

Before the
United States Trade Representative
Washington, DC

In re

Request for Comments on
International Services Agreement

Dkt. No. USTR–2013–0001

**COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the request for comments issued by the United States Trade Representative (USTR) and published in the Federal Register at 78 Fed. Reg. 5,239 (Jan. 24, 2013), the Computer & Communications Industry Association (CCIA)¹ submits the following comments regarding the proposed International Services Agreement.

I. Introduction

The significance of the Internet to global trade cannot be overstated. The Internet accounted for 21% of the GDP growth in mature economies over the past 5 years, with 75% of the benefits captured by companies in more traditional industries.² In a survey of 30 countries with a collective 2010 GDP of \$19 trillion, Internet penetration was found to be growing at 25% per year over the past five years, and contributing an average of 1.9% to GDP— a \$366 billion impact.³ If information flows are viewed as trade in knowledge services, then the volume of information relayed by online platforms such as Google, Yahoo, Facebook, Tuenti, Baidu,

¹ CCIA is an international nonprofit membership organization representing companies in the computer, Internet, information technology, and telecommunications industries. Together, CCIA’s members employ nearly half a million workers and generate approximately a quarter of a trillion dollars in annual revenue. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition in the computer, telecommunications, and Internet industries. A list of CCIA members is available at <http://www.cciagnet.org/members>.

² McKinsey Global Institute, *Internet Matters: The Net’s sweeping impact on growth, jobs and prosperity*, May 2011; *see also* McKinsey Global Institute, *The great transformer: The impact of the Internet on economic growth and prosperity*, Oct. 2011.

³ Olivia Nottebohm *et al.*, McKinsey & Co., “Online and upcoming: The Internet’s impact on Aspiring Countries,” Jan. 2012.

Yandex and Microsoft Bing, places those services among the largest traders in the global economy.

Within the United States, Internet services represent an extraordinary portion of the U.S. economy and provide substantial economic benefits to multiple sectors. As early as 2009, the Internet was adding an estimated \$2 trillion to annual GDP, over \$6,500 per person, according to the National Economic Council.⁴ Total combined business-to-business and business-to-consumer e-commerce shipments, sales, and revenues, as measured by the Commerce Department for 2008, were \$3.8 trillion.⁵ In light of this data, “information discrimination” against U.S. digital goods and services represents a fundamental strategic threat to U.S. economic interests.

The costs of discrimination against these services are not felt merely by the high-tech sector, given the opportunities that Internet services create for more traditional businesses. Online marketplaces such as eBay and Etsy provide crucial platforms for international SME trade every year, and that trade is growing. Research indicates that 75% of the positive impact of the Internet accrued to traditional industries through efficiency gains and expanded markets, and that SMEs who heavily utilized the Internet exported twice as much as those that did not, and further, that Internet usage increased SME productivity by 10%.⁶ In addition to these platforms, the Internet enables numerous knowledge-enhancing services that we now largely take for granted, such as email and GPS positioning, whose consumer application largely post-date the Uruguay Round.

More profoundly, the Internet as a platform to facilitate commerce is ever more critical to the entire economy. Services across all sectors rely upon the Internet for mission-critical business operations across the board, and that reliance and ‘value add’ impact is growing. In order to craft appropriate trade provisions for the Internet, it is essential to understand its nature: the Internet is not just an invention – it is, as the printing press and the steam engine were, a *general purpose*

⁴ Exec. Ofc. of the President, Nat’l Econ. Council/OSTP, *A Strategy for American Innovation: Driving Towards Sustainable Growth and Quality Jobs*, Sept. 2009, at 5, available at <<http://www.whitehouse.gov/administration/eop/nec/StrategyforAmericanInnovation>>.

⁵ See U.S. Census Bureau, *2008 E-Stats*, at 2 (May 2010). Industries whose product demand is driven by Internet content and services, such as consumer electronics, also make a significant economic contribution. For the same year, 2008, CE industries were responsible for \$1.3 trillion in annual value-added to the U.S. economy. See PriceWaterhouseCoopers, *Innovation: U.S. Economic Contribution of Consumer Electronics*, at 2 (2008).

⁶ *Internet Matters*, *supra* note 2.

technology (GPT)⁷ which transforms everything about our societies and economies. One of the best examples of the Internet's special nature is the impact it has on the global supply chain across all industries.

