

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

In re

Request for Comments and Notice of a Public
Hearing on Negotiating Objectives for a U.S.-
Japan Trade Agreement

Docket No. USTR-2018-23569

**COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

Pursuant to the request for comments published by the Office of the United States Trade Representative (USTR) in the Federal Register at 83 Fed. Reg. 54,164 (Oct. 26, 2018), the Computer & Communications Industry Association (CCIA) submits the following comments on negotiating objectives for a U.S.-Japan free trade agreement. CCIA represents technology products and service 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

I. Introduction

CCIA supports USTR's pursuit of a full-fledged trade agreement with Japan, and welcomes the opportunity to provide comments on negotiating objectives for a potential agreement. USTR is strongly encouraged to make digital trade a priority in these negotiations with Japan.² Failure to do so would be a significant missed opportunity, especially considering the contribution of Internet and technology firms to the domestic economies of both the United States and Japan.

In setting its negotiating objectives, USTR should build off positive achievements in the recent U.S-Mexico-Canada Agreement (USMCA). The USMCA text should serve as the basis for negotiating priorities for the digital trade and intellectual property chapters, improving on

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

² In November 2018, CCIA joined a broad coalition of other industry groups encouraging USTR to include strong digital trade commitments in its plans to enter into trade negotiations with Japan, the United Kingdom, and the European Union. The letter notes that the Administration would miss an opportunity with three of our most important trading partners if it omitted digital trade from the negotiations. *See* Industry Letter to U.S. Representative Lighthizer on Digital Trade (Nov. 6, 2018), *available at* <http://www.ccianet.org/wp-content/uploads/2018/11/Multi-Assoc-Letter-to-USTR-on-Digital-Trade-in-Japan-EU-UK-FTAs.pdf>.

areas where more can be done to further digital exports.³ As explained in comments below and in CCIA’s comments in other proceedings,⁴ improvements can be made with respect to ensuring protections for copyright limitations and exceptions and removing inequities in *de minimis* levels with trading partners to facilitate e-commerce.⁵

The U.S. approach to U.S.-Japan trade should reflect the strong digital economies of both countries, and the increasing importance of Internet-enabled trade to the global market. CCIA’s recommendations for U.S. trade priorities with Japan focus on digital trade and services issues including: copyright limitations and exceptions critical for development of next-generation technologies; the inclusion of intermediary protections relied on by U.S. services exporters; and commitments to facilitate cross-border data flows and remove localization mandates.

II. Strength of U.S.-Japan Digital Trade Relationship

The United States and Japan are strong trading partners — Japan is the United States’ fourth largest trading partner and was the second-largest contributor to U.S. foreign direct investment in 2017.⁶ Both countries’ commitments to technological innovation and investment should be reflected in any free trade agreement between the two countries.⁷

An increasing number of countries are adopting discriminatory practices against U.S. technology and Internet firms and pursuing local policies and regulations that close off their

³ Office of the U.S. Trade Rep., United States-Mexico-Canada Agreement Text (2018), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-statesmexico> [hereinafter “USMCA”]. See also U.S. Trade Representative, Summary of Objectives for NAFTA Renegotiation (Nov. 2017), <https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf>.

⁴ Pre-Hearing Submission of CCIA, In re Investigation No. TPA-105-003, U.S. International Trade Commission, filed Oct. 29, 2018, available at <http://www.ccianet.org/wp-content/uploads/2018/10/CCIA-Pre-hearing-Brief-USMCA-Inv-No.-TPA-105-003.pdf>.

⁵ The current *de minimis* level for low-value shipments into Japan is 10,000 JPY (\$90 USD). By comparison, shipments to the United States that are less than \$800 do not have to pay customs duties. This inequity disadvantages U.S. small business and online retailers. Global Express Association, Overview of De Minimis Value Regimes Open to Express Shipments World Wide (Mar. 9, 2018), https://global-express.org/assets/files/Customs%20Committee/de-minimis/GEA%20overview%20on%20de%20minimis_9%20March%202018.pdf; U.S. Customs and Border Control, De Minimis Value Increases to \$800 (Mar. 11, 2016), <https://www.cbp.gov/newsroom/national-media-release/de-minimis-value-increases-800>.

⁶ Japan accounts for the second most foreign direct investment in the United States, behind the UK, with \$469.0 billion. U.S. Dept. of State, Investment Climate Statements for 2018, Japan (2018), <https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2018&dclid=281502#wrapper> [hereinafter “2018 Japan Investment Climate”].

