

**STATEMENT FOR THE RECORD**

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**SUBMITTED TO**

**United States House of Representatives Committee on Ways and Means, Subcommittee on Trade**

**1102 Longworth House Office Building**

**Expanding U.S. Digital Trade and Eliminating Barriers to U.S. Digital Exports**

**July 13, 2016  
10:00 AM**

Chairman Reichert, Ranking Member Rangel, and members of the Subcommittee, I would like to thank you for giving eBay Inc. the opportunity to submit a statement for the record on this important topic.

eBay Inc. is a global commerce leader including the Marketplace, StubHub and Classifieds platforms. Collectively, we connect buyers and sellers around the world, empowering people and creating opportunity through Connected Commerce. Founded in 1995 in San Jose, California, eBay is one of the world's largest and most vibrant marketplaces for discovering great value and unique selection.

In 2015, eBay enabled \$82 billion of gross merchandise volume and today, 58% of our Marketplaces business is international. Our platforms enable hundreds of thousands of US entrepreneurs, small businesses, as well as mid-size and large businesses, to reach customers around the world. We empower over 164 million buyers globally on our marketplaces with users in 190 countries. Our platform facilitates a new kind of a global trade that is truly beneficial for Main Street businesses across America.

eBay Inc. is an Internet and mobile technology-based business, but in the 21st Century global economy, every business that operates internationally in any significant scale depends on access to, and transmission of, digital goods and services, including logistics, online services, distribution networks, finance and professional services. The Internet accounts for 21% of GDP growth in advanced economies and facilitates \$8 trillion each year in e-commerce. The United States is the unquestioned world leader in Internet-enabled business, innovation and entrepreneurship. But data moving across borders is not just an Internet industry phenomenon; it impacts every business, including manufacturers, agricultural businesses, and financial services providers. McKinsey reports that 75% of the impact of the Internet is being realized by traditional industry.<sup>i</sup> The US International Trade Commission estimates that digital trade has already boosted US gross domestic product by 3.4% to 4.8% through enhanced productivity and reduced international trade costs, and the effect on US total employment ranged from no change to an increase of 2.4 million full-time equivalents.<sup>ii</sup>

My team at eBay Inc. has spent the last four years conducting research on the growth of global trade by technology-enabled small businesses.<sup>iii</sup> In April 2016, we released the United States Small Online Business Growth Report<sup>iv</sup> which provides an in-depth look at trade and growth figures for eBay-enabled small businesses and entrepreneurs (annual sales of \$10K or more) in all 50 states as well as the District of Columbia. The report also provides a state-by-state snapshot of the counties with the most eBay-enabled small business activity per capita.

The report findings reveal that nearly every eBay-enabled small business in each state is an exporter, and that eBay-enabled small businesses as a whole have been experiencing sales growth rates that exceed their state economy averages. The research also shows that active eBay-enabled small businesses emerge from communities nationwide, rural and urban alike. These findings further bolster the argument that the technology-enabled platform commerce model, which significantly reduces the cost of doing business over distances, is a highly inclusive model of trade. For example, our research revealed that 97% of eBay-enabled small businesses in the United States export. This figure dwarfs the export activity of traditional US businesses, which stands at approximately 1% nationwide. Additionally, nationwide, eBay-enabled small businesses that export reach an average of 18 foreign markets.

Alongside these impressive statistics, there are many excellent examples of small business success stories including:

