



Comments to the Department of Commerce
Office of the Secretary;
National Telecommunications and Information Administration;
International Trade Administration;
National Institute of Standards and Technology

Notice of Inquiry
on the
Global Free Flow of Information on the Internet
Docket No. 100921457-0457-01

Executive Summary

Introduction

Types of Restrictions on the Free Flow of Information on the Internet

Impact of Restricted Internet Information Flows on Innovation, Trade and Commerce

An Agenda to Preserve and Enhance the Free Flow of Information Online

U.S. Government has Opportunity to Focus on Real Solutions

Ensure that Liability Regimes Do Not Create Restrictions on Expression and Information Flows at the Internet Intermediary Level

Attached: Enabling Trade in the Era of Information Technologies: Breaking Down Barriers to the Free Flow of Information, a Google whitepaper

Executive Summary

Google thanks the Department of Commerce for examining the impact of restrictions on the global free flow of information, and for recognizing the important role that the flow of electronic information plays in global commerce. We particularly appreciate the Department's work to promote unimpeded information flows and its effort through the Notice of Inquiry to develop enhanced strategies to advance this agenda.

Protecting and promoting the flow of information and free expression are core Google values. After all, it is our company's mission to "make the world's information universally accessible and useful," whether a user is in New York, London, or Tokyo. Free expression and the free flow of information are also vital to our business. When our services are blocked or filtered our users are unable to access search results, both organic and paid, and our advertising revenues decline.

More broadly, the free flow of information enables all of the Internet services and commerce that are central to economic growth and job creation in the 21st century. The tremendous economic benefits of the Internet are the result of its open architecture, its connective power, and its ability to make information accessible

everywhere around the world. Restrictions on the flow of information inherently limit (and, in some cases, entirely disrupt) the Internet's ability to support and drive the growth (including in exports) of industries that directly or indirectly rely on it. International rules should be established to prevent these types of restrictions, and the U.S. Government should act to protect the free flow of information internationally. The Internet's potential to spur economic growth is only beginning to be realized. Regulations or policies that hamper and Balkanize the Internet negatively impact this potential for growth and development in both mature and nascent markets.

This submission proposes a multi-pronged governmental strategy to promote the global free flow of information:

- Catalog and publicly highlight as unfair trade barriers those practices by governments that restrict or disrupt the flow of online information services.
- Take appropriate action where particular government restrictions on the free flow of online information violate international trade rules.
- Establish new international trade rules -- under bilateral, regional, and multilateral agreements -- that mandate transparency, provide additional assurances in favor of the free flow of information on the Internet, and ensure that Internet intermediaries can function effectively.

In addition, it should take care to implement this agenda by working in coordination with on-the-ground industry, non-governmental organizations, and academic entities that are best able to act on behalf of global Internet users and to promote the free flow of information. These kinds of groups are best able to drive effective solutions and ensure that they adapt to new technologies. Intergovernmental organizations, by contrast, are slow-moving by design and increasingly dominated by nations that not only block free expression but also favor companies that are government-controlled or owned by their citizens.

This is an ambitious but achievable agenda that encourages openness and limits the disruptions of Internet information flows, and – in turn – leads to new jobs and exports and opportunities that advance the nation's overall economic priorities.

Introduction

Google is pleased that the Department of Commerce is looking into the economic effects of restrictions on information flows. The work done by the Department to promote job creation, encourage the development of new infrastructure, foster technological competitiveness, and advance the goals of sustainable development, is of fundamental importance to the continuing growth in information industries and increasing international trade and exports in this sector. Each of these efforts is a key contributor to the conditions that ensure that the Internet remains an economic engine for the United States and the rest of the world.

The free flow of information is another key and necessary condition for growth in information services worldwide. The Internet's open architecture is a fundamental prerequisite to its economic benefits, and the United States has the opportunity to show leadership in this area. Economists agree that an open Internet has been and remains an absolutely critical piece of the new information economy's ability to empower individuals and create shared information markets. Moving away from an open Internet will significantly cramp its future potential, and severely limit the ability of technology companies to research, and compete in, or bring products to, international markets.

Nevertheless, according to the Open Net Initiative more than 40 governments today are restricting information online to varying degrees, a tenfold increase from just a decade ago.¹ Governments are incorporating surveillance tools into their Internet infrastructure; blocking online services in their entirety; imposing new, secretive regulations; and mandating onerous licensing. These actions often unnecessarily restrict trade, and left unchecked, they will almost certainly become worse. Moreover, governments are engaging in practices that benefit home-grown enterprises, making it harder for foreign companies to compete in those markets. China's indigenous innovation policies that promote favored industries and limit imports are just one example of how recently enacted regulations have harmed U.S. exporters.² Thus, Internet and Internet-dependent companies are facing a very difficult international trade environment in which information platforms and services are impeded, businesses' revenue streams are undercut, access to information in key markets is disrupted, and discrimination against U.S. and other multinational businesses grows.

Google and many other companies have been adversely impacted by increasing restrictions on international information flow. These restrictions limit the ability of large technology companies like Google to compete in global markets, and they disproportionately burden entrepreneurs -- technology companies and purveyors of traditional goods and services attempting to reach new markets abroad through digital channels.

