

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

In re

Request for Comments on Negotiating
Objectives for a United States-Republic of
Kenya Trade Agreement

Docket No. USTR-2020-0011

**COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

Pursuant to the request for comments published by the Office of the United States Trade Representative (USTR) in the Federal Register at 85 Fed. Reg. 16,450 (Mar. 23, 2020), the Computer & Communications Industry Association (CCIA) submits the following comments on negotiating objectives for a U.S.-Republic of Kenya free trade agreement. CCIA represents technology products and service providers of all sizes, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. CCIA members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion.¹

I. Introduction

CCIA supports USTR's pursuit of a full-fledged trade agreement with Kenya, and welcomes the opportunity to dramatically expand existing market access currently available under the African Growth and Opportunity Act. In particular, USTR is strongly encouraged to make digital trade a priority of the negotiations and use this opportunity to develop a model for future U.S. trade deals with the wider African Continental Free Trade Area, and throughout the region.

There is great potential for growth in U.S.-Kenya trade, and both countries stand to benefit from increased trade and market access for Internet services, and Internet-enabled trade in goods and services. Kenya's digital economy continues to grow. In 2019, Kenya was identified as one of the top 10 developing and transition economies in Sub-Saharan Africa in the

¹ A list of CCIA members is available at <https://www.cciagnet.org/members>.

UNCTAD B2C E-commerce Index.² The digital transformation has also played a role in Kenya's agricultural market.³ While improvement is needed to expand Internet penetration, clear and consistent rules for digital trade could further enable digital services by encouraging investment and opening up new markets for e-commerce.

In setting its negotiating objectives, USTR should build off positive achievements in recent U.S. trade agreements including the U.S.-Mexico-Canada Agreement (USMCA) and the U.S.-Japan Digital Trade Agreement. These agreements should serve as the basis for negotiating priorities, especially with respect to the digital trade and intellectual property chapters, improving on areas where more can be done to further digital exports.⁴ The U.S. approach to trade agreements must reflect the increasing importance of Internet-enabled trade to the global market.

II. Recommendations for the Digital Trade Chapter

The U.S. should continue to negotiate strong digital trade commitments in free trade agreements.⁵ The Digital Trade chapter of USMCA and the U.S.-Japan Digital Trade Agreement are the gold standard of digital trade provisions, and the agreement with Kenya should reflect these texts. This includes, but is not limited to, commitments enabling cross-border data flows and removing localization requirements, source code protection, protections for online intermediaries for non-IP user-generated content, risk-based cybersecurity measures, artificial intelligence governance, electronic payments, competition, taxation, and sharing of open government data. The below section expands on some of these provisions, the opportunity to

² See UNCTAD B2C E-Commerce Index 2019, *available at* https://unctad.org/en/PublicationsLibrary/tn_unctad_ict4d14_en.pdf.

³ Brookings, *Foresight Africa 2020*, *available at* https://www.brookings.edu/wp-content/uploads/2020/01/ForesightAfrica2020_20200110.pdf at 59 (“There are several examples from across the globe that highlight the role of technology in transforming the lives of farmers. For example, today, through Hello Tractor, which connects tractor owners with farmers over text message, farmers in Nigeria, Ghana, and Kenya can seamlessly rent machines that they previously had to buy or could not access at all. Over 500,000 farmers have been reached with tractor services. About 60 percent of the farmers report higher productivity and more than 90 percent report overall improvement in quality of life.”).

⁴ Office of the U.S. Trade Rep., United States-Mexico-Canada Agreement Text (2018), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-statesmexico> [hereinafter “USMCA”]. See also Office of the U.S. Trade Rep., Summary of Objectives for NAFTA Renegotiation (Nov. 2017), <https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf>.

⁵ The provisions discussed in this section could be included in a specific Digital Trade Chapter, or in other chapters in a U.S.-Kenya agreement.

build upon some of these provisions, and their importance for inclusion in a U.S.-Kenya trade agreement.

A. Cross-Border Data Flows and Removing Localization Barriers

Cross-border data flows are critical to digital trade, and forced data localization mandates make it difficult for U.S. exporters to expand into new markets. Studies have found that “for many countries that are considering or have considered forced data localization laws, local companies would be required to pay 30-60% more for their computing needs than if they could go outside the country’s borders.”⁶ Another study found that the impact of recently proposed or enacted data localization legislation on GDP is “substantial” in seven countries.⁷ Recent analysis from the OECD has revealed an increasing level of restrictiveness for digitally-enabled services in part due to restrictions on cross-border movement of data.⁸ With an uptick in data-related barriers in recent years, trade discussions and clear rules are critical to ensure that any restrictions are consistent with existing international obligations and are targeted in a manner that does unreasonably limit legitimate cross-border trade.