II. The Importance of Internet Services to the U.S. Economy

Services liberalization is of paramount importance to the U.S. economy. Starting more than sixty years ago with the General Agreement on Tariffs and Trade (GATT), U.S. trade policy constructed an enduring legacy of free trade, dramatically reducing barriers to trade in goods. Yet the United States is now quite far advanced in its transformation from a products economy into a services economy. "Services industries employ 95 million of America's 110 million private-sector workers," and "at least in the United States exporting services industries employ more people than work in factories, farms, and mines combined."⁸ This is increasingly true of all economies, however, as trading partners are selling fewer products and goods, but providing more value-add further down the product chain. Nevertheless, international trade law has failed to keep pace with this economic transition.⁹

Due to these changes, the U.S. economy has migrated out from underneath the robust umbrella of liberalization that our trade policy constructed over the last 60 years, into a world in which, functionally, we are prohibited from discriminating against goods – the primary export of many U.S. trading partners – but these same trading partners face a less comprehensive set of prohibitions to abide by when it comes to discriminating against the services that they import from the United States. To protect U.S. economic interests, remedying the relatively

⁷ Additional discussion of the impact of GPTs and how they differ from less transformative inventions is available in Nathan Rosenberg & Manuel Trajtenberg, "A General-Purpose Technology at Work: The Corliss Steam Engine in the Late-Nineteenth-Century United States," 64 *J. of Econ. History* 61-99 (2004) available at http://journals.cambridge.org/abstract_S0022050704002608. See also Susanto Basu & John Fernald, "Information and Communications Technology as a General-Purpose Technology: Evidence from US Industry Data," 8 *German Econ. Rev.* 146–173 (2007) at <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0475.2007.00402.x/abstract>.

⁸ Edward Gresser, *Services Trade Liberalization as a Foundation of Global Recovery*, February 2012 at <http://uscsi.org/images/files/press-releases/Gresser%20White%20Paper%20FINAL.pdf>.

⁹ While e-commerce and Internet services fall within the remit of WTO's liberalizing mandate, insufficient attention has been given to this crucial area. The WTO's Work Programme on Ecommerce began in 1998 but has been eclipsed by the focus on Doha and development-related issues. It should be noted that renewed interest in e-commerce as part of a GATS+ initiative may provide an opportunity to remedy this neglect, as most WTO members appear to agree that the majority of electronically-delivered services are services governed by GATS.

disadvantaged posture of services in the global trade regime must take precedence among trade policy priorities.

III. Policy Recommendations for the ISA

A modern trade agreement addressing services must recognize that Internet commerce is constituted by multiple layers. At the foundation is a transportation layer, functioning largely as a common carrier, providing infrastructure for data communication. On top of this layer are Internet services, including Web traffic. Some Internet services may themselves serve as inputs to or platforms for other goods or services, such as an SME who may use YouTube as a platform to share video content with a worldwide audience, or a vendor who may list products on eBay to reach buyers across the globe. Each layer constitutes a separate service, and each requires protection.

At the infrastructure and transport layer, the ISA must have provisions that prevent actions that impede or distort basic functions such as addressing and traffic routing. Such provisions should be horizontal, meaning, the provisions 'cross' all the sectors the ISA covers, since all services increasingly rely upon the network. These protections should also ensure that ISA countries do not create local hardware or connectivity hosting requirements; these decisions should be left with infrastructure operators based upon how to ensure the best performance and resiliency at the least cost.

With respect to services running on top of this infrastructure, provisions in the ISA must ensure that information transported by the network is free from arbitrary obstacles, filtering, blocking or monitoring, barring a legitimate government interest.

As Ambassador Kirk highlighted in notifying Congress of the intention to pursue the ISA, “Internet usage has increased by 500 times since 2001, when the last multilateral trade negotiation was launched. The development of appropriate provisions to support services trade through electronic channels therefore must be an important component of any new agreement.”¹⁰

Some specific policy choices that will help adapt the international trade framework to better respond to the needs of Internet trade at the services layer include:

¹⁰ Letter from Ambr. Ron Kirk, Jan. 15, 2013, at http://www.ustr.gov/sites/default/files/01152013%20ARK%20letter%20to%20Speaker%20Boehner_0.pdf

A) Mandate minimum protections for the cross border flow of data and information.