As discussed in more detail in the rest of this submission, foreign governments are regulating Internet information flows in ways that can and have had a significant impact on the ability of companies to do business abroad. These actions demand a response from the U.S. and other affected governments to ensure an open and level playing field worldwide. Google also urges the Department to consider carefully existing and proposed U.S. regulations that could also have the effect of restricting the flow of information, and with it the international competitiveness of U.S. companies. The U.S. is the birthplace of the Internet, and it must continue to set an example of responsible regulation that enables individuals and companies to enjoy and build on the many benefits of the free flow of digital information. In order to advocate effectively for openness that benefits our companies and nation, we must adopt and implement policies that can serve to demonstrate to the world the short and long term benefits of an open information environment.³

Types of Restrictions on the Free Flow of Information on the Internet

Like most companies that make content available or facilitate the flow of information across borders, Google has experienced the effect of restrictions of information firsthand, often in the light of the media. More than 20 governments have blocked some or all Google services, or demanded restrictive conditions for allowing their access within their borders.

Governments have pursued four basic strategies to control information on the Internet:

¹Open Net Initiative, *More than half a billion Internet users are being filtered worldwide*

(2010), <http://opennet.net/blog/2010/01/more-half-a-billion-internet-users-are-being-filtered-worldwide>.

²U.S.-China Economic and Security Review Commission, *2010 Report to Congress* 46 (November 17, 2010).

³Exports to Iran, which include downloads of products like Google Earth and Talk, which may be used as vital communication resources for citizens on the ground, are expressly forbidden due to sanctions against Iran. See U.S. Dept. of Treasury Office of Foreign Assets Control, *An overview of O.F.A.C. Regulations involving Sanctions against Iran 2* (October 15, 2010).

- Technical blocking of access to an entire Internet service (*e.g.*, a search engine, an online store, a platform for hosted content) or specific keywords, web pages, and domains.
- Licensing requirements or other means to force companies to remove search results, making it more difficult for users to locate particular content.
- Take-down requirements demanding the removal of certain websites, enforced by legal orders or by making whole domains invisible to users.
- Encouragement of self-censorship through means including surveillance and monitoring, threats of legal action, and informal methods of intimidation.⁴

Most government control of Internet information consists of either wholesale government blockage of an Internet service, or regulation of the content the service may carry. Wholesale government blockage of an Internet service is tantamount to a customs official stopping certain goods at the border, a well-recognized trade barrier. In other cases, governments demand that as a condition of providing services to a particular market, companies like Internet service providers and search engines block or disrupt services, websites, and content. In either situation, the result is a restriction on the ability of Internet companies to provide their services (and generate revenue accordingly), and a disruption in the trade of all other enterprises that use these services.

Specific examples of Google's experience with censorship and information restrictions have been documented in the press, and we have provided an appendix to this submission that offers a more complete list of incidents that have affected Google services. We hope that the Department continues to encourage companies to share these experiences in order to bring more transparency to the nature of the problem and facilitate a better understanding of how to address most effectively the illegitimate blockage of information flow.

Some limitations on Internet information flows are done in a manner, and for reasons, that are justifiable in the public interest. Restrictions on child pornography, requests for information to be used to pursue legitimate criminals or preserve national security, and protection of copyright and intellectual property can often be legitimate reasons to regulate information flow. User protection regimes, such as spam blocking, can also fall into this category. Different public policy objectives may, however, call the appropriate degrees of tolerable restriction into question.

In contrast, a number of governments worldwide have implemented various kinds of information restriction in order to suppress information and dissent or support businesses. Far too many governments around the world now impose limitations on online free expression for political reasons -- in order to limit debate about government actions; obscure official failures; or quell discussion of controversies that deserve public debate. Governments in China, Iran, Myanmar, Syria, Tunisia, Vietnam and elsewhere have employed a wide variety of techniques in order to ban websites -- blogs, search engines, video sites and more -- that question their

⁴These four basic techniques were identified by the Open Net Initiative, a collaborative partnership of researchers at the University of Toronto, Harvard University, the University of Cambridge and Oxford University. See Open Net Initiative, *About Filtering*, <http://opennet.net/about-filtering>. Others use different taxonomies to describe the range of efforts to control information on the Internet. See, e.g., Congressional-Executive Commission on China, *Hearing on Google and Internet Control in China: A Nexus Between Human Rights and Trade?* (Mar. 24, 2010) (statement of Rebecca MacKinnon, Visiting Fellow, Center for Information Technology Policy, Princeton University).

policies, report on uprisings, or challenge official interpretation of current and historical events. They have also developed increasingly sophisticated techniques to help them track dissidents and have punished and jailed hundreds. The crackdown on opposition protesters in Iran that followed elections in the summer of 2009 is a case in point.

Impact of Restricted Internet Information Flows on Innovation, Trade and Commerce

The Internet has rightfully been labeled a “general purpose technology enabler” – a once-in-a-generation technological development that fundamentally changes how economic activity is organized and enables a productivity leap. The rapid spread of the Internet has also created new, rapidly expanding markets. Online traffic has increased at a compound annual growth rate of 66 percent over the past five years.⁵ Today more than one-quarter of the world’s population (1.7 billion people) uses this technology to communicate, inform, create, and buy and sell across borders.⁶ These 1.7 billion Internet users are a massive new consumer base for both Internet services like email and the hard goods and services that are increasingly advertised, marketed, or sold online.

