

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.-
United Kingdom Trade Agreement

Docket No. USTR-2018-0036

**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. 57,790 (Nov. 16, 2018), the Computer & Communications Industry Association (CCIA) submits the following comments on negotiating objectives for a United States-United Kingdom trade agreement. 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

I. Introduction

The U.S. trade agenda should promote market access and recognize the importance of liberalized trade. CCIA supports the Administration’s pursuit of trade agreements and increased discussions with key partners and views these actions as the optimal trade policy tool to facilitate free and fair trade. A comprehensive trade agreement between the United States and the UK, following the UK’s anticipated exit from the European Union, presents a key opportunity to further strengthen this long-standing trade partnership.

A U.S.-UK trade agreement should serve as a model free trade agreement for the 21st century, leveraging the strength of both countries in digital trade. A defining aspect of the current trading relationship is services enabled by, and products that utilize, Internet services and information and communications technology (ICT) business-to-business services essential for companies with global value chains. To illustrate, “digitally deliverable” exports to the UK

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

account for 23 percent of U.S. exports and 29 percent of U.S. imports from the EU.² In 2017, the United States exported \$5.2 billion in telecommunications, computer, and information services alone to the UK.³ Both countries also have strong e-commerce markets.⁴

In setting its negotiating objectives for a U.S.-UK agreement, USTR should build off positive achievements in the recently signed U.S.-Mexico-Canada Agreement (USMCA).⁵ The USMCA text should serve as the basis for negotiating priorities for the digital trade, intellectual property, and telecommunications chapters, while improving on areas where more can be done to further priorities for digital exports.

II. Recommendations for Negotiating Priorities

A. Uphold long-standing copyright frameworks that provide protections for online intermediaries for user-uploaded content.

Intermediary liability protections for Internet service providers, such as the copyright safe harbors found in Section 512 of the Digital Millennium Copyright Act, have been critical to growing the U.S. digital economy by providing business certainty to U.S. investors and innovators.⁶

Following the adoption of the E-Commerce Directive in 2000, the UK implemented corresponding legislation into its national law.⁷ Among the provisions in the legislation were protections for information society services.⁸ There is a concerning trend in the UK in recent years where courts have expanded the responsibility of intermediaries to police the

² CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, *Where the Money Is: The Transatlantic Digital Market* (Oct. 12, 2017), <https://www.csis.org/blogs/future-digital-trade-policy-and-role-us-and-uk/where-money-transatlantic-digital-market> (defining “digitally-enabled services” as “business, professional, and technical services, royalties and license fees, insurance services, financial services, and telecommunications that are largely enabled by information technologies”).

³ U.S. DEPT. OF COMMERCE, Bureau of Economic Analysis, United Kingdom - International Trade and Investment Country Facts (last updated Dec. 19, 2018), <https://apps.bea.gov/international/factsheet/factsheet.cfm?Area=327>.

⁴ CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, *Fueling the Ecommerce Boom in U.S.-UK Trade* (Nov. 2, 2017), <https://www.csis.org/blogs/future-digital-trade-policy-and-role-us-and-uk/fueling-ecommerce-boom-us-uk-trade>.

⁵ 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-statesmexico> [hereinafter “USMCA”]. See also OFFICE OF THE 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>.

⁶ 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-Ir.pdf>.

⁷ The Electronic Commerce (EC Directive) Regulations 2002 [U.K.].

⁸ *Id.* at § 17, 18, 19.

communications of third parties using their services.⁹

Following its departure from the EU, the UK will no longer be required to comply with the E-Commerce Directive.¹⁰ As discussed further in the following section, protections for intermediaries, in both IP and non-IP contexts, may be at risk following the UK's exit from the EU. It is critical that USTR seek intermediary protections for intermediaries in a trade agreement that are consistent with U.S. copyright law.

B. Encourage investment by providing regulatory certainty to online intermediaries for third-party content.

Internet services need regulatory certainty to operate abroad. Numerous conflicting liability regimes undermine this certainty and 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.¹¹ The U.S. and the UK should work to reduce uncertainty and achieve consistency in liability rules among countries.¹²

Currently, there are protections for online intermediaries under the E-Commerce Directive. The UK government has recently stated that, even in the event of a “no deal” scenario, the UK policy approach will “continue to align with the provisions contained in the Directive, including those on liability of intermediary services providers and general

⁹ See generally Stanford CIS, World Intermediary Liability Map, “United Kingdom Court Decisions”, <https://wilmap.law.stanford.edu/country/united-kingdom#decisions> (last visited Jan. 15, 2019). Since 2011, UK courts have also liberally granted injunctive relief against ISPs to block websites hosting infringing content pursuant to the § 97A Copyright, Designs & Patents Act, starting with the 2011 case of *Twentieth Century Fox v British Telecommunications Plc.* [2011 EWHC 1981 (Ch)].

