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Modernizing Liability Rules to Promote Global Digital Trade[1]

I. Executive Summary

Internet-enabled commerce represents a significant, yet still growing, sector of the global economy. From 2012 to 2016, global e-commerce grew 44 percent from $19.3 trillion to $27.7 trillion.[2] Internet companies have flourished in markets where policymakers and courts have crafted frameworks that enable innovation in the digital economy.

However, companies are increasingly facing challenges abroad when engaging in international trade. Due to a failure to modernize rules pertaining to intermediary liability, Internet companies can be hit with substantial penalties in one territory for conduct that is lawful in most other countries, including their own. These penalties deny local small and medium-sized enterprises (SMEs) access to the global marketplace, discourage domestic startup companies, and deter direct investment and market entry by multinational Internet companies. Further concerning is a growing trend where regions are abandoning longstanding liability frameworks that have ushered in the digital age that at best are vaguely drafted in attempts to regulate speech online, and at worst, are thinly-veiled protectionism.

As the Internet continues its exponential growth and becomes even more intertwined with global commerce, it is critical that barriers are identified and discouraged. International trade rules must be modernized in a manner that promotes liability rules that are consistent, clear, and work for Internet companies of all stages of development to encourage the export of Internet services. This approach to trade policy that recognizes the frameworks that have enabled the success of the Internet age will benefit developed and emerging markets alike. From the perspective of developed markets, predictability in international liability rules is increasingly important as domestic Internet markets are relatively saturated compared to international markets. Further growth and maturity is dependent on the ability to access and export to international markets. Several major Internet companies already make up more than 50 percent of their revenue from markets outside their home markets.[3]

Modernization is equally important from the perspective of emerging businesses that aim to compete in the global marketplace. Internet-enabled commerce facilitates globalized markets with fewer costs traditionally associated with global expansion. The U.S. International Trade Commission has observed that Internet-connected entrepreneurs are

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1 This white paper updates a previously released CCIA paper from 2013. *See* Ali Sternburg & Matthew Schruers, *Modernizing Liability Rules to Promote Internet Trade*, Computer & Communications Industry Association (2013), http://www.ccianet.org/wp-content/uploads/2013/09/CCIA-Liability-Rules-Paper.pdf.

2 U.S. Int'l Trade Comm'n, *Global Digital Trade 1: Market Opportunities and Key Foreign Trade Restrictions* (Aug. 2017), *available at* https://www.usitc.gov/publications/332/pub4716_0.pdf.

3 Steve Goldstein, *S&P 500 Companies Generate Barely Over Half Their Revenue at Home*, MarketWatch (Aug. 19, 2015), https://www.marketwatch.com/story/sp-500-companies-generate-barely-over-half-their-revenue-at-home-2015-08-19.

able to sell products and services into the global market without building their own multinational supply chains. However, for local entrepreneurs to leverage the power of the Internet, the trade framework must ensure predictable intermediary liability rules for the platforms used. For instance, the U.S. Trade Representative has identified "unreasonable burdens on Internet platforms for non-IP-related liability for user-generated content and activity" as a key barrier to trade in Internet services.[4]

This policy paper explains how digital trade is threatened by policy interventions and judicial action around the world that depart from established intermediary frameworks, and that trade rules are insufficient to protect against the harms this trend presents. First, the paper illustrates how intermediary rules were crafted to further the digital age and the international consensus around these underlying principles. Second, the paper provides case studies of how these rules are being undermined through various methods. Third, the paper offers possible solutions to ensure that longstanding liability frameworks for Internet services are protected to further enable the growth of the global digital economy.

II. Modernizing Global Markets for Internet Services

Policies aimed at protecting existing revenue streams of domestic industries are prominent obstacles to Internet-enabled trade. These policies encourage litigation against foreign Internet companies by plaintiffs in local courts, which impede market entry and deter local investment.

The economic stakes are significant. In 2016, it was estimated that more than a fifth (22 percent) of global GDP is attributed to digital skills, capital, goods or services. Global e-commerce also grew from $19.3 trillion in 2012 to $27.7 trillion in 2016.[5] The goods sold in the global search market alone were valued at $780 billion in 2009. The online marketplace has also spawned a thriving market for small business transactions, including used goods; eBay alone reported its gross value of goods sold in its global marketplace was $83.76 billion in 2016 – up 2.5 percent from 2015.[6] SMEs in particular are well-poised to take advantage of Internet opportunities. The Internet grants SMEs access to services as "inputs" which increases the productivity of SMEs and their ability to compete internationally.[7] SMEs that heavily utilized the Internet exported twice as much as those who did not and those with high Internet usage increased productivity by 10 percent. The strength of Internet-enabled commerce directly affects trade – estimates link Internet connectivity with increased exports.[8]

Forward-thinking legislators carefully crafted laws that would encourage rapid innovation and incentivize digital entrepreneurship. This led Internet companies to flourish initially more readily in the United States. The development of similar innovation-friendly intermediary protections in the European Union soon led to the creation of a likewise vibrant Internet economy in several European markets. Denmark, Sweden, Luxembourg, and the Netherlands are among the top five nations for "e-intensity" according to 2015 estimates.[9] The EU has since cultivated a vibrant startup economy. In the application economy alone, the EU had 1.64 million jobs – a sign of a vibrant and growing tech sector.[10]

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4 Office of the U.S. Trade Rep., *Key Barriers to Digital Trade* (2017), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2017/march/key-barriers-digital-trade.

