



Renegotiating NAFTA: Threats to Our Internet Freedom & Access

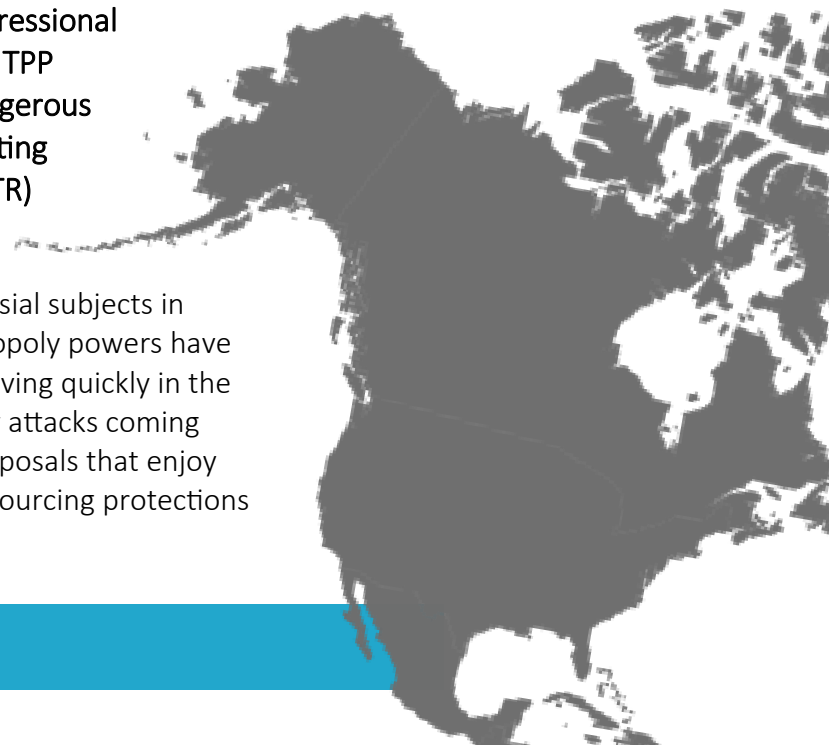
The North American Free Trade Agreement (NAFTA) was radically different from past trade deals that focused on traditional trade matters, like cutting border taxes. Instead, most of NAFTA's provisions granted new powers and privileges to multinational corporations. NAFTA was the first international trade agreement to include specific obligations related to intellectual property (IP) – patents, copyrights and trademarks. Far from encouraging “free trade,” these IP terms actually blocked access and creativity by locking in long monopoly rights for Big Content, including the music recording industry and Hollywood studios, as well as pharmaceutical giants.

These industries were able to insert anti-consumer, anti-internet-user provisions because trade negotiations are done behind closed doors with hundreds of official U.S. trade advisors representing industry interests while the public is locked out. Under NAFTA rules, every country must conform their domestic policies to the pact's terms. And NAFTA's terms are not subject to change unless all three countries agree. So public opinion may change, governments may change, but thanks to agreements like NAFTA, corporate protections remain shielded from democratic change. The result: Using NAFTA to lock in these forms of corporate protectionism has compromised cultural and educational sharing ever since.

Now with NAFTA renegotiations underway, the industry wants to lock in even more expansive monopoly rights and limit governments' regulation of the internet. Big Content and other corporations are pushing for new NAFTA rules that would restrict our access to information and educational resources, protect the big, established companies and stifle innovation. The internet is a growing, ever-evolving platform. Many rely on it for information. Increasingly, it has become a dominant marketplace. Governments must have the ability, now and in the future, to regulate it and protect users and consumers without having their hands tied by so-called “trade” agreements.

Under the guise of “modernizing” the 24-year-old agreement, officials from United States, Canada and Mexico are developing terms that go even further than the extreme copyright rules that were included in the Trans-Pacific Partnership (TPP). Intense congressional opposition across the political spectrum meant the TPP could not be passed here. Nevertheless, those dangerous TPP rules and worse are back in the NAFTA negotiating objectives that the U.S. Trade Representative (USTR) outlined when talks started.¹

NAFTA's IP terms should be one of the most controversial subjects in the renegotiations. But these extreme corporate monopoly powers have received almost no public attention and have been moving quickly in the closed-door negotiations. This contrasts with the noisy attacks coming from the corporate lobby against U.S. government proposals that enjoy wide public support, like cutting NAFTA's investor outsourcing protections and investor-state tribunals.



Putting Our Freedom of Expression and Access to Information at Risk

The public has no access to the NAFTA texts due to the secretive nature of the negotiations. It is impossible to know for sure what is being negotiated behind closed doors. However, press reports and conversations with knowledgeable sources have revealed that the NAFTA renegotiations are based on the copyright terms in the U.S.-Korea Free Trade Agreement (FTA), also known as KORUS. That pact's IP provisions were *even more extreme* than the TPP's. If the KORUS template is imported into NAFTA, it will lock in the most controversial U.S. copyright laws and impose them on Canada and Mexico as well. **If these provisions are included in a final NAFTA, they will:**



Criminalize Even Small-scale Copyright Infringement, Including Sharing With Friends and Family

KORUS and early TPP rules required that governments enact and enforce criminal penalties for even small-scale copyright infringement, such as sending copies of a recipe you found online to a friend. If this regime were imposed through a revised NAFTA, people could face fines or even jail time for sharing music or movie files. Some proposals from the TPP would have required governments to seize violators' property (including their computer hardware, phones, etc.) or internet domains and destroy them, even without a formal complaint from the copyright holder. This would turn internet providers and companies operating social media platforms into content cops, meddling in the information we share online.