⁷ See, e.g., U.S. Dept. of State, *Joint Statement on the 9th U.S.-Japan Policy Cooperative Dialogue on the Internet Economy* (July 27, 2018), <https://www.state.gov/r/pa/prs/ps/2018/07/284592.htm> (both countries announcing their continued commitment to enhance the global digital economy policy environment and enabling digital trade) [hereinafter “2018 Joint Statement on Policy Cooperative Dialogue on the Internet Economy”].

markets to U.S. digital exporters.⁸ This is especially true in the Asia-Pacific Region.⁹ However, Japan stands apart as a key source of U.S. foreign investment.¹⁰ A U.S.-Japan free trade agreement that builds on these strengths will open up the market for Internet technologies and encourage reciprocal foreign investment.

Japan has prioritized innovation in emerging technologies, including the Internet of Things, robotics, and artificial intelligence, and their integration as a central role in society as evidenced by the launch of “Society 5.0.”¹¹ As a partner in growing the digital economy, maintaining and further developing close trade ties with Japan is critical. This is also important due to the nature of many U.S. firms’ supply-chains, some of which are intertwined with Japanese companies, and rely on their market to manufacture and deliver goods and services.

A strong U.S.-Japan free trade agreement is also timely due to the announcement in early 2018 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The United States is at a significant disadvantage due to its absence from the eleven-country agreement that will advance trade in the Asia-Pacific Region — a continuous source of growth and investment.¹² The United States is excluded from trade promotion enabled by the agreement, which will limit the strength of U.S. economic influence in the Asia-Pacific Region, at a time when regional partners are key to countering China’s discriminatory practices.¹³ Active engagement with our trading partners in the region will offset this imbalance, and a trade agreement with Japan would be a positive step forward.

⁸ Comments of CCIA, In re Request for Public Comments to Compile the National Trade Estimate Report on Foreign Trade Barriers, Dkt. No. 2018-0029, filed Oct. 30, 2018, *available at* <http://www.ccianet.org/wp-content/uploads/2018/10/CCIA-Comments-to-USTR-for-2019-NTE.pdf> [hereinafter “*CCIA Comments for 2019 NTE*”].

⁹ *Id.* at 61, 64, 72, 77.

¹⁰ *2018 Japan Investment Climate*, *supra* note 6.

¹¹ See Government of Japan, Society 5.0 Presentation, *available at* https://www.japan.go.jp/abonomics/_userdata/abonomics/pdf/society_5.0.pdf (“We aim at creating a society where we can resolve various social challenges by incorporating the innovations of the fourth industrial revolution (e.g. IoT, big data, artificial intelligence (AI), robot, and the sharing economy) into every industry and social life. By doing so the society of the future will be one in which new values and services are created continuously, making people’s lives more conformable [sic] and sustainable.”).

¹² U.S. direct investment in the Asia-Pacific Region grew from \$881.1 billion in 2016 to \$941.2 billion in 2017. Foreign direct investment in the U.S. grew from \$627.9 billion to \$684.6 billion during that span. Bureau of Economic Analysis, Direct Investment by Country and Industry, 2017 (last updated July 30, 2018), <https://www.bea.gov/news/2018/direct-investment-country-and-industry-2017>.

¹³ See generally *CCIA Comments for 2019 NTE*, *supra* note 8 (listing digital trade barriers presented by China’s discriminatory practices against U.S. Internet services).

III. Balanced Intellectual Property Regime

The U.S. and Japanese Internet economies benefit 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.¹⁴ They are also critical to the development of emerging technologies such as AI and machine learning.¹⁵ 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.¹⁶ USTR noted in 2017 that the United States “seeks . . . 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.”¹⁷ The U.S. should commit to upholding these commitments in the intellectual property chapters of its FTAs, continuing with any trade agreement with Japan.

A. Exceptions Needed for Emerging Tech

A flexible copyright regime is necessary for the continued growth of the digital economy. Principles such as fair use have been a cornerstone of U.S. copyright law from the beginning, and industries that rely on this right are a significant contributor to the U.S. economy and exports.¹⁸ CCIA released a report last year on the economic contribution of fair use industries which found that these industries account for 16 percent of the U.S. economy and generate \$5.6 trillion in annual revenue.¹⁹ Fair use is also critical to activities central to new areas of innovation and cutting edge technology such as artificial intelligence and text and data mining.

A balanced regime with appropriate limitations and exceptions is also what Congress intended when it granted Trade Promotion Authority (TPA) in 2015. TPA provides that the principal negotiating objectives of the United States should include promoting intellectual

¹⁴ 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>.

¹⁵ European Alliance for Research Excellence, *The Global AI Race* (June 2018), <http://eare.eu/assets/uploads/2018/06/Global-AI-Race.pdf>.

¹⁶ 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>.

¹⁷ Office of the U.S. Trade Rep., *The Digital 2 Dozen* (2017), <https://ustr.gov/sites/default/files/Digital-2-Dozen-Updated.pdf>.