5 U.S. Int'l Trade Comm'n, *Global Digital Trade 1: Market Opportunities and Key Foreign Trade Restrictions* (Aug. 2017), https://www.usitc.gov/publications/332/pub4716_0.pdf.

6 Fareeha Ali, *eBay's US Sales Grow Only 3.4% in 2016*, Digital Commerce 360 (Jan. 25, 2017), https://www.digitalcommerce360.com/2017/01/25/ebays-us-sales-grow-only-34-2016/. For example, a French court ordered Google to de-index specified search results and "make them accessible worldwide" pursuant to another RTBF claim.

7 Joshua P. Meltzer, *Using the Internet to Promote Services Exports by Small- and Medium-Size Enterprises*, Brookings (Feb. 2015), https://www.brookings.edu/wp-content/uploads/2016/06/Internet-WP_WEB-Final.pdf.

8 George R.G. Clarke, *Has the Internet Increased Exports for Firms from Low and Middle Income Countries?*, Information Economics & Policy, Vol. 20, Issue 1 (Mar. 2008).

9 The Boston Consulting Group, *The 2015 BCG e-Intensity Index* (Nov. 18, 2015), https://www.bcgperspectives.com/content/interactive/telecommunications_media_entertainment_bcg_e_intensity_index/.

10 Michael Mandel, *The App Economy in Europe: Leading Countries and Cities*, The Progressive Policy Institute (June 2016), http://www.progressivepolicy.org/wp-content/uploads/2016/11/2016.06-Mandel_The-App-Economy-in-Europe_Leading-Countries-and-Cities-final.pdf.

The Internet has proven to be a critical aspect of the global economy, and many countries are eager to develop a strong innovation sector. Unfortunately, many countries have not adopted similar regulatory regimes to enable such technological growth. Instead, countries are increasingly adopting laws that impose greater responsibility on Internet services, regardless of size, and courts are taking a more proactive approach to impose significant liability on Internet companies. This is often from a misplaced sense of protectionism, against mostly foreign Internet companies.

Until international rules are improved to harmonize Internet liability rules, conflicting domestic regulations will continue to impede Internet businesses from entering new markets – whether domestic or multinational. International trade rules should aim to promote the following commitments: (1) provide adequate protections for online intermediaries for user conduct and content in both the intellectual property and non-intellectual property related speech contexts; and (2) discourage courts from enforcing extraterritorial judgments on online intermediaries. These commitments would create greater certainty for Internet commerce, and encourage global economic growth.

a. Liability Protections for Online Intermediaries

Since the early days of the commercial Internet, U.S. policymakers recognized that holding Internet businesses liable for the conduct of their users would jeopardize growth of the emerging industry and place unreasonable burdens on companies. Most Internet companies thrive by serving as a platform for users to connect with one another in innovative and novel methods. While automatic systems can certainly aid in the identification of harmful content, or content that may infringe upon rightsholders' copyrights, they are the result of significant investment and development. Further, human review remains a critical aspect of all content moderation in order to carefully evaluate content and not impair free speech. This dynamic makes businesses uniquely vulnerable to laws imposing strict liability on intermediaries for the misdeeds of users.

The U.S. Congress responded to this problem with a statute designed to place reasonable limitations on Internet services' liability for the misdeeds of their users. Section 230 of the Communications Decency Act (CDA) of 1996 provided services immunity from liability for the speech of their users, thus allowing Internet companies to combat undesirable or potentially illegal activity without fear of facing liability. Under U.S. law, ISPs are not treated as "the publisher or speaker of any information" provided by a third party.[11] The law justifies this protection by stating it helps to "preserve the vibrant and competitive free market" online.[12] In the context of copyright, the Digital Millennium Copyright Act (DMCA) created a notice and takedown process for rightsholders to notify intermediaries of infringing content posted online by users in order for the intermediary to expeditiously remove the infringing content.[13] Over two decades later, the record of success is clear through today's highly successful U.S. Internet services and applications. While Congress recently added a new subsection to 47 U.S.C. § 230 via Pub. L. No. 115-164, these changes are confined to narrow criminal conduct which isn't the subject of negotiations in the international context, where the conversation is focused on civil liability protections.

The EU followed the U.S. approach shortly after passage of the CDA. The European E-Commerce Directive, adopted in 2000, similarly established that online services are not to be held liable for substantively unmodified information transmitted from one party to another.[14] The E-Commerce Directive "relies on a simple, yet powerful principle: it is the person or entity responsible for posting content or goods for the sale that has legal responsibility for the content or goods in question, not the intermediary hosting the content or the platform on which the good is traded or the information is exchanged."[15]

11 47 U.S.C. § 230(c).

12 47 U.S.C. § 230(b).

13 17 U.S.C. § 512.

14 *See* E-Commerce Directive, 2000/31/EC of the European Parliament and of the Council of 8 June 2000, arts. 12-15.

15 Martin H. Thelle & Svend T. Jespersen, *Online Intermediaries: Assessing the Economic Impact of the EU's Online Liability Regime* at 7 (2012), https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/9/189/0/1253-01%20Edima%20Online%20Intermediaries%20Report%20FINAL%2010JAN2012.pdf.

These provisions are widely considered to have struck the right balance between the various interests. The U.S. Department of Commerce noted that the system "provides incentives for creators to produce and distribute their works" and "incorporates exceptions and limitations to accommodate appropriate uses of those works in a dynamic and rapidly evolving technological landscape.[16] The European Commission released a 2016 report maintaining their commitment to upholding a "balanced and predictable liability regime for online platforms" due to its role in "the further development of the digital economy and opening up investment opportunities."[17] This approach has also received global support from international organizations[18] and civil society[19] as the carefully balanced approach to moderating third party content online.

