit ISPs and hosting ISPs. Examples of hosting ISPs include those that host only email services or online storage.<sup>94</sup> These types of ISPs provide free internet access by subsidizing the cost through the use of advertisements.<sup>95</sup>

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<sup>85</sup> *Intellectual property chapter summary*, *supra* note 54.

<sup>86</sup> USMCA, *supra* note 12, at art. 20.88.

<sup>87</sup> *What is an Internet Service Provider?*, What Is My IP Address, <https://whatismyipaddress.com/isp> (last visited Nov. 29, 2018).

<sup>88</sup> *What is an Internet Service Provider?*, *supra* note 87.

<sup>89</sup> Tim Fisher, *Internet Service Provider (ISP): What exactly does an internet service provider do?*, Lifewire (Sept. 5, 2018), <https://www.lifewire.com/internet-service-provider-isp-2625924>.

<sup>90</sup> *What is an Internet Service Provider?*, *supra* note 87.

<sup>91</sup> Tim Fisher, *supra* note 89.

<sup>92</sup> *What is an Internet Service Provider?*, *supra* note 87.

<sup>93</sup> *What is an Internet Service Provider?*, *supra* note 87.

<sup>94</sup> Tim Fisher, *supra* note 89.

<sup>95</sup> Tim Fisher, *supra* note 89.

As previously stated, when NAFTA was created, it did not take into account the impact the internet might have in the future and, therefore, did not create any provisions for its use or for IP protections online. As a result, the United States, Canada, and Mexico each created their own versions of IP laws and protections, including extensive copyright statutes. Each country's version has its own definition of what an ISP is, with varying degrees of overlap between them.

In response to NAFTA's oversight, the Digital Millennium Copyright Act of 1998 (DMCA) was adopted by the United States.<sup>96</sup> The DMCA defines an ISP as a service provider. Under the DMCA there are four categories of conduct that a service provider may fall into: (1) transitory communications, (2) system caching, (3) storage of information on systems or networks at direction of users, and (4) information location tools. The language used to define a service provider for the first category, transitory communications, in the DMCA is nearly identical to that in the first part of the definition offered in the USMCA.<sup>97</sup> However, the language used to describe a service provider for the other three categories is much broader, defining a service provider as "a provider of online services or network access, or the operator of the facilities therefor."<sup>98</sup>

Limitations on liability for service providers under the DMCA is dependent upon the service provider's category of conduct. However, to be eligible for a limitation, there are two general conditions a service provider must meet. First, that it adopt and implement a policy for terminating the accounts of subscribers who are repeat infringers in appropriate circumstances. Second, "it must accommodate and not interfere with . . . measures that copyright owners use to identify or protect copyrighted works, that have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair and voluntary multi-industry process, are available to anyone on reasonable nondiscriminatory terms, and do not impose substantial costs or burdens on service providers."<sup>99</sup>

Additionally, under the DMCA, "a service provider is eligible for the limitation on liability only if it does not have actual knowledge of the infringement, is not aware of facts or circumstances from which infringing activity is apparent, or upon gaining such knowledge or awareness, responds expeditiously to take the material down or block access to it."<sup>100</sup> Further, the DMCA implemented a notice and takedown procedure where the copyright owner can submit a notice to the service provider requesting that the infringing material be taken down. So long as

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<sup>96</sup> Luis Schmidt, *Notice and take down before NAFTA*, CTC Legal Media (Jan. 2018), <http://www.olivares.mx/wp-content/uploads/2018/02/olivares-final-jan-18.pdf>.

<sup>97</sup> *The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary*, U.S. Copyright Office (Dec. 1998) [hereinafter DMCA] <https://www.copyright.gov/legislation/dmca.pdf>.

<sup>98</sup> DMCA, *supra* note 97, at 9.

<sup>99</sup> DMCA, *supra* note 97, at 9-10.