Internet companies are major sources of employment and drivers of economic growth. In the United States, the Internet industry has created more than 3 million jobs.⁷ They range from familiar multinational firms to some 20,000 small businesses with fewer than 500 employees.⁸ These industries contribute at least \$300 billion to the U.S. GDP.⁹ Annual Internet-based commerce worldwide is expected to soon reach \$1 trillion;¹⁰ in the U.S. alone, online retail sales were over \$132 billion in 2008.¹¹ Globally, Internet and telecommunications services contributed 3.3 percent of GDP in 2004, compared with 1.8 percent in 1990, with virtually every single economy enjoying growth in the sector.¹² If a web site is taken out of service for seven days, it will have an impact on revenue equivalent to 2% of total annual turnover¹³. In a developing, low-margin market, a couple of weeks of blockage are enough to eliminate a company’s annual profit.

⁵Fed. Comm’n Comm’n [FCC], *Connecting America: The National Broadband Plan* ch. 4 (2010).

⁶Miniwatts, Internet World Stats, *Internet World Users by Language: Top Ten Languages* (chart) (Sept. 30, 2009), <http://www.internetworldstats.com/stats7.htm>; Int’l Telecomm. Union [ITU], *The World in 2009: ICT Facts and Figures 1* (2009), http://www.itu.int/ITU-D/ict/material/Telecom09_flyer.pdf. The total number of fixed broadband subscribers reached nearly 500 million by the end of 2009. *Id.* at 5.

⁷Hamilton Consultants, *Economic Value of the Advertising Supported Internet Ecosystem* 24 (June 10, 2009).

⁸Hamilton Consultants, *Economic Value of the Advertising Supported Internet Ecosystem* 56 (June 10, 2009).

⁹Hamilton Consultants, *Economic Value of the Advertising Supported Internet Ecosystem* 56 (June 10, 2009).

¹⁰Brian Hindley & Hosuk Lee-Makiyama, *Protectionism Online: Internet Censorship and International Trade Law* 3 (ECIPE, Working Paper No. 12/2009), available at <http://ecipe.org/publications/ecipe-working-papers/protectionism-online-internet-censorship-and-international-trade-law>.

¹¹U.S. Census Bureau, *Estimated Quarterly U.S. Retail Sales (Adjusted): Total and E-commerce* (chart) (May 15, 2009), <http://www.census.gov/mrts/www/data/html/09Q1table3.html>.

¹²Int’l Telecomm. Union [ITU], *digital.life: ITU Internet Report 2006* 73 (2006), <http://www.itu.int/osg/spu/publications/digitalife/docs/digital-life-web.pdf>.

¹³ECIPE: Protectionism Online: Internet Censorship and International Trade Law

Internet firms have evolved into central figures in international trade. According to a study by Hamilton Consultants, large U.S. Internet corporations earn about one-half their revenues outside the U.S..¹⁴ In the case of Google, revenues from outside of the U.S. comprised 53 percent of total revenues in the first quarter of 2010, and more than half of Google searches come from outside the U.S..¹⁵ And even in more traditional sectors, like the goods and services businesses, the Internet has also been transformative. The Internet has empowered businesses of all sizes to reach international markets in ways unimaginable a generation ago. It has dramatically reduced the high entry costs to export markets that has for centuries kept most small business limited to local geography. This transformation of industry happens in both the industrial and developing world. In the U.S. state of Georgia, a small manufacturing operation is reaching out to international customers through Internet advertising.¹⁶ In Idaho, a wilderness tourism company has attracted international customers through online search ads.¹⁷ And in the South American nation of Guyana, women are using online marketing to sell hand-woven hammocks to people around the world.¹⁸

Many companies also rely on particular Internet services as their key advertising platform. For instance, companies are projected to spend over \$225 billion on Internet advertising over the next three years (2011-2013).¹⁹ Google alone generated more than \$54 billion in economic activity for its business partners in the U.S. in 2009, based largely on the returns that businesses received from advertisements run next to search results and on websites.²⁰

Thus, the importance of the Internet to the U.S. economy, including with respect to export growth is clear and demonstrable. According to one recent study, a 10 percent increase in Internet penetration is associated with a 1.7 percent increase in export growth in the services sector. A similar (albeit lower) correlation pertains to trade in goods.²¹ Another study that compared the role of the Internet and that of port facilities in trade facilitation found that the Internet is at least as important in facilitating trade. Improving the speed and affordability of Internet access could lead to a 4 percent increase in trade in manufactured goods, compared to a 2.8 percent increase associated with improving port efficiency.²² But the potential in these numbers can

¹⁴Hamilton Consultants, *Economic Value of the Advertising Supported Internet Ecosystem 7* (June 10, 2009). Note that the jobs measured by Hamilton Consultants are merely advertising supported jobs. As such, the number of jobs created by the broader advertising industry is higher.

¹⁵Google Investor Relations, *Google Announces First Quarter 2010 Financial Results* (Apr. 15, 2010), http://investor.google.com/earnings/2010/Q1_google_earnings.html.

¹⁶Google, *Google in Georgia*, in *Google's Economic Impact: United States 2009* (2009), available at http://www.google.com/economicimpact/pdf/google_economicimpact.pdf.

¹⁷Google, *Google in Idaho*, in *Google's Economic Impact: United States 2009* (2009), available at http://www.google.com/economicimpact/pdf/google_economicimpact.pdf.

¹⁸Simon Romero, *Weavers Go Dot-Com, and Elders Move In*, N.Y. Times, Mar. 28, 2000, available at http://www.nytimes.com/learning/teachers/featured_articles/20000330thursday.html.

¹⁹PriceWaterhouseCoopers, *Global Entertainment and Media Outlook 2009-2013* 30 (2009).

²⁰Google, *Google's Economic Impact: United States 2009* (2009), available at http://www.google.com/economicimpact/pdf/google_economicimpact.pdf.