A carefully crafted approach to intermediary liability is essential. While it is true that some larger companies have taken proactive steps to create tools to monitor content, such tasks are not 100 percent effective and often infeasible for the many small platforms that flourish on the Internet.[20] Further, the imposition of liability on companies that make good faith efforts to prevent unlawful conduct, but nevertheless cannot remove everything, may deter them from undertaking any prevention efforts at all.

b. Extraterritorial Judgments

Using trade policy to promote appropriate intermediary liability frameworks is especially important since courts are attempting to enforce judgments on intermediaries not only within their borders, but worldwide. Enforcing extraterritorial judgments on U.S. services not only imposes significant compliance costs, but also opens up intermediaries to greater degrees of liability in countries with competing laws. Important domestic policy choices pertaining to intermediaries are threatened when U.S. courts are asked to enforce foreign judgments that conflict with U.S. law. Orders enforcing foreign judgments should not be inconsistent with protections provided under the DMCA and CDA.

There are also significant technical difficulties to enforcing these judgments in effectively all countries of operation. While intermediaries make a concerted effort to identify and remove content regarding illegal content and copyright infringement, pinpointing and effectively removing this material is challenging.

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16 U.S. Dept. of Commerce, E*nabling Growth and Innovation in the Digital Economy* at 27 (2016), https://www.ntia.doc.gov/files/ntia/publications/enabling_growth_innovation_in_the_de_0.pdf.

17 *EUR-Lex Access to European Union law*, EUR-Lex, European Commission (May 25, 2016), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0288.

18 World Economic Forum, Expert Group on the Digital Economy, *Maximizing the Opportunities of the Internet for International Trade* at 13 (2016), *available at* http://www3.weforum.org/docs/E15/WEF_Digital_Trade_report_2015_1401.pdf ("The US has now included appropriate protections on intermediary liability in the intellectual property context - modelled on existing national safe harbours - as part of several bilateral free trade agreements and the TPP. This is important, as many countries do not have in place intermediary liability regimes. Similar protections from liability for non-IP content posted by users (e.g. defamation and other speech-related harms) should also be included in trade agreements."); Organisation for Economic Co-Operation and Development, *High Level Meeting – The Internet Economy: Generating Innovation And Growth* at 6 (2011), *available at* https://www.oecd.org/internet/innovation/48289796.pdf ("Appropriate limitations of liability for internet intermediaries have, and continue to play, a fundamental role, in particular with regard to third party content. Internet intermediaries, like other stakeholders, can and do play an important role by addressing and deterring illegal activity, fraud and misleading and unfair practices conducted over their networks and services as well as advancing economic growth. Limitations play an important role in promoting innovation and creativity, the free flow of information, and in providing the incentives for cooperation between stakeholders."); United Nations, Special Rapporteur on Freedom of Opinion and Express, *Joint Declaration on Freedom of Express and the Internet* (2011), *available a*t https://www.osce.org/fom/78309?download=true ("[I]ntermediaries should not be required to monitor user-generated content and should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression.").

19 The Manila Principles on intermediary liability were created in 2015 by global civil society groups for promoting freedom and expression and innovation. They state that "[i]ntermediaries must never be made strictly liable for hosting unlawful third-party content, nor should they ever be required to monitor content proactively as part of an intermediary liability regime. ... Broad variation amongst the legal regimes of the countries in which online intermediaries operate increases compliance costs for companies. It may discourage them from offering their services in some countries due to the high costs of localized compliance." Manila Principles on Intermediary Liability, Mar. 24, 2015, *available at* https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf. *See also* Center for Democracy & Technology, CDT Comments on Proposed Transatlantic Trade and Investment Agreement (May 2013), *available at* https://www.cdt.org/files/pdfs/CDT-TTIP-Comments-5-10-13.pdf ("Ensure strong protections for Internet intermediaries against liability for the expression and activities of users. Internet intermediaries are key enablers of the free flow of information online, because they provide the conduits, platforms, and tools for a robust variety of user-generated communication. Uneven treatment of intermediaries creates significant uncertainty for Internet-based businesses."); Wikimedia, "Intermediary Liability", https://policy.wikimedia.org/policy-landing/liability/ (last visited July 10, 2018) ("The law should allow internet platforms to stay out of editorial decisions so that people can share and speak freely. . .Increasing a platform's responsibility to monitor and proactively remove user generated content will make it impossible for free culture and open source groups to grow as an online community.").

20 For example, Google employs roughly 10,000 content moderators and other professionals to address violations of its content practices. Elizabeth Dwoskin, *Google Wants More Humans To Help Solve The Problem of Child Exploitation on YouTube*, Wash. Post (Dec. 5, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/12/05/google-now-wants-more-humans-to-help-solve-the-problem-of-child-exploitation-on-youtube/?utm_term=.a0a17548e70f.

Balancing different countries' laws is already hard enough for online intermediaries which operate hundreds of country-specific domains. Complications arise when governments attempt to apply domestic laws to Internet activities that occur outside their borders without considering the equities of stakeholders outside their jurisdictions. Requiring sites to implement countries' often contradictory laws at an international scale would be all but impossible and, consequently, expose intermediaries to further liability if they fall short. It would be even harder for small businesses and startups to effectively navigate and implement these policies, limiting competition and harming users. Facing heightened liability, huge fines, and a complex, inconsistent legal system could discourage new businesses from forming and force current ones to curb their services.

