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NAFTA

Third-Quarter NAFTA Lobbying Turns to Copyright and Digital Trade



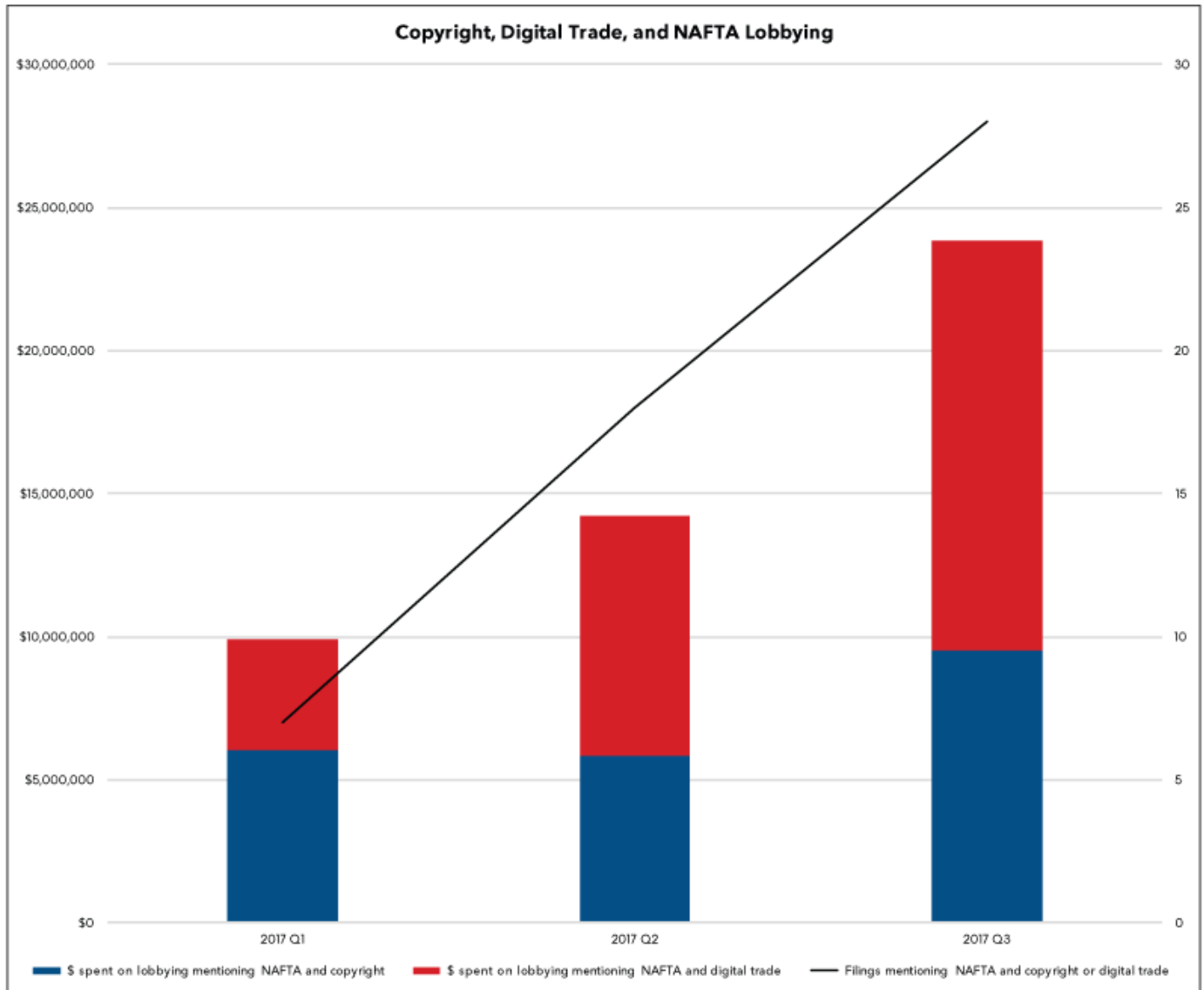
By Llewellyn Hinkes-Jones

Copyright and digital trade issues have increasingly become a topic of discussion related to lobbying during the ongoing North American Free Trade Agreement (NAFTA) talks.

