

Before the
United States Trade Representative
Washington, DC

In re

Request for Comments Concerning
Proposed Transatlantic Trade and
Investment Agreement

Dkt. No. USTR–2013–0019

**COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the request for comments issued by the United States Trade Representative (USTR) and published in the Federal Register at 78 Fed. Reg. 19,566 (Apr. 1, 2013), the Computer & Communications Industry Association (CCIA)¹ submits the following comments regarding the proposed Transatlantic Trade and Investment Partnership (TTIP). These comments respond to selected questions identified in the notice, in the order in which those questions appeared. CCIA has separately requested to testify orally at the public hearings scheduled for May 29 and 30 at the United States International Trade Commission.

I. General Objectives (Question A)

The Computer & Communications Industry Association strongly supports the TTIP. To this end, we agree that the agreement should focus on “new principles or disciplines addressing emerging challenges in international trade” that “would benefit U.S.-EU trade as well as strengthen the multilateral rules-based trading system and support other trade-related priorities.”²

Given that both the United States and the European Union have relatively open markets and robust regulatory frameworks, the greatest gains from the proposed agreement will come

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

² Request for Comments Concerning Proposed Transatlantic Trade and Investment Agreement, 78 Fed. Reg. 19,566, 19,567 (Apr. 1, 2013).

from updating our trade rules to reflect the realities of a 21st-century, Internet-enabled economy. In areas where robust protections and evolved regimes currently exist, such as intellectual property rights, the US and the EU should focus on affirming the forward-thinking aspects of each others' current approaches, while pushing for discrete updates to comport with the realities of global digital commerce. Where the US and the EU take different regulatory approaches, trade negotiators should focus on achieving interoperability between the different regimes. Furthermore, harmonization among US and EU domestic regulatory and customs frameworks where both entities are committed to similar goals has enormous potential to eradicate needless barriers to transatlantic commerce.

Furthermore, trade in technology goods helps advance the reach of the digital economy, with a catalytic effect on innovation and productivity. CCIA has long supported expansion of the WTO's Information Technology Agreement, and while we look forward to continued progress in the ITA negotiations, inclusion of duty-free treatment of all technology goods in the TTIP would send a strong signal that the US and EU recognize the importance of market access for technology goods to the 21st-century economy. We would also stress the need to limit non-tariff barriers, such as those regarding product standards and certification, as equally important. One forward-thinking principle would be to ensure that, where possible, commitments are made on a "negative-list" basis, so that gains from this agreement do not evaporate when technology advancement and innovation in both products and services blur the borders of current trade commitments.

II. Economic Costs & Benefits (Question B)

The significance of the Internet to global trade cannot be overstated. The Internet accounted for 21% of the GDP growth in mature economies over the past 5 years, with 75% of the benefits captured by companies in more traditional industries.³ In a survey of 30 countries with a collective 2010 GDP of \$19 trillion, Internet penetration was found to be growing at 25% per year over the past five years, and contributing an average of 1.9% to GDP— a \$366 billion

³ McKinsey Global Institute, "Internet Matters: The Net's sweeping impact on growth, jobs and prosperity," May 2011, *available at* http://www.mckinsey.com/insights/high_tech_telecoms_internet/internet_matters; *see also* McKinsey Global Institute, "The great transformer: The impact of the Internet on economic growth and prosperity," Oct. 2011, *available at* http://www.mckinsey.com/insights/high_tech_telecoms_internet/the_great_transformer.

impact.⁴ If information flows are viewed as trade in knowledge services, then the volume of information relayed by online platforms such as Google, Yahoo, Facebook, Tuenti, and Microsoft Bing, places those services among the largest traders in the global economy.

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

The costs of discrimination against these services are not felt merely by the high-tech sector, given the opportunities that Internet services create for more traditional businesses. Online marketplaces such as eBay and Etsy provide crucial platforms for international small-and-medium-sized enterprise (SME) trade every year, and that trade is growing. Research indicates that 75% of the positive impact of the Internet accrued to traditional industries through efficiency gains and expanded markets, and that SMEs who heavily utilized the Internet exported twice as much as those that did not, and further, that Internet usage increased SME productivity by 10%.⁷ In addition to these platforms, the Internet enables numerous knowledge-enhancing services that we now largely take for granted, such as email and GPS positioning, whose consumer application largely post-date the Uruguay Round.

