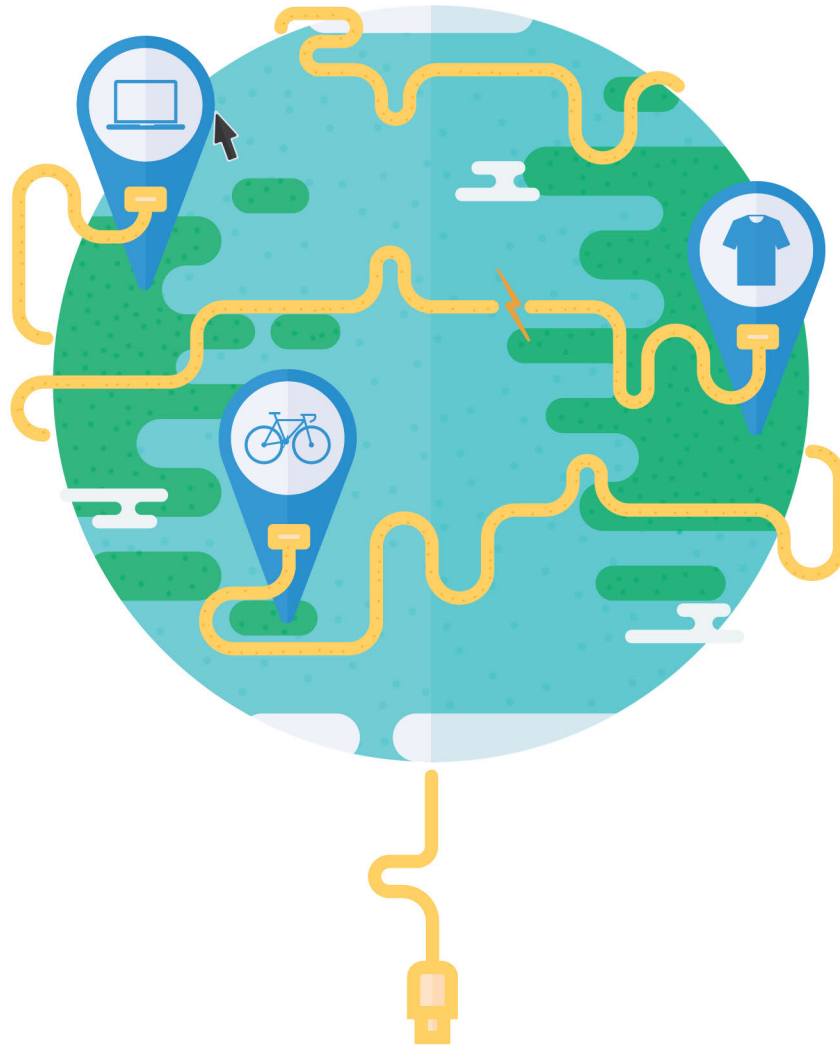




Internet Association

National Trade Estimate Report Comments on

# Digital Trade Barriers



October 2016



## **INTERNET ASSOCIATION COMMENTS REGARDING FOREIGN TRADE BARRIERS TO U.S. EXPORTS FOR 2017 REPORTING**

The Internet Association<sup>1</sup> supports policies that promote and enable internet innovation – ensuring that information flows freely across national borders, uninhibited by restrictions that are fundamentally inconsistent with the transnational, free, and decentralized nature of the internet. In order to preserve and expand the internet’s role as a driver of U.S. exports, economic development and opportunity, USTR should make open internet policies abroad a top trade priority. It should push back on market access barriers and inadequate legal frameworks abroad that threaten the internet’s global growth and its transformation of trade.

On behalf of forty of the world’s leading internet companies, the Internet Association submits the following comments to the Trade Policy Staff Committee (Docket No. USTR 2016-0007) for consideration as USTR prepares the 2017 National Trade Estimate Report (NTE). The proceeding comments identify foundational laws and regulatory frameworks underpinning internet innovation, highlighting key areas where conflicts with these rules in other countries threaten the growth of U.S. digital goods and services exports, and areas where removing these barriers can unlock significant U.S. economic gains through trade.

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<sup>1</sup> Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Snapchat, Spotify, SurveyMonkey, Ten-X, TransferWise, TripAdvisor, Turo, Twitter, Uber Technologies, Inc., Upwork, Yahoo!, Yelp, Zenefits, and Zynga



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## INTRODUCTION

As recently as fifteen years ago, only 10 percent of the world was online,<sup>2</sup> largely through dial-up connections.<sup>3</sup> Many consumers still accessed content through the “walled garden” of information provided by portals, with no significant choice of websites or service providers. There were only 4 percent of the number of websites available today. Facebook had not yet launched, and there were no significant video streaming services comparable to Netflix, YouTube, or Amazon.<sup>4</sup>

Today, the internet has become, in its short commercial lifespan, a key engine for global economic growth, innovation, democratic discourse, and cross-border trade in goods and services. The growth generated by the internet during this time span is equivalent to the growth generated by the Industrial Revolution after 50 years. The digital economy has been the fastest growing sector of the U.S. economy, representing 15 percent of U.S. GDP growth,<sup>5</sup> with the internet industry on its own responsible for \$966 billion of annual U.S. GDP.<sup>6</sup>

The internet now powers U.S. growth across all sectors, dramatically expanding the set of U.S. businesses that can compete in the global economy. Including in the U.S. services sector, which accounts for more than 75 percent of employment in the United States.<sup>7</sup> The internet drives this growth by enabling traditional businesses, small businesses, and individuals to reach new customers in foreign markets, in ways that were not possible fifteen years ago.<sup>8</sup> The centrality of

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<sup>2</sup> *Internet Users in the World*, Internet Live Stats, <http://www.internetlivestats.com/internet-users/#trend> (last visited Oct. 26, 2016).

<sup>3</sup> John B. Horrigan and Lee Raine, *The Broadband Difference: How Online Behavior Changes with High-Speed Internet Connections*, Pew Research Center (June 23, 2002), <http://www.pewinternet.org/2002/06/23/the-broadband-difference-how-online-behavior-changes-with-high-speed-internet-connections/>.

<sup>4</sup> *Total Number of Websites*, Internet Live Stats, <http://www.internetlivestats.com/total-number-of-websites/> (last visited Oct. 26, 2016).

<sup>5</sup> See Matthieu Pélissier du Rausas et al., McKinsey Global Institute, *Internet Matters: The Net's Sweeping Impact on Growth, Jobs and Prosperity*, at 16 (2011) ("*Internet Matters*"), [http://www.mckinsey.com/~media/McKinsey/dotcom/Insights%20and%20pubs/MGI/Research/Technology%20and%20Innovation/Internet%20matters%20-%20Nets%20sweeping%20impact/MGI\\_internet\\_matters\\_full\\_report.ashx](http://www.mckinsey.com/~media/McKinsey/dotcom/Insights%20and%20pubs/MGI/Research/Technology%20and%20Innovation/Internet%20matters%20-%20Nets%20sweeping%20impact/MGI_internet_matters_full_report.ashx).

<sup>6</sup> *IA Internet Report* at 5.

<sup>7</sup> 2014 Jobs Across America Report, Coalition of Services Industries, <https://servicescoalition.org/jobs/2014/index.html>.



the internet to the broader economy is borne out in economic statistics: in a recent five-year period, internet-related industries increased the nominal value added to the U.S. economy by approximately 110.4 percent.<sup>9</sup>

The growth of almost all internet companies and startups—and the growth of the numerous sectors that rely on internet services—now depends on reaching global users and foreign markets. Today, over three billion people use the internet around the world, and 95 percent of consumers reside outside the U.S.<sup>10</sup> For many U.S.-based internet services, more than 50 percent of revenue comes from outside the U.S.

