

Statement of

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“International Data Flows: Promoting Digital Trade in the 21st Century”

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Chairman Goodlatte, Ranking Member Conyers, Subcommittee Chairman Issa, Ranking Member Collins, and Members of the Subcommittee, my name is Ed Black, President & CEO of the Computer & Communications Industry Association. We appreciate the committee's attention to the important matter of international data flows. CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Many CCIA members are directly affected by barriers to international data flows, and many other industry sectors who depend on their services are indirectly harmed by the growing problem of digital trade barriers. There is a lot on the line here: CCIA members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion.¹

The modern Internet is the cornerstone of cross-border trade in goods and services. Cross-border e-commerce is estimated to represent between 10 to 15 percent of total global e-commerce, and could grow from a 2014 figure of \$80 billion to as high as \$350 billion by 2025.² This trade is critical to U.S. economic interests. International markets are important growth opportunities;³ while the top global Internet brands are made in America, the vast majority of their users are now outside the United States.⁴ We are not talking only about the digital transmission of things that could be shipped physically, like digital media. Increasingly, the

¹ A list of CCIA members is available at <https://www.ccianet.org/members>.

² U.S. International Trade Comm'n, *Recent Trends in U.S. Services Trade: 2015 Annual Report*, May 2015, at 116, <http://www.usitc.gov/publications/332/pub4526.pdf>, (hereinafter "*Recent Trends in U.S. Services Trade*").

³ U.S. International Trade Comm'n, *Digital Trade in the U.S. and Global Economies, Part 1* (July 2013), <http://www.usitc.gov/publications/332/pub4415.pdf>.

⁴ Mary Meeker, *Internet Trends 2014*, May 28, 2014, at 130, <http://www.kpcb.com/blog/2014-internet-trends>. By way of specific example, Google's total international revenue was 39% of its overall sales in 2005, whereas today 56% of its revenue comes from overseas. *Compare* Press Release, Google, *Google Announces Fourth Quarter and Fiscal Year 2005 Results*, Jan. 31, 2006, https://investor.google.com/earnings/2005/Q4_google_earnings.html with Press Release, Google, *Google Announces Fourth Quarter and Fiscal Year 2014 Results*, Jan. 29, 2015, https://investor.google.com/earnings/2014/Q4_google_earnings.html. Similarly, 83% of Facebook's users lie outside of the U.S. and Canada, while fewer than 50% of Facebook users were international as of 2008. *Compare* Facebook Company Info, <http://newsroom.fb.com/company-info/> with Miguel Helft, *Facebook Makes Headway Around the World*, N.Y. Times, July 7, 2010, <http://www.nytimes.com/2010/07/08/technology/companies/08facebook.html>.

most important aspects of our trade involve access to platforms and provision of services. Internet platforms and services not only export services to users abroad; they also empower small- and medium-sized U.S. businesses to participate in international trade like never before.⁵ Small businesses and individual craftsmen can use platforms like eBay and Etsy to sell their wares globally without the need for an international presence. Data shows that small- and medium-sized businesses on eBay who focused on international markets grew 57% faster than their more domestic-focused counterparts.⁶ Similarly, payment processors like PayPal and Google Wallet allow the same small firms to process payments globally, and global Internet advertising networks like those offered by Facebook, Twitter, Google, and Amazon allow these companies and individual sellers to target potential customers across borders. Thus, breaking down barriers to digital trade would also help small business exporters who rely on global Internet services. But to be clear, eliminating trade barriers isn't a zero-sum, "us-versus-them" issue. When governments impose digital trade barriers, they deny their own citizens crucial tools to advance their own economic welfare, and risk being left behind in the 21st-century economy. Breaking down these barriers would be a win-win outcome.

But to achieve this, we have to recognize that blocking or interfering with users' access to online platforms and services is no different than blockading a port, and we must respond accordingly.

Unfortunately, U.S. trade policies haven't adapted to the new reality. While trade policy has dramatically reduced barriers to trade in goods, the liberalization of trade in services has

⁵ See, e.g., Andreas Lendle *et al.*, *There Goes Gravity: How eBay Reduces Trade Costs*, World Bank Research Paper No. 6253, Oct. 2012, http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2012/10/25/000158349_20121025161729/Rendered/PDF/wps6253.pdf; McKinsey Global Institute, *Internet Matters: The Net's Sweeping Impact on Growth, Jobs and Prosperity*, *supra* note 11.

⁶ Brian Bieron, *et al.*, *2015 US Small Business Global Growth Report*, eBay Public Policy Lab, 2015, at 11, https://www.ebaymainstreet.com/sites/default/files/2015-us-small-biz-global-growth-report_0.pdf.

lagged behind. Yet the United States is increasingly a services economy.⁷ In fact, the United States is the largest global exporter of services, exporting \$662 billion in 2013.⁸ Recent data also shows continued growth in our services trade, with the United States' surplus in services trade growing 2.2 percent to \$5 billion from 2013 to 2014.⁹

The result is one of our most important exports—Internet services—do not get the same protection as what we import from other countries. Today, countries can far more easily block bits than bananas at the border, and that's a huge problem when much of our exports are bits. This has to change.