More profoundly, the Internet as a platform to facilitate commerce is ever more critical to the entire economy. Services across all sectors rely upon the Internet for mission-critical business operations across the board, and that reliance and ‘value add’ impact is growing. In

⁴ Olivia Nottebohm *et al.*, McKinsey & Co., “Online and upcoming: The Internet’s impact on Aspiring Countries,” Jan. 2012, at http://www.mckinsey.com/client_service/high_tech/latest_thinking/impact_of_the_internet_on_aspiring_countries.

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

⁶ *See* US Census Bureau, “2008 E-Stats,” at 2 (May 2010). Industries whose product demand is driven by Internet content and services, such as consumer electronics, also make a significant economic contribution. For the same year, 2008, CE industries were responsible for \$1.3 trillion in annual value-added to the US economy. *See* PriceWaterhouseCoopers, “Innovation: US Economic Contribution of Consumer Electronics,” at 2 (2008).

⁷ “Internet Matters,” *supra* note 3.

order to craft appropriate trade provisions for the Internet, it is essential to understand its nature: the Internet is not just an invention – it is, as the printing press and the steam engine were, a *general purpose technology* (GPT)⁸ which transforms everything about our societies and economies. One of the best examples of the Internet’s special nature is the impact it has on the global supply chain across all industries.

III. Customs Harmonization and Cooperation (Question H)

In response to the Trade Policy Staff Committee (TPSC) call for comments on “opportunities to enhance customs cooperation between the United States and the EU and its member states,” we propose that the US seek to harmonize the threshold below which goods are not subject to customs treatment. The 800 USD threshold referenced in S. 489, the Low Value Shipment Regulatory Modernization Act, would be a logical target.⁹ We would also recommend that the threshold adjust annually based on agreed-upon metrics for inflation.

Given advances in technology, especially the Internet and online platforms and programs that streamline the buying and selling process, it is easier for small and medium size businesses to be active participants in international commerce. Indeed, even individual entrepreneurs and artisans can participate, and earn a solid living, from selling goods online. Although the Internet and e-commerce platforms have reduced many of the barriers that once prevented non-bulk international commerce, considerable barriers – such as complicated customs and duties processes – still impede this important commercial sector. For Internet-enabled small businesses who frequently ship low-value goods to individual consumers across borders, even limited customs hassles and duties can be cost prohibitive and therefore trade-distorting.

In fact, the Working Party of the OECD Trade Committee highlighted this concern in a report on global value chains (GVCs):

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

⁹ S. 489, 113th Congress, § 3(a)(2)(c)(1) (2013), *at* <http://www.govtrack.us/congress/bills/113/hr1020/text>.

Trade facilitation measures are important for making GVCs accessible to small and medium sized enterprises (SMEs). Obtaining information about various countries' customs formalities, inspection requirements and administrative procedures is a particular hurdle for small firms entering new markets. Complying with the documentation requirements and testing and certification procedures entails high fixed costs; these disproportionately burden SMEs that import and export small amounts. The fixed costs of participating in GVCs can be reduced by making information readily available on line and introducing single windows and simplified clearance procedures for small shipments. To promote the participation of SMEs in GVCs, improving the efficiency of border crossings should be a priority.¹⁰

By harmonizing the *de minimis* thresholds at a reasonable level, the US and EU would provide leadership in updating global trade rules to better fit the realities of the 21st-century economy and lessen the barriers that SMEs transacting in low-value shipments face when conducting business between the world's two largest economies.

IV. Relevant E-Commerce and Cross-Border Data Flow Issues and Existing Barriers to Trade in Services (Questions I & J)

Both the United States and the European Union have been leaders on ICT issues and with the TTIP they should build upon the ICT Trade Principles they agreed to in 2011.¹¹ Given that the purpose of the 2011 understanding was “to promote the implementation of these principles within the bilateral economic relationship and in their trade negotiations with third countries,” the TTIP not only provides a unique opportunity to affirm and evolve the principles both parties have already agreed to, but to craft creative, thoughtful trade agreement language that serves as a model to other countries and international trade negotiators.

¹⁰ OECD, “Trade Policy Implications of Global Value Chains: Contribution to the Report on Global Value Chains,” TAD/TC/WP(2012)31/FINAL at 14 (April 18, 2013), *available at* [http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP\(2012\)31/FINAL&docLanguage=En](http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP(2012)31/FINAL&docLanguage=En).

¹¹ European Union-United States Trade Principles for Information and Communication Technology Services (April 4, 2011), *available at* http://www.ustr.gov/webfm_send/2780.