However, many countries are now taking starkly different approaches to internet law and regulation that conflict with the open and decentralized frameworks that the U.S. has championed, and which have allowed digital trade to thrive. Simply put, the rise of discriminatory, closed, and protectionist approaches to the internet abroad threatens the growth of the 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 to target internet platforms through laws such as ‘ancillary copyright’ that eliminate critical copyright limitations and exceptions, as USTR highlighted in its 2016 National Trade Estimate.<sup>11</sup> Alternatively, these threats may emerge when a country uses other measures – such as data localization requirements, intermediary liability penalties, site-blocking, and other restrictions or industrial policy frameworks that create barriers for foreign internet services.

Digital market access barriers do not just harm internet services. They harm small businesses, developers, entrepreneurs, and content creators who are deprived of the 10 percent productivity boost and the 200 percent export boost that come from using the internet.<sup>12</sup> These barriers also

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<sup>8</sup> United States International Trade Commission, *Digital Trade in the US and Global Economies, Part 1* (July 2013), <http://www.usitc.gov/publications/332/pub4415.pdf> (describing the internet’s “significant contributions to U.S. output, employment, consumer welfare, trade, innovation, productivity, and corporate financial performance”).

<sup>9</sup> Stephen E. Siwek Economists Inc., *Measuring the U.S. Internet Sector*, Internet Association, at 5 (Dec. 10, 2015) (“*IA Internet Report*”), <http://internetassociation.org/wp-content/uploads/2015/12/Internet-Association-Measuring-the-US-Internet-Sector-12-10-15.pdf>.

<sup>10</sup> Internet Users, Internet Live Stats, <http://www.internetlivestats.com/internet-users/> (last visited Sept. 14, 2015).

<sup>11</sup> Ambassador Michael B.G. Froman, *2016 National Trade Estimate Report on Foreign Trade Barriers*, Office of U.S. Trade Representative (Mar. 23, 2016), <https://ustr.gov/sites/default/files/2016-NTE-Report-FINAL.pdf>.

<sup>12</sup> Matthieu Pélissié du Rausas et al., *Internet Matters*, at ii.



harm traditional industries such as healthcare and advanced manufacturing that historically have captured more than 75 percent of the value generated by the internet.<sup>13</sup>

In 2014, the U.S. exported \$399.7 billion in digitally-deliverable services, an increase of 12 percent since 2011. This represented 56 percent of U.S. services exports and about 17 percent of total U.S. goods and services exports. In all, the U.S. now has an annual digitally-deliverable trade surplus of \$158.9 billion.<sup>14</sup> This surplus – and the continued growth of U.S. leadership in digital services – is under threat as a result of new laws and inadequate legal frameworks abroad.

If the U.S. is to maintain its leadership in the global digital economy, it is critical both to recognize the key frameworks that enable the growth of digital services and to push back on market access barriers abroad that may stifle the development of the global internet. The continued growth of the internet will benefit not only technology companies, but also companies and workers in every sector of the economy, as well as consumers around the world.<sup>15</sup>

In the following section, we describe key elements of the legal and policy framework that have been essential to the growth of the U.S. internet sector and its transformation of trade. In the final section of these comments, we provide a detailed list of countries that have enacted specific barriers that impede U.S. internet services.

### *The Innovation-Without-Permission Foundation*

The United States is the epicenter of the global growth of the internet economy due to our open, innovation-without-permission ecosystem. This robust ecosystem results from specific policy decisions that have created the most innovation-friendly legal framework in the world. In particular, five sets of policies have proven critical to the growth of the internet:

- Support for the free flow of information
- Balanced copyright laws and fair use
- Appropriate intermediary liability protections to enable open platforms
- Promotion of an open global internet for new services and innovations
- Fair and nondiscriminatory enforcement of privacy, taxation, and other regulations

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<sup>13</sup> *Id.* at 2.

<sup>14</sup> 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>.  
<http://www.esa.gov/economic-briefings/digitally-deliverable-services-remain-important-component-us-trade>.

<sup>15</sup> Remarks by Deputy U.S. Trade Representative Robert Holleyman to the New Democrat Network, at 3 (May 1, 2015), <https://ustr.gov/about-us/policy-offices/press-office/speechestranscripts/2015/may/remarks-deputy-us-trade>.





These policies continue to provide the foundation that enables the digital economy domestically – and when they are not reflected abroad, U.S. trade will increasingly suffer. These issues are even more critical to small businesses and startups, who often lack the legal or financial resources to navigate complex and burdensome regulatory frameworks abroad.

### *Support for the Free Flow of Information*

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 and content creators 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.

### *Balanced Copyright Laws and Fair Use*

Internet services rely on balanced copyright protections such as fair use to foster innovation, promote growth, and preserve the free and open internet. And 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. These critical limitations and exceptions to copyright enable digital trade by providing the legal framework that allows nearly all internet services to function effectively.

For instance, internet services require copyright limitations and exceptions to crawl the World Wide Web for search results, store copies of this content, and create algorithms that improve relevance and efficiency of responses to user search queries.<sup>16</sup> Limitations and exceptions like fair use allow short ‘snippets’ of text or thumbnails of pictures to be used under limited circumstances by aggregation services. Social media and other user-generated content platforms require fair use, where people share news stories, videos, and other content.

Fair use is also critical for cloud computing platforms. Faster broadband speeds, cheap storage costs, and ubiquitous, multi-device connectivity to the internet have shifted storage of content from a user’s personal computer to the “cloud.” Cloud-based storage allows a user to keep copies of their content in a remote location that gives them access to such content anywhere they are connected to the internet. A user can download this content to multiple devices at different times or stream audiovisual content using a software-based audiovisual player. Fair use not only

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<sup>16</sup> *How Internet Search Engines Work*, How Stuff Works, <http://computer.howstuffworks.com/internet/basics/search-engine1.htm> (last visited Oct. 26, 2016).



enables portability, but it also allows for more seamless upgrades and transitions to new or multiple devices via cloud storage, because content does not need to be laboriously copied from one device to another. In addition, taking advantage of economies of scale, cloud storage of data can be more secure than storage on local servers.

This sort of usage has spurred dramatic growth of the cloud-based ecosystem. Mobile cloud apps made up 81 percent of mobile data traffic in 2014, and mobile cloud traffic is projected to grow 11-fold from 2014 to 2019.<sup>17</sup> The global market for cloud services (or Infrastructure-as-a-Service, “IaaS”) is projected to grow from \$49 billion in 2015 to \$67 billion in 2018.<sup>18</sup> *The Economist* now describes cloud computing as “a business-critical issue,” enabling organizations to avoid the problems associated with aging IT systems and “to better position themselves to sell and compete on global platforms.”<sup>19</sup>

In sum, fair use enables the operation of countless business-critical technologies and services where obtaining the prior authorization of a rights holder is impractical and unwarranted. As a result, there is a strong need to ensure that fair use or an analogous framework is in place where U.S. companies do business. For example, a cloud technology company operating in a jurisdiction lacking a fair use principle must weigh the potential of litigation before innovating and bringing a product or service to market. Without a flexible fair use standard, technology companies in most jurisdictions must rely on a regulatory or legislative body to approve specific uses or technologies.

A number of U.S. trading partners – regardless of their system of law or level of development – already embrace fair use or other similar flexible frameworks that drive innovation in the digital environment. These countries have produced a significant corpus of fair use decisions and precedent that has been remarkably consistent in its articulation of the relevant principles and constraints. In fact, one study assessing these countries found that the adoption of fair use language was associated with positive economic outcomes both for companies that depend on copyright enforcement *and* for companies that depend on copyright exceptions.<sup>20</sup>

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<sup>17</sup> Louis Columbus, *Roundup of Cloud Computing Forecasts and Market Estimates Q3 Update, 2015*, *FORBES* (Sept. 27, 2015), <http://www.forbes.com/sites/louiscolumbus/2015/09/27/roundup-of-cloud-computing-forecasts-and-market-estimates-q3-update-2015/>.

<sup>18</sup> *The Developers’ Coup: 2015 Development Demands and Vendor Opportunities: Insights from TBR’s Cloud Platform and Developer Research*, TBR (Aug. 26, 2015), [http://www.slideshare.net/TBR\\_Market\\_Insight/the-developers-coup-2015-applications-development-demands-and-vendor-opportunities](http://www.slideshare.net/TBR_Market_Insight/the-developers-coup-2015-applications-development-demands-and-vendor-opportunities)).