To protect the global trading economy and to protect our economic interests, U.S. trade policy must modernize. We need to give top priority to barriers to Internet trade and impediments to Internet-enabled services. We need to start considering bringing trade disputes against countries who are blocking bits. If nations want to argue that giving their populace access to social media raises national security matters, we need to bring the most extreme claims to the WTO. If the modern trade system cannot meaningfully respond to the needs of the Internet sector, then that industry has little to gain from backing the trade agenda.

My testimony highlights principle obstacles to digital trade, including filtering, blocking, and localization mandates, onerous intermediary liability regimes, unbalanced intellectual property laws, and the recent developments regarding the U.S.-EU Safe Harbor Framework.

⁷ Bureau of Labor Statistics, *Current Employment Statistics, Employees on nonfarm payrolls by industry sector and selected industry detail seasonally adjusted*, <http://www.bls.gov/web/empsit/ceseeb1a.htm> (last modified Oct. 2, 2015).

⁸ World Trade Organization, *International Trade Statistics 2014* (2014), at 17, 28, https://www.wto.org/english/res_e/statis_e/its2014_e/its2014_e.pdf.

⁹ *Recent Trends in U.S. Services Trade* at 32.

FILTERING AND BLOCKING

The most conspicuous barriers to digital trade are the outright filtering and blocking of U.S. Internet platforms and online content.¹⁰ These are hardly isolated events. Some estimates predict that 38% of the world's 3 billion-plus Internet users live in countries where popular social media or messaging apps were blocked in the past year.¹¹ These practices have clear trade-distorting effects. For example, when a social media or video platform is blocked, it is not only harmful to the service and users in question; it also immediately affects content providers, advertisers, and small businesses using the service to find and interact with new and existing customers.

Censorship methods most often consist of network-level blocking and filtering achieved through state control of or influence over communications infrastructure. Known offenders include Afghanistan, Burma, China,¹² Cuba, Egypt, Guatemala, Indonesia, Iran,¹³ Kazakhstan, North Korea, Pakistan,¹⁴ Russia,¹⁵ Saudi Arabia, Syria, Tunisia, Turkey,¹⁶ Turkmenistan, the United Arab Emirates, Uzbekistan, and Vietnam.¹⁷

¹⁰ Sanja Kelly *et al.*, *Freedom on the Net 2014: Tightening the Net: Governments Expand Online Controls*, Freedom House, 2014,

<https://freedomhouse.org/sites/default/files/resources/FOTN%202014%20Summary%20of%20Findings.pdf>.

¹¹ Sanja Kelly *et al.*, *Freedom on the Net 2015: Privatizing Censorship, Eroding Privacy*, Freedom House, 2015, at 15, https://freedomhouse.org/sites/default/files/FH_FOTN_2015Report.pdf.

¹² See Matthew Schruers, Testimony before the U.S.-China Economic & Security Review Commission, *Commercial Espionage and Barriers to Digital Trade in China*, June 15, 2015 at <http://www.uscc.gov/sites/default/files/Schruers%20Testimony.pdf>; U.S. International Trade Commission, *Digital Trade in the U.S. and Global Economies, Part 2*, August 2014, at 98, <http://www.usitc.gov/publications/332/pub4485.pdf> (hereinafter “*Digital Trade in the U.S. and Global Economies, Part 2*”). In China alone, informal estimates suggest that this blocking has easily cost American firms billions of dollars as they are pushed out of the market. Julie Makinen, *Chinese censorship costing U.S. tech firms billions in revenue*, L.A. Times, Sep. 22, 2015, <http://www.latimes.com/business/la-fi-china-tech-20150922-story.html>.

¹³ Lorenzo Franceschi-Bicchierai, *Iran Takes Aim at Google, Wikipedia in Latest Internet Censorship Effort*, Mashable, May 16, 2014, <http://mashable.com/2014/05/16/iran-google-wikipedia/>; Michelle Moghtader, *Iran expands 'smart' Internet censorship*, Reuters, Dec. 26, 2014, <http://www.reuters.com/article/2014/12/26/us-iran-internet-censorship-idUSKBN0K40SE20141226>.

¹⁴ Rob Crilly, *Pakistan threatens to ban Google unless it cleans up YouTube*, The Telegraph, June 11, 2013, <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/10112655/Pakistan-threatens-to-ban-Google-unless-it-cleans-up-YouTube.html>; See Gibran Ashraf, *Facebook censored 54 posts for 'blasphemy' in Pakistan in second*

DATA AND INFRASTRUCTURE LOCALIZATION

Many countries abroad continue to show interest in implementing data localization policies, which include mandated server localization and data storage. Accelerated by the impact of the Snowden revelations, the number of countries imposing or considering data and infrastructure localization requirements has increased in recent years. Stated motivations for these policies include the desire to ensure domestic privacy protections, to protect against foreign espionage, to guarantee law enforcement access to personal data, and to promote local economic development, but at root these policies are inspired by protectionist instincts. These regulations are often vaguely construed, inadequately articulated and, therefore, nearly impossible to effectively implement.¹⁸

Yet even as tools of protectionism, which the global trade system was built to oppose, data localization policies are likely to hinder economic development, rather than promote

half of 2014, Express Tribune, Mar. 18, 2015, <http://tribune.com.pk/story/855030/facebook-censored-54-posts-for-blasphemy-in-pakistan-in-second-half-of-2014/>.