A free trade agreement with Kenya presents an opportunity to set norms on opening cross-border data flows in trade agreements in the region, strengthening data flows between the U.S. and African countries. Commitments on data flows will enable digital trade and the U.S. should be ambitious in its negotiating objectives with respect to data flows to facilitate access to new markets and provide for opportunities in digital commerce in both regions. This is relevant with respect to U.S.-Kenya talks due to recent domestic legislation that could have the effect of restricting cross-border transfer of data absent clear rules.⁹

⁶ Leviathan Security Group, *Quantifying the Cost of Forced Localization* (2014), available at <https://static1.squarespace.com/static/556340ece4b0869396f21099/t/559dad76e4b0899d97726a8b/1436396918881/Quantifying+the+Cost+of+Forced+Localization.pdf>.

⁷ Matthias Bauer *et al.*, *The Costs of Data Localization* (ECIPE 2014), available at http://www.ecipe.org/wp-content/uploads/2014/12/OCC32014__1.pdf (finding that the GDP was reduced in the following countries with data localization policies: Brazil (-0.2%), China (-1.1%), EU (-0.4%), India (-0.1%), Indonesia (-0.5%), Korea (-0.4%), and Vietnam (-1.7%)).

⁸ OECD Services Trade Restrictiveness Index: Policy Trends up to 2020, available at <https://issuu.com/oecd.publishing/docs/oecd-stri-policy-trends-up-to-2020?fr=sNmVINzYxOTI3Mw>.

⁹ Office of the U.S. Trade Rep., 2020 National Trade Estimate Report, available at https://ustr.gov/sites/default/files/2020_National_Trade_Estimate_Report.pdf at 308 (Kenya’s Data Protection Act, 2019 “passed in November, includes unclear and potentially restrictive provisions governing the cross-border transfer of personal information. The Act requires that data controllers provide ‘proof’ that personal data will be secure as a condition for transferring the data outside Kenya, but does not describe what would constitute proof. The Act also requires consent of the data subject as a condition for the cross-border transfer of any ‘sensitive personal

B. *Protections for ‘Interactive Computer Services’ for Third-Party Content*

An agreement with Kenya should contain certain safeguards from liability for third-party content, reflecting the domestic regimes of both parties.¹⁰ Unpredictable liability rules for online intermediaries represent a considerable barrier to global Internet commerce. Guaranteeing minimum standards for the protection of Internet services from liability for third-party content is critical to promoting U.S. digital trade exports.¹¹ Recent U.S. trade agreement text provides the basis for these safeguards, while also making clear that these provisions are subject to GATS exceptions.¹² These provisions are consistent with U.S. law and will ensure that companies can continue to take steps to proactively remove objectionable content.¹³

C. *Measures to Secure Digital Trade and Promote Strong Cybersecurity*

Products and services that facilitate digital trade must be technologically secured. The United States and Kenya should continue efforts to promote regulatory cooperation and international standards for securing products and services. A trade agreement should also follow the USMCA in calling for risk-based cybersecurity measures, as it is the more effective approach in comparison to prescriptive regulation. A U.S.-Kenya trade agreement should also contain commitments to promote strongly encrypted devices and connections. Specifically, a trade agreement should prevent parties from compelling manufacturers or suppliers to use a specified algorithm or to provide access to a technology, private key, algorithm, or other cryptographic design details.

data,’ a broad category of information. Such conditions may prove burdensome for firms that supply services on a cross-border basis or depend on data processing systems located abroad. Additionally, the Act empowers a political official to prohibit the cross-border transfer of certain categories of data, creating uncertainty for businesses operating in Kenya that depend on cross-border data flows”).

¹⁰ EAC Electronic Transactions Act in 2015 (providing protection of intermediaries from liability for non-IP-protected third party content); 47 U.S.C. § 230.

¹¹ See CCIA, *Modernizing Liability Rules for Digital Trade* (2018), available at <http://www.cciainet.org/wp-content/uploads/2018/07/Modernizing-Liability-Rules-2018.pdf>.

¹² USMCA, *supra* note 4 at art. 19.17. See also Rachael Stelly, *Setting the Digital Standard for U.S. Trade Agreements*, Disruptive Competition Project (Aug. 9, 2019), <http://www.project-disco.org/21st-century-trade/080919-setting-the-digital-standard-for-u-s-trade-agreements/>.

¹³ USMCA also recognizes recent changes to § 230 of the Communications Decency Act and is consistent with U.S. law. The Annex (19-A) makes explicit reference to the recently-enacted FOSTA as a recognized example of an exception to these requirements under Article 32.1 (exceptions for measures to protect public morals).

