Before the
Office of the United States Trade Representative
Washington, D.C.

In re	
Request for Comments on Negotiating Objectives Regarding Modernization of the North American Free Trade Agreement With Canada and Mexico	Docket No. 2017-0006

COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Pursuant to the request for comments issued by the Office of the United States Trade Representative (USTR) and published in the Federal Register at 82 Fed. Reg. 23,699 (May 23, 2017), the Computer & Communications Industry Association (CCIA) submits the following comments on matters relevant to the modernization of NAFTA in order to inform development of U.S. negotiating positions. CCIA's comments focus on digital trade and services issues. Concurrently with this submission, CCIA is requesting to testify at the hearing.

I. Introduction

CCIA represents technology products and services providers of all sizes, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. CCIA members employ more than 750,000 workers and generate annual revenues in excess of $540 billion.[1]

The economy has changed substantially since NAFTA was enacted more than twenty years ago, and the Internet has become a central component of cross-border trade in both goods and services. Given U.S. leadership in high-tech innovation and Internet technology, re-examining NAFTA with an eye toward promoting the export of Internet-enabled products and services promises huge economic gains. As the U.S. International Trade Commission (ITC) noted in a 2013 report, "[s]tudies that have quantified the economic contributions of the Internet

[1] A list of CCIA members is available at https://www.ccianet.org/members.

have generally found that it has made significant contributions to U.S. output, employment, consumer welfare, trade, innovation, productivity, and corporate financial performance."[2]

The U.S. approach to NAFTA should reflect the increasing importance of Internet-enabled trade to the U.S. economy. While trade policy has dramatically reduced barriers to trade in goods, the United States is increasingly becoming a services economy, with service industries employing a large majority of U.S. private-sector workers.[3] Meanwhile, the United States is the largest global exporter of services, exporting $690 billion in 2015 (a growth of 3 percent over the previous year).[4] The Internet has been the single biggest component of the cross-border trade in services, with many of those services facilitating the international goods trade as well.

Given these developments, priorities for reopening NAFTA should reflect the dramatic transformation in the U.S. economy, as well as the growing importance of digital trade. To that end, CCIA's comments focus on digital trade and services issues, including preventing restrictions on competition, ensuring the free flow of data, and promoting clear online liability and intellectual property rules.

II. Barriers to Trade in Services

A. Promoting Advanced Telecommunications

Access to telecommunications networks is crucial to the U.S. economy, and NAFTA should contain provisions that both facilitate access as well as promote the deployment of advanced telecommunications facilities. NAFTA signatories should commit to ensuring interconnection, access to leased circuits, collocation, and timely access to poles, conduits, rights-of-way, and other facilities under reasonable terms and conditions. In particular, NAFTA signatories should ensure that, in their respective territories, a major supplier provides to another signatory's providers leased public telecommunications services in a reasonable period of time at reasonable and non-discriminatory terms, conditions, and capacity based and cost-oriented rates that are on a generally available offer. NAFTA should also encourage each party's telecommunications regulatory agency to provide appropriate forbearance, based on a fact-based

[2] United States International Trade Commission, *Digital Trade in the U.S. and Global Economies, Part 1* (July 2013), http://www.usitc.gov/publications/332/pub4415.pdf.

[3] Bureau of Labor Statistics, *Current Employment Statistics, Employees on nonfarm payrolls by industry sector and selected industry detail seasonally adjusted*, http://www.bls.gov/web/empsit/ceseeb1a.htm (last modified Feb. 5, 2016).

[4] World Trade Organization, *International Trade Statistics 2016* (2016), at 48, https://www.wto.org/english/res_e/statis_e/wts2016_e/wts2016_e.pdf.

assessment of market conditions that considers suppliers' comments, provided that the forbearance promotes competition and is in the public interest. NAFTA should require that regulators conduct regular market reviews that incorporate regularly reported accounts from providers. It should further ensure that major suppliers offer access to unbundled network elements and services for legacy and advanced telecommunications on reasonable and non-discriminatory terms and conditions to competing telecommunications providers and information service providers that need access to the underlying network. Similarly, it should encourage the ability to prevent anti-competitive behavior by a major supplier in their territory.