<sup>100</sup> DMCA, *supra* note 97, at 12.

the service provider promptly removes or blocks the identified infringing material, the provider is exempt from liability.<sup>101</sup>

In Canada, additional legislation to address NAFTA's lack of inclusion of the internet was not necessary, as Canada's Copyright Act (Copyright Act) was enacted in 1985 before the creation of NAFTA. In the Copyright Act, Canada uses the term "network services" rather than "service provider". The Act defines network services as "a person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication of the internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter."<sup>102</sup> Additionally, the Copyright Act has its own form of notice and takedown for providers of network services. Ultimately, the Copyright Act and the DMCA are relatively similar, but the DMCA provides more in depth and detailed provisions governing the liability impositions on ISPs.

Mexico's copyright law is governed by the Federal Law on Copyright, enacted in 1996, and is tied to the WIPO. Although Mexico has copyright protections for those who infringe upon copyrighted works, it does not appear Mexico provides protections for infringement through an ISP.<sup>103</sup>

Under the USMCA, liability of ISPs has become more clear and unified. The various limitations for service providers in DMCA are consolidated into a general limitations provision.<sup>104</sup>

### III. What the USMCA means for ISPs

#### A. Safe harbors and legal remedies in the USMCA

While the USMCA provides more opportunities for enforcement of copyright infringement, it also limits the liability of ISPs for their users' infringing conduct online. The safe harbor provisions for ISPs are located in Article 20.89. The legal remedies and safe harbors include incentives for ISPs to cooperate with copyright protections or to take actions to deter the unauthorized storage and transmission of copyrighted material. They also include limitations that preclude

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<sup>101</sup> DMCA, *supra* note 97.

<sup>102</sup> Copyright Act, R.S.C., c. C-42 (1985) [hereinafter Canada Copyright Act] *available at* <https://laws-lois.justice.gc.ca/eng/acts/c-42/FullText.html>.

<sup>103</sup> Federal Law of Copyright, WIPO (June 15, 2018) *available at* [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=477186](http://www.wipo.int/wipolex/en/text.jsp?file_id=477186).

<sup>104</sup> USMCA, *supra* note 12, at art. 20.89.2.

monetary relief against ISPs who have no control over the copyright infringement, but the infringement occurs on systems or networks they control.<sup>105</sup>

There are four functions of service provided which the limitations that preclude monetary relief may be applied to. These limitations are modeled after those in the DMCA. The first function is “transmitting, routing or providing connections for material without modification of its content or the intermediate and transient storage of that material done automatically in the course of such a technical process.”<sup>106</sup> Limitations to this function only apply when the ISP does not initiate the spreading of the materials, and where it does not select the material that is posted or the material’s recipients.<sup>107</sup> The second function is “caching carried out through an automated process.”<sup>108</sup> Caching is “the process of saving data temporarily” to the website, browser, or app. This is done so that the website, browser, or app does not have to download the information every time a user visits.<sup>109</sup> The third function is “storage, at the direction of a user, of material residing on a system or network controlled or operated by or for the” ISP.<sup>110</sup> The fourth function is “referring or linking users to an online location by using information location tools, including hyperlinks and directories.”<sup>111</sup>

The USMCA gives the United States, Canada, and Mexico some discretion in the application of the four limitations. Each country must include in its laws conditions for when ISPs qualify for or do not qualify for the limitations. However, the USMCA stipulates that laws pertaining to the second and third functions must include a requirement for ISPs to quickly and efficiently remove or disable access to infringing material on their network or system. The requirement must occur once the ISP has actual knowledge of the infringement or becomes aware of a situation where infringement is apparent, such as through notice.<sup>112</sup> The notice provision is taken from the Copyright Act’s notice and takedown provision. Once an ISP has removed or disabled the infringing material in a manner that is consistent with the USMCA standard, and has promptly notified or taken steps to notify the owner of the copyrighted material that such removal or disabling occurred, the ISP is exempt from any liability.<sup>113</sup>

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<sup>105</sup> USMCA, *supra* note 12, at art. 20.89.1.

<sup>106</sup> USMCA, *supra* note 12, at art. 20.89.2.

<sup>107</sup> USMCA, *supra* note 12, at art. 20.89, n.117.

<sup>108</sup> USMCA, *supra* note 12, at art. 20.89.2(b).

