

Before the
United States International Trade Commission
Washington, D.C.

In re

United States-Mexico-Canada Agreement:
Likely Impact on the U.S. Economy and on
Specific Industry Sectors; Institution of
Investigation and Scheduling of Hearing

Investigation No. TPA-105-003

**PRE-HEARING BRIEF OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

Pursuant to the notice issued by the U.S. International Trade Commission (ITC) and published in the Federal Register at 83 Fed. Reg. 52,232 (Oct. 16, 2018), the Computer & Communications Industry Association (CCIA) submits the following pre-hearing brief in relation to the ITC Investigation on the United States-Mexico-Canada Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors.

I. Introduction

The renegotiation of the North American Free Trade Agreement (NAFTA) presented a key opportunity to set the rules for a modern 21st century trade agreement with two of the strongest trading partners of the United States. While NAFTA has been a net economic success for the United States,¹ a modern overhaul is much needed for the 24-year-old agreement to factor in the growth of the digital economy and the strong digital trade relationship the U.S. enjoys with Mexico and Canada.² The Bureau of Economic Analysis (BEA) at the U.S. Department of

¹ U.S. CHAMBER OF COMMERCE, *NAFTA Works for America*, <https://www.uschamber.com/nafta-works> (last visited Oct. 30, 2018) (noting that trade with Canada and Mexico supports 14 million American jobs and nearly 4 million of those jobs are supported by the increase in trade generated by NAFTA); Amanda Waldron, *NAFTA Renegotiation: Separating Fact From Fiction*, BROOKINGS (Aug. 17, 2017) (“NAFTA has allowed U.S. companies to access new markets for their exports, reduce their costs of production, and create even more jobs.”).

² The BEA’s report estimates the value of this industry by examining the international trade of information and communications technology (ICT) services and “potentially” ICT-enabled (PICTE) services — “services that can be traded remotely using the internet or some other digital network.” U.S. PICTE service exports in total was \$403.5 billion in exports and \$244.0 billion in imports. U.S. PICTE service exports to Canada totaled \$27.8 billion, accounting for 52 percent of all U.S. service exports to Canada. PICTE exports to Canada grew at an annual growth rate of 4 percent from 2006 to 2016. U.S. PICTE service exports to Mexico totaled \$8.8 billion, accounting for 27 percent of U.S. service exports to Mexico. PICTE exports to Mexico grew at an annual rate of 5.5. percent from 2006 to 2016. These numbers show that almost half of all services traded from the U.S. to Canada and Mexico are likely delivered through cross-border data flows. This confirms that the growth of digitally-enabled services is critical to the trading relationship with our North American partners. See U.S. COMMERCE DEPT., *Fact Sheet*,

Commerce released a study in 2018 on the value of digital trade in North America. U.S. information and communications technology (ICT) and what they referred to as “potentially” ICT-enabled (PICTE) service exports to Canada totaled \$27.8 billion, accounting for 52 percent of all U.S. service exports to Canada. U.S. PICTE service exports to Mexico totaled \$8.8 billion, accounting for 27 percent of U.S. service exports to Mexico. These statistics highlight just what was at stake in the renegotiation of NAFTA for Internet services.

The announcement of the United States-Mexico-Canada Agreement (USMCA) is a significant step forward in reducing digital trade barriers in provisions in the digital trade and intellectual property chapters.³ CCIA supports the inclusion of critical protections for intermediaries to ensure U.S. Internet services can be exported around the world and inclusion of a strong digital trade chapter that removes barriers to cross-border data flows. These protections will allow more fluid delivery of Internet services, reduce barriers to entry, and strengthen the North American digital economy.

CCIA’s pre-hearing brief and testimony at the public hearing will focus on the impact of several key provisions in USMCA: Chapter 20 (Intellectual Property) on the importance of a balanced copyright regime, and Chapter 19 (Digital Trade) on the value of facilitating cross-border data flows and robust intermediary liability protections.

II. Chapter 20: Intellectual Property

USMCA’s intellectual property chapter provides strong protections to all participants in the content creation, distribution, and consumption process.

U.S. trade agreements have long reflected domestic copyright law by including necessary intermediary protections for online services. USMCA continues this tradition,⁴ pulling directly from Title 17 of the U.S. Code, and is consistent with prior free trade agreements dating back to 2003.⁵ These provisions will provide certainty to U.S. Internet exporters by ensuring that they

Digital Trade in North America (Jan. 2018), <https://www.commerce.gov/news/fact-sheets/2018/01/digital-trade-north-america>.

³ OFFICE OF THE U.S. TRADE REPRESENTATIVE, United States-Mexico-Canada Agreement Text (2018), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico> [hereinafter “USMCA”].

⁴ *Id.* at art. 20.J.11.

⁵ 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

enjoy the same protections and expectations under U.S. law when delivering services outside the United States.⁶ They will also encourage investment. A 2016 report found that 71 percent of investors expressed concern in investing in Internet businesses where the intermediaries could be held liable for third party content, demonstrating the importance of regulatory certainty and intermediary protections.⁷

The inclusion of U.S. statutory exceptions to the circumvention of technological protection measures (TPMs) is also a welcomed addition. The language is consistent with 17 U.S.C. § 1201, including § 1201(f) on reverse engineering and interoperability, in providing limitations and exceptions to TPMs.⁸

Although USMCA reflects these important aspects of U.S. copyright law, its IP chapter omits other critical copyright limitations and exceptions long relied on by U.S. Internet services and users and a core element of the successful U.S. copyright statutory framework. 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,⁹ and industries that rely on this right are a significant contributor to the U.S. economy and exports.¹⁰ 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.¹¹ 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. Because some U.S. trading partners have sought to undermine American successes in this area by creating regulatory

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.

