National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue NW, Room 4725
Washington, DC 20230

Re: Docket Number 180124068-8068-01
Notice of Inquiry; International Internet Policy Priorities

Internet Association welcomes the opportunity to respond to National Telecommunications and Information Administration's (NTIA) notice of inquiry regarding international internet priorities. Internet Association represents over 40 of the world's leading internet companies. IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet.

I. The Free Flow Of Information And Jurisdiction

A. What are the challenges to the free flow of information online?

The internet sector is a key driver of the U.S. economy, with internet industries representing an estimated 6 percent of U.S. GDP, totaling nearly $1 trillion. Internet companies are creating new opportunities for all Americans by facilitating millions of transactions around the world through e-commerce, cloud computing, social media, online advertising, communications, online payments, and content-delivery platforms.

Yet, there are market access barriers for internet companies. These barriers may be the result of intentional decisions like targeting internet platforms through burdensome or unnecessary regulations. Alternatively, these barriers may emerge when a country uses other measures – such as unbalanced copyright regimes, restrictions on data flows or data localization requirements, intermediary liability penalties, site-blocking, forced technology transfer, burdensome customs rules, and other restrictions or industrial policies that create barriers for internet-enabled goods and services.

Cross-border, global exchange of information – without censorship, content-based regulation, or filtering mandates – facilitates commerce and promotes economic inclusiveness. The internet ecosystem flourishes when users, content creators, and businesses are empowered through an open architecture that promotes the unrestricted exchange of ideas and information. Internet services instantaneously connect users to goods and services, facilitate social interactions, and drive economic activity across borders. Consequently, support for the free flow of information is vital to eliminate trade barriers that restrict commerce or prevent U.S.-based internet services from having the freedom to operate in a foreign jurisdiction.

Unfortunately, data localization mandates, restrictions on data transfers, and blockages of entire services are increasingly restricting U.S. services from accessing overseas markets. We encourage NTIA to prioritize breaking down barriers that restrict the free flow of data across borders and tackle measures that require U.S exporters to store, manage, or otherwise process data locally.

The U.S. copyright framework both ensures an appropriate level of copyright protection and drives innovative internet and technology products and services. Internet services rely on balanced copyright protections such as Section 107 of the Copyright Act ('fair use') and Section 512 of the Digital Millennium Copyright Act ('ISP safe harbors') to create jobs, foster innovation, and promote economic growth. The U.S. internet sector – as well as small businesses that rely on the internet to reach customers abroad – require balanced copyright rules to do business in foreign markets.

In countries that lack this two-sided model of copyright law, U.S. innovators are at a significant disadvantage. Increasingly, governments like the EU (including Spain, Germany, and France), Australia, Brazil, Colombia, India, and Ukraine, are proposing new onerous systems of copyright liability for internet services, and several of these countries are out of compliance with commitments made under U.S. free trade agreements.

Critical limitations and exceptions to copyright enable digital trade by providing the legal framework that allows nearly all internet services to function effectively. Web search, machine learning, computational analysis, text/data mining, and cloud-based technologies all, to some degree, involve making copies of copyrighted content. These types of innovative activities – areas where U.S. businesses lead the world – are possible under copyright law because of innovation-oriented limitations and exceptions. In the United States, industries that benefit from fair use and other copyright limitations generate $4.5 trillion in annual revenue and employ one in eight U.S. workers. Unfortunately, foreign trading partners often lack such limitations and exceptions, which limits the export opportunities for U.S. industries in those markets.

In addition, Section 512 of the Digital Millennium Copyright Act (DMCA) is a foundational law of the U.S. internet economy. It provides a 'safe harbor' system that protects the interests of copyright holders, online service providers, and users – assigning responsibilities and rights for each. Safe harbors are critical to the functioning of cloud services, social media platforms, online marketplaces, search engines, internet access providers, and many other businesses. Weakening safe harbor protections would devastate the U.S. economy – costing around 425,000 U.S. jobs and decreasing U.S. GDP by $44 billion annually. And yet key trading partners, including three countries (Australia, Colombia, and Peru) that have obligations to enact safe harbors under trade agreements with the U.S., have failed to implement ISP safe harbors.

A fundamental reason that the internet has enabled trade is its open nature – online platforms can facilitate transactions and communications among millions of businesses and consumers, enabling buyers and sellers to connect directly on a global basis. This model works because platforms can host

these transactions without automatically being held responsible for the vast amounts of content surrounding each transaction. In the U.S., Section 230 of the Communications Decency Act has enabled the development of digital platforms by ensuring that online services can host user content without being considered the 'speaker' of that content. This law enables features such as customer reviews, which have been essential to building customer trust for U.S. small businesses in foreign markets.

The proliferation of content, applications, and services available online has delivered enormous value directly to consumers as well as small businesses. This includes lower entry barriers, greater access to information, markets, banking, and healthcare, communities of common interest, and new forms of media and entertainment. So called "over-the-top" (OTT) services play key roles in the digital economy. Each 10 percent increase in the usage of these services adds approximately $5.6 trillion to U.S. GDP.

Yet numerous foreign governments – Brazil, Colombia, the European Union (as well as several member states including Italy, Germany, France, and Spain), Ghana, India, Indonesia, Kenya, Thailand, Vietnam, Zimbabwe, among others – are developing and implementing measures to regulate online communications and video services as traditional public utilities. Some regulators and telecommunications providers are applying sector-specific telecom regulations to online services on matters such as emergency calling, number portability, quality of service, interconnection, and tariffing. Similarly, regulators have sought to subject online video services to broadcasting-style obligations on local content quotas, local subsidies, and a variety of regulatory fees. Such special regulation is not necessary for online services, where there are few barriers to new market entrants and low switching costs. While often couched as "level playing field" proposals, these initiatives serve to protect incumbent businesses, impede trade in online services, and make it substantially more difficult for U.S. internet firms to export their services.

B. Which foreign laws and policies restrict the free flow of information online? What is the impact on U.S. companies and users in general?

Please see Internet Association's "2017 National Trade Estimate Report Comments On Digital Trade Barriers" attached to this filing. It is also available online here: https://cdn1.internetassociation.org/wp-content/uploads/2013/04/InternetAssociation-NTE2017.pdf

C. Have courts in other countries issued internet-related judgments that apply national laws to the global internet? What have been the practical effects on U.S. companies of such judgements? What have the effects been on users?

Despite existing protections under the E-Commerce Directive for internet services that host third-party content, courts in some European Union member states have excluded certain internet services from the scope of intermediary liability protections. For example, one platform that hosted

third-party content in Italy was found liable because it offered "additional services of visualisation and indexing" to users. Another U.S.-based platform was found liable because it engaged in indexing or other organization of user content. A third internet service was held liable for third-party content because it automatically organized that content in specific categories with a tool to find 'related videos.' All of these activities represent increasingly common features within internet services, and the existence of these features should not be a reason to exclude a service from the scope of intermediary liability protections under the E-Commerce Directive, in Italy, or any other member state.

We have concerns about the Court of Justice of the European Union's (CJEU's) decision in *GS Media v. Sanoma Media*, which held that linking to copyrighted content posted to a website without authorization can itself be an act of copyright infringement. This case is already generating additional lawsuits testing the extent of the ruling, which may create new liability for online services doing business in the EU. It has also resulted in new monetary demands from publishers to those who provide links to content. We urge NTIA to monitor this situation and engage with European counterparts to prevent other negative impacts from this ruling.

In the Delfi opinion, the European Court of Human Rights held an Estonian news site responsible for numerous user comments on articles, even though the company was acting as an intermediary, not a content provider, when hosting these third-party comments. In response to that decision, the Delfi.ee news site shut down its user comment system on certain types of stories, and the chief of one newspaper association stated: "This ruling means we either have to start closing comments sections or hire an armada of people to conduct fact checking and see that there are no insulting opinions." Without clarification following this opinion, numerous internet services are likely to face increased liability risks and market access barriers in Estonia.

The Russian internet regulator has recently appealed to a court to block LinkedIn over alleged non-compliance with the Russian data localization requirements. The court of first instance has ruled that LinkedIn must be blocked in Russia entirely until the company is in compliance with these requirements. LinkedIn has appealed this order.

D. What are the challenges to freedom of expression online?

The widespread adoption of the internet has allowed people to develop new ways to express themselves. However, threats to free expression are just as prevalent online as they are off. A number of countries have created laws to limit online participation as a way to limit individuals ability to express themselves.

Brazil is considering certain provisions within its data protection legislation that risk harming both its own growing digital economy and market access by foreign services, including a new type of "adequacy" regime for assessing whether companies in other countries can move data in and out of

Brazil. In addition, there are several bills before Brazilian Congress that would implement a form of the "right to be forgotten" in Brazil, requiring that online services remove information that is deemed "irrelevant" or "outdated," even if it is true. These developments conflict with Brazil's strong commitment to freedom of expression and access to information, and present market access barriers for both small and large U.S. services seeking to enter the Brazilian market.

In Thailand one webmaster faced a sentence of up to 32 years in jail under the "Lèse Majesté" law for allowing comments on an interview with a Thai man known for refusing to stand at attention during the Thai Royal Anthem. Such rules have resulted in the blockage of U.S. online services in Thailand.

E. What should be the role of all stakeholders globally—governments, companies, technical experts, civil society and end users—in ensuring free expression online?

The internet flourishes when users, content creators, and businesses are empowered through an open architecture that promotes the unrestricted exchange of ideas and information. Internet services instantaneously connect users to goods and services, facilitate social interactions, and drive economic activity across borders. Consequently, support for the free flow of information is vital to eliminate trade barriers that restrict commerce or prevent U.S.-based internet services the freedom to operate in a foreign jurisdiction.

F. What role can NTIA play in helping to reduce restrictions on the free flow of information over the internet and ensuring free expression online?

NTIA can continue to coordinate efforts with USTR and other agencies within the federal government that work on internet issues to ensure barriers are not added. NTIA can become an advocate for these issues and act as an ombudsman to break down barriers when they arise.

G. In which international organizations or venues might NTIA most effectively advocate for the free flow of information and freedom of expression? What specific actions should NTIA and the U.S. Government take?

World Trade Organization (WTO) is currently debating establishing rules to remove digital trade barriers. Last December, the United States and 76 other WTO members agreed at the Buenos Aires WTO Ministerial to start exploring WTO negotiations on trade-related aspects of e-commerce. USTR is actively engaged with WTO on this process. NTIA can assist USTR during this process and help to ensure that the approach taken by the U.S. government meets the needs of the internet industry.

NTIA can advocate for the wider adoption of U.S. policies at the World Intellectual Property Organization (WIPO), one of the 15 specialized agencies of the United Nations (UN). This includes advocating for balanced copyright protections like fair use, copyright safe harbors, and intermediary liability protections like Section 230 of the Communications Decency Act. These frameworks are

critical to past, present, and future U.S digital trade leadership. Unfortunately, as the internet becomes ubiquitous to trade, many countries are now taking starkly different approaches to the laws and regulations that affect the internet, conflicting with the U.S. legal frameworks that have allowed digital trade to thrive.

II. Multistakeholder Approach To Internet Governance

A. Does the multistakeholder approach continue to support an environment for the internet to grow and thrive? If so, why? If not, why not?

The internet is one of the greatest engines for economic growth, freedom, and prosperity the world has ever known, thanks in large part to its multistakeholder governance model. For our companies to continue to innovate, to foster development and change, and ultimately to succeed as businesses globally, we need the continuation of the current bottom-up model of internet governance.

The future of the internet community, and businesses that operate within it, is dependent on the continuation of the internet's security, stability, interoperability, and resiliency. Equitable treatment of all stakeholders within a global multistakeholder model will ensure that the internet remains a hub for innovation around the world. Preserving a free internet is also essential to the preservation of political and economic liberty for global citizens.

There are countries that want to impose a top-down, state-centric governance model for the internet. These countries believe that something as powerful as the internet needs to be tamed by governments, or in some cases fragmented so that networks stop at national borders. Fragmentation of the internet would impede the free flow of information online and free speech worldwide, and would have political, economic, social, and cultural costs to society.

Additionally, one notable enabler of the multistakeholder approach has been the Internet Governance Forum (IGF), a vital platform for discussions and global engagement. IA supports the IGF, as well as efforts to ensure it can continue to play its important roles most effectively. Specific suggested goals include achieving greater participation by governments, enhanced sectoral balance in choice of workshops, and sustainable sources of funding.

B. Are there public policy areas in which the multistakeholder approach works best? If yes, what are those areas and why? Are there areas in which the multistakeholder approach does not work effectively? If there are, what are those areas and why?

The multistakeholder approach is well suited to the development of internet policy because it encourages participation in decision-making by the groups that actually own and operate the

technical infrastructure of the internet, as well as by its users. As noted by former Assistant Secretary of Commerce for Communications and Information Lawrence E. Strickling:

"The multistakeholder model of Internet governance is the best mechanism for maintaining an open, resilient, and secure Internet because, among other things, it is informed by a broad foundation of interested parties – including businesses, technical experts, civil society, and governments – arriving at consensus through a bottom-up process regarding policies affecting the underlying functioning of the Internet domain system." (Testimony before the Senate Committee on Commerce, Science, and Transportation, February 25, 2015)

"By encouraging the participation of industry, civil society, technical and academic experts, and governments from around the globe, multistakeholder processes result in broader and more creative problem solving than traditional governmental approaches." ("Moving Together Beyond Dubai" Blog Post, April 2, 2013)

D. Should the IANA Stewardship Transition be unwound? If yes, why and how? If not, why not?

Unwinding the IANA Stewardship Transition would undermine the credibility and the ultimate position of the United States. It would give new life to the efforts of authoritarian governments to battle for control of the core internet functions in intergovernmental organizations, such as through the International Telecommunication Union (ITU), empowering those around the world who want to divide and wall off parts of the internet and it would limit freedom of commerce and expression worldwide.

The United States performed a largely administrative role as the overseer of the contract with the Internet Corporation for Assigned Names and Numbers (ICANN). From the beginning, the recognition existed that ultimately the internet should be governed and held accountable not by governments but rather by public and private stakeholders. Therefore, since the creation of the model that governs the internet today, it was always envisaged that this oversight role held by the United States would eventually transition to the private sector.

While U.S. government stewardship served the global community well, the transition also fortified the principles that have made the internet exceptional and helped protect the it from bitter ideological battles among governments, including authoritarian governments that seek to fragment and control the internet for political ends. Seeking to resume the U.S. government's "special" role – which has always hidden the reality that it was the internet community itself that was primarily responsible for keeping the internet working around the world – could also encourage other governments to break off and create their own systems, endangering the seamless functionality and openness of the global internet.

E. What should be NTIA's priorities within ICANN and the GAC?

NTIA's top priority should be to strongly advocate for U.S. interests where needed. NTIA should be applauded for its active engagement within ICANN and the GAC since the IANA transition occurred. The U.S. can and should continue to be a leading voice within ICANN, as it has done recently in regard to the GDPR and WHOIS discussion, and during the course of discussions surrounding the use of geographic names in the DNS. Further, NTIA should remain vigilant in ensuring that ICANN is accountable to the full community of stakeholders.

J. What role should multilateral organizations play in Internet governance?

We do not believe inter-governmental bodies are the right way to govern the internet. A global internet that is not constrained by geographic boundaries should not be governed solely through institutions defined by them. Instead, we should look for innovative solutions involving the breadth of the internet community.

Notwithstanding the internet's success as an incubator of both democracy and economic growth, many member states in the ITU persist in efforts to increase governmental and intergovernmental control over the internet. The internet's open and decentralized governance framework should not be challenged by some states' top-down assertion of control over aspects of internet governance and their desire to use the ITU as a mechanism for asserting such control. These regimes have led the charge against an open and global internet and its liberalized markets, seeking to wall off their networks or otherwise maintain greater control over their citizens' online behavior, actions that could lead to fragmentation of the global internet and isolation of certain populations. Allowing intergovernmental oversight of internet functions and policy may also legitimize such restrictions on online content and interactions.

Additionally, internet governance fora should not be subject to capture by any one stakeholder or group of stakeholders, including national governments. Well-constructed multistakeholder governance models contain checks and balances that foreclose capture and lead to consensus driven decision-making to the long-term benefit of all internet stakeholders

To the extent multilateral organizations are involved in internet governance, they should be focused on promoting best practices and educating member countries on the benefits of internet access and use.

III. Privacy and Security

B. Which international venues are the most appropriate to address questions of digital privacy? What privacy issues should NTIA prioritize in those international venues?