<sup>19</sup> *Mapping the Cloud Maturity Curve*, *THE ECONOMIST* (May 14, 2015), <http://www.economistinsights.com/analysis/mapping-cloud-maturity-curve>.

<sup>20</sup> Mike Palmedo, *Firm Performance in Countries With & Without Open Copyright Exceptions*, Program on Information Justice and Intellectual Property (May 18, 2015), <http://infojustice.org/archives/34386>.





Yet the rise of unbalanced copyright frameworks in other countries – and the lack of fair use or other balancing principles abroad – threatens this growth. Such threats may come through intentional decisions to target U.S. internet services through laws such as ancillary copyright and ‘neighboring rights,’ as USTR highlighted in its 2016 National Trade Estimate. Market access barriers also emerge through requirements to monitor or prevent the availability of certain types of third-party content, or through new compulsory collective management schemes. Finally, these threats may emerge when a country increases its level of copyright protection and enforcement in order to comply with trade obligations or diplomatic pressure, but fails to balance these new rules with flexible limitations and exceptions such as fair use that are necessary for the digital environment.<sup>21</sup> In all of these cases, unbalanced copyright frameworks serve as significant market barriers to U.S. services. To combat this trend, the U.S. must ensure that current and future trading partners have balanced copyright frameworks in place.

In the country-specific section below, we provide specific examples of market access barriers related to unbalanced copyright frameworks, as well as suggestions for how USTR can help these trading partners modernize their copyright regimes for the digital environment.

### *Appropriate Intermediary Liability Protections to Enable Open Platforms*

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.

Intermediary liability protections are under threat abroad, however, creating significant market access barriers for U.S. companies doing business globally as well as a barrier to the open internet. Foreign governments are exerting a heavier hand of control over speech on the internet and are subjecting online platforms to crippling liability for the actions of individual users for things like defamation, “dangerous” speech, political dissent, copyright issues, and other non-IP issues.

Such liability rules have a significant negative impact on platforms like eBay, Etsy, Google Search, and TripAdvisor, which help U.S. small and medium-sized businesses reach global customers. Negative liability rulings can make it impossible for e-commerce platforms to provide the kinds of user review and customer feedback mechanisms that businesses need in

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<sup>21</sup> See *Supplemental Comments of Computer & Communications Industry Association*, In re 2016 Special 301 Review, Docket No. USTR-2015-0022. As the level of copyright enforcement in a foreign jurisdiction increases, market access issues in that jurisdiction often shift from infringement-related barriers to barriers regarding “liability for copying incidental to common Internet services and communications platforms.”



order to gain support for their products in new markets, and which consumers need to determine whether to buy a particular product or service.

The U.S. and EU have displayed great foresight in promoting rules that enable the internet to function as a platform for trade, through Section 230 of the Communications Decency Act, Section 512 of the Digital Millennium Copyright Act, and Article 12-15 of the E-Commerce Directive. Section 230 generally protects internet platforms from civil liability under federal and state law for content provided by a third person. Imagine a world in which Twitter was responsible for every tweet sent, Facebook was legally liable for millions of posts per minute, and online newspapers were responsible not just for the content of their articles but for all users' commentary on those articles. That would be a different world – and certainly not for the better.

Section 230 was adopted in response to *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*,<sup>22</sup> in which the court treated the internet company as a publisher of content developed by a third party user of the internet company's platform. At the time of the decision, Prodigy's site received 60,000 postings a day – far too many to review in their entirety.<sup>23</sup> The court imposed potential liability on Prodigy for users' posts, and Section 230 was a critical step by the U.S. to resolve these liability risks and establish a trade-friendly legal framework.

Yet we are now seeing new liability risks and monitoring requirements crop up around the world, challenging the global growth of internet services and creating similar problems to those seen by Prodigy in 1996. Broad liability requirements not only harm internet services, they put small businesses, developers, and entrepreneurs, who increasingly rely on internet platforms to engage in trade with users and consumers, at global risk. To promote digital trade – and ensure that U.S. platforms and small businesses can continue to reach markets around the world – the U.S. must ensure that trading partners have appropriate liability protections in place.

Similarly, Section 512 of the Digital Millennium Copyright Act provides online service providers with a safe harbor from liability for copyright infringement, so long as the providers comply with certain obligations. These measures explicitly do not impose an affirmative duty on service providers to monitor its site or seek information about copyright infringement on its service. These same provisions are largely reflected in the EU's E-Commerce Directive, and in recent trade agreements, including Article 18.82 of the TPP.

Adoption of the DMCA's safe harbors has been critical to the growth of the internet and enabled online platforms to transform trade. Copyright is a strict liability regime with a unique statutory damages component and a judicially-developed secondary liability construction. Absent safe harbors that limit liability for service providers, this framework would result in astronomical claims for statutory damages against Internet companies, often for the very caching and hosting

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<sup>22</sup> 1995 WL 323710 (May 24, 21995), *superseded by statute as stated in Shiamili v. Real Estate Grp. of New York*, 952 N.E.2d 1011 (N.Y. Ct. App. 2011).

<sup>23</sup> *Prodigy*, 1995 WL 323710 at \*3.



functions that enable the Internet to exist as we know it. The absence of analogous safe harbors abroad has the potential to significantly chill innovation, information sharing, and development of the internet. It is not feasible for an internet service to proactively “police the internet” for infringing activity on its platform. That is, it is difficult if not impossible for a third party to know in most instances whether any particular distribution of a work is infringing; whether the distribution is a fair use; whether the sender has a license; or even who owns the copyright.

USTR has promoted IP safe harbors in trade agreements for the last 15 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 take down specific content that is claimed to be infringing. Other countries have failed to adopt safe harbors, even in light of ongoing trade obligations to do so. Such efforts threaten the ability of internet companies to expand globally by eliminating the certainty that the IP safe harbor framework provides and introducing potential liability on platforms that do not have the ability to make legal determinations about the nature of specific content.

### *Promotion of an Open Global Internet for New Services and Innovations*

Efforts by the U.S. government to encourage an open global internet where anyone can innovate and launch new services have been key to U.S. economic growth. To ensure that these services can compete on a global basis, the U.S. must continue to defend the model of an open global internet, ensuring that new and restrictive efforts by other governments to halt the growth of this open platform for trade do not take hold.

In particular, the U.S. should be prepared to challenge unreasonable or discriminatory restrictions on the operation of internet platforms, services, and applications, sometimes pejoratively and misleadingly grouped together as “over-the-top” or “OTT” services. The regulatory model that has underpinned the growth of these services in the U.S. and many other countries is one where regulators have taken specific steps to ensure that Internet platforms and services are not subject to legacy regulations designed for phone services, broadcasting services, public utilities, and infrastructure providers. For example, the distinction in the Communications Act of 1934 between “information services” and “telecommunications services” has served as a durable tool to shield new services from legacy regulations designed for infrastructure providers. Such treatment allows anyone with an innovative idea to launch without first obtaining a regulator’s permission or having to hire a team of lawyers. At the same time, this distinction allows policymakers to ensure that information services continue to be subject to generally applicable regulations to protect consumers, privacy, competition, and other public values.

Increasingly, many countries currently apply, or contemplate applying, to internet companies the laws that apply to public utilities and traditionally regulated industries (such as broadcasters or telephone companies). In addition, some countries require foreign internet services to enter into joint venture arrangements or other interconnection agreements with local providers. Often such



proposals are erected purely to harm U.S. internet platforms and protect domestic, incumbent interests. USTR and other agencies should be prepared to challenge these restrictions as market access barriers.

