Internet Association

Submission For USTR National Trade Estimate Report For 2019

Docket No. USTR-2018-0029

Internet Association

Introduction

On behalf of the world's leading internet companies, we are pleased to submit the following comments to the Trade Policy Staff Committee (Docket No. USTR-2018-0029) for consideration as the Office of the United States Trade Representative (USTR) prepares the 2019 National Trade Estimate Report (NTE).

Internet Association (IA)[1] supports policies that promote and enable internet innovation, ensuring that information flows freely and safely across national borders, uninhibited by restrictions that are fundamentally inconsistent with the open and decentralized nature of the internet.

Around the world, internet businesses are facing increasing challenges that undermine the United States' (U.S.) leadership in the digital economy, making USTR's work in understanding and addressing foreign digital restrictions more critical than ever before. There are a number of current trends that are extremely concerning to the health of the digital economy. Countries, including Vietnam, Indonesia, and India, are adopting forced data localization policies that pose a fundamental threat to the free flow of information across borders and internet-driven trade. The EU is threatening to adopt a Copyright Directive that splits away from the U.S. model, using copyright not to promote innovation but instead to limit market access by online services. Additionally, the proposed EU digital services tax appears to be intended to impose a financial burden only on successful U.S. companies and undermines the international tax system. Moreover the recent push by some countries, notably India, Indonesia, and South Africa, to end the WTO moratorium on duties on electronic transmission would have a detrimental impact on how the internet connects and adds value to the world.

In order to preserve and expand the internet's role as a driver of U.S. exports, economic development, and opportunity, USTR must continue to make open internet policies abroad a top trade priority. It must continue to push back on market access barriers that threaten the internet's global growth and its transformation of trade. IA applauds the strong steps that USTR took in the USMCA to address new digital barriers, but recognizes that there is more work to do on a global basis to promote digital trade and counteract unfair foreign practices. The ability of U.S. businesses to reach 95 percent of the world's customers through U.S. internet services hangs in the balance.

In the 2018 NTE, USTR deepened its focus on barriers to digital trade, with the understanding that digital represents a critical element of U.S. competitiveness and a key source of U.S. innovation and growth, not just for the tech sector but also for manufacturing, agriculture, and other traditional industries.[2] In the NTE, USTR laid out the growing number of laws and regulations around the world that block the flow of data across borders, limit cloud computing, and otherwise restrict the ability of internet companies to compete globally. IA welcomed these developments and encourages USTR to preserve and expand the internet's role as a key driver of U.S. exports, job creation, and economic development by making digital trade a top priority in the 2019 NTE Report and its trade agenda.

[1] A complete list of Internet Association's membership can be found at: https://internetassociation.org/our-members/.
[2] https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/march/2018-fact-sheet-key-barriers-digital

American Digital Trade Leadership

The U.S. is the global internet and digital content leader. Americans are enjoying a digital revolution that has led to amazing products, lower prices, and new jobs. We export all of this across the globe, with digital trade now accounting for more than 50 percent of all U.S. services exports. And every sector of the economy benefits from this leadership. That didn't just happen – existing U.S. law and policy are central to our digital success and leadership.

USTR should fight to see the adoption of America's digital framework across the world, including in our trade deals, and at the same time defend against attacks on U.S. technology leadership. There's a global race to set the rules for the digital economy. Other countries are actively pressuring their trading partners to adopt policies that will threaten the success of the U.S. digital economy both in the U.S. and abroad.

All industries — and businesses of all sizes — reap the rewards of our digital leadership. Small businesses and entrepreneurs in every American state and every community use the internet to sell and export across the globe. Internet-connected small businesses are three times as likely to export and create jobs, grow four times more quickly, and earn twice as much revenue per employee. The internet cuts the trade deficit in every sector of the economy. Each year, U.S. manufacturers export $86.5 billion of products and services through digital trade. Newly released figures from BEA show that the 2017 U.S. digital trade surplus increased 7.8 percent to $172.6 billion[3] from $160.2 in 2016.[4]

America rose to digital leadership thanks to our digital policies. Digital technologies are central to supporting American small business growth. Existing U.S. law and policies have fostered the adoption and use of digital technologies here and around the world.

The internet is a borderless medium and the movement of electronic information enables virtually all global commerce. Every sector of the economy relies on information flows from manufacturing, to services, to agriculture. Requirements that force U.S. companies to store or process data locally hurt U.S. businesses and threaten the open nature of the internet.

Intermediary liability protections allow online platforms to function and facilitate massive volumes of U.S. exports, especially by small- and medium-sized businesses. They support 425,000 U.S. jobs and $44 billion in U.S. GDP annually.[5] If online platforms or other services are held liable for other people's materials, including customer reviews or other user-generated content, they would not be able to operate in such an open manner or, more importantly, innovate.

The U.S. has a strong and innovation-oriented copyright framework that protects creators' legitimate rights, enables new innovation, and allows consumers to benefit – including through safe harbors like those in the Digital Millennium Copyright Act (DMCA) and limitations and exceptions like fair use. This framework has been critical to the U.S. digital economy domestically and needs to be projected globally. Fair use laws underpin one in eight U.S. jobs, drive 16 percent of our economy, and generate $368 billion

[3] This filing previously stated totals for "total digital service exports" and "digital service trade surplus" that summed together ICT-enabled service exports and potential ICT-enabled service exports. These figures should not have been summed together as potential ICT-enabled service exports includes ICT-enabled service exports. The correct totals are approximately $439 billion in digital service exports and a surplus of $172.6 billion for digital service trade balance. The previous, incorrect figures were $470 billion in digital service exports and $196.1 for for digital service trade balance.
[4] https://apps.bea.gov/iTable/iTable.cfm?ReqID=62&step=1#reqid=62&step=9&isuri=1&6210=4
[5]https://internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf

in exports annually.[6] They hold the key to future U.S. innovation, including in areas like artificial intelligence.

E-commerce is enabling millions of American small businesses to find customers and make sales around the world in ways impossible a just a few of decades ago. The U.S. maintains streamlined and simplified trade facilitation and customs procedures, including an $800 de minimis and a $2,500 informal clearance threshold. Complex laws and policies at foreign borders, though, are putting e-commerce enabled American small businesses at a disadvantage, slowing the speed of delivery, increasing costs, and compromising U.S. competitiveness.

Key Issues Impacting Internet Companies Around the World

Broadly key issues impacting internet companies fall into the following areas.

- → Burdensome Or Discriminatory Data Protection Regimes
- → Customs Barriers To Growth In E-Commerce
- → Data Flow Restrictions And Service Blockages
- → Discriminatory Or Non-Objective Application Of Competition Regulations
- → Filtering, Censorship, And Service-Blocking
- → Non-IP Intermediary Liability Barriers
- → Restrictions On U.S. Cloud Service Providers
- → Overly Restrictive Regulation Of Online Services
- → Sharing Economy Barriers
- → Unbalanced Copyright And Liability Frameworks
- → Unilateral Or Discriminatory Tax Regimes

Burdensome Or Discriminatory Data Protection Regimes

Data has revolutionized every part of our economy and our lives, both online and offline. Businesses and nonprofits of all sizes, in all sectors, have integrated data into their products and services to the benefit of consumers. Countries around the world are creating new privacy laws to regulate how companies handle data. This array of laws and regulations creates a "patchwork" effect that complicates compliance efforts and leads to inconsistent experiences for individuals.

IA companies believe trust is fundamental to their relationship with their users and customers.[7] IA member companies know that to be successful they must meet individuals' reasonable expectations with respect to how the personal information they provide to companies will be collected, used, and shared. That is why IA member companies are committed to transparent data practices and to continually refining their consumer-facing policies so that they are clear, accurate, and easily understood by ordinary individuals. Additionally, IA member companies have developed numerous tools and features to make it easy for individuals to manage the personal information they share, as well as their online experiences.

To give users and companies greater assurance that privacy will be protected on a cross-border basis, IA urges USTR to ensure that privacy protections are implemented in an objective and non-discriminatory way. In addition, it is important to encourage mechanisms that promote compatibility between different privacy regimes, as opposed to unilateral regulations that do not provide a basis for transferring data on a cross-border basis. Where regulations fall short of this standard, IA encourages USTR to identify these issues as key impediments to digital trade in the 2019 NTE.

[6] http://www.ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf
[7] https://internetassociation.org/files/ia_privacy-principles-for-a-modern-national-regulatory-framework_full-doc/

Customs Barriers To Growth In E-Commerce

Some countries have antiquated, complex, and costly customs procedures that make it difficult for U.S. small businesses to compete. In addition, some countries are reacting to the rise in American led e-commerce by implementing protectionist customs policies that will raise costs and slow delivery times, limiting U.S. companies' ability to serve customers in other markets. Governments across the globe have complex customs regimes and IA encourages USTR to identify these issues as key impediments to digital trade in the 2019 NTE and work with foreign countries to modernize these antiquated systems and overly burdensome systems. When it comes to USMCA, IA understands that USTR must undertake intensive work during the implementation phase of the agreement. In particular, IA encourages the parties to work to ensure that the provisions related to tax and duty collection and procedures for low value shipments do not lead to additional obstacles for small businesses exporting to Canada and Mexico.[8]

Data Flow Restrictions And Service Blockages

Cross-border, global exchange of information – without censorship, content-based regulation, or filtering mandates – facilitates commerce and promotes economic inclusiveness. The internet ecosystem flourishes when users and content creators are empowered through an open architecture that promotes the unrestricted exchange of ideas and information. Internet services instantaneously connect users to goods and services, facilitate social interactions, and drive economic activity across borders. Consequently, support for the free flow of information is vital to eliminate trade barriers that restrict commerce or prevent U.S.-based internet services the freedom to operate in a foreign jurisdiction.

Unfortunately, data localization mandates and other limits on data transfers are increasingly restricting U.S. services from accessing overseas markets. While China and Russia have had data localization requirements in place, other countries are threatening to follow suit, particularly in the Asia-Pacific region. The most concerning developments in the past year have come from forced data localization efforts in India, Indonesia, and Vietnam.

In May, Indonesia issued draft regulatory amendments to localize certain classes of data. In June, Vietnam passed a Cybersecurity Law with undefined and potentially broad localization requirements. In July, India released a draft personal data protection bill seeking to localize certain classes of personal data. In October, a regulation from the Reserve Bank of India came into force, requiring that data related to financial transactions be stored only in India.

These and other foreign governments frequently cite concerns about security, privacy, and law enforcement access to justify localization measures. However, as the U.S. responds to these measures, it is critical to convey that data localization requirements typically increase data security risks and costs – as well as privacy risks – by requiring storage of data in a single centralized location that is more vulnerable to natural disaster, intrusion, and surveillance. In practice, the primary impact of a data localization measure is not to safeguard data but instead to wall off local markets from U.S. competition, while hurting local businesses as well.

Non-IP Intermediary Liability Barriers

A fundamental reason that the internet has enabled trade is its open nature – online platforms can facilitate transactions and communications among millions of businesses and consumers, enabling

[8] https://internetassociation.org/us-mexico-canada-agreement/

buyers and sellers to connect directly on a global basis. This model works because platforms can host these transactions without automatically being held responsible for the vast amounts of content surrounding each transaction. In the U.S., Section 230 of the Communications Decency Act has enabled the development of digital platforms by ensuring that online services can host user content without being considered the 'speaker' of that content. This law enables features such as customer reviews, which have been essential to building customer trust for U.S. small businesses in foreign markets.

However, this core principle, which has allowed U.S. services to function as platforms for trade and communication, is increasingly under threat abroad. USTR has rightly identified "unreasonable burdens on internet platforms for non-IP-related liability for user-generated content and activity" as a barrier to digital trade in the last two NTE reports. Yet this state of affairs has not improved. Foreign governments are exerting a heavier hand of control over speech on the internet and are subjecting online platforms to crippling liability or blockages for the actions of individual users for defamation, "dangerous" speech, political dissent, and other non-IP issues. At the same time, foreign governments are making it more difficult for platforms to evolve new approaches to dealing with problematic content.

IA encourages USTR to identify the increasing number of non-IP liability trade barriers abroad and use upcoming trade negotiations and additional engagements to set clear rules that would prohibit governments from making online services liable for third-party content.

Overly Restrictive Regulation Of Online Services

The proliferation of content, applications, and services available online has delivered enormous value directly to consumers and small businesses. This includes lower entry barriers; greater access to information, markets, banking, healthcare, and communities of common interest; and new forms of media and entertainment. So called "over-the-top" (OTT) services play key roles in the digital economy. Each 10 percent increase in the usage of these services adds approximately $5.6 trillion to U.S. GDP.[9]

Yet numerous foreign governments – Brazil, Colombia, the EU (as well as several member states including Italy, Germany, France, and Spain), Ghana, India, Indonesia, Kenya, Thailand, Vietnam, and Zimbabwe, among others – are developing and implementing measures to regulate online communications and video services as traditional public utilities. Some regulators and telecommunications providers are applying sector-specific telecom regulations to online services on matters such as emergency calling, number portability, quality of service, interconnection, and tariffing. Similarly, regulators have sought to subject online video services to broadcasting-style obligations on local content quotas, local subsidies, and a variety of regulatory fees. Such special regulation is not necessary for online services, where there are few barriers to new market entrants and low switching costs. While often couched as "level playing field" proposals, these initiatives serve to protect incumbent businesses, impede trade in online services, and make it substantially more difficult for U.S. internet firms to export their services.

To maintain and capitalize on the clear U.S. competitive advantage in this area, IA urges USTR to identify legal or regulatory measures that are harming the deployment of online services to consumers and businesses, and engage with foreign counterparts to address these market access barriers. IA also encourages USTR to work on introducing disciplines on OTT regulations into ongoing trade negotiation.

Unbalanced Copyright And Liability Frameworks

[9] "The Economic and Societal Value of Rich Interaction Applications (RIAs)." WIK, 2017. http://www.wik.org/fileadmin/Studien/2017/CCIA_RIA_Report.pdf

The U.S. copyright framework both ensures a high level of copyright protection and drives innovative internet and technology products and services. Internet services rely on balanced copyright protections such as Section 107 of the Copyright Act ('fair use') and Section 512 of the DMCA ('ISP safe harbors') to create jobs, foster innovation, and promote economic growth. The U.S. internet sector – as well as small businesses that rely on the internet to reach customers abroad – require balanced copyright rules to do business in foreign markets.

In countries that lack this two-sided model of copyright law, U.S. innovators are at a significant disadvantage. Increasingly, governments like the EU (including Spain, Germany, and France), Australia, Brazil, Colombia, India, and Ukraine are proposing new onerous systems of copyright liability for internet services and several of these countries are out of compliance with commitments made under U.S. free trade agreements. The EU is actively advancing new regulations through the Copyright Directive that would directly conflict with U.S. law and require a broad range of U.S. consumer and enterprise firms to install filtering technologies, pay European organizations for activities that are entirely lawful under the U.S. copyright framework, and face direct liability for third-party content.

If the U.S. does not stand up for the U.S. copyright framework abroad, then U.S. innovators and exporters will suffer, and other countries will increasingly misuse copyright to limit market entry. For example, critical limitations and exceptions to copyright under U.S. law enable digital trade by providing the legal framework that allows nearly all internet services to function effectively. Web search, machine learning, computational analysis, text/data mining, and cloud-based technologies all, to some degree, involve making copies of copyrighted content. These types of innovative activities – areas where U.S. businesses lead the world – are possible under copyright law because of innovation-oriented limitations and exceptions. In the U.S., industries that benefit from fair use and other copyright limitations generate $4.5 trillion in annual revenue and employ 1 in 8 U.S. workers.[10] Unfortunately, foreign trading partners lack these innovation-oriented rules, which limit the export opportunities for U.S. industries in those markets.

In addition, Section 512 of the DMCA is a foundational law of the U.S. internet economy. It provides a 'safe harbor' system that protects the interests of copyright holders, online service providers, and users, imposing responsibilities and rights on each. Safe harbors are critical to the functioning of cloud services, social media platforms, online marketplaces, search engines, internet access providers, and many other businesses. Weakening safe harbor protections would devastate the U.S. economy, costing nearly half a million U.S. jobs.[11] And yet key trading partners have failed to implement ISP safe harbors, including three countries (Australia, Colombia, and Peru) that have express obligations to enact safe harbors under trade agreements with the U.S.

USTR has promoted copyright safe harbors in trade agreements for the last 15 years, including in the USMCA. Increasingly, however, jurisdictions have chipped away at the principles behind this safe harbor framework. For example, some countries have proposed or implemented requirements that internet companies monitor their platforms for potential copyright infringement or broadly block access to websites, rather than adhere to the U.S. model of taking down specific pieces of infringing content upon notice. Other countries have failed to adopt safe harbors at all. Such efforts threaten the ability of internet companies to expand globally by eliminating the certainty that copyright safe harbors provide.

IA urges USTR to use upcoming trade negotiations to promote a strong and balanced copyright framework that benefit all U.S. stakeholders. Without these business-critical protections, internet services – and the industries they enable – face troubling legal risks, even when they follow U.S. law.

[10] Capital Trade. "Fair Use in the U.S. Economy." http://www.ccianet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf.
[11] http://internetassociation.org/wp-content/uploads/2017/06/NERA-Intermediary-Liability-Two-Pager.pdf

Unilateral Or Discriminatory Tax Regimes

Some foreign trading partners, such as the EU, are imposing taxation measures that single out digital platforms for special treatment, often with the intention of giving domestic companies an advantage over U.S. competitors. In many countries, these taxation measures run afoul of treaty obligations and are outside the agreed international framework for cross-border trade and investment. Unfortunately, these tax regimes are on the rise globally. The majority of such measures have three core problems from a trade perspective: they are discriminatory in design or effect towards U.S. companies, they effectively create tariffs on U.S. services, and they tax income that is already taxed by the United States. IA urges USTR to seek to prevent trading partners from implementing these types of unilateral measures concerning digital products and services

Emerging Issues

Finally, with the rapid pace of internet-innovation, IA calls on USTR to intensify efforts to address emerging market access restrictions that impede U.S. digital trade. Foreign governments continue to propose or implement burdensome measures such as local presence requirements and forced transfers of technology, encryption keys, source code, and algorithms as conditions of market access.

In addition, governments across the globe are considering measures that would assign liability for collecting customs duties and/or taxes directly to U.S. internet services. IA urges USTR to ensure that any cross-cutting regulations are implemented in an objective and non-discriminatory way. Where regulations fall short of this standard, IA encourages USTR to identify these issues as key impediments to digital trade in the 2019 NTE.

