

Signed, Sealed & Delivered: Canada, United States, and Mexico Agree on Copyright Protection in New NAFTA Deal

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On November 30, 2018, Canada, the United States, and Mexico signed the Canada-United States-Mexico Agreement (CUSMA). The new trade deal, announced earlier this fall (and known in the United States as USMCA), will replace the North American Free Trade Agreement (NAFTA) and comes with various copyright-related changes.

The stated objective of the intellectual property chapter of CUSMA is that “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation to the mutual advantage of producers and users in a manner conducive to social and economic welfare and to a balance of rights and obligations.”

One of the key aspects of the new trade deal will require Canada to extend the term of copyright protection for Canadian works to not less than the life of the author plus 70 years. Under current Canadian law, copyright protection lasts for 50 years from the death of the author. However, in the United States and the European Union, copyright protection extends to 70 years after the author’s death and, in Mexico, 100 years after the death of the author.

The extended term of copyright protection will also affect the term of Crown copyright in Canada. The new deal provides that, where the term of protection of a work is calculated on a basis other than the life of a natural person, the term shall not be less than 75 years from publication. Currently, Crown copyright is protected for 50 years from the first publication of the work.

CUSMA also includes strong standards against the circumvention of technological protection measures and the removal or alteration of rights management information, requiring criminal procedures and penalties for wilful circumventions and activities for the purposes of commercial advantage or private financial gain. The requirement does not apply to non-profit libraries, archives, educational institutions, or public non-commercial broadcasting entities.

The new deal also requires certain safe harbours for Internet service providers, shielding them from direct liability for copyright infringement so long as they meet certain obligations. Although the CUSMA safe harbour provisions do not require “monitoring” or “affirmatively seeking facts indicating infringing activity,” they do include requirements surrounding takedown and repeat infringer policies. However, those requirements do not apply to Canada; an annex to the agreement provides that, when a country has various

other measures in place (including a notice and notice scheme) at the time of signing, the default safe harbour requirements do not apply.

Although the deal has been signed, legislators from the three countries still have to approve CUSMA before it goes into effect and replaces NAFTA. In Canada, implementation legislation will need to be drafted, reviewed, debated, and passed before ratification. The parties are required to give effect to the intellectual property rights provisions of the new agreement on the date of entry into force of CUSMA, but Canada has 2.5 years from that date to implement the changes required to effect the new term of protection for copyright requirements.

If you have any questions on the copyright-related changes included in CUSMA, please contact Jessica Zagar or any member of our Intellectual Property Group.

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