¹⁸ See CCIA, *Fair Use in the U.S. Economy* (2017), <http://www.ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>.

¹⁹ *Id.*

property in a way that facilitates legitimate digital trade.²⁰ Committee reports from both chambers of Congress contained identical language elaborating on this mandate, specifically recognizing that trade agreements should “foster an appropriate balance in copyright systems, inter alia by means of limitations and exceptions consistent with the internationally recognized 3-step test.”²¹

A U.S.-Japan free trade agreement should reflect the two trading partners’ commitments to preserving limitations and exceptions in copyright law needed to further innovation. Japan has structured its copyright laws to facilitate innovation in emerging technologies, allowing copyright exceptions for text and data mining first in 2009 and expanding the exception with its 2018 amendments.²² U.S. leadership in this area is due in part to the decision to codify fair use in 1976, at 17 U.S.C. § 107. The intellectual property chapter in a trade agreement between the two countries should reflect this shared commitment.

Mandated technological protection measures (TPMs) are a frequent inclusion in U.S. trade agreements. However, corresponding statutory exceptions to these anti-circumvention measures are not always reflected. As included in the USMCA, there should be exceptions to anti-circumvention that are consistent with 17 U.S.C. § 1201, including § 1201(f) on reverse engineering and interoperability, in providing limitations and exceptions to TPMs.²³

B. Intermediary Framework That Will Provide Certainty for U.S. Service Exporters

U.S. trade policy has long reflected domestic copyright principles by including necessary intermediary protections for online services in trade agreements dating back to 2003.²⁴ Ensuring

²⁰ Section 102(b)(5)(A)(ii) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015.

²¹ S. REP. NO. 114-42, at 17 (2015), *available at* <https://www.congress.gov/114/crpt/srpt42/CRPT-114srpt42.pdf>; H. REP. NO. 114-100, at 45 (2015), *available at* <https://www.congress.gov/114/crpt/hrpt100/CRPT-114hrpt100-pt1.pdf>.

²² The Copyright Act 2018 Amendments introduced three important provisions: (1) Article 30-4 allows users to analyze copyrighted works for machine learning including the use of raw data to carry out deep learning activities; (2) Article 47-4 permits electronic incidental copies of works; and (3) Article 47-5 allows the use of copyrighted works for data verification when conducting research by enabling searchable databases, which are necessary to carry out data verification of the results and insights obtained through text and data mining. European Alliance for Research Excellence, *Japan Amends Its Copyright Legislation to Meet Future Demands in AI and Big Data* (2018), <http://eare.eu/japan-amends-tdm-exception-copyright> (summarizing and explaining Copyright Act 2018); text of legislation is available at http://www.mext.go.jp/b_menu/houan/kakutei/detail/1405213.htm.

²³ *USMCA*, *supra* note 3, at art. 20.H.11.

²⁴ *See* U.S.-Austl. Free Trade Agreement, May 18, 2004, 43 I.L.M. 1248, art. 17.11, para. 29; U.S.-Bahr. Free Trade Agreement, Dec. 7, 2005, 44 I.L.M. 544, art. 14.10, para. 29; U.S.-Chile Free Trade Agreement, June 6, 2003, 42 I.L.M. 1026, art. 17.11, para. 23; U.S.-Colom. Free Trade Agreement, Nov. 22, 2006, art. 16.11, para. 29; U.S.-S. Kor. Free Trade Agreement, June. 30, 2007, art. 18.10, para. 30; U.S.-Morocco Free Trade Agreement, June 15, 2004, art. 15.11, para. 28; U.S.-Oman Free Trade Agreement, Jan. 19, 2006, art. 15.10, para. 29; U.S.-Pan. Trade

these protections are included in trade agreements is also consistent with Congressional intent under TPA.²⁵ USMCA continues this tradition, drawing directly upon Title 17 of the U.S. Code.²⁶ The negotiating objectives with Japan should do the same.

IV. Digital Trade

A. Cross-Border Data Flows and Removing Localization Barriers

Cross-border data flows are critical to digital trade and forced data localization mandates make it difficult for U.S. exporters to expand into new markets. A 2014 report found that “for many countries that are considering or have considered forced data localization laws, local companies would be required to pay 30-60% more for their computing needs than if they could go outside the country’s borders.”²⁷ Another study found that the impact of recently proposed or enacted data localization legislation on GDP is “substantial” in seven countries.²⁸

Japan is a close ally of the United States in global efforts to enable cross-border data flows.²⁹ Japan participates in the Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules (CBPR) system along with the United States. Japan recognizes the threat that

Promotion Agreement, June 28, 2007, art. 15.11, para. 27; U.S.-Sing. Free Trade Agreement, May 6, 2003, 42 I.L.M. 1026, art. 16.9, para. 22.