- The McClellan Family from Ferndale, Washington, started Hardware Sales, formerly Powder Sales, in 1962, specializing in sales of dynamite to loggers, miners, and road builders. This family-owned business became an integral part of their small Washington state community, as the one-stop hardware store. However, in 2007, the success of mainstream big box retailers, forced the family to adapt to the changing retail landscape by opening a Hardware Sales Internet division. That’s when they brought in Steve Douge, who had experience in online sales to run their Internet division. What started as an eBay only operation has now expanded to its own website. The company regularly gives back to the community through their work with the local Boys and Girls club, as well as donating tools and equipment to organizations such as Habitat for Humanity and other non-profit building projects. Hardware Sales exports around 25% of its products.
- Adam Wexler of Brooklyn, NY operates StereoBuyers, a locally owned, family-run business focused on buying and selling High-End pre-owned HiFi audio equipment. The seed of StereoBuyers was planted in the mid1990s. As a college student, Adam wanted a high end stereo, but could not afford one. That’s when he got the idea to buy and sell stereo equipment that had been traded into a local HiFi shop. After graduation, Adam continued to run StereoBuyers part time until 2009, when he left his full-time job as one of Manhattan’s top high-end AV salesmen and designers to pursue the business full-time. In 2012 Hurricane Sandy completely wiped out Adam’s business and putting his warehouse and products in 7 feet of water. Luckily, through hard work and determination, Adam and the StereoBuyers team were able to build themselves back up. StereoBuyers exports about 30% of its products.

This trade activity represents a new model of SME exporting that has emerged in parallel to the SME “Global Value Chain” model where small enterprises engage in trade as a component of a giant commercial enterprise. We have coined the term “Global Empowerment Network to describe this new model by which small businesses are able to create a storefront presence online and compete directly in global markets through e-commerce platforms with vibrant customer bases. The Global Empowerment Network combines a set of services and conditions enabling SMEs to transcend borders, reach customers on a global scale, and facilitate business transactions.

There are four key building blocks that fuel the Global Empowerment Network: (1) Connectivity to the global Internet at lost cost and without gatekeepers; (2) Global platform-based marketing, marketplace and payment services; (3) Efficient, modern and “connected” package-level logistics and delivery services; and (4) Legal, regulatory, and public policy framework supporting direct SME-to-consumer global commerce.

Our United States Small Online Business Growth Report also provides key recommendations for policy makers to drive even greater economic growth among small American business that use the Internet to export. These include:

- Increase Low Value Customs “De Minimis” Thresholds Across the Globe
- Support the Trans-Pacific Partnership Agreement (TPP) and Other Efforts to Modernize Trade Policy
- Modernize Postal Systems to Support Small Business Digital Trade
- Promote the US Standard of Intellectual Property Law in Trade Agreements
- Ensure a Free and Open Internet
- Explore Flexible International Regulatory Cooperation Solutions

- Provide Coordinated Export Promotion Assistance to Internet-Enabled SMEs

The kind of cross-border trade being done by these, and hundreds of thousands of other “micro-multinationals” spread across America, is growing rapidly. Research from Progressive Economy finds that low-value or “micro” US exports increased by 103% between 2005 and 2010, more than twice the increase for all exports.<sup>v</sup> Moreover, the 2013 World Economic Forum (WEF) Enabling Trade report found that the use of technology platforms can reduce the burdens small businesses face when selling overseas, increasing cross-border small business sales by 60-80%.<sup>vi</sup>

Finally, it is key to realize that when examining the barriers and opportunities for U.S. business in the digital age, our discussion is not merely about business or policy; it is about people. Globalization and trade are fundamental realities of the world in which we live. Unfortunately, a significant number of people have not yet been able to directly take part in the global marketplace because they own or work in businesses that have, traditionally, been too small or too remote. But now the Internet, and the global data-based businesses and platforms that underpin 21st Century commerce, are enabling small business and consumers, for the first time, to truly enjoy the benefits of direct participation in the global market.

We sit at the dawn of a new era of globalization that is far more inclusive than the one that preceded it – a future where millions of small businesses from across the US can participate in their local economy and also increase revenue through access to customers around the world. This is good economics because it means more growth and wealth, and it is good for society because it means a more inclusive future. We need to make the right policy choices to achieve this future.

Chairman Reichert, Ranking Member Rangel, and members of the Subcommittee, we respectfully submit this statement for the record and pledge to work with you to ensure that US small businesses and consumers can realize the true benefits from the Internet.