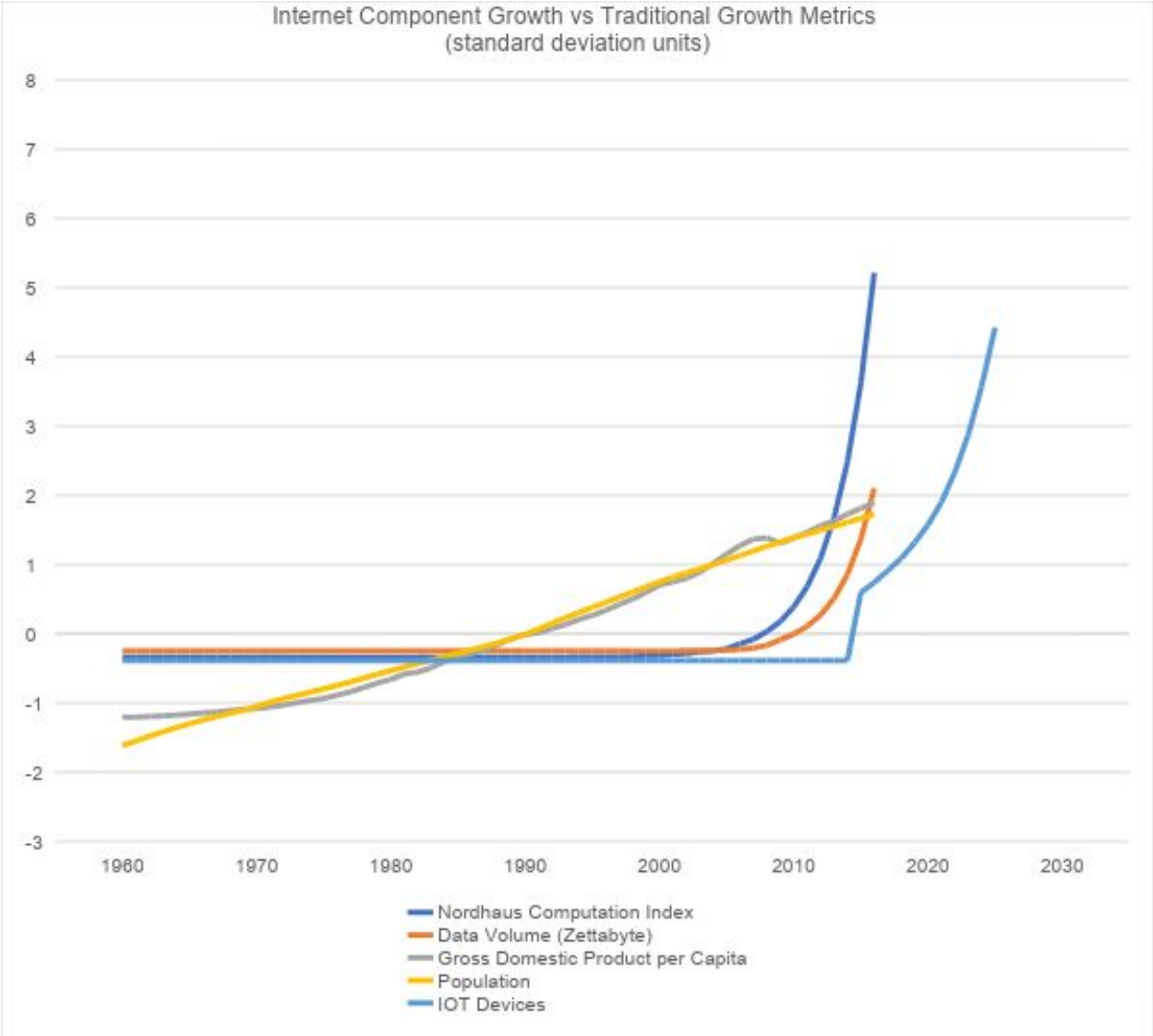
We support NTIA's involvement with the Organization for Economic Co-operation and Development (OECD) and the Internet Governance Forum (IGF) policy-making processes and encourage NTIA to be an advocate for continued multistakeholder processes. These venues, and U.S. participation in them, are more important than ever. NTIA should prioritize the continued multistakeholder approach to setting international internet policy rather than risking laws such as GDPR become the baseline international approach for the global internet community. Internet Association believes in flexible but robust approaches to online privacy and data security policies

A key priority in this area is maintaining regulatory coherence and cross-border predictability for consumers and businesses. NTIA should therefore engage in those fora with the broadest international reach, so as to avoid a patchwork of inconsistent regimes on privacy. These include the ongoing multilateral discussions on e-commerce within the WTO, the Asia-Pacific Economic Cooperation forum, and the OECD.

IV. Emerging Technologies and Trends

A. What emerging technologies and trends should be the focus of international policy discussions? Please provide specific examples.

A key starting point for understanding the array of emerging trends and technologies related to the digital ecosystem is the fundamentally different growth trajectory of the internet. Plainly, the internet is growing exponentially. This is seen in terms of the data it produces, the number devices connected to it, the number of users on it, and the power of computers to process the information traveling on it. Compared to standard metrics for country-level growth, internet components exhibit a fundamentally different pattern as illustrated in the following chart.



Sources: Nordhaus Computation Index (Nordhaus, 2010); Data Volume (Computer Science Corporation, 2016); IOT Devices (Statista, 2018); Population and GDP per Capita (US Census Bureau)

This context is crucial for understanding the pace of change. The current emergence of new technologies and the potential for the emergence of future technologies is moving far more rapidly than many stakeholders appreciate due to a tendency among some to examine the internet through the lenses of traditional industries. Such a tendency, beyond the potential for missing or not fully appreciating key developments, can hamper economic growth. As illustrated by Hooton and Kaing (2018), these growth components of the internet intrinsically and increasingly drive U.S. economic growth.

Any discussion about specific emerging trends and technologies, from machine learning to quantum computing, must be based on a solid understanding of their respective key engineering features and a full appreciation of the timeframe for their development/maturation.

B. What are the current best practices for promoting innovation and investment for emerging technologies? Are these best practices universal, or are they dependent upon a country's level of economic development? How should NTIA promote these best practices?

There is a longstanding set of research illustrating the importance of skilled labor markets and high-quality technology infrastructure (e.g. high-speed internet) for promoting innovation and investment. These two factors extend beyond simply technology development to other industries as well, but research has demonstrated a particularly strong link to the development of emerging technologies and businesses that develop them. They help to explain the highly concentrated nature of the digital and internet technology sectors within individual countries as well as the concentration of investment firms around them. They also appear to outweigh other negative factors, such as cost of living, regulator environment, and others. (Hooton, Chung, and Kaing, 2017)

More recent literature from a variety of authors at the World Bank (see Farole et al., 2018; Farole, Goga, and Ionescu-Heroiu, 2018; and Hooton and Farole, 2018), Brookings Institute (see Austin, Glaeser, and Summers, 2018), and elsewhere have also highlighted the role of regional economic potential rather than national economic development levels. A high-skilled labor force and good infrastructure are two critical ingredients in developing economic potential while high levels of inequality and differing historical economic growth rates over the past 30 years likely help create agglomeration forces that 'lock in' innovation and investment in a few key regional areas (e.g. Silicon Valley, Route 128, etc.).

This regional concentration, however, should not mask the overarching importance of national legal frameworks. While innovation and investment in emerging technologies has shown a tendency to concentrate similarly to other tertiary services, they depend on national level frameworks to ensure sufficient investment incentives and protections to fundamental aspects of digital technology business models (Internet Association, 2017). For example, Dippon (2017) demonstrated the value of U.S. intermediary liability protections at over $44 billion per year as well as approximately 425,000 jobs. Internet Association has demonstrated consistent industry consensus among businesses on principles around net neutrality, strong privacy protections, and other guiding principles. And future unreleased research from Internet Association demonstrates the lost economic potential from barriers to the international internet economy, innovation, and investment from restrictions in national digital frameworks.

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2017

NATIONAL TRADE ESTIMATE REPORT COMMENTS ON

Digital Trade Barriers

Comments Regarding Foreign Trade Barriers to U.S. Exports for 2018 Reporting

Introduction

On behalf the world's leading internet companies, we are pleased to submit the following comments to the Trade Policy Staff Committee (Docket No. USTR-2017-0013) for consideration as USTR prepares the 2018 National Trade Estimate Report on Foreign Trade Barriers (NTE).

Internet Association (IA)[1] supports policies that promote and enable internet innovation – ensuring that information flows freely and safely across national borders, uninhibited by restrictions that are fundamentally inconsistent with the open and decentralized nature of the internet. We are now at a tipping point with respect to U.S. export leadership in the digital economy, making USTR's work in understanding and addressing foreign digital restrictions more critical than ever before. In order to preserve and expand the internet's role as a driver of U.S. exports, economic development, and opportunity, the U.S. should make open internet policies abroad a top trade priority. USTR should push back on market access barriers that threaten the internet's global growth and its transformation of trade. The ability of U.S. businesses to reach 95 percent of the world's customers through U.S. internet services hangs in the balance.

USTR broke new ground in the 2017 NTE Report by highlighting a number of new barriers to digital trade, including "unreasonable burdens on internet platforms for non-IP-related liability for user-generated content and activity." In addition, USTR identified specific market access barriers, including EU measures on "ancillary copyright" and "neighboring rights," EU copyright filtering obligations, unreasonable intermediary liability obligations in countries like Thailand and India, application of legacy regulations to so-called "over-the-top" internet services in Indonesia and Vietnam, China's restrictions on U.S. cloud service providers, China's extensive blocking of legitimate websites, and many other emerging digital barriers. IA welcomed these developments and encourages USTR to redouble efforts to preserve and expand the internet's role as a key driver of U.S. exports, job creation, and economic development by making digital trade a top priority in the 2018 NTE Report.

American Digital Trade Leadership

The internet is connecting U.S. workers and businesses to foreign markets in way unimaginable a generation ago. IA members are creating new opportunities for all Americans by facilitating millions of transactions around the world through e-commerce, cloud computing, social media, online advertising, communications, online payments, and content-delivery platforms. The internet sector is a key driver of the U.S. economy, with internet industries representing an estimated 6 percent of U.S. GDP, totaling nearly $967 billion.[2] Our sector now

[1] Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Expedia, Facebook, Google, Groupon, Handy, HomeAway, IAC, Intuit, LinkedIn, Lyft, Match Group, Microsoft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Rackspace, Quicken Loans, reddit, Salesforce.com, Snap Inc., Spotify, SurveyMonkey, Ten-X, Thumbtack, TransferWise, TripAdvisor, Turo, Twitter, Uber Technologies, Inc., Upwork, Yelp, Zenefits, Zillow Group, and Zynga

[2] Stephen Siwek, *Measuring the U.S. Internet Sector*, Economists Incorporated (Dec. 2015) at 4-5.

accounts for over 10.4 million American jobs, 86 percent of which are outside major tech hubs.[3] In its short commercial lifespan, the internet is now a crucial engine for global economic growth, innovation, and cross-border trade in goods and services.

The internet is powering U.S. trade-driven growth across all sectors of the economy by dramatically expanding the number of U.S. businesses that can compete on a global scale. Today's digital-traders – including manufacturers, farmers, and small businesses – are utilizing internet-enabled tools to reach foreign markets and customers, bypassing the outdated traditional models of trade that required huge sums of capital and costly multinational supply chains. U.S. industries, once locked out of the international trading system, are now capitalizing on the internet to reach global audiences. Internet services now drive a U.S. digital trade surplus of $158.9 billion.[4]

The internet sector's growth in the U.S. and its ability to drive digital exports abroad is directly correlated with the enactment of innovation-critical laws and policies in the U.S. – including balanced copyright protections like fair use and copyright safe harbors and intermediary liability protections like Section 230 of the Communications Decency Act. These frameworks are critical to past, current, and future U.S digital trade leadership. Unfortunately, as the internet becomes ubiquitous to trade, many countries are now taking starkly different approaches to the laws and regulations that affect the internet, conflicting with the U.S. legal frameworks that have allowed digital trade to thrive. In just three years, there has been a significant drop-off in the number of the world's top internet companies that are based in the U.S.[5] The rise of discriminatory, closed, and protectionist approaches to the internet abroad threatens the growth of the entire U.S. economy and the viability of U.S. internet services.

Such threats come in many forms. Market access barriers may be the result of intentional decisions like targeting internet platforms through burdensome or unnecessary regulations. Alternatively, these threats may emerge when a country uses other measures – such as unbalanced copyright regimes, restrictions on data flows or data localization requirements, intermediary liability penalties, site-blocking, forced technology transfer, burdensome customs rules, and other restrictions or industrial policies that create barriers for internet-enabled goods and services.

As the administration continues to pursue an active trade agenda – through the renegotiation of the North American Free Trade Agreement (NAFTA) and otherwise – it is more critical than ever to ensure the U.S. sets clear guidelines for how governments treat digital trade. Updating NAFTA represents a once in a generation opportunity to write digital trade rules for the North American market and provide a template for future U.S.

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[3] J Deighton, *Economic Value of the Advertising-Supported Internet Ecosystem* (Mar. 2017), https://www.iab.com/wp-content/uploads/2017/03/Economic-Value-Study-FINAL-2017.pdf

[4] Economic & Statistics Admin., U.S. Dep't of Commerce, Digitally Deliverable Services Remain an Important Component of U.S. Trade (May 28, 2015), http://www.esa.gov/economic-briefings/digitally-deliverable-services-remain-important-component-us-trade.

[5] Mary Meeker. "Internet Trends 2016 - Code Conference." Kleiner Perkins Caufield Byers. http://www.kpcb.com/blog/2016-internet-trends-report (Nine of the world's top internet companies were based in the U.S. in 2013, compared to just six companies in 2016.)

trade agreements in the future. Doing so will send a clear signal to our trading partners that limiting, restricting, or blocking U.S. internet services is unacceptable.

In our remaining comments, we outline long-standing, new, and emerging threats that continue to undermine U.S. digital trade leadership and growth. We also catalog measures that foreign governments are using to specifically discriminate against the U.S. internet sector.

Data Flow Restrictions and Service Blockages

Cross-border, global exchange of information – without censorship, content-based regulation, or filtering mandates – facilitates commerce and promotes economic inclusiveness. The internet ecosystem flourishes when users, content creators, and businesses are empowered through an open architecture that promotes the unrestricted exchange of ideas and information. Internet services instantaneously connect users to goods and services, facilitate social interactions, and drive economic activity across borders. Consequently, support for the free flow of information is vital to eliminate trade barriers that restrict commerce or prevent U.S.-based internet services the freedom to operate in a foreign jurisdiction.

Unfortunately, data localization mandates, restrictions on data transfers, and blockages of entire services are increasingly restricting U.S. services from accessing overseas markets. We encourage USTR to prioritize breaking down barriers that restrict the free flow of data across borders and tackle measures that require U.S exporters to store, manage, or otherwise process data locally.

Unbalanced Copyright Regimes

The U.S. copyright framework both ensures an appropriate level of copyright protection *and* drives innovative internet and technology products and services. Internet services rely on balanced copyright protections such as Section 107 of the Copyright Act ('fair use') and Section 512 of the Digital Millennium Copyright Act ('ISP safe harbors') to create jobs, foster innovation, and promote economic growth. The U.S. internet sector – as well as small businesses that rely on the internet to reach customers abroad – require balanced copyright rules to do business in foreign markets.

In countries that lack this two-sided model of copyright law, U.S. innovators are at a significant disadvantage. Increasingly, governments like the EU (including Spain, Germany, and France), Australia, Brazil, Colombia, India, and Ukraine, are proposing new onerous systems of copyright liability for internet services, and several of these countries are out of compliance with commitments made under U.S. free trade agreements.

Critical limitations and exceptions to copyright enable digital trade by providing the legal framework that allows nearly all internet services to function effectively. Web search, machine learning, computational analysis, text/data mining, and cloud-based technologies all, to some degree, involve making copies of copyrighted content. These types of innovative activities – areas where U.S. businesses lead the world – are possible under copyright law because of innovation-oriented limitations and exceptions. In the United States, industries that benefit from fair use and other copyright limitations generate $4.5 trillion in annual revenue and employ one in

eight U.S. workers.[6] Unfortunately, foreign trading partners often lack such limitations and exceptions, which limits the export opportunities for U.S. industries in those markets.