A. Forced Localization

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

Generally, these measures compel financial services providers to process data onshore or require online service providers or other companies to locate data within their borders. Such provisions not only harm multinational companies, they also harm cloud computing, a vibrant and growing sector of the US and EU economies that enables outsourcing of both infrastructure and software. US companies pioneered cloud computing, and the US and EU are currently the unquestioned world leaders in the field.¹² The market for Data Center Outsourcing (DCO) in North America was \$33 billion in 2011, while the markets for web hosting and colocation were estimated to be worth \$23 billion. In Europe, the DCO market was estimated to be worth \$38 billion in 2011, while webhosting and co-location were \$8.6 billion.¹³ These companies allow their clients, large and small companies alike, to outsource their in-house information technology needs. Instead of spending on local software and expensive servers, companies can outsource their entire information and communications technology infrastructure to third-party specialists. As hosting and services can easily be provided regardless of location, local data hosting requirements can disproportionately affect US and EU companies and serve as thinly veiled protectionism for foreign competitors. Given that the greatest growth for cloud demand is predicted to come from emerging markets in the near future,¹⁴ positive language liberalizing the

¹² US companies such as Amazon, Savvis, Salesforce.com and Rackspace comprise the majority of revenue in the "public cloud" market.

¹³ Press Release, Gartner, Gartner Says Data Center Services Market Shows Regional Differences in the Move Toward the Cloud (March 26, 2012), *available at* <http://www.gartner.com/newsroom/id/1962115>.

¹⁴ "But the fastest growth in public IT services spending will be in the emerging markets, which will see its collective share nearly double by 2016 when it will account for almost 30% of net-new public IT cloud services spending growth." See IDC Press Release, "IDC Forecasts Public IT Cloud Services Spending Will Approach \$100 Billion in 2016, Generating 41% of Growth in Five Key IT Categories." Sept. 11, 2012, *available at* <http://www.idc.com/getdoc.jsp?containerId=prUS23684912#.USzjZ-s5x8M>.

markets for hosting and cloud computing will benefit both the US and the EU and set positive precedent for the next generation of trade negotiators. Furthermore, affirming these principles would allow both European and US multinational companies the certainty needed to more efficiently build their internal IT systems without needing to duplicate data centers or scatter their IT infrastructure across the world.

With this in mind, TTIP should oblige signatories not to take actions that affect the choices of commercial actors in physical provision of hardware, software, or services that would impact network performance, resiliency, security, and/or costs of deployment or operations. Many countries are tempted to require that certain types of hardware or software integral to the operation of the network be physically sited within their national boundaries. There are many reasons why these choices are made, but the reality is that mandates of this kind generally have unanticipated negative consequences, frustrating efforts to ensure the best performance for the largest number of users at the lowest cost. This is not in the long-term interests of any country – and there are better and more sustainable ways to encourage local investment in the ICT sector than through these kinds of mandates.¹⁵

B. Free Flow of Information

The TTIP should promote a single, transatlantic marketplace for digital information and services, reflecting the shared US and European commitment to the free flow of information as a key driver of the digital economy. It is certainly the case that the networked economy, and international commerce generally, depends upon data flowing freely without impediment, and it is also the case that this critical need can be undermined in pursuit of other public policy priorities. Given that the US and EU economies are among the most technologically advanced in the world, TTIP language affirming the concept of the free flow of information can serve as an important beacon for the rest of the international trade community.

The global nature of data flows in the networked economy will be the object of policy debate at the national level for some time, and laws made nationally in response will continue to evolve. Each country's answers to these value questions will have undisputed commercial

¹⁵ There is much scholarly literature on the subject, *e.g.*, the 2009 WEF report, "ICT for Economic Growth: A Dynamic Ecosystem Driving The Global Recovery", *available at* <https://members.weforum.org/pdf/ict/ICT%20for%20Growth.pdf>.

implications, especially with respect to services trade, and yet trade negotiators may be wary of binding international obligations where national discussions continue.

Faced with a need for legal certainty in a dynamic environment, TTIP could create a “framework” process whereby parties’ minimum obligations in key areas are established, but evolve through periodic collaboration among relevant trade and other government officials.¹⁶ Ensuring that questions of trade and international commerce are considered alongside regulatory policy-making in difficult areas such as national security or privacy could minimize trade-distorting policies while still accomplishing desired regulatory objectives.

