

January 21, 2018

Dear Ambassador Lighthizer, Secretary Guajardo, and Minister Freeland,

We are American, Canadian, and Mexican scholars and advocates in the field of Internet law and policy. We write regarding your efforts to modernize the North American Free Trade Agreement (“NAFTA”). When NAFTA was negotiated, the Internet was an obscure electronic network. Since then, the Internet has become a significant—and essential—part of our societies and our economies.

To acknowledge this, if a modernized NAFTA contains a digital trade chapter, it should contain protections for online intermediaries from liability for third party online content, similar to the United States’ “Section 230” (47 U.S.C. §230). Section 230 is directly responsible for the success of major Internet companies that aggregate and publish third party content, including Google, YouTube, Facebook, Twitter, Amazon, eBay, Yelp, Wikipedia, and so many more. Due to these services’ ubiquity and popularity, most consumers benefit from Section 230’s immunity many times an hour.

Incorporating intermediary immunity into NAFTA will advance commerce and trade in two important ways.

First, intermediary immunity facilitates the development of effective reputation systems that strengthen markets. Reputation systems improve buyer trust and encourage vendors to compete on quality as well as price. Online, consumer review services and other wisdom-of-the-crowds feedback mechanisms have emerged that have no offline equivalent. However, online reputation systems require liability immunity to function properly. Otherwise, vendors can easily suppress truthful negative information via litigation threats. Immunity keeps that information online so that it can benefit consumers.

Second, intermediary immunity lowers the barriers to launch new online services predicated on third party content, making those markets more competitive. Without immunity, new entrants face business-ending liability exposure from day one; and they must make expensive upfront investments to mitigate that risk. Immunity lowers entrants’ capital requirements and the riskiness of their investments, leading to more new entrants seeking to disrupt incumbents. This helps prevent the market from ossifying at a small number of incumbent giants.

Intermediary immunity leads to many other positive benefits, including advancing consumers’ free speech rights (by giving traditionally disenfranchised voices access to global publication platforms) and ensuring that intermediaries undertake the socially valuable work of moderating anti-social content without fearing liability for doing that work.

For these reasons, NAFTA’s digital trade chapter would benefit from providing liability immunities for intermediaries publishing third party content. We appreciate your consideration of this letter, and we would welcome the opportunity to discuss it further with you.

Best regards,

Professor Eric Goldman, Santa Clara University School of Law
and the 38 individuals and 16 organizations listed on the next two pages

Individuals (affiliations are for identification only)

Prof. David Ardia, University of North Carolina School of Law
Andrew P. Bridges, Stanford Center for Internet and Society (fellow)
Prof. Annemarie Bridy, University of Idaho School of Law
Prof. Hillary Brill, American University Washington College of Law
Prof. Irene Calboli, Texas A&M University School of Law
Prof. Michael A. Carrier, Rutgers Law School
Prof. Michael W. Carroll, American University Washington College of Law
Prof. Anupam Chander, UC Davis School of Law
Prof. Colleen Chien, Santa Clara University School of Law
Prof. Jorge Contreras, University of Utah S.J. Quinney College of Law
Prof. Carys Craig, Osgoode Hall Law School, York University
Prof. Tonya M. Evans, University of New Hampshire School of Law
Prof. Joshua Fairfield, Washington & Lee University School of Law
Prof. Christine Haight Farley, American University Washington College of Law
Alex Feerst, Stanford Center for Internet and Society (fellow)
Prof. Sean Flynn, American University Washington College of Law
Prof. Roger Allan Ford, University of New Hampshire School of Law
Prof. Elizabeth Townsend Gard, Tulane University Law School
Prof. Michael Geist, University of Ottawa, Faculty of Law
Prof. Lucie Guibault, Dalhousie University, Schulich School of Law
Prof. Christian Helmets, Santa Clara University Leavey School of Business
Gwen Hinze, UC Berkeley School of Law School (JSD candidate)
Prof. Eric E. Johnson, University of North Dakota School of Law
Prof. Ariel Katz, Faculty of Law, University of Toronto
Prof. Mark A. Lemley, Stanford Law School
Prof. David Levine, Elon University School of Law
Prof. Yvette Joy Liebesman, Saint Louis University School of Law
Lisa Macklem, University of Western Ontario (PhD candidate)
Prof. Mark A. McCutcheon, Athabasca University
Prof. Rory McGreal, Athabasca University
Prof. Lateef Mtima, Howard University School of Law
Prof. Ira Steven Nathenson, St. Thomas University School of Law (Florida)
Prof. Art Neill, California Western School of Law
Cindy Paul, University of Alberta Copyright Office
Prof. Jorge R. Roig, Charleston School of Law
Prof. Pamela Samuelson, UC Berkeley School of Law
Prof. (adjunct) David Silverman, Lewis & Clark Law School
Prof. Rebecca Tushnet, Harvard Law School

[signatories continued on next page]

Organizations

Center for Democracy & Technology
Citizen Outreach
The Committee for Justice
Competitive Enterprise Institute
Electronic Frontier Foundation
Engine
FreedomWorks
Horizontal (Mexico)
Institute for Intellectual Property and Social Justice
New America's Open Technology Institute
New Media Rights
Niskanen Center
Public Knowledge
R Street
TechFreedom
Wikimedia Foundation