



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

In re:

Request for Comments on Negotiating
Objectives for a U.S.-Japan Trade Agreement

Docket Number USTR-2018-0034

**COMMENTS OF
INTERNET ASSOCIATION**

Internet Association (IA)¹ represents over 40 of the world's leading internet companies. IA is the only trade association that exclusively represents leading global internet companies on matters of public policy. IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet. In response to the opportunity to provide written comments on the request for comments on Negotiating Objectives for a U.S.-Japan Trade Agreement, IA respectfully submits the following comments.

Japan² and the U.S. both have vibrant digital economies and strong commitments to the open internet. The U.S. and Japan are key beneficiaries and drivers of flows of data. East Asia had the highest number of internet users with Japan ranking third in the region with 101 million internet users.³

A U.S.-Japan free trade agreement (FTA) with strong digital provisions is a landmark opportunity for both countries. First, the U.S. and Japan share similar economic interests around digital trade. Second, the U.S. and Japan have an opportunity to set a high standard on digital trade for others to emulate – especially at a time when countries like China and Russia are pushing very different models of digital trade. Third, the U.S. and Japan can leverage the recent U.S.-Mexico-Canada Agreement (USMCA) deal and continue to build out a next-generation template for digital trade.

DATA FLOWS AND DIGITAL SERVICES

Cross-border data flows have grown 45 times larger since 2005 and are projected to grow another 9 times in the next 5 years as digital flows of commerce, information, searches, video, communication, and intracompany traffic continue to surge.⁴ The internet is the key medium for businesses to reach new foreign customers and to purchase software and services that allow them to improve productivity.

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

Promote the free flow of information. The ability to transfer and access information across borders is critical to all economic sectors and when information is restricted, the economy and exports are hurt. Data flows contribute hundreds of billions of dollars to the global economy.⁵

¹ <https://internetassociation.org/our-members/>

² <https://www.humblebunny.com/japans-top-social-media-networks-2017/>

³ <https://www.statista.com/topics/2361/internet-usage-in-japan/>

⁴ 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>.

⁵ Ibid.



- The U.S.-Japan FTA should prohibit governments from restricting the movement of information across the internet.

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

- The U.S.-Japan FTA should prohibit governments from requiring that data be stored or processed locally.

Protect privacy and consumers. Privacy and consumer protection are critical underpinnings of digital trade. Clear and interoperable rules on these issues will enhance consumer confidence in digital trade.

- The U.S.-Japan FTA should ensure that enforceable privacy protections will apply to the digital marketplace. In addition, the U.S.-Japan FTA should include mechanisms to promote compatibility between different privacy regimes, giving users and companies greater assurance that privacy will be protected on a cross-border basis.

Promote intermediary liability protections. Intermediary liability protections have enabled the development of digital platforms and the free flow of information. These protections ensure cloud and other internet services can host third-party content and communications without the service provider being considered the publisher or speaker. Intermediary liability protections enable features such as customer reviews, which have been essential to building customer trust for e-commerce businesses in the U.S. and Japan. Without intermediary liability protections, internet services would not be able to function as open platforms for trade and communication. Weakened intermediary liability protections for Americans would cost 425,000 U.S. jobs and decrease U.S. GDP by \$44 billion annually.⁶

- The U.S.-Japan FTA should prohibit governments from making online services liable for third-party content.

Ensure 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 technology and hurt exports.

- The U.S.-Japan FTA 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 and other customs processes on digital products. World Trade Organization members have only agreed to a temporary moratorium on imposing such duties. The U.S.-Japan FTA 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.

- The U.S.-Japan FTA should prohibit governments from imposing customs duties and other customs formalities on digital transmissions.

⁶<https://internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf>



No unnecessary regulation of online services. Foreign governments are seeking to limit market access by imposing complex and unnecessary licensing requirements on 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 have low switching costs. Sharing economy services also face significant market access and operational barriers in markets that limit the ability to supply or consume services offered by these platforms.

In addition, the Japanese Government is considering new, aggressive platform regulation apparently targeted at U.S. digital intermediaries. An interim report released by the government has had no industry consultation and contains several unsubstantiated allegations. It suggests new regulation that would dictate contractual terms between businesses and require disclosure of commercially sensitive information. We urge USTR to engage with the Japanese government on this issue as part of the trade discussions and ensure that new regulation does not target U.S. businesses or impede the export of U.S. services to Japan.

- The U.S.-Japan FTA should prohibit governments from imposing unnecessary or facilities-based regulatory and licensing or operational requirements on providers of online services and applications.

Non-discriminatory taxation of the digital economy.

- The U.S.-Japan FTA should ensure that each government provides full non-discriminatory treatment to digital services and service providers of the other party, and does not apply taxation measures in a way that discriminates against digital services or is not technologically neutral.

Promote open government data. Small and large companies are increasingly using public data to build innovative commercial applications and services, improve their ability to navigate global markets, and build machine translation and image recognition systems that rely on access to text and images. By releasing data in an open format that can be searched, retrieved, used, reused, and redistributed, governments can assist local companies in building these cross-border services.

- The U.S.-Japan FTA should encourage the release of government data in an open and machine-readable format.

INTELLECTUAL PROPERTY

The global economy is now intrinsically tied to the digital economy. As traditional industries like manufacturing, agriculture, and financial services embrace the internet for their operations and to export, it is more critical than ever to promote frameworks that are tailored for the digital environment. Future 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 exporters.

As more exporters leverage the internet to trade goods and services and use a number of these innovative practices, copyright limitations and safe harbors, tailored for the digital environment, have become even more critical to the growth of the entire economy.



Despite limited exceptions for search engines⁷ and some data mining activities,⁸ Japanese law today does not clearly provide for the full range of limitations and exceptions necessary for the digital environment⁹ – which creates significant risks for U.S. and other foreign services engaged in caching, machine learning, and other transformative uses of content.