Foreign Digital Trade Barriers

Argentina

Burdensome Or Discriminatory Data Protection Regimes

Argentine President Mauricio Macri submitted to National Congress Bill No. MEN-2018-147-APN-PTE, aiming to replace in its entirety the Personal Data Protection Law No. 25,326, in force since 2000, which together with the Argentine Constitution sets forth general principles regarding data protection and habeas data. This bill includes a problematic provision regarding the extraterritorial application of the law.

Customs Barriers To Growth In E-Commerce

In recent years the government of Argentina ("GOA") has sought to reform the customs agency and has made positive strides. In 2016, the GOA implemented the Comprehensive Import Monitoring System (SIMI) in order to promote competitiveness and facilitate trade, while maintaining sufficient controls to manage risks. The SIMI established three different low-value import regimes (Postal, Express, and General). However, given the challenges that persist in clearing goods through the General import regime, only the Express Courier regime works functionally for e-commerce transactions. Thus, the limits within the Express regime creates serious roadblocks for U.S. companies seeking to export to Argentina. The Express regime limits shipments to packages under 50 kilograms and under $1000, with a limit of three of the same items per shipment, with duties and taxes assessed. While import certificates and licenses for products are not required, the government limits the number of shipments

per year per person to five, which is strictly enforced. U.S. companies have had to stop exporting to Argentina altogether given the complexities within the General regime and the inability to know how many shipments a customer has already received.

Restrictive Regulation Of Online Services

In Argentina, the telecommunications reform commission recently issued seventeen principles that would inform a "convergence" bill, aimed at unifying the telecommunications and audiovisual content laws that were enacted by the previous government.[12] These principles do not explicitly leave information services, content services, and apps out of the scope of the bill, and may include new obligations both to register applications and satisfy intermediary liability requirements. In particular, the obligation to register an application would entail a set of complex administrative procedures that developers would need to follow before making their app widely available. Such obligations could create clear market access barriers for internet services that do not face registration requirements in other markets.

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services.

- → *License cap:* The City of Buenos Aires has enacted a supply cap of an arbitrary maximum of 2,500 for-hire vehicles.
- → *Independent operator restriction:* All for-hire vehicles must be affiliated with a for-hire agency and work exclusively for that agency.
- → *Return-to-garage rule:* For-hire vehicles are required to return to their registered place of business between trips.
- → *Technology restrictions:* For-hire vehicles may be solicited only by either phone call or email.

Unbalanced Copyright And Liability Frameworks

The lack of a framework on intermediary liability protections in Argentina has led to significant uncertainty for foreign firms seeking to do business in Argentina. IA supports Bill 0942-S-2016, which provides a clear framework that limits the liability of intermediaries for content generated, published, or uploaded by users until they are given appropriate notice under Argentine law.

[12] *New Rules of the Game in Telecommunications in Argentina,* Observacom. http://www.observacom.org/new-rules-of-the-game-in-telecommunications-in-argentina/http://www.observacom.org/new-rules-of-the-game-in-telecommunications-in-argentina/

Australia

General

Australia's recently introduced Access and Assistance Bill stands as a significant barrier to trade for U.S. technology companies. The bill would impose obligations that are unprecedented and unworkable. If the bill became law, it would negatively affect the ability of businesses to safely and securely rely on any digital service, the internet, or technology more generally. Legally introduced security vulnerabilities, "backdoors," and other "secret access" capabilities designed to overcome encryption and other security features would have a material impact on any industry relying on technology. Given that the same technology can be sold and used globally, the introduction of such capabilities would not only put at risk the privacy and security of Australian citizens, businesses, and governments, it would undermine privacy and security globally. With this bill, Australia introduces significant risk that may compel foreign technology providers to cease operations in and exports to Australia.

Unbalanced Copyright And Liability Frameworks

Under the Australia-U.S. FTA (AUSFTA), Australia is obligated to provide safe harbors for a range of functions by online services providers. Australia has failed to comply with this commitment. Australia's Copyright Act of 1968's safe harbor provisions do not unambiguously cover all internet service providers, including the full range of internet services (cloud, social media, search, UGC platforms).[13] Instead, only a narrower subset of " service providers" are covered under Australian law,[14] rather than the broader definition of "internet service providers" in the Australia-U.S. FTA. The lack of full coverage under this safe harbor framework creates significant liability risks and market access barriers for internet services seeking access to the Australian market. IA urges USTR and others in U.S. government to engage with Australian counterparts to make necessary adjustments to Division 2AA of the Copyright Act to bring this safe harbor into compliance with AUSFTA requirements.

On 28 June 2018, the Australian Parliament amended the Copyright Act's provisions on safe harbors. The amendments expand the intermediary protections to some service providers including organizations assisting persons with a disability, public libraries, archives, educational institutions and key cultural institutions — effectively acknowledging that the scope of the current safe harbor is too narrow. However, the amendments pointedly left out commercial service providers including online platforms.[15] The amendments do not put Australian copyright law into compliance with the AUSFTA. In fact, it is clear that the amendments were framed in such a way as to specifically exclude U.S. digital services and platforms from the operation of the scheme, with members of the Australian Parliament referencing the importance of their exclusion in the parliamentary debate.[16] Further amendments to these provisions are required to make sure that limitations on liability for commercial service providers are extended to all functions provided for under Article 17.11.29(b)(i)(A-D). The failure to include online services such as search engines and commercial content distribution services disadvantages U.S. digital services in Australia and serves as a deterrent for investment in the Australian market.

[13] Copyright Act 1968, Part V Div. 2AA.

[14] Section 116ABA of the Copyright Amendment (Service Providers) Act 2018.
[15] Copyright Amendment (Service Providers) Act 2018 https://www.legislation.gov.au/Details/C2018A00071.
[16] Copyright Amendment (Service Providers) Bill 2017, Second Reading https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/4a4f29d6-cec4-4a55-97d8-b11f23b85dd4/toc_pdf/Senate_2018_05_10_6092_Official.pdf;fileType=application%2Fpdf#search=%22chamber/hansards/4a4f29d6-cec4-4a55-97d8-b11f23b85dd4/0258%22

Australia has also proposed amendments to the scope of the online copyright infringement scheme in section 115A of the Copyright Act 1968, including to allow injunctions to be obtained against online search providers.[17] The Australian Government has indicated that it anticipates these changes will only affect two U.S. companies.[18] In circumstances where the scheme already applies to carriage service providers, thus disabling access to Australian users to offending sites, there is no utility in the extension of these laws to other providers.

In addition, IA urges USTR to work with Australia to develop a clearer fair use exception in order to resolve uncertainty under the existing fair dealing regime. The Australian Law Reform Commission and the Australian Productivity Commission have both made positive recommendations on fair use that would enable Australia to achieve an appropriate balance in its copyright system and increase market certainty for both Australian and U.S. providers of digital services. The government should adopt these recommendations and implement "a broad, principles-based fair use exception."[19]

Unilateral Or Discriminatory Tax Regimes

In 2016, Australia's Multinationals Anti-Avoidance Law entered into force. This law appears to be outside the scope of the OECD BEPS recommendations and may impede market access for businesses seeking to serve the Australian market. In 2017, Australia passed another unilateral tax measure, the Diverted Profits Tax. Finally, in 2018, Australia has released a discussion draft which suggests it is actively considering a third unilateral tax measure, targeted exclusively at digital technology, a major US export sector. This measure is designed to circumvent the multilateral tax system and would undermine the OECD's attempts to create a globally agreed approach to taxation in the digital age. We urge the U.S. government to engage with counterparts in Australia to develop taxation principles that are consistent with international best practices.[20]

Brazil

Burdensome Or Discriminatory Data Protection Regimes

Brazil is considering certain provisions within its data protection legislation that risk harming both its own growing digital economy and market access by foreign services, including a new type of "adequacy" regime for assessing whether companies in other countries can move data in and out of Brazil.[21]

In addition, there are several bills before the Brazilian Congress that would implement a form of the "right to be forgotten" in Brazil, requiring that online services remove information that is deemed "irrelevant" or "outdated," even if it is true.[22] These developments conflict with Brazil's strong

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[17] The Copyright Amendment (Online Infringement) Bill 2018 https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6209

[18] Explanatory Memorandum https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6209_ems_b5e338b6-e85c-4cf7-8037-35f13166ebd4/upload_pdf/687468.pdf;fileType=application/pdf.

[19] Australian Productivity Commission, April 2016 report.

[20] *Combating Multinational Tax Avoidance – A Targeted Anti-Avoidance Law*, Australian Tax Office, https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Doing-business-in-Australia/Combating-multinational-tax-avoidance--a-targeted-anti-avoidance-law/.

[21] *Localization Barriers to Trade: Why Demanding Too High a Price for Market Access Threatens Global Innovation*, Global Trade Magazine (Oct. 6, 2016), http://www.globaltrademag.com/global-trade-daily/localization-barriers-trade.

[22] Matt Sandy, *Brazilian Lawmakers Threaten to Crack Down on Internet Freedom*, Time (Jan. 20, 2016), http://time.com/4185229/brazil-new-internet-restrictions/.

commitment to freedom of expression and access to information, and would present market access barriers for both small and large U.S. services seeking to enter the Brazilian market.

For privacy regulations to be relevant and effective in today's environment, the U.S. and Brazil should advocate for interoperability of privacy regimes and frameworks that ensure accountable cross-border flows of information, while both protecting consumers and allowing for the benefits of e-commerce. For example, the U.S. should encourage Brazil to consider the APEC Cross Border Privacy Rules model as a best practice.[23]

Customs Barriers To Growth In E-Commerce

Brazil's de minimis threshold (Decree No. 1804 of 1980 and Ministry of Finance Ordinance No. 156 of 1999) — for which no duty or tax is charged on imported items – only applies to C2C transactions under $50. The current level is not commercially significant and serves as a barrier to e-commerce, increasing the time and cost of the customs clearance process for businesses of all sizes. At its current level, Brazil's de minimis increases transactional costs for Brazilian businesses and restricts consumer choice and competition in the market. IA encourages the removal of this barrier to trade by extending the de minimis threshold to both B2C and B2B transactions and increasing the de minimis threshold to a commercially meaningful level.

Data Flow Restrictions And Service Blockages

Brazil maintains a variety of localization barriers to trade in response to the weak competitiveness of its domestic tech industry. It provides tax incentives for locally sourced information and communication technology (ICT) goods and equipment (Basic Production Process (PPB) – Law 8387/91, Law 8248/91, and Ordinance 87/2013); it offers government procurement preferences for local ICT hardware and software (2014 Decrees 8184, 8185, 8186, 8194, and 2013 Decree 7903); it does not recognize the results of conformity assessment procedures performed outside of Brazil for equipment connected to telecommunications networks (ANATEL's Resolution 323).

The GSI (Institutional Security Office) revised its cloud guidelines and determined that Government data should have some types of data localized. While this is only applicable to government data and these are just guidelines, this precedent raises serious concerns.

Filtering, Censorship, And Service-Blocking

Brazil has blocked WhatsApp multiple times as part of legal disputes related to specific users, cutting off access to a U.S.-based messaging service for more than one-hundred million Brazilians in the process.[24]

Restrictions On U.S. Cloud Service Providers

Presidential Decree 8135 of November 5, 2013 and subsequent Ordinances (No. 141 of May 2, 2014, and No. 54 of May 6, 2014) required that federal agencies procure email, file sharing, teleconferencing, and VoIP services from Brazilian "federal public entities" such as SERPRO, Brazil's Federal Data

[23] *Cross Border Privacy Rules System*, CBPRS, http://www.cbprs.org/ (last visited Oct. 25, 2016).

[24] *See WhatsApp Officially Un-Banned In Brazil After Third Block in Eight Months*, The Guardian (July 19, 2016), https://www.theguardian.com/world/2016/jul/19/whatsapp-ban-brazil-facebook;https://www.theguardian.com/world/2016/jul/19/whatsapp-ban-brazil-facebook Glen Greenwald & Andrew Fishman, *WhatsApp, Used By 100 Million Brazilians, Was Shut Down Nationwide by a Single Judge* , The Intercept (May 2, 2016), https://theintercept.com/2016/05/02/whatsapp-used-by-100-million-brazilians-was-shut-down-nationwide-today-by-a-single-judge/.https://theintercept.com/2016/05/02/whatsapp-used-by-100-million-brazilians-was-shut-down-nationwide-today-by-a-single-judge/.

Processing Agency. Such measures disrupt the global nature of the ICT industry and disadvantage both access to technology in Brazilian and the ability of U.S. ICT companies to do business in Brazil. The Brazilian Government (through the Ministry of Planning and the Ministry of Communications, Science and Technology) announced in August 2016, that Decree 8135 would be revoked. However, actual revocation of such legal imposition has not yet taken place, creating substantial uncertainty. The U.S. government should urge Brazil to immediately revoke this Decree and its Ordinances and ensure that any new measures avoid provisions that would hinder Brazilians' access to best-in-class, cloud-based communication services.

Overly Restrictive Regulation Of Online Services

Brazil is currently debating revisions to the legal basis for its telecom sector, and some legislators have supported the idea of regulating online services in a similar way to telecom services.[25] However, this approach risks raising costs for online entrepreneurs and halting Brazil's innovation due to increased bureaucracy and artificial limits on services, harming both local consumers and foreign providers of internet services.

Sharing Economy Barriers

Drivers seeking to provide transportation services outside of the traditional taxi industry and via apps face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services.

- → *Licensing restriction:* In July 2017, São Paulo limited eligibility to only those cars licensed in the São Paulo municipality (a subset of the metropolitan area) and required drivers to follow a strict dress code.

- → *Data-sharing demands*: Several municipalities across Brazil (including Sao Paulo, Rio, Brasilia, Porto Alegre, and Vitoria) have passed regulations requiring companies providing transportation apps to share granular-level data, for instance pick-up and drop-off location, complete with exact longitude and latitude. This level of granularity is beyond what is necessary for regulators and cities to carry out their legitimate oversight and planning functions and it seriously jeopardizes both consumers' privacy and businesses' competitive interests.

Unbalanced Copyright Frameworks And Non-IP Liability

Historically, the 'Marco Civil' law[26] has offered legal certainty for domestic and foreign online services and has created conditions for the growth of the digital economy in Brazil.[27] Recently, there have been attempts to revisit or change key provisions of this legal framework, including by compelling online companies to assume liability for all user communications and publications.[28]

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[25] *Taxation on OTT in Brazil*, Tech in Brazil (June 10, 2015), http://techinbrazil.com/taxation-on-ott-in-brazil; Juan Fernandez Gonzalez, *Brazil's Creators Demand VOD Regulation,* Rapid TV News (July 5, 2016), http://www.rapidtvnews.com/2016070543482/brazil-s-creators-demand-vod-regulation.html#axzz4O8DTZE5y.

[26] Brazilian Civil Rights Framework for the Internet, Law No. 12.965 (2014).

[27] Angelica Mari, *Brazil Passes Groundbreaking Internet Governance Bill*, ZDNet, http://www.zdnet.com/brazil-passes-groundbreaking-internet-governance-bill-7000027740/.

[28] Andrew McLaughlin, *Brazil's Internet is Under Legislative Attack*, Medium https://medium.com/@mcandrew/brazil-s-internet-is-under-legislative-attack-1416d94db3cb#.dy4aak1yk.https://medium.com/@mcandrew/brazil-s-internet-is-under-legislative-attack-1416d94db3cb#.dy4aak1yk.

Other Brazilian proposals would require online services to censor criticism of politicians and others, via a 48-hour notice-and-takedown regime for user speech that is "harmful to personal honor." This is a vague and overbroad standard that would present a significant market access barrier for U.S. companies seeking access to the Brazilian market.

Canada

Burdensome Or Discriminatory Data Protection Regimes

The Privacy Commissioner has published guidance that argues existing legislation allows for a 'right to be forgotten' in Canada.[29]

Customs Barriers To Growth In E-Commerce

Canada's *de minimis* threshold (the level below which no duty or tax is charged on imported items) remains at CAD $20 (approximately USD $15), the lowest of any industrialized country and among the lowest in the entire world.[30] For comparison, the *de minimis* threshold for items imported into the U.S. is $800 USD – over 40 times higher than Canada's.[31] This low threshold, which has not been adjusted since the 1980s, creates an unnecessary barrier to trade through increased transaction costs for Canadian businesses, and restricts consumer choice and competition. Raising the *de minimis* threshold would help U.S. and Canadian small businesses participate more fully in global trade and e-commerce. Recent studies have also shown that any gains realized by collecting additional duties are often outweighed by the cost of assessing and processing of the high volume of shipments that fall below the low threshold.[32] In fact, proposals to increase the *de minimis* threshold have been shown to be revenue neutral or even positive for the Canadian Government.[33]

Chile

Burdensome or Discriminatory Data Protection Frameworks

Chile has joined several other governments in Latin America in responding reactively to data privacy concerns by advancing heavy handed data privacy bills that seek to align their privacy regulations with GDPR, without fully comprehending the impact on the local economy or how the systems are effectively implemented and enforced. These draft pieces of legislation raise a number of challenges for U.S. companies, including 1) scope of application and extraterritoriality; 2) introduction of the right to be forgotten; 3) express consent for all situations; and 4) prior authorization by the authority for international data transfer. In some cases, these rules could have a crippling impact on all U.S. companies that need to transfer data across borders.

[29] https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-online-reputation/pos_or_201801/

[30] Christine McDaniel et al., *Rights of Passage: The Economic Effects of Raising the De Minimis Threshold in Canada*, C.D. Howe Institute, at 1 (June 23, 2016), https://www.cdhowe.org/public-policy-research/rights-passage-economic-effects-raising-dmt-threshold-canada.

[31] *Id*. at 2.

[32] *See, e.g.*, *id.*

[33] *Id*.

Unbalanced Copyright And Liability Frameworks

Chile does not have a comprehensive framework of copyright exceptions and limitations for the digital economy. Chilean *Intellectual Property Law* includes a long but inflexible list of rules[34] that does not clearly provide for open limitations and exceptions that are necessary for the digital environment – for instance, flexible limitations and exceptions that would enable text and data mining, machine learning, and indexing of content. This handful of limitations leaves foreign services and innovators in a legally precarious position. In order to reduce market access barriers to U.S. services, we urge USTR to work with Chile to implement a multi-factor balancing test analogous to fair use frameworks in the U.S and Singapore, to enable copyright-protected works to continue to be used for socially useful purposes that do not unreasonably interfere with the legitimate interests of copyright owners.