¹⁵ Miriam Elder, *Censorship row over Russian internet blacklist*, Guardian, Nov. 12, 2012, <http://www.theguardian.com/world/2012/nov/12/censorship-row-russian-internet-blacklist>; Sanja Kelly *et al.*, *Freedom on the Net 2013*, Freedom House, Oct. 2013, at 592, http://freedomhouse.org/sites/default/files/resources/FOTN%202013_Full%20Report_0.pdf; Amar Toor, *Russia banned Wikipedia because it couldn't censor pages*, The Verge, Aug. 27, 2015, <http://www.theverge.com/2015/8/27/9210475/russia-wikipedia-ban-censorship>; Rob Price, *Reddit is now censoring posts and communities on a country-by-country basis*, Business Insider, Aug. 14, 2015, <http://www.businessinsider.com/reddit-unbanned-russia-magic-mushrooms-germany-watchpeopledie-localised-censorship-2015-8>.

¹⁶ Joe Parkinson *et al.*, *Turkey's Erdogan: One of the World's Most Determined Internet Censors*, Wall St. J., May 2, 2014, <http://online.wsj.com/articles/SB10001424052702304626304579505912518706936>; Reporters Without Borders, *Turkey, Enemy of the Internet?*, Aug. 28, 2014, <http://en.rsf.org/turquie-turkey-enemy-of-the-internet-28-08-2014,46856.html>; Emre Peker, Joe Parkinson & Sam Schechner, *Google, Others Blast Turkey Over Internet Clampdown*, Wall St. J., Apr. 1, 2014, <http://online.wsj.com/articles/SB10001424052702303978304579473190997035788>; Zeynep Karataş, *Ongoing censorship blocks Kurdish, critical, data-based media during time of crisis*, Today's Zaman, Aug. 15, 2015, http://www.todayszaman.com/anasayfa_ongoing-censorship-blocks-kurdish-critical-data-based-media-during-time-of-crisis_396569.html.

¹⁷ *Digital Trade in the U.S. and Global Economies, Part 2* at 98.

¹⁸ See Anupam Chander & Uyen P. Le, *Breaking the Web: Data Localization vs. the Global Internet*, UC Davis Legal Studies Research Paper No. 378, Apr. 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407858 (hereinafter "Chander & Le"); see also *Digital Trade in the U.S. and Global Economies, Part 2*.

domestic industry.¹⁹ As the McKinsey Global Institute documented in 2011, 75% of the value of the Internet accrues to traditional, non-Internet centric businesses through productivity gains and easier access to foreign markets.²⁰ As a result, such policies will invariably harm global competitiveness.²¹

We have see such policies arise in countries including Russia,²² India,²³ China,²⁴ France,²⁵ Germany,²⁶ Nigeria,²⁷ Indonesia,²⁸ and Vietnam,²⁹ among others.

¹⁹ Leviathan Security Grp., *Quantifying the Costs of Forced Localization* (2015), <http://static1.squarespace.com/static/556340e4b0869396f21099/t/559dad76e4b0899d97726a8b/1436396918881/Quantifying+the+Cost+of+Forced+Localization.pdf>.

²⁰ Matthieu Pélissié du Rausas *et al.*, McKinsey Global Institute, *Internet Matters: The Net's Sweeping Impact on Growth, Jobs and Prosperity* (2011), http://www.mckinsey.com/insights/high_tech_telecoms_internet/internet_matters.

²¹ For example, foreign investment will likely decline. Given the high cost of constructing data centers, many companies will simply opt out of serving markets with onerous data localization requirements, especially small- and medium-sized businesses. In 2013, the average cost of data centers in Brazil and Chile were \$60.3 million and \$43 million, respectively. Loretta Chao & Paulo Trevisani, *Brazil Legislators Bear Down on Internet Bill Push for Data Localization*, Wall St. J., Nov. 13, 2013, <http://online.wsj.com/articles/SB10001424052702304868404579194290325348688>.

²² Paul Sonne, *Russia Steps Up New Law to Control Foreign Internet Companies*, Wall St. J., Sept. 24, 2014, <http://online.wsj.com/articles/russia-steps-up-new-law-to-control-foreign-internet-companies-1411574920>; Sergei Blagov, *Russia Clarifies Looming Data Localization Law*, Bloomberg BNA, Aug. 10, 2015, <http://www.bna.com/russia-clarifies-looming-n17179934521/>; Matthias Bauer, Hosuk Lee-Makiyama, & Erik van der Marel, *Data Localisation in Russia: A Self-imposed Sanction* (European Centre for International Political Economy June 2015), <http://ecipe.org/publications/data-localisation-russia-self-imposed-sanction/>.

