Internet Association

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

In re:

Request for Comments:
Negotiating Objectives Regarding Modernization of the North American Free Trade Agreement with Canada and Mexico

Docket No. USTR-2017-0006

**COMMENTS OF
INTERNET ASSOCIATION**

Internet Association (IA)[1] represents over 40 of the world's leading internet companies and supports policies that promote and enable internet innovation – ensuring that information flows freely across national borders, uninhibited by restrictions that are fundamentally inconsistent with the transnational, open, and decentralized nature of the internet. In response to the opportunity to provide written comments for Docket Number: USTR-2017-0006, *Request for Comments: Negotiating Objectives Regarding Modernization of the North American Free Trade Agreement with Canada and Mexico*, IA respectfully submits the following comments.

When the North American Free Trade Agreement (NAFTA) entered into force in the 1990s online marketplaces, the cloud, the app economy, the sharing economy, smart manufacturing, Internet of Things, artificial intelligence, precision agriculture, and machine learning were largely the stuff of science fiction. Today, these technologies and businesses are at the center of U.S. competitiveness and future trade growth. The United States is a global leader in digital trade, and American exporters are leveraging internet-enabled tools to connect with customers in nearly every foreign market in the world. A modernized NAFTA is an opportunity to help the United States maintain and build on this leadership position.

The internet sector now makes up 6 percent of U.S. GDP and employs nearly 3 million Americans.[2] The digital economy has grown from nothing when NAFTA was first implemented to one of the largest and fastest growing sectors of the United States economy. Today, the United

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[1] Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Match Group, Microsoft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Snap Inc., Spotify, SurveyMonkey, Ten-X, TransferWise, TripAdvisor, Turo, Twitter, Uber Technologies, Inc., Upwork, Yahoo!, Yelp, Zenefits, and Zynga.
[2] Stephen Siwek. "Measuring the U.S. Internet Sector." https://cdn1.internetassociation.org/wp-content/uploads/2015/12/Internet-Association-Measuring-the-US-Internet-Sector-12-10-15.pdf.

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States runs a $41.8 billion trade surplus in services with Canada and Mexico.[3] And globally, the internet has helped the United States unlock a massive $159 billion trade surplus in digital trade.[4] In addition, each year, U.S. manufacturers leverage the internet to export $86.5 billion of products and services through online sales.[5]

The internet is also opening up trade to more Americans in fundamentally positive ways. Hundreds of thousands of U.S. small businesses use the internet to directly access customers in North America and around the world – with digitally-intensive small businesses three times as likely to export as other small businesses.[6]

In the hundreds of pages of NAFTA legal texts, the word "internet" does not appear once. The agreement says little on information flows. On intellectual property, NAFTA includes detailed rules in some areas, but lacks provisions that are critical to the United States digital economy. Overall, the parts of U.S. law that have enabled America's internet strength are absent from NAFTA.

Modernizing NAFTA not only offers an opportunity to address specific market access issues for American's internet-enabled goods and services exporters, but it also provides a chance to address issues of global concern for the digital economy. While Canada and Mexico follow some practices we advocate, codifying provisions would strengthen the North American market overall by furthering certainty for U.S. internet companies and setting important precedents for the digital economy worldwide. Specifically, IA urges negotiators to focus on the key elements that encompass a positive digital trade framework, including the prioritization of data flows and digital services, balanced intellectual property, and customs and trade facilitation measures that affect internet-enabled exporters.

As the United States formalizes negotiating objectives for modernizing NAFTA, we encourage the U.S negotiators to prioritize the following issues.

DATA FLOWS AND DIGITAL SERVICES

Cross-border data flows have grown 45-fold since 2005 and are projected to grow by another nine times in the next five years as digital flows of commerce, information, searches, video,

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[3] U.S. Chamber of Commerce. "The Facts on NAFTA." https://www.uschamber.com/sites/default/files/the_facts_on_nafta_-_2017.pdf.
[4] U.S. Department of Commerce, Economic and Statistics Administration. "Digitally Deliverable Services Remain an Important Component of U.S. Trade." http://esa.doc.gov/economic-briefings/digitally-deliverable-services-remain-important-component-us-trade.
[5] United States International Trade Commission. "Digital Trade in the U.S. and Global Economies, Part 2." https://www.usitc.gov/publications/332/pub4485.pdf.
[6] Deloitte. "Connected Small Businesses U.S." https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-connected-small-businesses.pdf.