China

Data Flow Restrictions And Service Blockages

China imposes numerous requirements on internet services to host, process, and manage data locally within China, and places significant restrictions on data flows entering and leaving the country.[35]

Discriminatory Or Non-Objective Application Of Competition Regulations

Chinese competition regulators continue to use the Anti-Monopoly Law (AML) to intervene in the market to advance industrial policy goals. In many cases involving foreign companies, China's enforcement agencies have implemented the AML to advance industrial policy goals and reduce China's perceived dependence upon foreign companies, including in cases where there is no evidence of abuse of market power or anti-competitive harm.

The Chinese companies that benefit from these policies are often national champions in industries that China considers strategic, such as commodities and high-technology. Through its AML enforcement, China seeks to strengthen such companies and, in apparent disregard of the AML, encourages them to consolidate market power, contrary to the normal purpose of competition law. By contrast, the companies that suffer are disproportionately foreign.

We urge continued U.S. government engagement on this issue to ensure that competition laws in China are not enforced in a discriminatory manner.

Electronic Payments

The People's Bank of China (PBOC) released Notification No. 7 in March 2018 that restricted foreign institutions that intend to provide electronic payment services for domestic or cross-border transactions. Notification No. 7 mandates service providers set up a Chinese entity and obtain a payments license. The PBOC has subsequently blocked foreign entities from obtaining payment license by restricting the ability to acquire existing licensed entities and by stopping foreign entities from applying for licenses, and by not approving new foreign entity applications, including for those already in the pipeline. The inconsistent interpretation has resulted in the blocking or delaying the launch and operation of new electronic payment services provided by U.S. companies.

[34] Law No. 17.336 on Intellectual Property (as amended 2014), Art. 71.

[35] *Data localization,* AmChamChina, http://www.amchamchina.org/policy-advocacy/policy-spotlight/data-localization

Filtering, Censorship, And Service-Blocking

In the world's biggest market, China, the services of many U.S. internet platforms are either blocked or severely restricted. Barriers to digital trade in China continue to present significant challenges to U.S. exporters.

China imposes numerous requirements on internet services to host, process, and manage data locally within China, and places significant restrictions on data flows entering and leaving the country.[36] China actively censors – and often totally blocks – cross border internet traffic. It has been estimated that approximately 3,000 internet sites are totally blocked from the Chinese marketplace, including many of the most popular websites in the world. High-profile examples of targeted blocking of whole services include China's blocking of Facebook, Picasa, Twitter, Tumblr, Google search, Foursquare, Hulu, YouTube, Dropbox, LinkedIn, and Slideshare. This blocking has cost U.S. services billions of dollars, with a vast majority of U.S. companies describing Chinese internet restrictions as either "somewhat negatively" or "negatively" impacting their capacity to do business in the country.

At the same time, Chinese-based internet firms such as Baidu and Tencent are not blocked in China, nor are they blocked in the U.S. This gives Chinese firms an unfair commercial advantage over U.S.-based internet companies.

Restrictions on U.S. Cloud Service Providers

U.S. cloud services providers (CSPs) are among the strongest American exporters, supporting tens of thousands of high-paying American jobs and making a strong contribution toward a positive balance of trade. While U.S. CSPs have been at the forefront of the movement to the cloud in virtually every country in the world, China has blocked them. Draft Chinese regulations combined with existing Chinese laws are poised to force U.S. CSPs to transfer valuable U.S. intellectual property, surrender use of their brand names, and hand over operation and control of their business to a Chinese company in order to operate in the Chinese market. Without immediate U.S. government intervention, China is poised to implement fully these restrictions, effectively barring U.S. CSPs from operating or competing fairly in China.

Recently, China's Ministry of Industry and Information Technology (MIIT) has proposed two draft notices – Regulating Business Operation in Cloud Services Market (2016) and Cleaning up and Regulating the Internet Access Service Market (2017). These measures, together with existing licensing and foreign direct investment restrictions on foreign CSPs operating in China under the Classification Catalogue of Telecommunications Services (2015) and the Cybersecurity Law (2016), would require foreign CSPs to turn over essentially all ownership and operations to a Chinese company, forcing the transfer of incredibly valuable U.S. intellectual property and know-how to China.

More specifically, these measures 1) prohibit licensing foreign CSPs for operations; 2) actively restrict direct foreign equity participation of foreign CSPs in Chinese companies; 3) prohibit foreign CSPs from signing contracts directly with Chinese customers; 4) prohibit foreign CSPs from independently using their brands and logos to market their services; 5) prohibit foreign CSPs from contracting with Chinese telecommunication carriers for Internet connectivity; 6) restrict foreign CSPs from broadcasting IP addresses within China; 7) prohibit foreign CSPs from providing customer support to Chinese customers; and 8) require any cooperation between foreign CSPs and Chinese companies be disclosed in detail to regulators. These measures are fundamentally protectionist and anti-competitive.

[36] *Data localization,* AmChamChina, http://www.amchamchina.org/policy-advocacy/policy-spotlight/data-localization

Further, China's draft notices are inconsistent with its WTO commitments as well as specific commitments China has made to the U.S. Government in the past. In both September 2015 and June 2016, China agreed that measures it took to enhance cybersecurity in commercial sectors would be non-discriminatory and would not impose nationality-based conditions or restrictions.

Given this very serious situation, it is critical that the U.S. secure a Chinese commitment to allow U.S. CSPs to compete in China under their own brand names, without foreign equity restrictions or licensing limitations, and to maintain control and ownership over their technology and services. Chinese CSPs are free to operate and compete in the U.S. market, and U.S. CSPs should benefit from the same opportunity in China.

Overly Restrictive Regulation Of Online Services

China's revised Telecommunications Services Catalog released in 2015 expands regulatory oversight of new services not typically regulated as telecom services. China's classification of Cloud Computing, online platforms, and content delivery networks as Value Added Telecom Services (VATS) not only has far-reaching consequences for market access and the development of online services in China, but also runs counter to China's WTO commitments. For example, cloud computing is traditionally classified as a Computer and Related Service, not a Telecommunications Service. Applying licensing obligations to online platforms imposes a number of market access limitations and regulatory hurdles, making it more difficult for online companies to participate in the Chinese market. The Catalog subjects a broad set of services to cumbersome, unreasonable, and unnecessary licensing restrictions, imposes new conditions on Telecommunications Service suppliers with longstanding business in that country, and impedes market access to foreign suppliers of computer and related services by classifying certain computer and related services such as cloud computing as VATS.

Colombia

Burdensome or Discriminatory Data Protection Regimes

IA encourages USTR to monitor developments with Colombia's Data Protection Authority. One of the top contenders to lead the DPA is an academic who has publicly stated opposition to recognizing the U.S. as a country that provides adequate levels of protection for personal data.

Overly Restrictive Regulation of Online Services

Colombia has proposed a number of problematic measures aimed at online services and platforms. One bill in Congress proposed by the Ministry of Transportation seeks to subject online platforms used for the provision of transportation services to requirements of registration, prior authorization, and database sharing with authorities.[37] The Colombian Ministry of ICTs is evaluating whether or not to extend broadcasting and public utility regulation to streaming platforms, and seeks to propose a bill to reform the TV sector. A bill in Congress aims at subjecting subscription-based audiovisual streaming platforms to the television public utility legal framework. In addition, there are secondary regulatory initiatives to classify audiovisual streaming services as telecommunications services. Finally, there is a

[37] Draft Law Number 126 Senate through which the Private Transportation Service is created by Technology Platforms and other provisions, Republic of Colombia Congress (Mar. 9, 2015), http://www.imprenta.gov.co/gacetap/gaceta.mostrar_documento?p_tipo=05&p_numero=126&p_consec=43703.

bill proposing to extend the scope of application of Colombian data protection law to all processing performed abroad by electronic means of personal data of people located in the country.[38]

Colombia has also considered a tax proposal that would raise VAT tariffs, remove long standing VAT exemptions, and make online services provided from abroad subject to VAT in Colombia, raising barriers for foreign companies in the ICT sector.[39] This initiative seems focused on compelling foreign internet services and platforms to contribute locally, as demonstrated by the public comments of several sponsors of the proposal.

These measures are likely to have a disproportionate impact on U.S. services. Complex regulations targeted at foreign services will be difficult to implement and will likely drive smaller digital services away from entering the Colombian market.

As Colombia works to adapt national frameworks to promote the digital economy and innovation, USTR should encourage Colombia to avoid creating market access barriers that could halt the growth of new online services that are critical to Colombia's growing economy.

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles.

- → *License cap:* In February 2015, the Ministry of Transport froze the granting of any new for-hire vehicle licenses. No technical study or research of any sort was conducted to provide an underlying rationale for this licensing freeze and the ministry made no public statement justifying the step.

Unbalanced Copyright And Liability Frameworks

To date, Colombia has failed to comply with its obligations under the U.S.-Colombia Free Trade Agreement to provide copyright safe harbors for internet service providers. A bill to implement the U.S.-Colombia FTA copyright chapter is pending, but while this bill contains a number of new copyright enforcement provisions, it lacks both fair use limitations and exceptions and intermediary liability safe harbor provisions that are required under the Colombia FTA.[40] Without a full safe harbor, intermediaries remain liable for civil liability. Action should be taken by the government to provide a full safe harbor as required by the Colombia FTA.

Unilateral Or Discriminatory Tax Regimes

Colombia's Tax Authority has announced that the Financing Law bill (intended to be enacted by December 2018) will include a Permanent Establishment obligation for foreign companies that "have

[38] Proyecto de Ley Estatutaria 91 de 2016 Senado, Republic of Colombia Congress, http://www.imprenta.gov.co/gacetap/gaceta.mostrar_documento?p_tipo=18&p_numero=91&p_consec=45526.

[39] 178/2016 C Reforma Tributaria, Republic of Colombia Congress (Oct. 19, 2016), http://www.camara.gov.co/portal2011/proceso-y-tramite-legislativo/proyectos-de-ley?option=com_proyectosdeley&view=ver_proyectodeley&idpry=2247.

[40] USTR, Intellectual Property Rights In in the US-Colombia Trade Promotion Agreement, US-U.S.-Colombia Trade Agreement, https://ustr.gov/uscolombiatpa/ipr visited Oct. 25, 2016).

significant economic activities in the country." The bill appears to be designed to require digital economy companies to pay taxes on the same income that is taxed in the United States.

Ecuador

Burdensome or Discriminatory Data Protection Regimes

The National Public Data Registration Agency has been working on a data protection bill that, according to reports, "will be based on the GDPR" and will be submitted to Congress in 2019. Key topics for the bill include strict requirements on express consent and a right to be forgotten provision.

Egypt

Sharing Economy Barriers

Drivers seeking to provide transportation services outside of the traditional taxi industry and via apps face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services.
Licensing fees: The law governing app-based transportation services requires drivers to obtain an "operation card" and an "operation permit" that, depending on executive regulations pending as of August 2018, may come with disproportionate costs of up to EGP 1,000 per year and EGP 2,000 per year, respectively.

- → *Limit on drivers per vehicle:* Pending executive regulations may dictate that any licenses vehicle may only ever be operated by the same single individual.

- → *Data sharing requirement*: Pending executive regulations may require app providers to share data with authorities outside of due legal process.

European Union (EU)

Broad, Unclear, and Intrusive Monitoring and Filtering Obligations

If implemented, Article 13 of the proposed Copyright Directive – read in conjunction with Recital 38 – would narrow the existing EU copyright safe harbor for hosting providers in unpredictable ways across different member states, subjecting online services to incalculable liability risks and requiring the costly deployment of content filtering technologies to "prevent the availability" of certain types of content.

This proposed requirement deviates from shared U.S. and EU norms that have been critical to the growth of the commercial internet. The internet is a vibrant and economically valuable platform in large part because of balanced intermediary liability laws, which permit users and small businesses to post material – such as videos, reviews, and pictures – online without being unduly exposed to liability for the content of that material. Both the U.S. (under Section 512 of the Digital Millennium Copyright Act) and the EU (under Articles 12-15 of the E-Commerce Directive) create a "safe harbor" that protects online services from being liable for what their users do, as long as the service acts responsibly, such as by taking down content after being given notice that it infringes copyright.

However, the recent proposal by the Commission would deviate from this common transatlantic approach to intermediary liability by requiring service providers to "take measures . . . to prevent the

availability on their services of works or other subject-matter identified by rightholders." This language would create new, broad, and unclear filtering obligations that could be implemented in different and inconsistent ways across member states. Service providers would be subject to a moving target in the EU for years to come. Larger providers would face critical liability risks, while smaller startups and entrepreneurs would be deterred from entering the market, given the difficulty of raising funds from venture capitalists that have consistently characterized such rules as strong impediments to investment.[41] Moreover, such filtering technology will be expensive for large and small services to develop and maintain.

U.S. stakeholders have concerns about the Court of Justice of the European Union's (CJEU's) decision in *GS Media v. Sanoma Media*, which held that linking to copyrighted content posted to a website without authorization can itself be an act of copyright infringement.[42] This case is already generating additional lawsuits testing the extent of the ruling, which may create new liability for online services doing business in the EU. It has also resulted in new monetary demands from publishers to those who provide links to content.

In addition, in the *Delfi* opinion, the European Court of Human Rights held an Estonian news site responsible for numerous user comments on articles, even though the company was acting as an intermediary, not a content provider, when hosting these third-party comments. In response to that decision, the Delfi.ee news site shut down its user comment system on certain types of stories, and the chief of one newspaper association stated: "This ruling means we either have to start closing comments sections or hire an armada of people to conduct fact checking and see that there are no insulting opinions." Without clarification following this opinion, numerous internet services are likely to face increased liability risks and market access barriers in Estonia.

Burdensome or Discriminatory Data Protection Regimes

The E.U. General Data Protection Regulation is now in effect.[43] There is still considerable ambiguity in the text. Specifically, how E.U. data protection authorities choose to interpret the law will have a significant impact on companies' ability to operate in the E.U. and offer consistent services and products across the globe.

Privacy Shield is indispensable to many U.S. companies, the U.S. economy, and the U.S.-EU economic relationship. The program provides companies on both sides of the Atlantic with a mechanism to comply with data protection requirements when transferring personal data from the EU and Switzerland to the U.S. in support of transatlantic commerce. Its usefulness may be threatened by future court challenges and modifications arising out of the annual review process – such as potential restrictions on automated processing/profiling.[44] Standard Contractual Clauses (SCCs) may also be threatened by ongoing litigation.[45] Significant challenges to these transfer mechanisms threaten the viability of billions of dollars in EU-U.S. data transfers.

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[41] Fifth Era, *The Impact of Internet Regulation on Early Stage Investment* (Nov. 2014), http://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/5487f0d2e4b08e455df8388d/1418195154376/Fifth+Era+report+lr.pdf.

[42] C–GS Media BV v Sanoma Media Netherlands BV et al., ECLI:EU:C:2016:644, European Court of Justice (8 September 2016).

[43] *See* Warwick Ashford, *D-Day for GDPR is 25 May 2018*, Computer Weekly (May 4, 2016), http://www.computerweekly.com/news/450295538/D-Day-for-GDPR-is-25-May-2018.

[44] http://www.computerweekly.com/news/450302513/Slow-response-to-Privacy-Shield-EU-US-data-transfer-programme.

[45] *See, e.g.,* Allison Grande, *Irish Regulator Says Data Transfer Row Will Deliver Clarity*, Law 360 (Sept. 30, 2016), https://www.law360.com/articles/846924?sidebar=true.

IA is also concerned about measures in the ePrivacy Bill that would prohibit processing of all electronic communications data and metadata, except in very limited circumstances where there is explicit consent from all parties.

Customs/Trade Facilitation

The European Commission introduced a pair of proposed regulations (collectively, the Goods Package) on December 19, 2017. The Goods Package includes a Proposal for a Regulation on Enforcement and Compliance in the Single Market for Goods (the Enforcement Regulation). The Enforcement Regulation is aimed at increasing enforcement of existing EU product legislation and advancing customer safety. However, as currently drafted, the Goods Package will do little to improve overall customer safety, and the unintended effects may actually increase overall risk for EU customers. The current proposal includes burdensome requirement for a dedicated "Responsible Person for compliance information" (Responsible Person) that will significantly limit access to the EU marketplace for U.S. small businesses. More specifically, the manufacturers of all goods sold into the EU must appoint a person located in the EU to hold compliance documentation and who will likely be accountable for non-compliance more broadly with liability for sellers who offer a product where such Responsible Person has not been appointed. The requirement does not distinguish between types of goods, nor does it provide any waivers for SMEs or small volume sellers. The Responsible Person requirement will hurt U.S. resellers particularly hard because, in many cases, manufacturers of low-risk merchandise that aren't focused on the EU won't appoint a Responsible Person, making resale into the EU virtually impossible. As a whole, the proposed legislation could be inconsistent with the EU's TBT obligations on conformity assessment measures, as well as have the effect of creating unnecessary obstacles to international trade.

Data Flow Restrictions And Service Blockages

IA is monitoring new developments in France and Germany, including efforts to establish local infrastructure for cloud data processing in France and Germany, and new local data retention requirements for internet services in Germany.

Non-IP Intermediary Liability

The EU has proposed a draft terrorism regulation that would include a one-hour turnaround time for removing terrorist content upon notification from national authorities, with sanctions for individual violations and systematic failures. This regulation would also require the adoption of proactive measures to prevent abuse and re-uploading of terrorist content (in contravention of Article 15 of the e-Commerce Directive), and would require hosting providers to identify benchmarks and timelines for implementation. Proposed sanctions for violating this regulation include fines of up to 4 percent of global turnover. In addition, national authorities across the EU would be able to impose specific technical requirements on companies, raising the likelihood of a web of conflicting and impractical requirements that would make it more difficult for US services to compete in the European market, and decreasing the likelihood of a coordinated effort to fight against terrorist content.

Separately, in the Delfi opinion, the European Court of Human Rights held an Estonian news site responsible for numerous user comments on articles, even though the company was acting as an intermediary, not a content provider, when hosting these third-party comments. In response to that decision, the Delfi.ee news site shut down its user comment system on certain types of stories, and the chief of one newspaper association stated: "This ruling means we either have to start closing comments sections or hire an armada of people to conduct fact checking and see that there are no insulting opinions." Without clarification following this opinion, numerous internet services are likely to face increased liability risks and market access barriers in Estonia.

Overly Restrictive Regulation Of Online Services

There are currently active consultations and proposals regarding the extension of certain telecom and broadcasting obligations to online voice and video services, including obligations concerning emergency services, limited accessibility requirements, data portability, interoperability, confidentiality of communications, and data security,[46] as well as local content quotas relating to the Audiovisual Media Services Directive.