²³ Chander & Le at 16-19; *Avoiding NSA clutches: India to launch internal email policy for government communications*, RT, Oct. 31, 2013, <http://rt.com/news/india-nsa-internal-email-994/>; Thomas K. Thomas, *National Security Council proposes 3-pronged plan to protect Internet users*, Hindu Business Line, Feb. 13, 2014, <http://www.thehindubusinessline.com/info-tech/national-security-council-proposes-3pronged-plan-to-protect-internet-users/article5685794.ece>; Matthias Bauer *et al.*, *The Costs of Data Localisation: Friendly Fire on Economic Recovery*, ECIPE Occasional Paper No. 3/2014, http://www.ecipe.org/app/uploads/2014/12/OCC32014__1.pdf.

²⁴ U.S.-China Economic & Security Review Commission, *Red Cloud Rising: Cloud Computing in China*, Sept. 2013, revised Mar. 2014, at 5, http://origin.www.uscc.gov/sites/default/files/Research/DGI_Red%20Cloud%20Rising_2014.pdf; AmCham China, *Protecting Data Flows in the US-China Bilateral Investment Treaty*, Apr. 2015, at 4, <http://www.amchamchina.org/policy-advocacy/policy-spotlight/data-localization>; Gillian Wong, *China to Get Tough on Cybersecurity*, Wall St. J., July 9, 2015, <http://www.wsj.com/articles/china-to-get-tough-on-cybersecurity-1436419416>; Austin Ramzy, *What You Need to Know About China's Draft Cybersecurity Law*, N.Y. Times, July 9, 2015, <http://sinosphere.blogs.nytimes.com/2015/07/09/what-you-need-to-know-about-chinas-draft-cybersecurity-law/>.

²⁵ *Appel public à commentaires sur le référentiel d'exigences applicables aux prestataires de services sécurisés d'informatique en nuage*, Aug. 11, 2014, <http://www.ssi.gouv.fr/actualite/appel-public-a-commentaires-sur-le-referentiel-dexigences-applicables-aux-prestataires-de-services-securises-dinformatique-en-nuage/>; Chander & Le at 12-13.

INTERMEDIARY LIABILITY

CCIA has long argued that the failure to modernize liability rules abroad has increasingly contributed to U.S. Internet companies being held liable abroad for conduct that has long been construed as lawful in the Internet ecosystem. These penalties deter direct investment and market entry by Internet companies, and as a consequence deny local small- and medium-sized enterprises Internet-enabled access to the global marketplace. They similarly discourage investment in and growth of domestic startups.³⁰ We know that increasing liability on intermediaries decreases venture capital investments. While U.S. Internet businesses have thrived domestically under carefully crafted legal frameworks in U.S. law, like the Digital Millennium Copyright Act safe harbors and Section 230 of the Communications Decency Act, international asymmetries in liability rules frequently favor domestic plaintiffs.³¹ U.S. exporters encounter unreasonably hostile liability rules in numerous countries abroad, including France,³²

²⁶ Alison Smale, *Merkel Backs Plan to Keep European Data in Europe*, N.Y. Times, Feb. 16, 2014, <http://www.nytimes.com/2014/02/17/world/europe/merkel-backs-plan-to-keep-european-data-in-europe.html>; Michael Birnbaum, *Germany looks at keeping its Internet mail traffic inside its borders*, Wash. Post, Nov. 1, 2013, http://www.washingtonpost.com/world/europe/germany-looks-at-keeping-its-internet-e-mail-traffic-inside-its-borders/2013/10/31/981104fe-424f-11e3-a751-f032898f2dbc_story.html; Glyn Moody, *Germany's data retention bill requires metadata to be kept in the country*, Ars Technica UK, May 19, 2015, <http://arstechnica.co.uk/tech-policy/2015/05/germanys-data-retention-bill-requires-metadata-to-be-kept-in-the-country/>.

²⁷ U.S. Department of State, *Nigeria Investment Climate 2015*, May 2015, at 13, <http://www.state.gov/documents/organization/241898.pdf>

²⁸ Chander & Le at 19-20.

²⁹ *Id.* at 24.

³⁰ Matthew Le Merle *et al.*, *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study*, Booz & Co. (2011), <http://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/54877560e4b0716e0e088c54/1418163552585/Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>.

³¹ For a general overview of these issues, see Ignacio Garrote Fernández-Diez, *Comparative Analysis on National Approaches to the Liability of Internet Intermediaries for Infringement of Copyright and Related Rights*, http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries_garrote.pdf (comparative analysis on national approaches to the liability of Internet intermediaries for infringement of copyright and related rights).

³² Cour d'appel [C.A.] Paris, Feb. 4, 2011, *André Rau v. Google and Aufeminin.com*; Cour d'appel [C.A.] Paris, Jan. 14, 2011, *Google Inc. v. Bac Films, The Factory et al.*; Robert Andrews, *Google Fined In French Court For Not Stopping Video Copyright Abuse*, paidContent, Mar. 9, 2011, at <http://paidcontent.org/2011/03/09/419-google-fined-in-french-court-for-not-stopping-video-copyright-abuse>; Cour d'appel [C.A.] Paris, Sept. 3, 2010, *LVMH v. eBay*, (*aff'g* Commercial Court Paris June 30, 2008); Cour d'appel [C.A.] Reims, July 20, 2010, *Hermes v. eBay* (*aff'g* T.G.I. Troyes, June 4, 2008); see, e.g., Tribunal de grande instance [T.G.I.] Paris, Nov. 14, 2011, *Olivier*

Germany,³³ Italy,³⁴ India,³⁵ Thailand,³⁶ Vietnam,³⁷ Estonia,³⁸ among others. Foreign courts are all too willing to “shoot the messenger” when foreign users express unfavorable views about the government, royalty, or national heroes, for example. This has to change. If U.S. services exporters are going to have meaningful access to foreign markets, we need to ensure that courts

Martinez v. Google and Prisma Presse; Sarl Louis Feraud Int'l v. Viewfinder Inc., 489 F.3d 474 (2d Cir. 2007) (non-French site ordered to remove the photographs from New York servers or face penalties of 50,000 francs per day).