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<sup>i</sup> 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](http://www.mckinsey.com/insights/high_tech_telecoms_internet/internet_matters)

<sup>ii</sup> U.S. International Trade Commission, Digital Trade in the U.S. and Global Economies, Part 2 available at: <http://www.usitc.gov/publications/332/pub4485.pdf>

<sup>iii</sup> The Full range of research can be found here: <http://www.ebaymainstreet.com/lab>

<sup>iv</sup> Available at: <http://www.ebaymainstreet.com/policy-papers/us-small-online-business-growth-report>

<sup>v</sup> Gresser, Edward. “Lines of Light: Data Flows as a Trade Policy Concept.” (2012).

<sup>vi</sup> World Economic Forum, Enabling Trade (2013)

United States House of Representatives

Committee on Ways and Means

Subcommittee on Trade

Hearing on Expanding U.S. Digital Trade and Eliminating Barriers to

U.S. Digital Exports

Testimony

by

Etsy

Chairman Reichert and Members of the House Ways and Means Trade Subcommittee, thank you for the opportunity to submit written testimony on the importance of expanding U.S. digital trade and eliminating barriers to U.S. digital exports.

Etsy is a marketplace, founded in 2005, where people around the world connect to make, sell, and buy unique goods. Our community is the heart and soul of Etsy and is made up of creative entrepreneurs who sell on our platform, thoughtful consumers looking to buy unique goods in our marketplace and the Etsy employees who maintain our platform and nurture our ecosystem. Our community also includes the retailers who participate in our Wholesale offering and the manufacturers who form responsible partnerships with Etsy sellers. As of December 2015, Etsy has 1.6 million active sellers present in almost every country around the world – selling everything from food to furniture. We have 25 million active buyers worldwide, and in 2015 our sellers sold \$2.39 billion worth of goods.

The internet has made it easier for anyone to start and grow a business, and Etsy sellers typify this new face of digitally-enabled entrepreneurship. Fully 86% of our US sellers are women, and most operate their businesses on their own out of their home, using the Etsy platform to reach consumers around the world. While 30% operate their creative business as their sole occupation, for the rest it's an important source of supplemental income, contributing an average of 15% to annual household income.<sup>1</sup>

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<sup>1</sup> “Building an Etsy Economy: The New Face of Creative Entrepreneurship”, 2015. [www.etsy.me/sellercensus](http://www.etsy.me/sellercensus)

The creative entrepreneurs who sell on Etsy may not be the businesses one imagines when considering the exporters who could benefit from global trade agreements, yet as of March 31, 2016, 30.3% of gross merchandise sales on Etsy involve a buyer or a seller outside the United States. Many Etsy sellers start selling goods internationally from the moment they open their shops. Unfortunately, existing trade laws have not kept up with the growth of global ecommerce and the opportunities it provides to micro-businesses.

Most independent, creative businesses lack the infrastructure and information to navigate complicated international trade rules. Customs and duties vary by country, and credible information about each country's requirements can be difficult to find. Packages are often delayed in customs or subject to unforeseen import taxes that the buyer must pay before receiving their package. Package tracking often stops at the border, creating unnecessary friction in international transactions. In the face of these challenges, buyers may reverse transactions or request refunds, the cost of which the seller often bears.

In addition to customs and duties requirements, e-commerce regulations vary widely between countries. Discrepancies in consumer protection or privacy laws pose a challenge for individual sellers, who must find relevant information on requirements for each country before shipping an item, or who may unknowingly break local laws when they allow buyers from other countries to purchase their goods. International trade agreements offer opportunities to reduce the barriers that prevent digitally-enabled micro-businesses from exporting their goods.

## **A Universal De Minimis Customs, Duties and Tax Exemption**

Many countries already set customs and duties exemptions for goods under a specific monetary value, yet these de minimis thresholds vary widely between countries. For example, goods under \$800 are exempt from US customs and duties, while anything over roughly \$20 is subject to customs and duties in Canada. These duties, tariffs and taxes create considerable friction for US exporters, leading to reversed transactions and forgone sales for the micro-businesses who sell on Etsy. Negotiating a universal low-value customs, duties, and tax exemption that covers most peer-to-peer transactions would eliminate the biggest barrier that internet-enabled entrepreneurs face.