⁶ Matthew LeMerle *et al.*, *The Impact of Internet Regulation on Early Stage Investment* at 25 (Fifth Era 2016), <https://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/56f192c240261d4703566506/1458672343753/01603+Fifth+Er+Report+-+The+Impact+of+Internet+Regulation+on+Investment.pdf>. See also Matthew Le Merle *et al.*, *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study* at 6, 19 (Booz & Co. 2011), <https://www.strategyand.pwc.com/media/uploads/Strategyand-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf> (“Holding DCIs liable for the content uploaded by users would have a significantly negative effect on investment in this space, reducing the pool of interested angel investors by 81 percent.” . . . “Almost all interviewees said that changing regulations to remove the safe harbor protections currently afforded intermediaries would have a negative impact on investment.”).

⁷ *Id.*

⁸ *USMCA*, *supra* note 3, at art. 20.H.11.

⁹ 17 U.S.C. § 107 (1976) (codifying decades of judicial decisions on fair use, dating back to *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841)).

¹⁰ A 2017 report on the economic contribution of fair use industries found that these industries account for 16 percent of the U.S. economy and generate \$5.6 trillion in annual revenue. 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>.

¹¹ *Id.*

hurdles to U.S. exporters' use of publicly available content,¹² omitting these critical aspects of the U.S. copyright framework from the USMCA intellectual property chapter invites challenges to U.S. leadership in these areas.

While the text includes the limited exceptions language similar to the Berne 3-step test, it fails to include language that would fully reflect U.S. law.¹³ Unlike the abandoned Trans-Pacific Partnership Agreement (TPP),¹⁴ USMCA contains no explicit reference to copyright balance. Without commitments to uphold these protections from key trading partners, U.S. Internet and technology firms are discouraged from exporting.

III. Chapter 19: Digital Trade

USMCA includes a strong digital trade chapter that will aid in the removal of trade barriers by facilitating cross-border data flows, protecting source code,¹⁵ and providing consistency across borders by ensuring civil protections for intermediary services.

Cross-border data flows are critical to digital trade and forced data localization mandates make it difficult 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 percent more for their computing needs than if they could go outside the country’s borders.”¹⁶ USMCA goes even further than previously U.S.-negotiated text such as TPP to discourage localization and data flow restrictions.¹⁷ As countries are becoming

¹² James Vincent, *EU Approves Controversial Copyright Directive, Including Internet ‘Link Tax’ And ‘Upload Filter’*, THE VERGE (Sept. 12, 2018), <https://www.theverge.com/2018/9/12/17849868/eu-internetcopyright-reform-article-11-13-approved>; see also CCIA Comments Regarding Foreign Trade Barriers to U.S. Exports for 2019 Reporting, USTR Dkt No. 2018-0029, filed Oct. 30, 2018, at 12-15, 36-45.

¹³ USMCA, *supra* note 3, at art. 20.H.9.

¹⁴ Trans-Pacific Partnership Agreement at art. 18.66, <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf> (“Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.”).

¹⁵ Article 19.16 of USMCA prohibits forced transfer of source code or algorithms expressed in source code as a condition to do business in a country.

¹⁶ LEVIATHAN SECURITY GROUP, *Quantifying the Cost of Forced Localization* (2014), *available at* <https://static1.squarespace.com/static/556340e4b0869396f21099/t/559dad76e4b0899d97726a8b/1436396918881/Quantifying+the+Cost+of+Forced+Localization.pdf>.

¹⁷ Art. 19.11 of USMCA goes further than TPP by stating that that “[n]o party shall prohibit or restrict the cross-border of information”, compared to Art. 14.11 in TPP that stated “[e]ach Party shall allow the cross-border transfer of information”, absent legitimate public policy objectives. Further Article 19.12 (Location of Computing Facilities) is significantly shortened and now only states that “[n]o Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory.”

increasingly skeptical about the benefits of these provisions in free trade agreements, USMCA is an example of getting it right.

Another key provision in the digital trade chapter is the limitation on civil liability for interactive computer services for third party content.¹⁸ These protections are fully consistent with U.S. law under § 230 of the Communications Decency Act and ensure that companies can continue to take steps to proactively remove objectionable content.¹⁹ While they may be a newer component of U.S. trade agreements, the inclusion of these protections recognizes the realities of the global Internet economy and the needs of Internet services to effectively operate. The inclusion of these protections, and continued reference in future trade agreements, will foster innovation and encourage investment.²⁰ Industry expects to closely follow how these provisions will be implemented in Canada and Mexico.

IV. Conclusion

In conclusion, USMCA represents a significant step forward to strengthen the digital trade relationship between two key trading partners.

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¹⁸ *USMCA*, *supra* note 3, at art. 19.17.

¹⁹ 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).

²⁰ Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections* at 18 (NERA Economic Consulting 2017), <https://cdn1.internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf> (“a reduction in safe harbor protection would cost the U.S. economy \$75 billion annually, lower employee earnings by some \$23 billion annually, and eliminate over 425,000 jobs”).