¹⁰ DG FOR INTERNAL POLICIES, The Consequences of Brexit on Services and Establishment (2017), available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/602035/IPOL_IDA\(2017\)602035_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/602035/IPOL_IDA(2017)602035_EN.pdf) (“The E-commerce Directive establishes harmonised rules on electronic commerce, such as transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of intermediary service. According to the Directive, Ecommerce in principle is subject to the law of the Member State in which the service provider is established and Member States are not allowed to restrict incoming services. The Directive will cease to apply to the UK after Brexit and the UK as well as EU Member States would be able to impose restrictions on incoming services. . . . As Ecommerce is one of the fastest growing industries, it should be given high priority.”).

¹¹ See CCIA, *Modernizing Liability Rules for Digital Trade* (2018), available at <http://www.cciagnet.org/wpcontent/uploads/2018/07/Modernizing-Liability-Rules-2018.pdf>.

¹² In the USMCA, the U.S. was successful in not only obtaining protections for U.S. online intermediaries in the copyright context, but also wisely including safeguards from civil liability for content uploaded by its users. Any U.S. trade agreement going forward should contain these same commitments. See *USMCA*, *supra* note 5, at art. 19.17.

monitoring.”¹³ However, some reports suggest that the UK may look to change its law.¹⁴ USTR should make clear in its negotiating objectives that any agreement pursued by the United States must include these protections, building off the strong provisions in the USMCA digital trade chapter.¹⁵

C. Protect copyright limitations and exceptions necessary for next-generation technologies.

USTR should include commitments to balanced copyright law present in U.S. law that provide for limitations and exceptions in its negotiating objectives with the UK. 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.”¹⁶ The U.S. should commit to upholding these commitments in the intellectual property chapters of its FTAs, and continue to seek these commitments in a trade agreement with the UK.

This includes provisions such as fair use, exceptions to circumvention of mandated technological protection measures, and other allowances such as those needed for text and data mining in the UK. USTR should pursue language that recognizes the shared commitment of the U.S. and the UK to promote balanced copyright. While not always as flexible as fair use in the United States, the UK doctrine of “fair dealing” allows for similar uses of copyrighted works in the cases of criticism, research, reviews, and reporting.¹⁷ A missed opportunity in the USMCA was language supportive of balanced copyright provisions, and USTR should include stronger language to protect the export of U.S. technology products and services in a U.S.-UK intellectual

¹³ *Guidance on the E-Commerce Directive in the Event of No Deal* (Jan. 9, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770119/Guidance_on_the_eCommerce_Directive_in_the_event_of_no_deal.pdf.

¹⁴ *UK Could Rethink Social Media Laws After Brexit, Says Minister*, THE GUARDIAN (Mar. 14, 2018), <https://www.theguardian.com/media/2018/mar/14/uk-could-rethink-social-media-laws-after-brexit-says-minister>; U.K. COMMITTEE ON STANDARDS IN PUBLIC LIFE, *Intimidation in Public Life, Review by the Committee on Standards in Public Life* (2017), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/666927/6.3637_CO_v6_061217_Web3.1__2_.pdf (“The government should seek to legislate to shift the balance of liability for illegal content to the social media companies away from them being passive ‘platforms’ for illegal content. Given the government’s stated intention to leave the EU Single Market, legislation can be introduced to this effect without being in breach of EU law. We believe government should legislate to rebalance this liability for illegal content, and thereby drive change in the way social media companies operate in combating illegal behaviour online in the UK.”).

¹⁵ *Id.*

¹⁶ OFFICE OF THE U.S. TRADE REPRESENTATIVE, *The Digital 2 Dozen* (2017), <https://ustr.gov/sites/default/files/Digital-2-Dozen-Updated.pdf>.