III. International Liability Concerns for Internet Services

Internet companies are prone to liability risks upon entering new markets, often for activities that are lawful in multiple markets. Online businesses may find themselves facing legal action in jurisdictions regarding moderating practices that are encouraged in others. The cross-border nature of the Internet makes these traditional international business challenges more pressing. These companies may face liability not only for a 'local' website crafted for a particular market, but for all domains that the company maintains. As a result, Internet companies are forced to choose between abandoning foreign markets altogether, denying local users the benefits of Internet services, or abandoning their services due to pervasive legal uncertainty. Below are a variety of case studies illustrating the problems with liability rules insufficient for the digital age, as well as cases where countries attempt to enforce compliance extraterritoriality.

a. Enforcement of Extraterritorial Judgments Abroad

In the closely watched *Equustek* case, a trial court in British Columbia issued an interim injunction against Google, a non-party, ordering it to remove a defendant's website from Google's search results in all territories globally. This injunction was affirmed last year by the Canadian Supreme Court.[21] Google de-indexed search results pointing to the defendant's websites conducted on google.ca. Yet the court upheld the injunction for Google to de-index and remove results on a global basis.

Years after the interim injunction was issued, the plaintiff has still not moved for a trial, having achieved by the interim order against Google, a non-party, the most important relief it sought. This has permitted a trial court in British Columbia to determine what every citizen in the world can or cannot see, merely by issuing an injunction against a non-party. U.S. courts have rightfully pushed back against enforcing the injunction within the United States, as it would conflict with the protections Internet service providers enjoy under U.S. law.[22] However, the Canadian Supreme Court has refused to amend the injunction in light of the U.S. judgment.[23]

b. Exporting the 'Right to Be Forgotten' to Global Markets

The Court of Justice of the European Union established the 'right to be forgotten' (RTBF) in the EU in a 2014 judgment.[24] The RTBF requires search engine operators to delist websites from their search results at the request of individuals in the

21 *Google Inc. v. Equustek Solutions et al*, [2017 1 S.C.R.], https://scc-csc.lexum.com/scc-csc/scc-csc/en/16701/1/document.do.

22 *Google LLC v. Equustek Solutions Inc., et al*, 2017 WL 5000834, No. 5:17-cv-04207-EJD (N.D. Cal. Nov. 2, 2017) (stating Google is harmed because the Canadian order restricts activity that Section 230 protects. In addition, the balance of equities favors Google because the injunction would deprive it of the benefits of U.S. federal law . . . The Canadian order would eliminate Section 230 immunity for service providers that link to third-party websites. By forcing intermediaries to remove links to third-party material, the Canadian order undermines the policy goals of Section 230 and threatens free speech on the global internet.").

23 *Equustek Solutions Inc. v. Jack et al*, 2018 BCSC 610, http://www.courts.gov.bc.ca/jdb-txt/sc/18/06/2018BCSC0610.htm.

24 C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (May 13, 2014), http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=EN.

EU if the website is "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed."[25]

Interpretation of this ruling has led some European authorities to assert that search engines must remove links from all domains used by the company regardless of audience. A pending RTBF case in France will have international implications to the operation of search services, and those who run sites that serve as a platform for online speech. In March 2016 the French Data Protection Authority, CNIL, fined Google 100,000 euros for failing to comply with Europe's 2014 RTBF ruling.[26] CNIL mandated that Google must remove search results not just to search on the .fr or .co.uk domains, but also those conducted on .com and other Google domains with worldwide reach. Google appealed, and publicly remarked that "each country should be able to balance freedom of expression and privacy in the way that it chooses, not in the way that another country chooses."[27]

The French court has referred questions to the European Court of Justice (ECJ) to determine whether this 'right' must be respected internationally – in that, to fulfill its obligations under the takedown request, they must scrub all mention of the content on their services worldwide.[28] If this appeal is unsuccessful, French authorities would effectively have the ability to constrain what non-French Internet users are able to access under their own legal standards, giving France extraterritorial control to stop users around the world from finding legally published information.[29] As domestic courts in EU Member States begin to impose injunctions pursuant to the RTBF, the decision of the ECJ will have significant consequences.[30] There are already indications that the practice of worldwide injunctions against Internet services to remove links is becoming more common.[31]

c. The EU's Potential Departure from Its Longstanding Intermediary Rules

The EU's successful intermediary regime is threatened by inconsistency in the implementation of the E-Commerce Directive and the Digital Single Market proposals to expand liability for online services and platforms.

The Digital Single Market initiative contains proposals that threaten to undermine the E-Commerce Directive. If enacted, these changes will impose greater liability across online services especially platforms. This regulatory direction threatens

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25 Court of Justice of the European Union, Press Release No 70/14 (May 13, 2014), http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf.

26 Julia Fioretti, *France Fines Google Over 'Right To Be Forgotten'*, Reuters (Mar. 24, 2016), https://www.reuters.com/article/us-google-france-privacy-idUSKCN0WQ1WX.

27 Natasha Lomas, *Google's Right to be Forgotten Appeal Heading to Europe's Top Court*, TechCrunch (July 19, 2017), https://techcrunch.com/2017/07/19/googles-right-to-be-forgotten-appeal-heading-to-europes-top-court/.

