



Via: Email and Registered Mail

September 11, 2017

Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508
USA

Attention: Mr. Robert E. Lighthizer, U.S. Trade Representative

Attention: Mr. John M. Melle, Assistant U.S. Trade Representative for the Western Hemisphere and Chief NAFTA Renegotiator

Dear Sirs:

**RE: NAFTA RENEGOTIATIONS:
Unfair Canadian Protectionist “Presence Requirements” for .CA Domain Names
Stifles U.S. Internet Commerce Competition and Market Access**

We write to you on behalf of members of the Internet Commerce Association. Founded in 2006, the Internet Commerce Association (ICA) is a non-profit trade organization representing domain name investors, website developers and related companies. The ICA is made up of responsible businesses and individuals who have joined together to improve public confidence in Internet commerce. Based in Washington D.C., the ICA’s mission is to assist with the development of domain name related policy and to advocate for fairness in government policy and regulation.

While we certainly recognize the importance of Canada maintaining control of its national domain name and Canada’s interest in keeping the .ca space “Canadian”, we want to bring to your attention a longstanding Canadian protectionist domain name policy which has resulted in a grossly uneven playing field for American e-commerce businesses who want to enter the Canadian market. As you know, domain names play a fundamental role in Internet commerce by providing a location or “storefront” for Internet retailers. To-date, Canada has substantially hindered and prevented Americans from obtaining .CA (Canadian) Internet domain names which are integral to fair and successful entry into the Canadian e-commerce market. ICA’s position is that U.S. businesses should have the same opportunity to register Canadian .CA country code top level domain (ccTLD) names, as Canadian businesses have to register United States .US ccTLD domain names, and we urge the USTR to advance that position in ongoing negotiations.



When NAFTA was signed in 1992, the commercial Internet was in its infancy and was therefore not a subject matter for the United States' negotiations with Canada and other North American nations. According to recent statistics, however, Canadians spent USD \$25.6 billion shopping online last year according to researcher eMarketer and Bloomberg calculations.¹ We are aware that the United States is now taking Internet commerce with Canada seriously, and has already requested that Canada raise the value of goods that Canadians can buy online without paying import duties to US \$800, up from its current unrealistic and prohibitively low level of CDN \$20. The United States seems well aware that by keeping its duty free allowance at CDN \$20, the Canadian government has been protecting its Canadian online retailers from competition by U.S. online retailers.

What may have escaped notice however is that aside from the grossly unfair duties on online sales, Canada has erected substantial and longstanding barriers to U.S. businesses obtaining .CA domain names. The "Canadian Internet Registration Authority" ("CIRA") manages the .CA domain space. Since November 8, 2000, CIRA has enacted so-called "Canadian Presence Requirements"², a copy of which is attached herewith for your ease of reference. In order for anyone to register a .CA domain name, such as widgets.ca, the "Canadian Presence Requirements" must be met, which require that the registrant be Canadian. Several categories of "Canadian" exist, such as inter alia, a Canadian citizen, a permanent resident of Canada, a Canadian or Canadian provincial corporation, or a Canadian trademark holder.

What this means in effect, is that any U.S. entity or organization that wants to register a .CA domain name simply can't, unless they either incorporate in Canada or wait months or years to obtain a Canadian trademark registration. Incorporating in Canada is a substantial expense and also necessarily involves filing of annual Canadian corporate tax returns and annual corporate maintenance, which adds an additional costly layer of expense and red tape for U.S. business that their Canadian counterparts are not subject to. Obtaining a Canadian trademark is also not a viable solution for a U.S. business wanting to immediately enter the Canadian online market, as it forces U.S. businesses to wait months or even years for approval by the Canadian Intellectual Property Office before a trademark registration is granted which would permit the U.S. business to register a .CA domain name. This puts U.S. competitors at a severe disadvantage to Canadians, who can open up their online business with a .CA domain name right away, with no waiting period whatsoever.

Although U.S. business are not required to obtain a .CA domain name in order to sell online to Canadians, according to CIRA's own documentation and research, "62% of Canadian Internet users prefer making purchases from Canadian websites over American ones".³ And how does an

¹ See "E-commerce goes north, forcing Canada's retailers out of hibernation" The Record, May 12, 2017 (<https://www.therecord.com/news-story/7312657-e-commerce-goes-north-forcing-canada-s-retailers-out-of-hibernation/>).