²¹Caroline Freund & Diana Weinhold, *The Internet and International Trade in Services*, 92 A.E.A. Papers & Proc. 236, 236 (2002); see also Caroline Freund & Diana Weinhold, *The Effect of the Internet on International Trade*, 62 J. Int'l Econ. 171, 172 (2004) (for trade in goods).

²²United Nations Economic and Social Commission for Asia and the Pacific & Asian Development Bank, *Designing and Implementing Trade Facilitation in Asia and the Pacific* 85 (2009), available at

only be realized if the Internet remains an open environment where information flows freely and innovation is not thwarted by roadblocks.

Behind the big picture numbers, there is particular technical functionality and economic activity that is disrupted by restrictions on the flow of information across the Internet.

Government restrictions on accessibility of information on the Internet disrupt market access of services and goods providers. When a foreign government blocks or technically interferes with a website, the Internet business occurring through that site cannot reliably offer its services, attract users, or serve advertisements to Internet users in that country. The government action is the equivalent of shuttering the windows of a brick-and-mortar store, or, in the case of technical interference, stopping every third or fourth customer from entering the store. For companies that are breaking into new markets, disruption of the services for even short periods of time can disrupt business plans and block their visibility to new customers at critical moments.

And the business disruption is particularly pronounced where a government interferes with a so-called Internet intermediary website, as it also affects all of the business and individuals that use the site to communicate, trade, and advertise, including small businesses for which the Internet is the only available means to reach a broad audience. Companies that sell or advertise goods and services on intermediary sites are severely impacted when the site is blocked or becomes unstable in a particular country: examples include a small business that advertises on Google search through AdWords but cannot reach certain markets when the search service is blocked; an artist or music publisher who cannot reach a certain market when an entire online music store goes offline; a manufacturer selling goods when an online marketplace like eBay is interrupted.

Consider the example where a government takes a website out of service for one week. For the intermediary company offering the service, that break will decrease revenue for the site by at least 2 percent on an annual basis.²³ For the company that uses the platform to advertise or sell goods and services, there will be a similar drop and a loss of trust in the platform. And given users' tendency to move to new services when the ones they use do not load quickly, let alone services that disappear for a week – the resulting perception of unreliability could result in both short- and long-term decreases in traffic.²⁴ In one study, over three-quarters of consumers said they would be less likely to return to a site that took too long to load.²⁵

More fundamentally, restrictive rules related to the flow of information change the nature of the service that an Internet company can provide in a given market. The core business of intermediary companies is to

<http://www.unescap.org/publications/detail.asp?id=1352> (citing John S. Wilson et al., *Assessing the Potential Benefit of Trade Facilitation: A Global Perspective* 24-32 (World Bank, Policy Research Working Paper 3224, 2004)).

²³Brian Hindley & Hosuk Lee-Makiyama, *Protectionism Online: Internet Censorship and International Trade Law* 6 (ECIPE, Working Paper No. 12/2009), available at <http://ecipe.org/publications/ecipe-working-papers/protectionism-online-internet-censorship-and-international-trade-law>.

²⁴ShanShan Qi et al., *A Study of Information Richness and Downloading Time for Hotel Websites in Hong Kong*, in *Information and Communication Technologies in Tourism: 2008* 267, 268 (Peter O'Connor et al. eds. 2008) (citing C. Ranganathan & S. Ganaphy, *Key Dimensions of Business-to-Consumer Websites*, *Info. & Mgmt.*, 39(6), 457-465 (2002)),

²⁵JupiterResearch, *Retail Web Site Performance: Consumer Reaction to a Poor Online Shopping Experience* 5-7 (2006), available at http://www.akamai.com/dl/reports/Site_Abandonment_Final_Report.pdf.

provide access to the search results, hyper-links, websites, emails, blog entries, news, maps, calendars, spreadsheets, photos, and videos that drive interactions across the Internet; they are providing information and communication platforms. The utility of those services and the trust of users are both compromised when the product contains incomplete and distorted information.

Government restrictions on accessibility of information on the Internet hurt the downstream businesses that cannot access services or goods. Businesses and consumers that rely on access to the Internet services are adversely impacted when these services are blocked or impeded as a result of Internet censorship. To take one example, the recent unintentional blockage of Google Docs in Turkey caused substantial disruptions for businesses that rely on that Internet service²⁶. Said one Turkish service provider: “We have created a Google document [page] and were running our operations from there; now we cannot communicate.” As a result, they will be forced to migrate to more expensive platforms or applications that are not hampered by government restrictions.

Non-transparent regulation chills investment. The imposition of non-transparent and arbitrary regulation on online services – as is often the case under restrictive information regimes – makes it difficult for businesses to execute commercial plans. To successfully export to or invest in a new market, a company needs to be able to understand the rules of the road and have some level of confidence that the government will not arbitrarily interfere with its business. In countries where multinational firms face excessive or vague rules about operations, licenses and content, they must spend millions to employ lawyers, government relations experts and content reviewers in order to continue to operate. Even then, there is no guarantee that the rules won’t change from year to year or month to month. This poses additional financial hardships and makes firms less competitive.