28 Request for a Preliminary Ruling from the Court d'Etat, Case C-507/17, Google Inc. v. Commission Nationale de L'informatique et des Libertes (Aug. 21, 2017), http://curia.europa.eu/juris/document/document.jsf?text=&docid=195494&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=369957 (asking "[m]ust the 'right to de-referencing', as established by the Court of Justice of the European Union in its judgment of 13 May 2014 on the basis of the provisions of Articles 12(b) and 14(a) of Directive [95/46/EC] of 24 October 1995, be interpreted as meaning that a search engine operator is required, when granting a request for de-referencing, to deploy the de-referencing to all of the domain names used by its search engine so that the links at issue no longer appear, irrespective of the place from where the search initiated on the basis of the requester's name is conducted, and even if it is conducted from a place outside the territorial scope of Directive [95/46/EC] of 24 October 1995?.").

29 Greg Sterling, *Right to Be Forgotten: French Argue They Have Authority to Regulate Google Globally*, Search Engine Land (Sept. 21, 2015), http://searchengineland.com/right-to-be-forgotten-french-argue-they-have-authorityto-regulate-google-globally-231233.

30 *See, e.g.*, Belgian Court of Cassation Rules on Right to Be Forgotten, Hunton Privacy Blog (June 1, 2016), https://www.huntonprivacyblog.com/2016/06/01/belgian-court-of-cassation-rules-on-right-to-be-forgotten/; Andrew Griffin, *Google Loses 'Right to Be Forgotten' Fight Against Businessman And Must Delete Information About Him*, The Independent (Apr. 13, 2018), https://www.independent.co.uk/life-style/gadgets-and-tech/news/google-right-to-be-forgotten-ruling-latest-london-high-court-europe-a8302981.html. Other countries that are also starting to consider the RTBF including Argentina and India. *See* Edward Carter, Argentina's Right to Be Forgotten, 27 Emory L. Rev. 23 (2013), *available at* http://law.emory.edu/eilr/_documents/volumes/27/1/recent-developments/carter.pdf (noting that the courts are inconsistent in their recognition of the RTBF; Telecom Regulatory Authority of India, *Recommendations on Privacy, Security and Ownership of the Data in the Telecom Sector* (2018), *available at* https://www.trai.gov.in/sites/default/files/RecommendationDataPrivacy16072018_0.pdf (recommending that the right to be forgotten should be conferred upon the telecommunications consumers).

31 For example, a French court ordered Google to de-index sites and "make them inaccessible worldwide". Court Order Complaint to Google (2018), *available at* https://www.lumendatabase.org/notices/16919104#.

the state of the European digital economy.[32] Rather than strangling the burgeoning online space by imposing broader liability on intermediary services, the EU should be looking for ways to further growth.

In September 2016, the European Commission (EC) submitted a copyright reform proposal to the European Parliament and the European Council. Article 13 of the proposal would require proactive monitoring and filtering content uploaded, or possibly even linked to, on a platform. The proposal would upend nearly two decades of established law in the EU under the E-Commerce Directive, and suggests that most modern service providers may be excluded from critical intermediary liability protections. Consistent with U.S. law, EU law explicitly provides that online services have no obligation to monitor or filter online content. Since the Directive's implementation, online services have invested heavily in European operations. These protections have also enabled the startup community in the EU to develop, attracting investment from the United States. Article 13 of the draft proposal implies that online services must develop or procure content recognition technology, and affirmatively filters all Internet content including audiovisual works, images, and text.[33]

The EC proposal does not specify what type of filtering a provider must implement, effectively empowering foreign rightsholders to dictate U.S. services' technology inconsistently across the EU. In short, a provider will never know when it has done "enough" short of litigating in every EU Member State. This is in direct conflict with what the EU Commission sought to do under the Digital Single Market initiatives — provide clarity and uniformity of rules for the digital economy across the EU. It will not be resolved until the Court of Justice of the EU eventually addresses the question, and affected hosting providers can expect inconsistent rulings and injunctions from lower courts in different countries.

While some Internet companies have been able to invest the resources to voluntarily create similar technologies, they were able to do so under the longstanding liability framework for intermediaries. Further, mandatory adoption of the technologies vaguely contemplated in the proposal would effectively shut out smaller companies from market entry.[34] The vagueness of these requirements under current proposed texts, and the likelihood of inconsistent rulings across Member States, empowers European rightsholders to dictate which innovations are successful.

It is encouraging that members of the European Parliament took heed of the warnings expressed by civil society[35] and industry and recently voted to reject the content filtering proposal. However, negotiations on the proposal continue.[36]

d. Germany's Problematic Approach to Combating Hate Speech

Governments are struggling with how to respond to calls for further content restrictions on online services in the face of hate speech and terrorist content. Internet companies are at the forefront of new practices and technologies to better regulate content on their various services and platforms.[37] Through direct engagement with governments, they are working

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32 In 2012, intermediaries' activities contributed to around 430 € to the EU GDP. Katrine Ellersgaard Nielsen et al., *The Impact of Online Intermediaries on the EU Economy*, Copenhagen Economics (2013), https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/6/226/0/The%20impact%20of%20online%20intermediaries%20-%20April%202013.pdf.

33 Maud Sacquet, *European Parliament to Decide on Copyright Reform*, Disruptive Competition Project (July 3, 2018), http://www.project-disco.org/european-union/070318-european-parliament-to-decide-on-copyright-reform/.

34 To illustrate, the automated system that YouTube voluntary employs cost an estimated $60 million. *Controversial Copyright Law Rejected By EU Parliament*, BBC (July 5, 2018), https://www.bbc.com/news/technology-44712475. *See also* Maud Sacquet, *The Real Cost of Filtering Technology*, Disruptive Competition Project (July 5, 2017), http://www.project-disco.org/european-union/070517-the-real-cost-of-filtering-technology/.