Negotiators should prioritize the following intellectual property issues that are essential for the digital environment as crucial objectives for a U.S.-Japan FTA.

Promote innovation through protecting ‘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. Machine learning, computational analysis, text and data mining, online search, and cloud-based technologies all involve making copies of copyrighted content without the explicit consent of the copyright holder. These types of innovative activities are possible under copyright law because of robust limitations and exceptions. Fair use industries account for 16 percent of the U.S. economy, generate \$5.6 trillion in annual revenue, employ 18 million U.S. workers, and drive \$368 billion in annual exports.¹⁰

- The U.S.-Japan FTA should require governments to adopt clear copyright limitations and exceptions, including fair use and text and data mining rules, to enable innovative uses of copyrighted material.

Copyright ‘safe harbors’ for online service providers. A ‘safe harbor’ system that protects the interests of copyright holders, online service providers, and users by imposing responsibilities and rights on each is important. Safe harbors are critical to the functioning of cloud services, social media platforms, online marketplaces, search engines, internet access providers, and many other businesses. A safe harbor system also provides incentives for service providers to cooperate with rights holders.

- The U.S.-Japan FTA should require governments to adopt strong copyright safe harbors from liability for online service providers, along the lines of America’s Digital Millennium Copyright Act system that has been the cornerstone of U.S. innovation and rights holders’ protection.

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 providers and emerging services. Risks of significant damages can deter 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.¹¹

- The U.S.-Japan FTA should require proportionality and due process in copyright enforcement measures.

⁷ Copyright Law of Japan, Section 5 Art. 47-6, <http://www.cric.or.jp/english/clj/cl2.html> (narrowly defining the exception for search engine indexing as “for a person who engages in the business of retrieving a transmitter identification code of information which has been made transmittable . . . and of offering the result thereof, in response to a request from the public”).

⁸ Copyright Law of Japan, Section 5 Art. 47-7, <http://www.cric.or.jp/english/clj/cl2.html> (limiting the application of this data mining exception to “information analysis” done (1) on a computer, and (2) not including databases made to be used for data analysis).

⁹ Approximately a decade ago, there was legislative discussion intended to facilitate the development of internet services in Japan by explicitly allowing copyright exceptions for activities such as crawling, indexing, and snipping that are critical to the digital environment. This discussion resulted in a 2009 amendment to Japanese copyright law – however, the resulting amendment only provided narrowly defined exceptions for specific functions of web search engines, not for other digital activities and internet services. Japan continues to lack either a fair use exception or a more flexible set of limitations and exceptions appropriate to the digital environment.

¹⁰ <http://www.cciianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>

¹¹ Ibid.



TRADE FACILITATION (INCLUDING CUSTOMS, ICT IMPORTS)

E-commerce and online marketplaces seamlessly connect buyers and sellers across the Atlantic Ocean. Small- and medium-sized businesses who a generation ago would have faced insurmountable barriers to participating in international commerce and trade are turning to the internet to reach global consumers and suppliers. Today, nearly \$8 trillion is exchanged through global e-commerce annually.¹² In addition, with the help of e-commerce and online marketplaces, 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.¹³

Burdensome and complex customs procedures discourage or block online sellers altogether from these markets. In some cases, internet-enabled exporters are often unable to reach international customers because of outdated trade rules that do not accommodate package-level e-commerce exports.

- Negotiators should prioritize customs and trade facilitation issues as key objectives for a U.S.-Japan FTA.

ICT imports. Japan currently makes it difficult to import information and communications technology (ICT) devices as part of new product testing prior to market launch. Currently, Japan does not allow for the importation of any devices that do not hold regulatory authorizations for these purposes. This is a particular hardship for technology companies trying to develop and test devices for the Japanese market. For an ICT product to be successful, the device has to be tested locally to ensure that it will function as intended in the local conditions and that it meets the expectations of local users.

The U.S. Federal Communications Commission (47 C.F.R. 2.1204(a)(3)) provides for import conditions under these circumstances. Specifically, devices that have not yet obtained regulatory authorization can be imported in limited quantities for demonstration at industry trade shows and for testing and evaluation to determine compliance with the FCC Rules and Regulations, product development, or suitability for marketing.

- USTR should seek commitments in the U.S.-Japan FTA that will allow for common opportunities in Japan's market.

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 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.

- USTR should seek commitments in the U.S.-Japan FTA that harmonize de minimis levels with the current U.S. standard.

¹²McKinsey Global Institute. "Internet Matters: The Net's Sweeping Impact on Growth, Jobs, and Prosperity."

<https://www.mckinsey.com/industries/high-tech/our-insights/internet-matters>

¹³ 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>.



GOVERNMENT PROCUREMENT

The U.S. and Japan have implemented Cloud First and Cloud Smart policies. Cloud computing has brought forth a new and more efficient means of managing government information technology resources. It has opened up avenues for modernization, innovation, cost savings, and improvements in cybersecurity. Commercial cloud computing in the public sector allows for the delivery of better citizen services, facilitates inter-agency collaboration for greater efficiency, results in faster deployment of mission-critical applications, increases operational continuity and business recovery, allows for enhanced budget control, decreases spending on legacy infrastructure, and increases overall IT efficiency while contributing to sustainability.

- Given these numerous benefits, the U.S.-Japan FTA should include first of its kind measures on implementation and maintenance of Cloud First and Cloud Smart policies. The inclusion of Cloud First policies in the FTA would set an important precedent for other agreements being negotiated.

CONCLUSION

A U.S.-Japan FTA represents a significant opportunity for the 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.-Japan trade policy is likely to lead to better outcomes and more legitimacy.