Turn Internet Service Providers (ISPs) Into Copyright Police

Service providers act as a gateway between individuals and all the information they access and share on the internet. NAFTA proposals³ would compel service providers to terminate their users' internet access after three allegations of copyright infringement (the so-called "three strikes" rule). Service providers would become responsible for tracking down and issuing warning notices to users who download and upload content. After three notices, these accused file-sharers could face a penalty ranging from a fine to termination of subscriber service, and their identity may be disclosed to the copyright owners. Forcing internet service providers to police the internet in this way could make it too expensive to offer open platforms for user-generated content. This would mean a serious curtailment of internet users' freedom of expression, stifling individual creativity and innovation.

Prohibit Users From Working Around Technological Measures, Such as Unlocking Cell Phones

Corporations install technological controls on devices to limit their use, for example, locking a cell phone to a single carrier. "Anti-circumvention" rules criminalize user efforts to work around these controls. Every three years, the U.S. copyright office introduces limited exemptions for users (so far including unlocking your phone). If the revised NAFTA follows the KORUS template, it would punish circumvention of technical protection measures regardless of any intent to infringe copyright. This could limit users' abilities to tinker with their devices and content, even for legal purposes such as research and innovation.

Stifle Internet Users' Access to Information, Creativity and Innovation by Locking in Controversial and Lengthy Copyright Terms

Copyright protections can benefit people who create written or musical works by requiring those who seek to enjoy the creation to pay for access. But currently, U.S. law guarantees a monopoly for the life of the creator plus 70 years. It is Big Content corporations that reap profits from absurdly long copyright periods that endure many years after the death of an author or composer. These "Mickey Mouse extensions" – so named because Disney Corporation, with other conglomerates, pushed for them to keep private control of Mickey Mouse and other

characters long after Walt Disney died – “impose severe costs on the American public without providing any public benefit.”² Indeed, these long copyright terms undermine the availability and affordability of educational materials like textbooks, and, by restricting access to those who can pay, limit the public’s overall access to knowledge. As well, unless copyright laws have exceptions, like ones allowing “fair use,” fans of sharing and remixing may be blocked from using cultural icons which, long after the death of their creators, should belong to all of us.

The U.S. government, at the behest of the Big Content corporations, is reportedly pushing for a Mickey Mouse rule in NAFTA. This would force Canada to extend its copyright terms an additional twenty years, while locking in the “life plus 70 years” rule here in the United States. If Big Content wins in NAFTA, it will be harder to enact reforms in United States that support access to information, sharing and the public domain – especially on the internet.

Make Websites Liable for Hosting Infringing Content.

“Safe harbor” provisions shield online service providers, such as search functions (e.g., Google) and platforms (e.g., YouTube and Facebook) from liability for content posted on the internet by users. These policies limit the liability of intermediaries – internet service providers – for allegedly “illegal or infringing” content or behavior by third parties, unless the providers have actual knowledge or constructive notice of specific infringing activity or content, which they then are responsible to address. This immunity, which was intended to promote free speech by internet users, was critical to the early development of the internet and is recognized in U.S. law. But Hollywood and the recording industry have long been campaigning for rules that hold service providers liable for the conduct of their users.⁴ Big Content wants internet service providers to be liable so they feel compelled to take proactive measures to protect themselves by limiting or blocking uses of copyrighted materials on their platforms. The types of content that these interests want to create internet provider liability for are almost inevitably too broad, preventing satirical, educational and other fair uses. This so-called “secondary liability” can chill free speech and technological development. In the NAFTA talks, U.S. negotiators reportedly have proposed provisions limiting safe harbors.⁵

If they succeed, internet service providers would be compelled to block videos and content that most of us count on to be able to view and share widely. As the internet has become an increasingly commercial platform – with internet providers like Google compiling and trading data about their users and companies like Amazon setting anti-competitive terms for retailers – “trade” agreements must not impose limits on consumers’ free speech or their ability to demand regulations of the internet that protect their interests. Governments around the world are grappling with these policy issues, which makes the attempt to lock in one set of rules via “trade” agreements a terrible idea.

Undermine Parody, Criticism and Free Expression by Failing to Balance Copyright With User Rights

Fair use exceptions to copyright are a keystone of freedom of expression in the United States. Anyone who has commented on, critiqued or made a parody of a copyrighted song or text has benefited from fair use. Yet restrictive language that was included in KORUS (the “three-step test”) may be included in NAFTA without establishing necessary limitations and exceptions in copyright to protect users. This could upset the long-established balance between the rights of copyright owners and users.

Create New Threats for Journalists and Whistleblowers

The TPP included ambiguous language on trade secrets that corporations could use to bully and deter the investigative journalists and whistleblowers we count on to uncover or expose wrongdoing. If this language were included in NAFTA, it could be used to criminalize unauthorized access and disclosure of information through a computer system.