Furthermore, regarding the cross-border supply of telecommunications services, NAFTA would be improved by including provisions that would limit the ability of a NAFTA party's major suppliers from abusing their market position. Each party's telecommunications regulatory agency should have adequate remedial requirements. For example, NAFTA should directly incorporate and codify the findings of the WTO panel from the *Mexico – Telecoms*[5] case, which appropriately interpreted GATS telecoms provisions (especially those findings related to the definition of "reasonable" and "cost-oriented rates") and prompted reforms of Mexico's telecommunications regulations.

B. Preventing Restrictions on the Growth of Over-the-Top (OTT) Services

NAFTA should encourage greater growth and competition in OTT services. Online services help drive growth in some of the most profitable services offered by telecommunications providers.[6] Indeed, a recent study found that rich interaction applications (RIAs) that enable immersive interaction and communication, such as photo/video sharing, payment, and chat between individuals, groups, and enterprises contributed close to $6 trillion across 64 countries over a 16-year period.[7] Furthermore, online services also present cost-saving and product-enhancement opportunities for telecom providers, such as the opportunity to

[5] *See* Panel Report, *Mexico - Measures Affecting Telecommunications Services,* WTO Doc. WT/DS204/R (adopted Apr. 2, 2004) (finding that Mexico breached its commitment to ensuring cost-based rates for connecting international calls to Mexico by granting its dominant carrier exclusive authority to set artificially high interconnection charges that resulted in excess payments of over $1 billion by U.S. companies and consumers).

[6] *See* OECD, The Development of Fixed Broadband Networks (Jan. 2015), https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP/CISP%282013%298/FINAL&docLanguage=En (noting that "pricing mechanisms that do not excessively depress demand have the advantage of stimulating adoption").

[7] WIK, *The Socioeconomic Value of Rich Interaction Applications (RIA)* (2017), http://www.wik.org/index.php?id=879&L=1.

substitute fully featured Voice over Internet Protocol (VoIP) for circuit-switched voice. NAFTA should promote a clear regulatory distinction between information services and telecommunications services, which has been critical to the development of Internet services and applications in the U.S. and elsewhere. NAFTA should prevent data localization requirements for RIAs, as discussed in further detail below.

III. Digital Trade Issues

A. Ensuring the Free Flow of Data

Cross-border data flows are the lifeblood of global digital trade and by extension the array of industries that increasingly rely on the Internet to compete in the global marketplace. In the U.S. the productivity gains and efficiencies enabled by data flows have boosted the economy by hundreds of billions of dollars.[8] Policies that restrict data flows, either directly through explicit data and infrastructure localization requirements, or indirectly for national security or other purposes, negate the productivity gains and efficiencies enabled by Internet platforms and cloud computing.

To ensure that the U.S. economy continues to reap the benefits of cross-border data flows, NAFTA should affirmatively protect them. First, NAFTA should prohibit governments from interfering with data flows or the exchange of information online. This includes prohibiting governments from imposing customs duties on data transmissions. Second, NAFTA should prohibit governments from imposing data localization or residency requirements on data controllers or processors, as well as linking market access and/or commercial benefits to investment in or use of local infrastructure. To the extent possible, these prohibitions should apply to both explicit and indirect measures to keep data in a particular country.

B. Promoting Secure Digital Technologies

Providers of digital devices and services have for many years sought to improve the security of their platforms through the deployment of technologies that safeguard the communications and commercial transactions that they enable. More recently, strong encryption has been increasingly enabled on now-ubiquitous smartphones and deployed end-to-end on consumer-grade communications services and browsers. Encrypted devices and connections

[8] James Manyika *et al*., *Digital globalization: The new era of global flows* (McKinsey Global Institute, 2016), http://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows.

protect users' sensitive personal and financial information from bad actors who might attempt exploit that information.[9]

Many countries, at the behest of their respective national security and law enforcement authorities, are considering or have implemented laws that mandate access to encrypted communications. Often the relevant provisions are not explicit, but mandate facilitated access, technical assistance, or compliance with otherwise infeasible judicial orders. Other versions require access to or transfer of source code as a condition of allowing technology imports.

Such exceptional access regimes run contrary to the consensus assessments of security technologists because they are technically and economically infeasible to develop and implement.[10] Companies already operating in countries that have or are considering anti-encryption or source code access laws will be required to alter global platforms or design region-specific devices, or face fines and shutdowns for noncompliance. Companies that might have otherwise expanded to these markets will likely find the anti-encryption or facilitated access requirements to be barriers to entry.

