

Recent US Actions Muddy USMCA Media Protections

By **Robert Holleyman, Christopher Cole, Michelle Gitlitz and Trey Flowers** (July 21, 2020, 6:07 PM EDT)

Companies in the online marketplace have been paying close attention to Section 230 of the U.S. Communications Decency Act of 1996, or CDA, in recent weeks and months.

CDA Section 230 is a powerful law that provides websites, blogs and social networks that host third-party speech with liability protection against a range of laws that might otherwise hold them legally responsible for what their users say and do.

On July 1, the new United States-Mexico-Canada Agreement, or USMCA, went into effect. The USMCA, for the first time in any trade agreement, requires U.S. trading partners to adopt provisions modeled on Section 230 of the CDA. There was no similar provision in the North American Free Trade Agreement, which the USMCA replaced and which went into force two years prior to passage of the CDA.

Inclusion of provisions modeled on Section 230 in the USMCA further U.S. policy, as articulated in the CDA:

to promote the continued development of the Internet and other interactive computer services and other interactive media [with the purpose to] preserve the vibrant and competitive free market [for] Internet and other interactive computer services.

Congress articulated its policy broadly to facilitate political diversity, cultural development and intellectual activity, and to maximize user control.

The online liability provisions of the USMCA are aligned with CDA Section 230. The purpose of these provisions is to ensure that interactive computer service providers are not held liable for third-party content published on their platforms.

An interactive computer service provider is defined in the USMCA as a "system or service that provides or enables electronic access by multiple users to a computer server." Article 19.17 of USMCA Chapter 19, on digital trade, states:

[N]o Party shall adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability



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for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information.

Annex 19-A of the USMCA provides that Article 19.17 shall not apply to Mexico until three years after the USMCA enters into force. Given that Mexico does not have a corollary to Section 230 in its current law or jurisprudence, the annex provides a transition period until 2023, to enable Mexico to enact laws and regulations to come into compliance. How Mexico drafts and enacts its provisions to comply with its new obligation remain to be seen.

By contrast, there is no transition period applicable to Canada. The requirements of Article 19.17 have immediate applicability to Canada as with the U.S. Since a statutory equivalent to Section 230 does not exist in Canada, its ability to meet the obligations of the USMCA must be viewed through judicial interpretations of existing statutes and how laws may be amended in the future by the Canadian Parliament.

Nothing in Canada's USMCA implementing legislation directly addresses Article 19.17, and, as scholars at the Berkman Klein Center for Internet & Society have argued, certain elements of Canadian intermediary liability appear to be inconsistent with Article 19.17.[1]

As such, legislative changes may be required to align Canadian law with Article 19.17 of USMCA. This raises the possibility of a potential early challenge to Canada's compliance, although whether the U.S. or Mexico during its own three-year transition period, would do so remains unclear.

On its face, the U.S. offers far greater clarity than its North American neighbors. When the U.S. sought and secured the inclusion of Article 19.17, it did so in reliance on both the statutory basis of CDA Section 230 and judicial interpretation.

U.S. success in securing this and other key provisions in the negotiated USMCA was viewed favorably by key governmental bodies charged with reviewing the agreement. Early consideration came from the Office of the U.S. Trade Representative's Advisory Committee for Trade Policy and Negotiations which is required by U.S. statute to review all proposed free trade agreements.

The advisory committee considered both the USMCA's digital trade chapter, Chapter 19, containing this provision and its intellectual property chapter, Chapter 20.[2] The formal submission by the committee stated that it "is pleased with these high-standard chapters and recommend they serve as models for future trade agreements."

The advisory committee effectively recognized the value of adding both liability protection for interactive computer services in connection with user-posted content in Chapter 19, as well as the expanded intellectual property provisions of Chapter 20.

Indeed, Article 19.17 makes clear that its liability protections are not applicable and do not in any way diminish the USMCA's expanded protection of intellectual property, a long-standing negotiating priority of the U.S.

The biggest open question is how the U.S. will consider its new obligations going forward, having secured the model's inclusion in the USMCA. Even as the U.S. embraced the new trade agreement and

championed its entry into force, there were simultaneous efforts to potentially modify or limit Section 230 within the U.S.

In June, the [U.S. Department of Justice](#), following a review initiated in 2019, issued a series of recommendations for Section 230 reform.[3] The U.S. Department of Justice identified four primary areas where it believes reform is most needed:

- Incentivizing online platforms to address illicit content;
- Clarifying federal government enforcement capabilities to address unlawful content;
- Promoting competition; and
- Promoting open discourse and greater transparency.

These recommendations, in addition to President Donald Trump's recent Executive Order on Preventing Online Censorship,[4] which seeks to curb some of the statutory provisions enumerated in Section 230, leaves unclear the steps the U.S. will take to ensure that Canada and Mexico meet their new obligations, or even whether the U.S. will maintain its own.

The Congressional Research Service released a report in June highlighting the potential impact of Trump's Section 230 executive order on U.S. trade obligations.[5] The report notes that under certain circumstances, such as to maintain public order, the USMCA allows parties to adopt measures that could potentially run counter to Article 19.17.

However, as the report states,

If a party to these agreements believes the U.S. has acted contrary to its obligations, it may potentially impose countermeasures against the U.S. (e.g., raise tariffs or suspend other trade benefits) consistent with the relevant dispute settlement arrangement or with general rules of international law.

As such, potential changes to Section 230 could lead to a trade dispute, depending on the scope of those changes and the rationale for making them, as well as if Canada or Mexico believes they run afoul of the USMCA and have an interest in challenging U.S. compliance.

This presents a paradox. Consider the potential, for example, of a popular U.S. media service being held liable in Mexico or Canada, as a result of inadequate implementation of Section 230 principles in that nation, while facing a completely different regime within the U.S.

The executive order, if effective, leaves unclear the steps the U.S. will take to ensure that Canada and Mexico meet their new obligations or even whether the U.S. will maintain its own.

Taken as a whole, however, companies will find that the USMCA provides new benefits as well as processes to enhance the flow of goods, services and, for the first time, digital trade across North America. Even with the numerous unanswered questions, USMCA also reflects a growing recognition across North America of the purposes and value of the approach that the U.S. Congress initiated through Section 230 of the CDA.

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[1] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3645462.

[2] <https://ustr.gov/sites/default/files/files/agreements/FTA/AdvisoryCommitteeReports/AdvisoryCommitteeonTradePolicyNegotiation%28ACTPN%29.pdf>.

[3] <https://www.justice.gov/file/1286331/download>.

[4] <https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/>.

[5] <https://crsreports.congress.gov/product/pdf/LSB/LSB10484>.