Separately, the EU is considering a new regulation on "platform-to-business" (P2B) relations that would require online intermediaries to provide redress mechanisms and meet aggressive transparency obligations concerning delisting, ranking, differentiated treatment, and access to data. These rules would apply not just to marketplaces with business users but also to non-contractual relations between businesses and platforms. Among other obligations, online intermediaries would be required to "outline the main parameters determining ranking," including "any general criteria, processes, specific signals incorporated into algorithms or other adjustment or demotion mechanisms used in connection with the ranking."[47] These and other obligations represent disproportionate requirements that are likely to create market access barriers for developers, platforms, and SMEs seeking access to the EU market.

Recently, the European Parliament has sought to strengthen the P2B regulation by increasing the types of platforms covered (including mobile operating systems), banning vertical integration, introducing 'choice screens' for default services, and exposing search engines to more requirements. IA encourages USTR to monitor these developments and ensure that the P2B regulation does not threaten trade secrets and potentially violate the principles in Art. 19.16 of the USMCA.

Sharing Economy Barriers

Ridesharing companies face two general categories of barriers that prohibit them from effectively competing across EU member states: market access restrictions and operational restrictions. While many of these restrictions may directly apply to drivers using ridesharing networks, they directly affect the provision of ridesharing companies' software application services by limiting the scale, raising the cost, undermining the efficiency, and eroding the quality that business models using these technologies can otherwise generate. These restrictions go beyond what is necessary to advance any legitimate public interest objective and instead serve to prevent competition with domestic traditional transportation providers.

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[46] *See* Fact Sheet, *State of the Union 2016: Commission Paves the Way for More and Better Internet Connectivity for All Citizens and Business,* European Commission (Sept. 14, 2016), http://europa.eu/rapid/press-release_MEMO-16-3009_en.htm; *Report On OTT Services,* BEREC (Jan. 29, 2016), http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5751-berec-report-on-ott-services; Lisa Godlovitch et al., *Over-the-Top (OTT)Players: Market Dynamics and Policy Challenges*, European Parliament (Dec. 15, 2015), http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2015)569979 (last visited Oct. 25, 2016).

[47] https://ec.europa.eu/digital-single-market/en/news/regulation-promoting-fairness-and-transparency-business-users-online-intermediation-services.

Unbalanced Copyright Frameworks And Other Issues

The EU is readying changes to its copyright framework which will make it harder for U.S. businesses to effectively compete in Europe and will burden U.S. companies with compliance obligations if they decline to pay European companies or organizations for activities that are entirely lawful and legal under the U.S. copyright framework. The copyright proposal diminishes needed checks and balances, tilting rights in favor of just rights holders, in an approach that will significantly harm American exporters and innovators.

The European Commission's Copyright Directive includes several elements likely to restrict a wide range of internet services in European markets.[48] Some of these restrictions are also reflected in a September 2017 communication from the European Commission.[49] The proposed changes would represent a significant departure by the EU from its shared approach with the U.S. on the foundational principles of the free and open internet, and would significantly restrict exports of U.S. online services to the EU.

Particular problems with the Directive include new "neighboring rights" for news publishers that conflict with the Berne Convention (Article 11), broad and unclear monitoring and filtering obligations for service providers (Article 13), as well as potentially intrusive multi-stakeholder processes regarding the design and operation of content recognition technologies (Article 13). These barriers are discussed in more detail below, along with other concerns about restrictions on text and data mining and liability for hyperlinks.

We encourage USTR to reiterate the U.S. government's opposition to these and other measures as currently drafted and to seek obligations through the upcoming U.S./EU bilateral trade negotiations to prohibit such measures. Departures by the EU from the proven, successful policies that we have followed to date on both sides of the Atlantic risk thwarting the continued growth of innovative and creative industries alike.

Ancillary Copyright And Neighboring Rights

"Ancillary copyright" or "neighboring rights" laws refer to legal entitlements for quotations or snippets that enable countries to impose levies or other restrictions on the use of this information. Such levies negatively impact the ability of U.S. services to use or link to third-party content, including snippets from publicly available news publications.

The subject matter covered by ancillary copyright is ineligible for copyright protection under international law and norms. Article 10(1) of the Berne Convention provides that "[i]t shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries."[50] It is further provided as an example that

[48] Eur. Comm'n, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (Sept. 14, 2016), https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market; World Intellectual Property Organization (WIPO), Berne Convention for the Protection of Literary and Artistic Works (as amended on Sept. 28, 1979), Eur. Comm'n, Directive of the European Parliament and of the Council on copyright in the Digital Single Market (2016 draft), http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283698.

[49] https://ec.europa.eu/digital-single-market/en/news/communication-tackling-illegal-content-online-towards-enhanced-responsibility-online-platforms. This communication discusses the implementation of "proactive measures" to detect and filter problematic content online, both for copyright and non-copyright purposes.

[50] Berne Convention for the Protection of Literary and Artistic Works, art. 10(1), last revised July 24, 1971, amended Oct. 2, 1979, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221 (hereinafter "Berne Convention").

"quotations from newspaper articles and periodicals in the form of press summaries" are fair practice. As incorporated into TRIPS Article 9, Article 10(1) of the Berne Convention creates an obligation on member states to allow for lawful quotations.[51]

However, ancillary copyright laws impose a levy on quotations in direct violation of these obligations under TRIPS and create new rights contradictory to international standards meant to protect market access. For example, these laws would require online services that aggregate news content to pay a tax to the news publisher for the ability to link to one of its articles. Rather than attempting to navigate complex individual negotiations with publishers in order to include a headline or other small amount of newsworthy content on a third-party site, online services might simply stop showing such content, causing traffic to news publishers to plunge. These laws create a stealth tax on U.S. internet services operating in foreign jurisdictions, and unfairly disadvantage internet services from offering services otherwise protected under copyright law by raising barriers to market entry.

As discussed below, previous implementations of this principle in EU member states such as Germany and Spain have generated direct and immediate market access barriers for U.S. services.[52] The EU's new proposal, like those earlier provisions, runs afoul of international obligations in the Berne Convention by giving some publishers the right to block internet services from making quotations from a work.[53]

The threat posed by ancillary copyright laws to U.S. stakeholders is genuine and timely, especially as Europe considers more widespread proposals that would violate international copyright obligations to the detriment of U.S. copyright stakeholders, and hinder the growth of new business models. The discriminatory harm done by these stealth taxes on search engines and news aggregators creates economic and legal barriers to entry that effectively deny market access and fair competition to U.S. stakeholders whose business models include aggregation of quotations protected by international copyright standards. Expressing such concerns after legislation is enacted or is inevitable is too late.

Liability for Hyperlinks

Finally, IA has concerns about the Court of Justice of the CJEU's decision in *GS Media v. Sanoma Media*, which held that linking to copyrighted content posted to a website without authorization can itself be an act of copyright infringement.[54] This case is generating additional lawsuits testing the extent of the ruling, which may create new liability for online services doing business in the EU. It has also resulted in new monetary demands from publishers to those who provide links to content. We urge USTR to monitor this situation and engage with European counterparts to prevent other negative impacts from this ruling.

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[51] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, art. 9.

[52] *EU Lawmakers Are Still Considering This Failed Copyright Idea*, Fortune (March 24, 2016), http://fortune.com/2016/03/24/eu-ancillary-copyright/http://fortune.com/2016/03/24/eu-ancillary-copyright/ (describing failed attempts in Germany and Spain, which included causing Google to shutdown its Google News service in Spain and partially withdraw its news service in Germany, and news publishers' revenue to tank in both countries).

[53] Eur. Comm'n, Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (Article 11), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0596&from=EN.

[54] C–*GS Media BV v Sanoma Media Netherlands BV* et al., ECLI:EU:C:2016:644, European Court of Justice (8 September 2016).

Restrictions on Text and Data Mining

Finally, the European Commission proposals for text and data mining further restrict technology startups and businesses of all types from engaging in cutting-edge research and data analytics. By limiting who can legally engage in machine learning, these restrictive proposals will have a significant impact on the emerging market and jobs associated with data analytics, technology, and artificial intelligence.

Weakening of E-Commerce Directive Protections for Internet Services in EU Member States

Despite existing protections under the E-Commerce Directive for internet services that host third-party content, courts in some EU member states have excluded certain internet services from the scope of intermediary liability protections. For example, one platform that hosted third-party content in Italy was found liable because it offered "additional services of visualisation and indexing" to users.[55] Another U.S.-based platform was found liable because it engaged in indexing or other organization of user content.[56] A third internet service was held liable for third-party content because it automatically organized that content in specific categories with a tool to find 'related videos.'[57] All of these activities represent increasingly common features within internet services, and the existence of these features should not be a reason to exclude a service from the scope of intermediary liability protections under the E-Commerce Directive, in Italy or any other member state.

Unilateral Or Discriminatory Tax Regimes

On March 21, 2018, the Commission published a proposal to introduce a 3 percent Digital Services Tax (DST) from 2020, on both large online marketplace and online advertising businesses irrespective of where the business is established. More specifically, the DST proposal would require each EU Member State to impose a tax of 3 percent on gross revenues obtained in that Member State resulting from the provision of any one of the following services: a) placing advertising on a digital interface, where the advertising appears on a user's device in the EU; b) making available a multi-sided digital interface that allows users to find and interact with other users, and which may facilitate the provision of underlying supplies of goods or services directly between users, where a user is located or based in the EU; and c) the transmission (e.g., sale) of data collected about users and generated from users' activities on digital interfaces, where the user is in the EU.

DST would apply only to companies whose worldwide revenues reported for the relevant financial year exceeds 750 million Euros and whose taxable revenues obtained within the EU during the relevant financial year exceeds 50 million Euros. The net effect is that the tax will be applied to primarily U.S. companies and it will become more expensive for U.S. companies of all sizes, not just those that surpass the thresholds to export goods and services to Europe.

As a result, DST may violate the EU's commitments under the WTO's General Agreement on Trade in Services (GATS) by discriminating against U.S. companies in favor of EU companies. More specifically, under the GATS, the EU has agreed to provide "national treatment" to services and service suppliers of other WTO Members in the economic sectors that are covered by the DST. This means that the EU may

[55] RTI v. Kewego (2016).

[56] Delta TV v. YouTube (2014).

[57] RTI v. TMFT (2016).

not discriminate against those services and service suppliers in favor of its own "like" domestic services and service suppliers.

The EU should refocus its efforts on reaching consensus with other leading economies within the OECD on any new digital taxation models so as to guarantee fairness and avoid discrimination and double taxation.

EU Member State Measures

Austria

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services.

- → *Vehicle requirements:* For-hire vehicles must be of a minimum length of 4.2 meters, width of 1.56 meters, height of 1.3 meters, and be equipped with air conditioning.
- → *Capital requirements:* In Vienna, vehicle fleet owners must meet a capital requirement of 7,500 euros for every car that they want to operate.
- → *This requirement is cumulative:* if someone wants to add a fifth car to a fleet of four cars, she would have to produce proof of additional available funds of 37,500 euros (5 x 7,500 euros) and not merely an additional 7,500 euros.
- → *Professional experience requirement:* To become a for-hire driver, one needs at least three years of relevant work experience.
- → *Return-to-garage rule:* For-hire vehicles must return to their company's place of business after completion of the trip unless they receive a new request during their return to the company's place of business. The request itself, however, must be accepted at the company place of business.

Belgium

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles and raising the price consumers must pay for their services.

- → *Vehicle requirements:* In the Brussels Capital Region, for-hire vehicles must cost at least 31,133.29 euros (excluding VAT) and have a wheelbase longer than 2.8 meters.

- *Exams:* In the Brussels Capital Region, any prospective independent driver must pass a test entitled "examen d'accès à la profession d'indépendant" which includes accounting and corporate finance.

- *Minimum trip duration and price:* Legislation in the three Belgian regions requires each for-hire vehicle trip to last a minimum of three hours and to cost a minimum of 90 euros.

Denmark

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services must be licensed to provide commercial passenger transport. These new entrants face multiple market access and operational restrictions that serve no public interest but are instead intended to protect incumbents.

- *License cap:* There are currently caps on the number of commercial passenger transport licenses and these caps will only be fully removed in January 2021.

- *Exams:* Prospective drivers must attend a 74-hour course and pass a test on first aid, conflict prevention, and other subjects. This test includes a Danish language test. Drivers must either join a taxi booking company or establish their own booking office, which requires a separate licensing exam that tests issues of contract, tax, insurance, employment and transportation law; work environment; economics and accounting; tender processes; conflict management; and maintaining a dispatch center.

- *Financial capacity:* Drivers must show DKK 40,000 in available funds for the first permit/vehicle and DKK 20,000 for any subsequent permit/vehicle.

- *Mandatory redundant equipment:* Vehicles must be equipped with various in-car equipment, including taximeters and signage that are redundant given current smartphone-based technology.

- *Maximum prices:* Commercial transport providers must price below set ceilings, limiting competition and the use of dynamic pricing algorithms to balance supply and demand and thus deliver consumers a more reliable service.

France

Data Flow Restrictions And Service Blockages

France's ministerial regulation on "public archives" requires any institution that produces public documents to store and process these data only on French soil. These regulations function as data localization requirements for U.S. cloud providers seeking to provide cloud services to the French public sector.

Non-IP Intermediary Liability Barriers

Prime Minister Édouard Philippe recently announced a proposal on hate speech that includes a one day removal requirement (modeled on Germany's NetzDG Law) as well as a possible one hour removal requirement for terrorist content, which could be extended to other forms of problematic content such

as "obvious" hate speech. Proposed fines for violating this law would be up to 37 million euros. Furthermore, the law would create a new status for online intermediaries called "accélérateur de contenus," which would attach additional obligation to companies that "promote, reference, and rank online content."

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services.

- → *Vehicle requirements:* For-hire vehicles must be less than 6 years old and equipped with at least four doors. They must have a minimum length of 4.5 meters, a minimum width of 1.7 meters, and 115 horsepower (electric or hybrid vehicles are exempt from these restrictions).

- → *Exams:* French law requires prospective for-hire vehicle drivers to pass stringent exams. The exams include both practical and written sections, covering topics such as general culture, business management, and English language. There is a delay of approximately 3 months between the practical and written exams. The average pass rate between May and November 2017 was approximately 14 percent due to the difficulty of the process.

- → *Capital requirements:* Drivers must provide 1,500 euros in equity or a bank guarantee when registering their company with the Ministry of Transportation.

- → *Return-to-garage rule:* Between trips, drivers must return either to their registered place of business or to an authorized off-street parking space, unless a new trip request is received on the way to either place.

- → *Geolocation prohibition:* French rules forbid for-hire drivers and apps facilitating their services from informing consumers about the availability and the location of a for-hire vehicle prior to a booking request while taxis face no such restriction.

- → *Platform liability:* French law holds app-based services liable for the transportation service provided by the drivers using the app.

Unbalanced Copyright And Liability Frameworks

Under France's "image indexation" law, an "automated image referencing service" must negotiate with a French rights collection society and secure a license for the right to index or "reference" a French image. Individual artists or photographers cannot opt out of this licensing regime. This law requires online services to seek a license for any indexation of an image published in France.[58] This law reflects the same spirit as the German and Spanish ancillary copyright regimes, insofar as it creates a regulatory structure intended to be exploited against U.S. exporters – a "right to be indexed." By vesting these indexing "rights" in a domestic collecting society, the law targets an industry that consists largely of U.S. exporters. As several industry and civil society organizations have previously noted, the law will impact a

[58] Art. L. 136-4, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032854341&fastPos=1&fastReqId=643428459&categorieLien=id&oldAction=rechTexte. Loi 2013-46 du 10 décembre 2013 Project de Loi Dispositions relatives aux objectifs de la politique de défense et à la programmation financière, rapport du Sénat, http://www.senat.fr/petite-loi-ameli/2015-2016/695.html.

wide range of online services and mobile apps.[59] These requirements present significant market access barriers for the large number of online services in the U.S. and elsewhere that work with images.

Unilateral Or Discriminatory Tax Regimes

In September 2017, the French Government adopted a decree[60] implementing a tax on revenues of paid video-on-demand services, even when the provider is based abroad, as well as a tax on online advertising revenues of video-sharing platforms even when these videos are generated by users. These two taxes were portrayed by the French media as the "Netflix tax" and the "YouTube tax," respectively, creating great uncertainty and hindering the provision of video services across borders.

Germany

Non-IP Intermediary Liability Barriers

The German NetzDG law, which is now in force, mandates removal of "obviously illegal" content within 24 hours and other illegal content within 7 days. Online services are subject to penalties of up to 50 million Euros if they are found to be out of compliance with this law. The law applies to online services with more than 2 million users in Germany, including a wide range of U.S. services. It covers provisions of the German Criminal Code connected to illegal content – not just obviously illegal content related to terrorism and abuse, but also a wide range of other activities that are criminalized under German law, including incitement to hatred, insults, and defamation.

This significant divergence from U.S. and EU frameworks on non-IP intermediary liability is concerning on its own, and is being closely observed by governments around the world that may be considering similar actions. IA urges USTR to monitor these developments and engage with counterparts in Germany and elsewhere to ensure that any measures on controversial content do not introduce burdensome market access restrictions on U.S. services.

Overly Restrictive Regulation of Online Services

The German film levy law extends film funding levies from German to foreign pay video on demand (VOD) services despite the EU Audiovisual Media Services Directive's Country of Origin principle, according to which providers only need to abide by the rules of a Member State rather than in multiple countries. The law further extends the levy to foreign ad-funded VOD services insofar as they make cinematographic works available to Germans. Such services have to pay a proportion of their German revenues to the regulatory body, thus hindering cross-border businesses and raising costs for consumers.

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the

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[59] Open Letter to Minister Azoulay, March 2016, available at http://www.ccianet.org/wp-content/uploads/2016/03/OpenLetter-to-Minister-Azoulay-Image-Index-Bill-on-Creation-Eng.pdf.

[60] https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=EF7CB30D13C42B2ED3740B0441D1DEA2.tpdila21v_3?cidTexte=JORFTEXT000035595843&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000035595430

taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services.

- *Exams:* Local chambers of commerce organize exams for prospective operators. Exam spots are limited and typical waiting times can stretch up to several months. Some parts of the exam have nothing to do with running a for-hire vehicle company (for example, where to dispose of special waste). These tests are very burdensome and a major hurdle for prospective drivers to open an independent business, resulting in a failure rate of approximately 70 percent.