NAFTA should recognize and mitigate these concerns by preventing countries from compelling manufacturers or suppliers to use a particular cryptographic algorithm or to provide access to a technology, private key, algorithm specification, or other cryptographic design details. Similarly, NAFTA should prohibit governments from conditioning market access, with appropriate exceptions, on their ability to demand access to cryptographic keys or source code.

IV. Intermediary Liability Limitations (Section 230)

Unpredictable liability rules for online intermediaries represent a considerable barrier to international Internet commerce, and guaranteeing minimum standards for the protection of Internet services from liability for third party content is critical to promoting U.S. digital trade exports. A revised NAFTA should include liability protections for online intermediaries consistent with existing U.S. law. While it is widely understood that "[i]ntermediaries are increasingly important and empower end-users" in the global economy, and that "[l]imitations on their liability for the actions of users of their platforms have encouraged the growth of the

[9] Bijan Madhani, *Blast from the Past: Learning Lessons from Previous Panics Over Ubiquitous Strong Encryption*, Disruptive Competition Project, Sept. 10, 2015, http://www.project-disco.org/privacy/091015-blast-from-the-past-learning-lessons-from-previous-panics-over-ubiquitous-strong-encryption/.

[10] Harold Abelson, *et al*., *Keys Under Doormats: Mandating insecurity by requiring government access to all data and communications*, MIT Computer Science and Artificial Intelligence Laboratory Technical Report, July 6, 2015, http://dspace.mit.edu/bitstream/handle/1721.1/97690/MIT-CSAIL-TR-2015-026.pdf.

Internet,"[11] many countries have yet to adopt the liability limitations found in U.S. law (47 U.S.C. § 230), and Europe, among others. Congress recognized in 1996 that imposing liability upon Internet and e-commerce businesses for the misconduct of others would jeopardize the growth of this vital industry, and limited service providers' liability with Section 230, while recognizing certain exceptions.[12] NAFTA should encourage Canada and Mexico follow suit, and at a minimum commit to limiting online intermediaries' liability with regard to third party information, which intermediaries do not substantially modify, and where intermediaries do not select who receives the information at issue.

V. Balanced Intellectual Property Regimes

The U.S. economy benefits substantially from a balanced intellectual property regime. In addition to copyright protection, limitations and exceptions like the fair use doctrine have been critical to U.S. success, and contribute substantially to the U.S. economy and U.S. exports.[13] Intermediary liability protections for Internet service providers, such as the copyright safe harbors found in Section 512 of the Digital Millennium Copyright Act have also been critical to growing the U.S. digital economy by providing business certainty to U.S. investors and innovators.[14]

A. Promoting Balanced Copyright and Fair Use

Balanced copyright rules such as fair use and related limitations and exceptions have been critical to the growth of the U.S. technology and Internet economy. Within the last thirty years, balanced copyright law has enabled the development of innovative new products and services such as the VCR, DVR, iPod, cloud computing, search engines, social media services, and 3D printing. Users of copyrighted works—including consumers, libraries, museums, reporters, and creators—also depend upon concepts like fair use and other limitations and exceptions to engage in research, reporting, parody, and political discourse. Fair use, codified in 17 U.S.C. § 107, encourages significant economic growth and exports. As of 2014, value added

[11] OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives* (2011), at 15, http://dx.doi.org/10.1787/9789264115644-en.

[12] 47 U.S.C. § 230(c)(1), provides that "no provider or user of an interactive computer service shall be treated as the publisher of any information provided by another information content provider."

[13] Andrew Szamosszegi & Mary Ann McCleary, *Fair Use in the U.S. Economy* (Capital Trade, Inc. 2017), http://www.ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf.

[14] Matthew Le Merle *et al*., *The Impact of Internet Regulation on Early Stage Investment* (Fifth Era 2014), http://www.fifthera.com/s/Fifth-Era-report-lr.pdf.

by industries that rely on fair use was $2.8 trillion, approximately 16 percent of total U.S. current dollar GDP, and exports of goods and services related to fair use industries increased 21% in 2014, from $304 billion in 2010 to $368 billion in 2014.[15] As USTR indicated in its *Digital 2 Dozen* statement of priorities earlier this year, U.S. policy is to seek "the commitment of our free trade agreement partners to continuously seek to achieve an appropriate balance in their copyright systems, including through copyright exceptions and limitations."[16]

