



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

*In re:*

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

Docket Number USTR-2018-0036  
83 FR 57790

**COMMENTS OF  
INTERNET ASSOCIATION**

Internet Association (IA) represents over 40 of the world’s leading internet companies.<sup>1</sup> 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 consultation on trade negotiations between the United Kingdom (UK) and the United States (U.S.), IA respectfully submits the following comments.

The U.S. and UK both have vibrant digital economies and strong commitments to the open internet. One sign of the strong, reciprocal digital trade relationship between our two countries is that both are the most important cross-border e-commerce markets for each other, and both are world leaders in digital exports:

- Forty-nine percent of Americans buy from UK sites and 70 percent of UK e-commerce shoppers use U.S. e-commerce sites.
- The U.S. has a \$172.6 billion<sup>2</sup> trade surplus in digital services, in part thanks to our digital policies. In 2015, the UK ran a £6.6 billion surplus in the global trade of digital services. Digital trade now accounts for 7 percent of the UK's global services exports.
- Nearly \$8 trillion is exchanged through global e-commerce annually.<sup>3</sup>
- The UK digital sector is creating jobs 2.8 times faster than the rest of the economy<sup>4</sup> and in the U.S. employment in the digital economy has grown at an average pace of 3.7 percent, compared to 1.7 percent for overall employment growth.<sup>5</sup>

The U.S. and UK are also key beneficiaries and drivers of transatlantic flows of data, which are the largest in the world. British and American companies use data like they use intermediate goods and services – as a critical input in operations and production processes that produce new insights and solutions and improve business processes and products.

These data points show why a U.S.-UK free trade agreement (FTA) with strong digital provisions is a landmark opportunity for both countries. First, it serves both U.S. and UK economic interests given that it is an area where both economies excel. Second, on the 'values' and global economy level, this is an

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

<sup>2</sup> This filing previously stated totals for “total digital service exports” and “digital service trade surplus” that summed together ICT-enabled service exports and potential ICT-enabled service exports. These figures should not have been summed together as potential ICT-enabled service exports includes ICT-enabled service exports. The correct totals are approximately \$439 billion in digital service exports and a surplus of \$172.6 billion for digital service trade balance. The previous, incorrect figures were \$470 billion in digital service exports and \$196.1 for for digital service trade balance.

<sup>3</sup> <https://www.mckinsey.com/industries/high-tech/our-insights/internet-matters>

<sup>4</sup> <https://www.swipe.to/9057ct?p=wkSMOKDp9>

<sup>5</sup> <https://economia.icaew.com/opinion/october-2018/how-digital-is-driving-us-economy>



opportunity for U.S. and UK to be trailblazers internationally and set a high standard for others to emulate – especially at a time when countries like China and Russia are pushing very different, closed visions of the internet. Third, the U.S. and UK can leverage the recent U.S.-Mexico-Canada Agreement (USMCA) deal and continue to build out a next-generation template for digital trade. Finally, this agreement offers a chance for the UK to distinguish itself vis a vis Brussels, which has been more reticent on digital trade issues like data flows.

IA has itself recently launched an office in London – it’s first outside of the U.S. – in part due to recognition of the importance of strong links between the U.S. and UK on trade and internet policy.

In the lead up to negotiations, U.S. and UK officials should strenuously avoid any proposals that seek to disadvantage American or UK companies. IA is particularly concerned about the UK’s embrace of a digital tax proposal that would single out the U.S. digital economy for additional taxation. This type of unilateral tax measure would skirt the UK’s treaty obligations, taking it outside the agreed international framework for cross-border trade and investment and unfairly claiming tax revenue due in other countries. The U.S. and UK should not move forward with FTA negotiations until these digital tax issues are resolved.

### KEY U.S.-UK TRADE CONCERNS

IA’s recent filing to USTR on the National Trade Estimate (NTE)<sup>6</sup> provides a more detailed summary of UK market access barriers. Of the measures identified in that filing, the issues listed below are among the most concerning. IA encourages USTR to engage with UK counterparts to address these and other important issues prior to and during these trade negotiations.