## **Open Customs and Duties Data**

Customs and duties vary by country, and credible information about each country's requirements and restrictions can be difficult to find. Whereas a traditional small business might expand incrementally, digital platforms like Etsy allow a small business to offer her products worldwide from the moment she opens her shop. For an Etsy seller, the challenges arise not in breaking into a new market, but in figuring out what rules apply to a particular product in a particular country *after* the purchase has been made, when there is considerable pressure to ship a good quickly. These sellers scour the internet for credible information, occasionally canceling a transaction where information is unavailable, or simply shipping the good and hoping for the best. While many trade agreements include provisions to make this information publicly available, there is an opportunity to bring this requirement into the 21st century by requiring governments to make

relevant information available in a common format through an open API, which third-party developers could use to create user-friendly tools for their customers.

### **Intermediary Liability**

In the US, Section 230 of the Communications Decency Act (CDA 230) protects intermediaries from liability for the actions of their users. This key principle of intermediary immunity (also called “safe harbor”) from liability has helped Etsy grow and evolve over the last ten years, enabling 1.6 million active sellers to open an online shop and pursue their passion. Online marketplaces must create a safe and trusted environment for transactions to occur, but should not incur the same legal responsibilities and liabilities as those who use their platforms. Including intermediary liability provisions in trade agreements would allow startups to build new global platforms without creating undue risk, and enable these platforms to provide opportunities to micro businesses around the world.

Thanks to the power of the internet and an increasingly global economy, would-be entrepreneurs can start a business and reach a global market of consumers for the price of an internet connection. Policy makers should take advantage of the opportunities to promote entrepreneurship at every level by reducing barriers micro-businesses face when operating at a global scale.



**U.S. House of Representatives Ways & Means Committee**

**Comments on Expanding U.S. Digital Trade and Eliminating Barriers  
to U.S. Digital Exports**

**Presented by:**

**Jennifer Topolski, Owner, J. Topolski**

**July 13, 2016**

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Chairman Reichert and Members of the House Ways and Means Trade Subcommittee, thank you for the opportunity to submit written testimony on the importance of expanding U.S. digital trade and eliminating barriers to U.S. digital exports. As a creative entrepreneur who operates a global e-commerce business, I believe that there are several opportunities to reduce the barriers I face to exporting my goods.

I graduated from college in 2005 with an illustration BFA and immediately began working as a freelancer in various creative industries. I worked as a fine artist assistant, a stylist, a photo retoucher, a graphic designer, a ceramicist, and an illustrator, all while working on my own art and design as time allowed. In 2008 a friend told me about Etsy, an online marketplace where anyone could sell their handmade work, and I decided to open up a shop selling my ceramic work and jewelry. Slowly and steadily, I learned the ins and outs of running a business; particularly an online business. I worked constantly to learn how to improve my search engine rankings, how to handle customer service, how to file sales taxes, and the mountains of other things small business owners must figure out. My sales consistently improved and I began to turn down freelance work in favor of working on my own business. By 2013, I no longer accepted contract work at all, and I now have my first "full-time job" running my own business.

It is an amazing thing to live in a time where anyone with an internet connection, a camera, and a craft can sell their work to anyone in the world. It opens a tremendous opportunity for countless people with an entrepreneurial spirit, who historically may not have had the resources to begin a business. Whether these businesses provide supplemental income for stay at home parents, something to help make ends meet between jobs, or a full-time income, most of us would not have been able to do this before the internet age.

The internet has created an on-ramp to entrepreneurship, but now more and more micro-entrepreneurs are entering a field that is not structurally prepared to let our businesses run smoothly. Yes, you can learn a lot from a Google search, but it doesn't replace the legal department that a traditional business

would have in-house. In a global marketplace, I frequently struggle to make sense of international laws. After doing all the work to design, create and sell my jewelry, I then have to put on my international exporter hat, investigating questions like: *Can I ship this ring to Australia? Is this gemstone Kimberly Process certified? Is precious metal allowed into the country via the postal service at all, or only Fedex? Is silver considered fine jewelry by their postal laws, or just gold and platinum? What is the de minimis VAT threshold for the country I am shipping to? Does this country require a packing slip on the outside of the box to clear customs? Is their postal service on strike? If so, what do I do?*

These are typical questions I need to think about, and many industries beyond jewelry have similar concerns. I rely on the USPS website and their posted international restrictions, although I don't know how frequently it is updated.