Within Canadian copyright law, the Commonwealth-descended principle of fair dealing[17] is in many ways similar to the U.S. fair use doctrine. Thus, U.S. providers of technology products and services can export into the Canadian market without the risk that new technological innovations, such as machine learning, will lead to unjustified copyright liability. In fact, more than 40 nations now have some form of statutory fair use or fair dealing provision in their domestic copyright law.[18] Mexican copyright limitations, however, lack a similar provision,[19] meaning that U.S. technology providers exporting into the Mexican market face potential legal liability for innovative products or services that are lawful in the United States and Canada, and many other jurisdictions worldwide. NAFTA should preserve and promote the balance in U.S. and Canadian copyright law, and also ensure that Mexican law is updated to meet international norms. To set a global example for modern copyright norms, NAFTA signatories should commit to establish and maintain a balanced copyright system through fair use/fair dealing limitations and exceptions, which will ensure adequate and effective protection of copyright while guaranteeing appropriate flexibility for new technology and innovation.

B. Promoting Business Certainty for Online Intermediaries

Foreign countries have frequently imposed substantial penalties on U.S. Internet companies for conduct of third parties—something that is not permitted under U.S. law and that impedes the ability of U.S. online services to be a platform for trade.[20] These penalties impede U.S. Internet companies from expanding services abroad. This hurts not only Internet

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[15] Andrew Szamosszegi & Mary Ann McCleary, *Fair Use in the U.S. Economy*, *supra* note 13.

[16] USTR, *The Digital 2 Dozen*,(Jan. 2017), https://ustr.gov/sites/default/files/Digital-2-Dozen-Updated.pdf.

[17] Copyright Act of Canada, §§ 29 *et seq.* (as amended June 22, 2016).

[18] Jonathan Band, *The Fair Use/Fair Dealing Handbook* (as updated Mar. 10, 2015), http://infojustice.org/archives/29136.

[19] *See* Ley Federal Del Derecho de Autor, §§ 147-150 (as amended Jan. 14, 2016).

[20] *See generally* Ali Sternburg & Matt Schruers, CCIA, *Modernizing Liability Rules to Promote Internet Trade* (2013), http://cdn.ccianet.org/wp-content/uploads/2013/09/CCIA-Liability-Rules-Paper.pdf.

companies, but also denies local small and medium-sized enterprises Internet-enabled access to the global marketplace, similarly discouraging investment in and growth of domestic startups.[21] While U.S. Internet businesses have thrived domestically under carefully crafted legal frameworks, international asymmetries in liability rules frequently favor domestic plaintiffs.[22]

Due to the importance of online intermediaries in the U.S. economy, limiting liability for online service providers has been a consistent element of U.S. international policy for over a decade. As a result, at the start of the millennium the United States entered into numerous trade agreements with roughly a dozen nations that compel contracting parties to provide copyright liability limitations similar to that which is found in 17 U.S.C. § 512.[23] USTR should continue this policy, and include these safe harbor provisions in NAFTA. USTR also identified this in its *Digital 2 Dozen* document this year, stating that the U.S. "seeks copyright safe harbors for legitimate Internet Service Providers (ISPs) comparable to those in U.S. law."[24]

VI. Party-Specific Trade Policy Considerations

A. Canada

The Canadian federal government has endeavored to consolidate information and communication technology services across dozens of Canadian federal entities into a single central agency, Shared Services Canada. For reasons of privacy and national security, U.S. and

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[21] Matthew Le Merle *et al*., *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study*, Booz & Co. (2011), http://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/54877560e4b0716e0e088c54/1418163552585/Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf.

[22] For a general overview of these issues, *see* Ignacio Garrote Fernández-Díez, *Comparative Analysis on National Approaches to the Liability of Internet Intermediaries for Infringement of Copyright and Related Rights*, http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries_garrote.pdf (comparative analysis on national approaches to the liability of Internet intermediaries for infringement of copyright and related rights).