- *Return-to-garage rule:* For-hire vehicle drivers must return to their place of business/residence after completion of each trip, unless they receive a new trip request during th2e trip or on their way back to the place of business/residence. That request, however, must be actively accepted and dispatched at the company's place of business/independent driver's residence. This is especially burdensome for small businesses and independent operators.

Unbalanced Copyright And Liability Frameworks

Ancillary copyright laws in Germany and Spain have proven detrimental for U.S. companies, EU consumers, publishers, and the internet ecosystem that requires adequate protection of rights under copyright law. The German *Leistungsschutzrecht* was enacted in August 2013, and holds search engines liable for making available in search results certain "press products" to the public.[61] The statute excludes "smallest press excerpts," making the liability regime less clear and exposing search engines to confusing new rules. These laws specifically target news aggregation, imposing liability on commercial search engines and other online platforms while exempting "bloggers, other commercial businesses, associations, law firms, or private and unpaid users."[62] By extending copyright protection to short snippets or excerpts of text used by search engines and other internet platforms, this law violates Article 10(1) of the Berne Convention, directly violating the ability of online platforms to use permissible quotations under the TRIPS Agreement.

Greece

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by greatly raising the price consumers must pay for for-hire services and lowering the quality of the services they can provide.

- *Minimum trip duration:* For-hire vehicle trips must last a minimum of three hours.

- *Return-to-garage rule:* Between trips, drivers must return to their registered place of business.

Unbalanced Copyright And Liability Frameworks

Greece will soon have an administrative committee that can issue injunctions to remove or block potentially infringing content. Instead of adhering to the U.S. system by submitting a DMCA notice, a rights holder may now choose to apply to the committee for the removal of infringing content in

[61] German Copyright Act (1965, as last amended in 2013), at art. 87f(1), http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0572.
[62] Id.

exchange for a fee. While implementation is still uncertain, this measure represents a significant divergence from U.S. procedures on efficient removal of infringing content.

Hungary

Filtering, Censorship, And Service-Blocking

In Hungary, legislation enables the order by local authorities of a 365-day ban of online content, such as websites and electronic applications that advertise passenger transport services.[63]

Unilateral Or Discriminatory Tax Regimes

Hungary has implemented an advertising tax aimed at foreign suppliers of media content and advertising services.

Italy

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services.

- → *License cap:* While Italian transportation laws do not impose a cap on the number of for-hire vehicle licenses available, municipalities nevertheless grant for-hire vehicle licenses on an irregular and arbitrary basis. In Rome, for example, there are only 1,024 for-hire vehicle licenses and the last one was issued in 1993 (compared to 7,800 taxi licenses). In Milan, there are only 229 for-hire vehicle licenses and the last one was issued in the 1970s (compared to 5,200 taxi licenses).

- → *Return-to-garage rule:* For-hire drivers have an obligation to return to garage before and after each trip and are prohibited from parking their vehicle anywhere but in its designated garage.

Unbalanced Copyright And Liability Frameworks

Italy recently passed a new amendment that empowers the Italian Communications Authority to "require information providers to immediately put an end to violations of copyright and related rights, if the violations are evident, on the basis of a rough assessment of facts." This law amounts to a copyright 'staydown' requirement that conflicts with both Section 512 of the DMCA and the E-Commerce Directive, and will serve as a market access barrier for U.S. services in Italy.

[63] *See* Marton Dunai, *Hungarian Parliament Passes Law That Could Block Uber Sites*, Business Insider (June 13, 2016), http://www.businessinsider.com/r-hungarian-parliament-passes-law-that-could-block-uber-sites-2016-6. http://www.businessinsider.com/r-hungarian-parliament-passes-law-that-could-block-uber-sites-2016-6.

Poland

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services.

- → *Written contract required.* Prior to each for-hire trip, the driver and rider must sign a written paper contract and they must do so within the registered business premises of the driver.
- → *Vehicle rental and sharing prohibition.* The for-hire license holder needs to own or lease the for-hire vehicle; drivers cannot rent or share vehicles.
- → *Capital requirement.* The for-hire license holder needs to deposit 9,000 euros for the first vehicle operated under the license and 5,000 euros for each additional vehicle.

Unbalanced Copyright And Liability Frameworks

In its recent judgment of January 25, 2017 in the case of *OTK v. SFP*,[64] the CJEU concluded that Article 13 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (the Enforcement Directive) shall not preclude EU Member States from allowing a rights holder in an infringement proceeding to demand payment in an amount higher than the appropriate fee which would have been due if permission had been given for the work concerned to be used. In addition, in such a situation, the court clarified that there is no need for the rights holder to prove the actual loss caused to him as a result of the infringement. This equates to the introduction in EU law of punitive damages, without any appropriate safeguards.

Portugal

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire category. In addition, for-hire platforms will face restrictions that will limit their capacity to compete.

- → *Regulatory tax*: Platforms will have to pay a 5 percent regulatory tax on their service fee to promote taxi modernization and public transportation. No other regulated transportation activity pays such a tax.
- → *Cash payments prohibited:* Mandatory electronic payments will exclude significant segments of the population from these services. Taxi services face no such restriction.

[64] C-367/15 Stowarzyszenie 'Oławska Telewizja Kablowa' v. Stowarzyszenie Filmowców Polskich, ECLI:EU:C:2017:36, European Court of Justice (January 25, 2017).

- *Price controls*: Prices will not be able to fluctuate freely according to supply and demand and are instead capped at twice the average fare price of the previous 72 hours. This will decrease service reliability and driver earnings.

Spain

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services.

- *License cap:* Transportation law limits the number of for-hire vehicle licenses that a region may grant to one for every 30 taxi licenses in that region.

- *Licensing insecurity:* In September 2018, the national government approved a Royal Law Decree that transfers power over for-hire vehicles from the national government to the regions, a step acknowledged as so likely to lead directly to the cancellation of VTC licenses by subnational governments that the national government delayed its implementation for 4 years and described the delay as an expropriation payment to compensate VTC license holders.

- *Vehicle requirements:* For-hire vehicle companies must have a minimum of seven vehicles.

- *Geographic restrictions:* For-hire vehicles may only provide service in regions other than their home region up to a maximum of 20 percent of their trips in any three-month period.

- *De facto price floor:* For-hire vehicles are prohibited from selling their service on an individual seat basis and must instead sell the service of the entire vehicle.

- *Data sharing demands*: In 2017, the regional government of Catalonia passed a Law Decree (implementing regulation required before it enters into force) that requires for-hire vehicle licensees to electronically submit to the government's online registry the following data before any trip is begun: (i) name and ID number of the for-hire vehicle licensee, (ii) license plate number of vehicle, (iii) name and ID number of the rider, (iv) location and time of the agreement for services to be provided, (v) location and time where the service will be initiated, (vi) location and time where the service will be terminated, (vii) other data that the government may choose to require. A similar Royal Decree was approved by the national cabinet at the end of 2017 and requires the same level of data as the Catalan Law Decree.

Unbalanced Copyright And Liability Frameworks

In Spain, reforms of the *ley de propriedad intelectual* in 2014 resulted in an unworkable framework, requiring "equitable compensation" for the provision of "fragments of aggregated content" by "electronic content aggregation service providers."[65] Like the German law, the Spanish law creates liability for platforms using works protected under international copyright obligations in the TRIPS

[65] Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Informe de la Ponencia: Proyecto de Ley por la que se modifica el Texto Refundido de la Ley de Propriedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, No. 81-3 (July 22, 2014), available at http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-81-3.PDF.

Agreement. The Spanish law is arguably even worse than the German law because it does not allow publishers to waive their right to payment: they have to charge for their content, irrespective of whether they have existing contractual or other relationships with news aggregators, and irrespective of creative commons or other free licenses. The tariffs are arbitrary and excessive: one small company was asked to pay 7,000 euros a day (2.5 million euros a year) for links or snippets posted by its users.[66]

The Spanish ancillary copyright law yielded similar results to the German law. Soon after the enactment of the Spanish law, Google News shut down in Spain.[67] An economic study prepared by the Spanish Association of Publishers of Periodical Publications found that the result of *ley de propriedad intellectual,* which was meant to benefit publishers, was higher barriers to entry for Spanish publishers, a decrease in online innovation and content access for users, and a loss in consumer surplus generated by the internet. The results are most concerning for smaller enterprises facing drastic market consolidation and less opportunity to compete under the law.[68]

These ancillary copyright laws have proven detrimental for U.S. companies, consumers, publishers, and the broader internet ecosystem.

Sweden

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services must be licensed as a taxi driver. These new entrants face multiple market access and operational restrictions that serve no public interest but are instead intended to protect incumbents.

- → *Capital requirements*: Swedish rules impose a capital requirement of SEK 100,000 for one vehicle and SEK 50,000 for each subsequent vehicle.

- → *Mandatory redundant equipment:* Every vehicle must either be equipped with an approved taximeter (or secure an exemption) and must be connected to a central accounting system, making it more difficult for drivers to report their taxes when working via apps.

Unbalanced Copyright And Liability Frameworks

A recent Supreme Court ruling[69] in Sweden has resulted in the banning of websites displaying mere photos of public art exhibited in public spaces. Even though Sweden has a copyright exception for such photos, the Court found the commercial interest a site may have in using works of art is a limit to the application of the exception. The case was brought by a visual arts collecting society against offentligkonst.se, an open map with descriptions and photographs of works of public art across Sweden which is operated by Wikimedia SE. This means that even in the case of a webpage written by an amateur blogger, the mere reproduction of a photo of public art, which would elsewhere be deemed fair use, can now lead to fines when this page displays an ad.

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[66] https://www.elconfidencial.com/tecnologia/2017-02-07/canon-aede-meneame-internet-facebook-agregadores_1327333/

[67] *An Update on Google News in Spain*, Google Europe Blog (Dec. 11, 2014) http://googlepolicyeurope.blogspot.com/2014/12/an-update-on-google-news-in-spain.html.

[68] *Economic Report of the Impact of the New Article 32.2 of the LPI (NERA for AEEPP)*, Spanish Association of Publishers of Periodicals (July 9, 2015), http://coalicionprointernet.com/wp-content/uploads/2015/07/090715-NERA-Report-for-AEEPP-FINAL-VERSION-ENGLISH.pdf.

[69] April 4, 2016, case Ö 849-15, Bildupphovsrätt i Sverige ek. för v. Wikimedia Sverige.

United Kingdom

Unbalanced Copyright And Liability Frameworks

The UK has so far failed to implement a private copying exception, which is necessary to ensure full market access for U.S. cloud providers and other services. The government's first attempt to introduce such an exception in October 2014 was quashed by the UK's High Court in July 2015.[70] Without such an exception in place in the UK, individual cloud storage services will continue to face significant market access barriers, and even an attachment to an email may be deemed to be an infringement.

Unilateral Or Discriminatory Tax Regimes

In addition to the broader effort by the European Union to advance a Digital Services Tax, the UK is actively considering its own digital tax proposals. Recent statements from the UK government about new tech taxes clearly target US companies. This is a concern for firms investing in the UK. This type of unilateral tax policy would skirt the UK's treaty obligations, taking it outside the agreed international framework for cross-border trade and investment. IA encourages USTR to ensure that the UK and other trading partners abide by tax treaties and do not unfairly claim tax revenue due in other countries.

The UK's diverted profits tax is another example of a unilateral approach to international tax policy, diverging from international treaties and the agreed rules for apportioning profits among different countries. This tax was a major step outside of the multilateral tax system, designed to privilege the UK over its trading partners. Under this policy, the UK can levy taxes on structures and payments that are not related to UK activities, creating an impediment to cross-border investment and a significant source of uncertainty among multinational companies with any ties to the UK market.

Hong Kong

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services.

- → *License cap*: For-hire vehicle licenses (Hire Car Permit - HCP) are capped under a 1981 ordinance at 1,500.
- → *Vehicle requirement:* For-hire vehicles must have a minimum taxable value of HKD $300,000 (if the applicant can show a contract for future services, typically with a corporate client) or HKD $400,000 (if the applicant cannot show a contract for future services).
- → *Physical location requirement*: The passenger's name and trip details must be recorded at the registered physical address of the vehicle operator. Proof of demand: Operators must demonstrate the necessity of the service to the satisfaction of the regulator.

[70] Case No. CO/5444/2014, EWHC 2041, ¶ ¶ 11 and 12 (Royal Court of Justice 2015), http://www.bailii.org/ew/cases/EWHC/Admin/2015/2041.html.

Unbalanced Copyright And Liability Frameworks

In the past years, Hong Kong had considered measures to bring its copyright law in line with the realities of digital age: including safe harbor provisions for internet intermediaries and exceptions for parody which would form a strong foundation for future reforms and further discussion of flexible exceptions and limitations. Since the draft bill in question did not pass, Hong Kong has never reactivated a discussion on amending its copyright framework. USTR should urge Hong Kong counterparts to adopt reforms introducing a safe harbor regime in line with the international practice and a broad set of limitations and exceptions which would remove market access barriers for numerous U.S. businesses by establishing a more balanced copyright framework and support the growth of national digital economy.

India

Burdensome or Discriminatory Data Protection Regimes

India's draft Data Protection bill seeks to define principles and parameters for the Indian data economy. However, in a number of respects, the Bill is far more restrictive than the EU's recently enacted GDPR, which is widely considered to be the most comprehensive regulation in the data protection sphere. Along with data localization requirements, other excessive restrictions in the Bill include:

- → New discretionary powers to local data protection authorities (DPAs), including the ability to impose draconian penalties on foreign companies, unilaterally suspend data transfers, engage in search and seizure activities, cancel the registration of 'data fiduciaries,' and order the discontinuation of certain businesses or activities;
- → Onerous obligations on 'significant data fiduciaries,' including data audits and impact assessments by DPAs; the assignment of 'data trust scores' to companies and the publication of ratings on the DPA's website; and mandatory registration and record-keeping requirements;
- → Potentially destructive monetary penalties linked to global turnover, uncapped compensation, and inclusion of criminal penalties and non-bailable offences;
- → Definition of 'sensitive personal data' to include financial data and passwords (in conflict with global best practices on privacy), and definition of a 'child' to include anyone under 18 years old;
- → An unduly tight timeline for companies (and the government itself) to implement this new law;
- → Imposition of an EU-style 'right to be forgotten' to be adjudicated by DPAs.

IA strongly encourages USTR and other U.S. agencies to engage with Indian counterparts to address these concerns and develop a privacy framework that is more consistent with global norms, as recently articulated in Art. 19.8 of the USMCA.

Data Flow Restrictions And Service Blockages

The government of India has taken several recent steps that are in deep conflict with global best practices on data governance and data localization, and which present severe market access barriers to U.S. firms.

Among other recent developments on data localization, IA is deeply concerned with the Reserve Bank of India's directive (RBI/2017-18/153, dated April 6, 2018) requiring data related to payment transactions be stored only in India. The directive, which is now in force, requires "storage of data in a system in India" without clarifying whether the data can be accessed from or transferred outside the country, even if a copy is kept in India. Other proposed measures with prescriptive requirements on data localization include a draft cloud computing policy requiring local storage of data, the draft national e-commerce policy framework, and the draft Data Protection Bill. These would harm a wide range of U.S. exporters to India and damage India's domestic digital economy.

For example, the Data Protection Bill would require companies to store a copy of all "personal data" in India, while subjecting "sensitive" personal data to even stricter requirements and mandating that "critical" personal data can only be processed within India. These definitions of personal data all remain very unclear and, if not addressed, will create significant market access barriers for U.S. firms doing business in India.

India is using data localization requirements to address concerns about security and law enforcement access to data. But these requirements will be counterproductive to India's security objectives. Data localization has been shown to increase security risks and costs by requiring storage of data in a single, centralized location, making companies more vulnerable to natural disaster, intrusion, and surveillance. In addition, localization requirements make it more difficult to implement best practices in data security, including redundant or shared storage and distributed security solutions.

Mandating local storage of data locally will not facilitate access to data by law enforcement. The U.S. and India can engage through bilateral and multilateral instruments to make data sharing work in the cloud era without resorting to data localization measures. For example, the CLOUD Act provides a path for governments that honor baseline principles of privacy, human rights, and due process to seek bilateral agreements with the U.S. on law enforcement requests. We encourage dialogue between the Department of Justice and Indian counterparts on this issue.

Data localization requirements are also deeply problematic from an economic perspective. Forced localization significantly dilutes the benefits of cloud computing and cross-border data flows, which have previously brought great benefits to India and have driven the development of India's IT industry. This approach fails to address India's economic priorities, including the government's vision of making India a trillion dollar digital economy, creating jobs, and using emerging technologies like artificial intelligence and the Internet of Things to solve the country's pressing problems.

Ultimately, forced data localization will decrease foreign direct investment, harm India's 'ease of doing business' goals, make it more difficult for local startups to access state-of-the-art technologies and global markets, and hurt Indian consumers seeking to access information and innovative products online.

IA strongly urges USTR to request the removal of data localization requirements in the RBI directive, the data protection bill, the e-commerce policy, the cloud computing policy, and other recent proposals.

Discriminatory Or Non-Objective Application Of Competition Regulations

We are aware that several Competition Commission of India (CCI) decisions have been overturned by the Competition Appellate Tribunal on procedural grounds. One way to avoid this situation is through improving CCI interaction with parties during the course of an investigation. It is important for due process and for efficiency of investigations to ensure that parties under investigation have an understanding of the issues for which they are being investigated, and have the opportunity to comment on emerging thinking and provide relevant evidence before allegations are formalized in a DG Report or

finalized in an Order. This is consistent with the practice of other agencies around the world, notably the European Commission and UK Competition and Markets Authority.

In addition, there may be more that the CCI can do to protect the confidential information of investigated parties and third parties. The improper disclosure of information, and information leaks more generally, can have a detrimental impact on the investigatory process and the standing of the agency. Providing adequate protections for this information can increase the quality of investigations by encouraging cooperation and voluntary submission of confidential information.

Barriers to Mobile Payments

In March 2017, the Reserve Bank of India released new guidelines that require mobile payment product providers to establish a local entity in order to access the market. This requirement isn't limited to financially regulated entities, and applies even to companies that are serving as a platform for licensed partners.

Blocking Foreign Direct Investment

The Ministry of Commerce, Government of India formed a think tank (or committee) to frame the E-Commerce Policy for India, a draft of which was released in July 2018. The think tank that drafted the policy did not have any representation of foreign companies. Indian promoted companies (comprising largely of companies which were Indian startups but now have substantial foreign equity invested in them) such as Snapdeal, Paytm, and Ola Cabs are represented on this think tank and aim to make the policy favorable to Indian companies in order to protect their interests. Some of the proposed clauses in the policy included provisions to enable founders to retain control of companies they have minority stakes in, mandatory disclosure of source codes to the government under domestic law, discouraging FDI in the sector through over-regulation, among others.