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communication, and intracompany traffic continue to surge.[7] The internet is the key medium for businesses to reach new foreign customers.

While U.S. internet companies have significant footprints in Mexico and Canada, American digital and e-commerce exporters still face considerable barriers in these markets. Various market access, regulatory, liability, licensing, and operational barriers continue to limit the growth of these companies.

To encourage American innovation and internet-led economic growth, U.S. negotiators should prioritize the following issues as key objectives for a new NAFTA digital economy chapter.

Promote the free flow of information. The ability to transfer and access information across borders is critical to all U.S. economic sectors, and when information is restricted, the United States economy and U.S. exports are hurt. Data flows contribute hundreds of billions of dollars to the United States economy and have been at least as important as the flow of goods to U.S. economic growth in recent years.[8]

- NAFTA should prohibit governments from restricting the movement of information across the internet.

Prevent data localization. Requirements that force U.S. companies to manage, store, or otherwise process data locally or other policies that link market access or commercial benefits to investment or use of local infrastructure hurt U.S. businesses and consumers and threaten the open transnational nature of the internet.

- NAFTA should prohibit governments from requiring that data be stored or processed locally.

Intermediary liability protections. Section 230 of the Communications Decency Act is a core foundation of the United States internet economy; it has enabled the development of digital platforms and the free flow of information that powers the U.S. economy. Section 230 ensures that cloud or other internet services can host massive amounts of speech without the internet service being considered the 'speaker'. Section 230 enables valuable features such as customer reviews, which have been essential to building customer trust for e-commerce businesses. Venture capitalists have pointed to Section 230 as one of the key reasons for the commercial success of internet-enabled U.S. businesses. Without intermediary liability protections like Section 230, internet services would not be able to function as open platforms for trade and communication.

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[7] McKinsey Global Institute. "Digital globalization: The new era of global flows." http://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows.
[8] Ibid.

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- NAFTA should prohibit governments from making online services liable for third-party content. Mexico and Canada lack a clear legal principle like Section 230, creating increased risks for U.S. internet service exporters. In fact, Mexico has proposed increasing liability for e-commerce companies.

Open digital markets. NAFTA contains a very broad "cultural" carve-out for Canada that enables it to impose restrictions on the provision of U.S. content in Canada.

- NAFTA should ensure that U.S. companies can provide internet services and distribution of non-local content, without market access or national treatment restrictions.

- NAFTA should also prohibit discrimination against trade of digital products.

Encryption and source code integrity. Other countries require access to encryption keys or source code as a condition for letting technology imports into their market. Such measures, if left unchallenged, would compromise U.S. technology and hurt U.S. exports, while undermining security overall.

- NAFTA should prohibit governments from requiring access to encryption keys and source code as a condition for market access.

No customs duties on digital transmissions. Some countries have threatened to apply customs duties on digital products. World Trade Organization members have only agreed to a temporary moratorium on imposing such duties. NAFTA should ensure that governments cannot impose tariffs on the flow of music, video, software, e-books, games and information as they move across borders. This will continue to benefit the creators, artists, and entrepreneurs who depend on online sales to get ahead.

- NAFTA should prohibit governments from imposing customs duties on digital transmissions.

No unnecessary regulation of online services. Foreign governments are seeking to limit market access for U.S. businesses by imposing complex and unnecessary licensing requirements on online services. In order to protect local incumbent telecom providers, governments are applying regulations designed for public telecom utilities to online services. This makes little economic sense. Unlike traditional public utility infrastructure, online service markets typically have no serious barriers to new market entrants and low switching costs. U.S. law clearly recognizes this distinction. U.S.-based sharing economy services also face market access and operational barriers in both markets that limit the ability to supply or consume services offered by these platforms.

- NAFTA should prohibit governments from imposing unnecessary or facilities-based regulatory and licensing or operational requirements on providers of online services and applications.

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INTELLECTUAL PROPERTY

The United States economy is now intrinsically tied to the digital economy. As traditional industries like manufacturing, agriculture, and financial services embrace the internet for both operations and to export, it is more critical than ever to promote frameworks in Mexico and Canada that are tailored for the digital environment. Future U.S. economic growth in nearly every sector is now reliant on internet-innovations like cloud computing, artificial intelligence, machine learning, internet of things, computational analysis, text and data mining, and the use of snippets. Critical to these innovations are balanced intellectual property frameworks that support American exporters.