D. Provisions to Enable Innovation in Next-Generation Technologies

Artificial intelligence (AI) and machine learning technologies increasingly impact cross-border trade, and free trade agreements will soon govern the development and growth of these technologies. To continue to use and export new AI technologies, businesses and users need a trade framework that allows them to move data and infrastructure safely across borders while ensuring that other countries will not misuse legal systems to impede the growth of new technologies. Trade rules that can facilitate the responsible cross-border growth of AI technologies include those on enabling cross-border data flows and removing localization requirements; encouraging governmental investment in and release of open data; identifying and sharing best practices for the responsible use of AI; cooperation and public-private collaboration on AI; and the adoption of innovation-oriented copyright rules that enable machine analysis of data. In addition, to ensure substantive convergence and avoid the potential for discriminatory outcomes, the United States and Kenya should agree to avoid adopting any measures that violate national treatment rules or give less favorable treatment to AI products or applications than they give to like products or applications without an AI component.

As a matter of good regulatory practice, the development and implementation of AI regulations should include: adopting a risk-based approach, including transparent processes for assessing, managing, and mitigating risks associated with specific AI applications; assessing whether potential risks can be mitigated or addressed using existing instruments and regulatory frameworks; considering whether any new or proposed regulation is proportionate in balancing potential harms with economic and social benefits; employing risk management best practices, including considering the risk-substitution impact of a specific AI application against a scenario where that application has not been deployed but baseline risks remain in place; and promoting the development of voluntary consensus standards to manage risks associated with AI applications in a manner that is adaptable to the demands of dynamic and evolving technologies.

E. Provisions to Maintain Clear Procedural and Substantive Standards in Competition Frameworks

Competition provisions in trade agreements help to propagate pro-competitive policies around the world. The United States and Kenya should promote and strengthen a common understanding of the importance of maintaining competitive markets that deliver long-run

consumer welfare benefits. These provisions also foster convergence on substantive principles and procedural norms that increase legal certainty for businesses and consumers across multiple jurisdictions. To increase convergence, the parties should agree to avoid targeted rules or thresholds for specific sectors or groups of companies, which create the potential for discretionary or discriminatory implementation of competition rules, including in the digital context.

F. Provisions to Enable Electronic Payments

Electronic payment (e-payment) systems which are interoperable across borders are critical in enabling the growth of cross-border digital trade. Trade policy can help drive the development of cross-border e-payment systems through commitments on the free flow of data including financial services data, promoting interoperability through international standards, and encouraging open innovation and competition through the adoption of open e-payment models such as real-time payments (RTP) systems and encouraging open application programming interfaces (APIs) to allow all e-payment service providers to compete.

G. Avoid Unilateral and Discriminatory Taxation Rules

International trade requires a consistent and predictable international tax system. Through this trade agreement, the U.S. and Kenya should maintain their commitment to reach a consensus-based multilateral solution to the tax challenges arising from the digitalization of the economy, and should agree to avoid any digital taxation measures that are discriminatory in nature and contravene long-standing principles of international taxation.

H. Provisions on Government Procurement

Governments are increasingly purchasing high-quality and secure cloud services as part of an effort to modernize, become more efficient and productive, and provide more online services to citizens. A U.S.-Kenya free trade agreement should reflect rules-based commitments to the promotion and open procurement of cloud services, while encouraging governments to broaden access to innovative and productivity-enhancing services.

III. Recommendations for the Intellectual Property Chapter

Strong digital economies benefit substantially from a balanced intellectual property regime. In addition to copyright protection, limitations and exceptions like the fair use doctrine

have been central to U.S. success, and contribute substantially to the U.S. economy and U.S. exports.¹⁴ The U.S. should commit to upholding these commitments in the intellectual property chapters of its FTAs, continuing with a trade agreement with Kenya.

A. Preserving Balance in Copyright Frameworks

A flexible copyright regime is critical for the continued growth of the digital economy. Principles such as fair use have been a cornerstone of U.S. copyright law from the beginning, and industries that rely on this right are a significant contributor to the U.S. economy and exports.¹⁵ CCIA released a report in 2017 on the economic contribution of fair use industries which found that these industries account for 16 percent of the U.S. economy and generate \$5.6 trillion in annual revenue.¹⁶ Fair use is also critical to activities central to new areas of innovation and cutting edge technology such as artificial intelligence and text and data mining.¹⁷

A balanced regime with appropriate limitations and exceptions is also what Congress intended when it granted Trade Promotion Authority (TPA) in 2015. TPA provides that the principal negotiating objectives of the United States should include promoting intellectual property in a way that facilitates legitimate digital trade.¹⁸ Committee reports from both chambers of Congress contained identical language elaborating on this mandate, specifically recognizing that trade agreements should “foster an appropriate balance in copyright systems, inter alia by means of limitations and exceptions consistent with the internationally recognized 3-step test.”¹⁹ USTR has also noted that the United States “seeks . . . the commitment of our free trade agreement partners to continuously seek to achieve an appropriate balance in their copyright systems, including through copyright exceptions and limitations.”²⁰

¹⁴ Andrew Szamosszegi & Mary Ann McCleary, *Fair Use in the U.S. Economy* (Capital Trade, Inc. 2017), <http://www.cciagnet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ European Alliance for Research Excellence, *The Global AI Race* (June 2018), <http://eare.eu/assets/uploads/2018/06/Global-AI-Race.pdf>.