³³ Karin Matussek, *Google Loses German Copyright Cases Over Image-Search Previews*, Bloomberg, Oct. 13, 2008, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a_C1wVkcVpww (reversed on appeal); *See also* Hamburg Regional Court, Sept. 26, 2008, *Horn v. Google*, Partial Verdict, Ref. No. 308 O 42/06; Anna Zeiter, *German Supreme Court Finds eBay Liable for Actively Promoted Third Party Copyright Infringements*, Stanford Center for Internet & Society, Dec. 18, 2013, <http://cyberlaw.stanford.edu/blog/2013/12/german-supreme-court-finds-ebay-liable-actively-promoted-third-party-copyright>; LG Hamburg, Apr. 20, 2012, *GEMA v. YouTube*, Ref. No. 310 O 461/10; Karin Matussek, *Google's YouTube Must Help Detect Illegal Uploads, Court Says*, Bloomberg News, Apr. 20, 2012, <http://www.businessweek.com/news/2012-04-20/google-s-youtube-must-help-detect-illegal-uploads-court-says>.

³⁴ The Finocchiaro Law Firm, *Yahoo! Announces its intention to appeal against the order of the Court of Rome*, Apr. 13, 2011, <http://www.blogstudiolegalefinocchiaro.com/wordpress/2011/04/yahoo-announces-its-intention-to-appeal-against-the-order-of-the-court-of-rome>; Giulio Coraggio, *Yahoo! Liable for Searchable Contents!*, DLA Piper, IPT Italy, Apr. 3, 2011, http://blog.dlapiper.com/IPTItaly/entry/yahoo_liable_for_searchable_contents. *See also* Béatrice Martinet Farano, *Internet Intermediaries' Liability for Copyright and Trademark Infringement: Reconciling the EU and U.S. Approaches* 134 (Stanford-Vienna Transatlantic Tech. Law Forum (TTLF) Working Paper No. 14, 2012), at http://www.law.stanford.edu/sites/default/files/publication/300252/doc/slspublic/farano_wp14-4.pdf (noting that “most UGC [user-generated content] websites relying on an advertisement business models [sic] should be denied hosting protection” under recent court decisions).

³⁵ Rishabh Dara, *Intermediary Liability in India: Chilling Effects on Free Expression on the Internet* (2011), <http://cis-india.org/internet-governance/intermediary-liability-in-india.pdf>; Amol Sharma, *Facebook, Google to Stand Trial in India*, Wall St. J., Mar. 13, 2012, at <http://online.wsj.com/article/SB10001424052702304537904577277263704300998.html>; Amol Sharma, *In Search of Justice at the Google, Facebook Trial*, India Real Time, Mar. 13, 2012, at <http://blogs.wsj.com/indiarealtime/2012/03/13/in-search-of-justice-at-the-google-facebook-trial>.

³⁶ James Hookway, *Conviction in Thailand Worries Web Users*, Wall St. J., May 30, 2012, at <http://online.wsj.com/article/SB10001424052702303674004577435373324265632.html> (noting that this “sets a concerning precedent for prosecuting website owners for what their users say online.”). *See also* Center for Democracy & Technology, *Comments on Thailand's Proposed Computer-Related Offenses Commission Act*, March 2012, at <https://cdt.org/files/pdfs/Comments-Thailand-CCA-Draft.pdf>; Jeremy Malcolm, *Intermediary Liability in Thailand Done Right and Done Wrong*, Electronic Frontier Foundation, Apr. 3, 2015, <https://www.eff.org/deeplinks/2015/04/intermediary-liability-thailand-done-right-and-done-wrong>.

³⁷ James Hookway, *Vietnam Rights Record Cools U.S. Ties*, Wall St. J., Aug. 8, 2013, at <http://online.wsj.com/article/SB10001424127887323838204579000160962041046.html>; Thuy Nguyen, *Online Intermediaries Case Studies Series: Roles and Liabilities of Online Intermediaries in Vietnam – Regulations in the Mixture of Hope and Fear*, The Global Network of Internet & Society Research Centers (2015) at 8, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566364.

³⁸ Mark Scott, *Estonian News Site Can Be Held Liable for Defamatory Comments, Court Rules*, N.Y. Times, June 17, 2015, <http://www.nytimes.com/2015/06/18/business/media/estonian-news-site-can-be-held-liable-for-defamatory-comments-court-rules.html>; *see also* Heather Greenfield, *European Court Rules Online News Sites Liable For Online Comments*, CCIA News, Jun. 17, 2015, <http://www.ccianet.org/2015/06/european-court-rules-online-news-sites-liable-for-online-comments/>.

in those markets cannot penalize intermediaries for what third parties say on the Internet. This is particularly significant when the speech at issue would be protected by the First Amendment.