²⁵ H. REP. NO. 114-100, *supra* note 21, at 46 (“Strong intellectual property rights protection should be accompanied by provisions on liability that are consistent with U.S. law, including the Digital Millennium Copyright Act, and that provide limitations on the scope of remedies available against service providers for copyright infringements they do not control, initiate, or direct, and that take place through systems or networks, controlled or operated by them or on their behalf. Such limitations also must create legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage, and transmission of copyrighted materials.”).

²⁶ USMCA, *supra* note 3, at art. 20.J.10-11.

²⁷ Leviathan Security Group, *Quantifying the Cost of Forced Localization* (2014), available at <https://static1.squarespace.com/static/556340ece4b0869396f21099/t/559dad76e4b0899d97726a8b/1436396918881/Quantifying+the+Cost+of+Forced+Localization.pdf>.

²⁸ Mathias Bauer, *The Costs of Data Localization*, ECIPE, available at http://www.ecipe.org/app/uploads/2014/12/OCC32014__1.pdf (finding that the GDP was reduced in the following countries with data localization policies: Brazil (-0.2%), China (-1.1%), EU (-0.4%), India (-0.1%), Indonesia (-0.5%), Korea (-0.4%), and Vietnam (-1.7%)).

²⁹ 2018 Joint Statement on Policy Cooperative Dialogue on the Internet Economy, *supra* note 7 (“Both countries reaffirmed their commitment to promote cross border data flows and effective information privacy protection, and to work closely together to expand participation in the Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules (CBPR) system. In addition, they discussed the need for the CBPR system to serve as a foundation for a globally interoperable data protection framework and committed to work cooperatively in support of interoperable privacy frameworks in international fora, and on a bilateral basis. Both countries reaffirmed the importance of working closely together to promote a free and fair digital trade environment. They emphasized the importance of challenging third-country restrictions on digital trade, including data localization measures; restrictions on the free flow of information; and requirements to transfer source code or other technology as a condition of market access.”).

increased localization barriers present to the growth of electronic commerce.³⁰ An FTA with Japan presents an opportunity to set the global norms on opening cross-border data flows in trade agreements. These negotiations present an opportunity to further enable digital trade and the U.S. should be ambitious in its negotiating objectives with respect to data flows and localization barriers to set the global standard.

B. Protections for ‘Interactive Computer Services’ for Third-Party Content

In addition to the USMCA’s protections for U.S. online intermediaries in the copyright context, it also wisely provides certain safeguards from liability for third-party content not concerning copyright. An agreement with Japan should build upon this success. Unpredictable liability rules for online intermediaries represent a considerable barrier to international Internet commerce. Guaranteeing minimum standards for the protection of Internet services from liability for third-party content is critical to promoting U.S. digital trade exports.³¹ The USMCA should serve as the basis for future U.S. digital trade chapters in FTAs and an agreement with Japan should retain the section on intermediary protections.³² These protections are fully consistent with U.S. law under § 230 of the Communications Decency Act and will ensure that companies can continue to take steps to proactively remove objectionable content.³³

The U.S. and Japan should commit to upholding civil protections for online intermediaries to provide regulatory certainty to foreign exporters and further enable the digital economy.

V. Conclusion

A U.S.-Japan free trade agreement should reflect the two countries’ strong commitments to furthering global digital trade, and USTR should include the recommended priorities in its negotiating objectives.

³⁰ Ministry of Economy, Trade, and Industry (METI), *White Paper on International Economy and Trade 2018* (July 10, 2018), available at http://www.meti.go.jp/english/press/2018/pdf/0710_001b.pdf, at 4 (“The promotion of the free flow of information is developing a favorable cycle that is creating new technical innovations and business models and is improving the quality of people’s lives. On the other hand, digital protectionist moves are also emerging, including imposing restrictions on the free flow of cross-border data and the installation locations of servers.”).

³¹ See CCIA, *Modernizing Liability Rules for Digital Trade* (2018), available at <http://www.ccianet.org/wp-content/uploads/2018/07/Modernizing-Liability-Rules-2018.pdf>.

³² *USMCA*, *supra* note 3, at art. 19.17.

³³ USMCA recognizes recent changes to § 230 of the Communications Decency Act and is consistent with current U.S. law. The Annex (19-A) makes explicit reference to the recently-enacted FOSTA as a recognized example of an exception to these requirements under Article 32.1 (exceptions for measures to protect public morals).

Respectfully submitted,

Rachael Stelly
Policy Counsel
Computer & Communications Industry Association
655 Fifteenth Street NW, Suite 410
Washington, DC 20005
(202) 783-0070 x130
rstelly@ccianet.org

November 21, 2018