Mexico currently lacks clear copyright limitations and exceptions, like fair use, for commercial purposes. Currently, digital creators and innovators in Mexico must rely on a general provision that allows the use of works where there is no economic profit.[9] In addition, Mexico also lacks comprehensive safe harbors for liability for online infringement.

U.S. negotiators should prioritize the following intellectual property issues that are essential for the digital environment as crucial objectives for modernizing NAFTA.

'Fair uses' of copyright material. A strict regime of strong copyright protection and enforcement – without limitations and exceptions like the 'fair use' of copyrighted material – would doom the internet economy and U.S. innovation leadership. Yet for too long, U.S. trade policy has been focused on exporting only strong copyright protection and enforcement, while giving short shrift to the other parts of U.S. copyright law that U.S. tech success depends on.

Web search, machine learning, computational analysis, text and data mining, and cloud-based technologies all involve making copies of copyrighted content without the explicit consent of the copyright holder. These types of innovative activities – areas where the United States leads – are possible under copyright law because of robust limitations and exceptions.

In the United States, industries that benefit from fair use and other copyright limitations generate $4.5 trillion in annual revenue and employ 1 in 8 U.S. workers.[10] But foreign trading partners often lack such limitations and exceptions, which can limit the export strength of these U.S. industries. It is widely recognized that without a doctrine like fair use, many leading U.S. internet services would never have emerged.

- NAFTA should be updated to require governments to adopt a strong set of copyright limitations and exceptions, such as the United States system of fair use, to enable these kinds of innovative uses of copyrighted material. Such rules are missing in Mexico, and would set a gold standard for other countries that threaten to discriminate against U.S. services through unbalanced copyright regimes.

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[9] Mexico Federal Law on Copyright (as amended, 2016), Art. 148-151.

[10] Capital Trade. "Fair Use in the U.S. Economy." http://www.ccianet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf.

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Copyright 'safe harbors' for online service providers. Together with Section 230 and fair use, the Digital Millennium Copyright Act is a foundation of the United States internet economy. It provides a 'safe harbor' system that protects the interests of copyright holders, online service providers, and users – imposing responsibilities and rights on each. Safe harbors are critical to the functioning of cloud services, social media platforms, online marketplaces, search engines, internet access providers, and many other businesses. Where safe harbors are not in place, 78 percent of venture capital investors are less likely to invest in these services.[11] U.S. online service providers need a legal framework to protect against copyright claims over the massive volumes of content that they host but do not control. At the same time, a safe harbor system provides an incentive to service providers to cooperate with right holders. Mexico has no copyright safe harbor regime, which means that U.S. service providers can be held liable under Mexican law even if they have a system in place to remove content.

- NAFTA should be updated to require governments to adopt strong copyright safe harbors from liability for online service providers.

Proportionality and due process in copyright enforcement. Copyright damage regimes – if not properly calibrated – can have a stifling effect on innovation and legitimate services, especially smaller U.S. providers and emerging services. Risks of significant damages in other countries can deter U.S. startups from developing new technologies, particularly when it comes to newer technologies such as machine learning and comprehensive digital media services that may not be squarely addressed by existing safe harbors and exceptions. 85 percent of early stage investors agree that the risk of high statutory damages in IP cases would deter them from investing in media platforms.[12]

- NAFTA should be updated to require proportionality and due process in copyright enforcement measures.

Limits on global injunctions and non-party injunctions. The digital economy has developed in a legal environment where the United States has been free to develop and enforce its own laws regarding the internet, rather than allow other countries to dictate what U.S. businesses and citizens can do online. However, courts in some other countries, including Canada, have recently sought to control what U.S. companies can publish and access online on a global basis – by issuing non-party injunctions (so-called 'global injunctions') against U.S. companies.

These types of injunctions restrain U.S. trade, interfere with U.S. sovereignty, and harm the ability of the United States to adjudicate, develop, and evolve its own body of law. Global injunctions can result in situations where countries with weaker standards on free speech and due process can impose extraterritorial control on the activities of U.S. citizens and companies.

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[11] Fifth Era. "The Impact of Internet Regulation on Early Stage Investment." http://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/5487f0d2e4b08e455df8388d/1418195154376/Fifth+Era+report+lr.pdf.
[12] Ibid.

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These types of injunctions make it more difficult for U.S. internet companies to serve a global customer base and facilitate exports by U.S. small businesses. They can even lead to 'plaintiff tourism,' in which a plaintiff is unable to get an injunction under U.S. law – but instead forum shops in search of a foreign court that will enforce its judgment in the United States. The United States should not be under an obligation to enforce judgments from courts in Canada, Mexico, or elsewhere that restrain U.S. trade and conflict with U.S. law.