¹⁷ Copyright, Designs and Patents Act 1988 at § 29, 30 [U.K.].

property chapter.¹⁸

D. Discourage unjustified taxation of U.S. digital services.

In negotiations with the UK, USTR should oppose tax-related proposals that seek to disadvantage American companies. An alarming trend among foreign countries is the singling out of the U.S. digital economy for additional taxation. U.S. technology firms are increasingly the target of these unprecedented “digital services taxes” (DST) around the world.¹⁹ Following the EU’s proposal, many European countries have decided to move forward with an interim tax on an industry comprised mostly of U.S. digital exporters, while also pushing international institutions to globalize this taxation.²⁰

In November 2018, the UK government announced that it would introduce a new digital services tax in April 2020.²¹ While the proposal purports to have a non-discriminatory intent,²² the practical effect of the tax will be that a handful of U.S. companies will contribute the majority of the tax revenue, just as the case is with the EU’s DST proposal.²³

E. Enable cross-border data flows and discourage data localization mandates.

Global data flows are essential for the modern economy.²⁴ Companies need to be able to move data across borders in a secure, high-quality, and seamless manner, while also respecting

¹⁸ USMCA cites the Berne three-step test language. *See USMCA, supra* note 5 at art. 20.39. However, this is not as strong as language in previously negotiated U.S. trade agreements that fully reflects the importance of this principle.

¹⁹ CCIA has highlight the DST as a discriminatory trade barrier in additional proceedings with the U.S. government. *See* 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.ccia.net.org/wpcontent/uploads/2018/10/CCIA-Comments-to-USTR-for-2019-NTE.pdf>.

²⁰ Spain, Italy, France, and Austria have all introduced a national digital services tax.

²¹ The UK’s DST would be a “narrowly-targeted” 2% tax on the UK revenues of digital businesses that are considered to derive significant value from the participation of their users. The tax would be applied to specific digital business activities, which the government considers derive significant value from users and the business activities in scope with be the following: “the provision of a social media platforms, “search engine” or “online marketplace.” UK Digital Services Tax Consultation (Nov. 2019), *available at* <https://www.gov.uk/government/consultations/digital-services-tax-consultation>.

²² *Id.* at 31-32 (“The DST does not discriminate against non-resident businesses.”).

²³ The EU’s DST discriminates against U.S. digital firms in the following ways: (a) the DST thresholds — at least \$750 million in global gross revenue and at least \$50 million in EU gross revenue — are designed to capture Google, Facebook, Amazon, eBay, Uber, Airbnb but few EU firms; (b) the revenues subject to the proposal DST are defined to capture business models of U.S. firms but not EU digital firms; and (c) the proposal allows value added taxes and similar taxes to be subtracted from ‘taxable revenue’ in calculating the base from the 3% impost which would increase the tax base since the United States does not have value added taxes. *See* Gary Clyde Hufbauer & Zhiyao Lu, *The European Union’s Proposed Digital Services Tax: A De Facto Tariff*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (June 2018), *available at* <https://piie.com/system/files/documents/pb18-15.pdf> at 7.

²⁴ MCKINSEY GLOBAL INSTITUTE, *Digital Globalization: The New Era of Global Flows* (2016), *available at* <https://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows>.

applicable data protection laws. Forced localization barriers discourage investment and reduce GDP.²⁵

A U.S.-UK trade agreement presents an opportunity for the U.S. to pursue strong rules concerning cross-border data flows in a trade agreement. The EU's proposed text for future trade agreements to facilitate cross-border data flows and digital trade falls short and includes provisions that would increase the likelihood of data localization rather than reduce barriers.²⁶ The UK has a chance to pursue rules on cross-border data that would go further than the EU's approach to liberalize digital trade between the U.S. and UK. USTR should be ambitious in its negotiations with the UK, and seek to include the provisions contained in the USMCA on cross-border data flows and prohibitions on localization mandates.²⁷ It is also critical that there remains a valid mechanism for companies to legally transfer the data of UK citizens following the UK's exit from the EU in the same manner as the U.S.-EU Privacy Shield.²⁸

To further encourage trade and advance the global understanding²⁹ that customs duties cannot be placed on flow of digital music, video, software, electronic books, games, and information as they cross borders, a U.S.-UK trade agreement should also prohibit governments from imposing customs duties on digital transmissions.

²⁵ INFORMATION TECHNOLOGY & INNOVATION FOUNDATION, *Cross-Border Data Flows: Where Are the Barriers, and What Do They Cost?* (May 2017), http://www2.itif.org/2017-cross-border-data-flows.pdf?_ga=2.235143297.1087885902.1547571994-588068352.1547571994 (“These studies show that data localization and other barriers to data flows impose significant costs: reducing U.S. GDP by 0.1-0.36 percent; causing prices for some cloud services in Brazil and the European Union to increase 10.5 to 54 percent; and reducing GDP by 0.7 to 1.7 percent in Brazil, China, the European Union, India, Indonesia, Korea, and Vietnam, which have all either proposed or enacted data localization policies.”).

