



Intermediary Liability Protections & Trade: What The USMCA Text Actually Says

America's intermediary liability protections have fostered a thriving digital economy over the past two decades. In 2018, America exported more than \$450 billion in digital services exports, much of which was enabled by intermediary liability protections. Digital services now represent the largest trade surplus of any industry. With this in mind, it's critical for Congress to pass USMCA. Below is a look at what the intermediary liability text in USMCA means:

USMCA and U.S. law both make clear that if it is illegal offline, it is also illegal online. Both contain a clear exception for enforcement of federal criminal laws and allows enforcement of consistent state laws. Nothing in this agreement prevents the U.S. federal government (or Canada or Mexico) from taking actions to enforce their laws online.

This line makes clear that USMCA does not supersede previous changes to the U.S.'s intermediary liability laws and that similar, future changes are not precluded.

Intermediary liability protections allow online platforms to host content like customer reviews and user ratings, which are critical for small businesses looking to export.

USMCA Intermediary Liability Text

Article 19.17: Interactive Computer Services

1. The Parties recognize the importance of the promotion of interactive computer services, including for small and medium-sized enterprises, as vital to the growth of digital trade.
2. To that end, other than as provided in paragraph 4, no Party shall adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information.⁷
3. No Party shall impose liability on a supplier or user of an interactive computer service on account of:
 - a. any action voluntarily taken in good faith by the supplier or user to restrict access to or availability of material that is accessible or available through its supply or use of the interactive computer services and that the supplier or user considers to be harmful or objectionable; or
 - b. any action taken to enable or make available the technical means that enable an information content provider or other persons to restrict access to material that it considers to be harmful or objectionable.
4. Nothing in this Article shall:
 - a. apply to any measure of a Party pertaining to intellectual property, including measures addressing liability for intellectual property infringement; or
 - b. be construed to enlarge or diminish a Party's ability to protect or enforce an intellectual property right; or
 - c. be construed to prevent:
 - i. a Party from enforcing any criminal law; or
 - ii. a supplier or user of an interactive computer service from complying with a specific, lawful order of a law enforcement authority.⁸
5. This Article is subject to Annex 19-A

Annex 19-A

1. Article 19.17 (Interactive Computer Services) shall not apply with respect to Mexico until the date of three years after entry into force of this Agreement.
2. The Parties understand that Articles 145 and 146 of Mexico's Ley Federal de Telecomunicaciones y Radiodifusión, as in force on the date of entry into force of this Agreement, are not inconsistent with Article 19.17.3 (Interactive Computer Services). In a dispute with respect to this article, subordinate measures adopted or maintained under the authority of and consistent with Articles 145 and 146 of Mexico's Ley Federal de Telecomunicaciones y Radiodifusión shall be presumed to be not inconsistent with Article 19.17.3 (Interactive Computer Services).
3. The Parties understand that Mexico will comply with the obligations in Article 19.17.3 (Interactive Computer Services) in a manner that is both effective and consistent with Mexico's Constitution (Constitución Política de los Estados Unidos Mexicanos), specifically Articles 6 and 7.
4. For greater certainty, Article 19.17 (Interactive Computer Services) is subject to Article 32.1 (General Exceptions), which, among other things, provides that, for purposes of Chapter 19, the exception for measures necessary to protect public morals pursuant to paragraph (a) of Article XIV of GATS is incorporated into and made part of this Agreement, mutatis mutandis. The Parties agree that measures necessary to protect against online sex trafficking, sexual exploitation of children, and prostitution, such as Public Law 115-164, the "Allow States and Victims to Fight Online Sex Trafficking Act of 2017," which amends the Communications Act of 1934, and any relevant provisions of Ley General para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas y para la Protección y Asistencia a las Víctimas de estos delitos, are measures necessary to protect public morals.

⁷ For greater certainty, a Party may comply with this Article through its laws, regulations, or application of existing legal doctrines as applied through judicial decisions.

⁸ The Parties understand that measures referenced in paragraph 4(c)(ii) shall be not inconsistent with paragraph 2 in situations where paragraph 2 is applicable.

This provision ensures that good actors in the online ecosystem can continue to enforce codes of conduct on their platforms and moderate harmful content.

Nothing in this section of USMCA would impact companies' IP rights or their ability to enforce them. This provision makes clear these intermediary liability protections do not protect illegal IP violations.

USMCA clearly states that the three countries, including the U.S., retain the ability to adapt their laws to address illegal activity and any issues dealing with public morals.

USMCA says that the intermediary liability provisions in the agreement don't require any new changes to U.S. law, nor do they alter the existing 20 years of case law.