<sup>109</sup> Lee Bell, *What is caching and how does it work? Caching is a process used by browsers and apps to store information*, WIRED Explains (May 17, 2017), <https://www.wired.co.uk/article/caching-cached-data-explained-delete>.

<sup>110</sup> USMCA, *supra* note 12, at art. 20.89.2(c).

<sup>111</sup> USMCA, *supra* note 12, at art. 20.89.2(d).

<sup>112</sup> USMCA, *supra* note 12, at art. 20.89.3.

<sup>113</sup> USMCA, *supra* note 12, at art. 20.89.3(b).

Eligibility of the limitations on an ISP is conditioned upon three requirements. First, that the ISP adopt and reasonably implement a policy that allows for termination of repeat infringers in the appropriate circumstance.<sup>114</sup> Second, the ISP must accommodate and not interfere with the standard technical measures that are accepted in the applicable country's territory. The standard technical measures have four characteristics: (1) to protect and identify copyrighted material; (2) "to be developed through an open, voluntary process by a broad consensus of copyright owners and service providers"; (3) to be available on reasonable and nondiscriminatory terms; and (4) to not impose substantial costs on ISPs or substantial burdens on their systems or networks.<sup>115</sup> Third, regarding the third and fourth functions of the four limitations, the ISP must not receive financial benefit directly from the infringing activity when the ISP has the right or ability to control such activity.<sup>116</sup> However, except to the extent consistent with the standard technological measures, eligibility is not conditioned on the ISP monitoring its services or actively seeking infringing actions.<sup>117</sup>

It is important to note that although an ISP may not qualify for the limitations, it does not automatically mean the ISP must incur liability. An ISP may not be found liable as long as the country it is located in provides for some type of limitation, exception, or other defense to the liability as part of the country's legal system.<sup>118</sup>

## **B. Effect of the safe harbors on the United States, Canada, and Mexico**

The safe harbors and legal remedies laid out in the USMCA are not just applicable to ISPs, they also come with stipulations for the United States, Canada, and Mexico. In an effort to avoid unnecessary market disruption in the online community, and to encourage the enforcement of copyrights online, the provisions under the USMCA of each country must include in its laws conditions for when ISPs qualify for or do not qualify for the limitations,<sup>119</sup> notice and takedown,<sup>120</sup> and eligibility conditions.<sup>121</sup> Eligibility conditions may not apply to a country if the country continues five things from the time the USMCA is enacted. First, the country must continue to include in its laws the circumstances where an ISP does

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<sup>114</sup> USMCA, *supra* note 12, at art. 20.89.6 (a).

<sup>115</sup> USMCA, *supra* note 12, at art. 20.89.6 (b).

<sup>116</sup> USMCA, *supra* note 12, at art. 20.89.6 (c).

<sup>117</sup> USMCA, *supra* note 12, at art. 20.89.7.

<sup>118</sup> USMCA, *supra* note 12, at art. 20.89.9.

<sup>119</sup> USMCA, *supra* note 12, at art. 20.89.3.

<sup>120</sup> USMCA, *supra* note 12, at art. 20.89.4.

<sup>121</sup> USMCA, *supra* note 12, at art. 20.89.6.



not qualify for the limitations that preclude monetary relief against ISPs for copyright infringement they have no control over, but that occurs on systems or networks they control.<sup>122</sup> Second, the country must continue to provide statutory secondary liability for situations when a person provides an internet or other digital network service for the purpose of encouraging copyright infringement. These situations can relate to factors such as whether the person had knowledge that the service was used for enabling copyright infringement, the benefits the person received from the service, or whether the person promoted or marketed the service as a way to engage in copyright infringement.<sup>123</sup> Third, the country must continue to require ISPs engaged in the first and third functions of the four limitations to be a part of a system that forwards notices for alleged infringements. If the ISP fails to engage in that system, the country must subject the ISP to predetermined monetary damages.<sup>124</sup> Fourth, the country must continue to require ISPs who use the function of information location tools to remove any duplicates it makes of copyrighted materials within a specified time period, and to communicate the removal to the public.<sup>125</sup> Finally, the country must continue to require ISPs who use the function of storage of material residing on a system or network controlled or operated by or for the ISP to remove or disable access to material once it becomes aware of a court decision that causes the storing of certain materials to be infringing.<sup>126</sup>