[23] *See, e.g.*, United States-Chile Free Trade Agreement, art. 17.11(23), June 6, 2003, 42 I.L.M. 1026; United States-Dominican Republic-Central America Free Trade Agreement, art. 15.11(27), May 28, 2004, 43 I.L.M. 514; United States-Australia Free Trade Agreement, art. 17.11(29), May 18, 2004, 43 I.L.M. 1248; United States-Morocco Free Trade Agreement, art. 15.11(28), June 15, 2004, 44 I.L.M. 544; United States-Bahrain Free Trade Agreement, art. 14.10(29), Sept. 14, 2004, 44 I.L.M. 544; United States-Peru Trade Promotion Agreement, art. 16.11(29), Apr. 12, 2006, http://www.ustr.gov/trade-agreements/freetradeagreements/peru-tpa/final-text; United States-Colombia Trade Promotion Agreement, art. 16.11(29), Nov. 22, 2006, http://www.ustr.gov/tradeagreements/free-trade-agreements/colombia-fta/finaltext; United States-Singapore Free Trade Agreement, art. 16.9(22), May 6, 2003, 42 I.L.M. 1026; United States-Panama Trade Promotion Agreement, art. 15.11(27), June 28, 2007, http://www.ustr.gov/trade-agreements/free-tradeagreements/panama-tpa/finaltext; United States-Korea Free Trade Agreement, art. 18.10(30), June 30, 2007, 46 I.L.M. 642; United States-Oman Free Trade Agreement, art. 15.10(29), Jan. 1, 2009, http://www.ustr.gov/tradeagreements/free-trade-agreements/oman-fta/finaltext.

[24] USTR, *The Digital 2 Dozen*, *supra* note 16.

foreign cloud computing suppliers are precluded from participating in government procurement processes for systems containing personal or sensitive information, unless the data will be stored on servers physically located in Canada. The public sector represents approximately one third of the Canadian economy and is a major consumer of U.S. services, particularly in the information and communication technology sector.

Canada also has one of the world's lowest de minimis thresholds for goods coming across the border at $20 CAD — a threshold that has not been adjusted since the 1980s.[25] This low, de minimis level includes shipped goods, which has a significant effect on digital trade. Recent studies have shown that the small gains realized by collecting duties on these shipped goods is heavily outweighed by the costs of processing the large amount of shipments that fall below the de minimis level.[26] Encouraging Canada to raise the de minimis level on shipped goods and imports in NAFTA would result in a substantial economic gain for both the U.S. and Canada by ensuring fairness for Canadian consumers, improving economic and government efficiency, and reducing the amount of regulatory burdens for small businesses operating internationally.

B. Mexico

Mexico's Customs Agency seeks to drastically modify its simplified imports model by increasing the Value Added Tax and the duty for express shipments, transforming their simplified model into one more in line with the definite imports model.[27] The proposed changes would force higher prices, extended product shipment wait times, and decreased product selection on customers. Rejecting these proposed changes and maintaining a simplified imports model will help fuel the growth of the tech industry in Mexico, and will give consumers a wider selection of tech products at competitive prices. USTR should encourage the Mexican

[25] Andy Blatchford, *Feds Urged to Bump Up Duty-Free Limit For Canadian Shoppers*, The Huffington Post, Mar. 16, 2016, http://www.huffingtonpost.ca/2016/03/16/ottawa-faces-renewed-calls-to-let-canadians-spend-more-without-paying-duty_n_9481262.html.

[26] *See generally* Christine McDaniel, Simon Schropp, & Omin Latipov, *Rights of Passage: The Economic Effects of Raising the de minimis Threshold in Canada*, C.D. Howe Institute, June 23, 2016, https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/E-brief_Rights%20of%20Passage_June16.pdf (stating "we find that lifting the threshold would have a net economic benefit of up to C$648 million.").

[27] On June 22, 2016, Mexico's Tax Administration Service issued a ruling announcing amendments to the current Foreign Trade Rule 3.7.3 and proposed new rule 3.7.35; *see (Mexico) SAT publishes new amendments to general foreign trade rules*, edicom, July 19, 2016, http://www.edicomgroup.com/en_US/news/8488-mexico-sat-publishes-new-amendments-to-general-foreign-trade-rules.

government to ensure compliance with its existing international trade commitments, and promote similar ones in NAFTA, as well as evaluate the alternative rule proposed by courier companies.

In addition to maintaining a more simplified imports model, digital trade would flourish if the large number of Mexican agencies that issue official regulations coordinated more to work within the NOMS requirements. Mexico should also resolve ambiguities surrounding the types of data that can be stored in the cloud by reviewing upcoming cloud computing legislation. More transparency and accountability on both of these fronts would lead to increased growth of e-commerce in Mexico.

Respectfully submitted,

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