One particular aspect of this that deserves mention is European data regulators' enforcement of the so-called "right to be forgotten." Various courts have prohibited online services from linking to published news accounts about individuals, and in some cases even prohibited linking to stories that reported on court orders to disappear content.³⁹ It is problematic that courts might entertain an individual's desire to suppress their fellow citizens' access to media accounts of past criminality and corruption.⁴⁰ It is even more worrisome that some European data regulators have demanded the removal of such links *worldwide*.⁴¹ When foreign officials threaten to fine U.S. companies for allowing U.S. citizens to read lawfully published media accounts, it is time to take a stand, not only for free trade, but free speech as well.

COPYRIGHT LIMITATIONS AND EXCEPTIONS

Balanced copyright rules such as fair use and related limitations and exceptions have been critical to the growth of the U.S. technology and Internet economy. We're increasingly finding that U.S. trade policy's failure to export strong limitations and exceptions along with strong copyright protections is hamstringing our businesses abroad and impeding U.S. exports.

For example, legislatures in Europe and elsewhere have increasingly proposed or implemented new publisher subsidies that are used against U.S. services, including social media,

³⁹ Daphne Keller, *Intermediary Liability and User Content Under Europe's New Data Protection Law*, Stanford Center for Internet & Society, Oct. 8, 2015, <http://cyberlaw.stanford.edu/blog/2015/10/intermediary-liability-and-user-content-under-europe%E2%80%99s-new-data-protection-law>; Samuel Gibbs, *Google ordered to remove links to 'right to be forgotten' removal stories*, Guardian, Aug. 20, 2015, <http://www.theguardian.com/technology/2015/aug/20/google-ordered-to-remove-links-to-stories-about-right-to-be-forgotten-removals>.

⁴⁰ Jane Wakefield, *Politician and paedophile ask Google to 'be forgotten'*, BBC News, May 15, 2014, <http://www.bbc.com/news/technology-27423527>

⁴¹ Samuel Gibbs, *French data regulator rejects Google's right-to-be-forgotten appeal*, Guardian, Sept. 21, 2015, <http://www.theguardian.com/technology/2015/sep/21/french-google-right-to-be-forgotten-appeal>.

news aggregation, and search providers. U.S. and other providers of online search, news aggregation, and social media platforms are compelled to pay for the “privilege” of quoting from news publications. This proposal is often referred to as a quotation or snippet tax. Restrictions on the quotation right violate international obligations, including Article 10(1) of the Berne Convention,⁴² and the TRIPS Agreement.⁴³

But because U.S. trade policy has not made balanced copyright a priority, policymakers across Europe, in national capitals and Brussels, have now taken interest in using imbalanced IP laws as a vehicle to tax services exported by American Internet companies and thereby subsidize local publishers.⁴⁴ At present, laws in Spain and Germany pose the most significant barriers to U.S. exporters.

Germany enacted a so-called ancillary copyright law (*Leistungsschutzrecht*) in August 2013, extending copyright protection to news snippets, *i.e.* small text excerpts in search results, notwithstanding international obligations that require free quotation.⁴⁵ The German statute expressly holds search engines liable for making available to the public snippets in search results, thereby creating direct liability for the automatic processes by which search results are generated. The German Copyright Arbitration Board recently suggested that if the length of such ‘snippets’ exceeds seven words (excluding ‘keywords’), then search engines and other news

⁴² Berne Convention for the Protection of Literary and Artistic Works, art. 10(1), amended Oct. 2, 1979.

⁴³ TRIPS Agreement, art. 9 (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971)”).

⁴⁴ *EU’s Oettinger mulls levy on Google - Handelsblatt*, Reuters, Oct. 28, 2014, <http://www.reuters.com/article/2014/10/28/eu-commission-oettinger-idUSL5N0SN34020141028>; *Oettinger Floats Proposal for EU-wide ‘Google-tax’*, EurActiv, Oct. 29, 2014, <http://www.euractiv.com/sections/innovation-enterprise/oettinger-floats-proposal-eu-wide-google-tax-309568>; *EU plant Urheberrechtsabgabe im Internet*, Handelsblatt, Oct. 28, 2014, <http://www.handelsblatt.com/politik/international/schutz-geistigen-eigentums-bis-2016-eu-plant-urheberrechtsabgabe-im-internet/10900130.html> (“... Wenn Google intellektuelle Werte aus der EU bezieht und damit arbeitet, dann kann die EU diese Werte schützen und von Google eine Abgabe dafür verlangen”).