## *Fair and Non-Discriminatory Application of Privacy, Tax, Customs, and Other Regulations*

Finally, a key component of the growth of the internet as a platform for trade has been U.S. development and implementation of cross-cutting regulations – such as tax, competition, customs, and cross-border privacy protections – in an objective and non-discriminatory way. These values and regulatory principles are now critical for U.S. economic growth abroad. Our foreign trading partners are increasingly imposing, or are contemplating imposing, unilateral regulations or taxes that deviate from global norms and uniquely harm U.S. internet firms. Often, these proposals are meant to give domestic companies an advantage over their competitors in the United States. Yet singling out internet firms or digital platforms for special treatment – or depriving foreign services of key procedural protections within regulatory processes – can make it more difficult to deliver digital services on a cross-border basis, harming both the local economy and the U.S. economy. USTR can play an important role in supporting the growth of the digital economy by challenging unilateral or discriminatory measures and procedures that deviate from international norms and WTO commitments, and by working with other countries to build a rigorous and interoperable framework that promotes key regulatory values while ensuring fair treatment of foreign competitors.



## **DETAILED SPECIFIC ISSUES BY COUNTRY**

In the United States, we take for granted the policy and legal framework that has enabled the operation and growth of the internet. As U.S.-based internet companies expand services around the globe, and as all U.S. exporters increasingly rely on the internet to power trade, they are encountering more closed frameworks. And, increasingly, protectionist laws and regulations are being considered or adopted in many countries, which have the effect of impeding the growth of U.S. services and those who use them. Given that much of the current and future growth of U.S. services will be generated through overseas business, the lack of appropriate frameworks in other countries presents an existential threat to the development of the U.S. internet economy.





## UNBALANCED COPYRIGHT FRAMEWORKS

### European Union

The European Commission's proposed Copyright includes several elements likely to restrict a wide range of internet services in European markets.<sup>24</sup> The proposed changes would represent a significant departure by the E.U. from its shared approach with the United States on the foundational principles of a free and open internet, and would restrict exports of U.S. online services to the E.U.

Among the particular problems:

- Broad and unclear monitoring and filtering obligations for service providers (Article 13);
- Potentially intrusive multi-stakeholder processes regarding the design and operation of content recognition technologies (Article 13); and
- Extension of new entitlements or “neighboring rights” to news publishers in a manner that conflicts with Article 10(1) of the Berne Convention as well as existing practices between news publishers and online services (Article 11).<sup>25</sup>

If implemented, Article 13 of the proposed directive (read in conjunction with Recital 38) would narrow the existing E.U. 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.

This proposed requirement deviates from shared U.S. and E.U. 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 E.U. (under Articles 12-15 of the E-Commerce Directive) create a “safe harbor” that protects online services from being liable for

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<sup>24</sup> European Commission, 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](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283698).

<sup>25</sup> European Commission, Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (2016 draft), <https://drive.google.com/file/d/0B6d07lh0nNGNNjZpcGlsQ3pJN3M/view>.



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 right holders.” 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 startups and entrepreneurs would be deterred from entering the market, given difficulty of raising funds from venture capitalists that have consistently characterized such rules as strong impediments to investment.<sup>26</sup> Moreover, such filtering technology will be expensive for large and small services to develop and maintain.

In these ways, this new copyright proposal is quite similar to the “duty of care” that USTR correctly flagged in the 2016 National Trade Estimate as generating numerous market access problems for U.S.-based services, including significant “logistical difficulties,” “implications for free expression,” and a “regulatory regime to more tightly control platforms’ behaviors.” We encourage USTR to raise strong concerns about this new proposal, recognizing that it will serve as a damaging market access barrier for U.S.-based services if it is implemented.

In addition, we urge continued engagement on the ancillary copyright or “neighboring rights” proposal (Article 11), which will likely have a negative effect on many U.S. stakeholders. This proposal would require online services that aggregate news content, such as Reddit, 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.

Previous implementations of this principle in E.U. member states such as Germany and Spain have generated direct and immediate market access barriers for US services.<sup>27</sup> This new

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<sup>26</sup> 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>

<sup>27</sup> *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/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).



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

As a result, we urge USTR to classify this provision as a potential market access barrier and engage directly with counterparts at the European Commission to ensure that the final version of Europe's copyright law does not hinder the growth of new business models.

Finally, 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.<sup>28</sup> 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.

## France

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.<sup>29</sup> 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. We urge USTR to engage with counterparts in France to address this new legal barrier, and to monitor other developments around the world related to compulsory collective management schemes.

## Germany

Germany passed an ancillary copyright law (*Leistungsschutzrecht*) in 2014. This law holds search engines and other providers liable for making certain "press products" available to the

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<sup>28</sup> *C--GS Media BV v Sanoma Media Netherlands BV et al.*, [ECLI:EU:C:2016:644](#), European Court of Justice (8 September 2016).

<sup>29</sup> 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>.



public in search results and elsewhere. The German Federal Association for Information Technology, Telecommunications, and New Media (BitKom) found that the new law created significant legal uncertainty, which forced many innovative businesses to stop or drastically reduce operations in Germany, hindering the free flow of information.<sup>30</sup> 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.

In addition, 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. We urge USTR to continue to classify this law as a market access barrier and engage with counterparts in Germany to address this barrier.

## Spain

In Spain, reforms of the *ley de propiedad 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.”<sup>31</sup> 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.<sup>32</sup> An economic study prepared by the Spanish Association of Publishers of Periodical Publications found that the result of *ley de propiedad intelectual*, which was meant to benefit publishers, was higher barriers to entry for

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<sup>30</sup> *Ancillary Copyright for Publishers: Taking Stock in Germany*, Federal Association for Information Technology, Telecommunications and New Media (BitKom) at 2-4 (May 20, 2015), available at <https://www.bitkom.org/Publikationen/2015/Positionspapiere/Ancillary-Copyright-for-Publishers-Taking-Stock-in-Germany/20150520-ancillary-copyright-taking-stock-in-Germany-BITKOM.pdf>.

<sup>31</sup> 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 Propiedad 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](http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-81-3.PDF).

<sup>32</sup> *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>.



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 concerning for smaller enterprises facing drastic market consolidation and less opportunity to compete under the law.<sup>33</sup>

These ancillary copyright laws have proven detrimental for U.S. companies, EU consumers, publishers, and the broader internet ecosystem. The threat posed by these laws to U.S. stakeholders is genuine and timely, and we strongly urge USTR to address these laws as market access barriers.

## United Kingdom

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.<sup>34</sup> 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.

## Australia

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).<sup>35</sup> Current Australian provisions cover only a narrower subset of "carriage service providers,"<sup>36</sup> rather than the broader definition of "internet service providers" in the TPP (and Australia-U.S. FTA).<sup>37</sup> 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 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 and TPP requirements.

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<sup>33</sup> *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-AEPP-FINAL-VERSION-ENGLISH.pdf>.

<sup>34</sup> 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>.

<sup>35</sup> Copyright Act 1968, Part V Div. 2AA.

<sup>36</sup> Telecommunications Act 1997, Div. 3 Section 87 (defining carriage service providers as licensed telecommunications entities providing carrier services to the public).

<sup>37</sup> Trans-Pacific Partnership, Section J, Art. 18.81.





## Chile

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<sup>38</sup> 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 comply with Article 18.66 of the TPP, Chile must implement a general flexible exception, such as a multi-factor balancing test analogous to fair use frameworks in the U.S and Singapore, 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.

## Colombia

While a bill to implement the U.S.-Colombia FTA copyright chapter is pending, this bill lacks both safe harbor provisions and fair use limitations and exceptions.<sup>39</sup>

## Japan

Article 18.66 of the TPP requires Japan (and other signatories) 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. However, despite limited exceptions for search engines<sup>40</sup> and some data mining activities,<sup>41</sup> Japanese law today does not clearly provide for the full range of limitations and exceptions necessary for the digital environment<sup>42</sup> – which creates

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<sup>38</sup> Law No. 17.336 on Intellectual Property (as amended 2014), Art. 71.

<sup>39</sup> USTR, *Intellectual Property Rights in the US-Colombia Trade Promotion Agreement*, US-U.S.-Colombia Trade Agreement, <https://ustr.gov/uscolombiatpa/ipr> (last visited Oct. 25, 2016).