Most broadly, U.S. trade policy should strive to achieve the same market access for Internet services as we have achieved for physical goods. The ISA must establish reasonable boundaries on when a party may limit the cross-border flow of information. Specifically, such restrictions should be required to comply with WTO principles of transparency, necessity, being as minimally restrictive as possible, and the provision of due process to affected parties. As fixed definitions of what constitutes international commerce at a given moment cannot adequately adapt to the rapid pace of change, it is vital that exceptions for limiting the flow of information be negotiated on a negative list basis, lest all progress be lost with the advancement of technology.

In particular, the ISA must ensure that, at a minimum, information services receive the benefit of national treatment, which at present is often not the case. China, for example, has directly alleged American search sites are purveyors of pornography, even though Chinese services allow users to link to similar adult content.¹¹ Numerous other U.S. Internet services, including Blogger, Facebook, Flickr, Twitter, and WordPress have over time been blocked or severely restricted by the Chinese government, while domestic versions of the same services are permitted to operate, even though they contain similar levels of “offensive” content.¹² The economic consequences of such treatment can be substantial.¹³

To ensure that these practices do not occur within ISA members, the agreement should specify that all restrictions on cross-border Internet services are “narrowly tailored, confined to

¹¹ Simon Elegant, *Chinese Government Attacks Google Over Internet Porn*, TIME, June 22, 2009, available online at <<http://www.time.com/time/world/article/0,8599,1906133,00.html>>..

¹² Jordan Calinoff, *Beijing's Foreign Internet Purge*, FOREIGN POLICY, Jan. 15, 2010, available online at <http://www.foreignpolicy.com/articles/2010/01/14/chinas_foreign_internet_purge>.

¹³ For example, in 2007 China blocked U.S. based search engines and redirected users to the leading Chinese search engine, Baidu. Google's policy of redirecting Chinese users to the site's uncensored Hong Kong page led the Chinese government to filter all Google search results through its “Great Wall” monitoring system. As a result, Google's market share fell to 30.9 percent in the first quarter of 2010, down from 35.6 percent in the fourth quarter of 2009; Baidu, China's largest domestic search engine, saw its market share increase from 58.4 percent to 64 percent over the same period. As a result of its loss in search market share, Google experienced a drop in advertising revenue in China as advertisers shifted their business to Baidu, allowing Baidu to charge higher rates for advertising. See Mark Lee, *Google Wins China Permit Renewal, Defusing Standoff*, BUSINESSWEEK, July 9, 2010, available online at <<http://www.businessweek.com/news/2010-07-09/google-wins-china-permit-renewal-defusing-standoff.html>>.

certain special cases, and do not unreasonably prejudice the legitimate interests of parties engaged in lawful trade.”¹⁴

B) Prohibit local data hosting requirements.

A variety of countries have introduced or enacted measures that would compel financial services providers to process data onshore or require online service providers or other companies to locate data within their borders. Such measures are both discriminatory and contrary to the notion of cross-border trade.

The Internet’s rapid growth depends upon its end-to-end design, allowing compatible hardware to be attached to the edges of the network and immediately send and receive data to any other ‘node’ of the network. At the same time, the network is also designed to ensure that packets of data take the most efficient route between two points. These features undergird the resilience, reliability and flexibility of the Internet, but run contrary to the desires of governments seeking jurisdictional control, political leverage, and/or local investment from online services. As a result, policies mandating local infrastructure in order to operate locally have become attractive to certain jurisdictions. To respond to this trend, the ISA should proscribe the imposition of local hosting requirements as a condition of market access.

Furthermore, such local hosting requirements can potentially harm a vibrant and growing sector of the U.S. economy: cloud computing, which includes the outsourced provision of both infrastructure and software as services. U.S. companies pioneered cloud computing, and the U.S. is currently the unquestioned world leader in the field.¹⁵ These companies allow their clients, large and small companies alike, to outsource their in-house information technology needs. Instead of needing to invest in local software and expensive servers, companies can outsource their whole IT stack to third-party specialists. As hosting and services can easily be provided regardless of location, local data hosting requirements can disproportionately affect U.S. companies and serve as thinly veiled protectionism for foreign competitors of U.S. cloud companies. Given that the greatest growth for cloud demand is predicted to come from outside

¹⁴ Talal Abu-Ghazaleh, *WTO at the Crossroads: A Report on the Imperative of a WTO Reform Agenda*, at 35 at http://www.wto.org/english/thewto_e/dg_e/dft_panel_e/report_talal_abu_janv13_e.pdf

¹⁵ U.S. companies such as Amazon, Savvis, Salesforce.com and Rackspace comprise the majority of revenue in the “public cloud” market.

the United States in the near future,¹⁶ ensuring U.S. cloud companies get market access to major developing markets is exceedingly important.