C. Affirming Full Market Access for Digital Products

The TTIP should include a strong e-commerce chapter that ensures that digital products, regardless of their classification, are not discriminated against merely because they are provided and consumed digitally. In this vein, the TTIP should mirror commitments the US has already made, specifically in the US-Australia Free Trade Agreement, that prevent discrimination against digital products regardless of their source country.¹⁷

D. Reaffirming Liability Protections for Internet Intermediaries

Unbounded liability rules constitute a major barrier to international Internet commerce, and the TTIP should reaffirm the US-EU consensus that the protection of Internet services from liability for third party content is fundamental to robust digital trade.

Due to the extraordinary quantity of data transiting communications networks, these businesses are unusually vulnerable to strict liability for the misdeeds of any users. Congress responded to this problem in 1996 with Section 230 of the Communications Decency Act, providing categorical immunity from liability for user misconduct, thus allowing Internet companies to combat undesirable or potentially illegal activity without fear of additional liability for editing user content. Section 230 states that “no provider or user of an interactive computer service shall be treated as the publisher of any information provided by another information

¹⁶ Discussion of framework conventions and their applications may be found in Nele Matz-Luck, “Framework Conventions as a Regulatory Tool,” 1 *Goettingen J. of Int’l L.* 439-458 (2009), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535892.

¹⁷ United States-Australia Free Trade Agreement, art. 17.2(2), May 18, 2004, 2004 U.S.T. LEXIS 162, 234, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/Australia/asset_upload__file469_5141.pdf.

content provider.” The European E-Commerce Directive similarly establishes that online services are not to be held liable for substantively unmodified information transmitted from one party to another, of that party’s choosing.¹⁸ “The EU’s liability regime relies on a simple, yet powerful principle: it is the person or entity responsible for posting content or goods for sale that has legal responsibility for the content or goods in question, not the intermediary hosting the content or the platform on which the good is traded or the information is exchanged.”¹⁹

Among developed countries, it is widely recognized that “[i]ntermediaries are increasingly important and empower end-users” and that “[l]imitations on their liability for the actions of users of their platforms have encouraged the growth of the Internet.”²⁰ Neither law nor practice have caught up with this understanding, however. Even in Member States of the European Union, notwithstanding the E-Commerce Directive’s nominally strong limitation on liability, US companies and their executives have been subjected to civil and criminal liability based entirely on misconduct by third parties on the Internet. In Italy in 2010, for example, US executives were criminally convicted when an Italian Internet user posted to the Italian YouTube site a video of students mistreating a disabled classmate, notwithstanding the fact that the video was removed within hours of authorities reporting it to YouTube.²¹ Although the conviction was ultimately overturned, nearly three years had passed during which US executives faced the prospect of criminal prosecution for third-party content.²²

One primary objective of the e-commerce provisions of TTIP should be to reaffirm the transatlantic consensus that unbounded intermediary liability will discourage Internet-fueled growth and innovation and “weaken private sector confidence.”²³ Accordingly, the agreement should re-establish the commitment to liability limitations that European Member States have made to one another, a principle that has been a mainstay of US Internet policy for nearly 20

¹⁸ See European E-Commerce Directive, 2000/31/EC of the European Parliament and of the Council of 8 June 2000, arts. 12-15.

¹⁹ Martin H. Thelle & Svend T. Jespersen, “Online Intermediaries: Assessing the Economic Impact of the EU’s Online Liability Regime,” at 7 (2012), available at <http://www.europeandigitalmedia.org/uploads/Press/documents/Copenhagen%20Economics-Online%20Intermediaries-201201.pdf>.

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

²¹ See Rachel Donadio, “Larger Threat Is Seen In Google Case,” N.Y. TIMES, Feb. 24, 2010.

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

²³ See OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives*, supra note 20, at 15.

years. Codifying the existing US-EU norm on this will transmit to other states that 21st-century trade requires reasonably bounded liability rules.²⁴

To achieve this, TTIP should provide, at the least, that no Internet service may be held liable on account of any electronic information flows on its platform, to the extent that: (1) the information is provided by another; (2) the Internet service does not substantively modify the information at issue; and (3) the Internet service does not select the receiver of the information. TTIP should also prohibit trading partners from (a) imposing a general obligation on Internet services to monitor the electronic information which they transmit or store, or (b) imposing a general obligation to affirmatively seek out facts or circumstances that might indicate illegal activity; and, finally, ensure that national treatment extends to liability rules as applied to Internet services.