<sup>40</sup> 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").

<sup>41</sup> 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).

<sup>42</sup> 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



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.

## Mexico

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,<sup>43</sup> even though TPP provides that a legitimate purpose for limitations and exceptions may, in appropriate circumstances, include commercial purposes.<sup>44</sup>

## New Zealand

Article 18.66 of the TPP requires New Zealand 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 TPP Article 18.66, 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.

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

<sup>43</sup> Mexico Federal Law on Copyright (as amended, 2016), Art. 148-151.

<sup>44</sup> Trans-Pacific Partnership Agreement, Art. 18.66 n. 79.



## Nigeria

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.

## Peru

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<sup>45</sup> – 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.<sup>46</sup>

## Vietnam

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 as text and data mining, machine learning and indexing of content. To comply with TPP Article 18.66, Vietnam should adopt a flexible fair use exception modeled on the multi-factor balancing tests found in countries such as Singapore and the United States.<sup>47</sup> Vietnam also fails to provide safe harbors consistent with requirements in TPP Article 18.82, as discussed below.

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<sup>45</sup> Legislative Decree No. 822 of April 23, 1996, Title IV Chapter 1.

<sup>46</sup> Legislative Decree No. 822 of April 23, 1996, Title IV Chapter 1, Art. 50.

<sup>47</sup> Law on Intellectual Property (as amended, 2009), Art. 25, 26.



## INTERMEDIARY LIABILITY

### European Union Member States

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.

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.<sup>48</sup> Another U.S.-based platform was found liable because it engaged in indexing or other organization of user content.<sup>49</sup> 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.’<sup>50</sup> 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. As part of broader engagement by USTR and other U.S. government officials with counterparts in the E.U. and its member states, we urge USTR to highlight the importance of maintaining strong liability protections under the E-Commerce Directive to enable open internet platforms.

### Brazil

IA urges USTR to monitor potential changes to the ‘Marco Civil’ law,<sup>51</sup> which historically has been instrumental in offering legal certainty for domestic and foreign online services, and in creating conditions for the growth of the digital economy in Brazil.<sup>52</sup> In particular, there are

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<sup>48</sup> RTI v. Kewego (2016).

<sup>49</sup> Delta TV v. YouTube (2014).

<sup>50</sup> RTI v. TMFT (2016).

<sup>51</sup> Brazilian Civil Rights Framework for the Internet, Law No. 12.965 (2014).

<sup>52</sup> Angelica Mari, *Brazil Passes Groundbreaking Internet Governance Bill*, ZDNET (Mar. 26, 2014), <http://www.zdnet.com/brazil-passes-groundbreaking-internet-governance-bill-7000027740/>.



attempts to revisit or change key provisions of this legal framework, including by compelling online companies to assume liability for all user communications and publications.<sup>53</sup>

## Colombia

While a bill to implement the U.S.-Colombia FTA copyright chapter is pending, this bill lacks intermediary liability safe harbor provisions that are required under the FTA.

## India

IA members continue to identify risks and concerns around India's intermediary liability framework. In particular, India does not have a clear safe harbor framework for online intermediaries,<sup>54</sup> meaning that internet services are not necessarily protected from liability in India for user actions in case of copyright infringements.

We urge USTR to provide an updated assessment of India's IP liability framework as a market access barrier, following from the analysis provided in the 2016 National Trade Estimate: "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. Such strict rules encourage over-compliance with takedown notices, causing intermediaries to remove content that may not be illegal. Foreign companies providing internet services in India are forced to choose between needlessly censoring their customers and subjecting themselves to the possibility of legal action."

## Kenya

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.

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<sup>53</sup> Andrew McLaughlin, *Brazil's Internet is Under Legislative Attack*, MEDIUM (Apr. 4, 2016), <https://medium.com/@mcandrew/brazil-s-internet-is-under-legislative-attack-1416d94db3cb#.dy4aak1yk>.

<sup>54</sup> 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 . . .").





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.

## Mexico

Mexico does not have a comprehensive ISP safe harbor framework covering the full range of service providers and functions, with prohibitions on 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. This is also required by TPP.

## New Zealand

Currently, New Zealand’s Copyright Act 1994 limits safe harbor caching to “temporary storage” while TPP includes 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.

## Turkey

In Turkey, internet services face liability if users post content that is blasphemous, discriminatory, or insulting – which makes it very difficult to run an e-commerce service that solicits user reviews of products and services.

## Ukraine

Several provisions within Ukraine Draft Laws #4629, #3081-1, and #3081-d impose broad intermediary liability and could jeopardize fair and equitable market access for U.S. companies. In particular, we urge USTR to call attention to Draft Laws #4629 and #3081-d, which would create market access barriers by requiring website owners and hosting services to monitor websites for potential infringement, to maintain a database of possible offenders, and to remove



information within 24 hours of a complaint without any proof of copyright ownership.<sup>55</sup> These laws would increase the liability of intermediaries for copyrighted content without providing new protections. These new enforcement measures would go well beyond existing liability provisions in U.S. law and would lack numerous balancing factors that are critical to Section 512 of the Digital Millennium Copyright Act.

## Vietnam

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 content takedown requests, as well as numerous other market access barriers highlighted below.<sup>56</sup>

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 CDA, Section 512 of the DMCA, and Article 18.82 of the TPP.<sup>57</sup>

This draft decree also includes long and inflexible data retention requirements, a requirement for

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<sup>55</sup> See Tetyana Lokot, *New Ukrainian Draft Bill Seeks Extrajudicial Blocking for Websites Violating Copyright*, GLOBAL VOICES (Feb. 1, 2016), <https://advoc.globalvoices.org/2016/02/01/new-ukrainian-draft-bill-seeks-extrajudicial-blocking-for-websites-violating-copyright/>. 1, 2016).

<sup>56</sup> Draft Decree Amending Decree 72/2013-ND-CP on the Management, Provision and Use of Internet Services and Information Content Online.

<sup>57</sup> To comply with Article 18.82 of the TPP, Vietnam must at a minimum include express and unambiguous limitations on liability covering the transmitting, caching, storing, and linking functions in TPP Article 18.82.2; Vietnam should 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.



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

### European Union Member States

We urge USTR to monitor 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.

### Brazil

Past Brazilian governments' interventionist policies have prevented innovation and technological progress. In order to ensure access to innovation and to 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;<sup>58</sup>
- CERTICS Decree, which stands at odds with the global nature of the software industry;<sup>59</sup>
- The Margin of Preferences Decrees<sup>60</sup> 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<sup>61</sup> which requires 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.

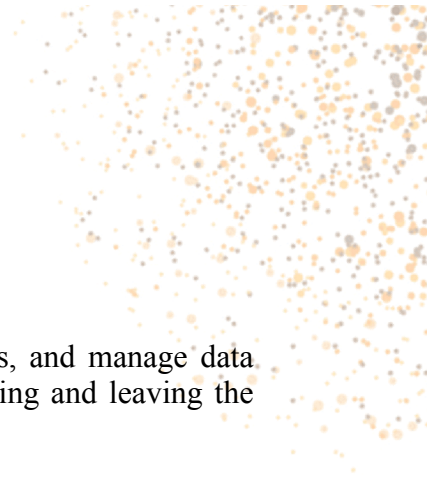
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<sup>58</sup> Law No. 8248 of Oct. 23, 1991.

<sup>59</sup> Decree No. 8186 of Jan. 17, 2014.

<sup>60</sup> Decree No. 8194 of Feb. 12, 2014; Decree No. 8184 of Jan. 17, 2014; and Decree No. 7903 of Feb. 12, 2013.

<sup>61</sup> Ordinance No. 54 of May 6, 2014; and Ordinance No. 141 of May 2, 2014.



## China

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.<sup>62</sup>

## Indonesia

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.”<sup>63</sup> We urge USTR and others in U.S. government to engage with counterparts in Indonesia to address the wide range of concerns associated with these measures.

## Kenya

Recent draft legislation includes ambiguous requirements related to localization.

