

JANUARY 23, 2018

eff.org



Could Platform Safe Harbors Save the NAFTA Talks?

As the sixth round of talks over a modernized North American Free Trade Agreement (NAFTA) kicks off in Montreal, Canada, this week, EFF has joined with 15 other organizations and 39 academic experts to send the negotiators an [open letter](#) [PDF] about the importance of platform safe harbor rules, a topic that has been [proposed for the deal's Digital Trade chapter](#). The proposed rules, which are based on [S47 U.S.C. section 230, a provision of the Communications Decency Act \("CDA 230"\)](#), would require that Internet intermediaries—whether giants like Facebook, or just your neighbour with an open Wi-Fi hotspot—[can't be held liable](#) for most speech of their users.

Usually our arguments for such strong platform safe harbor protections (which the letter refers to as intermediary immunity) center around how these support users' freedom of expression, by preventing would-be censors and critics from shutting down the platforms that host user speech. But as trade negotiators are not particularly receptive to [human rights arguments](#), instead our joint letter focuses on the economic arguments for platform safe harbors, which are also compelling:

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.

The difficulty with the inclusion of Section 230 style safe harbors in NAFTA is that it would either require Canada and Mexico to change their law, or it would require the provision to be watered down in order to become compatible with their existing law—which would make its inclusion pointless. Therefore, the first option is the better one. For Canada, in particular, strengthening legal protection for Internet platforms could help roll back the precedent set in the [Google v. Equustek](#) case, in which the Canadian Supreme Court required Google to globally de-index a website that purportedly infringed Canadian trade secret rights.

Although changing Canadian law to strengthen platform safe harbors would be a significant step, there are certainly [even tougher issues](#) pending in the NAFTA negotiations, such as dispute resolution, government procurement, and America's demand for a five-year sunset clause. Moreover, Canada is asking a lot of the United States, too; having this month filed a broad-ranging [World Trade Organization \(WTO\) complaint](#) [PDF] against the United States alleging that the latter is flouting WTO rules in the way that it imposes tariffs and duties on other countries. In that context, reaching an agreement on platform safe harbors could become an olive branch to bring the countries closer to an overall deal.

Exporting Section 230 to Mexico and Canada isn't the only reason to advocate for its inclusion in a modernized NAFTA. This negotiation comes at a time when Section 230 stands under threat in the United States, currently from the [SESTA and FOSTA proposals](#), which could escalate into demands that platforms also assume greater responsibility for other types of content. As uncomfortable as we are with the lack of openness of trade negotiations, baking Section 230 into NAFTA may be the best opportunity we have to protect it domestically.

Officially, this is the second-last round of NAFTA talks that has been scheduled, although it seems next to impossible that the talks could be resolved in the next round. The two more likely scenarios are either that President Trump will notify the other parties that the U.S. is withdrawing from the existing NAFTA, or that

additional rounds of negotiation will be scheduled after the Mexican general elections in July. Extending the negotiation would also leave more time for negotiators to begin to engage meaningfully with the public about platform safe harbors and other digital policy issues, which they have failed to do to date.

Frankly, we [don't think that trade agreements are the right place](#) to be negotiating rules for the Internet, and we'd rather that a Digital Trade chapter wasn't being negotiated at all, without significant reforms to the [transparency and openness of the negotiations](#). But if a Digital Trade chapter in NAFTA is inevitable, which seems to be the case, the better outcome for users is for broad platform safe harbor rules to be a part of that deal—both to protect users and innovators in the United States, and to ensure that the same level of protection applies North and South of the border.

JOIN EFF LISTS

Join Our Newsletter!

Email updates on news, actions, events in your area, and more.

Email Address

Postal Code (optional)

Anti-spam question: Enter the three-letter abbreviation for Electronic Frontier Foundation:

SUBMIT

RELATED UPDATES

Solutions for a Stalled NAFTA: Stop