Discriminatory government restrictions on accessibility of information provide a competitive advantage to local companies. Finally, some governments manipulate the Internet in favor of local firms. In China, for instance, numerous U.S. Internet services have been kept out or severely restricted, while Chinese versions of the same services have been permitted to operate, despite containing comparable levels of “offensive” content. As an article in *Foreign Policy* noted:

[I]n July 2009, after the riots...in Xinjiang, China blocked Facebook. Meanwhile direct Chinese copies of Facebook, Ren Ren Wang and Kai Xin Wang, have been enjoying enormous success. Also in the aftermath of the Xinjiang riots, microblogging site Twitter was cut off by the Chinese firewall for similarly dubious reasons. Less than two months later, Chinese Internet giant Sina launched a near identical microblogging service. ... Even a seemingly harmless site, like [Flickr], has been blocked in China, while its identical clone Bababian has grown steadily with foreign technology and no competition. Likewise, blog-hosting sites Blogger and WordPress have long been blocked in China. Instead Chinese netizens use Tianya, the 13th-most popular site in China. Far from being a sanitized land of boring blogs about daily activities ... [it] is a vitriolic, sensationalized, and hate-filled arena that makes Western gossip sites seem like the *Economist*.²⁷

²⁶ Google docs and other Google services were blocked in Turkey recently when the Regulator's “refresh” of the YouTube access ban already in place accidentally brought down other Google services sharing an IP with YouTube.

²⁷ *Foreign Policy*, *Beijing's Foreign Internet Purge*, January 15, 2010, http://www.foreignpolicy.com/articles/2010/01/14/chinas_foreign_internet_purge.

Government restrictions on accessibility of information put the global Internet at risk. Even beyond the immediate commercial effects of measures taken to impede Internet information flow, there is a broader negative effect that restrictive Internet regulations have on the shape and architecture of the Internet.

The Internet was developed as an open network of networks, with no centralized dictation regarding technological implementation or policies for access and usage. As the Federal Communications Commission recently observed, “Today’s Internet embodies a legacy of openness and transparency that has been critical to the network’s success as an engine for creativity, innovation, and economic growth;”²⁸ “[i]ts continued health and growth...depend on its continued openness.”²⁹ This statement is true not only in the U.S., but worldwide; any restrictions on the flow of information globally affect the Internet here.

As one commentator has observed: “The decision to make the Web an open system was necessary in order for it to be universal. You can’t propose that something be a universal space and at the same time keep control of it.”³⁰ This remains true today. Governments that build censorship into networks change the architecture and nature of the Internet in ways that damage trade and innovation. In particular, the fragmentation of the global Internet into “local” networks operating under different rules necessarily complicates and slows trade and economic growth. It makes information delivery uneven and re-creates the disparities among people’s access to information that the Internet has heretofore succeeded in eliminating. A divided Internet impedes the ability of businesses to reach a global market and impedes the collaboration and network effects that create so much of the value for many Internet businesses and Internet users. New cloud technology – like many Google services – do not reside in one location, making these restrictions difficult to comply with. When the Internet becomes fragmented due to local regulations, the interoperability that provides a fundamental equality of access is thrown by the wayside, blocking user and uptake.

In sum, when Internet services are blocked or restricted, or the Internet is regulated in a non-transparent or arbitrary manner, the substantial economic and trade benefits of the Internet are put at risk. Thus, limitations on the free flow of information and restrictive Internet regulations are a clear threat to open markets and trade. Governments that limit or block the flow of information threaten not only the ability of companies to access and compete in their markets, but also threaten the very traits of the Internet that have made it into an engine of economic growth and put at risk the ability of the Internet-related business to continue expanding their exports, employment, and innovation. Trade officials and policymakers should be deeply concerned about the impact of Internet information restrictions on economic growth and trade interests. And, they should be ready to use current trade rules and negotiating forums to reduce this threat.

Ensure that Liability Regimes Do Not Create Restrictions on Expression and Information Flows at the Internet Intermediary Level

Internet intermediaries, the companies that provide services such as search, commerce sites, and applications, represent a substantial and growing segment of developed economies. These businesses generally act as

²⁸Fed. Comm’n Comm’n [FCC], Notice of Proposed Rulemaking, *In the Matter of Preserving the Open Internet*, ¶ 17, FCC 09-93 (Oct. 22, 2009).

²⁹Fed. Comm’n Comm’n [FCC], *Connecting America: The National Broadband Plan* ch. 4 (2010).

³⁰World Wide Web Consortium (W3C), *Frequently Asked Questions*, <http://www.w3.org/People/Berners-Lee/FAQ.html> (quoting Sir Tim Berners-Lee, an engineer widely credited with creating the concept and protocols of the World Wide Web).

intermediaries between “upstream” services or goods being supplied, and users: e-commerce markets like eBay and Amazon that bring buyers and sellers together; search engines that help users find resources on the web; “app stores” that allow computer programmers to sell their software products for particular devices; video or photo sharing sites where user-generated content is posted; social services that promote connections among Internet users; and many, many others – some just starting up in a garage somewhere in the U.S.

Internet service providers, generally acting as intermediaries, have played a critical role in fostering the free flow of information. Whether in the form of the Internet access providers, commercial web hosting providers, search engines, or consumer-oriented services like Flickr, Twitter, or YouTube, it is these intermediaries who have built the platforms that have made the radical expansion of information flows possible.

The central role of intermediaries, however, also makes them an inviting target for governments and private parties who would restrict the free flow of information. Accordingly, preserving the Internet as a space for free expression and access to information, thereby supporting innovation and economic development goals, requires protecting intermediaries from unreasonable legal liability. This is not to say that “anything goes” online, but rather that the legal liability regimes that apply to intermediaries must be carefully tailored if in order to foster free information flows both domestically and abroad.