### C. What does this mean?

The bottom line comes down to that the USMCA implements greater protections for copyright owners. This means that ISPs will need to be proactive if the USMCA is ratified by the United States, Canadian, and Mexican legislatures. “In order to be eligible for the safe harbor protection, ISPs will need to expeditiously remove or disable access to infringing content and implement a policy of terminating the accounts of repeat infringers. Notably, however, ISPs will not be required to monitor their networks for infringing activity.”<sup>127</sup>

The type of proactiveness necessary for an ISP will depend on the type of function or functions it is utilizing. It will also depend upon the laws enacted in the country where it is located. For example, if the ISP is located in Mexico, it will likely need to be vigilant in learning the new IP laws and protections to understand

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<sup>122</sup> USMCA, *supra* note 12, at annex to Section J, (1)(a).

<sup>123</sup> USMCA, *supra* note 12, at annex to Section J, (1)(b).

<sup>124</sup> USMCA, *supra* note 12, at annex to Section J, (1)(c).

<sup>125</sup> USMCA, *supra* note 12, at annex to Section J, (1)(d).

<sup>126</sup> USMCA, *supra* note 12, at annex to Section J, (1)(e).

<sup>127</sup> Mark Evans, *supra* note 75.

what it can and cannot do to qualify for the limitations of liability since Mexico's current copyright laws do not appear to provide protections against copyright infringement through an ISP. Alternatively, if the ISP is located in Canada, it likely can continue conducting business as it already is as the provisions and protections in place regarding ISPs in the USMCA are relatively the same as the protections Canada currently has in place.<sup>128</sup> However, it is almost impossible to know for certain how the new provisions will impact the liability of ISPs until it is enacted. Although the USMCA lays out the consequences, limitations, and exclusions, it will ultimately be left to the courts to determine what the new provisions look like in practice.

It is also important to highlight that the provisions for liability relate only to those who qualify as ISPs. As stated earlier, not every person or company that has a website is considered an ISP, they must actually be providing access to the internet.<sup>129</sup> Therefore, the liabilities and their exclusions and limitations do not apply to every company that has an internet presence – merely having, owning, and operating a website where users are able to post content is not enough for the ISP liability provisions of the USMCA IP chapter to apply.

#### IV. Conclusion

Whether the USMCA will be ratified by the United States, Canada, and Mexico legislatures is yet to be seen. However, the language of the USMCA is available online for the citizens of the United States, Canada, and Mexico to begin preparing for when the agreement might take effect. Whether or not the USMCA is ratified, implementation of provisions enacted for the internet and protections of IP rights in that medium appear to be the evolving trend and will likely be here to stay. If not in this agreement, then likely in the next.

Much of the language of the USMCA reflects the core protections of NAFTA and is nearly identical to the TPP. However, the changes in the USMCA unify the protections of IP across the United States, Mexico, and Canada, making it easier for trade to occur between them. However, that also means that copyright and trademark owners must be aware of their property's use in more countries than just their own. ISPs must also be aware. Although the USMCA provides them circumstances where their liability for infringing acts is limited, this does not let them off the hook completely. ISPs must carefully read the laws of the country

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<sup>128</sup> *USMCA v NAFTA: What's changed and what it means for IP in Canada*, Smart & Biggar/Fetherstone (Oct. 2, 2018), <https://www.lexology.com/library/detail.aspx?g=b8e253be-0590-4d85-983d-13dc5f9b096e>.

<sup>129</sup> *What is an Internet Service Provider?*, *supra* note 87.

where they are located and determine what steps they should take to ensure they are protected.

Looking at what the country's laws are after the enactment of the USMCA, and what they were before, can help ISPs create a better understanding of the protections they have and what changes they need to make. Understanding the history behind the USMCA and the rationale for the changes will help better protect your IP and rights in the future.