E-commerce firms are globally classified under different models such as marketplace, inventory, and hybrid. While most developed countries do not distinguish between them, India continues to treat these models differently, due to pressure exerted by trader associations and Indian e-commerce firms who are looking to undermine foreign companies. India is the only country to define the marketplace model and currently, FDI is not permitted in the inventory model and is permitted only in the marketplace model, with the exception of food retail. The draft New Economic Policy recommended that limited inventory model be allowed for 100 percent made in India goods sold through platforms whose founder/promoter would be a resident Indian, where the company would be controlled by an Indian management and foreign equity would not exceed 49 percent. Despite receiving much flak for such a proposal, it is being reported that the revised draft policy is likely to keep this unchanged. India currently does not allow a hybrid model in e-commerce and has issued multiple regulations which have sought to restrict the inventory model in India, including effecting a 25 percent cap on sales from a single seller or its group companies on e-commerce platforms. The draft NEP proposed to allow Indian companies to follow an inventory model for made in India products, a provision which wasn't extended to companies with foreign equity. This was aimed at protecting the interests of companies promoted by Indian entrepreneurs over foreign equity-held companies.

Duties on Electronic Transmissions

India wants to do away with the ongoing moratorium on customs duty on electronic transmissions which goes against its current WTO obligations. Levying customs duties on electronic transmissions will hurt e-commerce companies as it will be a deterrent for buyers and sellers to transact on online platforms. It

will also create barriers for India in the global e-commerce market thus adversely impacting the country's economy as well. Due to India adopting different standardization norms, smaller players may find it difficult to enter the market.

Filtering, Censorship, And Service-Blocking

Indian regional and local governments engage in a regular pattern of shutting down mobile networks in response to localized unrest, disrupting access to internet-based services.[71]

Non-IP Intermediary Liability Barriers

USTR correctly highlighted numerous problems with India's non-IP liability framework in the 2017 National Trade Estimate:

> India's 2011 Information Technology Rules fail to provide a robust safe harbor framework to shield online intermediaries from liability for third-party user content. Any citizen can complain that certain content is "disparaging" or "harmful," and intermediaries must respond by removing that content within 36 hours. Failure to act, even in the absence of a court order, can lead to liability for the intermediary. The absence of a safe harbor framework discourages investment to internet services that depend on user generated content.

Safe harbors from intermediary liability are not just critical elements of balanced intellectual property enforcement frameworks; they also power digital trade and enable companies that are dependent upon intellectual property to access new markets. Where such safe harbors are incomplete or nonexistent, stakeholders in the internet sector face greater difficulty and risk in accessing these markets.

Overly Restrictive Regulation Of Online Services

In March 2015, India's telecom regulator, TRAI, issued a consultation paper on "Regulatory Framework for Over-the-Top (OTT) services."[72] There has been no response from the regulator on this paper after comments were submitted, yet it appears that the matter is still under consideration. In 2016, there have been additional consultation papers on issues including net neutrality,[73] VoIP,[74] and cloud service.[75] Many of these consultations have sought feedback on whether there is a need for regulation of OTT providers that offer such services. However, again, regulators have provided little feedback or response to industry submissions. Finally, the Ministry of Telecommunications recently released draft registration

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[71] *India Shuts Down Kashmir Newspapers Amid Unrest*, Al Jazeera (July 17, 2016), http://www.aljazeera.com/news/2016/07/india-shuts-kashmir-newspapers-unrest-160717134759320.htmlhttp://www.aljazeera.com/news/2016/07/india-shuts-kashmir-newspapers-unrest-160717134759320.html; Betwa Sharma & Pamposh Raina, *YouTube and Facebook Remain Blocked in Kashmir*, New York Times India Ink Blog (Oct. 3, 2012), http://india.blogs.nytimes.com/2012/10/03/youtube-and-facebook-remain-blocked-in-kashmir/?_r=0http://india.blogs.nytimes.com/2012/10/03/youtube-and-facebook-remain-blocked-in-kashmir/?_r=0 (reporting on the practices of the Jammu and Kashmir governments to "increasingly [use] a communication blackout to prevent unrest in the valley.").

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

[73] TRAI, *Consultation Paper on Net Neutrality* (May 30, 2016), http://www.trai.gov.in/Content/ConDis/20775_0.aspx.

[74] TRAI, *Consultation Paper on Internet Telephony (VoIP)* (June 22, 2016), http://www.trai.gov.in/Content/ConDis/20779_0.aspx.http://www.trai.gov.in/Content/ConDis/20779_0.aspx.

[75] TRAI, *Consultation Paper on Cloud Computing* (Oct. 6, 2016), http://www.trai.gov.in/Content/ConDis/20777_0.aspx.http://www.trai.gov.in/Content/ConDis/20777_0.aspx.

guidelines for machine-to-machine (M2M) service providers in India, with a focus on increasing regulation of M2M service providers.[76]

Restrictions on U.S. Cloud Service Providers

Cloud computing services require a highly reliable, low latency underlying network. Cloud service providers face significant regulatory challenges in operating and managing data centres in India including 1) inability to buy dark fibre in order to construct and configure their own networks, 2) a prohibition on the purchase of dual-use equipment used to manage and run those networks, 3) inability to own and manage a network to cross-connect data centers and connect directly to an Internet Exchange Point (IXP), and 4) high submarine cable landing station charges. These restrictions significantly impact the ability of cloud service providers to configure and manage its own network to optimize access by customers, to minimize latency and downtime by choosing ideal routing options, and to reduce the capex and opex costs incurred in offering cloud services in India.

Unbalanced Copyright And Liability Frameworks

India's intermediary liability framework continues to pose a significant risk to U.S. internet services. In particular, India does not have a clear safe harbor framework for online intermediaries,[77] meaning that internet services are not necessarily protected from liability in India for user actions in case of copyright infringements.

Unilateral Or Discriminatory Tax Regimes

We are deeply concerned about India's adoption of an "equalization levy," which imposes an additional 6 percent withholding tax on outbound payments to nonresident companies for digital advertising services.[78] These provisions do not provide credit for tax paid in other countries for the service provided in India. In addition, thelevy targets business income even when a foreign resident does not have a permanent establishment in India, and even when underlying activities are not carried out in India, in violation of Articles 5 and 7 of the U.S.-India tax treaty. And it does this by singling out one particular activity provided through one particular mode of supply: online advertising.

This measure deviates from international agreements and is deliberately designed to circumvent double tax agreements, exposing multinationals operating in India to double taxation, essentially creating a tariff on U.S. services. This levy impedes foreign trade and increases the risk of retaliation from other countries where Indian companies are doing business.

Separately, in February 2018, India's Finance Minister introduced a measure to enact a "substantial economic presence" tax measure as of April 2019. The measure seeks to unilaterally change the definition of Permanent Establishment. It is effectively targeted at the digital sector, but may also impact other transactions outside the digital economy. This measure preempts the outcomes of the multilateral OECD process and may expose US companies to double taxation.

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

[77] The Copyright (Amendment) Act, 2012, Section 52(1)(b)-(c) (allowing infringement exceptions for "transient or incidental storage" in transmission and, in part, "transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration . . .").

[78] Madhav Chanchani et al., *Equalisation Levy of 6% On Digital Ad: Government Finds a Way to Tax Companies Like Google, Facebook,* The Economic Times (Mar. 2, 2016), http://economictimes.indiatimes.com/news/economy/policy/equalisation-levy-of-6-on-digital-ad-government-finds-a-way-to-tax-companies-like-google-facebook/articleshow/51216310.cms.

Indonesia

General

Indonesia's "Draft Regulation Regarding the Provision of Application and/or Content Services through the Internet" targets online services and would require platforms to take responsibility for a very broad list of content types, including content that "ruins reputation," "is contradictory to the Indonesian constitution," and "threatens the unity of Indonesia."[79] This regulation, which is part of the broader package of OTT regulations discussed below, will present significant market access barriers to U.S. providers in Indonesia.

Data Flow Restrictions And Service Blockages

The government of Indonesia has introduced a series of forced data localization measures through Ministry of Communication and Informatics Regulation 82/2012 and the more recent Draft Regulation Regarding the Provision of Application and/or Content Services Through the Internet. These measures contain numerous market access barriers, including requirements for foreign services to "place a part of its servers at data centers within the territory of the Republic of Indonesia."[80]

Indonesia's GR82 data localization policy continues to be a significant barrier to digital trade, and is inhibiting foreign firms' participation in Indonesian e-commerce. Indeed, U.S. firms have lost, and continue to lose, business in Indonesia from customers being told they must store their data locally. Indonesia is planning to take important steps to reform its data localization policy, including by replacing it with a data classification policy whereby only national security and intelligence data must remain onshore. This approach would be a positive step for Indonesia. However, we are concerned that there are no clear commitments to finalizing this revision, creating tremendous business uncertainty and increased compliance risks. We urge you to strongly encourage Indonesia to move swiftly in finalizing this revision.

Discriminatory Or Non-Objective Application Of Competition Regulations

Indonesia currently imposes restrictions on foreign direct investment related to e-commerce. This impairs the ability of U.S. firms to invest in Indonesia and provide local e-commerce offering. Non-Indonesian firms are prevented from directly retailing many products through electronic systems and limited to 67 percent of ownership for warehousing, logistics or physical distribution services provided that each of these services is not ancillary to the main business line. Indonesia should liberalize its FDI restrictions related to e-commerce, which limit the ability of Indonesia to grow its digital economy.

Duties On Electronic Transmissions

Indonesia has taken an unprecedented step to impose customs barriers and potentially duties on electronic transmissions. Indonesia recently issued Regulation No.17/PMK.010/2018 (Regulation 17), which amended Indonesia's Harmonized Tariff Schedule (HTS) Chapter 99 to add: "Software and other digital products transmitted electronically." Chapter 99 effectively treats an electronic transmission as a customs "import," which triggers a number of negative implications including: the imposition of customs

[79] https://www.telegeography.com/products/commsupdate/articles/2016/05/05/mcit-issues-draft-regulation-on-ott-in-indonesia/

[80] Alexander Plaum, *The Impact of Forced Data Localisation on Fundamental Rights*, Access Now (June 4, 2014), https://www.accessnow.org/the-impact-of-forced-data-localisation-on-fundamental-rights/.

import requirements (including declaration and other formalities) that will be impossible to meet for certain intangible products, the imposition of import duty and taxes on each electronic transmission, the creation of U.S. technology and security risks, and constraint of the free-flow of communication into Indonesia. These extremely onerous customs reporting requirements are likely to restrict international trade and may expose U.S.-originated digital transmissions to a variety of customs measures, including seizure. The inclusion of "[s]oftware and other digital products transmitted electronically" in Indonesia's HTS skirts Indonesia's commitment under the World Trade Organization (WTO) Moratorium on Customs Duties on Electronic Transmissions, a commitment that Indonesia reaffirmed as recently December 2017.

Indonesia appears to be the only country in the world that has added electronic transmissions to its HTS. Imposing customs requirements on purely digital transactions will impose significant and unnecessary compliance burdens on nearly every enterprise, including many SMEs. Indonesia's actions will establish a dangerous precedent, and will likely have the effect of encouraging other countries to violate the WTO Moratorium. In order to eliminate this barrier, Indonesia must rescind Regulation 17 and remove Chapter 99 from its HTS.

Overly Restrictive Regulation of Online Services

Indonesia introduced a draft law in April 2016 focused on online services ("Draft Regulation Regarding the Provision of Application and/or Content Services through the Internet") that would require data localization, creation of a local entity or permanent establishment, forced cooperation with local telecom operators offering similar services, new intermediary liability and monitoring requirements, exclusive use of a national payment gateway, and numerous other barriers that would severely impact or cripple the ability of many internet services to do business in Indonesia.[81] The compliance and enforcement provisions of these regulations would impose significant costs on both companies and on the government, ultimately hampering the development of Indonesia's digital economy.

Unilateral Or Discriminatory Tax Regimes

Indonesia has taken steps on taxation that significantly deviate from global norms, bilateral tax treaties, and WTO commitments. These steps include proposed requirements that would compel foreign services to create a permanent establishment in order to do business in Indonesia.[82] This process would require significant resources from online service providers, many of which are small companies that lack the necessary legal and technical resources to comply with such processes, and could have significant tax consequences that conflict with OECD multilateral principles. Furthermore, this requirement would likely violate Indonesia's WTO commitments to allow computer and other services to be provided on a cross-border basis.

Jamaica

Burdensome or Discriminatory Data Protection Regimes

IA encourages USTR to monitor developments on a data protection bill modeled on the GDPR. This bill is currently being discussed in Parliament.

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[81] *MCIT Issues Draft Regulation on OTT In Indonesia,* TeleGeography (May 5, 2016), https://www.telegeography.com/products/commsupdate/articles/2016/05/05/mcit-issues-draft-regulation-on-ott-in-indonesia/.

[82] Victoria Ho, *Indonesia Tells Google and Other Internet Firms to Pay Tax or Risk Getting Blocked*, Mashable (Mar. 1, 2016), http://mashable.com/2016/03/01/indonesia-tax-google/#bmvYs96AfsqF.

Japan

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services, whether as a taxi or one of the two for-hire vehicle categories ("city hire" and "other hire"), faces market access and operational restrictions that serve no public interest but are instead intended to protect incumbents.

- → *License cap:* Japanese law has capped the number of taxi and other hire licenses. Only in some jurisdictions may taxi and for-hire vehicle companies petition for additional licenses to be issued, although in practice such petitions are rarely ever successful.
- → *Minimum trip duration.* While the number of city hire licenses is not capped, city hire cars must be booked for a minimum of 2 hours.
- → *Price controls*: Regulations set a minimum price floor and a maximum price ceiling for both taxis and hire cars.
- → *"Return-to-garage" rule:* Hire car drivers must return to their registered place of business after completing every trip.
- → *Barriers to independent taxi operators*: In order to receive a license to work as an independent taxi driver—as opposed to an affiliate of a larger taxi firm—a driver must first have 10 years of experience driving for the same taxi firm and be at least 35 years old.

Unbalanced Copyright And Liability Frameworks

Despite limited exceptions for search engines[83] and some data mining activities,[84] Japanese law today does not clearly provide for the full range of limitations and exceptions necessary for the digital environment[85] – which creates significant liability risks and market access barriers for U.S. and other foreign services engaged in caching, machine learning, and other transformative uses of content.

Jordan

Sharing Economy Barriers

Drivers seeking to provide transportation services outside of the traditional taxi industry and via apps face market access and operational restrictions that serve no legitimate public interest and are instead

[83] Copyright Law of Japan, Section 5 Art. 47-6, http://www.cric.or.jp/english/clj/cl2.html (narrowly defining the exception for search engine indexing as "for a person who engages in the business of retrieving a transmitter identification code of information which has been made transmittable . . . and of offering the result thereof, in response to a request from the public").

[84] Copyright Law of Japan, Section 5 Art. 47-7, http://www.cric.or.jp/english/clj/cl2.html (limiting the application of this data mining exception to "information analysis" done (1) on a computer, and (2) not including databases made to be used for data analysis).

[85] Approximately a decade ago, there was legislative discussion intended to facilitate the development of internet services in Japan by explicitly allowing copyright exceptions for activities such as crawling, indexing, and snippeting that are critical to the digital environment. This discussion resulted in a 2009 amendment to Japanese copyright law – however, the resulting amendment only provided narrowly defined exceptions for specific functions of web search engines, not for other digital activities and internet services. Japan continues to lack either a fair use exception or a more flexible set of limitations and exceptions appropriate to the digital environment.

meant to protect the taxi industry by limiting the number of vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services.

- *Vehicle ownership:* The driver must be either the owner of the vehicle or a relative up to a "second degree" of the owner.
- *Licensing fees and exclusivity*: Drivers must obtain a license that costs up to $600 USD per year and that restricts the driver to working via one app provider only.
- *Platform liability:* Regulations place full liability for all driver actions on the app provider company through which the driver is sourcing work.
- *Data-sharing requirement:* App providers regularly face demands to share data in real time from security and judicial agencies and without clear due process.
- *On-shoring requirement:* Technology companies seeking to operate in Jordan are required to have significant local physical presence (staff, call centers, software engineers, etc.) and to contract locally with local service providers.

Kenya

Burdensome or Discriminatory Data Protection Regimes

Kenya's draft privacy bill refers to a "right to be forgotten" or "right to erasure." Hosting platforms already give users the ability to delete or erase information that the user has posted or uploaded to the platform. In those contexts, giving users a "right to erasure" with respect to content that they have uploaded would not meaningfully change the options that users already have. However, there is a risk that a "right to erasure" could be interpreted more broadly, creating significant operational burdens and legal uncertainty for small companies and startups in Kenya and elsewhere.

There are complex legal and operational issues regarding how to balance the interests of users and publishers, how to balance one user's privacy interests with another user's free expression and journalistic interests, and how to account for the broader public's right to know the truth and have access to accurate historical records. In many cases, individual content hosts and publishers are not well-placed to adjudicate conflicts between these rights.

This compliance obligation would drastically reduce the possibility for new platforms, search engines, and internet services – including local services – to enter the Kenyan market.

Data Flow Restrictions And Service Blockages

Recent draft legislation includes ambiguous requirements related to data localization.

Overly Restrictive Regulation Of Online Services

The Ministry of ICT has started drafting a new national ICT policy in response to, among other things, the need to provide clarity on how to treat online services.[86] We encourage USTR to monitor the

[86] Lilian Ochieng, *Kenya Plans ICT Sector Reforms to Regulate Internet Firms*, Daily Nation (Mar. 17, 2016), http://www.nation.co.ke/business/Kenya-plans-new-bill-to-reign-in-on-rider-tech-firms/996-3121342-ayu7lsz/index.html.

development of this policy and to promote a light-touch framework for regulating information services that is consistent with the U.S. approach.

Unbalanced Copyright And Liability Frameworks

The East African Legislative Assembly passed the East African Community Electronic Transactions Act in 2015. While the Act provides for some level of protection of intermediaries from liability for third party content, it fails to include any 'counter-notice' procedures for a third party to challenge a content takedown request, and it removes legal protections if the intermediary receives a financial benefit from the infringing activity. Lack of a counter-notice provision exposes internet intermediaries to business process disruptions through frivolous takedown notices.

