



**Computer & Communications
Industry Association**
Tech Advocacy Since 1972

Before the
United States Senate Committee on Finance
Regarding
“Advancing Congress’s Trade Agenda, The Role of Trade Negotiating Authority”
January 16, 2014
Statement of the
Computer & Communications Industry Association

The Computer & Communications Industry Association (CCIA) represents large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services – companies that collectively generate more than \$250 billion in annual revenues.¹

CCIA has been a leading advocate for expanded trade since our founding decades ago. Today, the task at hand is to establish a framework for promoting 21st-century trade, and the Bipartisan Congressional Trade Priorities Act of 2014 makes many strides toward achieving this. Fortunately, existing U.S. law already reflects principles necessary to promote modern, Internet-enabled commerce in the international marketplace. A modern framework for digital trade must enable the expansion of, and respond to new barriers to, technology-enabled commerce. The economic potential of Internet-related trade is immense. Yet businesses face numerous barriers today: impediments to cross-border data flows, mandates on the location and use of technology infrastructure, forced technology transfer, and unreasonable liability rules regarding third-party activity. Internet trade is also confronted with unbalanced IP laws, which do not adequately reflect the appropriate balance presently found in U.S. law and practice. These issues were not addressed when Congress last considered the issue of trade promotion authority in 2002, and thus much work needs to be done.

¹ A complete list of CCIA members is available at <http://www.cciagnet.org/members>.

The Trade Priorities Act makes significant strides in responding to many of these new issues. In order to fully realize the needs of 21st-century commerce, however, U.S. trade policy must do more to respond to the challenges Internet businesses face in the global marketplace. The blueprint for action is clear: the highly successful legal norms pioneered in U.S. law should become global norms. CCIA applauds the Committee's work on this issue, and looks forward to helping address the challenges facing the economic interests of the technology and Internet sector.

I. Digital Trade Promotion

The proposed trade promotion language is a marked step forward for digital trade, enshrining concepts such as the free flow of information and the prevention of forced localization as official U.S. trade objectives. Ensuring that online, digital commerce receives treatment equal to physical trade is essential, as more and more of both the U.S. and the world's commercial transactions move from the physical world to the Internet.

The Committee is no doubt familiar with the great commercial benefits the open Internet provides. It allows small-and-medium-size businesses to access markets and customers well beyond their reach in the brick and mortar world, lowers costs along the entirety of global supply chains, increases efficiency in business from the Fortune 500 down to the smallest mom-and-pop shop, and is the catalyst for the online services marketplace, one of the greatest economic drivers in the country today.

As an example of the immense economic benefit of the Internet, the Boston Consulting Group conducted a study in 2012 analyzing the economic promise of the Internet economy. The study predicts that the Internet economy in the G-20 will reach \$4.2 trillion by 2016.² Another study, conducted by the McKinsey Global Institute, estimates that 21% of GDP growth over the past 5 years is attributable to the Internet and that 2.6 jobs are created for every job lost. And, perhaps more telling, the same study estimates that 75% of the economic value of the Internet accrues to *traditional sectors* of the economy in the form of greater efficiency and expanded market access.³

² Boston Consulting Group, *The Internet Economy in the G-20* (2012), available at https://www.bcgperspectives.com/content/articles/media_entertainment_strategic_planning_4_2_trillion_opportunity_internet_economy_g20/.

³ McKinsey Global Institute, *Internet Matters: The Net's Sweeping Impact on Growth, Jobs, and Prosperity* (2011), available at <http://www.mckinsey.com/features/~media/6BDDD3D756C449C1A9C41633EE5B0732.ashx>.

Furthermore, a recent comprehensive report from the U.S. International Trade Commission, requested by this very Committee, noted that “digital trade continues to grow both in the U.S. economy and globally” and that a “further increase in digital trade is probable, with the U.S. in the lead.” In fact, the report also shows that U.S. digital exports have exceeded imports and that surplus has continually widened since 2007.⁴ As the U.S. economy continues to change, the Internet and the innovative ecosystem that it has spawned become increasingly important to our global economic competitiveness.

The Internet both grows the pie for everyone, and significantly benefits the United States as well. Given the commitment of both the Administration and Congress to lower the trade deficit, it would be unthinkable for the U.S.’s new trade agenda not to acknowledge and support the most internationally competitive sector of the U.S. economy.

Language ensuring the U.S. Government’s commitment to the free flow of information and opposition to other digital trade barriers, including preventing trading partners from imposing local hosting requirements, are necessary steps towards constructing a trade agenda that both comports with the realities of 21st-century commerce and serves the best interests of the United States. However, these steps are not sufficient to ensure that 21st-century international online commerce flourishes over the coming decades.