Provisions addressing cross-border data flows and local infrastructure, it should be noted, are included in the Trade Principles for ICT Services that the United States has agreed to with both the European Union and Japan.

C) Minimize duties and tariffs.

U.S. trade policy should aspire to remove direct or indirect tariffs, fees, or duties on any Internet services, as well as upon payments made through such services. Specifically, the ISA should make permanent the 1998 WTO e-commerce moratorium prohibiting members from imposing customs duties on electronic transmissions¹⁷ and, if possible, broaden it to prohibit the taxation of cross-border digital services and goods generally.

D) Mandate minimum liability protection for Internet services.

Unbounded liability rules constitute a major barrier to international Internet commerce, and instituting minimum standards for the protection of Internet services from liability for third party content is fundamental to robust digital trade.

Within the United States, Congress recognized early on that holding Internet and e-commerce businesses liable for the wrongful conduct of their users would jeopardize the growth of this vital industry and place unreasonable burdens on these service providers. Due to the extraordinary quantity of data transiting communications networks, these businesses are unusually vulnerable to strict liability for the misdeeds of any users. Unlike many of our international trading partners, Congress responded to this problem with two statutes designed to limit Internet businesses' liability for the wrongdoing of others. First, Section 230 of the Communications Decency Act provided categorical immunity from liability for user misconduct, thus allowing Internet companies to combat undesirable or potentially illegal activity without

¹⁶ “But the fastest growth in public IT services spending will be in the emerging markets, which will see its collective share nearly double by 2016 when it will account for almost 30% of net-new public IT cloud services spending growth.” See IDC Press Release, “IDC Forecasts Public IT Cloud Services Spending Will Approach \$100 Billion in 2016, Generating 41% of Growth in Five Key IT Categories.” Sept. 11, 2012. Available at: <http://www.idc.com/getdoc.jsp?containerId=prUS23684912#.USzjZ-s5x8M>.

¹⁷ WTO Declaration, *The Geneva Ministerial Declaration on global electronic commerce*, May 25, 1998 (available at: http://www.wto.org/english/tratop_e/ecom_e/mindecl_e.htm)

fear of additional liability.¹⁸ Section 230 has provided a foundation for today's highly successful Internet services and applications by establishing a robust limitation on potential liability. Second, Section 512 of the U.S. Digital Millennium Copyright Act (DMCA)¹⁹ provided limitations on remedies available against online intermediaries whose users are implicated in copyright infringement, provided that the service provider complies with a notice and takedown regime specified by statute. The success of Internet and e-commerce businesses in the U.S. must be at least partially attributed to the fact that the U.S. Congress carefully crafted laws that encourage rapid innovation and entrepreneurialism online by establishing certainty and predictability with respect to liability matters. It is no accident that innovation in Internet-connected products and services is concentrated in free societies, and particularly the United States.

While the international community now recognizes that “[i]ntermediaries are increasingly important and empower end-users” and that “[l]imitations on their liability for the actions of users of their platforms have encouraged the growth of the Internet,”²⁰ liability limitations have not yet caught up with this understanding. Even in Member States of the European Union, whose E-Commerce Directive contains a nominally strong safe harbor for Internet service providers, U.S. companies and their executives have been subjected to civil and criminal liability based entirely on misconduct by third parties on the Internet.

In Italy in 2010, U.S. executives were criminally convicted when an Italian Internet user posted to the Italian YouTube site a video of students mistreating a disabled classmate, notwithstanding the fact that the video was removed within hours of authorities reporting it to YouTube.²¹ Although the conviction was ultimately overturned, nearly three years had passed during which U.S. executives faced the prospect of criminal prosecution for third-party content.²² In France, a French court imposed in liability on eBay for sales of authentic (non-counterfeited)

¹⁸ 47 U.S.C. § 230.

¹⁹ 17 U.S.C. § 512.

²⁰ OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives*, at 15 (2011) at <http://dx.doi.org/10.1787/9789264115644-en>.

²¹ See Rachel Donadio, *Larger Threat Is Seen In Google Case*, N.Y. Times, Feb. 24, 2010.