Fortunately, the U.S. has been a leader in crafting “safe harbors” for Internet intermediaries, as demonstrated by the Digital Millennium Copyright Act’s (DMCA) “safe harbor” regime and the Communications Decency Act’s Section 230 (CDA 230) immunity for online republishers. As the Department of Commerce recently recognized as part of its Inquiry on Copyright Policy, Creativity, and Innovation, “[b]oth provisions of law are seen as having contributed significantly to expansion of the digital economy and both remain essential to promoting innovation and to protection intellectual property online.”³¹

The safe harbor regimes in the U.S. (as well as similar legal regimes for Internet intermediaries in Europe and elsewhere) are rooted in the principal that, in most cases, intermediaries should not be held strictly liable for the activities of users -- instead, sanctions for unlawful behavior should fall on users who misuse online services and any legal obligations on intermediaries should obtain only after they have received adequate notice. Moreover, these legal establish a “safe zone” (*i.e.*, without risk of incurring liability) in which intermediaries may experiment with voluntary private measures to curtail illegal behavior on their systems without inflicting unnecessary collateral damage on legitimate information flows.

This safe harbor approach has a variety of important benefits for free expression and information flows. It:

- Protects the principle that information ought to be treated as “innocent until proven guilty” and ensures that intermediaries need not subject every video, blog post, tweet, or search query to pre-screening, surveillance, and monitoring.³²

³¹Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy, 75 Fed. Reg. 61419, 61421 (Oct. 5, 2010).

³²Congress specifically stated that the DMCA safe harbors are not conditioned on any obligation to affirmatively monitor user activities. See 17 U.S.C. 512(m)(1).

- Prevents so-called “over-blocking” of content by intermediaries who are fearful of the legal compliance costs that would be necessary.
- Fosters transparency, affording complaining parties and those complained about an opportunity to engage with each other directly.³³
- Treats fairly small enterprises and start-ups, which would otherwise be burdened by legal regimes that are unclear and/or costly.

In addition, the safe harbor regime allows for technical innovation to address new content-related challenges, including ways to foster free expression while respecting the interests of intellectual property rights holders. For example, the YouTube Content ID system, the largest, most sophisticated, and fastest-growing online video management platform in the world that helps rightholders to identify when their content is used on YouTube and then choose whether to block the video; monetize it by allowing ads to be served around the matched content; or track viewing statistics. Today, a majority of YouTube’s Content ID partners opt to monetize, rather than block, their content. Similarly, despite the broad legal immunity provided to intermediaries by CDA 230, YouTube has deployed a user “flagging” system that allows users to identify videos that include hate speech, graphic violence, and adult content for review and potential removal under YouTube’s community guidelines. These and similar voluntary efforts would not have been possible if intermediaries were not free to experiment and negotiate with stakeholders about effective strategies to address illegal or objectionable content online.

Google submits that these balanced legal protections for Internet intermediaries are crucial in promoting free expression, innovation, and economic growth online. One need only consider the tremendous recent growth in participatory media (also known as “user-generated content”) online to appreciate the enabling effects of these legal regimes. Participatory media sites like YouTube, Facebook, Blogger, and Twitter have become vital forums for all manner of expression, from economic and political participation to forging new communities and interacting with family and friends. These kinds of sites simply would not exist if intermediaries faced the risk of monetary liability for every item posted by millions of users.

As the NOI recognizes, “the burden of screening, analyzing and carefully filtering each piece of user-generated information is a task beyond the resources available to most Internet intermediaries.”³⁴ On YouTube, for example, 35 hours of video are uploaded every minute. This scale of expression is elicited in part because the hosting services provided by YouTube are free-of-charge to users. It is simply not feasible, neither technically nor financially, to perform a legal review of every video before posting it. The legal regime created by the DMCA safe harbors and CDA 230 has allowed intermediaries to address valid concerns reactively, after receiving notice from the interested parties.

Put in place in the late 1990s, the legal standards that govern Internet intermediaries in the U.S. have proven to be a success story for promoting innovation, creativity and human development. The Commerce Department, other U.S. agencies and other governments should work to demonstrate the benefits of these

³³Google also forwards many DMCA takedown notices to the public Chilling Effects repository for public information and academic study. See <http://www.chillingeffects.org>.

³⁴(NOI, p. 60072)

sort of regimes, and resist efforts by other governments to fashion differing legal regimes that would force intermediaries to clamp down on free expression.³⁵

An Agenda to Preserve and Enhance the Free Flow of Information Online

There is a growing consensus among experts that governments must do more in the face of Internet information restrictions than appeal for the protection of human rights and encourage development of tools that allow users to bypass government firewalls. Censorship online poses a significant economic threat to companies seeking a level playing field as they establish markets overseas. The Department of Commerce has the opportunity to develop an agenda that will minimize restrictions on freedom of expression and flow of information on the Internet and their adverse impact on commerce and economic growth. In doing so, the U.S. government can ensure a healthy environment for innovation and commerce online, and support the broad range of companies doing business globally on the Internet.

There are three key areas in which the U.S. government can act to break down barriers to free trade and Internet commerce and ensure that individuals and businesses are able to realize the full potential of the Internet as a global marketplace and platform for innovation:

- Catalog and publicly highlight as unfair trade barriers those practices by governments that restrict or disrupt the flow of online information services.
- Take appropriate action where particular government restrictions on the free flow of online information violate international trade rules.
- Establish new international trade rules – under bilateral, regional and multilateral agreements – that mandate transparency, provide additional assurances in favor of the free flow of information on the Internet, and ensure that Internet intermediaries can function effectively.