**Unilateral Or Discriminatory Tax Regimes.** While the European Commission’s initial proposal for a Digital Services Tax (DST) failed to gain the required unanimous support from European finance ministers in December 2018, the UK is continuing to pursue its own problematic digital tax legislation. In the UK’s October annual budget, the government proposed a version of the DST that would apply a 2 percent tax on gross revenue linked to UK users of three types of business models: search engines, social media platforms, and online marketplaces.<sup>7</sup> This proposal is narrowly targeted at U.S. technology companies. For example, the legislation excludes ads on UK news websites, but includes ads shown to UK users of social media websites or online search engines. As Chancellor of the Exchequer Philip Hammond noted: “It’s only right that these global giants, with profitable businesses in the UK, pay their fair share towards supporting our public services.”<sup>8</sup> IA encourages U.S. negotiators to address and challenge these discriminatory efforts in advance of negotiations.

The UK’s diverted profits tax is another example of a unilateral approach to international tax policy, diverging from international treaties and the agreed rules for apportioning profits among different countries. This tax was a major step outside of the multilateral tax system, designed to privilege the UK over its trading partners. Under this policy, the UK can levy taxes on structures and payments that are not related to UK activities, creating an impediment to cross-border investment and a significant source of uncertainty among multinational companies with any ties to the UK market.

**Unbalanced Copyright And Liability Frameworks.** The EU is finalizing negotiations on a Copyright Directive that would disrupt settled law and harm transatlantic digital trade. Recent proposals for Article 13 of the Directive would dramatically weaken long-standing protections under the E-Commerce Directive and impose an unworkable filtering mandate on hosting providers as well as a separate and conflicting “staydown” obligation. Recent proposals on Article 11 would deny online publishers the

<sup>6</sup> [https://internetassociation.org/files/ia\\_submission-for-ustr-national-trade-estimate-report-for-2019/](https://internetassociation.org/files/ia_submission-for-ustr-national-trade-estimate-report-for-2019/)

<sup>7</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/752172/DST\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752172/DST_web.pdf)

<sup>8</sup> <https://www.theguardian.com/uk-news/2018/oct/29/hammond-targets-us-tech-giants-with-digital-services-tax>



choice to consent to the free listing of their content in online services, and would require online services to obtain a license before publishing links that quote anything other than individual words.

If the UK were to implement these measures, online service providers in the U.S. and elsewhere would be subject to a moving target in the UK for years to come. Larger providers would face critical liability risks, while smaller startups and entrepreneurs would be deterred from entering the UK market, given the difficulty of raising funds from venture capitalists that have consistently characterized such rules as strong impediments to investment.

In addition, the UK has so far failed to implement a private copying exception, which is necessary to ensure full market access for U.S. cloud providers and other services. The government's first attempt to introduce such an exception in October 2014 was quashed by the UK's High Court in July 2015. Without such an exception in place in the UK, individual cloud storage services will continue to face significant market access barriers, and even an attachment to an email may be deemed to be an infringement.

**Platform-to-Business Regulation.** The EU is finalizing negotiations on a new regulation on “platform-to-business” (P2B) relations that would require online intermediaries to provide redress mechanisms and meet aggressive transparency obligations concerning delisting, ranking, differentiated treatment, and access to data. These rules would apply not just to marketplaces with business users but also to non-contractual relations between businesses and platforms, mobile operating systems, and search engines, going far beyond the scope of early versions of the regulation. Among other obligations, online intermediaries would be required to “outline the main parameters determining ranking,” including “any general criteria, processes, specific signals incorporated into algorithms or other adjustment or demotion mechanisms used in connection with the ranking.” In addition, recent proposals for Article 5 of the regulation would provide insufficient protections for trade secrets, which are critical to how platforms fight spam and abuse. IA encourages U.S. and UK negotiators to push back on these and other disproportionate requirements that are likely to create market access barriers for developers, platforms, and SMEs seeking access to the UK and EU markets.

## DATA FLOWS AND DIGITAL SERVICES

Cross-border data flows have grown 45 times larger since 2005 and are projected to grow by another nine times in the next five years as digital flows of commerce, information, searches, video, communication, and intracompany traffic continue to surge.<sup>9</sup> The internet is the key medium for businesses to reach new foreign customers and to purchase software and services which 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.-UK 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.<sup>10</sup>

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

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<sup>9</sup> 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>.

<sup>10</sup> Ibid.



**Prevent data localization.** Requirements that force 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 businesses and consumers and threaten the open transnational nature of the internet.