- NAFTA should be updated to prohibit global injunctions against a foreign non-party that is not connected to the underlying dispute.

CUSTOMS/TRADE FACILITATION

E-commerce and online marketplaces seamlessly connect buyers and sellers in the North American market. Small and medium-sized businesses that a generation ago would have faced unsurmountable barriers to participating in international commerce and trade are now turning to the internet to reach global consumers and suppliers. Today, nearly $8 trillion is exchanged through global e-commerce annually.[13] In addition, with the help of e-commerce and online marketplaces, U.S. small businesses grow up to four times faster than businesses that do not embrace the internet, create twice as many jobs, are 50 percent more likely to be exporters, and bring in twice as much revenue through exports as a percentage of sales.[14]

Unfortunately, both Canada and Mexico continue to erect customs and trade facilitation barriers that limit the success of internet-enabled goods exporters, many that ship small, low-value packages. Mexico and Canada both maintain artificially low and commercially insignificant de minimis thresholds. In addition, burdensome and complex customs procedures discourage or block online sellers all together from these markets. In some cases, internet-enabled exporters are often unable to reach Canadian and Mexican customers because of outdated trade rules that do not accommodate package-level e-commerce exports.

U.S. negotiators should prioritize the following customs and trade facilitation issues as key objectives for modernizing NAFTA.

Establish de minimis thresholds consistent with U.S. level. E-commerce is powering trade by giving internet-enabled businesses the ability to find customers around the world. Unfortunately, burdensome, complex, costly and time-consuming customs procedures make it difficult to ship products across borders in a cost effective way. These barriers are so significant that they can

[13]McKinsey Global Institute. "Internet Matters: The Net's Sweeping Impact on Growth, Jobs, and Prosperity." http://www.mckinsey.com/~/media/McKinsey/Industries/High%20Tech/Our%20Insights/Internet%20matters/MGI_internet_matters_full_report.ashx.

[14] Internet Association. "TISA Should Address Intermediary Liability Protections – A Cornerstone of the Digital Economy." https://internetassociation.org/wp-content/uploads/2016/07/Internet-Association-TISA-Intermediary-Liability-2-Page-Handout.pdf.

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prevent small businesses from exporting all together – as firms with small resources cannot afford to navigate these complex rules on their own. Establishing commercially meaningful de minimis thresholds are key to enabling an environment conducive to e-commerce because they simplify import requirements, reduce and make transparent import costs, and expedite customs clearance for e-commerce shipments. The artificially low de minimis thresholds in Canada (20 CAD) and Mexico ($50 for express shipments; $300 for postal shipments) disproportionately impact internet-enabled businesses in the Unites States – especially small businesses – who regularly ship low-value items. Canada has the lowest de minimis threshold in the industrialized world. By comparison, the United States de minimis is currently set at $800.

- NAFTA should be updated to include commitments that harmonize de minimis levels with the current United States standard.

Prohibit burdensome customs procedures. Changes to customs formalities, inspections, requirements, and administrative procedures that add complexity, expense, and time to clear e-commerce shipments across borders, create significant barriers to trade, particularly for internet-enabled small businesses. For example, Mexico has recently proposed changes to its customs procedures that will disadvantage U.S. e-commerce companies exporting to Mexico.

- In addition to establishing de minimis thresholds for low-value shipments, NAFTA should require countries to further improve upon their WTO trade facilitation commitments, including through rules requiring that NAFTA countries conduct customs operations transparently and take specific steps to simplify and expedite customs procedures.

Prohibit the transfer of liability for collecting and remitting customs duties and fees and indirect taxes from third parties to internet intermediaries. Governments across the globe, including Mexico and in Canada, have considered measures that would assign liability for collecting duties and/or taxes directly to U.S. internet services.

- NAFTA should include language that would prohibit countries from assigning customs duties and indirect tax collection to internet services.

CONCLUSION

Modernizing NAFTA represents a significant opportunity for the U.S. internet sector. Internet Association appreciates USTR's focus on relevant digital trade, intellectual property, and customs and trade facilitation issues in the request for comments and looks forward to playing a meaningful role during the negotiations. We also urge USTR to give all affected stakeholders the opportunity to provide input into the negotiating process, including draft text. Increased openness and transparency in U.S. trade policy is likely to lead to better outcomes and more legitimacy.

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