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
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Citizen Outreach
The Committee for Justice
Competitive Enterprise Institute
Electronic Frontier Foundation
Engine
FreedomWorks
Horizontal (Mexico)
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New America’s Open Technology Institute
New Media Rights
Niskanen Center
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Wikimedia Foundation