Addressing Particular Instances of Internet Restrictions. The first two action items recognize that there are that individuals and companies face two fundamental problems in addressing the negative impact of restrictions on Internet information flow: (1) difficulty in determining the specific measures and broader regulatory framework that are thwarting their ability to access and operate a particular service in a particular market, including legal restrictions that many governments place on the ability of affected service providers to disclose requests to restrict access to information; and (2) limitations on their ability to convince governments to alter their actions.

At Google, we consider ourselves leaders in giving users the best window into what governments are doing with information flows. As a company we feel it is our responsibility to ensure that we maximize transparency around the flow of information related to our tools and services. We believe that more information means more choice, more freedom, and ultimately more power for the individual.

More specifically, Google has created two tools to give our users deeper insight into how governments interfere with the free flow of information and block our services. First, we created an interactive map that shows the number of government inquiries for information about users and requests for Google to take

³⁵As described above, international trade agreements like the upcoming Trans-Pacific Partnership Trade Agreement (TPP) provide opportunities to accomplish this goal.

down or censor content³⁶. Our second transparency tool is an interactive graph that provides information about the accessibility to Google services around the world³⁷. Each graph shows historic traffic patterns for a given country/region and service. By illustrating outages, this tool visualizes disruptions in the free flow of information, whether it's a government blocking information or a cable being cut. We hope this raw data will help facilitate studies about service outages and disruptions, and greater transparency will help in ongoing discussions about the appropriate scope and authority of government requests. In addition to the material we make available and have shared with the Department in these comments, there are several independent organizations that release regular reports about government requests for information and content removal, including Chilling Effects, Herdict, and the Open Net Initiative.

The U.S. Government can support the effort to establish a transparent record of Internet information restrictions by establishing mechanisms to facilitate similar reporting by the full range of individuals and companies that experience the effects of government attempts to restrict access to information online. More importantly, the U.S. Government can use its resources to publish and highlight the types of restrictions and other like challenges that individuals and companies face in foreign markets, push these issues high on bilateral and multilateral agendas, and pursue action where appropriate under international rules, including existing transparency and due process regimes. Companies may be hard-pressed to speak up on their own out of fear of retribution by governments that employ arbitrary restrictions and threats. They need the U.S. government to bring its weight to bear to address foreign governments' disruptions of the flow of information and commerce on the Internet.

Establishing Binding Rules of the Road. The third area of focus recognizes that governments will always seek some regulation of information flows, so there must be an agreement on a clear, comprehensive and binding presumption in favor of the free flow of information. While this concept can be translated into binding trade agreement language in different ways, the end result must be to put the burden on governments to justify with particularity any censorship or other disruption of the Internet. And in such scenarios, governments must tailor restrictions narrowly, spell out legitimate government objectives that are being advanced, and provide basic and legal process to affected service providers. And, finally, because transparency provides an important check against excessive and unfair censorship and disruption of the Internet, governments should:

- make available all orders or requests made for information from service providers;
- publish, on a regular schedule, all orders or requests made to information provided on the Internet;
- publish in advance and for public comment all measures that affect the provision of Internet information services;
- publish the terms of all licenses (including ancillary documents that affect the terms of the license) for the provision of Internet information services to the extent a license is required, while advocating against the need for licenses;

³⁶The government requests map can be found at <http://www.google.com/transparencyreport/>. We would like to be able to share even more information with the Department and our users, including how many times we disclosed data in response to these requests, but the requests we receive for user data come from a variety of law enforcement agencies with different legal authorities and different forms of requests, from requests for information to requests to take down content. In many jurisdictions, we are legally prevented from sharing information with users.

³⁷The traffic tool is available at <http://www.google.com/transparencyreport/traffic/>.

- ensure that services can be provided without local investment and infrastructure;
- advocate simultaneously for the elimination of licensing requirements for Internet services; and
- publish all decisions on licensing applications and all revocations, including the reasons for the decision or revocation with citation to relevant legal authority.

Governments have long agreed that any restriction on the importation of goods should be prohibited.³⁸ In addition there is consensus that, to the extent that any technical regulations are imposed that restrict trade, they should be limited to pursuit of legitimate governmental objectives and tailored to be no more trade restrictive than necessary to achieve that objective.³⁹ Other than tariffs, which have to be negotiated on a reciprocal basis, the default position under the World Trade Organization (WTO) is that governments may not restrict imports of goods, and any deviations from that must be justified. Similar disciplines were extended to trade in services in 1995 under the General Agreement on Trade in Services; however, the structure of that agreement and the nascency of Internet services at that time means that the discipline must be restated to ensure that it extends the full breadth of the 21st century digital economy.

The U.S. and Korea took an initial, positive step in this direction in 2007 by agreeing to the following provision in the Korea-U.S. Free Trade Agreement (KORUS):

Recognizing the importance of the free flow of information in facilitating trade, and acknowledging the importance of protecting personal information, the Parties shall endeavor to refrain from imposing or maintaining unnecessary barriers to electronic information flows across borders.⁴⁰

This provision applies to any measure that disrupts information flows and applies to all digital content, whether goods or services.

The U.S. and other governments should improve the KORUS language and incorporate it into other trade agreements. Among other things, the provision should be revised to be binding – in KORUS it is an agreement to “endeavor to refrain from” certain restrictions – and it should apply to all electronic information flows, not just those “across borders”.