35 *See* Copyright 4 Creativity, https://saveyourinternet.eu/ (last visited July 10, 2018).

36 Press Release, European Parliament, Parliament to Review Copyright Rules in September, *available at* http://www.europarl.europa.eu/news/en/press-room/20180628IPR06809/parliament-to-review-copyright-rules-inseptember.

37 It is important to recognize that while technologies can be a useful tool, they are not perfect and using automated technologies will always present concerns regarding censoring lawful speech. *See* Center for Democracy and Technology, *Mixed Messages? The Limits of Automated Social Media Content Analysis* (Nov. 2017), https://cdt.org/insight/mixed-messages-the-limits-of-automated-social-media-content-analysis/ ("Today's tools for automating social media content analysis have limited ability to parse the nuanced meaning of human communication, or to detect the intent or motivation of the speaker. Policymakers must understand these limitations before endorsing or adopting automated content analysis tools. Without proper safeguards, these tools can facilitate overbroad censorship and biased enforcement of laws and of platforms' terms of service.").

on solutions that will make online spaces safer and adequately address unlawful content online.[38]

However, proposals that designate Internet services as the sole arbiter of permitted speech raise significant concerns to free speech and intermediary protections. A newly implemented German law is an example of the wrong approach. Germany adopted the Act to Improve the Enforcement of Rights on Social Networks (the "Network Enforcement Law" or "NetzDG") in June 2017.[39] The NetzDG law mandates removal of "manifestly unlawful" content within 24 hours, and provides penalties of up to 50 million Euros. Unlawful content under the law includes a wide range of content from hate speech to "unlawful propaganda."[40] The large fines and broad considerations of "manifestly unlawful content" and potential scope[41] have led to companies removing lawful content, erring on the side of caution in attempts to comply. Since coming into force in January 2018, the law has already led to high profile cases of content removal and wrongful account suspensions, groups have expressed concerns about its threats to free expression,[42] and the German government has already indicated that changes were needed to protect lawful speech online.[43]

Further concerning is its potential domino effect on other regimes. Russia, Singapore, and the Philippines have cited this law as a positive example they intend to copy in the future to regulate speech.[44] Cases arising under this law will also have implications on extraterritoriality.[45]

e. Expansion of Intermediary Liability in India

While India has sought to limit service provider liability, existing provisions have still been harmful to intermediaries.[46] In October 2015, an administrator of a WhatsApp group was arrested when someone in his group shared a video depicting violence toward a cow and the Prime Minister (notwithstanding the fact that group administrators in this application could not even delete members' posts in this app).[47] Imposing liability on an intermediary who cannot technologically respond to

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38 The Global Internet Forum to Counter Terrorism was created in 2017 to ensure that their consumer services are "hostile to terrorists and violent extremists." *See Facebook, Microsoft, Twitter and YouTube Announce Formation of the Global Internet Forum to Counter Terrorism*, Facebook Newsroom (June 26, 2017), https://newsroom.fb.com/news/2017/06/global-internet-forum-to-counter-terrorism/; *Update On The Global Internet Forum To Counter Terrorism*, Google Public Policy (Dec. 4, 2017), https://www.blog.google/around-the-globe/google-europe/update-global-internet-forum-counter-terrorism/.

39 Beschlussempfehlung und Bericht [Resolution and Report], Deutscher Bundestag: Drucksache [BT] 18/13013, http://www.bundesrat.de/SharedDocs/drucksachen/2017/0501-0600/536-17.pdf?__blob=publicationFile&v=1 (Ger.). Unofficial English translation *available at* https://medium.com/speech-privacy/what-might-germanys-new-hate-speech-take-down-law-mean-for-tech-companies-c352efbbb993.

40 Referencing the German Criminal Code making illegal the following speech-related activities: dissemination of propaganda material or use of symbols in unconstitutional organizations, defamation of the state, preparation or encouraging the commission of a seriously violent offense endangering the state, treasonous forgery, public incitement to crime, breach of the peace, forming criminal and terrorist organizations, incitement to hatred, dissemination of depictions of violence, defamation of religious associations, distribution of child pornography, insult, intentional and unintentional defamation, violation of intimate privacy by taking photographs, threatening the commission of a felony, and forgery of data.

41 The law is designed to only apply to social media companies (it was informally referred to as the 'Facebook law'), but a wide variety of sources may also be implicated as the law is so broadly written to include sites that host third party content including Tumblr, Flickr, and Vimeo. Social media networks are defined as a tele-media service provider that operate online platforms (1) with the intent to make a profit, and (2) on which users can share content with other users or make that content publically available. *See* Library of Congress, *Germany: Social Media Platforms to Be Held Accountable for Hosted Content Under "Facebook Act"* (June 30, 2017), http://www.loc.gov/law/foreign-news/article/germany-social-mediaplatforms-to-be-held-accountable-for-hosted-content-under-facebook-act/.

42 *Germany: Flawed Social Media Law*, Human Rights Watch (Feb. 14, 2018), https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law ("[T]he law places the burden on companies that host third-party content to make difficult determinations of when user speech violates the law, under conditions that encourage suppression of arguably lawful speech. Even courts can find these determinations challenging, as they require a nuanced understanding of context, culture, and law. Faced with short review periods and the risk of steep fines, companies have little incentive to err on the side of free expression.").

43 Emma Thomasson, *Germany Looks to Revise Social Media Law As Europe Watches*, Reuters (Mar. 8, 2018), https://www.reuters.com/article/us-germany-hatespeech/germany-looks-to-revise-social-media-law-aseurope-watches-idUSKCN1GK1BN.