In addition to investigating the laws that govern my products, I also must manage my customers and their expectations. "When can I expect my package?" is a perfectly reasonable question, but 1-5 weeks is not a very reasonable answer. Unfortunately, it is an honest one. Once a package leaves the US, I cannot do anything to retrieve it, or often even track it. I don't know postal laws in other countries, and even if I can find the information in English, I may not be able to explain it well to a customer. I have found a few websites that estimate VAT and GST taxes, but sadly many customers are still outraged at the amount of money they must pay to their customs agency for the privilege of international shopping. I cannot immediately absorb refunds for packages that don't make it to the destination in time for an event or are refused based on the customs charge, and waiting for an unclaimed package to return back to me so I can refund a customer is stressful for both of us.

The greatest single thing that policymakers can do to help creative micro-entrepreneurs like me, who are international exporters in our own right, is to negotiate a higher de minimis customs, duties and tax exemption in trade negotiations. The US recently increased our de minimis customs exemption to \$800, which will help US sellers source materials and process returns. Using our de minimis as a benchmark, we should encourage our trading partners to increase their own de minimis exemptions, helping digitally-enabled micro-exporters like me reap the benefits of the global economy.

Additionally, instead of all of this information living online through various and cumbersome portals, we should require our trading partners to make information about their customs, duties and import taxes available in a common format via an open API, so this data can not only be accessed easily, but third-party companies and organizations can build effective and reliable tools for micro-entrepreneurs.

Running any small business is an overwhelmingly difficult task, but online businesses have some unique hurdles to clear, particularly when it comes to exporting our goods. International trade deals have the potential to reduce the barriers we face when exporting our goods, while increasing the policy transparency that is vital to all of us trying to stay on the right side of the laws. As our employment culture shifts toward a contract-based society, being self-employed will become increasingly common. The more resources we have to run our businesses smoothly, and legally, the better it will be for our entire economy.

# EXPANDING U.S. DIGITAL TRADE AND ELIMINATING BARRIERS TO U.S. DIGITAL EXPORTS

## COMMENTS OF PUBLIC KNOWLEDGE

### I. STATEMENT OF INTEREST

Public Knowledge is a non-profit organization dedicated to promoting freedom of expression, an open internet, and access to affordable communications tools and creative works. As part of this mission, Public Knowledge advocates on behalf of the public interest for a balanced intellectual property system, particularly with respect to new and emerging technologies, and for communications policy that fosters such emerging technologies. Public Knowledge is grateful for the opportunity to address the issues raised by U.S. trade policy in this context.

### II. INTRODUCTION

U.S. trade policy should encourage policies that promote innovation, competition, and the rights of internet users. These goals can be achieved in part through provisions that promote free expression and privacy, balanced intellectual property rights, protections for internet intermediaries and preservation of the open internet, as well as provisions that reaffirm contracting parties' commitments to expanding internet access and protecting human rights online. Further, U.S. trade negotiations should strive for greater transparency and inclusion in the negotiation process. Lastly, trade agreements should not strive to dictate policy choices in detail, but should provide high-level principles and guidelines, allowing parties flexibility in implementation.

U.S. internet companies currently dominate the market for internet services abroad,<sup>1</sup> and U.S. trade policies have the potential to affect global internet policy for billions of users.<sup>2</sup> U.S. trade policy can benefit both commerce and the interests of consumers by promoting a free, open, and competitive internet. Internet and telecommunications services contribute substantially to the GDP,<sup>3</sup> overall productivity, and employment.<sup>4</sup> The

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<sup>1</sup> See Markham C. Erickson & Sarah Leggin, "Exporting Internet Law Through International Trade Agreements: Recalibrating U.S. Trade Policy in the Digital Age" ("Exporting Internet Law"), 24 *Catholic Univ. J. of L. & Tech.* 317, 324 (2016); see also Susan Ariel Aaronson, "The Digital Trade Imbalance and Its Implications for Internet Governance," *Global Commission on Internet Governance Paper Series: No. 25*, 7 (Jan. 2016); See *Exporting Internet Law* at 324; Ali Sternberg & Matt Schreurs, "Modernizing Liability Rules to Promote Internet Trade," *CCIA Research Paper*, 2, <http://www.ccianet.org/wp-content/uploads/2013/09/CCIA-Liability-Rules-Paper.pdf>.