## Korea

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

## Nigeria

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.

## Russia

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<sup>62</sup> *Data localization*, AmChamChina, <http://www.amchamchina.org/policy-advocacy/policy-spotlight/data-localization> (last visited Oct. 27, 2016).

<sup>63</sup> 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/>.





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.

## Saudi Arabia

In July, 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.

## Vietnam

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



## Internet Association

implement new data retention requirements, local presence requirements, interconnection requirements, and additional server localization requirements.





## CUSTOMS/TRADE FACILITATION

Many foreign jurisdictions have not raised their *de minimis* thresholds – the level below which no duty or tax is charged on imported items – in decades. Unnecessarily low *de minimis* thresholds create a barrier to trade through increased transaction costs for businesses, which in turn lowers consumers’ choices. Recent studies demonstrate that any gains realized by collecting additional duties from low *de minimis* thresholds are eliminated by the costs of assessing and processing the high volume of shipments that fall below the threshold. USTR should include the problem of low *de minimis* thresholds, as described in the comments below, in its 2017 report and promote an agenda to advocate raising these unnecessary barriers to trade in consumer goods.

### Brazil

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 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.

### Canada

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.<sup>64</sup> For comparison, the *de minimis* threshold for items imported into the United States is \$800 USD – over 40 times higher than Canada’s.<sup>65</sup> This low threshold, which has not been adjusted since the 1980s, creates an unnecessary barrier to trade

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<sup>64</sup> 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>. <https://www.cdhowe.org/public-policy-research/rights-passage-economic-effects-raising-dmt-threshold-canada>.

<sup>65</sup> *Id.* at 2.



through increased transaction costs for Canadian businesses, and restricts consumer choice and competition. Raising the *de minimis* would help Canadian small businesses participate more fully in global trade and e-commerce, growing Canada's digital economy. 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.<sup>66</sup> In fact, proposals to increase the *de minimis* threshold have been shown to be revenue neutral or even positive for the Canadian Government.<sup>67</sup>

## Mexico

Mexico's Customs Agency seeks to modify the simplified imports model via couriers (amendments to the current Foreign Trade Rule 3.7.3. and proposed new Rule 3.7.35) by increasing the VAT and duty for express shipments, in addition to several new requirements, such as reporting the harmonized system (HS) code of every product contained in an express shipment and monthly reports listing tax IDs for customers and shipment invoices. Mexican authorities should avoid the implementation of excessive measures that will transform the courier model into something similar to the definite imports model, eliminating the simplified procedures and thereby hurting Mexican e-commerce, small and medium businesses, and consumers in general. Maintaining a simplified imports model not only helps fuel the growth of a new sector of the Mexican economy, but also brings consumer benefits by allowing wider selection of products at the best possible prices. Mexican Customs authorities should (1) ensure compliance with its national and international commitments regarding foreign trade facilitation, as expressed in the TPP and the TFA to which Mexico recently adhered; and (2) evaluate the alternate rule proposed by courier companies. IA members request the U.S. government include this issue in the 2017 NTE and immediately oppose these changes.

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<sup>66</sup> *See, e.g., id.*

<sup>67</sup> *Id.*



## FILTERING, CENSORSHIP AND SERVICE-BLOCKING

### Brazil

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.<sup>68</sup>

Several new bills have been introduced that would require site-blocking injunctions.<sup>69</sup>

### China

In the world's biggest market, China, 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.<sup>70</sup> We appreciate that USTR has noted these trade barriers.<sup>71</sup> 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,

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<sup>68</sup> 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>; <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/>. <https://theintercept.com/2016/05/02/whatsapp-used-by-100-million-brazilians-was-shut-down-nationwide-today-by-a-single-judge/>.

<sup>69</sup> 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/>.

<sup>70</sup> *Data localization*, AmChamChina, <http://www.amchamchina.org/policy-advocacy/policy-spotlight/data-localization> (last visited Oct. 27, 2016).

<sup>71</sup> Ambassador Michael B.G. Froman, *2016 National Trade Estimate Report on Foreign Trade Barriers*, Office of U.S. Trade Representative (Mar. 23, 2016), <https://ustr.gov/sites/default/files/2016-NTE-Report-FINAL.pdf>.





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, the 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.

## France

French legislation has prohibited the use of geolocation by intermediaries to show users the available cars for a U.S.-based ride-sharing service.<sup>72</sup>

The U.S.-based ride-sharing service suspended the ridesharing in July 2015, following a violent taxi strike in Paris and three weeks of violence from taxi drivers in major French cities.<sup>73</sup> The Ministry of Interior (the Police Prefect of Paris and other prefects) issued administrative orders banning U.S. and other French ride-sharing services’ use of non-professional drivers in Paris and other cities.<sup>74</sup> A French court has furthermore criminally convicted two Uber executives, for violating transportation and privacy laws in connection with their operation of UberPop’s services.<sup>75</sup>

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<sup>72</sup> See Romain Dillet, *Uber, SnapCar and Others May Not Be Able to Use Geolocation in France*, TECHDIRT (Apr. 24, 2014), <https://techcrunch.com/2014/04/24/uber-snapcar-and-others-wont-be-able-to-use-geolocation-in-france/>. <https://techcrunch.com/2014/04/24/uber-snapcar-and-others-wont-be-able-to-use-geolocation-in-france/>.

<sup>73</sup> Josh Lowe, *Chaos Expected as French Taxi Drivers Strike Against Uber*, NEWSWEEK (Jan. 26, 2016), <http://www.newsweek.com/uber-strikes-paris-taxi-drivers-419620>. <http://www.newsweek.com/uber-strikes-paris-taxi-drivers-419620>.

<sup>74</sup> See Emile Picy & Leila Abboud, *French Court Upholds Ban on Uber’s Service Using Non-Professional Drivers*, REUTERS (Sept. 22, 2015), <http://www.reuters.com/article/us-france-uber-tech-idUSKCN0RM26C20150922><http://www.reuters.com/article/us-france-uber-tech-idUSKCN0RM26C20150922>.

<sup>75</sup> See Sam Schechner et al., *French Court Convicts Uber of Violating Transport, Privacy Laws*, THE WALL STREET JOURNAL (June 9, 2016), <http://www.wsj.com/articles/french-court-convicts-uber-of-violating-transport-privacy-laws-1465477861>. <http://www.wsj.com/articles/french-court-convicts-uber-of-violating-transport-privacy-laws-1465477861>.



## Hungary

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.<sup>76</sup>

## India

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.<sup>77</sup>

## Italy

Shortly after a U.S. based ride-sharing service launched in several cities across Italy, the company was forced to dramatically scale back services in Rome and Milan and withdraw from other cities. A 2015 judgment of the Court of Milan banned the U.S.-based ride-sharing service's use of its application that connects ride seekers with private drivers. Under this decision, the U.S. ride-sharing service may only employ professional drivers with taxi licenses. The order has been executed throughout the national territory, granting the appeal lodged by the trade associations of taxi drivers which accused the U.S.-based ride-sharing service of "unfair competition." It must be noted that this decision applies only to the U.S.-based ride-sharing service but not to similar services, such as the Italian platform Letzgo (recently re-branded as "Zego"), which continues to operate in Italy without restrictions.

## Spain

A judge of the Commercial Court N°2 in Madrid decided to temporarily ban a U.S.-based ride-sharing service and block its domain across Spain after a request from Asociación Madrileña del

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<sup>76</sup> 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>. <http://www.businessinsider.com/r-hungarian-parliament-passes-law-that-could-block-uber-sites-2016-6>.

<sup>77</sup> *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>; <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](http://india.blogs.nytimes.com/2012/10/03/youtube-and-facebook-remain-blocked-in-kashmir/?_r=0)[http://india.blogs.nytimes.com/2012/10/03/youtube-and-facebook-remain-blocked-in-kashmir/?\\_r=0](http://india.blogs.nytimes.com/2012/10/03/youtube-and-facebook-remain-blocked-in-kashmir/?_r=0) (reporting on the practices of the Jammu and Kashmir governments to "increasingly [use] a communication blackout to prevent unrest in the valley.").