II. Promoting Reasonable Limitations on Intermediary Liability

Internet services increasingly offer platforms for trade, both digital and conventional. Online intermediaries facilitate mind-boggling numbers of interactions and transactions daily. Today, the Internet functions as a commerce-facilitating platform, and it therefore matters to everyone.

Frequently, however, foreign states seek to blame and burden the intermediary for “undesirable” communications. This is particularly appealing when the intermediary or platform is a foreign company with deeper pockets than the domestic end-user whose conduct or speech may be at issue. These liability rules constitute a major barrier to Internet commerce. Congress wisely recognized that penalizing Internet platforms for users’ speech or misconduct would jeopardize the industry’s growth, and broadly limited this liability. Europe, and other developing

⁴ United States International Trade Commission, *Digital Trade In the U.S. and Global Economies, Part I* (2013), available at <http://www.usitc.gov/publications/332/pub4415.pdf>.

countries also provide some liability protections.⁵ Unfortunately, these protections are not broadly adopted, and are inadequately enforced.⁶ At a time when the U.S. leads the world in the growing market for high-value Internet services, we must resist calls to “shoot the messenger.” U.S. trade policy must reverse the trend toward saddling U.S. enterprises – which are often wholly unaware of the speech or content at issue – with liability for other parties’ words and actions.

Intermediaries have been subjected to extreme liability in numerous foreign markets for third party content.⁷ In some instances, these cases are clearly protectionist, and in others they have the effect of inhibiting lawful free speech and free expression. In many cases, intermediaries are held responsible for online content about which they had no prior knowledge. Courts often impose the impossible burden of affirmatively monitoring and proactively censoring all “undesirable” communications — an obligation uniformly rejected in U.S. and European law. These liability risks “weaken private sector confidence” and impede market entry.⁸

U.S. law features two specific safe harbors – Section 230 of the Communications Decency Act,⁹ and Section 512 of the Digital Millennium Copyright Act – which address this sort of problem.¹⁰ For over 10 years, U.S. trade policy has aggressively promoted principles similar to Section 512 to be included in our trade agreements, which we applaud. Our trade policy should continue to reflect this mainstay principle in our trade agreements. At the same time, it is essential that U.S. trade policy also promote intermediary liability protections similar to Section 230, which limits intermediary liability for user misconduct, thus allowing Internet companies to combat undesirable or potentially illegal activity without fear of additional liability for editing user content. This principle, adopted in 1996, made the online environment safe for

⁵ OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives*, at 15 (2011) available at <http://dx.doi.org/10.1787/9789264115644-en>.

⁶ Martin H. Thelle & Svend T. Jespersen, *Online Intermediaries: Assessing the Economic Impact of the EU’s Online Liability Regime* (2012), at 7, available at <http://www.europeandigitalmedia.org/uploads/Press/documents/Copenhagen%20Economics-Online%20Intermediaries-201201.pdf>.

⁷ See generally Ali Sternburg & Matt Schruers, *Modernizing Liability Rules to Promote Internet Trade* (2013), at <http://www.ccianet.org/wp-content/uploads/2013/09/CCIA-Liability-Rules-Paper1.pdf>.

⁸ See OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives*, *supra* note 2, at 15.

⁹ 47 U.S.C. § 230.

¹⁰ 17 U.S.C. § 512.

digital commerce. If digital commerce is to extend to international trade, a similar principle must be reflected in international trade norms.

III. Balanced Intellectual Property

Since 2002, the economy has changed dramatically, and today a broad range of services exported by U.S. businesses depends upon various limitations and exceptions to copyright. Research commissioned by CCIA in 2011 and recently cited by the National Academies of Science¹¹ concluded that industries depending upon fair use and other limitations to copyright contributed \$2.4 trillion in value-add to the U.S. economy (roughly one-sixth of total U.S. current dollar GDP) and employ approximately 1 in 8 U.S. workers. More relevant from a trade perspective, exports of goods and services related to these industries increased by 64 percent between 2002 and 2009, from \$179 billion to \$266 billion. Exports of trade-related services, including Internet or online services, were the fastest growing segment, increasing nearly ten-fold from \$578 million in 2002 to more than \$5 billion annually in 2008-2009.¹²

