April 27, 2018

Dear Ambassador Lighthizer, Secretary Guajardo, and Minister Freeland,

The undersigned organizations are trade associations representing a significant part of the U.S., and Internet economies, civil society groups dedicated to an open and free Internet that transcends national borders, and academics with specific expertise in intermediary liability and/or international trade. We are writing to underscore our strong belief that the modernized North American Free Trade Agreement (NAFTA) should include protections for online intermediaries — i.e., the sites and services that "bring together or facilitate transactions between third parties on the Internet."[1]

Section 230 of the Communications Decency Act (Section 230) should be the exemplar for negotiators as to what those protections might include. The public summary of the United States' proposal for NAFTA 2.0 strikes the right note: "rules that limit non-IPR civil liability of online platforms for third party content, subject to NAFTA countries' rights to adopt non-discriminatory measures for legitimate public policy objectives."[2]

Section 230's allocation of liability has led to the unparalleled success of the U.S. technology sector: in general, the law should hold legally responsible for unlawful content those who create it. Section 230 has never protected online intermediaries from prosecution under U.S. federal criminal law.

The success of U.S. companies in exporting both digital services and physical goods, sold through the Internet, has greatly contributed to America's overall balance of trade, but it would not have been possible without Section 230. Uncertainty about intermediary liability in Canada and Mexico frustrates NAFTA's primary goal of "eliminat[ing] barriers to trade in, and facilitat[ing] the cross-border movement of, goods and services," both because U.S. companies are unsure of their potential liability in Canada and Mexico and because it is difficult for Canadian and Mexican Internet-based services to get off the ground. The latter denies Canadian and Mexican companies the benefits of "fair competition in the free trade area," NAFTA's secondary goal. Overall, consumers in all three countries suffer from less robust digital trade, competition and innovation than would be possible with consistent standards for intermediary liability. Section 230's qualified intermediary protections facilitate U.S. exports in three key ways, and would likewise benefit Mexican and Canadian exports if included in NAFTA.

First, the U.S. has developed a uniquely strong ecosystem of online intermediaries. This ecosystem is composed primarily of small to medium sized businesses who play a unique role in the Internet. They provide the addresses, transmission, dissemination points, postal services, and facilities for interaction for the Internet. What they all have in common is that they provide a mechanism for one person, or entity, to interact in some way with another person. Each of these points of interaction

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[1] Karine Perset, *The Economic and Social Role of Internet Intermediaries*, OECD (April 2010), https://www.oecd.org/internet/ieconomy/44949023.pdf

[2] United States Trade Representative, Summary of Objectives for NAFTA Renegotiation (Nov. 2017), https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf

presents an opportunity for these businesses to export a service — which, in turn potentially also makes them vulnerable to liability for content they do not create.

Second, intermediary protections facilitate the development of effective reputation systems that strengthen markets for both physical goods sold over the Internet and digital services. Examples include the customer review feature that has become common on digital retail sites as well as websites dedicated to allowing users to rank other businesses, both online and offline. Such wisdom-of-crowds feedback mechanisms have no real offline equivalent; they improve buyer trust and encourage vendors to compete on quality as well as price. However, online reputation systems require liability protections to function properly. Otherwise, vendors could easily suppress truthful negative information by threatening litigation. Section 230 protections keep that information online so that it can benefit consumers.

Third, intermediary protections lower the barriers to launch new online services predicated on third party content, making those markets more innovative and competitive. Without these protections, new entrants face business-killing liability exposure from day one; and they must make expensive upfront investments to mitigate that risk. Intermediary protections lower entrants' capital requirements and the riskiness of their investments, which allows more new entrants seeking to disrupt incumbents. This helps prevent the market from ossifying at a small number of incumbent giants. Extending Section 230 protections will help Mexican and Canadian website operators compete on a global stage, while also expanding the market for American startups.

In addition to its obvious benefits for digital trade, Section 230's "Good Samaritan" protections prevent the Internet from becoming more sterile and more dangerous. Doing anything to monitor or moderate user content would increase a website's liability, so necessarily they would do less of it — and maybe none at all. Encouraging website operators to remain passive and ignorant only helps bad actors, like terrorists and sex traffickers. And holding websites responsible if they fail to take down content someone alleges to be defamatory means they would have to adjudicate legal disputes at an impossibly large scale. In practice, this creates a heckler's veto.

Neither Mexico nor Canada currently has a statute governing intermediary liability (beyond copyright claims). Canada follows the same basic common law principles of publisher liability that, in passing Section 230, the U.S. Congress recognized simply would not work online — and that would, perversely, discourage Good Samaritan policing of user content. As Canadian Internet lawyer Keith Rose explains: "website operators have no general shield from liability for defamation claims over third-party content. The innocent dissemination defence may be available, but it requires a high degree of passivity and ignorance."[3]

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[3] Keith D. Rose, *New UK Web Defamation Rules For User Content What Canadian Website Operators Need to Know*, Canadian Tech Law Blog (February, 2, 2014), https://www.canadiantechlawblog.com/2014/02/13/new-uk-web-defamation-rules-for-user-content-what-canadian-website-operators-need-to-know/. Canadian defamation law limits intermediary liability in one particular respect: a website operator cannot be held liable merely for hosting a link posted by a user to another site containing defamatory material because this does not constitute publication. Thus, for a certain category of claims, websites in Canada have intermediary protections equivalent to Section 230. *See, e.g.*., Crookes v. Newton, 2011 SCC 47, [2011] 3 S.C.R. 269; Meagan Fitzpatrick, *Internet Links Not Liber Top Court Rules*, CBC News (October 19, 2011, 9:53 AM),

Intermediary protections leads to many other positive benefits, including advancing consumers' free speech rights (by giving traditionally disenfranchised voices access to global publication platforms). For all these reasons, NAFTA's digital trade chapter would benefit from providing liability protections for intermediaries that publish third party content.

We appreciate your consideration of this letter, and we would welcome the opportunity to discuss it further with you.

Respectfully,

Civil Society Organizations
TechFreedom
Center for Democracy and Technology (CDT)
Electronic Frontier Foundation (EFF)
Engine
FreedomWorks
R Street Institute
The Committee for Justice

Trade Associations
Computers and Communications Industry Association (CCIA)
Internet Association
Internet Infrastructure Coalition (I2Coalition)
NetChoice

Individuals (affiliations are for identification only):
Prof. Eric Goldman, Santa Clara University School of Law
Prof. Rebecca Tushnet, Frank Stanton Professor of First Amendment Law, Harvard Law School
Dr. Elizabeth Townsend Gard, Professor of Law, Jill H. and Avram A. Glazer Professor of Social Entrepreneurship Tulane Law School
Prof. Roger E. Schechter, George Washington Univ. Law School
Prof. David L. Silverman, Lewis & Clark School of Law

http://www.cbc.ca/news/politics/internet-links-not-libel-top-court-rules-1.1064340. However, Canadian websites may still be sued for publishing user content other than links, such as negative user reviews.