Taxi (the taxi union) in December 2014.<sup>78</sup> This happened “inaudita parte”, i.e., the U.S.-based ride-sharing service did not have the chance to be heard and defend itself.<sup>79</sup> The Judge also ordered telecom operators to block access to the U.S.-based ride-sharing service’s app and ordered payment service providers to stop processing payments.<sup>80</sup> The U.S.-based ride-sharing service had to suspend its activities all over Spain, but the injunction also prevented users of Spanish mobile communications services to use the service when travelling abroad.

## Russia

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.<sup>81</sup> For example, Russia has ordered all of Wikipedia to be blocked due to problematic content on a single page.

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<sup>78</sup> See Al Goodman, *Spanish Judge Imposes Temporary Ban on Uber Taxi Service*, CNN (Dec. 9, 2014), <http://www.cnn.com/2014/12/09/world/europe/spain-uber-court-ban/>.

<sup>79</sup> *Id.*

<sup>80</sup> See Catherine Phillips, *Spanish Judge Bans Uber Taxi App*, NEWSWEEK (Dec. 9, 2014), <http://www.newsweek.com/spanish-judge-bans-uber-290482>.<http://www.newsweek.com/spanish-judge-bans-uber-290482>.

<sup>81</sup> 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/>.



## RESTRICTIVE REGULATION OF ONLINE SERVICES

Several countries have sought to apply public utility-style regulation to online services. For instance, some regulators and telecommunications providers have pushed to apply sector-specific regulations on matters such as emergency calling, number portability, interconnection, and tariffing to IP-delivered voice and video conferencing services. Similarly, broadcasting services and regulators have pushed to subject online video services to broadcaster obligations on local content origination and subsidies, or 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.

### European Union

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,<sup>82</sup> as well as local content quotas relating to the Audiovisual Media Services Directive.

### Argentina

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.<sup>83</sup> 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

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<sup>82</sup> 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](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](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 Parliament (Dec. 15, 2015), [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2015\)569979](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2015)569979) (last visited Oct. 25, 2016).

<sup>83</sup> *New Rules of the Game in Telecommunications in Argentina*, OBSERVACOM (Jan. 27, 2015), <http://www.observacom.org/new-rules-of-the-game-in-telecommunications-in-argentina/http://www.observacom.org/new-rules-of-the-game-in-telecommunications-in-argentina/> (last visited Oct. 24, 2016).



available. Such obligations could create clear market access barriers for internet services that do not face registration requirements in other markets. As such, we encourage USTR and the U.S. government to monitor the development of this bill and engage with counterparts in Argentina to promote a light-touch framework for regulating information services and avoid the creation of market access barriers.

## Brazil

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.<sup>84</sup> 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. IA encourages USTR to monitor the development of these legal changes and to engage with Brazilian counterparts to promote a light-touch regulatory framework consistent with the U.S. approach to information services.

## China

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. We urge USTR and other U.S. agencies to encourage China to remove the onerous, non-transparent licensing regime for value-added services and open the market to any company with competitive products and services in accordance with international norms, including eliminating equity caps for foreign companies

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<sup>84</sup> *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>.





## Colombia

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.<sup>85</sup> 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.<sup>86</sup>

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.<sup>87</sup> 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.

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<sup>85</sup> 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](http://www.imprenta.gov.co/gacetap/gaceta.mostrar_documento?p_tipo=05&p_numero=126&p_consec=43703).

<sup>86</sup> 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](http://www.imprenta.gov.co/gacetap/gaceta.mostrar_documento?p_tipo=18&p_numero=91&p_consec=45526).

<sup>87</sup> 178/2016 C Reforma Tributaria, Republic of Colombia Congress (Oct. 19, 2016), [http://www.camara.gov.co/porta12011/proceso-y-tramite-legislativo/proyectos-de-ley?option=com\\_proyectosdeley&view=ver\\_proyectodeley&idpry=2247](http://www.camara.gov.co/porta12011/proceso-y-tramite-legislativo/proyectos-de-ley?option=com_proyectosdeley&view=ver_proyectodeley&idpry=2247).



## India

In March 2015, India’s telecom regulator, TRAI, issued a consultation paper on “Regulatory Framework for Over-the-Top (OTT) services.”<sup>88</sup> There has been no response from the regulator on this paper after comments were submitted, yet it appears that the matter is still under consideration. In 2016, there have been additional consultation papers on issues including net neutrality,<sup>89</sup> VoIP,<sup>90</sup> and cloud services.<sup>91</sup> 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.<sup>92</sup> Given that many of these consultations and drafts could generate restrictive rules and market access barriers for U.S. services seeking entry to the Indian market, IA encourages USTR and others in U.S. government to engage with counterparts in India and promote a light-touch regulatory framework for online services that is consistent with the U.S. framework and other principles articulated in this filing.

## Indonesia

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 services to do business

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<sup>88</sup> TRAI, *Consultation Paper on Regulatory Framework for Over-the-Top (OTT) Services* (Mar. 27, 2015), [http://www.traai.gov.in/Content/ConDis/10743\\_23.aspx](http://www.traai.gov.in/Content/ConDis/10743_23.aspx).[http://www.traai.gov.in/Content/ConDis/10743\\_23.aspx](http://www.traai.gov.in/Content/ConDis/10743_23.aspx).

<sup>89</sup> TRAI, *Consultation Paper on Net Neutrality* (May 30, 2016), [http://www.traai.gov.in/Content/ConDis/20775\\_0.aspx](http://www.traai.gov.in/Content/ConDis/20775_0.aspx).

<sup>90</sup> TRAI, *Consultation Paper on Internet Telephony (VoIP)* (June 22, 2016), [http://www.traai.gov.in/Content/ConDis/20779\\_0.aspx](http://www.traai.gov.in/Content/ConDis/20779_0.aspx).[http://www.traai.gov.in/Content/ConDis/20779\\_0.aspx](http://www.traai.gov.in/Content/ConDis/20779_0.aspx).

<sup>91</sup> TRAI, *Consultation Paper on Cloud Computing* (Oct. 6, 2016), [http://www.traai.gov.in/Content/ConDis/20777\\_0.aspx](http://www.traai.gov.in/Content/ConDis/20777_0.aspx).[http://www.traai.gov.in/Content/ConDis/20777\\_0.aspx](http://www.traai.gov.in/Content/ConDis/20777_0.aspx).

<sup>92</sup> TRAI, *Consultation Paper on Spectrum, Roaming, and QoS related requirements in Machine-to-Machine (M2M) Communications* (Oct. 18, 2016), [http://www.traai.gov.in/Content/ConDis/20798\\_0.aspx](http://www.traai.gov.in/Content/ConDis/20798_0.aspx).[http://www.traai.gov.in/Content/ConDis/20798\\_0.aspx](http://www.traai.gov.in/Content/ConDis/20798_0.aspx).



in Indonesia.<sup>93</sup> 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. IA encourages USTR to classify these provisions as market access barriers and press for removal of these requirements.

## Kenya

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.<sup>94</sup> 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.

## Malaysia

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).<sup>95</sup> 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.

## Pakistan

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.<sup>96</sup> We encourage USTR to monitor the development of this policy and to promote a light-touch

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<sup>93</sup> *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/>.

<sup>94</sup> 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>.

<sup>95</sup> *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>.

<sup>96</sup> *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/>.



framework for regulating information services that is consistent with the U.S. approach, and that encourages innovation and investment.

## Senegal

Senegalese regulators have publicly announced a study to help decide whether and how to regulate online services.<sup>97</sup> 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.

## United Arab Emirates

In 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.<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup>

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<sup>97</sup> 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/>.

<sup>98</sup> 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 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>.

<sup>99</sup> See Mary-Ann Russon, *supra* note 98.

<sup>100</sup> 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->



## Uruguay

Uruguay is currently considering a bill to regulate digital platforms and services.<sup>101</sup> 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

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.<sup>102</sup>

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.