44 *See Germany: Flawed Social Media Law*, Human Rights Watch (Feb. 14, 2018), https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law.

45 A case arising in Austria has been referred to the ECJ on Facebook's obligations to remove content that the court deemed defamatory. Notably, the question referred include whether or not the hosting provider must remove identical flagged content worldwide, in the relevant Member State, or the relevant user worldwide, or of the relevant user in the relevant Member State. Request For A Preliminary Ruling from the Oberster Gerichtshof (Austria), Eva Glawischnig-Piesczek v. Facebook Ireland Limited, Case C-18/18, https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2018.104.01.0021.01.ENG.

46 Divij Joshi, *Indian Intermediary Liability Regime: Compliance with the Manila Principles on Intermediary Liability*, The Center for Internet and Society, India (2018), *available at* https://cis-india.org/internet-governance/files/indian-intermediary-liability-regime.

47 Varun B. Krishnan, *Social Media Administrator? You Could Land in Trouble*, NEW INDIA EXPRESS (Oct. 10, 2015), http://www.newindianexpress.com/states/tamil_nadu/Social-Media-Administrator-You-Could-Land-in-Trouble/2015/10/10/article3071815.ece.

content is tantamount to a prohibition on use of the application.[48]

Last year,[49] the Supreme Court of India ordered Google, Microsoft, and Yahoo to filter terms related to online advertisements for prenatal gender determination kits, which are banned in India. When confronting industry's argument that banning by key terms will likely remove permitted speech as well, the Court informed them that they should stop operating in India if they cannot resolve those issues.[50] The Court further directed Google, Microsoft, and Yahoo to set up their own in-house experts to monitor and delete the prohibited ads.[51]

India is hardly the only country whose authorities are taking further action against intermediaries.[52] However, as a quickly emerging player in the global Internet economy, India should have an intermediary framework that further enables innovation.[53]

IV. Promoting Trade Through Predictable Liability Rules

International trade policy must be proactive in harmonizing liability rules for intermediaries in order to liberalize trade. This can be accomplished through unilateral efforts from international organizations, as well as continued efforts through free trade agreements. Enforcement is also a critical aspect to ensure these protections are upheld.

Ongoing unilateral efforts to craft trade rules that are sufficient for the digital age are encouraged. Following the 2017 World Trade Organization Ministerial Conference, seventy-one countries agreed to move forward on exploratory work in trade-related aspects of electronic commerce, recognizing the roles of the WTO in "promoting open, transparent, non-discriminatory and predictable regulatory environments in facilitating electronic commerce.[54] Discussion papers have been encouraging, with the United States pushing to include intermediary protections in these new rules.[55] Further, the proposed Trade in Services Agreement (TiSA) would also open up borders and enable trade.[56] The current negotiating parties account for almost 70 percent of world trade in services.[57] TiSA should make clear that rules that protect intermediaries from liability for third party content are a cornerstone to e-commerce services. TiSA remains a critical opportunity to liberalize trade in Internet

48 A study by Copenhagen Economics found that online intermediaries can become a significant part of India's economy and their GDP contribution may increase to more than 1.3% by 2015 provided that the existing safe harbor regime is improved. Such opportunities would be valuable to local and foreign companies. *See* Copenhagen Economics, *Closing the Gap – Indian Online Intermediaries and a Liability System Not Yet Fit for Purpose*, Global Network Initiative (Mar. 2014), *available at* https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/1/251/0/Closing%20the%20Gap%20-%20Copenhagen%20Economics_March%202014.pdf.

49 Arap Gupta, *The Supreme Court's Slow March Towards Eroding Online Intermediary Liability*, The Wire (July 14, 2017), http://thewire.in/51399/ignorance-is-not-an-excuse-in-law/ (noting that the Supreme Court had failed to deliver a final ruling but instead repeatedly issuing orders to investigate the possibility of website blocking and key word filtering for search engine to remove generated ads).

50 Manish Singh, *Google, Microsoft and Yahoo Slammed by India's Supreme Court Over Sex Selection*, CNet (July 6, 2016), https://www.cnet.com/news/indias-supreme-court-orders-google-yahoo-and-microsoft-to-stop-showing-sex-determination-ads/.

51 Krishnadas Rajagopal, *Banning Online Pre-Natal Sex Determination Content Dangerous: SC*, The Hindu (Apr. 11, 2017), http://www.thehindu.com/news/national/general-ban-on-online-pre-natal-sex-determination- content-may-smother-citizens-right-to-know-supreme-court/article17926261.ece.

52 The lack of intermediary liability protections in Thailand has long been a concern to service providers. A notable case in 2012 involved a criminal conviction under Thailand's Computer Crimes Act of a webmaster whose only crime was "failing to quickly delete posts considered insulting to Thailand's royal family." The 2016 amendments only furthered this trend. While the recent amendments created a safe harbor for service providers for the first time in Thai law, the mandated timeframes for removal vary across content types. Without strict compliance with the notification requirements, the service provider will be subject to the same penalty as if they uploaded the content themselves. *See* Dhiraphol Suwanprateep, *Five Ministerial Notifications Under the Computer Crime Act Finally Come into Force*, Baker McKenzie (Aug. 4, 2017), http://www.bakermckenzie.com/en/insight/publications/2017/08/five-ministerial-notifications/.

53 The Boston Consulting Group, *The $250 Billion Digital Volcano: Dormant No More* (2017), *available at* https://media-publications.bcg.com/BCG-TiE-Digital-Volcano-Apr2017.pdf (mentioning that by 2020, India's Internet Industry is expected to comprise of 7.5% of its GDP).