In addition, Section 512 of the Digital Millennium Copyright Act (DMCA) is a foundational law of the U.S. internet economy. It provides a 'safe harbor' system that protects the interests of copyright holders, online service providers, and users – assigning responsibilities and rights for each. Safe harbors are critical to the functioning of cloud services, social media platforms, online marketplaces, search engines, internet access providers, and many other businesses. Weakening safe harbor protections would devastate the U.S. economy – costing around 425,000 U.S. jobs and decreasing U.S. GDP by $44 billion annually.[7] And yet key trading partners, including three countries (Australia, Colombia, and Peru) that have obligations to enact safe harbors under trade agreements with the U.S., have failed to implement ISP safe harbors.

USTR has promoted copyright safe harbors in trade agreements for the last fifteen years. Increasingly, however, jurisdictions have chipped away at the principles behind this safe harbor framework. For example, some countries have proposed or implemented requirements that internet companies monitor their platforms for potential copyright infringement or broadly block access to websites, rather than adhere to the U.S. model of taking down specific pieces of infringing content upon notice. Other countries have failed to adopt safe harbors at all. Such efforts threaten the ability of internet companies to expand globally by eliminating the certainty that copyright safe harbors provide.

IA urges USTR to use NAFTA renegotiations to promote a strong and balanced copyright framework that benefits all U.S. stakeholders. Without these business-critical protections, internet services – and the industries they enable – face troubling legal risks, even when they follow U.S. law. For example, Mexico currently lacks a strong set of limitations and exceptions like fair use, and does not have a copyright safe harbor.

Non-IP Intermediary Liability Protections

A fundamental reason that the internet has enabled trade is its open nature – online platforms can facilitate transactions and communications among millions of businesses and consumers, enabling buyers and sellers to connect directly on a global basis. This model works because platforms can host these transactions without automatically being held responsible for the vast amounts of content surrounding each transaction. In the U.S., Section 230 of the Communications Decency Act has enabled the development of digital platforms by ensuring that online services can host user content without being considered the 'speaker' of that content. This law enables features such as customer reviews, which have been essential to building customer trust for U.S. small businesses in foreign markets.

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[6] Capital Trade. "Fair Use in the U.S. Economy." http://www.ccianet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf.

[7] Nera. "Economic Value of Internet Intermediaries and the Role of Liability Protections." https://cdn1.internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf.

USTR rightly identified "unreasonable burdens on internet platforms for non-IP-related liability for user-generated content and activity" as a barrier to digital trade in the 2017 NTE. Yet the state of affairs has not improved. Foreign governments are exerting a heavier hand of control over speech on the internet and are subjecting online platforms to crippling liability or blockages for the actions of individual users for defamation, "dangerous" speech, political dissent, and other non-IP issues. At the same time, foreign governments are making it more difficult for platforms to evolve new approaches to dealing with problematic content.

IA encourages USTR to identify the increasing number of non-IP liability trade barriers abroad and to use NAFTA and other trade negotiations to set clear rules that would prohibit governments from making online services liable for third-party content. Mexico and Canada lack a clear legal principle like Section 230, creating increased risks for U.S. internet services in these markets.

Restrictions on U.S. Cloud Service Providers

Commercial enterprises, start-ups, universities, and a wide range of other institutions across the globe are actively migrating to cloud computing to meet their information technology needs. The global cloud services market segment totaled more than $100 billion in 2016 and is expected to double by 2020.[8] The world's largest cloud services providers (CSPs) are almost all American. Cloud computing is quickly becoming one of the United States' most important services exports.

U.S. cloud services providers are among the strongest American exporters, supporting tens of thousands of high-paying American jobs and making a strong contribution toward a positive balance of trade. While U.S. CSPs have been at the forefront of the movement to the cloud in virtually every country in the world, China has imposed onerous regulations on U.S. CSPs - effectively barring them from operating or competing fairly in China. Chinese laws and regulations on non-Chinese CSPs' clouds force U.S. CSPs to transfer valuable intellectual property, surrender use of their brand names, and hand over operation and control of their business to a Chinese company in order to sell in the Chinese market.

Restrictive Regulation of Online Services

The proliferation of content, applications, and services available online has delivered enormous value directly to consumers as well as small businesses. This includes lower entry barriers, greater access to information, markets, banking, and healthcare, communities of common interest, and new forms of media and entertainment. So called "over-the-top" (OTT) services play key roles in the digital economy. Each 10 percent increase in the usage of these services adds approximately $5.6 trillion to U.S. GDP.[9]

[8] Gartner. "Gartner Says by 2020 "Cloud Shift" Will Affect More Than $1 Trillion in IT Spending." http://www.gartner.com/newsroom/id/3384720

[9] WIK. "The Economic and Societal Value of Rich Interaction Applications (RIAs)." http://www.wik.org/fileadmin/Studien/2017/CCIA_RIA_Report.pdf

Yet numerous foreign governments – Brazil, Colombia, the European Union (as well as several member states including Italy, Germany, France, and Spain), Ghana, India, Indonesia, Kenya, Thailand, Vietnam, Zimbabwe, among others – are developing and implementing measures to regulate online communications and video services as traditional public utilities. Some regulators and telecommunications providers are applying sector-specific telecom regulations to online services on matters such as emergency calling, number portability, quality of service, interconnection, and tariffing. Similarly, regulators have sought to subject online video services to broadcasting-style obligations on local content quotas, local subsidies, and a variety of regulatory fees. Such special regulation is not necessary for online services, where there are few barriers to new market entrants and low switching costs. While often couched as "level playing field" proposals, these initiatives serve to protect incumbent businesses, impede trade in online services, and make it substantially more difficult for U.S. internet firms to export their services.

To maintain and capitalize on the clear U.S. competitive advantage in this area, we urge USTR to identify legal and regulatory measures that are harming the deployment of online services to consumers and businesses, and engage with foreign counterparts to address these market access barriers. We also encourage USTR to work on introducing disciplines on OTT regulations into ongoing trade negotiations, including NAFTA.

Emerging Issues

Finally, with the rapid pace of internet-innovation, we call on USTR to intensify efforts to address emerging market access restrictions that impede U.S. digital trade. Foreign governments continue to propose or implement burdensome measures such as local presence and/or partnership requirements and forced transfers of technology, encryption keys, source code, and algorithms as conditions of market access. Some foreign trading partners are imposing unilateral regulations or taxes that deviate from global norms and single out digital platforms for special treatment, often with the intention of giving domestic companies an advantage over U.S. competitors. In addition, governments across the globe are considering measures that would assign liability for collecting customs duties and/or taxes directly to U.S. internet services. We urge USTR to ensure that any cross-cutting regulations – such as tax, competition, customs, and cross-border privacy protections – are implemented in an objective and non-discriminatory way. Where regulations fall short of this standard, we encourage USTR to identify these issues as key impediments to digital trade in the 2018 NTE.

Foreign Digital Trade Barriers

Argentina

Restrictive Regulation of Online Services

In Argentina, the telecommunications reform commission recently issued seventeen principles that would inform a "convergence" bill, aimed at unifying the telecommunications and audiovisual content laws that were enacted by the previous government.[10] These principles do not explicitly leave information services, content services, and apps out of the scope of the bill, and may include new obligations both to register applications and satisfy intermediary liability requirements. In particular, the obligation to register an application would entail a set of complex administrative procedures that developers would need to follow before making their app widely available. Such obligations could create clear market access barriers for internet services that do not face registration requirements in other markets.

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services. *License cap*: The City of Buenos Aires has enacted a supply cap of an arbitrary maximum of 2,500 for-hire vehicles. *Independent operator restriction*: All for-hire vehicles must be affiliated with a for-hire agency and work exclusively for that agency. *Return-to-garage rule*: For-hire vehicles are required to return to their registered place of business between trips. *Technology restrictions*: For-hire vehicles may only be solicited by either phone call or email.

Australia

Unbalanced Copyright Frameworks

Under the Australia-U.S. FTA, Australia is obligated to provide safe harbors for a range of functions by online services providers. Australia has failed to comply with this commitment. The Copyright Act of 1968's safe harbor provisions do not unambiguously cover all internet service providers, including the full range of internet services (cloud, social media, search, UGC platforms).[11] Instead, only a narrower subset of "carriage service providers"

[10] *New Rules of the Game in Telecommunications in Argentina.* OBSERVACOM. http://www.observacom.org/new-rules-of-the-game-in-telecommunications-in-argentina/

[11] Copyright Act 1968, Part V Div. 2AA.

are covered under Australian law,[12] rather than the broader definition of "internet service providers" in the Australia-U.S. FTA.[13] The lack of full coverage under this safe harbor framework creates significant liability risks and market access barriers for internet services seeking access to the Australian market. We urge USTR and others in the U.S. government to engage with Australian counterparts to make necessary adjustments to Division 2AA of the Copyright Act to bring this safe harbor into compliance with AUSFTA requirements.

In addition, we urge USTR to work with Australia to develop a clearer fair use exception in order to resolve uncertainty under the existing fair dealing regime. The Australian Law Reform Commission and the Australian Productivity Commission have both made positive recommendations on fair use that would enable Australia to achieve an appropriate balance in its copyright system and increase market certainty for both Australian and U.S. providers of digital services. The government should adopt these recommendations and implement "a broad, principles-based fair use exception."[14]

Unilateral or Discriminatory Tax Regimes

In 2015, Australia passed its Multinationals Anti-Avoidance Law, which appears to be outside the scope of the OECD BEPS recommendations and may impede market access for businesses seeking to serve the Australian market. We urge the U.S. Government to engage with counterparts in Australia to develop taxation principles that are consistent with international best practices.[15]

Brazil

Unbalanced Copyright Frameworks and Non-IP Liability

Historically, the 'Marco Civil' law[16] has offered legal certainty for domestic and foreign online services and has created conditions for the growth of the digital economy in Brazil.[17] Recently, there have been attempts to revisit or change key provisions of this legal framework, including the compulsion of online companies to assume liability for all user communications and publications.[18]

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[12] Telecommunications Act 1997, Div. 3 Section 87 (defining carriage service providers as licensed telecommunications entities providing carrier services to the public).

[13] Trans-Pacific Partnership, Section J, Art. 18.81.

[14] Australian Productivity Commission. April 2016 report.

[15] *Combating Multinational Tax Avoidance – A Targeted Anti-Avoidance Law*. Australian Tax Office. https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Doing-business-in-Australia/Combating-multinational-tax-avoidance---a-targeted-anti-avoidance-law/ (last visited Oct. 25, 2015).

[16] Brazilian Civil Rights Framework for the Internet, Law No. 12.965.

[17] Angelica Mari. *Brazil Passes Groundbreaking Internet Governance Bill*, ZDNET, http://www.zdnet.com/brazil-passes-groundbreaking-internet-governance-bill-7000027740/.

[18] Andrew McLaughlin, *Brazil's Internet is Under Legislative Attack*, MEDIUM https://medium.com/@mcandrew/brazil-s-internet-is-under-legislative-attack-1416d94db3cb#.dy4aak1yk.

Non-IP Liability

Other Brazilian proposals would require online services to censor criticism of politicians and others, via a 48-hour notice-and-takedown regime for user speech that is "harmful to personal honor." This is a vague and overbroad standard that would present a significant market access barrier for U.S. companies seeking access to the Brazilian market.

Restrictive Regulation of Online Services

Brazil is currently debating revisions to the legal basis for its telecom sector, and some legislators have supported the idea of regulating online services in a similar way to telecom services.[19] However, this approach risks raising costs for online entrepreneurs and halting Brazil's innovation due to increased bureaucracy and artificial limits on services, harming both local consumers and foreign providers of internet services.

Filtering, Censorship, and Service-Blocking

Brazil has blocked WhatsApp three times in the past year as part of legal disputes related to specific users, cutting off access to a U.S.-based messaging service for more than one-hundred million Brazilians in the process.[20]

Several new bills have been introduced that would require site-blocking injunctions.[21]

Discriminatory Customs/Trade Facilitation Measures

Brazil's de minimis threshold (the level below which no duty or tax is charged on imported items) of USD $50 remains applicable only to the Consumer to Consumer transaction (C2C) and does not apply to either Business to Consumer (B2C) and Business to Business (B2B) transactions. There is a legal controversy related to the way this rule is being construed; there exists some case law stating that the exemption should apply for both B2C and C2C transactions and that the de minimis threshold should be raised to USD $100. This differentiated treatment of the threshold between transactions and the low de minimis threshold for imported items into

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[19] *Taxation on OTT in Brazil*. TECH IN BRAZIL (June 10, 2015). http://techinbrazil.com/taxation-on-ott-in-brazil; Juan Fernandez Gonzalez, *Brazil's Creators Demand VOD Regulation,* RAPID TV NEWS (July 5, 2016). http://www.rapidtvnews.com/2016070543482/brazil-s-creators-demand-vod-regulation.html#axzz4O8DTZE5y.

[20] *See WhatsApp Officially Un-Banned In Brazil* After Third Block in Eight Months, The Guardian (July 19, 2016) https://www.theguardian.com/world/2016/jul/19/whatsapp-ban-brazil-facebook; Glen Greenwald & Andrew Fishman, WhatsApp, Used By 100 Million Brazilians, Was Shut Down Nationwide by a Single Judge¸ The Intercept (May 2, 2016), https://theintercept.com/2016/05/02/whatsapp-used-by-100-million-brazilians-was-shut-down-nationwide-today-by-a-single-judge/.

[21] *See* Andrew Fishman, *Brazilian Cybercrime Bills Threaten Open Internet for 200 Million People,* THE INTERCEPT (Apr. 26, 2016), https://theintercept.com/2016/04/26/brazilian-cybercrime-bills-threaten-open-internet-for-200-million-people/; *Access Now Condemns Blocking of WhatsApp in Brazil*, ACCESS NOW (17 Dec. 2015), https://www.accessnow.org/access-now-condemns-blocking-whatsapp-brazil/.

Brazil of USD $50 (contrary to the United States which is $800 USD) creates unnecessary barriers to trade through increased transaction costs for Brazilian businesses, and acts to restrict consumer choice and competition in the Brazilian market. The Brazilian Government should remove this barrier to trade by expressly extending the application of the de minimis threshold to both business-to-consumer (B2C) and business-to-business (B2B) transactions and by increasing the de minimis threshold to a rate more in line with international standards and consumer shopping behavior.

Data Localization Requirements

Past Brazilian governments' interventionist policies have prevented innovation and technological progress. In order to ensure access to innovation and modern technology, Brazil should be open to the provision of products and services from other nations. Brazil should remove local content requirements, barriers to trade, and the tax incentives for locally sourced information and communication technology (ICT) goods and equipment. Specifically, we recommend repeal of:

- The Basic Production Process, which offers government procurement preferences for local ICT hardware and software;[22]
- CERTICS Decree, which stands at odds with the global nature of the software industry;[23]
- The Margin of Preferences Decrees[24] which grant ICT Equipment and Information Technology and Communication Equipment preference margins in government procurement, and;
- The Presidential Decree 8135 of November 5, 2013 and subsequent Ordinances[25] which require that federal agencies procure e-mail, file sharing, teleconferencing, and VoIP services from Brazilian "federal public entities" such as SERPRO, Brazil's federal data processing agency.

These measures disrupt the global nature of the ICT industry and disadvantage both access to technology in Brazil and the ability of U.S. ICT companies to do business in Brazil.

Burdensome or Discriminatory Data Protection Frameworks

Brazil is considering certain provisions within its data protection legislation that risk harming both its own growing digital economy and market access by foreign services, including a new type of "adequacy" regime for assessing whether companies in other countries can move data in and out of Brazil.[26]

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[22] Law No. 8248 of 8248 of Oct. 23, 1991.

[23] Decree No. 8186 of Jan. 17, 2014.

[24] Decree No. 8194 of Feb. 12, 2014; Decree No. 8184 of Jan. 17, 2014; and Decree No. 7903 of Feb. 12, 2013.

[25] Ordinance No. 54 of May 6, 2014; and Ordinance No. 141 of May 2, 2014.

[26] *Localization Barriers to Trade: Why Demanding Too High a Price for Market Access Threatens Global Innovation*, GLOBAL TRADE MAGAZINE (Oct. 6, 2016), http://www.globaltrademag.com/global-trade-daily/localization-barriers-trade.