E. Affirm the WTO E-Commerce Tax Moratorium and Prohibit a “Sending Party Pays” Regime in IP Networks

The free flow of information also relies on the efficient interconnection of the networks that make up the Internet. Historically, telephone networks have relied upon a system in which the network that originates a call paid the terminating network to have the call completed. IP networks, on the other hand, have traditionally interconnected under a free contract system in which the parties involved decide between themselves how to allocate costs. In many cases these deals are done “on a handshake” and an agreement is reached to exchange data with neither party paying the other. This reflects the fact that, for network operators, having many robust routes to the Internet is more important than trying to make money from peering arrangements.

Some constituencies, however, view interconnection as a potential source of revenue for themselves. These companies have proposed that governments mandate (at fora such as the

²⁴ Such a step is particularly timely since, outside of Europe examples abound of litigants and state actors penalizing intermediaries for third party content, even where the connection may be tenuous at best. *See, e.g.*, Michelle Griffin, “Man Sues Twitter over Hate Blog,” SYDNEY MORNING HERALD, Feb. 17, 2012, at <http://www.smh.com.au/technology/technology-news/man-sues-twitter-over-hate-blog-20120216-1tbwg.html> (libel claim against Twitter based upon a tweet of a hyperlink to allegedly defamatory post). In India in 2012, notwithstanding 2008 legislation refining Indian law to “correspond more closely to the DMCA/ECD model”, *see* OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives*, *supra* note 20, at 79-80, Facebook, Google, and other prominent Internet services were criminally prosecuted for hosting material that “seeks to create enmity, hatred and communal violence” and “will corrupt minds.” Amol Sharma, “Facebook, Google to Stand Trial in India,” WALL ST. J., Mar. 13, 2012, *available at* <http://online.wsj.com/article/SB10001424052702304537904577277263704300998.html>; *see also* Rebecca MacKinnon, “The War for India’s Internet,” FOREIGN POLICY, June 6, 2012, *available at* http://www.foreignpolicy.com/articles/2012/06/06/the_war_for_india_s_internet?page=0,0.

International Telecommunications Union) a “sending party network pays” model of interconnection. This model would lead to a world in which US businesses must pay the telecommunications carriers in other countries, some of whom are still state-owned and state-operated, for the privilege of reaching users accessing their services. Furthermore, these charges would violate the 1998 WTO e-commerce moratorium which explicitly forbids access fees of data transmissions.²⁵ As calls for a worldwide Internet “access charge” regime have echoed through international fora, the TTIP should make clear that such a regime would significantly hamper international trade and therefore should not be permissible in the modern, connected global economy. As information that transits over networks necessarily must be stored on physical hardware, the TTIP should also include language that prohibits taxes on stored data.

V. Transparency (Question P)

Transparency plays an important role in facilitation of modern trade agreements. In an Internet age, these principles are even more important. To this end, both the US and EU should include language requiring regulatory transparency. When exceptions to agreed-upon principles are invoked, such as deviations from free flow of information norms, the parties should make such decisions and the rationale behind them publicly available, enquiry points should be established and, where appropriate, due process should be provided to those affected by regulatory action. GATS Article III could prove to be a useful starting point as it includes language both parties have already agreed to.

More ambitiously, the TTIP should require both the United States and the European Union to make government data and information public and available online in machine readable, open data formats whenever possible. Easily accessible government data can provide the raw material for innovators and entrepreneurs to harness to improve the lives of citizens and make a wealth of government data and information more accessible to everyday citizens. To this end, both the United States²⁶ and the European Union²⁷ have recently announced ambitious open data

²⁵ Hosuk Lee-Makiyama, “Whither Global Rules for the Internet?”, EUROPEAN CTR. FOR INT’L POL. ECON., Policy Brief No. 12/2012, *available at* <http://www.ecipe.org/publications/wcit/>.

²⁶ Exec. Order No. 13642, 78 Fed. Reg. __ (May 14, 2013, forthcoming), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/09/executive-order-making-open-and-machine-readable-new-default-government->

initiatives. Using the TTIP to solidify these commitments would mark an important, forward-thinking innovation in trade agreements that could easily generate economic opportunity while also improving the accessibility and responsiveness of domestic governments.

VI. Intellectual Property (Question Q)

The TPSC's notice inquires as to "relevant trade-related intellectual property rights issues that should be raised with the EU." The issue of intellectual property law remains a contentious one in transatlantic relations. The subject has proven deeply divisive, and – with respect to at least some complicated issues – may not be appropriate for resolution in a trade agreement. Although both the US and EU have a mutual appreciation for robust and nuanced intellectual property rights regimes, substantial policy differences remain between the respective systems. Moreover, both copyright and patent law are facing fundamental questions of efficacy and credibility, and extensive reviews of both systems are beginning or underway on both sides of the Atlantic. The TTIP should not lock US policy into obsolete or flawed aspects of our IPR systems while they are undergoing heavy reexamination. To the extent that negotiators nevertheless opt to include intellectual property regulation in the TTIP, the following consensus items should be addressed.