It is crucial to U.S. exports that services recognized as lawful in the U.S. can also be offered in global markets. To be clear, 20th-century trade policy did not accurately reflect the IP balance found in U.S. law, and that has hindered the export of digital services. A 21st-century trade policy must remedy this. Indeed, under USTR leadership, the Trans-Pacific Partnership (TPP) is already poised to do so. USTR announced in July 2012 its intention to promote the balance of U.S. copyright law with a short provision in TPP, consistent with international and U.S. law, that would obligate parties to “seek to achieve an appropriate balance in their copyright systems in providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research.”¹³ These principles are critical aspects of the U.S. copyright system, appearing throughout our law and jurisprudence. It is very appropriate that the TPP recognize these principles, and given their importance, they should be formally recognized in our trade policy going forward. Failing to do so may inadvertently signal

¹¹ Stephen A. Merrill & William J. Raduchel, *Copyright in the Digital Era: Building Evidence for Policy*, National Research Council (2013), at http://www.nap.edu/catalog.php?record_id=14686.

¹² Thomas Rogers & Andrew Szamosszegi, *Fair Use in the U.S. Economy* at 26-27 (2011), available at <http://www.cciagnet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf>.

¹³ *USTR Introduces New Copyright Exceptions and Limitations Provision at San Diego TPP Talks*, July 3, 2012, at <http://www.ustr.gov/about-us/press-office/blog/2012/july/ustr-introduces-new-copyright-exceptions-limitations-provision>.

that the U.S. Government favors a skewed intellectual property system, which discriminates against successful U.S. industries.

This will ensure that our trading partners' laws reflect the same mainstream, common-sense principles found in U.S. IP law. As hard as it may be to believe, online services encounter cases abroad where it is unlawful to quote from newspaper articles,¹⁴ or where intermediaries are penalized because users want to sell legitimate, lawfully acquired goods.¹⁵ U.S. law effectively addresses these scenarios, while still affording robust protection to intellectual property. Our trade policy must do so as well.

IV. Promoting Consultation with Stakeholders

The Trade Priorities Act contains new provisions focused on public consultation. Increasing consultation on trade policy is both appropriate and prudent – efforts to increase transparency will help mitigate some of the misinformation that has been spread about the benefits of the trade agenda. In that vein, USTR's recent efforts to foster greater stakeholder engagement should be commended. That being said, the advisory committee structure that presently supports U.S. trade policy does not reflect the 21st century economy, has little input from the Internet sector, and therefore requires updating. For example, even though there are 15 Industry Trade Advisory Committees (ITACs), none of these pertain exclusively (or even predominantly) to digital trade, despite the relative importance of digital trade to our economy. ITACs 8 (Information Communications Technologies, Services, and Electronic Commerce) and 15 (Intellectual Property) both encompass some concerns of digital trade platforms, but both are largely constructed of representatives of companies that have either different or divergent interests. While telecommunications companies, hardware manufacturers or content producers are all important constituencies in the economy, none of these groups fully

¹⁴ As CCIA raised in response to USTR's 2013 Special 301 report, the German legislature has created a new *Leistungsschutzrecht* or so-called "ancillary right" for press publishers, such as newspapers and magazines, which prohibits Internet platforms from aggregating quotations of press publications without authorization, notwithstanding EU commitments to the contrary. See Comments of Computer & Communications Indus. Ass'n, Dkt. No. USTR-2010-022, filed Feb. 8, 2013, at [http://www.cciainet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20\[2013\].pdf](http://www.cciainet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf).

¹⁵ Such an obligation would obviously comport with the U.S. Supreme Court's recent, unambiguous decision in *Kirtsaeng v. John Wiley & Sons*, which interpreted 17 U.S.C. § 109(a) to mean that copyright's 'first sale' or 'exhaustion' doctrine permits the owner of a work to sell or dispose of that copy as he wishes, whether that work was made domestically or abroad. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1351, 1358 (2013).

reflect the perspective of businesses engaged in the export of Internet services and retailing, cloud computing and online platforms.

According to a 2009 report on the trade advisory system, GAO found in 2002 that “the structure and composition of the committee system had not been fully updated to reflect changes in the U.S. economy and U.S. trade policy.”¹⁶ In the intervening time, little has been done to formally incorporate Internet perspectives. Besides ensuring that USTR is receiving advice that is representative of the needs of the U.S. economy, a reassessment of the ITAC structure would ensure compliance with the Federal Advisory Committee Act’s requirements that advisory committees be fairly balanced in terms of points of view.

CCIA thanks the Committee for its continued efforts to modernize our trade policy, and looks forward to working together to address the challenges before our changing economy.

¹⁶ Government Accountability Office, *International Trade: Prior Updates of the Trade Advisory System Offer Insights for Current Review* (2009), available at <http://www.gao.gov/assets/130/123085.pdf>.