In addition, there are several bills before Brazilian Congress that would implement a form of the "right to be forgotten" in Brazil, requiring that online services remove information that is deemed "irrelevant" or "outdated," even if it is true.[27] These developments conflict with Brazil's strong commitment to freedom of expression and access to information, and present market access barriers for both small and large U.S. services seeking to enter the Brazilian market.

For privacy regulations to be relevant and effective in today's environment, the U.S. and Brazil should advocate for interoperability of privacy regimes and frameworks that ensure accountable cross-border flows of information, while both protecting consumers and allowing for the benefits of e-commerce. For example, the U.S. should encourage Brazil to consider the APEC Cross Border Privacy Rules model as a best practice.[28]

Sharing Economy Barriers

Drivers seeking to provide transportation services outside of the traditional taxi industry and via apps face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services. *Licensing barriers*: In April 2017, the lower house of Brazil's federal legislature approved a bill that would reclassify the provision of transportation through app-based services as similar to a public service like traditional taxis. This reclassification would vastly increase the amount of time and money required to start working with an app-based service like Uber. As of October 2017, the bill was under discussion in the Senate. *Discriminatory fees*: In May 2016, the city of São Paulo introduced a per mile road use fee on app-based transportation services. Notably, taxis are not required to pay this fee. In October 2016, the city amended the regulation to make the per mile fee progressive, increasing as the total number of trip miles facilitated by any app-based service increases. At that point in time, Brazilian app firms EasyTaxi (since merged with Spanish app company Cabify) and 99 were newer to the market and thus were facilitating significantly fewer trip miles than Uber. *Licensing barriers and operational restrictions*: In July 2017, São Paulo City Hall introduced an additional piece of regulation adding layers of red-tape for drivers working via apps. For example, it limits eligibility to only those cars licensed in the São Paulo municipality and requires drivers to follow a strict dress code. The changes are set to enter into effect in January 2018 (cities throughout Brazil have shown a propensity to subsequently replicate São Paulo's approach to regulating app-based transportation services). *Data-sharing demands*: Several municipalities across Brazil (including Sao Paulo, Brasilia, Porto Alegre, and Vitoria) have passed regulations requiring companies providing transportation apps to share granular-level data, for instance pick-up and drop-off location, complete with exact longitude and latitude. This level of granularity is beyond what is necessary for regulators and cities to carry out their legitimate oversight and planning functions, and it seriously jeopardizes both consumers' privacy and businesses' competitive interests.

[27] Matt Sandy, *Brazilian Lawmakers Threaten to Crack Down on Internet Freedom*, TIME (Jan. 20, 2016), http://time.com/4185229/brazil-new-internet-restrictions/.

[28] *Cross Border Privacy Rules System*, CBPRS, http://www.cbprs.org/ (last visited Oct. 25, 2016).

Canada

Customs/Trade Facilitation

Canada's *de minimis* threshold (the level below which no duty or tax is charged on imported items) remains at CAD $20 (approximately USD $15), the lowest of any industrialized country and among the lowest in the entire world.[29] For comparison, the *de minimis* threshold for items imported into the United States is $800 USD – over 40 times higher than Canada's.[30] This low threshold, which has not been adjusted since the 1980s, creates an unnecessary barrier to trade through increased transaction costs for Canadian businesses, and restricts consumer choice and competition. Raising the *de minimis* threshold would help U.S. and Canadian small businesses participate more fully in global trade and e-commerce. Recent studies have also shown that any gains realized by collecting additional duties are often outweighed by the cost of assessing and processing of the high volume of shipments that fall below the low threshold.[31] In fact, proposals to increase the *de minimis* threshold have been shown to be revenue neutral or even positive for the Canadian Government.[32]

Chile

Unbalanced Copyright Frameworks

Chile does not have a comprehensive framework of copyright exceptions and limitations for the digital economy. Chilean *Intellectual Property Law* includes a long but inflexible list of rules[33] that does not clearly provide for open limitations and exceptions that are necessary for the digital environment – for instance, flexible limitations and exceptions that would enable text and data mining, machine learning, and indexing of content. This handful of limitations leaves foreign services and innovators in a legally precarious position. In order to reduce market access barriers to U.S. services, we urge USTR to work with Chile to implement a multi-factor balancing test analogous to fair use frameworks in the U.S and Singapore, and to enable copyright-protected works to continue to be used for socially useful purposes that do not unreasonably interfere with the legitimate interests of copyright owners.

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[29] Christine McDaniel et al., *Rights of Passage: The Economic Effects of Raising the De Minimis Threshold in Canada*, C.D. HOWE INSTITUTE, at 1 (June 23, 2016), https://www.cdhowe.org/public-policy-research/rights-passage-economic-effects-raising-dmt-threshold-canada.

[30] *Id*. at 2.

[31] *See, e.g.*, *id.*

[32] *Id*.

[33] Law No. 17.336 on Intellectual Property (as amended 2014), Art. 71.

China

Restrictions on U.S. Cloud Service Providers

Recently, China's Ministry of Industry and Information Technology (MIIT) has proposed two draft notices – *Regulating Business Operation in Cloud Services Market* (2016) and *Cleaning up and Regulating the Internet Access Service Market* (2017). These measures, together with existing licensing and foreign direct investment restrictions on US CSPs operating in China under the *Classification Catalogue of Telecommunications Services (2015)* and the *Cybersecurity Law (2016)*, would require US CSPs to turn over essentially all ownership and operations to a Chinese company, forcing the transfer of incredibly valuable intellectual property and know-how to China.

More specifically, these measures: (1) prohibit foreign CSPs from operating cloud services; (2) prohibit direct equity participation of foreign CSPs in Chinese cloud companies; (3) prohibit foreign CSPs from signing contracts directly with Chinese customers; (4) prohibit foreign CSPs from independently using their brands and logos to market their services; (5) prohibit foreign CSPs from contracting with Chinese telecommunication carriers for Internet connectivity; (6) prohibit foreign CSPs from broadcasting IP addresses within China; (7) prohibit foreign CSPs from providing customer support to Chinese customers; and (8) require any cooperation between foreign CSPs and Chinese companies be disclosed in detail to regulators. These measures are fundamentally protectionist and anti-competitive. Importantly, Chinese cloud computing companies do not face any of the above-listed restrictions in the United States.

China cites concerns over privacy and national security as justifications for restrictions on U.S. CSPs. Privacy and national security are priorities for all countries around the world, but China is the only country addressing these concerns by requiring foreign companies to transfer their technology and to surrender their brand and operating control in order to do business. U.S. CSPs provide the most secure and controllable cloud technologies in the world and devote enormous resources and constant attention to protecting the security and privacy of their customers.

Further, China's restrictions on cloud are inconsistent with commitments China has made to the U.S. government in the past. In both September 2015 and June 2016, China agreed that measures it took to enhance cybersecurity in commercial sectors would be non-discriminatory and would not impose nationality-based conditions or restrictions.

Data Localization Requirements

China imposes numerous requirements on internet services to host, process, and manage data locally within China, and places significant restrictions on data flows entering and leaving the country.[34]

[34] *Data localization,* AmChamChina, http://www.amchamchina.org/policy-advocacy/policy-spotlight/data-localization

Filtering, Censorship, and Service-Blocking

In China, the world's biggest market, the services of many U.S. internet platforms are either blocked or severely restricted. Barriers to digital trade in China continue to present significant challenges to U.S. exporters.

China imposes numerous requirements on internet services to host, process, and manage data locally within China, and places significant restrictions on data flows entering and leaving the country.[35] China actively censors – and often totally blocks – cross border internet traffic. It has been estimated that approximately 3,000 internet sites are totally blocked from the Chinese marketplace, including many of the most popular websites in the world. High-profile examples of targeted blocking of whole services include China's blocking of Facebook, Picasa, Twitter, Tumblr, Google search, Foursquare, Hulu, YouTube, Dropbox, LinkedIn, and Slideshare. This blocking has cost U.S. services billions of dollars, with a vast majority of U.S. companies describing Chinese internet restrictions as either "somewhat negatively" or "negatively" impacting their capacity to do business in the country.

At the same time, Chinese-based internet firms such as Baidu and Tencent are not blocked in China, nor are they blocked in the United States. This gives Chinese firms an unfair commercial advantage over U.S.-based internet companies.

Restrictive Regulation of Online Services

China's revised Telecommunications Services Catalog released in 2015 expands regulatory oversight of new services not typically regulated as telecom services. China's classification of Cloud Computing, online platforms, and content delivery networks as Value Added Telecom Services (VATS) not only has far-reaching consequences for market access and the development of online services in China, but also runs counter to China's WTO commitments. For example, cloud computing is traditionally classified as a Computer and Related Service, not a telecommunications service. Applying licensing obligations to online platforms imposes a number of market access limitations and regulatory hurdles, making it more difficult for online companies to participate in the Chinese market. The Catalog subjects a broad set of services to cumbersome, unreasonable, and unnecessary licensing restrictions, imposes new conditions on telecommunications service suppliers with longstanding business in that country, and impedes market access to foreign suppliers of computer and related services by classifying certain computer and related services such as cloud computing as VATS.

Discriminatory or Non-Objective Application of Competition Regulations

Chinese competition regulators continue to use the Anti-Monopoly Law (AML) to intervene in the market to advance industrial policy goals. In many cases involving foreign companies, China's enforcement agencies have implemented the AML to advance industrial policy goals and reduce China's perceived dependence on foreign companies, including in cases where there is no evidence of abuse of market power or anti-competitive harm.

[35] *Data localization,* AmChamChina, http://www.amchamchina.org/policy-advocacy/policy-spotlight/data-localization

The Chinese companies that benefit from these policies are often national champions in industries that China considers strategic, such as commodities and high-technology. Through its AML enforcement, China seeks to strengthen such companies and, in apparent disregard of the AML, encourages them to consolidate market power, contrary to the normal purpose of competition law. By contrast, the companies that suffer are disproportionately foreign.

We urge continued U.S. government engagement on this issue to ensure that competition laws in China are not enforced in a discriminatory manner.

Colombia

Unbalanced Copyright Frameworks

To date, Colombia has failed to comply with its obligations under the U.S.-Colombia Free Trade Agreement to provide copyright safe harbors for Internet service providers. A bill to implement the U.S.-Colombia FTA copyright chapter is pending, but while this bill contains a number of new copyright enforcement provisions, it lacks both fair use limitations and exceptions and intermediary liability safe harbor provisions that are required under the FTA.[36] Without a full safe harbor, intermediaries remain liable for civil liability. Action should be taken by the government to provide a full safe harbor as required by the FTA.

Restrictive Regulation of Online Services

Colombia has proposed a number of problematic measures aimed at online services and platforms. One bill in Congress proposed by the Ministry of Transportation seeks to subject online platforms used for the provision of transportation services to requirements of registration, prior authorization, and database sharing with authorities.[37] The Colombian Ministry of ICTs is evaluating whether or not to extend broadcasting and public utility regulation to streaming platforms, and seeks to propose a bill to reform the TV sector. A bill in Congress aims at subjecting subscription-based audiovisual streaming platforms to the television public utility legal framework. In addition, there are secondary regulatory initiatives to classify audiovisual streaming services as telecommunications services. Finally, there is a bill proposing to extend the scope of application of Colombian data protection law to all processing performed abroad by electronic means of personal data of people located in the country.[38]

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[36] USTR, Intellectual Property Rights In in the US-Colombia Trade Promotion

Agreement, US-U.S.-Colombia Trade Agreement, https://ustr.gov/uscolombiatpa/ipr

visited Oct. 25, 2016).

[37] Draft Law Number 126 Senate through which the Private Transportation Service is created by Technology Platforms and other provisions, Republic of Colombia Congress (Mar. 9, 2015), http://www.imprenta.gov.co/gacetap/gaceta.mostrar_documento?p_tipo=05&p_numero=126&p_consec=43703.

[38] Proyecto de Ley Estatutaria 91 de 2016 Senado, Republic of Colombia Congress, http://www.imprenta.gov.co/gacetap/gaceta.mostrar_documento?p_tipo=18&p_numero=91&p_consec=45526.

Colombia has also considered a tax proposal that would raise VAT tariffs, remove longstanding VAT exemptions, and make online services provided from abroad subject to VAT in Colombia, raising barriers for foreign companies in the ICT sector.[39] This initiative seems focused on compelling foreign internet services and platforms to contribute locally, as demonstrated by the public comments of several sponsors of the proposal.

These measures are likely to have a disproportionate impact on U.S. services. Complex regulations targeted at foreign services will be difficult to implement and will likely drive smaller digital services away from entering the Colombian market.

As Colombia works to adapt national frameworks to promote the digital economy and innovation, USTR should encourage Colombia to avoid creating market access barriers that could halt the growth of new online services that are critical to Colombia's growing economy.

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles. *License cap:* In February 2015, the Ministry of Transport froze the granting of any new for-hire vehicle licenses. No technical study or research of any sort was conducted to provide an underlying rationale for this licensing freeze and the ministry made no public statement justifying the step.

Egypt

Sharing Economy Barriers

As of September 2017, the Egyptian Parliament was set to discuss a draft law on app-based transportation services. While an otherwise positive and forward-looking step, the draft law nevertheless contains certain problematic provisions. *Data-sharing requirements:* The draft law includes requirements for companies providing transportation apps to establish onshore servers, link their databases with Egyptian security authorities, and provide real-time data on riders, drivers, and trips.

[39] 178/2016 C Reforma Tributaria, Republic of Colombia Congress (Oct. 19, 2016), http://www.camara.gov.co/portal2011/proceso-y-tramite-legislativo/proyectos-de-ley?option=com_proyectosdeley&view=ver_proyectodeley&idpry=2247.

European Union

Unbalanced Copyright Frameworks

The European Commission's Copyright Directive includes several elements likely to restrict a wide range of internet services in European markets.[40] Some of these restrictions are also reflected in a September 2017 communication from the Commission.[41] The proposed changes would represent a significant departure by the EU from its shared approach with the United States on the foundational principles of the free and open internet, and would significantly restrict exports of U.S. online services to the EU.

Particular problems with the Directive include new "neighboring rights" for news publishers that conflict with the Berne Convention (Article 11), broad and unclear monitoring and filtering obligations for service providers (Article 13), as well as potentially intrusive multi-stakeholder processes regarding the design and operation of content recognition technologies (Article 13). These barriers are discussed in more detail below, along with other concerns about restrictions on text and data mining and liability for hyperlinks.

Ancillary Copyright and Neighboring Rights

"Ancillary copyright" or "neighboring rights" laws refer to legal entitlements for quotations or snippets that enable countries to impose levies or other restrictions on the use of this information. Such levies negatively impact the ability of U.S. services to use or link to third-party content, including snippets from publicly available news publications.

The subject matter covered by ancillary copyright is ineligible for copyright protection under international law and norms. Article 10(1) of the Berne Convention provides that "[i]t shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries."[42] It is further provided as an example that "quotations from newspaper articles and periodicals in the form of press summaries" are fair

[40] Eur. Comm'n, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (Sept. 14, 2016), https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market; World Intellectual Property Organization (WIPO), Berne Convention for the Protection of Literary and Artistic Works (as amended on Sept. 28, 1979), Eur. Comm'n, Directive of the European Parliament and of the Council on copyright in the Digital Single Market (2016 draft), http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283698.

[41] European Commission. "Communication on Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms." https://ec.europa.eu/digital-single-market/en/news/communication-tackling-illegal-content-online-towards-enhanced-responsibility-online-platforms.

[42] Berne Convention for the Protection of Literary and Artistic Works, art. 10(1), last revised July 24, 1971, amended Oct. 2, 1979, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221 (hereinafter "Berne Convention").

practice. As incorporated into TRIPS Article 9, Article 10(1) of the Berne Convention creates an obligation on member states to allow for lawful quotations.[43]

However, ancillary copyright laws impose a levy on quotations in direct violation of these obligations under TRIPS and create new rights contradictory to international standards meant to protect market access. For example, these laws would require online services that aggregate news content to pay a tax to the news publisher for the ability to link to one of its articles. Rather than attempting to navigate complex individual negotiations with publishers in order to include a headline or other small amount of newsworthy content on a third-party site, online services might simply stop showing such content, causing traffic to news publishers to plunge. These laws create a stealth tax on U.S. internet services operating in foreign jurisdictions, and unfairly disadvantage internet services from offering services otherwise protected under copyright law by raising barriers to market entry.