²⁶ Christian Borggreen, *How the EU's New Trade Provision Could End Up Justifying More Data Localisation Globally*, DISRUPTIVE COMPETITION PROJECT (May 14, 2018), <http://www.project-disco.org/europeanunion/051418eus-new-trade-provision-end-justifying-data-localisation-globally/> (“The risk, as recently highlighted by the European Parliament, is that third countries will justify data localisation measures for data protection reasons. Unfortunately, the European Commission's proposed text will encourage exactly that. Its article B2 states that “each Party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy.” This is essentially a carte blanche for non-EU countries to introduce data protectionism under the guise of “data protection”. It doesn't even require that countries can demonstrate that such laws are necessary and done in the least trade restrictive way, as under existing international trade law, which the EU has long been a party to.”).

²⁷ *USMCA*, *supra* note 5 at art. 19.11, 19.12.

²⁸ U.K. INFORMATION COMMISSIONER'S OFFICE, *International Data Transfers*, available at <https://ico.org.uk/for-organisations/data-protection-and-brexit/data-protection-if-there-s-no-brexit-deal/the-gdpr/international-data-transfers/> (last accessed Jan. 15, 2019); U.S. INTERNATIONAL TRADE ADMINISTRATION, *Privacy Shield and the UK FAQs*, <https://www.privacyshield.gov/article?id=Privacy-Shield-and-the-UK-FAQs> (last accessed Jan. 15, 2019).

²⁹ The World Trade Organization members have agreed to a moratorium on custom duties on electronic transmissions since 1998, renewing the moratorium at every Ministerial Meeting since. U.S. trade agreement must continue to support this global norm.

F. Provide equitable market access for Internet and communication providers.

Business models depend on access to local networks, often from a local incumbent. However, due to inadequate regulatory institutions and insufficient rules to enable access to infrastructure on fair terms, some businesses are restricted from doing so. For example, even in the United States there is no adequate regulation on bottlenecks in access layers, particularly in the business data service market. USTR should ensure that a U.S.-UK trade agreement works to provide consistent, pro-competitive regulation of business-grade whole access and prevent discrimination by major suppliers.

Another market access concern reported by industry is regulatory forbearance without an actual finding of competition. A U.S.-UK trade agreement must make clear that any forbearance determination is justified with empirical support. Favorable provisions are found in the EU-Mexico trade agreement, and analogous provisions should be pursued by USTR.³⁰

Public procurement regimes must be fair and transparent. USTR should also support full implementation of the WTO's 2017 Trade Facilitation Agreement in order to reduce administrative barriers in relation to the import of communications equipment.

G. Encourage measures to secure digital trade and promote strong cybersecurity.

Products and services that facilitate digital trade must be technologically secured. The United States and the UK should continue efforts to promote regulatory cooperation and international standards for securing products and services. A trade agreement should also follow the USMCA in calling for risk-based cybersecurity measures, as it is the more effective approach in comparison to prescriptive regulation.³¹

A U.S.-UK trade agreement should also contain commitments to promote strongly encrypted devices and connections. Specifically, a trade agreement should prevent parties from compelling manufacturers or suppliers to use a specified algorithm or to provide access to a technology, private key, algorithm specific, or other cryptographic design details.³² The UK has

³⁰ The text makes clear that any decisions not to regulate, made by the regulator, must be based in fact. *See Modernisation of the Trade part of the EU-Mexico Global Agreement*, http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156809.pdf (last accessed Jan. 15, 2019).

³¹ *USMCA*, *supra* note 5.

³² Bijan Madhani, *Digital Issues in NAFTA: Cross-Border Data Flows and Cybersecurity*, DISRUPTIVE COMPETITION PROJECT (June 15, 2017), <http://www.project-disco.org/21st-century-trade/061517-digital-issues-in-nafta-cross-border-data-flows-and-cybersecurity/>.

pursued policies that undermine secured communications,³³ and trade negotiations present a new opportunity for the United States to engage with the UK to discourage further efforts that will undermine security.

III. Conclusion

With the rising number of non-tariff and market access barriers directed at U.S. Internet firms, it is critical that a U.S.-UK trade agreement be comprehensive and include provisions critical to furthering the global digital economy.

Respectfully submitted,

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³³ Passed in 2016, the Investigatory Powers Act allows for authorities to require removal of “electronic protections” applied to communications data. *See* <https://www.legislation.gov.uk/ukpga/2016/25>.