A. Limitations and Exceptions

A copyright regime can allow technological progress only if it is balanced. Various exceptions and limitations, in both US and European copyright law, achieve this result. Both make liberal use of the Berne 3-step test,²⁸ which has inured to the benefit of both economies without eroding the incentive for creativity.

On July 3, 2012, USTR announced its intention to pursue in the Trans-Pacific Partnership a new provision, interpreting the Berne 3-step test, "that will obligate Parties to seek to achieve an appropriate balance in their copyright systems in providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and

²⁷ Press Release, European Commission, European Commission Welcomes Member States' Endorsement of EU Open Data Rules (April 10, 2013), *available at* http://europa.eu/rapid/press-release_IP-13-316_en.htm.

²⁸ Largely similar restatements of the "three-step test" appear in Berne art. 9, WIPO Copyright Treaty (WCT) art. 10(2), WIPO Performances and Phonograms Treaty (WPPT) art. 16(2), as well as the TRIPS Agreement art. 13, and US free trade agreements after 2003.

research.”²⁹ Although the language of this proposal has not yet been made public, CCIA supports the objective of ensuring that robust protection for copyright is achieved in a manner consistent with these purposes, and concurs with USTR’s assessment that these “principles are critical aspects of the US copyright system, and appear in both our law and jurisprudence.”³⁰ Given the importance of these principles, they should be appropriately carried forward in TTIP.

The economic significance of balanced copyright to the US economy cannot be understated. Research commissioned by CCIA in 2011 and recently cited by the National Academies of Science³¹ concluded that industries depending upon fair use and related limitations to copyright generated revenue averaging \$4.6 trillion, contributed \$2.4 trillion in value-add to the US economy (roughly one-sixth of total US current dollar GDP) and employ approximately 1 in 8 US workers. More relevant from a trade perspective, exports of goods and services related to fair use industries increased by 64 percent between 2002 and 2009, from \$179 billion to \$266 billion. Exports of trade-related services, including Internet or online services, were the fastest growing segment, increasing nearly ten-fold from \$578 million in 2002 to more than \$5 billion annually in 2008-2009.³²

European industries also substantially rely on various limitations and exceptions to copyright. “The value added generated by industries in the European Union relying on exceptions and limitations to copyright amounted to € 1.1 trillion or 9.3% of GDP in 2007. Nearly 9 million people are employed in these industries, amounting to 4% of all EU employees. Employees earned € 307 billion in wages and salaries.”³³

In addition to the general language already contemplated in TPP noted above, the following commonly accepted limitations and exceptions should be included in any substantive transatlantic trade instrument on copyright.

²⁹ “USTR Introduces New Copyright Exceptions and Limitations Provision at San Diego TPP Talks,” July 3, 2012, at <http://www.ustr.gov/about-us/press-office/blog/2012/july/ustr-introduces-new-copyright-exceptions-limitations-provision>.

³⁰ *Id.*

³¹ Stephen A. Merrill & William J. Raduchel, “Copyright in the Digital Era: Building Evidence for Policy,” National Research Council (2013), at http://www.nap.edu/catalog.php?record_id=14686.

³² Thomas Rogers & Andrew Szamosszegi, *Fair Use in the U.S. Economy* at 26-27 (2011) available at <http://www.cciagnet.org/fairusestudy>.

³³ I. Akker, *et al.*, “Economic Contribution of EU Industries Relying on Exceptions & Limitations to Copyright,” (2010), at <http://www.cciagnet.org/CCIA/files/ccLibraryFiles/Filename/000000000398/FairUseEUstudy.pdf>

(1) First Sale and Exhaustion of the Distribution Right

TTIP should provide for copyright exhaustion. That is, when a person executes the first sale of a fixation of a copyrighted work, that act truncates the right of distribution with respect to that copy. Such an obligation would obviously comport with the US Supreme Court's recent, unambiguous decision in *Kirtsaeng v. John Wiley & Sons*, which interpreted 17 U.S.C. § 109(a) to mean that copyright's 'first sale' or 'exhaustion' doctrine permits the owner of a work to sell or dispose of that copy as he wishes, whether that work was made domestically or abroad.³⁴ EU law similarly provides that the first sale, with consent of the rightholder, exhausts the right to control resale of that object, within the EU.³⁵ This consensus should be reaffirmed in TTIP.