Even more problematically, vague language about 'financial benefits' can remove an entire class of commercially-focused intermediaries from the scope of liability protections, and can result in a general obligation on these intermediaries to monitor internet traffic, disadvantaging commercial services from entering numerous East African markets, including Kenya, Uganda, Tanzania, Burundi, Rwanda, and South Sudan.

The requirements in the Act diverge from prevailing international standards for intermediary liability frameworks, and serve as market access barriers for companies seeking to do business in these countries. IA urges USTR to engage with counterparts in Kenya and elsewhere to amend this provision on the grounds highlighted above, and develop intermediary liability protections that are consistent with U.S. standards and international norms.

Korea

Burdensome or Discriminatory Data Protection Regimes

Several South Korean regulators have threatened a number of U.S. tech firms with investigations and fines for not complying with prescriptive South Korean privacy law, even though these firms do not maintain data controllers on South Korean territory. As a result, services have been forced to modify the way they do business in South Korea.

Data Flow Restrictions And Service Blockages

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

Separately, a new proposed bill would require online service providers to establish local servers in order to ensure user protection from deliberate diversion of traffic and slowed service. Penalties for not complying with this requirement would include up to a 3 percent fine based on revenue.

Discriminatory Or Non-Objective Application Of Competition Regulations

In investigating U.S. companies, the Korea Fair Trade Commission (KFTC) routinely fails to provide subjects a fair opportunity to defend themselves. Lack of transparency is an issue throughout the investigative process, during which the KFTC often denies U.S. companies access to third-party and exculpatory evidence in its possession, which is excluded from their investigative report or recommendation. Respondents only get access to documents the KFTC chooses to release, which are frequently heavily redacted. It is also important to ensure that Korea is meeting the standards of Article

16.1.3 of the U.S.-Korea Free Trade Agreement, which requires that respondents have a reasonable opportunity to cross-examine any witnesses.

Korea also does not recognize the attorney-client privilege, which makes it difficult for a company to receive frank advice from counsel about the merits of an investigation and ways to comply. In addition, Korea does not respect the status of documents that are subject to attorney-client privilege in other countries, which may lead to the loss of that privilege in some contexts.

Overly Restrictive Regulation of Online Services

Congress members have proposed an OTT bill to regulate online video platforms, targeting overseas service providers.

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services must be licensed as a taxi driver. These new entrants face operational restrictions that serve no public interest but are instead intended to protect incumbents by needlessly raising the cost of the services that these new entrants can provide.

- → *Minimum/maximum price restrictions:* Prices for regular taxis are regulated. Although prices for premium taxis are—in regulation—flexible, apps cannot—in practice—set premium taxi prices below a certain floor. This de facto rule is intended to protect incumbent regular taxis.

Unbalanced Copyright And Liability Frameworks

IA has concerns with private copyright levies on smartphones/tablets.

Malaysia

Overly Restrictive Regulation Of Online Services

In Malaysia, there has been a proposal to include regulation of online services within the ambit of communications regulators. In addition, last year, the Malaysian Communications and Multimedia Commission (MCMC) decided to assess the need for improvements to the Communications and Multimedia Act (CMA).[87] The U.S. government should monitor the development of these regulatory frameworks and to promote a light-touch framework for regulating information services that is consistent with the U.S. approach. In particular, Malaysia should avoid creating market access barriers by subjecting foreign internet services and applications to telecom-specific or public utility regulations.

Mexico

Data Flow Restrictions And Service Blockages

Recent regulation issued by the executive branch includes data localization provisions that conflict with the USMCA.

[87] *Amendment to Communications and Multimedia Act 1998 in March*, Astro Awani (Feb. 22, 2016), http://english.astroawani.com/malaysia-news/amendment-communications-and-multimedia-act-1998-march-95481.

Sharing Economy Barriers

Drivers seeking to provide transportation services outside of the traditional taxi industry and via apps face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services.

- → *License cap*: Certain states (e.g. Colima, Querétaro, and Guanajuato) limit the number of vehicles that can work with app-based transportation services.
- → *Cash payment prohibition:* Drivers working with app-based transportation services are prohibited from accepting cash payments in several states (Mexico City, Puebla, Querétaro, Yucatán, Sonora, San Luis Potosí, Coahuila, Colima, Aguascalientes, and Tijuana-Baja California).
- → *Vehicle requirements:* Depending on the state, vehicles providing app-based transportation services must not be more than 4-7 years old.
- → *Vehicle identification:* Some cities and states require vehicles providing app-based transportation services to have visible external identification, increasing the risk of physical violence and intimidation by the incumbent taxi industry.

Unbalanced Copyright Framework

Mexico currently does not have a comprehensive framework of copyright exceptions and limitations for the digital economy. Without the USMCA, digital creators and innovators in Mexico must rely on a general provision that allows the use of works where there is no economic profit,[88] which increases legal risk and costs for U.S. internet and technology companies seeking to offer commercial services in Mexico.

Without the USMCA, Mexico does not have a comprehensive ISP safe harbor framework covering the full range of service providers and functions and prohibiting the imposition of monitoring duties.

New Zealand

Unbalanced Copyright And Liability Frameworks

New Zealand has made commitments to promote balance in its copyright system through exceptions and limitations to copyright for legitimate purposes, such as criticism, comment, news reporting, teaching, scholarship, and research – including limitations and exceptions for the digital environment.

New Zealand relies on a static list of purpose-based exceptions to copyright. In practice, this means that digital technologies that use copyright in ways that do not fall within the technical confines of one of the existing exceptions (such as new data mining research technologies, machine learning, or innovative cloud-based technologies) are automatically ruled out, no matter how strong the public interest in enabling that new use may be. For example, there is a fair dealing exception for news in New Zealand, but it is more restrictive than comparable exceptions in Australia and elsewhere, and does not apply to photographs – which limits its broader applicability in the digital environment.

[88] Mexico Federal Law on Copyright (as amended, 2016), Art. 148-151.

As a result, New Zealand's approach to devising purpose-based exceptions is no longer fit for purpose in a digital environment. This approach creates a market access barrier for foreign services insofar as it is unable to accommodate fair uses of content by internet services and technology companies that do not fall within the technical confines of existing exceptions. To eliminate this barrier and comply with the U.S. standard and prevailing international norms, New Zealand should adopt a flexible fair use exception modeled on the multi-factor balancing tests found in countries such as Singapore and the U.S.

Intermediary Liability

New Zealand's Copyright Act 1994 limits safe harbor caching to "temporary storage" while U.S. law and other similar provisions in U.S. FTAs include no such limitation. The definition of caching in Section 92E of the Copyright Act should be amended to remove the requirement of the storage being "temporary." This amendment would allow for greater technological flexibility and remove uncertainty surrounding the definition of "temporary." In addition, the government should clarify that under this caching exception, there is no underlying liability for the provision of referring, linking, or indexing services.

Nigeria

Data Flow Restrictions And Service Blockages

The Guidelines for Nigerian Content Development in ICT require both foreign and local businesses to store all of their data concerning Nigerian citizens in Nigeria, and establish local content requirements for hardware, software, and services. These rules will significantly increase market access barriers for internet companies seeking to serve the Nigerian market. We urge USTR to engage with counterparts in Nigeria to highlight and resolve these barriers.

Unbalanced Copyright And Liability Frameworks

Nigeria has undertaken proceedings to reform its copyright laws. IA encourages USTR to be supportive of the development of a framework that is consistent with U.S. law, including through the implementation of fair use provisions and safe harbors from intermediary liability. The absence of these provisions would create market access barriers in a key African market for U.S. companies.

Norway

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles.

- → *License cap:* For-hire vehicle license caps are set by each county. Currently there are only 278 for-hire vehicle licenses in Norway.
- → *Restrictive eligibility criteria:* License holders must engage in commercial passenger transport as their primary occupation.

- *Vehicle requirements:* For-hire vehicles must be high-end models and are approved on a case-by-case basis. The threshold has varied over time, but typically a model comparable to a Mercedes S-Class (less than 5 years old) is required.
- *Capital requirements:* A bank guarantee of approximately $9,000 is required.
- *Geographic restrictions:* For-hire vehicle licenses entitle drivers to work only in a single restricted geographic area.

Pakistan

Overly Restrictive Regulation of Online Services

The Pakistan Telecommunications Authority is working on a regulatory framework draft for online services, which may include licensing. Licensing could carry government access requirements, which would pose significant market access barriers for U.S. companies.[89] IA encourages USTR to monitor the development of this policy and to promote a light-touch framework for regulating information services that is consistent with the U.S. approach, and that encourages innovation and investment.

Unilateral Or Discriminatory Tax Regimes

In May 2018, Pakistan's National Assembly passed its Finance Bill 2018 into law and created a new 5 percent withholding category for "fees for offshore digital services" on a gross basis. This unilateral law, effective as of July 2018, is a significant deviation from international tax agreements. It discriminates against US companies providing digital services to Pakistan and gives rise to double taxation.

Panama

Burdensome or Discriminatory Data Protection Regimes

Panama has introduced a new Data Protection bill. Unfortunately, this bill does not appear to recognize appropriate types of consent as a basis for transferring data outside the country. Any international transfer provision should permit transfers with the consent of the data subject, and the nature of that consent (e.g., whether it is express or implied, and the mechanism used to obtain it) should be based on the context of the interaction between the controller and the individual and the sensitivity of the data at issue. The required consent for transfers should not be burdensome, and should allow for the use of technology-neutral consent approaches. In addition, consent should be implied for common use practices, such as transferring data to cloud computing service providers located abroad. We encourage USTR to engage with counterparts in Panama to develop interoperable data protection frameworks that clearly allow for the forms of consent described above.

In addition, Article 2 of the Data Protection bill mentions that databases containing "critical State data shall be kept in Panama." The definition of critical State data set forth in Article 3 is, however, very broad. This could create a *de facto* data localization mandate for all data, even if this is not the objective of the law. The U.S. government should work with Panama to ensure that this language does not result in a data localization requirement.

[89] *See PTA To Regulate Mobile Apps and OTT Services in Pakistan*, More News Pakistan (Aug. 20, 2016), http://www.morenews.pk/2016/08/20/pta-regulate-mobile-apps-ott-services-pakistan/.

Sharing Economy Barriers

Drivers seeking to provide transportation services outside of the traditional taxi industry and via apps face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services.

- → *Fleet restrictions:* No individual may own more than two vehicles that are used to provide app-based transportation services. Companies are not allowed to own fleets, a restriction that does not apply to the taxi industry or to other modes of transportation.
- → *Vehicle requirements:* Vehicles providing app-based transportation must be less than 7 years old. This requirement does not apply to any other type of transportation.
- → *Cash payment prohibition:* Drivers working with app-based transportation services are prohibited from accepting cash payment, although no other type of transportation provider is similarly prohibited.
- → *Geographical restriction*: App-based transportation services cannot provide their services in six out of the ten provinces. This restriction does not apply to other modes of transportation.

Peru

Unbalanced Copyright And Liability Frameworks

Peru does not have a comprehensive framework of copyright exceptions and limitations for the digital economy. Peruvian law currently includes a long but inflexible list of rules that does not clearly provide for open limitations and exceptions that are necessary for the digital environment[90] – for instance, flexible limitations and exceptions that would enable text and data mining, machine learning, and indexing of content. To accomplish this objective, Peru should also remove the provision in *Legislative Decree 822 of 1996* stating that limitations and exceptions "shall be interpreted restrictively" – which has limited the ability of Peruvian copyright law to evolve and respond flexibly to new innovations and new uses of works in the digital environment.[91]

In addition, Peru is out of compliance with key provisions under the U.S.-Peru Trade Promotion Agreement that require copyright safe harbors for internet service providers.[92] We urge USTR to address this significant market access barrier for U.S. services and push for full implementation of the agreement.

[90] Legislative Decree No. 822 of April 23, 1996, Title IV Chapter 1.

[91] Legislative Decree No. 822 of April 23, 1996, Title IV Chapter 1, Art. 50.

[92] https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file437_9548.pdf

Russia

Data Flow Restrictions And Service Blockages

Russia has passed a series of localization requirements that amount to market access barriers for U.S. services seeking access to the Russian market, including:

- → Article 18 of Federal Law 242-FZ: requirement to store and process personal data concerning Russian citizens in Russian data centers. According to the current regulatory interpretation of this rule, the initial collection, processing, and storage of data must occur exclusively in Russia. Once this "primary processing" on local servers has occurred, data can be exported outside Russia subject to data subject consent. Given the requirement to localize processing, a global web service would typically be compelled to re-architect its global systems and networks in order to comply with such a provision.

- → Articles 10.1 and 10.2 of Federal Law No. 149-FZ: retain metadata for provision to Russian security agencies, and content-posting restrictions for websites.

- → "Yarovaya Amendments" amending Federal Laws 126-FZ and 149-FZ: requires "organizers of information distribution on the internet" to store the content of communications locally for 6 months, with longer metadata storage requirements for different types of providers. In addition, this package of laws requires internet services to provide government officials with sensitive user information and to assist national security agencies in decrypting any encrypted user messages.

- → "News Aggregators Law": According to the recently adopted amendments to the Federal Law 149-FZ, news search and aggregation services that exceed 1 million daily visitors and are offered in the Russian language with the possibility of showing ads must be offered through a local subsidiary in Russia. Foreign providers are not permitted to offer such services directly across the border, even though they are allowed to own the local company that offers them. The law additionally provides for significant content restrictions.

The Russian internet regulator has recently appealed to a court to block LinkedIn over alleged non-compliance with the Russian data localization requirements. The court of first instance has ruled that LinkedIn must be blocked in Russia entirely until the company is in compliance with these requirements. LinkedIn has appealed this order.

Filtering, Censoring and Service-Blocking

Russia has implemented a new site-blocking law, giving additional power to regulators over online services, including the power to demand that intermediaries block certain sites or certain types of content.[93] For example, Russia has ordered all of Wikipedia to be blocked due to problematic content on a single page.

[93] *See New Russian Anti-Piracy Law Could Block Sites "Forever,"* Torrent Freak (Apr. 25, 2015), https://torrentfreak.com/new-russian-anti-piracy-law-could-block-sites-forever-150425/.

Unbalanced Copyright And Liability Frameworks

Russia has taken additional steps to broaden the scope of an already unbalanced set of copyright enforcement measures. The "Mirrors Law," which came into effect on October 1, 2017, extends Russia's copyright enforcement rules into new domains by requiring search providers to delist all links to allegedly infringing websites within just 24 hours of a removal request. The law also applies to so-called "mirror" websites that are "confusingly similar" to a previously blocked website.

In practice, this law has resulted in overbroad removal and delisting requests for general-purpose websites that would not be subject to removal under Section 512 of the DMCA or other parts of U.S. copyright law. As USTR has noted elsewhere, 24 hours is an insufficient amount of time for service providers to review these types of requests. In addition, the principle of removing entire websites that include a proportionally minor amount of potentially infringing content was squarely rejected by the U.S. Congress during debate over the Stop Online Piracy Act in the 112th Congress.

We urge USTR to engage with counterparts in Russia to address this measure, which is likely to generate market access barriers for U.S. internet services.

Saudi Arabia

Customs Barriers To Growth In E-Commerce

In Saudi Arabia, a new product compliance regulation (*IECEE certification – International Electrotechnical Commission for Electrotechnical Equipment*) was enforced at all borders in 2018 by the Saudi Standards, Metrology and Quality Organization (SASO). It requires importers to register, upload several technical documents from foreign manufacturers (test reports, manufacturer certifications, translations, etc.) into an online portal, obtain prior authorization, submit several types of government and external lab company fees, and provide authorities with legal declarations. The regulation imposes an additional set of permit from the Saudi Telecom regulator (CITC) for specific product categories such as wireless electronic devices. All these measures constitute restrictions imposed to importers further complicating the ability to grow and thrive in the Saudi market. KSA also requires the provision of several sets of original signed and stamped international shipping and customs documents. Whereas in most ''developed'' countries customs formalities are completed with commercial invoice copies only, Saudi Arabia still imposes importers to provide original copies from origin shippers signed, stamped, and legalized by origin Chamber of Commerce offices. Failure to do so results in fines and shipment delays at borders.

Data Flow Restrictions And Service Blockages

Saudi Arabia's Communications and Information Technology Council issued a Public Consultation Document on the Proposed Regulation for Cloud Computing, which contains a provision on data localization that may have the effect of restricting access to the Saudi market for foreign internet services. This regulation would also increase ISP liability, create burdensome new data protection and classification obligations, and require compliance with cybersecurity and law enforcement access provisions that are significantly out of step with global norms and security standards. For example, under this regulation, CITC would be granted broad powers to require Cloud and ICT service providers to install and maintain governmental filtering software on their networks. These and other Cloud regulations would also prohibit the cross-border transfer of certain classes of data.

Senegal

Overly Restrictive Regulation Of Online Services

Senegalese regulators have publicly announced a study to help decide whether and how to regulate online services.[94] IA encourages USTR to monitor this study and to promote a light-touch framework for regulating information services that promotes market access for foreign services.

Singapore

Sharing Economy Barriers

Any new entrant seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access restrictions that protect the taxi industry by limiting the number of for-hire vehicles.

- → *Exams:* In 2017, the Singapore Government introduced a new training regime for for-hire vehicle drivers that includes a 10-hour training course and challenging test. The course is delivered by a single provider—the Singapore Taxi Academy—and taught by taxi drivers. Coupled with administrative delays in the processing of background checks and applications, the driver accreditation process amounts to a significant barrier to entry for drivers, taking upwards of four months to complete.

South Africa

Sharing Economy Barriers

Drivers seeking to provide transportation services outside of the traditional taxi industry and via apps face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services.

- → *Demand demonstration requirement*: The Western Cape provincial government requires drivers and/or app providers to prove evidence of demand for their services before issuing additional licenses to drivers.

- → *Lengthy licensing process*: A licensing process that is supposed to the take 2 months can take more than 6 months. Cities are also imposing moratoria on the issuance of licenses, making it even more difficult for drivers to become licensed.

- → *Lack of equal protection under the law*: Drivers who provide transportation via app-based services have been victims of targeted violence by taxi services. Law enforcement agencies are slow to intervene, directly threatening both the physical safety and economic wellbeing of those using app-based services.

[94] *See* Myles Freedman, *Senegal: ARTP Studies the Impact of VOIP Applications on Operators*, Extensia (Jan. 5, 2016), http://extensia-ltd.com/tunisia-4g-license-has-been-set-at-77-million/.