² See <https://cira.ca/assets/Documents/Legal/Registrants/CPR.pdf>

³ See CIRA, "Most Canadians prefer to buy from Canadian Companies when shopping online", March 23, 2016; located at; <https://cira.ca/press-releases/most-canadians-prefer-buy-canadian-companies-when-shopping-online>; and also see "The State of E-Commerce in Canada – CIRA Internet Fact Book", March 2016; <https://cira.ca/press-releases/most-canadians-prefer-buy-canadian-companies-when-shopping-online>



Internet user identify a “Canadian” website over an “American” one? The most obvious way is by identifying whether the website uses a .CA domain name. Furthermore, it is well known and also acknowledged by CIRA⁴, that having a .CA domain name assists business in ranking higher in search engines within the associated country.

What that means in effect for U.S. businesses is that if they do not obtain a .CA domain name, they are substantially prejudiced as a competitor in the Canadian Internet marketplace. By creating substantial financial barriers and red-tape obstacles to U.S. businesses seeking to obtain a .CA domain name, CIRA has effectively given Canadian business an unfair advantage. Countless U.S. businesses that want to reflect their brand in a .CA domain name and do business in Canada have been turned away by CIRA due to these unfair and prejudicial Canadian Presence Requirements. Other U.S. businesses that have been forced to comply with the Canadian Presence Requirements face thousands of dollars of punitive government and professional fees, just for being able to enter the Canadian Internet commerce marketplace in a fully competitive manner.

By contrast, Canadian businesses seeking to obtain an .US ccTLD domain name face substantially lower barriers⁵. The “usTLD Nexus Requirements Policy”⁶ allows any “foreign entity or organization that has a bona fide presence in the United States of America or any of its possessions or territories” to register a .US domain, and the non-exclusive factors evidencing such bona fide presence encompasses any potential registrant that “regularly performs lawful activities within the United States related to the purposes for which the entity or organization is constituted (e.g., selling goods or providing services to customers, conducting regular training activities, attending conferences)” or that “maintains an office or other facility in the United States for a lawful business, noncommercial, educational or governmental purpose “. Canadian businesses need not have an office or other physical presence in the United States to register an .US domain, much less incorporate or obtain a trademark in our nation. U.S. businesses providing goods and services to Canadians should be able to register .CA domains on equivalent terms in order to be able to fully compete in that nation’s online marketplace.

The purpose of NAFTA was to promote fair competition and eliminate barriers to trade. As stated in NAFTA’s objectives, at [Article 102\(a\)](#), the purpose of NAFTA was, inter alia, to:

- eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
- promote conditions of fair competition in the free trade area; and

⁴ See; CIRA, “Incorporating domain names into your business strategy”, February 21, 2015; <https://cira.ca/blog/ca-domains/incorporating-domain-names-your-business-strategy>

⁵ The .US ccTLD is currently operated by Neustar, Inc. under a contract entered into in 2014 with the National Telecommunications & Information Administration (NTIA) of the Department of Commerce. See <https://www.ntia.doc.gov/page/2011/us-domain-space> .

⁶ <http://www.about.us/policies/ustld-nexus-requirements>



- increase substantially investment opportunities in the territories of the Parties.

Pursuant to Article 1204 of NAFTA:

No Party may require a service provider of another Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border provision of a service.

Furthermore, there are no reservations made by Canada pursuant to Annex 1 of NAFTA which appear to purport to reserve any existing or future measures applicable to domain names.

Accordingly, it appears that CIRA's Canadian Presence Requirements are a direct violation of Canada's commitments under NAFTA, and should be the subject of compliance procedures and/or renegotiation.

Accordingly, we respectfully request that you take the foregoing into account in your NAFTA renegotiations, with a view to creating a level playing field for U.S. businesses when it comes to doing online business with Canada. We ask that U.S. business be given the same and equal opportunity to register .CA domain names as Canadians have to register .US domain names.

Finally, this letter solely addresses the disparity between .CA and .US domain registration requirements because U.S. businesses do not face similarly obstructionist nexus or presence requirements when they seek to register a .MX domain in Mexico's ccTLD.

We would like to reiterate that we are not opposed to a "Canadian Presence Requirement" per se, but want to see the policy reformed so that it is more conducive to business while still maintaining important qualifications for registration.

If we can provide further information on this subject we would be happy to do so. Our Counsel can be reached directly at 202-559-8597 or at psc@vlaw-dc.com.

Yours truly,
INTERNET COMMERCE ASSOCIATION

Per:

Philip S. Corwin, Counsel