

USMCA and Intellectual Property part II, Copyrights, Related Rights and Trade Secrets

Intellectual Property – July 2, 2020

USMCA Copyright and Trade Secrets

COPYRIGHT AND RELATED RIGHTS

1) Term of Protection for Copyright and Related Rights

- In the chapter regarding Copyrights, an amendment to the minimum term of protection of copyright and related rights is provided.
- According to the USMCA the term of protection of a work, shall be not less than the life of the author and at least 70 years after the author's death.
- In the case of related rights, the term shall not be less than 75 years from the first authorized publication of the performance or phonogram, unless such publication does not occur within 25 years from the date of creation, the term of protection shall not be less than 70 years.

2) Right of Communication to the Public.

- The concept of the right of communication to the public is extended to include the **digital environment**.
- According to the USMCA, the Parties have the obligation to provide the authors the exclusive right to authorize or prohibit the communication to the public of their works, by wire or wireless means,

including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them, such as streaming.

3) A presumption in favor of authors and holders of related rights.

- It is provided a presumption in favor of authors and holders of related rights.
- Pursuant with the USMCA, in civil, criminal and, if applicable, administrative proceedings **(i)** authors and **(ii)** holders of related rights shall have a presumption of being the right holder in the work.
- The person whose name is usually indicated as **(i)** the author, **(ii)** performer, **(iii)** artist or **(iv)** the producer of the work, performance or phonogram, or if applicable **(v)** the publisher, shall be deemed to be the right holder in that work, performance or phonogram.

4) Technological Protection Measures.

- According to the USMCA, each Party shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that **authors, performers, and producers of phonograms** use in connection with the exercise of their rights.
- Particularly, the USMCA seeks to provide legal certainty to **authors, performers, and producers of phonograms** in the face of major technological advances, since although the technological means allow the protection of their rights, it is also true that they can also lead to the infringement of those rights.
- **Effective technological measure**, under the USMCA, means a technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, or phonogram, or protects copyright or rights related to copyright.
- In such regard, Mexico and the other contracting parties shall have the obligation to regulate technological measures that control access to **(i)** a work, **(ii)** a performance or **(iii)** a phonogram, but shall also be obliged to sanction the circumvention or performance of activities that permit the unauthorized circumvention of an effective technological protection measure.

- According to the USMCA, each Party shall provide criminal procedures and penalties to be applied if it is determined that a person, has been fraudulently and intending to achieve a commercial benefit or financial gain in any of the activities described above.
- Each Party shall establish exceptions and limitations for non- infringing uses.

5) Rights Management Information

- The Treaty establishes the obligation to provide adequate and effective legal remedies to protect **rights management information (RMI)**, i.e., information that:
 - i. information that identifies a work, performance, or phonogram, the author of the work, the performer of the performance, or the producer of the phonogram; or the owner of a right in the work, performance, or phonogram;
 - ii. information about the terms and conditions of the use of the work, performance, or phonogram; or
 - iii. any numbers or codes that represent the information referred to in subparagraphs (i) and (ii),

6) Collective Management.

- The Parties recognize the important role of collective management societies in collecting and distributing royalties concerning copyright and related rights.

TRADE SECRETS

- It is provided the possibility that, through civil judicial procedures, any person lawfully in control of a trade secret, may prevent and obtain redress for the misappropriation of the industrial secret by any other person.
- The duration of the protection of a trade secret shall not be limited.

- Additionally, it is provided that judicial authorities will have the authority to:
 - i. order prompt and effective **provisional measures**, such as orders to prevent the misappropriation of the trade secret and to preserve relevant evidence,
 - ii. **to order specific procedures to protect the confidentiality** of any trade secret; and
 - iii. **impose sanctions** on parties, counsel, experts, or other person subject to such proceedings.
- The Treaty sets forth the obligation to include criminal procedures and sanctions for the unauthorized disclosure of a trade secret by a government official at the central level of government outside the scope of that person's official duties, including dissuasive sanctions such as:
 - i. monetary fines,
 - ii. suspension or termination of employment, and
 - iii. imprisonment, for the undue, unauthorized and fraudulent appropriation of a trade secret.
- It should be noted that the Treaty itself establishes that the **misappropriation and fraudulent appropriation** requires that the person knows that the trade secret was acquired in a manner contrary to honest commercial practices, and this may also include cases in which the acquisition, use or disclosure involves a **computer system**.
- USMCA provides **exceptions and limitations** to the case of misappropriation.
- Finally, it should be noted that the USMCA for clarity defines the concept "**in a manner contrary to honest commercial practices**" as practices consisting of:
 - i. breach of contract,
 - ii. breach of confidentiality and inducement to breach,
 - iii. the acquisition of undisclosed information by third parties who knew, or were grossly negligent in not knowing, that such practices were involved in the acquisition.

Should these measures have an adverse effect on you, please do not hesitate to contact our team with expertise in intellectual property matters, who can be of assistance:

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