- The U.S.-UK 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.-UK FTA should ensure that enforceable privacy protections will apply to the digital marketplace. In addition, the U.S.-UK 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 UK. Without intermediary liability protections, internet services would not be able to function as open platforms for trade and communication.

- The U.S.-UK 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 trade.

- The U.S.-UK 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 on digital products. World Trade Organization members have only agreed to a temporary moratorium on imposing such duties. The U.S.-UK 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.-UK FTA should prohibit governments from imposing customs duties on digital transmissions.

**No unnecessary regulation of online services.** Some 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.



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

**Avoid discriminatory taxation of the digital economy.**

- The U.S.-UK 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. Any reform to taxation measures affecting digital services should be developed in an internationally coordinated manner, for example through the current OECD international tax process.

**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.-UK FTA should encourage the release of government data in an open and machine-readable format.

**Establish a digital trade working group.** U.S.-UK trade negotiations offer an important opportunity to recognize both countries' mutual interest and leadership in digital trade. To advance joint leadership regionally and globally, the parties should consider opportunities to further coordinate on addressing digital trade barriers, including in third country markets experiencing significant digital trade challenges.

- The U.S.-UK FTA should establish a Digital Trade Working Group, so that the U.S. and the UK can coordinate on regulatory and policy approaches going forward, including when negotiating with third countries, and avoid significant divergences on digital policy issues.

**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.

Unfortunately, recent proposals under the EU Copyright Directive represent a strong step away from the innovation-oriented copyright frameworks that the U.S. recently negotiated in the USMCA. For example, Article 13 of the proposed Copyright Directive would narrow the existing copyright safe harbor for hosting providers in unpredictable ways in the UK and elsewhere, subjecting online services to incalculable liability risks and requiring the deployment of content filtering technologies and unfeasible “content staydown” practices. Article 11 of the Directive, if implemented, would not give publishers the choice to consent to the free listing of their content in online services, and would impose link taxes on



content from non-EU publishers, previously published content, and non-news content. These proposed requirements deviate from shared U.S. and UK norms that have been critical to the growth of the commercial internet.

Negotiators should challenge these emerging market access barriers while prioritizing the following intellectual property objectives that are essential for advancing innovation-oriented rules in the U.S. and UK.

**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. 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 are possible under copyright law because of robust limitations and exceptions.

- The U.S.-UK 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.

**Promote predictable 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.-UK FTA should require governments to adopt strong copyright safe harbors from liability for online service providers, modeled on the U.S. Digital Millennium Copyright Act and the E-Commerce Directive that have been the cornerstones of U.S. and UK innovation and protection of rights holders for two decades.
- The U.S.-UK FTA should ensure that any measures under the EU Copyright Directive are consistent and coherent with the U.S. legal framework and do not harm the ability of cloud providers, online platforms, search engines, creators, and users to access the UK market.

**Ensure 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.<sup>11</sup>

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

## CUSTOMS/TRADE FACILITATION

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

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<sup>11</sup> Ibid.





consumers and suppliers. Today, nearly \$8 trillion is exchanged through global e-commerce annually.<sup>12</sup> 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.<sup>13</sup>

Burdensome and complex customs procedures discourage or block online sellers altogether from these markets. In some cases, internet-enabled exporters are 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.-UK FTA.

**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.-UK FTA that harmonize de minimis levels with the current U.S. standard.

## GOVERNMENT PROCUREMENT

The U.S. and UK<sup>14</sup> are engaged in advancing “cloud first” 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, allows for enhanced budget control, decreases spending on legacy infrastructure, and increases overall IT efficiency while contributing to sustainability.

**Promote access to cloud services.** Parties should take steps through the digital trade, procurement, and good regulatory practices chapters to promote widespread and non-discriminatory access to commercial cloud services.

- Given these numerous benefits, the U.S.-UK FTA should include first-of-its-kind measures on implementation and maintenance of “cloud first” policies for all sectors. The inclusion of “cloud first” policies in the FTA would set an important precedent for other agreements being negotiated.

## CONCLUSION

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<sup>12</sup>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](http://www.mckinsey.com/~/media/McKinsey/Industries/High%20Tech/Our%20Insights/Internet%20matters/MGI_internet_matters_full_report.ashx).

<sup>13</sup>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>.

<sup>14</sup><https://www.gov.uk/guidance/government-cloud-first-policy>



A U.S.-UK 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.-UK trade policy is likely to lead to better outcomes and more legitimacy.