As discussed below, previous implementations of this principle in EU member states such as Germany and Spain have generated direct and immediate market access barriers for U.S. services.[44] The European Union's new proposal, like those earlier provisions, runs afoul of international obligations in the Berne Convention by giving some publishers the right to block internet services from making quotations from a work.[45]

The threat posed by ancillary copyright laws to U.S. stakeholders is genuine and timely, especially as Europe considers more widespread proposals that would violate international copyright obligations to the detriment of U.S. copyright stakeholders, and hinder the growth of new business models. The discriminatory harm done by these stealth taxes on search engines and news aggregators creates economic and legal barriers to entry that effectively deny market access and fair competition to U.S. stakeholders whose business models include aggregation of quotations protected by international copyright standards. Expressing such concerns after legislation is inevitable or already enacted is too late.

Broad, Unclear, and Intrusive Monitoring and Filtering Obligations

If implemented, Article 13 of the proposed directive – read in conjunction with Recital 38 – would narrow the existing EU copyright safe harbor for hosting providers in unpredictable ways across different member states, subjecting online services to incalculable liability risks and requiring the costly deployment of content filtering technologies to "prevent the availability" of certain types of content.

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[43] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Agreement, art. 9.

[44] *EU Lawmakers Are Still Considering This Failed Copyright Idea*, FORTUNE (March 24, 2016), http://fortune.com/2016/03/24/eu-ancillary-copyright/http://fortune.com/2016/03/24/eu-ancillary-copyright/ (describing failed attempts in Germany and Spain, which included causing Google to shutdown its Google News service in Spain and partially withdraw its news service in Germany, and news publishers' revenue to tank in both countries).

[45] Eur. Comm'n, Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (Article 11), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0596&from=EN.

This proposed requirement deviates from shared U.S. and EU norms that have been critical to the growth of the commercial internet. The internet is a vibrant and economically valuable platform in large part because of balanced intermediary liability laws, which permit users and small businesses to post material – such as videos, reviews, and pictures – online without being unduly exposed to liability for the content of that material. Both the United States (under Section 512 of the Digital Millennium Copyright Act) and the EU (under Articles 12-15 of the E-Commerce Directive) create a "safe harbor" that protects online services from being liable for what their users do, as long as the service acts responsibly, such as by taking down content after being given notice that it infringes copyright.

However, the recent proposal by the Commission would deviate from this common transatlantic approach to intermediary liability by requiring service providers to "take measures . . . to prevent the availability on their services of works or other subject-matter identified by rightsholders." This language would create new, broad, and unclear filtering obligations that could be implemented in different and inconsistent ways across member states. Service providers would be subject to a moving target in the European Union for years to come. Larger providers would face critical liability risks, while smaller start-ups and entrepreneurs would be deterred from entering the market, given the difficulty of raising funds from venture capitalists that have consistently characterized such rules as strong impediments to investment.[46] Moreover, such filtering technology will be expensive for large and small services to develop and maintain.

Weakening of E-Commerce Directive Protections for Internet Services in EU Member States

Despite existing protections under the E-Commerce Directive for internet services that host third-party content, courts in some European Union member states have excluded certain internet services from the scope of intermediary liability protections. For example, one platform that hosted third-party content in Italy was found liable because it offered "additional services of visualisation and indexing" to users.[47] Another U.S.-based platform was found liable because it engaged in indexing or other organization of user content.[48] A third internet service was held liable for third-party content because it automatically organized that content in specific categories with a tool to find 'related videos.'[49] All of these activities represent increasingly common features within internet services, and the existence of these features should not be a reason to exclude a service from the scope of intermediary liability protections under the E-Commerce Directive, in Italy or any other member state.

Restrictions on Text and Data Mining

Finally, the European Commission proposals for text and data mining further restrict technology start-ups and businesses of all types from engaging in cutting-edge research and data analytics. By limiting who can legally

[46] Fifth Era, *The Impact of Internet Regulation on Early Stage Investment* (Nov. 2014), http://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/5487f0d2e4b08e455df8388d/1418195154376/Fifth+Era+report+lr.pdf

[47] RTI v. Kewego (2016).

[48] Delta TV v. YouTube (2014).

[49] RTI v. TMFT (2016).

engage in machine learning, these restrictive proposals will have a significant impact on the emerging market and jobs associated with data analytics, technology, and artificial intelligence.

Liability for Hyperlinks

We have concerns about the Court of Justice of the European Union's (CJEU's) recent decision in *GS Media v. Sanoma Media*, which held that linking to copyrighted content posted to a website without authorization can itself be an act of copyright infringement.[50] This case is already generating additional lawsuits testing the extent of the ruling, which may create new liability for online services doing business in the EU. It has also resulted in new monetary demands from publishers to those who provide links to content. We urge USTR to monitor this situation and engage with European counterparts to prevent other negative impacts from this ruling.

Non-IP Intermediary Liability

In the Delfi opinion, the European Court of Human Rights held an Estonian news site responsible for numerous user comments on articles, even though the company was acting as an intermediary, not a content provider, when hosting these third-party comments. In response to that decision, the Delfi.ee news site shut down its user comment system on certain types of stories, and the chief of one newspaper association stated: "This ruling means we either have to start closing comments sections or hire an armada of people to conduct fact checking and see that there are no insulting opinions." Without clarification following this opinion, numerous internet services are likely to face increased liability risks and market access barriers in Estonia.

Data Localization Requirements

IA is monitoring new developments in France and Germany, including efforts to establish local infrastructure for cloud data processing in France and Germany, and new local data retention requirements for internet services in Germany.

Restrictive Regulation of Online Services

There are currently active consultations and proposals regarding the extension of certain telecom and broadcasting obligations to online voice and video services, including obligations concerning emergency services, limited accessibility requirements, data portability, interoperability, confidentiality of communications, and data security,[51] as well as local content quotas related to the Audiovisual Media Services Directive.

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[50] C--*GS Media BV v Sanoma Media Netherlands BV* et al., ECLI:EU:C:2016:644, European Court of Justice (8 September 2016).

[51] *See* Fact Sheet, *State of the Union 2016: Commission Paves the Way for More and Better Internet Connectivity for All Citizens and Business,* European Commission (Sept. 14, 2016), http://europa.eu/rapid/press-release_MEMO-16-3009_en.htm; *Report On OTT Services,* BEREC (Jan. 29, 2016), http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5751-berec-report-on-ott-services; Lisa Godlovitch et al., *Over-the-Top (OTT)Players: Market Dynamics and Policy Challenges*, European

Burdensome or Discriminatory Data Protection Frameworks

The E.U. General Data Protection Regulation was passed this year, but will not go into effect until May 2018.[52] There is still considerable ambiguity in the text. Specifically, how E.U. data protection authorities choose to interpret the law will have a significant impact on companies' ability to operate in the E.U. and offer consistent services and products across the globe.

While Privacy Shield was ultimately agreed upon this year, its usefulness may be threatened by future court challenges and modifications arising out of the annual review process – such as potential restrictions on automated processing/profiling.[53] Standard Contractual Clauses (SCCs) may also be threatened by ongoing litigation.[54] Significant challenges to these transfer mechanisms threaten the viability of billions of dollars in E.U.-U.S. data transfers.

Sharing Economy Barriers

Some of the most prominent U.S. sharing economy firms are focused on transportation, providing mobile apps to match independent drivers with consumers seeking their services. The newness of such app-based transportation services has generated questions about the appropriate way to regulate them. In many EU member states, however, regulations go beyond what is necessary to advance any legitimate public interest and instead serve as barriers to protect traditional transportation service providers. Although many of these market access and operational restrictions apply to the local independent drivers seeking to provide their services through apps—and not to the apps themselves—these barriers nevertheless directly damage the ability of U.S. firms to export their software application services by limiting the scale, undermining the efficiency, eroding the quality, and raising the cost of the services that they can facilitate.

Parliament (Dec. 15, 2015), http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2015)569979 (last visited Oct. 25, 2016).

[52] *See* Warwick Ashford, *D-Day for GDPR is 25 May 2018*, COMPUTER WEEKLY (May 4, 2016), http://www.computerweekly.com/news/450295538/D-Day-for-GDPR-is-25-May-2018.

[53] *See* Warwick Ashford, *Slow Response to Privacy Shield EU-US Data Transfer Programme*, COMPUTER WEEKLY (Aug. 15, 2016), http://www.computerweekly.com/news/450302513/Slow-response-to-Privacy-Shield-EU-US-data-transfer-programme.

[54] *See, e.g.,* Allison Grande, *Irish Regulator Says Data Transfer Row Will Deliver Clarity*, LAW 360 (Sept. 30, 2016), https://www.law360.com/articles/846924?sidebar=true.

EU Member State Measures

Austria

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services. *Vehicle requirements*: For-hire vehicles must be of a minimum length of 4.2 meters, width of 1.56 meters, height of 1.3 meters, and be equipped with air conditioning. *Capital requirements*: In Vienna, vehicle fleet owners must meet a capital requirement of 7,500 euros for every car that they want to operate. This requirement is cumulative: if someone wants to add a fifth car to a fleet of four cars, she would have to produce proof of additional available funds of 37,500 euros (5 x 7,500 euros) and not merely an additional 7,500 euros. *Professional experience requirement*: To become a for-hire driver, one needs at least three years of relevant work experience. *Return-to-garage rule*: For-hire vehicles must return to their company's place of business after completion of the trip unless they receive a new request during their return to the company's place of business. The request itself, however, must be accepted at the company place of business.

Belgium

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles and raising the price consumers must pay for their services. *Vehicle requirements*: In the Brussels Capital Region, for-hire vehicles must cost at least 31,133.29 euros (excluding VAT) and have a wheelbase longer than 2.8 meters. *Exams*: In the Brussels Capital Region, any prospective independent driver must pass a test entitled "examen d'accès à la profession d'indépendant" which includes accounting and corporate finance. *Minimum trip duration and price*: Legislation in the three Belgian regions requires each for-hire vehicle trip last a minimum of three hours and cost a minimum of 90 euros.

Denmark

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services must be licensed as a taxi driver. These new entrants face multiple market access and operational restrictions that serve no public interest but are instead intended to protect incumbents. *License cap*: There are caps on the number of taxi licenses,

administered by each municipality. *Exams*: Prospective taxi drivers must attend a 45-hour course and pass a test on energy saving, first aid, and other subjects. This test includes a Danish language test. Drivers must either join a taxi booking company or establish their own, which requires a separate licensing exam that tests issues of contract, tax, insurance, employment and transportation law; work environment; economics and accounting; tender processes; conflict management; and maintaining a dispatch center. *Financial capacity*: Taxi owners must show DKK 50,000 in available funds for the first permit/vehicle and DKK 25,000 for any subsequent permit/vehicle. *Mandatory redundant equipment*: Taxis must be equipped with various in-car equipment, including taximeters that are redundant given current smartphone-based technology.

France

Unbalanced Copyright Frameworks

Under France's newly enacted "image indexation" law, an "automated image referencing service" must negotiate with a French rights collection society and secure a license for the right to index or "reference" a French image. Individual artists or photographers cannot opt out of this licensing regime. This law, set to go into effect on January 8, 2017, will require online services to seek a license for any indexation of an image published in France.[55] These requirements will present significant market access barriers for the large number of online services in the U.S. and elsewhere that work with images. By its very existence the law also deprives U.S. image banks, such as Getty, from their right to control how they are indexed and from the possibility to negotiate indexation fees.

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services. *Vehicle requirements*: For-hire vehicles must be less than six years old and equipped with at least four doors. They must have a minimum length of 4.5 meters, a minimum width of 1.7 meters, and 115 horsepower (electric or hybrid vehicles are exempt from these restrictions). *Exams*: French law requires prospective for-hire vehicle drivers to pass stringent exams. The exams include both practical and written sections, covering topics such as general culture, business management, and English language. There is a delay of approximately 3 months between the practical and written exams. The current pass rate is approximately 12 percent due to the difficulty of the process. *Capital requirements*: Drivers must provide 1,500 euros in equity or a bank guarantee when registering their company with the Ministry of Transportation. *Return-to-garage rule*: Between trips, drivers must return either to their registered place of

[55] Art. L. 136-4, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032854341&fastPos=1&fastReqId=643428459&categorieLien=id&oldAction=rechTexte. Loi 2013-46 du 10 décembre 2013 Project de Loi Dispositions relatives aux objectifs de la politique de défense et à la programmation financière, rapport du Sénat, http://www.senat.fr/petite-loi-ameli/2015-2016/695.html.

business or to an authorized off-street parking space, unless a new trip request is received on the way to either place. *Geolocation prohibition*: French rules forbid for-hire drivers and apps facilitating their services from informing consumers about the availability and the location of a for-hire vehicle prior to a booking request—taxis face no such restriction.

Germany

Unbalanced Copyright Frameworks

Ancillary copyright laws in Germany and Spain have proven detrimental for U.S. companies, EU consumers, publishers, and the internet ecosystem that requires adequate protection of rights under copyright law. The German *Leistungsschutzrecht* was enacted in August 2013, and holds search engines liable for making available in search results certain "press products" to the public.[56] The statute excludes "smallest press excerpts," making the liability regime less clear and exposing search engines to confusing new rules. These laws specifically target news aggregation, imposing liability on commercial search engines and other online platforms while exempting "bloggers, other commercial businesses, associations, law firms or private and unpaid users."[57] By extending copyright protection to short snippets or excerpts of text used by search engines and other internet platforms, this law violates Article 10(1) of the Berne Convention, directly violating the ability of online platforms to use permissible quotations under the TRIPS Agreement.

Non-IP Intermediary Liability

The German NetzDG law mandates removal of "obviously illegal" content within 24 hours, and subjects online services to penalties of up to 50 million Euros if they are found to be out of compliance with this law. This significant divergence from U.S. and EU frameworks on non-IP intermediary liability is concerning on its own, and is being closely observed by governments around the world that may be considering similar actions. We urge USTR to monitor these developments and engage with counterparts in Germany and elsewhere to ensure that any measures on controversial content do not introduce burdensome market access restrictions on U.S. services.

Restrictive Regulation of Online Services

In addition, the German film levy law extends film funding levies from German to foreign pay video on demand (VOD) services despite the EU Audiovisual Media Services Directive's Country of Origin principle, according to which providers only need to abide by the rules of a Member State rather than in multiple countries. The new law that came into force on January 1, 2017 further extends the levy to foreign ad-funded VOD services insofar as they make cinematographic works available to Germans. Such services have to pay a proportion of their

[56] German Copyright Act (1965, as last amended in 2013), at art. 87f(1), http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0572.

[57] Id.

German revenues to the regulatory body, thus hindering cross-border businesses and raising costs for consumers.

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services. *Exams*: Local chambers of commerce organize exams for prospective drivers. Exam spots are very limited and typical waiting times can stretch up to several months. Some parts of the exam have nothing to do with running a for-hire vehicle company (for example, where to dispose of special waste). These tests are very burdensome and a major hurdle for prospective drivers. *Return-to-garage rule:* For-hire vehicles must also return to their company's place of business after completion of each trip, unless they receive a new trip request during the trip or on their way back to the place of business. That request, however, must be actively accepted and dispatched at the company's place of business.

Greece

Unbalanced Copyright Frameworks

Greece will soon have an administrative committee that can issue injunctions to remove or block potentially infringing content. Instead of adhering to the U.S. system by submitting a DMCA notice, a rightsholder may now choose to apply to the committee for the removal of infringing content in exchange for a fee. While implementation is still uncertain, this measure represents a significant divergence from U.S. procedures on efficient removal of infringing content.

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by greatly raising the price consumers must pay for for-hire services. *Minimum trip duration:* For-hire vehicle trips must last a minimum of six hours.

Hungary

Filtering, Censorship and Service-Blocking

In Hungary, legislation enabled the order by local authorities of a 365-day ban of online content, such as websites and electronic applications that advertise passenger transport services.[58]

Italy

Unbalanced Copyright Frameworks

Italy recently passed a new amendment that empowers the Italian Communications Authority to "require information providers to immediately put an end to violations of copyright and related rights, if the violations are evident, on the basis of a rough assessment of facts." This law amounts to a copyright 'staydown' requirement that conflicts with both Section 512 of the DMCA and the E-Commerce Directive, and will serve as a market access barrier for U.S. services in Italy.