(2) Temporary Copies

Copyright limitations and exceptions have customarily excluded from copyright temporary acts of reproduction which are transient or incidental. This exclusion is essential to modern technology, as digital devices and digital communications necessitate thousands of such copies, often without the user's knowledge. Copyright law on both sides of the Atlantic embraces this idea. US courts have held either that temporary electronic copies are not "fixed" with respect to copyright unless they are "of more than transitory duration,"³⁶ or that they may be fixed but constitute fair use.³⁷ Similarly, an exclusion for "temporary acts of reproduction [having] no independent economic significance" appears in article 5(1) of the EU Information Society Directive.³⁸ Parallel language also appears in the Chile-US Free Trade Agreement.³⁹

Given the importance of this principle, TTIP should provide an exception for temporary acts of reproduction which are transient or incidental, have no independent economic significance, and are an essential part of a technological process, to enable lawful transmissions or use of a work.

³⁴ *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1351, 1358 (2013).

³⁵ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167/10), art. 4(2). This is also consistent with NAFTA arts. 1705(2)(b) & 1706(1)(c).

³⁶ *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550-51 (4th Cir. 2004).

³⁷ *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007).

³⁸ Directive 2001/29/EC, *supra* note 35, art. 5(1). The EU Software Directive similarly indicates that otherwise copyright-regulated actions "shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose." Directive 2009/24/EC of the European Parliament and of the Council of 23 Apr. 2009 on the Legal Protection of Computer Programs, 2009 O.J. (L 111/16), art. 5(1).

³⁹ United States-Chile Free Trade Agreement, June 6, 2003, 42 I.L.M. 1026, art. 17.7(3) fn. 17.

(3) Nominative Use

Consistent with US and international law, TTIP should establish limitations on trademark rights to fair use of descriptive terms, nominative use of trademarks, and other uses to sustain free expression and avoid the creation of barriers to legitimate activity. Permitting the “fair use of descriptive terms” has been an international norm since TRIPS art. 17; and this provision appears in US FTAs, including Chile-US FTA art. 17.2.5, and KORUS. Trademark fair use is similarly a mainstay of European trademark law. Expansive, mandatory language protecting both descriptive and nominative uses also appears in the EU-Colombia-Peru FTA art. 206 (“Exceptions to the rights conferred by a trademark”), requiring that each party shall provide for the fair use of marks in the course of trade. US law also contemplates similar objectives by providing that neither nominative nor descriptive uses of terms qualify as trademark dilution.⁴⁰

(4) Non-Protection of Facts

As CCIA noted in its filing in response to the USTR’s 2013 Special 301 report,⁴¹ the German legislature has created a new *Leistungsschutzrecht* or so-called “ancillary right” for press publishers, such as newspapers and magazines. This legislation appears to prohibit Internet platforms from displaying snippets of information without authorization from the source. Constituencies in other European states have considered this approach, including Portugal.⁴² These developments occur notwithstanding EU commitments that individual facts and ideas be excluded from copyright protection.

That commitment is found in various places, including Article 10(1) of the Berne Convention, which states that

It 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

⁴⁰ 15 U.S.C. § 1125(c)(3) (limiting with respect to “Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use”).

⁴¹ See Comments of Computer & Communications Indus. Ass’n, Dkt. No. USTR-2010-022, filed Feb. 8, 2013, at [http://www.ccia.net/org/CCIA/files/ccLibraryFiles/Filename/000000000759/CCIA%20Comments%20on%20Special%20301%20\[2013\].pdf](http://www.ccia.net/org/CCIA/files/ccLibraryFiles/Filename/000000000759/CCIA%20Comments%20on%20Special%20301%20[2013].pdf).

⁴² Charles Cooper, “Portuguese media outlets demand Google pay for links: the latest example of a trend sweeping the Continent,” CNET News, Mar. 27, 2013, at http://news.cnet.com/8301-1023_3-57576628-93/portuguese-media-outlets-demand-google-pay-for-links-news-leads/.

quotations from newspaper articles and periodicals in the form of press summaries. (emphasis supplied).⁴³

The mandatory obligation not to extend copyright to facts was also carried forward into international trade law, including the TRIPS Agreement, which incorporates this and other articles of the Berne Convention for the Protection of Literary and Artistic Works by reference.⁴⁴ TRIPS also makes clear that copyright protection “shall extend to expression *and not ideas*”.⁴⁵

Because certain legislatures have overlooked these obligations, or choose to flout those obligations so as to benefit domestic publishing constituencies at the expense of multinational technology firms, the TTIP should reassert and reestablish the existing international commitments found in Berne art. 10(1) and TRIPS art. 9(2).