One important opportunity to negotiate a similar rule is the newly launched Trans-Pacific Partnership Trade Agreement (TPP) – which the U.S., Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore, Vietnam, and Malaysia are now negotiating. This agreement includes a mix of developed and developing countries and also countries with different levels of transparency, process, and openness when it comes to Internet regulation. As such, it is a good opportunity to establish broadly-applicable rules. It is also being negotiated in Asia, and as such will cover markets that represent key growth opportunities for U.S. Internet firms and the goods producers that depend on information flow to market internationally. Finally, it is the

³⁸GATT Article XI provides for the elimination of prohibitions or other quantitative restrictions on imported products.

³⁹Under the WTO regime governing trade in goods, Article 2.2 of the Agreement on Technical Barriers to Trade (TBT) provides that all “technical regulations” (i.e., those setting out mandatory product characteristics or related processes and production methods) affecting trade in goods must be the least trade restrictive measure that achieves a legitimate government objective.

⁴⁰Korea-U.S. Free Trade Agreement [KORUS] art. 15.8 (Cross Border Information Flows), signed June 1, 2007, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>.

first Free Trade Agreement (FTA) that the Obama Administration is negotiating, and as such will make an important statement about U.S. trade priorities.

The European Union also has opportunities to advance the Internet trade agenda in its pending trade negotiations with India and Canada, as well as negotiations it is pursuing in Southeast Asia and elsewhere. Renewed partnership agreements negotiations with Russia might also offer the EU a particularly important opportunity.

The U.S. and other governments should further embed these principles in less comprehensive agreements, such as those reached under the Asia Pacific Economic Cooperation (APEC) forum or trade and investment framework agreements. APEC offers a particularly interesting opportunity to highlight the importance of the Internet economy because the U.S. will be the next host of the forum.

Finally, governments should be looking to reach agreement on these principles in the WTO. If the Doha Round moves forward and negotiations proceed on trade in services, free flow of information should be on the table. There are also opportunities at the WTO in the context of negotiations regarding new Members. Russia is in the final stages of its WTO accession negotiations, and various Middle Eastern countries are negotiating accession too. Many of these countries impose onerous restrictions on the Internet, and their accessions are opportune moments to pursue specific agreements to uphold the free flow of information online.

U.S. Government has Opportunity to Focus on Real Solutions

The U.S. has already stepped up to the plate as a leader in efforts to protect and promote the free flow of information online. Secretary of State Hillary Clinton's speech of January 2010 and follow-up actions by a number of departments have clearly pointed the way. In moving forward, the Commerce Department should join other agencies in formulating a joint agenda with specific follow-up actions on the global agenda, many of which have been mentioned above. Crucially, Commerce should also join other agencies and recognize that public U.S.-led intervention in this area will not always yield the best results – that efforts to speak out must be matched by quiet diplomacy, careful negotiations, and development of technologies that cannot be co-opted by repressive regimes.

In pursuing any action that affects activity on the Internet, however, it is vitally important that national governments focus on solutions that are driven by on-the-ground players in industry, the NGO community, and academia. Experience indicates that empowering intergovernmental organizations to rule the Internet is unlikely to result in effective protection of human rights, and is highly likely to have the perverse effect of stifling innovation and economic growth.

There are several reasons why the Department -- working on behalf of U.S. and global Internet users and companies -- should strongly oppose efforts to grant authority over the flow or content of information on the Internet to any international agency. First, technology in this sector changes at such speed that there is no way for slow-moving agencies involving scores of governments to respond quickly enough. Regulations would be outdated from the moment they are issued.

Second, many of the international agencies which themselves comprise of members who may be inclined to censor will also favor companies that are government-controlled or owned by their citizens. The Commerce

Department and other U.S. agencies should continue to oppose actions by the People’s Republic of China, Tunisia and others to fundamentally change the nature of United Nations-related groups such as the Internet Governance Forum and the International Telecommunications Union.

In particular, the Commerce Department should oppose granting any power over Internet content or the flow of information to agencies like the ITU that were founded to establish and maintain technical standards for communication. Giving ITU directors and bureaucrats the power to dictate global standards – in effect creating an international “content tsar” – would impose one group of nation’s political, cultural and social standards on others. Individuals and groups should rather be free to propose and contest ideas and opinions - as well as to access those of others – in the global commons.

Working with a wide variety of non-governmental players is more likely to produce balanced and technically-savvy policies. The Global Network Initiative (GNI)⁴¹ – which combines companies, human rights groups, socially responsible investors and academics who have embraced guidelines on the pursuit of free expression and privacy -- is a case in point. Google is a founding member of the GNI, which aims to hold companies accountable for their actions and to form alliances among members to lobby for protection of the Internet as a free and open forum.

In contrast to international agencies, the GNI – and other like-minded initiatives – are far better able to act on behalf of global Internet users and to promote the free flow of information. These kinds of groups are more nimble and can adjust to new technologies and new issues. They are far less likely to become dominated by a single group or viewpoint. And while remaining apart from individual governments, they can work with those governments to adapt national laws and regulations that need to be updated or changed.

The Department should continue to work to ensure that companies from the U.S. have a level playing field in engaging in trade globally, focusing on real solutions and taking a leadership role globally.

Google thanks the Department for this opportunity to comment, and urges its continued involvement in trade and the free flow of information. The Internet, cloud services, and data innovation will drive the U.S. and world economies for years to come. Just as the Department showed global leadership in early Internet regulatory policy, it should lead in the creation of sensible and strong international trade agreements.

Sincerely,



Pablo L. Chavez
Director of Public Policy
Google, Inc.

⁴¹ See www.globalnetworkinitiative.org