→ *Vehicle identification*: Pending amendments to the National Land Transport Act would require vehicles providing app-based transportation services to have visible external identification, increasing the risk of physical violence and intimidation by the incumbent taxi industry.

Taiwan

Discriminatory Of Non-Objective Application Of Competition Regulations

The Taiwan Fair Trade Commission's (TFTC) investigations of U.S. companies often provide little to no insight into what issues are under investigation, as well as limited and inconsistent ability for a company to present its defense to decision-makers prior to a ruling. These procedural deficiencies are compounded by the fact that TFTC decisions are not stayed on appeal.

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services must either be licensed as a taxi driver or operate as a rental car driver (following convoluted regulatory requirements, the rider is technically renting the car from a car rental company which has sourced the driver, who then independently provides the driving service to rider/renter of the car). These new entrants face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect incumbents by limiting the number of new competing service providers, raising the price consumers must pay for those new services, and lowering the quality of the new service.

→ *License cap:* Taxi licenses are capped for taxi companies and taxi fleets and the growth in their number is pegged to the growth of each city/county's population or road expansion. (There is no license cap for individual taxi operators' licenses or for rental car licenses.)

→ *Minimum/maximum price restrictions:* Prices for taxis are regulated by local governments and constrained within a minimum price floor and maximum price ceiling. While taxis operating under the new Multi-Purpose Taxi scheme face only a price floor and not a price ceiling, access to the scheme is limited to only those taxi drivers who have an exclusive affiliation with a single taxi dispatch company and not those who operate independently or as members of a co-operative—forming a taxi dispatch company requires meeting a NTD $5 million capital requirement.

→ *Identification requirement:* Although a rider being driven by a rental car driver is not renting the car in the sense contemplated by legacy car rental regulations, the service is nevertheless governed by those regulations. As a result, the rider/renter must provide the rental car company with her/his national identification number, as if in fact renting the car to drive herself/himself. The national identification number is a very sensitive piece of personal information, akin to the Social Security number in the U.S. Requiring riders to turn it over has a severe deterrent effect on use of rental car driver services.

Unilateral Or Discriminatory Tax Regimes

Since 2017, Taiwan's Ministry of Finance has required nonresident suppliers to collect and remit a direct tax on cross-border B2C supplies of digital goods and services, requiring suppliers to remit 20 percent of the local source component of their "deemed profit." The "deemed profit" can be as much as 30 percent of revenue. This approach, implemented unilaterally, will expose US companies to double taxation.

Thailand

Data Flow Restrictions And Service Blockages

Thailand's Personal Data Protection Bill includes a number of concerning data localization requirements.

Non-IP Intermediary Liability Barriers

Internet service providers who "assist or facilitate" the commission of defamation by another person can be liable as supporters of the defamatory offenses, even if the actor does not realize such they are assisting or facilitating the offense.[95] One webmaster faced a sentence of up to 32 years in jail under the "Lèse Majesté" law for allowing comments on an interview with a Thai man known for refusing to stand at attention during the Thai Royal Anthem.[96] Such rules have resulted in the blockage of U.S. online services in Thailand.

Turkey

Data Flow Restrictions And Service Blockages

The Communique on Information Systems Management (VII-128.9), published by the Capital Markets Board of Turkey, requires publicly traded companies to keep their primary and secondary information systems, data, and infrastructure in Turkey.

Non-IP Intermediary Liability Barriers

In Turkey, internet services face liability if users post content that is blasphemous, discriminatory, or insulting. These are broad and vague limitations on user-generated content that make it very difficult for U.S. providers to operate in Turkey, whether they are running a communications platform or operating an e-commerce service that solicits user reviews of products and services.

Ukraine

Unbalanced Copyright And Liability Frameworks

USTR included Ukraine on the 2016 Special 301 Report watchlist in part due to "the lack of transparent and predictable provisions on intermediary liability" and the absence of "limitations on [intermediary] liability" in Ukraine's copyright law.[97] These problems have not been effectively addressed in the past year.[98] Ukraine's intermediary liability law, which has now come into force, containes numerous problems, including an unfeasible requirement to remove information within 24 hours of a complaint, a requirement to provide user data to third parties even if an intermediary disputes the presence of

[95] https://www.law.uw.edu/media/1423/thailand-intermediary-liability-of-isps-defamation.pdf
[96] https://www.eff.org/deeplinks/2012/05/suspended-sentence-good-news-thai-webmaster-jiew-threat-freedom-expression-remains
[97] https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf.
[98] See Tetyana Lokot, New Ukrainian Draft Bill Seeks Extrajudicial Blocking for Websites Violating Copyright, Global Voices (Feb. 1, 2016), https://advox.globalvoices.org/2016/02/01/new-ukrainian-draft-bill-seeks-extrajudicial-blocking-for-websites-violating-copyright/

infringing content, and a requirement to implement "technical solutions" for repeat postings that likely requires intermediaries to monitor and filter user content.[99] These and other provisions are in direct conflict with Section 512 of the Digital Millennium Copyright Act, and are harming the ability of U.S. companies to access the Ukraine market.

United Arab Emirates

Overly Restrictive Regulation Of Online Services

In United Arab Emirates (UAE), nationally controlled telecom services have consistently throttled foreign VoIP and communications services, including WhatsApp VOIP, Apple Facetime, Google Hangouts and Duo, LINE, and Viber.[100] This throttling has created significant market access barriers in a key Middle East market for U.S.-based internet services and apps. However, despite acknowledging the negative implications for foreign services, UAE regulators have declined to intervene, and instead have continued to insist that only national providers can provide these forms of communications services.[101] These restrictions are impeding market access for U.S. services and appear to conflict with UAE's GATS commitments.

U.S internet services face similar barriers in Morocco, Saudi Arabia, and Oman, where nationally owned telecom services have engaged in similar forms of throttling.[102]

Sharing Economy Barriers

Any driver seeking to provide app-based transportation services outside of the traditional taxi industry must be licensed under the for-hire vehicle category. In addition, for-hire vehicles face market access and operational restrictions that serve no legitimate public interest and are instead meant to protect the taxi industry by limiting the number of for-hire vehicles, lowering the quality of the services they can provide, and raising the price consumers must pay for those services.

- → *Vehicle requirements:* In Dubai, for-hire vehicle companies must own a minimum of 20 vehicles and only 10 percent of their vehicles can have a value of less than $50,000 USD. As a result, the minimum cost of setting up a for-hire vehicle company is approximately $1 million.

- → *Minimum price requirement:* For-hire transportation providers must charge 30 percent more than taxis.

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[99] Law of Ukraine "On State Support of Cinematography in Ukraine"

[100] *See* Joey Bui, *Skype Ban Tightens in the UAE*, The Gazelle (Feb. 7, 2015), https://www.thegazelle.org/issue/55/news/skype/; *Is Skype Blocked In in the United Arab Emirates (UAE)?*, Skype, https://support.skype.com/en/faq/FA391/is-skype-blocked-in-the-united-arab-emirates-uae (last visited Oct. 24, 2016); Mary-Ann Russon, *If You Get Caught Using a VPN In in in the UAE, You Will Face Fines of Up to $545,000*, International Business Times (July 27, 2016), http://www.ibtimes.co.uk/if-you-get-caught-using-vpn-uae-you-will-face-fines-545000-1572888 (describing the government's ban on VPNs being motivated, in part, by blocking UAE consumers from accessing VoIP services); Naushad Cherrayil, *Google Duo Works in UAE – For Now*, Gulf News (Aug. 21, 2016) http://gulfnews.com/business/sectors/technology/google-duo-works-in-uae-for-now-1.1882838.

[101] *See* Mary-Ann Russon, *supra* note 98.

[102] *See* Saad Guerraoui, *Morocco Banned Skype, Viber, WhatsApp and Facebook Messenger. It Didn't Go Down Well,* Middle East Eye (Mar. 9, 2016), http://www.middleeasteye.net/columns/boycotts-appeals-petitions-restore-blocked-voip-calls-morocco-1520817507; Afef Abrougui, *Angered By Mobile App Censorship, Saudis Ask: What's the Point of Having Internet?,* Global Voices Advox (Sept. 7, 2016), https://advox.globalvoices.org/2016/09/07/angered-by-mobile-app-censorship-saudis-ask-whats-the-point-of-having-internet/; Vinod Nair, *Only Oman-Based VoIP Calls Legal*, Oman Observer (Apr. 16, 2016), http://omanobserver.om/only-oman-based-voip-calls-legal/.

→ *Data-sharing requirement:* Companies providing transportation apps are required to share data in real time, via integration into government computer systems.

Uruguay

Overly Restrictive Regulation of Online Services

Uruguay is currently considering a bill to regulate digital platforms and services.[103] However, this draft bill is vague and broad, and could affect a wide range of internet services and products. IA encourages USTR to monitor the development of this bill and advocate for consistency with the principles for regulation provided within this filing.

Vietnam

Cybersecurity Law

Vietnam's Ministry of Public Security introduced a first draft of the Law on Cyber Security (LOCS) in mid-2017. It underwent multiple revisions until it was passed by the National Assembly (NA) on June 12, 2018, and will take effect on January 1, 2019.

On October 11, the Ministry of Public Security (MOPS) introduced a new version of the draft Guiding Decree for the LOCS. The draft decree subjects almost all online services to a requirement to store a broad range of user data in Vietnam, and requires online services to disclose that data in unencrypted form to the Ministry of Public Security. Article 59.1 requires a provider of these services to store "personal data" of users in Vietnam. Personal data is also defined broadly to include name, contact details, ID number, occupation, financial details, medical records, hobbies, political views, biometrics, and other information. Under Article 59.2, the MOPS may request access to personal data as well as other data generated while using a service, and the service provider must disclose such data in a decrypted format. In addition, the draft provides broadly designed criteria to identify "critical information systems," which may enable the MOPS to extend the scope of regulation to privately-owned systems.

These data localization, licensing, and representative office requirements would affect U.S. business quite broadly, forcing companies to adjust their investment strategies or abandon their business in the country. The U.S. should strongly encourage Vietnam to take certain steps to minimize the commercial impact of this bill.

Data Flow Restrictions And Service Blockages

Under the Decree on Information Technology Services (Decree No. 72/2013/ND-CP), Vietnam requires a wide range of internet and digital services to locate a server within Vietnam. In addition, Vietnam's Ministry of Information and Communications recently introduced a new draft decree (Draft Decree Amending Decree 72/2013-ND-CP) that would implement new data retention requirements, local presence requirements, interconnection requirements, and additional server localization requirements. Finally, as highlighted below, Vietnam's Law on Cyber Security includes significant data localization requirements.

[103] Transporte Público Y Creación De Plataformas Virtuales De Servicios, Carpeta No. 786, Repartido No. 388 (Feb. 16, 2016), available at http://vamosuruguay.com.uy/proyecto-plataformas-virtuales/.

Non-IP Intermediary Liability

Vietnam's Ministry of Information and Communications has introduced a new decree on the use of Internet Services and Online Information that includes an excessively short 3-hour window for compliance with content takedown requests, as well as numerous other market access barriers highlighted below.[104]

Unfortunately, the requirements in this decree deviate from international standards on intermediary liability frameworks, and would present significant barriers to companies seeking to do business in Vietnam. Online services often require more than 3 hours to process, evaluate, and address takedown requests, particularly in situations where there are translation difficulties, different potential interpretations of content, or ambiguities in the governing legal framework.

As USTR identified in the 2016 National Trade Estimate, a similar intermediary liability provision in India has forced U.S. services "to choose between needlessly censoring their customers and subjecting themselves to the possibility of legal action." IA urges USTR to take similar action on this Vietnamese decree and to highlight that this decree would serve as a market access barrier. In addition, we encourage USTR to work with Vietnam and other countries to develop intermediary liability protections that are consistent with U.S. law and relevant provisions in trade agreements, including Section 230 of the Communications Decency Act and Section 512 of the Digital Millennium Copyright Act.[105]

This draft decree also includes long and inflexible data retention requirements, a requirement for all companies to maintain local servers in Vietnam, local presence requirements for foreign game service providers, requirements to interconnect with local payment support service providers, and other market access barriers that will harm both U.S. and Vietnamese firms.

Finally, IA urges USTR to press Vietnam for greater transparency and public input into the development of internet-related proposals. This recent decree was publicized on a Friday, and comments on the decree were due on the following Monday. Such short windows do not provide sufficient time for expert input into the development of complex regulations, and are inconsistent with Vietnam's obligations under Chapter 26 of the TPP ("Transparency and Anti-Corruption") to provide for notice-and-comment processes when developing new regulations.

Overly Restrictive Regulation Of Online Services

In 2014 and 2015, Vietnam's government released two draft regulations appearing to target foreign providers of internet services. In October 2014, the Ministry of Information and Communications released a draft "Circular on Managing the Provision and Use of Internet-based Voice and Text Services," proposing unreasonable regulatory restrictions on online voice and video services. These restrictions would require foreign service providers to either:

- → Install a local server to store data or

[104] Draft Decree Amending Decree 72/2013-ND-CP on the Management, Provision and Use of Internet Services and Information Content Online.

[105] In particular, Vietnam must at a minimum include express and unambiguous limitations on liability covering the transmitting, caching, storing, and linking functions for its ISP safe harbors; revise Article 5(1) of Joint Circular No. 07/2012 to provide a safe harbor for storage rather than just "temporary" storage; and clarify that it's safe harbor framework does not include any requirements to monitor content and communications.

→ Enter into a commercial agreement with a Vietnam-licensed telecommunications company.[106]

The government of Vietnam also promulgated a draft IT Services Decree that would have included additional data localization requirements as well as restrictions on cross-border data flows.

While the government of Vietnam has apparently not taken any additional action on these measures, USTR should monitor this or any similar requirements. In particular, USTR should continue to resist any efforts that would prevent foreign providers from supplying internet services in Vietnam unless they enter into a commercial agreement with local telecommunications companies.

Sharing Economy Barriers

Vietnam has established a specific regulatory framework for for-hire vehicles working through apps ("e-contract"). License cap: Cities across Vietnam, including Hanoi and Ho Chi Minh City, have announced their intent to impose a cap on the number of e-contract vehicles. While such caps already exist in certain cities for taxis and traditional for-hire vehicles not working through smartphone apps, these caps are not enforced.

→ *Independent operation restriction:* Vietnam currently requires that all e-contract drivers affiliate with a transport company or transport cooperative, limiting the flexibility and autonomy that attracts drivers to work via apps. This requirement does not apply to traditional for-hire vehicle vehicles not working through apps, which can operate on an independent operator basis.

Unbalanced Copyright And Liability Frameworks

Vietnam does not have a comprehensive framework of copyright exceptions and limitations for the digital economy. Vietnamese law provides a short list of exceptions that do not clearly cover core digital economy activities such as text and data mining, machine learning, and indexing of content. IA urges USTR to work with Vietnam to implement a flexible fair use exception modeled on the multi-factor balancing tests found in countries such as Singapore and the U.S. [107]

Vietnam also inhibits U.S. digital trade by failing to provide for adequate and effective ISP safe harbors. IA encourages USTR to work with Vietnam to implement safe harbors that are consistent with Section 512 of the Digital Millennium Copyright Act.

Zimbabwe

Overly Restrictive Regulation of Online Services

A June 2016 consultation paper focused on the absence of "over-the-top" regulation and suggesting a licensing framework, with emergency services and lawful intercept under discussion.[108]

[106] *Circular Regulates OTT Services*, Vietnam News (Nov. 15, 2014), http://vietnamnews.vn/economy/262825/circular-regulates-ott-services.html#qvpySzIcYMz25vCl.http://vietnamnews.vn/economy/262825/circular-regulates-ott-services.html#qvpySzIcYMz25vCl.97 97.

[107] Law on Intellectual Property (as amended, 2009), Art. 25, 26.

[108] POTRAZ, *Consultation Paper No. 2 of 2016,* https://www.potraz.gov.zw/images/documents/Consultation_OTT.pdf.

Other Geographic Regions

East African Region

Unbalanced Copyright And Liability Frameworks

The East African Legislative Assembly passed the East African Community Electronic Transactions Act in 2015. While the Act provides for some level of protection of intermediaries from liability for third party content, it fails to include any 'counter-notice' procedures for a third party to challenge a content takedown request, and it removes legal protections if the intermediary receives a financial benefit from the infringing activity. Lack of a counter-notice provision exposes internet intermediaries to business process disruptions through frivolous takedown notices.

Even more problematically, vague language about 'financial benefits' can remove an entire class of commercially-focused intermediaries from the scope of liability protections, and can result in a general obligation on these intermediaries to monitor internet traffic, disadvantaging commercial services from entering numerous East African markets, including Kenya, Uganda, Tanzania, Burundi, Rwanda, and South Sudan.

The requirements in the Act diverge from prevailing international standards for intermediary liability frameworks, and serve as market access barriers for companies seeking to do business in these countries. IA urges USTR to engage with counterparts in Kenya and elsewhere to amend this provision on the grounds highlighted above, and develop intermediary liability protections that are consistent with U.S. standards and international norms.

Latin America Regional

Burdensome or Discriminatory Data Protection Regimes

Governments in the region continue to respond reactively to data privacy concerns by advancing heavy handed data privacy bills that seeks to align their privacy regulations with GDPR, without fully comprehending the impact on the local economy or how the systems are effectively implemented/enforced. These draft pieces of legislation—in. Panama, Chile, Ecuador, Argentina, and Honduras, for example—raise a number of challenges for U.S. companies, including: 1) scope of application and extraterritoriality; 2) introduction of the right to be forgotten; 3) express consent for all situations; and 4) prior authorization by the authority for international data transfer. In some cases these rules could have a crippling impact on all U.S. companies that need to transfer data across borders.

Unilateral Or Discriminatory Tax Regimes

Numerous countries in the region have already implemented or are in the process of putting place indirect taxes (VAT/GST) on cross-border supplies of electronically supplied services ("ESS"). However, in stark contrast to the dozens of other jurisdictions in the world, countries in Latin America are not leveraging global best practices or incorporating the key OECD principles of neutrality, efficiency, certainty and simplicity, effectiveness and fairness, and flexibility. Through a newly invented process, they are creating an unlevel playing field. Specifically, governments should utilize the "Non-resident Registration" Tax Collection Model, instead of attempting to implement the "Financial Intermediary" Tax

Collection Model that was recently created by the Argentine government and is potentially being replicated in Colombia, Chile, Costa Rica, and other countries.

U.S. suppliers of cross-border ESS have customers facing incidents of double taxation and there are other foreign services providers who are not having to pay the tax at all.