<sup>2</sup> Globally, more than 3 billion people are using the internet today, with 2 billion of those users situated in developing countries. ITU, "ITU Releases 2015 ICT Figures, Statistics Confirm ICT Revolution of the Past 15 Years" (May 26, 2015), [https://www.itu.int/net/pressoffice/press\\_releases/2015/17.aspx](https://www.itu.int/net/pressoffice/press_releases/2015/17.aspx).

<sup>3</sup> In 2014, the internet-related industry contributed approximately 6% percent (\$966.2B) to the U.S. real GDP. Stephen Siwek, *Internet Association, Measuring the U.S. Internet Sector*, 4 (2015), <http://internetassociation.org/wp-content/uploads/2015/12/Internet-Association-Measuring-the-US-Internet-Sector-12-10-15.pdf>. Another study shows that, in 2010, the internet contributed 1.9 percent to GDP in developing countries (\$366 billion, \$119 per capita), and 3.4 percent to GDP in developed countries, (about \$1,488 per capita). Olivia Nottebohm, et al., "Online and Upcoming: the Internet's Impact on Aspiring Countries," 8 (2012), [http://www.mckinsey.com/~media/mckinsey/dotcom/client\\_service/high%20tech/pdfs/internet\\_aspiring\\_executive\\_summary\\_v2.ashx](http://www.mckinsey.com/~media/mckinsey/dotcom/client_service/high%20tech/pdfs/internet_aspiring_executive_summary_v2.ashx).

<sup>4</sup> A recent report for the U.S. International Trade Commission found that the internet-related productivity gains have increased the U.S. real GDP by 3.4-3.5%. The same study determined that the internet led to a 1.8% increase in employment. See USITC, "Digital Trade in the U.S. and Global Economies," Part 2 Pub 4485 Investigation 332-540 (2014). See also Google, "Enabling Trade in the Era of Information Technologies: Breaking Down Barriers to the Free Flow of Information," 3 (2011) ("Google Trade Paper") ("The Internet has ...enable[d] the emergence of new business models, new processes, new inventions, new and improved goods and services and ...increase[d] competitiveness and flexibility in the economy, for example by the increased diffusion of information at

OECD has stated the internet's impact on productivity "may exceed the effects of any other technology enabler to date, including electricity and the combustion engine."<sup>5</sup> Done well, trade agreements can support these gains by promoting substantive norms for adapting domestic policymaking to the internationalization of business practices in the technology sector.<sup>6</sup> Done poorly, trade agreements can lock in policies that fail to translate to diverse national contexts and quickly become obsolete in an era of rapid change.

### **III. INTELLECTUAL PROPERTY PROVISIONS IN TRADE AGREEMENTS MUST BALANCE THE INTERESTS OF INTELLECTUAL PROPERTY OWNERS AND THE PUBLIC.**

To ensure that the internet will continue to drive innovation, productivity, and free expression globally, policymakers must take account of how the monopoly rights created by intellectual property law are frequently extended far beyond what is necessary to promote creativity and the dissemination of knowledge and culture. To that end, where trade agreements address intellectual property, the United States should demand a framework of limitations and exceptions to intellectual property rights that is at least as flexible as those in current the U. S. system, and that permits countries to carefully weigh the costs of expanding or creating new forms of intellectual property. Finally, U.S. trade policy should preserve sufficient flexibility for Congress and other national lawmakers to develop domestic intellectual property law and policy.