B. Safe Harbors

In addition to substantive limitations and exceptions, the safe harbors from copyright liability provided by the Digital Millennium Copyright Act (DMCA) have been critical to the growth of the Internet economy in the United States. These safe harbors were in part inspired by the European E-Commerce Directive, which Congress drew upon in the DMCA, having recognized that holding Internet and e-commerce businesses liable for the wrongful conduct of their users would jeopardize the growth of this vital industry and place unreasonable burdens on these service providers.

US copyright safe harbors are located in Section 512 of the DMCA,⁴⁶ which limits remedies available against online intermediaries whose users are implicated in copyright infringement, provided that the service provider complies with a notice and takedown regime

⁴³ Berne Convention for the Protection of Literary and Artistic Works, art. 10(1), as last revised July 24, 1971, amended Oct. 2, 1979, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221. *See also* Berne art. 2(8): “The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.”

⁴⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.”); *see also* Panel Report, *United States -- Section 110(5) of US Copyright Act*, WT/DS160/R, adopted July 27, 2000, ¶ 6.63 (finding not only that certain articles of the Berne Convention are incorporated into the TRIPS Agreement by way of Article 9.1, but also certain elements of the Berne Convention’s *acquis*).

⁴⁵ TRIPS Agreement, art. 9(2).

⁴⁶ 17 U.S.C. § 512.

specified by statute. (Intermediary liability with respect to other content is discussed *supra* in Part IV.D.) This statutory provision has been incorporated into numerous US free trade agreements since 2003. The success of Internet and e-commerce businesses in the US must be at least partially attributed to the fact that Congress carefully crafted laws that encourage rapid innovation and entrepreneurialism online by establishing certainty and predictability with respect to liability matters.

While IPR enforcement has been established as a component of international trade, these rules date from the TRIPS era, when international trade did not envision the expansive and growing importance that digital services would have in the international economy. As a result, intellectual property liability is all too often assigned to intermediaries instead of end users. In France, for example, a court imposed liability on eBay for sales of authentic (non-counterfeited) Louis Vuitton goods by various small businesses and individuals through eBay's site.⁴⁷ While these sales at issue were legal under US law and were marketed on eBay's US-facing site, the court imposed a \$60 million judgment in a decision that press accounts argued "reeks of protectionism."⁴⁸ Several extreme cases have occurred in Italy. In one, an Italian copyright licensee of a film brought suit against multiple search engines and in fact prevailed against Yahoo on the grounds that the search engine contained links that pointed to sites that enabled users to stream or download the work to which the licensee had rights.⁴⁹ In another case, an Italian court imposed liability in part *because* Yahoo provided functionality enabling users to report copyright violations.⁵⁰ Although Section 512 is substantially more prescriptive than the E-Commerce Directive, various court decisions illustrate consensus around a notice and takedown model. Given the importance of this provision to US and EU e-commerce, it should be incorporated into TTIP.

⁴⁷ Tribunal De Commerce De Paris, June 30, 2008, Geronimi.

⁴⁸ *See, e.g.*, Therese Poletti, "EBay Ruling in France Reeks of Protectionism," MARKET WATCH, July 1, 2008, at http://articles.marketwatch.com/2008-07-01/news/30697184_1_nichola-sharpe-ebay-perfume.

⁴⁹ Giulio Coraggio, "Yahoo Liable for Searchable Contents," IPT ITALY BLOG, Apr. 3, 2011, at http://blog.dlapiper.com/IPTItaly/entry/yahoo_liable_for_searchable_contents.

⁵⁰ *Reti Televisive Italiane S.p.A. (RTI) v. Yahoo! Italia S.r.l.*, Court of Milan, (Sept. 9, 2011).

VII. Conclusion

This agreement represents an opportunity to ensure that the international trade regime extends protections to information services in a manner that fully recognizes their status as equal to that of physical goods and services. In the long run, international trade rules on data flows should mirror the level of liberalization evident in GATT agreement rules for tangible goods. Until that time, movements of data will be far more vulnerable to trade restriction than movements of tangible goods.

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May 10, 2013