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services. *License cap*: While Italian transportation laws do not impose a cap on the number of for-hire vehicle licenses available, municipalities nevertheless grant for-hire vehicle licenses on an irregular and arbitrary basis. In Rome, for example, there are only 1,024 for-hire vehicle licenses and the last one was issued in 1993 (compared to 7,800 taxi licenses). In Milan, there are only 229 for-hire vehicle licenses and the last one was issued in the 1970s (compared to 5,200 taxi licenses). *Return-to-garage rule*: For-hire drivers have an obligation to return to their garage before and after each trip and are prohibited from parking their vehicle anywhere but in its designated garage. Although this return-to-garage ("RTG") rule was suspended in February 2017, that suspension expires at the end of 2017. In the meantime—and despite the RTG suspension—drivers continue to face heavy enforcement of the RTG rule by local police authorities, resulting in the impoundment of their vehicles.

[58] See Marton Dunai, Hungarian Parliament Passes Law That Could Block Uber Sites, Business Insider (June 13, 2016), http://www.businessinsider.com/r-hungarian-parliament-passes-law-that-could-block-uber-sites-2016-6.

Poland

Unbalanced Copyright Frameworks

In its recent judgment of January 25, 2017 in the case of *OTK v. SFP*,[59] the CJEU concluded that Article 13 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (the Enforcement Directive) shall not preclude EU Member States from allowing a rightsholder in an infringement proceeding to demand payment in an amount higher than the appropriate fee which would have been due if permission had been given for the work concerned to be used. In addition, in such a situation, the court clarified that there is no need for the rightsholder to prove the actual loss caused to him as a result of the infringement. This equates to the introduction in EU law of punitive damages, without any appropriate safeguards.

Spain

Unbalanced Copyright Frameworks

In Spain, reforms of the *ley de propriedad intelectual* in 2014 resulted in a similarly unworkable framework, requiring "equitable compensation" for the provision of "fragments of aggregated content" by "electronic content aggregation service providers."[60] Like the German law, the Spanish law creates liability for platforms using works protected under international copyright obligations in the TRIPS Agreement. The Spanish law is arguably even worse than the German law because it does not allow publishers to waive their right to payment: they have to charge for their content, irrespective of whether they have existing contractual or other relationships with news aggregators, and irrespective of creative commons or other free licenses.

The Spanish ancillary copyright law yielded similar results to the German law. Soon after the enactment of the Spanish law, Google News shut down in Spain.[61] An economic study prepared by the Spanish Association of Publishers of Periodical Publications found that the result of *ley de propriedad intellectual,* which was meant to benefit publishers, was higher barriers to entry for Spanish publishers, a decrease in online innovation and content access for users, and a loss in consumer surplus generated by the internet. The results are most

[59] C‑367/15 Stowarzyszenie 'Oławska Telewizja Kablowa' v. Stowarzyszenie Filmowców Polskich, ECLI:EU:C:2017:36, European Court of Justice (January 25, 2017).

[60] Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Informe de la Ponencia: Proyecto de Ley por la que se modifica el Texto Refundido de la Ley de Propriedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, No. 81-3 (July 22, 2014), available at http://www.congreso.es/ public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-81-3.PDF.

[61] *An Update on Google News in Spain*, GOOGLE EUROPE BLOG (Dec. 11, 2014) http://googlepolicyeurope.blogspot.com/2014/12/an-update-on-google-news-in-spain.html.

concerning for smaller enterprises facing drastic market consolidation and less opportunity to compete under the law.[62]

These ancillary copyright laws have proven detrimental for U.S. companies, consumers, publishers, and the broader internet ecosystem.

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services. *License cap:* Transportation law limits the number of for-hire vehicle licenses that a region may grant to one for every 30 taxi licenses in that region. *Vehicle requirements:* For-hire vehicle companies must have a minimum of seven vehicles. *Geographic restrictions:* For-hire vehicles may only provide service in regions other than their home region up to a maximum of 20 percent of their trips in any three-month period. *De facto price floor:* For-hire vehicles are prohibited from selling their service on an individual seat basis and must instead sell the service of the entire vehicle. *Data-sharing requirements:* In 2017, the regional government of Catalonia passed a Law Decree (implementing regulation is necessary before it enters into force) that requires for-hire vehicle licensees to electronically submit to the government's online registry the following data before any trip is begun: (i) name and ID number of the for-hire vehicle licensee, (ii) license plate number of vehicle, (iii) name and ID number of the rider, (iv) location and time of the agreement for services to be provided, (v) location and time where the service will be initiated, (vi) location and time where the service will be terminated, (vii) other data that the government may choose to require. As of October 2017, a similar Royal Decree is in draft form at the national level.

Sweden

Unbalanced Copyright Frameworks

A recent Supreme Court ruling[63] in Sweden has resulted in the banning of websites displaying mere photos of public art exhibited in public spaces. Even though Sweden has a copyright exception for such photos, the Court found the commercial interest a site may have in using works of art is a limit to the application of the exception. The case was brought by a visual arts collecting society against offentligkonst.se, an open map with descriptions and photographs of works of public art across Sweden which is operated by Wikimedia SE. This means that even in the case of a webpage written by an amateur blogger, the mere reproduction of a photo of public art, which would elsewhere be deemed fair use, can now lead to fines when this page displays an ad.

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[62] *Economic Report of the Impact of the New Article 32.2 of the LPI (NERA for AEEPP)*, SPANISH ASSOCIATION OF PUBLISHERS OF PERIODICALS (July 9, 2015), http://coalicionprointernet.com/wp-content/uploads/2015/07/090715-NERA-Report-for-AEEPP-FINAL-VERSION-ENGLISH.pdf.

[63] April 4, 2016, case Ö 849-15, Bildupphovsrätt i Sverige ek. för v. Wikimedia Sverige.

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services must be licensed as a taxi driver. These new entrants face multiple market access and operational restrictions that serve no public interest but are instead intended to protect incumbents. *Exams:* To obtain a taxi driver license, drivers must pass a test on map reading, driver economics, environment, safety, customer service, illnesses and disabilities, vehicle knowledge, and risks of being a taxi driver. *Capital requirements:* Swedish rules impose a capital requirement of SEK 100,000 for one vehicle and SEK 50,000 for each subsequent vehicle. *Mandatory redundant equipment:* Every vehicle must either be equipped with an approved taximeter (or secure an exemption) and must be connected to a central accounting system, making it more difficult for drivers to report their taxes when working via apps.

United Kingdom

Unbalanced Copyright Frameworks

The U.K. has so far failed to implement a private copying exception, which is necessary to ensure full market access for U.S. cloud providers and other services. The government's first attempt to introduce such an exception in October 2014 was quashed by the U.K.'s High Court in July 2015.[64] Without such an exception in place in the U.K., individual cloud storage services will continue to face significant market access barriers, and even an attachment to an e-mail may be deemed to be an infringement.

Hong Kong

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services. *License cap*: For-hire vehicle licenses are capped under a 1981 ordinance at 1,500. Vehicle requirement: For-hire vehicles must have a minimum taxable value of HKD $300,000 (if applicant can show a contract for future services, typically with a corporate client) or HKD $400,000 (if applicant cannot show a contract for future services). *Physical location requirement*: The passenger's name and trip details must be recorded at the registered physical address of the vehicle operator.

Unbalanced Copyright Frameworks

In the past years, Hong Kong had considered measures to bring its copyright law in line with the realities of digital age: including safe harbor provisions for internet intermediaries and exceptions for parody which would

[64] Case No. CO/5444/2014, EWHC 2041, ¶ ¶ 11 and 12 (Royal Court of Justice 2015), http://www.bailii.org/ew/cases/EWHC/Admin/2015/2041.html.

form a strong foundation for future reforms and further discussion of flexible exceptions and limitations. Since the draft bill in question did not pass, Hong Kong has never reactivated a discussion on amending its copyright framework. USTR should urge its Hong Kong counterparts to adopt reforms introducing a safe harbor regime in line with the international practice and a broad set of limitations and exceptions which would remove market access barriers for numerous U.S. businesses by establishing a more balanced copyright framework and support the growth of national digital economy.

India

Unbalanced Copyright Frameworks

India's intermediary liability framework continues to pose a significant risk to U.S. internet services. In particular, India does not have a clear safe harbor framework for online intermediaries,[65] meaning that internet services are not necessarily protected from liability in India for user actions in case of copyright infringements.

Non-IP Intermediary Liability

USTR correctly highlighted numerous problems with India's non-IP liability framework in the 2017 National Trade Estimate:

> India's 2011 Information Technology Rules fail to provide a robust safe harbor framework to shield online intermediaries from liability for third-party user content. Any citizen can complain that certain content is "disparaging" or "harmful," and intermediaries must respond by removing that content within 36 hours. Failure to act, even in the absence of a court order, can lead to liability for the intermediary. The absence of a safe harbor framework discourages investment to internet services that depend on user generated content.

Safe harbors from intermediary liability are not just critical elements of balanced intellectual property enforcement frameworks; they also power digital trade and enable companies that are dependent upon intellectual property to access new markets. Where such safe harbors are incomplete or nonexistent, stakeholders in the internet sector face greater difficulty and risk in accessing these markets.

Restrictive Regulation of Online Services

In March 2015, India's telecom regulator, TRAI, issued a consultation paper on "Regulatory Framework for Over-the-Top (OTT) services."[66] There has been no response from the regulator on this paper after comments were

[65] The Copyright (Amendment) Act, 2012, Section 52(1)(b)-(c) (allowing infringement exceptions for "transient or incidental storage" in transmission and, in part, "transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration . . .").

[66] TRAI, *Consultation Paper on Regulatory Framework for Over-the-Top (OTT) Services* (Mar. 27, 2015), http://www.trai.gov.in/Content/ConDis/10743_23.aspx.

submitted, yet it appears that the matter is still under consideration. In 2016, there have been additional consultation papers on issues including net neutrality,[67] VoIP,[68] and cloud services.[69] Many of these consultations have sought feedback on whether there is a need for regulation of "OTT" providers that offer such services. However, again, regulators have provided little feedback or response to industry submissions. Finally, the Ministry of Telecommunications recently released draft registration guidelines for machine-to-machine (M2M) service providers in India, with a focus on increasing regulation of M2M service providers.[70]

Filtering, Censorship, and Service-Blocking

Indian regional and local governments engage in a regular pattern of shutting down mobile networks in response to localized unrest, disrupting access to internet-based services.[71]

Unilateral or Discriminatory Tax Regimes

We are deeply concerned about India's recent adoption of an "equalization levy," aimed at creating an additional six percent withholding tax on foreign online advertising platforms.[72] While this levy was introduced with the ostensible goal of "equalizing the playing field" between resident service providers and non-resident service providers, one significant problem is that its provisions do not provide credit for tax paid in other countries for the service provided in India. Another problem is that this levy will target business income even when a foreign resident does not have a permanent establishment in India, and even when underlying activities are not carried out in India, in violation of Articles 5 and 7 of the U.S.-India tax treaty. And it does this by singling out one particular activity provided through one particular mode of supply: online advertising.

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[67] TRAI, *Consultation Paper on Net Neutrality* (May 30, 2016), http://www.trai.gov.in/Content/ConDis/20775_0.aspx.

[68] TRAI, *Consultation Paper on Internet Telephony (VoIP)* (June 22, 2016), http://www.trai.gov.in/Content/ConDis/20779_0.aspx.

[69] TRAI, *Consultation Paper on Cloud Computing* (Oct. 6, 2016), http://www.trai.gov.in/Content/ConDis/20777_0.aspx.

[70] TRAI, *Consultation Paper on Spectrum, Roaming, and QoS related requirements in Machine-to-Machine (M2M) Communications* (Oct. 18, 2016), http://www.trai.gov.in/Content/ConDis/20798_0.aspx.

[71] *India Shuts Down Kashmir Newspapers Amid Unrest*, AL JAZEERA (July 17, 2016), http://www.aljazeera.com/news/2016/07/india-shuts-kashmir-newspapers-unrest-160717134759320.html; Betwa Sharma & Pamposh Raina, *YouTube and Facebook Remain Blocked in Kashmir*, NEW YORK TIMES INDIA INK BLOG (Oct. 3, 2012), http://india.blogs.nytimes.com/2012/10/03/youtube-and-facebook-remain-blocked-in-kashmir/?_r=0.

72 Madhav Chanchani et al., Equalisation Levy of 6 percent On Digital Ad: Government Finds a Way to Tax Companies Like Google, Facebook, The Economic Times (Mar. 2, 2016), http://economictimes.indiatimes.com/news/economy/policy/equalisation-levy-of-6-on-digital-ad-government-finds-a-way-to-tax-companies-like-google-facebook/articleshow/51216310.cms.

The current structure of the equalization levy represents a shift from internationally accepted principles, which provide that digital taxation mechanisms should be developed on a multilateral basis in order to prevent double taxation. This levy is likely to impede foreign trade and increase the risk of retaliation from other countries where Indian companies are doing business. In addition, there is a risk that the levy will be extended more broadly to cover a wide range of foreign e-commerce and digital services.

Discriminatory or Non-Objective Application of Competition Regulations

We are aware that several Competition Commission of India (CCI) decisions have been overturned by the Competition Appellate Tribunal on procedural grounds. One way to avoid this situation is through improving CCI interaction with parties during the course of an investigation. It is important for due process and for efficiency of investigations to ensure that parties under investigation have an understanding of the issues for which they are being investigated, and have the opportunity to comment on emerging thinking and provide relevant evidence before allegations are formalized in a DG Report or finalized in an Order. This is consistent with the practice of other agencies around the world, notably the European Commission and UK Competition and Markets Authority.

In addition, there may be more that the CCI can do to protect the confidential information of investigated parties and third parties. The improper disclosure of information, and information leaks more generally, can have a detrimental impact on the investigatory process and the standing of the agency. Providing adequate protections for this information can increase the quality of investigations by encouraging cooperation and voluntary submission of confidential information.

Barriers to Online Payments and Local Presence Requirements

In March 2017, the Reserve Bank of India released new guidelines that require co-branding partners to have a local presence in India in order to offer their mobile payment product.

Local Preference for Government Procurement

Earlier this summer, the Department of Industrial Policy and Promotion released its “Make in India” Order, which requires all government agencies and state companies to provide a 20 percent price preference for the procurement of goods that have 50 percent India local content. More recently, the Indian Government has proposed expanding these discriminatory preferences to “cybersecurity products”, which encompasses a sweeping range of ICT hardware and software, including products related to mobile payments, cloud security, and data analytics. If implemented, the policy would put U.S. ICT companies, including cloud service providers, at a significant disadvantage. The proposal has no relationship to India’s national security. IA members request the US government to urge the Indian government not to adopt the cybersecurity proposal that gives 20 percent preference to Indian providers, and encourage them purchase products based on performance rather than local content requirements.

Foreign Direct Investment Restrictions

The Indian government continues to prohibit foreign investment in large portions of India's online retail sector, a $60 billion market. Under these restrictions, foreign companies, including leading U.S. online retailers can only invest in "marketplaces" where they connect buyers and sellers; they are not allowed to establish enterprises that own inventory. These restrictions create an unlevel playing field for U.S. online retailers and the hundreds of thousands of U.S. small and medium-sized enterprises from which they source because Indian companies are not subject to these same restrictions. We encourage the U.S. government to press the Indian government to remove FDI restrictions for online retail, which would provide Indian consumers a broader selection of products at more competitive prices.

Indonesia

Indonesia's "Draft Regulation Regarding the Provision of Application and/or Content Services through the Internet" targets online services and would require platforms to take responsibility for a very broad list of content types, including content that "ruins reputation," "is contradictory to the Indonesian constitution," and "threatens the unity of Indonesia."[73] This regulation, which is part of the broader package of OTT regulations discussed below, will present significant market access barriers to U.S. providers in Indonesia.

Data Localization Requirements

The government of Indonesia has introduced a series of forced data localization measures through Ministry of Communication and Informatics Regulation 82/2012 and the more recent Draft Regulation Regarding the Provision of Application and/or Content Services Through the Internet. These measures contain numerous market access barriers, including requirements for foreign services to "place a part of its servers at data centers within the territory of the Republic of Indonesia."[74]

Restrictive Regulation of Online Services

Indonesia introduced a draft law in April 2016 focused on online services ("Draft Regulation Regarding the Provision of Application and/or Content Services through the Internet") that would require data localization, creation of a local entity or permanent establishment, forced cooperation with local telecom operators offering similar services, new intermediary liability and monitoring requirements, exclusive use of a national payment gateway, and numerous other barriers that would severely impact or cripple the ability of many internet

[73] TeleGeography. "MCIT issues draft regulation on OTT in Indonesia." https://www.telegeography.com/products/commsupdate/articles/2016/05/05/mcit-issues-draft-regulation-on-ott-in-indonesia/

[74] Alexander Plaum, *The Impact of Forced Data Localisation on Fundamental Rights*, ACCESS NOW (June 4, 2014), https://www.accessnow.org/the-impact-of-forced-data-localisation-on-fundamental-rights/.

services to do business in Indonesia.[75] The compliance and enforcement provisions of these regulations would impose significant costs on both companies and on the government, ultimately hampering the development of Indonesia's digital economy.