²² See Eric Pfanner, *Italian Appeals Court Acquits 3 Google Executives in Privacy Case*, N.Y. Times, Dec. 21, 2012, at <http://mobile.nytimes.com/2012/12/22/business/global/italian-appeals-court-acquits-3-google-executives-in-privacy-case.xml>. See

Louis Vuitton goods by various small businesses and individuals through eBay's site.²³ While these sales at issue were legal under U.S. law and were marketed on eBay's U.S.-facing site, the court imposed a \$60 million judgment in a decision that press accounts argued "reeks of protectionism."²⁴ Notwithstanding 2008 legislation refining Indian law to "correspond more closely to the DMCA/ECD model",²⁵ in 2012 Facebook, Google, among other prominent Internet services were criminally prosecuted in India for hosting material that "seeks to create enmity, hatred and communal violence" and "will corrupt minds,"²⁶ and executives faced possible prison terms, in addition to financial penalties.²⁷ Such liability risks, according to the OECD, "weaken private sector confidence."²⁸ From the perspective of advancing U.S. global economic opportunities, unreasonable liability rules are functionally no different than traditional market barriers. To address these, the ISA should:

- Consistent with both Section 230 of the CDA and the safe harbors of the E-Commerce Directive, provide that no Internet service may be held liable on account of any electronic information flows on its platform, to the extent that: (1) the information is provided by another; (2) the Internet service does not substantively modify the information at issue; and (3) the Internet service does not select the receiver of the information.²⁹

²³ Tribunal De Commerce De Paris, June 30, 2008, Geronimi.

²⁴ See, e.g., Therese Poletti, *EBay Ruling in France Reeks of Protectionism*, Market Watch, July 1, 2008, at http://articles.marketwatch.com/2008-07-01/news/30697184_1_nichola-sharpe-ebay-perfume.

²⁵ OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives*, *supra* note 20, at 79-80.

²⁶ Amol Sharma, *Facebook, Google to Stand Trial in India*, Wall St. Journal, March 13, 2012, at <http://online.wsj.com/article/SB10001424052702304537904577277263704300998.html>

²⁷ Rebecca Mackinnon, *The War for India's Internet*, Foreign Policy, June 6, 2012, at http://www.foreignpolicy.com/articles/2012/06/06/the_war_for_india_s_internet?page=0,0

²⁸ OECD, *supra* note 20, at 15.

²⁹ 47 U.S.C. § 230(c)(1), provides that "no provider or user of an interactive computer service shall be treated as the publisher of any information provided by another information content provider." Similarly, the European E-Commerce Directive establishes that online services are not to be held liable for substantively unmodified information transmitted from one party to another, of that party's choosing. See European E-commerce Directive, 2000/31/EC of the European Parliament and of the Council of 8 June 2000, arts. 12-15. Accord Martin H. Thelle & Svend T. Jespersen, *Online Intermediaries: Assessing the Economic Impact of the EU's Online Liability Regime*, at 7 (2012) ("The EU's liability regime relies on a simple, yet powerful principle: it is the person or entity responsible for posting content or goods for 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.") Available at <http://www.europeandigitalmedia.org/uploads/Press/documents/Copenhagen%20Economics-Online%20Intermediaries-201201.pdf>.

- Prohibit trading partners from imposing a general obligation on Internet services to monitor the electronic information which they transmit or store, nor impose a general obligation to affirmatively seek out facts or circumstances that might indicate illegal activity; and
- Ensure that national treatment extends to liability rules as applied to Internet services. Particularly, the international trade framework should prohibit foreign authorities from penalizing U.S. companies when foreign nationals find it economically attractive to do business with services offered by U.S. businesses.

Ultimately, the regulation of online information flows should be justifiable, transparent, distort trade as little as possible and should functionally treat foreign and domestic websites and services the same.

IV. Conclusion

The ISA represents an opportunity to ensure that the international trade regime extends protections to information services in a manner that fully recognizes their status as equal to that of physical goods and services. Ideally, the WTO would have a binding agreement on data flows mirroring the GATT agreement rules for tangible goods. The lack of such an agreement leaves movements of data far more vulnerable than movements of tangible goods.³⁰ The ISA is an opportunity to correct this imbalance and update trade rules to reflect the new digital economy. The Internet is and will continue to be its great enabler, and we believe that the ISA must deal proactively with Internet issues in order to establish new rules of the road to adapt the timeless goals of the rules-based trading system to the new online reality.

³⁰ Gresser, *supra* note 8.