¹⁸ Section 102(b)(5)(A)(ii) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015.

¹⁹ S. REP. NO. 114-42, at 17 (2015), *available at* <https://www.congress.gov/114/crpt/srpt42/CRPT-114srpt42.pdf>; H. REP. NO. 114-100, at 45 (2015), *available at* <https://www.congress.gov/114/crpt/hrpt100/CRPT-114hrpt100-pt1.pdf>.

²⁰ Office of the U.S. Trade Rep., *The Digital 2 Dozen* (2017), <https://ustr.gov/sites/default/files/Digital-2-Dozen-Updated.pdf>.

U.S. leadership in this area is due in part to the decision to codify fair use in 1976, at 17 U.S.C. § 107. The intellectual property chapter in a U.S. trade agreement should reflect this commitment. USTR should take the opportunity with the new agreement to build off the limitation language in USMCA,²¹ to include stronger language on the importance of “an appropriate balance” in copyright and related rights regimes.²²

Mandated technological protection measures (TPMs) are a frequent inclusion in U.S. trade agreements. Corresponding statutory exceptions to these anti-circumvention measures are a critical component of these provisions. Consistent with USMCA, any TPM provision should include exceptions to anti-circumvention that are consistent with 17 U.S.C. § 1201, including § 1201(f) on reverse engineering and interoperability, in providing limitations and exceptions to TPMs.²³

B. Intermediary Framework That Will Provide Certainty for U.S. Service Exporters

Intermediary liability protections for Internet service providers, such as the framework in Section 512 of the Digital Millennium Copyright Act, have also been critical to growing the U.S. digital economy by providing business certainty to U.S. investors and innovators.²⁴ U.S. trade policy has long reflected domestic copyright principles by including necessary intermediary protections for online services in trade agreements dating back to 2003.²⁵ Ensuring these protections are included in trade agreements is also consistent with Congressional intent under

²¹ See USMCA, *supra* note 4 at art. 20.64.

²² See Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 18.66.

²³ USMCA, *supra* note 4 at art. 20.H.11.

²⁴ Matthew Le Merle *et al.*, *The Impact of Internet Regulation on Early Stage Investment* (Fifth Era 2014), <http://www.fifthera.com/s/Fifth-Era-report-lr.pdf>.

²⁵ See U.S.-Austl. Free Trade Agreement, May 18, 2004, 43 I.L.M. 1248, art. 17.11, para. 29; U.S.-Bahr. Free Trade Agreement, Dec. 7, 2005, 44 I.L.M. 544, art. 14.10, para. 29; U.S.-Chile Free Trade Agreement, June 6, 2003, 42 I.L.M. 1026, art. 17.11, para. 23; U.S.-Colom. Free Trade Agreement, Nov. 22, 2006, art. 16.11, para. 29; U.S.-S. Kor. Free Trade Agreement, June. 30, 2007, art. 18.10, para. 30; U.S.-Morocco Free Trade Agreement, June 15, 2004, art. 15.11, para. 28; U.S.-Oman Free Trade Agreement, Jan. 19, 2006, art. 15.10, para. 29; U.S.-Pan. Trade Promotion Agreement, June 28, 2007, art. 15.11, para. 27; U.S.-Sing. Free Trade Agreement, May 6, 2003, 42 I.L.M. 1026, art. 16.9, para. 22.

TPA.²⁶ USMCA continues this tradition, drawing directly upon Title 17 of the U.S. Code.²⁷ The negotiating objectives with Kenya should do the same.

IV. Recommendations for the Telecommunications Chapter

Kenya is one of a number of African countries that have local ownership requirements for telecommunications providers. Flexibility on local ownership requirements would better facilitate market access. Industry also reports that equipment delivery can be delayed due to different types of approval regimes, and that mutual recognition for approval processes could better facilitate operations.

V. Conclusion

CCIA welcomes the U.S. decision to negotiate a free trade agreement with Kenya, and encourages USTR to use this opportunity to negotiate an agreement that can serve as a model going forward in the region.

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Sincerely,

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²⁶ H. REP. NO. 114-100, at 46 (2015) (“Strong intellectual property rights protection should be accompanied by provisions on liability that are consistent with U.S. law, including the Digital Millennium Copyright Act, and that provide limitations on the scope of remedies available against service providers for copyright infringements they do not control, initiate, or direct, and that take place through systems or networks, controlled or operated by them or on their behalf. Such limitations also must create legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage, and transmission of copyrighted materials.”).

²⁷ USMCA, *supra* note 4 at art. 20.J.10-11.