54 Joint Statement on Electronic Commerce (Dec. 13, 2017), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?Language=E&CatalogueIdList=240862,240867,240868,240870,240871,240899,240875,240874,240878,240877&CurrentCatalogueIdIndex=4&FullTextHash=371857150.

55 Joint Statement on Electronic Commerce, Communication from the United States (Apr. 12, 2018), https://docs.wto.org/dol2fe/pages/fe_search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=244470&CurrentCatalogueIdIndex=0&FullTextHash=-372378051&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (referring to the following: "Trade rules, including rules ensuring access to networks, can ensure that governments do not arbitrarily block or filter online content, nor require Internet intermediaries to do so.").

56 Rachel F. Fefer, *Trade in Services Agreement (TiSA) Negotiations*, CRS Report R44354 (2017), *available at* https://fas.org/sgp/crs/misc/R44354.pdf.

57 Swiss National Center for Competence in Research, *A Plurilateral Agenda for Services: Assessing the Case for a Trade in Services Agreement*, Working Paper No. 2013/29, at 10 (May 2013), *available at* https://www.wti.org/media/filer_public/77/73/777372c1-a356-469b-9dcd-42668a8e855a/tisa_p_sauve.pdf.

services. Internet and Internet-enabled services are an increasingly large component of trade in services.[58] Many of these services rely on intermediary protections.

Free trade agreements (FTAs) are also a critical aspect of enabling trade. The United States has been progressive in adopting intermediary protections in its intellectual property chapters, consistent with U.S. law.[59] This is encouraging, but as illustrated through the preceding case studies, protections in the non-intellectual property related context are just as essential to enabling digital trade. It is encouraging that the United States has made rules that provide these appropriate non-criminal intermediary liability protections a NAFTA objective, stating it was their priority to "establish rules that limit non-IPR civil liability of online platforms for third party content, subject to NAFTA countries' rights to adopt non-discriminatory measures for legitimate public policy objectives.[60]

However, trade rules are only effective if governments adequately enforce the obligations made under these commitments. Not all trading partners have made good on these commitments. For example, Colombia[61] and Australia have yet to fully implement commitments under their agreements with the United States. Australia has gone further than a mere failure to update its law; it has recently passed legislation that would be in conflict with its commitments under the U.S.- Australia Free Trade Agreement to provide protections from liability for all service providers operating as intermediaries.[62]

V. Conclusion

Internet businesses have thrived under carefully crafted legal frameworks, which promote innovative and aggressive competition, and facilitate global digital trade. This success has enabled the growth of a myriad of startups and small businesses around the world, utilizing the Internet for commerce. International asymmetries in liability rules, however, often serve as barriers to market entry by penalizing multinational enterprises, at times in favor of domestic plaintiffs. International trade policy must be proactive in harmonizing liability rules to ensure open markets for Internet businesses around the world.

58 U.S. International Trade Commission, *Recent Trends in U.S. Services Trade Annual Report*, at 13(2018), *available at* https://www.usitc.gov/publications/332/pub4789.pdf ("In 2016, electronic services accounted for 12.7 percent ($93.4 billion) of total U.S. cross-border services exports and 11.2 percent ($54.3 billion) of imports, resulting in a surplus of $39.1 billion.").

59 *See* U.S-Australia Free Trade Agreement, Austl.-U.S., May 18, 2004, 43 I.L.M. 1248, art. 17.11, para. 29; U.S.-Bahrain Free Trade Agreement, Bahr.- U.S., Dec. 7, 2005, 44 I.L.M. 544, art. 14.10, para. 29; U.S.-Chile Free Trade Agreement, Chile- U.S. June 6, 2003, 42 I.L.M. 1026, art. 17.11, para. 23; U.S.-Colombia Free Trade Agreement, Colom.-U.S., Nov. 22, 2006, art. 16.11, para. 29; U.S.- South Korea Free Trade Agreement, U.S.- S. Kor. June. 30, 2007, art. 18.10, para. 30; U.S.-Morocco Free Trade Agreement, Morocco-U.S., June 15, 2004, art. 15.11, para. 28; U.S.-Oman Free Trade Agreement, Oman- U.S., Jan. 19, 2006, art. 15.10, para. 29; U.S.-Panama Trade Promotion Agreement, Pan.-U.S., June 28, 2007, art. 15.11, para. 27; U.S.-Singapore Free Trade Agreement, May 6, 2003, Sing.-U.S., 42 I.L.M. 1026, art. 16.9, para. 22.

60 Office of the U.S. Trade Rep., *Summary of Objectives for the NAFTA Renegotiation*, at 8 (Nov. 2017), *available at* https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf.

61 Colombia has failed to comply with its obligations under the U.S.-Colombia Free Trade Agreement to provide protections for Internet service providers. A current bill seeks to implement the U.S.- Colombia FTA copyright chapter does not include any language on online intermediaries. Intermediaries exporting services to Colombia remain exposed to potential civil liability for services and functionality that are lawful in the United States and elsewhere. *See* U.S.-Colum. Free Trade Agreement, Nov. 22, 2006, art. 16.11, para. 29.

62 Jonathan Band, *Australian Copyright Law Thumbs Nose at U.S. Trade Commitments*, Disruptive Competition Project (July 6, 2018), http://www.project-disco.org/intellectual-property/070518-australian-copyright-law-thumbs-nose-at-u-s-trade-commitments/.