⁴⁵ *See generally* Special 301 Comments of CCIA, Dkt. No. USTR-2012-0022, filed Feb. 8, 2013, [at http://www.cciagnet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20\[2013\].pdf](http://www.cciagnet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf).

aggregators should be liable for the “snippet tax”⁴⁶—in short, U.S. services have to pay to quote more than 8 words. This is inconsistent with U.S. copyright norms, and more significantly for this discussion, Berne and TRIPS.⁴⁷

Spain’s recent IP reforms imposed a similar “snippet tax,” which also subjects normal quotations to a tax. The Spanish approach actually prohibits news producers from waiving compensation rights, meaning that news publishers cannot opt out even if they want to. Faced with this measure, Google suspended its Google News service in the Spanish market. Like the German *Leistungsschutzrecht*, the Spanish IP revision not only undermines market access for U.S. companies and distorts established copyright law, but it also violates the EU and Spain’s treaty and WTO commitments.⁴⁸

If U.S. exporters of Internet services are going to enter crucial markets abroad, we need to ensure that the copyright law in those jurisdictions protects our businesses. So far, we have failed to do that.

U.S.-EU SAFE HARBOR

The economic importance of the free flow of data across borders is best demonstrated by the scale of the benefits derived from transatlantic digital trade. The transatlantic relationship between the United States and European Union is a significant component of both economies, as

⁴⁶ Jennifer Baker, *You want a 6% Google Tax? Get lost, German copyright bods told: Only snippets longer than seven words are chargeable*, The Register, Sept. 28, 2015, http://www.theregister.co.uk/2015/09/28/google_tax_6_pe_cent_germany_fails/.

⁴⁷ See, e.g., *Faulkner Literary Rights v. Sony Pictures Classics*, 953 F. Supp. 2d 701 (N.D. Miss. 2013) (finding quotation of nine words to be non-infringing). See also CCIA White Paper, *Understanding ‘Ancillary Copyright’ in the Global Intellectual Property Environment*, at 5-6, at <http://cdn.cciainet.org/wp-content/uploads/2015/02/CCIA-Understanding-Ancillary-Copyright.pdf> (February 2015) (explaining Berne authors rejection of requirement that quotations be “short”).

⁴⁸ See Raquel Xalabarder, *The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law*, IN3 Working Paper Series (Sept. 30, 2014), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504596.

each is the other's largest market for goods and services.⁴⁹ Within that vital relationship, digital trade continues to increase in relative importance as digitally delivered services become more and more essential to overall economic activity. In 2012, the Brookings Institute estimated that U.S. exports of digitally deliverable services to the EU were worth \$140.6 billion, or 72% of services exports, and the EU's share of digitally deliverable exports to the U.S. comprised 60% of services exports, amounting to \$106.7 billion.⁵⁰

However, recent developments have called into question the ongoing health of the transatlantic digital relationship. There are serious concerns about the continued viability of the EU-U.S. Safe Harbor Framework, which has been the primary mechanism enabling commercial data flows across the Atlantic over the last 15 years.⁵¹ The Safe Harbor Framework has been historically used by more than 4,000 U.S. companies, along with the U.S. subsidiaries of EU companies, to lawfully transfer data about EU citizens from Europe to the United States in compliance with European data protection regulations.⁵² In addition to being a direct contributor to the economic benefits that inure from transatlantic digital trade, the Safe Harbor has been a boon to transatlantic digital innovation. The efficiency gains from unimpeded cross-border data flows have enabled small businesses on both sides of the Atlantic to enter previously inaccessible markets and compete at scale. In fact, a full sixty percent of the companies who have certified

⁴⁹ See Joshua P. Meltzer, *The Importance of the Internet and Transatlantic Data Flows for U.S. and EU Trade and Investment 4* (Brookings Institute, Global Economy & Development Working Paper No. 79, 2014), at <http://www.brookings.edu/~media/research/files/papers/2014/10/internet-transatlantic-data-flows-meltzer/internet-transatlantic-data-flows-version-2.pdf>.

⁵⁰ *Id.* at 12.

⁵¹ Export.gov, *U.S.-EU Safe Harbor Overview*, http://export.gov/safeharbor/eu/eg_main_018476.asp (last visited Oct. 29, 2015).

⁵² Department of Commerce International Trade Administration, *Key Points Concerning the Benefits, Oversight, and Enforcement of Safe Harbor*, at https://business.usa.gov/export-portal?static/Safe%20Harbor%20Key%20Points%202012-2013_Latest_eg_main_068867.pdf.

compliance with the requirements of the Safe Harbor Framework are small- and medium-sized enterprises.⁵³

Unfortunately, early last month in the *Schrems* case, the Court of Justice of the European Union (CJEU) ruled against the legal underpinnings of the EU-U.S. Safe Harbor Framework.⁵⁴ The *Schrems* case was brought in the wake of the first disclosures of widespread electronic surveillance by the United States' intelligence apparatus. The Court argued that the European Commission, in its original finding that the Safe Harbor was adequate under EU law, failed to appropriately weigh the national security and surveillance practices of the United States relative to the limitations and exceptions found in the Safe Harbor.⁵⁵ In particular, the Court focused on a lack of transparency, oversight, and legal remedies for European citizens.⁵⁶

What does this decision mean for transatlantic data flows? In the near term, it means that the thousands of businesses—small and large—that have transferred data from Europe in compliance with the Safe Harbor will have to find alternative mechanisms to ensure that they can continue to do so in compliance with EU law. The currently available alternatives to permit EU-compliant data transfers are complex legal mechanisms, including binding corporate rules and standard contract clauses.⁵⁷ Both options are costly, piecemeal, time-consuming, and difficult to implement for even the most sophisticated companies. Expecting small- and medium-sized enterprises to successfully adopt these alternatives, particularly in the short term, to comply with the varying requirements of the data protection authorities of each EU member state would seem

⁵³ *Id.*

⁵⁴ Case C-362/14, *Maximilian Schrems v. Data Protection Commissioner*, Court of Justice of the European Union, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30dd028f031e9795435bbb33d1623614d833e34KaxiLc3qMb40Rch0SaxuRbN90?text=&docid=169195> (2015).