Unilateral or Discriminatory Tax Regimes

Indonesia has taken steps on taxation that significantly deviate from global norms, bilateral tax treaties, and WTO commitments. These steps include proposed requirements that would compel foreign services to create a permanent establishment in order to do business in Indonesia.[76] For example, Article 4 of the April 2016 "Draft Regulation Regarding the Provision of Application and/or Content Services through the Internet" (discussed above) requires providers to create a local entity or permanent establishment, as well as undergo a rigorous process of registration, including first with the IT regulator (BRTI) and then with BKPM in order to establish a business entity. This process would require significant resources from online service providers, many of which are small companies that lack the necessary legal and technical resources to comply with such processes, and could have significant tax consequences that conflict with OECD multilateral principles. Furthermore, this requirement would likely violate Indonesia's WTO commitments to allow computer and other services to be provided on a cross-border basis.

Japan

Unbalanced Copyright Frameworks

Despite limited exceptions for search engines[77] and some data mining activities,[78] Japanese law today does not clearly provide for the full range of limitations and exceptions necessary for the digital environment[79] – which

[75] *MCIT Issues Draft Regulation on OTT In Indonesia,* TELEGEOGRAPHY (May 5, 2016), https://www.telegeography.com/products/commsupdate/articles/2016/05/05/mcit-issues-draft-regulation-on-ott-in-indonesia/.

[76] Victoria Ho, *Indonesia Tells Google and Other Internet Firms to Pay Tax or Risk Getting Blocked*, MASHABLE (Mar. 1, 2016), http://mashable.com/2016/03/01/indonesia-tax-google/ - bmvYs96AfsqF.

[77] Copyright Law of Japan, Section 5 Art. 47-6, http://www.cric.or.jp/english/clj/cl2.html (narrowly defining the exception for search engine indexing as "for a person who engages in the business of retrieving a transmitter identification code of information which has been made transmittable . . . and of offering the result thereof, in response to a request from the public").

[78] Copyright Law of Japan, Section 5 Art. 47-7, http://www.cric.or.jp/english/clj/cl2.html (limiting the application of this data mining exception to "information analysis" done (1) on a computer, and (2) not including databases made to be used for data analysis).

[79] Approximately a decade ago, there was legislative discussion intended to facilitate the development of Internet services in Japan by explicitly allowing copyright exceptions for activities such as crawling, indexing, and snippeting that are critical to the digital environment. This discussion resulted in a 2009 amendment to Japanese copyright law – however, the resulting amendment only provided narrowly defined exceptions for specific functions of web search engines, not for other digital activities and Internet services. Japan continues to

creates significant liability risks and market access barriers for U.S. and other foreign services engaged in caching, machine learning, and other transformative uses of content.

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services must be licensed as a taxi driver. These new entrants face market access and operational restrictions that serve no public interest but are instead intended to protect incumbents. *License cap*: The supply of taxi licenses is capped in Japan. *Exams and professional experience*: In order to receive a taxi driver license, an applicant needs to pay approximately $3,000 and to have three years of driving experience. In order to then receive a license to work as an independent taxi driver—as opposed to an affiliate of one of the large taxi firms—a driver must first have 10 years of experience driving for the same taxi firm. *Minimum/maximum price restrictions*: Regulations set both a minimum price floor and a maximum price ceiling.

Kenya

Intermediary Liability

The East African Legislative Assembly passed the East African Community Electronic Transactions Act in 2015. While the Act provides for some level of protection of intermediaries from liability for third party content, it fails to include any 'counter-notice' procedures for a third party to challenge a content takedown request, and it removes legal protections if the intermediary receives a financial benefit from the infringing activity. Lack of a counter-notice provision exposes internet intermediaries to business process disruptions through frivolous takedown notices.

Even more problematically, vague language about 'financial benefits' can remove an entire class of commercially-focused intermediaries from the scope of liability protections, and can result in a general obligation on these intermediaries to monitor internet traffic, disadvantaging commercial services from entering numerous East African markets, including Kenya, Uganda, Tanzania, Burundi, Rwanda, and South Sudan.

The requirements in the Act diverge from prevailing international standards for intermediary liability frameworks, and serve as market access barriers for companies seeking to do business in these countries. We urge USTR to engage with counterparts in Kenya and elsewhere to amend this provision on the grounds highlighted above, and develop intermediary liability protections that are consistent with U.S. standards and international norms.

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lack either a fair use exception or a more flexible set of limitations and exceptions appropriate to the digital environment.

Data Localization Requirements

Recent draft legislation includes ambiguous requirements related to localization.

Restrictive Regulation of Online Services

The Ministry of ICT has started drafting a new national ICT policy in response to, among other things, the need to provide clarity on how to treat online services.[80] We encourage USTR to monitor the development of this policy and to promote a light-touch framework for regulating information services that is consistent with the U.S. approach.

Korea

Data Localization Requirements

Localization barriers regarding geospatial data continue to impeded foreign internet services from offering online maps, navigational tools, and related applications in Korea.

Discriminatory or Non-Objective Application of Competition Regulations

In investigating U.S. companies, the Korea Fair Trade Commission routinely fails to provide subjects a fair opportunity to defend themselves. Lack of transparency is an issue throughout the investigative process, during which the KFTC often denies U.S. companies access to third-party and exculpatory evidence in its possession, which is excluded from their investigative report or recommendation. Respondents only get access to documents the KFTC chooses to release, which are frequently heavily redacted. It is also important to ensure that Korea is meeting the standards of Article 16.1.3 of the U.S.-Korea Free Trade Agreement, which requires that respondents have a reasonable opportunity to cross-examine any witnesses.

Korea also does not recognize attorney-client privilege, which makes it difficult for a company to receive frank advice from counsel about the merits of an investigation and ways to comply. In addition, Korea does not respect the status of documents that are subject to attorney-client privilege in other countries, which may lead to the loss of that privilege in some contexts.

Burdensome or Discriminatory Data Protection Frameworks

Several South Korean regulators have threatened a number of U.S. tech firms with investigations and fines for not complying with prescriptive South Korean privacy law, even though these firms do not maintain data

[80] Lilian Ochieng, *Kenya Plans ICT Sector Reforms to Regulate Internet Firms*, DAILY NATION (Mar. 17, 2016), http://www.nation.co.ke/business/Kenya-plans-new-bill-to-reign-in-on-rider-tech-firms/996-3121342-ayu7lsz/index.html.

controllers on South Korean territory. As a result, services have been forced to modify the way they do business in South Korea.

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services must be licensed as a taxi driver. These new entrants face operational restrictions that serve no public interest but are instead intended to protect incumbents by needlessly raising the cost of the services that these new entrants can provide.
Minimum/maximum price restrictions: Prices for regular taxis are regulated. Although prices for premium taxis are—in regulation—flexible, apps cannot—in practice—set premium taxi prices below a certain floor. This de facto rule is intended to protect incumbent regular taxis.

Malaysia

Restrictive Regulation of Online Services

In Malaysia, there has been a proposal to include regulation of online services within the ambit of communications regulators. In addition, last year, the Malaysian Communications and Multimedia Commission (MCMC) decided to assess the need for improvements to the Communications and Multimedia Act (CMA).[81] The U.S. government should monitor the development of these regulatory frameworks and to promote a light-touch framework for regulating information services that is consistent with the U.S. approach. In particular, Malaysia should avoid creating market access barriers by subjecting foreign internet services and applications to telecom-specific or public utility regulations.

Mexico

Unbalanced Copyright Framework

Mexico does not have a comprehensive framework of copyright exceptions and limitations for the digital economy. Today, digital creators and innovators in Mexico must rely on a general provision that allows the use of works where there is no economic profit,[82] which increases legal risk and costs for U.S. internet and technology companies seeking to offer commercial services in Mexico.

Mexico does not have a comprehensive ISP safe harbor framework covering the full range of service providers and functions and prohibiting the imposition of monitoring duties. USTR should encourage Mexico to avoid creating market access barriers that could halt the growth of new online services critical to Mexico's growing economy by adopting clear safe harbor measures for online services.

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[81] *Amendment to Communications and Multimedia Act 1998 in March*, ASTRO AWANI (Feb. 22, 2016), http://english.astroawani.com/malaysia-news/amendment-communications-and-multimedia-act-1998-march-95481.

[82] Mexico Federal Law on Copyright (as amended, 2016), Art. 148-151.

Customs/Trade Facilitation

Today, Mexico provides simplified and consolidated import procedures for express shipments valued between US$0 and US$5,000. Mexico has put forward a draft rule, however, that would subject B2B and B2C shipments between US$50 and US$5,000 to additional requirements akin to full formal clearance. Further, for textiles and footwear shipments under US$50 formal clearance will be required. This change will add significant costs and time to get products through Mexican customs, undermining US companies, particularly small businesses, ability to compete in Mexico. IA Members request that the US Government secure Mexico's agreement to refrain from moving forward with revisions to its simplified process on express shipments.

New Zealand

Unbalanced Copyright Frameworks

New Zealand has made commitments to promote balance in its copyright system through exceptions and limitations to copyright for legitimate purposes, such as criticism, comment, news reporting, teaching, scholarship, and research – including limitations and exceptions for the digital environment.

Currently, New Zealand relies on a static list of purpose-based exceptions to copyright. In practice, this means that digital technologies that use copyright in ways that do not fall within the technical confines of one of the existing exceptions (such as new data mining research technologies, machine learning, or innovative cloud-based technologies) are automatically ruled out, no matter how strong the public interest in enabling that new use may be. For example, there is a fair dealing exception for news in New Zealand, but it is more restrictive than comparable exceptions in Australia and elsewhere, and does not apply to photographs – which limits its broader applicability in the digital environment.

As a result, New Zealand's approach to devising purpose-based exceptions is no longer fit for purpose in a digital environment. This approach creates a market access barrier for foreign services insofar as it is unable to accommodate fair uses of content by internet services and technology companies that do not fall within the technical confines of existing exceptions. To eliminate this barrier and comply with the U.S. standard and prevailing international norms, New Zealand should adopt a flexible fair use exception modeled on the multi-factor balancing tests found in countries such as Singapore and the United States.

Intermediary Liability

Currently, New Zealand's Copyright Act 1994 limits safe harbor caching to "temporary storage" while U.S. law and other similar provisions in U.S. FTAs include no such limitation. The definition of caching in Section 92E of the Copyright Act should be amended to remove the requirement of the storage being "temporary." This amendment would allow for greater technological flexibility and remove uncertainty surrounding the definition of "temporary." In addition, the government should clarify that under this caching exception, there is no underlying liability for the provision of referring, linking, or indexing services.

Nigeria

Unbalanced Copyright Frameworks

Nigeria has undertaken proceedings to reform its copyright laws. We encourage USTR to be supportive of the development of a framework that is consistent with U.S. law, including through the implementation of fair use provisions and safe harbors from intermediary liability. The absence of these provisions would create market access barriers in a key African market for U.S. companies.

Data Localization Requirements

The Guidelines for Nigerian Content Development in ICT require both foreign and local businesses to store all of their data concerning Nigerian citizens in Nigeria, and establish local content requirements for hardware, software, and services. These rules will significantly increase market access barriers for internet companies seeking to serve the Nigerian market. We urge USTR to engage with counterparts in Nigeria to highlight and resolve these barriers.

Norway

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles. *License cap*: For-hire vehicle license caps are set by each county. Currently there are only 233 for-hire vehicle licenses in Norway. *Vehicle requirements*: For-hire vehicles must be high-end models and are approved on a case-by-case basis. The threshold has varied over time, but typically a model comparable to a Mercedes S-Class (less than 5 years old) is required. *Capital requirements*: A bank guarantee of approximately $9,000 is required.

Pakistan

Restrictive Regulation of Online Services

The Pakistan Telecommunications Authority is working on a regulatory framework draft for online services, which may include licensing. Licensing could carry government access requirements, which would pose significant market access barriers for U.S. companies.[83] We encourage USTR to monitor the development of this policy and to promote a light-touch framework for regulating information services that is consistent with the U.S. approach, and that encourages innovation and investment.

[83] *See PTA To Regulate Mobile Apps and OTT Services in Pakistan*, MORE NEWS PAKISTAN (Aug. 20, 2016), http://www.morenews.pk/2016/08/20/pta-regulate-mobile-apps-ott-services-pakistan/.

Panama

Burdensome or Discriminatory Data Protection Frameworks

Panama has introduced a new Data Protection bill. Unfortunately, this bill does not appear to recognize consent as a basis for transferring data outside the country. Any international transfer provision should permit transfers with the consent of the data subject, and the nature of that consent (e.g., whether it is express or implied, and the mechanism used to obtain it) should be based on the context of the interaction between the controller and the individual and the sensitivity of the data at issue. The required consent for transfers should not be burdensome, and should allow for the use of technology-neutral consent approaches. In addition, consent should be implied for common use practices, such as transferring data to cloud computing service providers located abroad. We encourage USTR to engage with counterparts in Panama to develop interoperable data protection frameworks that clearly allow for the forms of consent described above.

In addition, Article 2 of the Data Protection bill mentions that databases containing "critical State data shall be kept in Panama." The definition of critical State data set forth in Article 3 is, however, very broad. This could create a *de facto* data localization mandate for all data, even if this is not the objective of the law. The U.S. government should work with Panama to ensure that this language does not result in a data localization requirement.

Peru

Unbalanced Copyright Frameworks

Peru does not have a comprehensive framework of copyright exceptions and limitations for the digital economy. Peruvian law currently includes a long but inflexible list of rules that does not clearly provide for open limitations and exceptions that are necessary for the digital environment[84] – for instance, flexible limitations and exceptions that would enable text and data mining, machine learning, and indexing of content. To accomplish this objective, Peru should also remove the provision in *Legislative Decree 822 of 1996* stating that limitations and exceptions "shall be interpreted restrictively" – which has limited the ability of Peruvian copyright law to evolve and respond flexibly to new innovations and new uses of works in the digital environment.[85]

In addition, Peru is out of compliance with key provisions under the U.S.-Peru Trade Promotion Agreement that require copyright safe harbors for internet service providers. We urge USTR to address this significant market access barrier for U.S. services and push for full implementation of the agreement.

[84] Legislative Decree No. 822 of April 23, 1996, Title IV Chapter 1.

[85] Legislative Decree No. 822 of April 23, 1996, Title IV Chapter 1, Art. 50.

Philippines

Sharing Economy Barriers

The Philippines has established a specific regulatory framework for transportation providers working through apps (Transportation Network Vehicle Services, "TNVS"). While forward-looking in principle, these regulations nevertheless include market access and operational restrictions. *License cap*: In mid-2016, the Land Franchising and Regulatory Board ("LFRB") stopped issuing TNVS accreditations. In mid-2017, the LFRB prohibited app companies from activating new drivers and making those drivers available to provide trips through their apps. These two decisions effectively created a license cap. New regulations expected in November 2017 will likely introduce an explicit cap. *Maximum price restriction*: In December 2016, the LFRB set a dynamic pricing maximum of 2x. New regulations expected in November 2017 will likely extend such price controls. *Minimum driving hours*: New regulations expected in November 2017 will likely impose minimum TNVS driver hours, limiting the growth of the sector by removing those drivers who can only work a smaller number of hours per week.

Russia

Unbalanced Copyright Frameworks

In the past year, Russia has taken additional steps to broaden the scope of an already unbalanced set of copyright enforcement measures. The "Mirrors Law," which came into effect on October 1, 2017, extends Russia's copyright enforcement rules into new domains by requiring search providers to delist all links to allegedly infringing websites within just 24 hours of a removal request. The law also applies to so-called "mirror" websites that are "confusingly similar" to a previously blocked website.

In practice, this law has resulted in overbroad removal and delisting requests for general-purpose websites that would not be subject to removal under Section 512 of the DMCA or other parts of U.S. copyright law. As USTR has noted elsewhere, 24 hours is an insufficient amount of time for service providers to review these types of requests. In addition, the principle of removing entire websites that include a proportionally minor amount of potentially infringing content was squarely rejected by the U.S. Congress during debate over the Stop Online Piracy Act, H.R. 3261.