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the-point-of-having-internet/; Vinod Nair, *Only Oman-Based VoIP Calls Legal*, OMAN OBSERVER (Apr. 16, 2016), <http://omanobserver.com/only-oman-based-voip-calls-legal/>.

<sup>101</sup> 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/>.

<sup>102</sup> *Circular Regulates OTT Services*, VIETNAM NEWS (Nov. 15, 2014), <http://vietnamnews.vn/economy/262825/circular-regulates-ott-services.html#qypySzIcYMz25vCl>.<http://vietnamnews.vn/economy/262825/circular-regulates-ott-services.html#qypySzIcYMz25vCl>.97 97.





## Zimbabwe

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.<sup>103</sup>

## Additional Countries

In addition, we request that USTR monitor similar developments and consultations in Ghana,<sup>104</sup> Mexico,<sup>105</sup> Nigeria,<sup>106</sup> Sri Lanka,<sup>107</sup> South Africa,<sup>108</sup> and Thailand.

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<sup>103</sup> POTRAZ, *Consultation Paper No. 2 of 2016*, [https://www.potraz.gov.zw/images/documents/Consultation\\_OTT.pdf](https://www.potraz.gov.zw/images/documents/Consultation_OTT.pdf).

<sup>104</sup> Olusegun Ogundeji, *Ghana Initiates Review Of OTT Services*, IT WEB AFRICA (May 16, 2016), <http://www.itwebafrica.com/telecommunications/338-ghana/236228-ghana-initiates-review-of-ott-services>.

<sup>105</sup> Jim O’Neill, *Mexico’s Telecom Regulator Eyes OTT as Its Popularity Continues to Grow*, OOYALA (Oct. 19, 2015), <http://www.ooyala.com/videomind/blog/mexico-s-telecom-regulator-eyes-ott-its-popularity>.

<sup>106</sup> See Yomi Kazeem, *Now It’s Nigeria’s Authorities Who Want to Regulate Apps Like WhatsApp and Facebook*, QUARTZ AFRICA (Feb. 17, 2016), <http://qz.com/617451/now-its-nigerias-authorities-who-want-to-regulate-apps-like-whatsapp-and-facebook/>.

<sup>107</sup> See LBO, *OTT Services, Threat to Sri Lankan Telco Revenues and State Taxes: Dialog Chief*, LANKA BUSINESS ONLINE (May 10, 2016), <http://www.lankabusinessonline.com/ott-services-threat-to-sri-lankan-telco-revenues-and-state-taxes-dialog-chief/> (reporting that Sri Lankan telecom companies are urging that regulation of OTT services is necessary for local telecom companies to remain competitive).

<sup>108</sup> See ICASA To Launch Inquiry on OTT Impact Regulation, SOUTH AFRICAN GOVERNMENT NEWS AGENCY (Jan. 27, 2016), <http://www.sanews.gov.za/south-africa/icasa-launch-inquiry-ott-impact-regulation>.



## UNILATERAL OR DISCRIMINATORY TAX REGIMES

The growth of the digital economy shows the need for a consistent global tax regime. Unilateral action by one country to deviate from this regime makes investment decisions harder, cross-border compliance more difficult, and market and trade fragmentation more likely, and creates the potential for endless tax disputes between governments. We urge USTR to monitor tax developments around the world and work towards a more harmonized approach, ensuring that the same dollar of profit will not be taxed twice in two different countries. USTR should ensure that tax measures do not increase the complexity of cross-border trade in a way that harms market access and the cross-border growth of internet services.

### Australia

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.<sup>109</sup>

### Belgium

The three regions in Belgium have set rules that (i) act as barriers to the PHV driver license (specifically, the “examen d’accès à la profession d’indépendant” in Brussels is a test including a part on accounting and corporate finances that any future independent worker needs to pass) or (ii) restrict the possibilities for consumers to use PHV services: a ride needs to last at least three hours and cost at least 90€, in the three regions (Walloon legislation only mentions the three hour requirement, but this results de facto in a high minimum price). Additional requirements in Brussels for PHV: the car needs to cost at least 31,133.29€ excluding VAT, have three separate compartments, and have a wheelbase longer than 2.8m.

A written agreement needs to be available in the car during the service (although this requirement is at present not heavily enforced by law enforcement authorities, who have so far accepted digital contracts). Other requirements include that (1) the car is only entitled to be on the public road when it is subject of a rental service, and (2) the car is rented as a whole, not seat by seat. Considering the possibilities offered by new technologies and on-demand services enabled by smartphones, this regulation is clearly an obstacle. Imposing the signature of a written contract also defeats the innovation brought by smartphones, and the interdiction for drivers to be on the public road when they are not transporting clients, makes it impossible for customers to book a ride instantly without a significant waiting time.

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<sup>109</sup> *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).



Also concerning is the impermeability between the regions. One needs to have his business installed in the same region he intends to ask a license from. For example, this rule prevents someone having his business in Brussels to ask for a license in Flanders, or vice versa, which creates a very inflexible supply for professional people transportation.

## India

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.<sup>110</sup> 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.

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. We urge USTR to recognize that this levy may serve as a market access barrier for foreign services, and engage with counterparts in India to develop taxation principles that are consistent with global best practices.<sup>111</sup>

## Indonesia

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

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<sup>110</sup> Madhav Chanchani et al., *Equalisation Levy of 6% 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>.

<sup>111</sup> OECD, *BEPs 2015 Final Report*, Action 15 (Oct. 5, 2015), <http://www.oecd.org/tax/developing-a-multilateral-instrument-to-modify-bilateral-tax-treaties-action-15-2015-final-report-9789264241688-en.htm>.



foreign services to create a permanent establishment in order to do business in Indonesia.<sup>112</sup> 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. We urge USTR to address these disproportionate taxation measures as market access barriers.

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<sup>112</sup> 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>.



## DISCRIMINATORY OR NON-OBJECTIVE APPLICATION OF COMPETITION REGULATIONS

### China

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 upon foreign companies, including in cases where there is no evidence of abuse of market power or anti-competitive harm.

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.

### India

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.

### Korea

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 the 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.

## Taiwan

The Taiwan Fair Trade Commission's 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.



## BURDENSOME OR DISCRIMINATORY DATA PROTECTION FRAMEWORKS

The U.S. should support efforts to ensure that cross-border data flows are accompanied by interoperable privacy frameworks, such as the APEC Cross Border Privacy Rules system, while working with other countries to avoid prescriptive or ex-ante privacy measures that place undue restrictions on innovation.

### European Union

The E.U. General Data Protection Regulation was passed this year, but will not go into effect until May 2018.<sup>113</sup> 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.<sup>114</sup> Standard Contractual Clauses (SCCs) may also be threatened by ongoing litigation.<sup>115</sup> Significant challenges to these transfer mechanisms threaten the viability of billions of dollars in E.U.-U.S. data transfers.

### Brazil

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.<sup>116</sup>

In addition, there are several bills before Brazilian Congress that would implement a form of the “right to be forgotten” in Brazil, requiring the removal from online services of information that is

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<sup>113</sup> 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>.

<sup>114</sup> 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>.

<sup>115</sup> 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>.

<sup>116</sup> *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>.



deemed “irrelevant” or “outdated” even if it is true.<sup>117</sup> These developments conflict with Brazil’s strong commitment to freedom of expression and access to information, and would present market access barriers for both small and large U.S. services seeking to enter the Brazilian market.

IA urges USTR to engage with Brazilian counterparts and to promote international best practices on privacy that will enable U.S. businesses to exchange data with Brazil while continuing to protect user data. 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.<sup>118</sup>

## Korea

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

## Panama

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

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<sup>117</sup> Matt Sandy, *Brazilian Lawmakers Threaten to Crack Down on Internet Freedom*, TIME (Jan. 20, 2016), <http://time.com/4185229/brazil-new-internet-restrictions/>.

<sup>118</sup> *Cross Border Privacy Rules System*, CBPRS, <http://www.cbprs.org/> (last visited Oct. 25, 2016).



## Internet Association

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.