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See* Press Release, Article 29 Working Party, Statement on Schrems Judgement (Oct. 16, 2015), *at* http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/2015/20151016_wp29_statement_on_schrems_judgement.pdf.

unlikely. Moreover, these alternative mechanisms may also be called into question by future regulators, just as the Safe Harbor was.⁵⁸

In the long term, the absence of a clear, reliable mechanism for lawful transfer of data across the Atlantic will lead to significant economic consequences. Larger companies may attempt to comply by building costly local facilities for processing and storage of data in the EU. Smaller firms may not be able to bear this burden, and could be forced to exit European markets. All told, in 2013 it was estimated that a serious disruption of this very kind to cross-border data flows with the EU would likely cost the EU between 0.8% and 1.3% of its GDP.⁵⁹ Those costs are likely to be considerably higher today—on both sides of the Atlantic.

Fortunately, a revised Safe Harbor Framework between the U.S. and the EU has been under negotiation by the Department of Commerce and European Commission since 2013 and is close to completion.⁶⁰ In the wake of the *Schrems* decision, it is important that the commitments in a new agreement be responsive to the concerns that the Court raised in their opinion. The new agreement must strike a delicate balance between the ongoing need for data-driven innovation to benefit consumers and small businesses and to drive economic growth, and a responsible, principles-based framework to ensure consumer protection. And most importantly, it must do so in a way that can be maintained in the long term, as legal certainty is a key ingredient for sustained transatlantic investment and growth in digital services. Where the revised agreement cannot be responsive to concerns of government access to data in the U.S. and the EU, national

⁵⁸ See Michelle Gyves, *German DPAs Announce Policy Severely Limiting Mechanisms for Lawful Germany-to-U.S. Data Transfers*, Proskauer Privacy Law Blog, Oct. 26, 2015, <http://privacylaw.proskauer.com/2015/10/articles/european-union/german-dpas-announce-policy-severely-limiting-mechanisms-for-lawful-germany-to-u-s-data-transfers/>.

⁵⁹ Matthias Bauer, *et al.*, *The Economic Importance of Getting Data Protection Right: Protecting Privacy, Transmitting Data, Moving Commerce*, ECIPE (2013), at https://www.uschamber.com/sites/default/files/documents/files/020508_EconomicImportance_Final_Revised_Ir.pdf

⁶⁰ See Vera Jourová, European Commissioner for Justice, Consumers, and Gender Equality, Remarks on Safe Harbour EU Court of Justice judgement before the Committee on Civil Liberties, Justice and Home Affairs (Oct. 26, 2015), at http://europa.eu/rapid/press-release_SPEECH-15-5916_en.htm.

governments must work together to develop a lasting solution that ensures individual rights are appropriately balanced with targeted requests.

The uncertainty that companies now face with respect to continued transatlantic data flows is merely the most recent and acute result of the significant trust deficit that U.S. digital service providers have struggled to overcome in the wake of the last two years of disclosures about the United States' electronic surveillance programs. For the United States to continue to reap the substantial benefits of those data flows, it must take steps to rebuild the confidence of Internet users in Europe and worldwide.

I want to commend this Committee for the work it has already done in this regard. It led the way by being the first body to pass the USA Freedom Act earlier this year, and recently favorably reported the Judicial Redress Act, which then passed the House just two weeks ago. The USA Freedom Act contained a number of long-overdue oversight and transparency reforms to the electronic surveillance apparatus of the United States, while still preserving limited essential tools. The Judicial Redress Act would grant citizens of certain allied countries specific rights to ensure the accuracy and proper handling of their data⁶¹—rights that our own citizens already enjoy here and abroad. The Act's passage in the Senate is critical to the viability of future law enforcement and commercial data transfers. It is both a matter of basic fairness to reciprocally extend these rights, and a showing of good faith to allies and Internet users in Europe that we are committed to reasonable privacy standards with respect to data held by our government.

The lifeblood of our Internet-based industry—which today has grown to include a substantial component of all the United States' industries—is the trust that global Internet users have in online platforms. The private sector and government, both here and in the EU, must

⁶¹ See Judicial Redress Act, H.R. 1428, 114th Cong. (2015).

work together to demonstrate to users worldwide that they should continue to place their confidence in the services of our Internet companies, which will in turn allow the Internet to flourish as a tool for innovation, expression, and commerce.

CONCLUSION

As the global Internet continues to grow and becomes even more tightly intertwined with international commerce, digital trade barriers will proliferate if left unchecked. To push back against these barriers, U.S. trade policy and enforcement priorities must be updated to reflect the growing significance of the Internet to the U.S. economy and U.S. trade performance.