We urge USTR to engage with counterparts in Russia to address this measure, which is likely to generate market access barriers for U.S. internet services.

Data Localization Requirements

Russia has passed a series of localization requirements that amount to market access barriers for U.S. services seeking access to the Russian market, including:

- Article 18 of Federal Law 242-FZ: requirement to store and process personal data concerning Russian citizens in Russian data centers. According to the current regulatory interpretation of this rule, the

initial collection, processing and storage of data must occur exclusively in Russia. Once this "primary processing" on local servers has occurred, data can be exported outside Russia subject to data subject consent. Given the requirement to localize processing, a global web service would typically be compelled to re-architect its global systems and networks in order to comply with such a provision.

- Articles 10.1 and 10.2 of Federal Law No. 149-FZ: retain metadata for provision to Russian security agencies, and content-posting restrictions for websites.
- "Yarovaya Amendments" amending Federal Laws 126-FZ and 149-FZ: requires "organizers of information distribution on the internet" to store the content of communications locally for 6 months, with longer metadata storage requirements for different types of providers. In addition, this package of laws requires internet services to provide government officials with sensitive user information and to assist national security agencies in decrypting any encrypted user messages.
- "News Aggregators Law": According to the recently adopted amendments to the Federal Law 149-FZ, news search and aggregation services that exceed one million daily visitors and are offered in the Russian language with the possibility of showing ads must be offered through a local subsidiary in Russia. Foreign providers are not permitted to offer such services directly across the border, even though they are allowed to own the local company that offers them. The law additionally provides for significant content restrictions.

The Russian internet regulator has recently appealed to a court to block LinkedIn over alleged non-compliance with the Russian data localization requirements. The court of first instance has ruled that LinkedIn must be blocked in Russia entirely until the company is in compliance with these requirements. LinkedIn has appealed this order.

Filtering, Censoring and Service-Blocking

Russia has implemented a new site-blocking law, giving additional power to regulators over online services, including the power to demand that intermediaries block certain sites or certain types of content.[86] For example, Russia has ordered all of Wikipedia to be blocked due to problematic content on a single page.

Saudi Arabia

Data Localization Requirements

Saudi Arabia's Communications and Information Technology Council issued a Public Consultation Document on the Proposed Regulation for Cloud Computing, which contains a provision on data localization that may have the effect of restricting access to the Saudi market for foreign internet services.

[86] *See New Russian Anti-Piracy Law Could Block Sites "Forever,"* TORRENT FREAK (Apr. 25, 2015), https://torrentfreak.com/new-russian-anti-piracy-law-could-block-sites-forever-150425/.

Senegal

Restrictive Regulation of Online Services

Senegalese regulators have publicly announced a study to help decide whether and how to regulate online services.[87] IA encourages USTR to monitor this study and to promote a light-touch framework for regulating information services that promotes market access for foreign services.

Singapore

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access restrictions that protect the taxi industry by limiting the number of for-hire vehicles. *Exams:* In 2017, the Singapore Government introduced a new training regime for for-hire vehicle drivers that includes a 10-hour training course and challenging test. The course is delivered by a single provider—the Singapore Taxi Academy—and taught by taxi drivers. Coupled with administrative delays in the processing of background checks and applications, the driver accreditation process amounts to a significant barrier to entry for drivers, taking upwards of four months to complete.

Taiwan

Discriminatory or Non-Objective Application of Competition Regulations

The Taiwan Fair Trade Commission's (TFTC) investigations of U.S. companies often provide little to no insight into what issues are under investigation, as well as limited and inconsistent ability for a company to present its defense to decision-makers prior to a ruling. These procedural deficiencies are compounded by the fact that TFTC decisions are not stayed on appeal.

Sharing Economy Barriers

In December 2016, Taiwan passed an amendment to the national Highway Act that singled out Uber by name and established grossly disproportionate and essentially prohibitive fines on both app-based ridesharing services and the independent drivers who use them. These fines can range up to nearly $800,000--nearly 300 times the fine for drunk driving. The amendment also created a bounty mechanism for Taiwanese citizens to report on drivers who work through app-based ridesharing services. As a result, Uber was forced to suspend operations in Taiwan in February 2017 and only relaunched in April 2017 after consenting to work solely through local car rental companies, a structure that needlessly raises costs for riders and decreases valuable work

87 See Myles Freedman, Senegal: ARTP Studies the Impact of VOIP Applications on Operators, Extensia (Jan. 5, 2016), http://extensia-ltd.com/tunisia-4g-license-has-been-set-at-77-million/.

opportunities for drivers. The limited scope of business allowed in Taiwan following Uber's resumption of operations has led to a dramatic reduction in the number of drivers able to offer services using the app.

Thailand

Non-IP Intermediary Liability

Internet service providers who "assist or facilitate" the commission of defamation by another person can be liable as supporters of the defamatory offenses, even if the actor does not realize such they are assisting or facilitating the offense.[88] One webmaster faced a sentence of up to 32 years in jail under the "Lèse Majesté" law for allowing comments on an interview with a Thai man known for refusing to stand at attention during the Thai Royal Anthem.[89] Such rules have resulted in the blockage of U.S. online services in Thailand.

Turkey

Non-IP Intermediary Liability

In Turkey, internet services face liability if users post content that is blasphemous, discriminatory, or insulting. These are broad and vague limitations on user-generated content that make it very difficult for U.S. providers to operate in Turkey, whether they are running a communications platform or operating an e-commerce service that solicits user reviews of products and services.

Ukraine

Unbalanced Copyright Frameworks

USTR included Ukraine on the 2016 Special 301 Report watchlist in part due to "the lack of transparent and predictable provisions on intermediary liability" and the absence of "limitations on [intermediary] liability" in Ukraine's copyright law.[90] These problems have not been effectively addressed in the past year.[91] A law proposed in late 2016 contained numerous problems, including an unfeasible requirement to remove information within 24 hours of a complaint, a requirement to provide user data to third parties even if an

[88] Kanaphon Chanhom, *Defamation and Internet Service Providers in Thailand.* https://www.law.uw.edu/media/1423/thailand-intermediary-liability-of-isps-defamation.pdf

[89] Eva Galperin, *Suspended Sentence Good News for Thai Webmaster Jiew, But the Threat to Freedom of Expression Remains*, Electronic Frontier Foundation (May 30, 2012). https://www.eff.org/deeplinks/2012/05/suspended-sentence-good-news-thai-webmaster-jiew-threat-freedom-expression-remains

[90] *2016 Special 301 Report*, United States Trade Representative (April, 2017), https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf.

[91] See Tetyana Lokot, New Ukrainian Draft Bill Seeks Extrajudicial Blocking for Websites Violating Copyright, Global Voices (Feb. 1, 2016), https://advox.globalvoices.org/2016/02/01/new-ukrainian-draft-bill-seeks-extrajudicial-blocking-for-websites-violating-copyright/

intermediary disputes the presence of infringing content, and a requirement to implement "technical solutions" for repeat postings that likely would require intermediaries to monitor and filter user content.[92] These and other provisions are in direct conflict with Section 512 of the Digital Millennium Copyright Act, and will harm the ability of U.S. companies to access the Ukraine market.

United Arab Emirates

Restrictive Regulation of Online Services

In the UAE, nationally controlled telecom services have consistently throttled foreign VoIP and communications services, including WhatsApp VOIP, Apple Facetime, Google Hangouts and Duo, LINE, and Viber.[93] This throttling has created significant market access barriers in a key Middle East market for U.S.-based internet services and apps. However, despite acknowledging the negative implications for foreign services, UAE regulators have declined to intervene, and instead have continued to insist that only national providers can provide these forms of communications services.[94] These restrictions are impeding market access for U.S. services and appear to conflict with UAE's GATS commitments.

U.S internet services face similar barriers in Morocco, Saudi Arabia, and Oman, where nationally owned telecom services have engaged in similar forms of throttling.[95]

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi

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[92] Law of Ukraine "On State Support of Cinematography in Ukraine."

[93] *See* Joey Bui, *Skype Ban Tightens in the UAE*, THE GAZELLE (Feb. 7, 2015), https://www.thegazelle.org/issue/55/news/skype/; *Is Skype Blocked In in the United Arab Emirates (UAE)?*, Skype, https://support.skype.com/en/faq/FA391/is-skype-blocked-in-the-united-arab-emirates-uae (last visited Oct. 24, 2016); Mary-Ann Russon, *If You Get Caught Using a VPN In in in the UAE, You Will Face Fines of Up to $545,000*, INTERNATIONAL BUSINESS TIMES (July 27, 2016), http://www.ibtimes.co.uk/if-you-get-caught-using-vpn-uae-you-will-face-fines-545000-1572888 (describing the government's ban on VPNs being motivated, in part, by blocking UAE consumers from accessing VoIP services); Naushad Cherrayil, *Google Duo Works in UAE – For Now*, GULF NEWS (Aug. 21, 2016) http://gulfnews.com/business/sectors/technology/google-duo-works-in-uae-for-now-1.1882838.

[94] *See* Mary-Ann Russon, *supra* note 98.

[95] *See* Saad Guerraoui, *Morocco Banned Skype, Viber, WhatsApp and Facebook Messenger. It Didn't Go Down Well,* MIDDLE EAST EYE (Mar. 9, 2016), http://www.middleeasteye.net/columns/boycotts-appeals-petitions-restore-blocked-voip-calls-morocco-1520817507; Afef Abrougui, *Angered By Mobile App Censorship, Saudis Ask: What's the Point of Having Internet?,* GLOBAL VOICES ADVOX (Sept. 7, 2016), https://advox.globalvoices.org/2016/09/07/angered-by-mobile-app-censorship-saudis-ask-whats-the-point-of-having-internet/; Vinod Nair, *Only Oman-Based VoIP Calls Legal*, OMAN OBSERVER (Apr. 16, 2016), http://omanobserver.om/only-oman-based-voip-calls-legal/.

industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services. *Vehicle requirements*: For-hire vehicle companies must own a minimum of 20 vehicles and only 10 percent of their vehicles can have a value of less than $50,000 USD. As a result, the minimum cost of setting up a for-hire vehicle company is approximately $1 million. *Minimum price requirement*: For-hire transportation providers must charge 30 percent more than taxis. *Data-sharing requirement*: Companies providing transportation apps are required to share data in real time, via integration into government computer systems.

Uruguay

Restrictive Regulation of Online Services

Uruguay is currently considering a bill to regulate digital platforms and services.[96] However, this draft bill is vague and broad, and could affect a wide range of internet services and products. We encourage USTR to monitor the development of this bill and advocate for consistency with the principles for regulation provided within this filing.

Vietnam

Unbalanced Copyright Frameworks

Vietnam does not have a comprehensive framework of copyright exceptions and limitations for the digital economy. Vietnamese law provides a short list of exceptions that do not clearly cover such core digital economy activities such as text and data mining, machine learning, and indexing of content. We urge USTR to work with Vietnam to implement a flexible fair use exception modeled on the multi-factor balancing tests found in countries such as Singapore and the United States.[97]

Vietnam also inhibits U.S. digital trade by failing to provide for adequate and effective ISP safe harbors. We encourage USTR to work with Vietnam to implement safe harbors that are consistent with Section 512 of the Digital Millennium Copyright Act.

Non-IP Intermediary Liability

Vietnam's Ministry of Information and Communications has introduced a new decree on the use of Internet Services and Online Information that includes an excessively short three-hour window for compliance with

[96] Transporte Público Y Creación De Plataformas Virtuales De Servicios, Carpeta No. 786, Repartido No. 388 (Feb. 16, 2016), available at http://vamosuruguay.com.uy/proyecto-plataformas-virtuales/.

[97] Law on Intellectual Property (as amended, 2009), Art. 25, 26.

content takedown requests, as well as numerous other market access barriers highlighted below.[98]

Unfortunately, the requirements in this decree deviate from international standards on intermediary liability frameworks, and would present significant barriers to companies seeking to do business in Vietnam. Online services often require more than three hours to process, evaluate, and address takedown requests, particularly in situations where there are translation difficulties, different potential interpretations of content, or ambiguities in the governing legal framework.

As USTR identified in the 2016 National Trade Estimate, a similar intermediary liability provision in India has forced U.S. services "to choose between needlessly censoring their customers and subjecting themselves to the possibility of legal action." We urge USTR to take similar action on this Vietnamese decree and to highlight that this decree would serve as a market access barrier. In addition, we encourage USTR to work with Vietnam and other countries to develop intermediary liability protections that are consistent with U.S. law and relevant provisions in trade agreements, including Section 230 of the Communications Decency Act and Section 512 of the Digital Millennium Copyright Act.[99]

This draft decree also includes long and inflexible data retention requirements, a requirement for all companies to maintain local servers in Vietnam, local presence requirements for foreign game service providers, requirements to interconnect with local payment support service providers, and other market access barriers that will harm both U.S. and Vietnamese firms.

Finally, we urge USTR to press Vietnam for greater transparency and public input into the development of internet-related proposals. This recent decree was publicized on a Friday, and comments on the decree were due on the following Monday. Such short windows do not provide sufficient time for expert input into the development of complex regulations, and are inconsistent with Vietnam's obligations under Chapter 26 of the TPP ("Transparency and Anti-Corruption") to provide for notice-and-comment processes when developing new regulations.

Data Localization Requirements

Under the Decree on Information Technology Services (Decree No.72/2013/ND-CP), Vietnam requires a wide range of internet and digital services to locate a server within Vietnam. In addition, as highlighted above, Vietnam's Ministry of Information and Communications recently introduced a new draft decree (Draft Decree Amending Decree 72/2013-ND-CP) that would implement new data retention requirements, local presence requirements, interconnection requirements, and additional server localization requirements.

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[98] Draft Decree Amending Decree 72/2013-ND-CP on the Management, Provision and Use of Internet Services and Information Content Online.

[99] In particular, Vietnam must at a minimum include express and unambiguous limitations on liability covering the transmitting, caching, storing, and linking functions for its ISP safe harbors; revise Article 5(1) of Joint Circular No. 07/2012 to provide a safe harbor for storage rather than just "temporary" storage; and clarify that its safe harbor framework does not include any requirements to monitor content and communications.

Restrictive Regulation of Online Services

In 2014 and 2015, Vietnam's government released two draft regulations appearing to target foreign providers of internet services. In October 2014, the Ministry of Information and Communications released a draft "Circular on Managing the Provision and Use of Internet-based Voice and Text Services," proposing unreasonable regulatory restrictions on online voice and video services. These restrictions would require foreign service providers to either:

- Install a local server to store data or
- Enter into a commercial agreement with a Vietnam-licensed telecommunications company.[100]

The government of Vietnam also promulgated a draft IT Services Decree that would have included additional data localization requirements as well as restrictions on cross-border data flows.

While the government of Vietnam has apparently not taken any additional action on these measures, USTR should monitor this or any similar requirements. In particular, USTR should continue to resist any efforts that would prevent foreign providers from supplying internet services in Vietnam unless they enter into a commercial agreement with local telecommunications companies.

Sharing Economy Barriers

Vietnam has established a specific regulatory framework for for-hire vehicles working through apps ("e-contract"). *License cap:* Cities across Vietnam, including Hanoi and Ho Chi Minh City, have announced their intent to impost a cap on the number of e-contract vehicles. While such caps already exist in certain cities for taxis and traditional for-hire vehicles not working through smartphone apps, these caps are not enforced. *Independent operation restriction:* Vietnam currently requires that all e-contract drivers affiliate with a transport company or transport cooperative, limiting the flexibility and autonomy that attracts drivers to work via apps. This requirement does not apply to traditional for-hire vehicle vehicles not working through apps, which can operate on an independent operator basis.

Zimbabwe

Restrictive Regulation of Online Services

A June 2016 consultation paper focused on the absence of "over-the-top" regulation and suggesting a licensing framework, with emergency services and lawful intercept under discussion.[101]

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[100] *Circular Regulates OTT Services*, VIETNAM NEWS (Nov. 15, 2014), http://vietnamnews.vn/economy/262825/circular-regulates-ott-services.html#qvpySzIcYMz25vCl. http://vietnamnews.vn/economy/262825/circular-regulates-ott-services.html#qvpySzIcYMz25vCl.97.

[101] POTRAZ, *Consultation Paper No. 2 of 2016,* https://www.potraz.gov.zw/images/documents/Consultation_OTT.pdf.