Lobbying filings that mentioned NAFTA and either copyright or digital trade have steadily increased throughout the year, but copyright in particular became a topic of contention as recording artists' organizations, publishers, and technology groups battle over expanding U.S.-style safe harbor provisions for copyrighted material to Canada and Mexico.

Currently, Canada has a different system for dealing with copyrighted material online that focuses on the individuals who upload copyrighted material, and Mexico has no system in place outside of the judiciary.

Tech groups wrote to U.S. Trade Representative (USTR) Robert Lighthizer in August, asking to add the safe harbor provisions from the Digital Millennium Copyright Act (DMCA) into NAFTA.



Source: Senate Lobbying Filings

Bloomberg BNA

Recording artists' groups, including the Recording Industry Association of America (RIAA) and Recording Academy, then wrote to Lighthizer in September, asking him not to include safe harbor or other large loopholes in copyright law.

Under safe harbor provisions in the U.S., service providers are exempt from monetary damages for copyright infringement as long as they comply with "notice and takedown" procedures that allow copyright holders the ability to remove copyrighted material.

Safe Harbor

Safe harbor provisions have been an ongoing dispute for the recording industry, which complained to Congress in 2014 about the rampant copyright infringement online and arduous process to remove copyrighted material.

Google also testified in support of the safe harbors to enable the free expression of the modern internet and social media.

Cara Duckworth, vice president of communications with the RIAA, told Bloomberg BNA that the group isn't against safe harbors in general but believes that they should be applied as originally intended: to passive neutral intermediaries, like internet service providers, and not for more active publishers who might be promoting copyrighted material.

Jeremy Malcolm, senior global policy analyst with the pro-tech and free expression Electronic Frontier Foundation (EFF), told Bloomberg BNA that European law differentiates between passive and active intermediaries, but that difference isn't likely to pass in NAFTA since it would mean large changes to U.S. law.

A statement in October on NAFTA from the Computer & Communications Industry Association (CCIA), which represents major tech companies including Google, Amazon, and Facebook, advocated for maintaining balanced copyright protections for online intermediaries and mentioned concerns about filtering and blocking technology as well as legal liability for third-party online intermediaries.

Canada's 'Notice and Notice' System

Rather than safe harbor, Canada uses a "Notice and Notice Regime," which requires that content providers pass along infringement notices to the originating internet users, who are responsible for content removal.

In an opening statement to the NAFTA talks, the Canadian telecom Bell Canada focused on expanding enforcement of commercial-scale piracy, including government regulated site blacklists, but didn't mention including U.S.-style safe harbors.

EFF's Malcolm told Bloomberg BNA that Canada wants to preserve the Notice and Notice system, but the USTR was opposed to its preservation when the topic was discussed during TPP negotiations.

RIAA's Duckworth criticized the Notice and Notice system as "notice and nothing" as it has no consequences and simply leads to Google being bombarded with takedown notices to little effect.

Brian Pomper, executive director with Action for Trade—an advocacy group that supports intellectual property rights for creators—told Bloomberg Law that while the notice and takedown system in the U.S. has its problems—describing it as a game of "Whack-a-Mole"—the Canadian regime is less effective.

But according to Pomper, neither is ideal. "There are approaches in other countries that the U.S. and Canada should look at, including blocking," for sites that don't respond to takedown notices.

In a post on their site, EFF's Malcolm described the potential black lists recommended by Bell as "harsh" and the likelihood for overblocking and misuse as "obvious."

No Regime in Mexico

Lucas S. Michels, an intellectual property and business law attorney with the Ironmark Law Group PLLC, said Mexico doesn't "appear to provide any legal incentives or procedures for ISPs to remove hosted infringing content upon notification from rights holders."

Michels told Bloomberg BNA that the lack of a system cuts both ways: for copyright owners and for those hosting content.

Copyright owners have no extra-judicial way of getting material removed without incurring attorney's fees, and large platforms are at risk when attorneys are eventually brought in.

Libraries may be the prime example of that risk. According to Jonathan Band, counsel for the Library Copyright Alliance (LCA), without safe harbor, Mexico's libraries risk lawsuits by hosting copyrighted material online.

That risk then extends to non-Mexican libraries and researchers who might interact with Mexican libraries and their hosted content.

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