#### **A. MAINTAINING CONGRESS'S ROLE IN INTELLECTUAL PROPERTY POLICY**

U.S. intellectual property rights must serve to "promote the progress of science and the useful arts."<sup>7</sup> Trade agreement provisions that restrictively prescribe elaborate intellectual property regimes can unduly constrain Congress's legislative autonomy. To the extent that trade agreements touch on domestic policy issues at all, they should focus on establishing high-level guidelines, rather than specific implementations. Further, Congress should maintain its role in shaping U.S. intellectual property policy through active participation in and oversight of U.S. trade negotiations.

#### **B. ENSURING BALANCED INTELLECTUAL PROPERTY RIGHTS THROUGH LIMITATIONS AND EXCEPTIONS**

Excessive IP regimes impose economic and social costs on society.<sup>8</sup> Robust limitations and exceptions are necessary to protect innovation, growth, and free expression. They also play a valuable role in digital trade. For example, in 2011, "about one out of every eight workers in the United States [was] employed in an industry that benefitt[ed]" from limitations and exceptions to copyright.<sup>9</sup> Further, these industries are responsible for a substantial portion of U.S. exports.<sup>10</sup> IP regimes without adequate limitations and exceptions would burden these industries--inhibiting market entry for new entrants, reducing investment in innovative services, and

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lower cost." This impact is not limited to internet-based industries, and extends to businesses in traditional sectors. *See* James Manyika & Chales Roxburgh, "The Great Transformer: The Impact of the Internet on Economic Growth and Prosperity," 3 (Oct. 2011), [http://www.mckinsey.com/~media/McKinsey/Industries/High%20Tech/Our%20Insights/The%20great%20transformer/MGI\\_Impact\\_of\\_Internet\\_on\\_economic\\_growth.ashx](http://www.mckinsey.com/~media/McKinsey/Industries/High%20Tech/Our%20Insights/The%20great%20transformer/MGI_Impact_of_Internet_on_economic_growth.ashx).

<sup>5</sup> OECD, "Broadband and the Economy: Ministerial Background Report," 8-9 (May 2007), <https://www.oecd.org/sti/40781696.pdf>.

<sup>6</sup> *See* Graeme Dinwoodie, "The International Intellectual Property Law System: New Actors, New Institutions, New Sources," 10 Marq. Intellectual Property L. Rev. 205 (2006).

<sup>7</sup> U.S. Const., Art. I, Sec. 8.

<sup>8</sup> Jodie Griffin, "The Economic Impact of Copyright" ("Griffin"), Public Knowledge, 1 (2012), <https://www.publicknowledge.org/files/TPP%20Econ%20Presentation.pdf>.

<sup>10</sup> *See id.* at 7.

increasing costs.<sup>11</sup>

For developing countries, flexibility in the scope of IP rights and a robust framework of limitations and exceptions may also be crucial. Excessive intellectual property monopolies can actively impair those countries' economic and technological development, without providing sufficient corresponding benefits to rightsholders.<sup>12</sup>

Historically, U.S. trade agreements have largely failed to provide for limitations and exceptions to intellectual property rights.<sup>13</sup> While KORUS marked a departure insofar as it explicitly permitted limitations and exceptions, and required limitations on intermediary liability, future trade agreements should go further towards expressly requiring such protections. While the TPP requires that signatories "shall provide" extensive intellectual property rights and enforcement mechanisms, it requires that signatories "shall endeavour to achieve" appropriate limitations and exceptions. Going forward, U.S. trade policy should ensure that trade agreements mandate parties to achieve balance in their intellectual property system through the provision of adequate limitations and exceptions.

## 1. BALANCED COPYRIGHT AND PATENT LAWS

In order to optimize incentives for creativity and maximize economic and social benefits, copyright and patent laws must contain a variety of balances, including: (a) adequately limited terms of copyright protection, (b) exhaustion of copyright and patent rights, (c) limitations and exceptions during the term of protection, such as the idea/expression limitation and fair use in copyright, and (d) proportionate remedies. While the TPP requires signatories to "recognize the importance of a rich and accessible public domain,"<sup>14</sup> and requires that intellectual property provisions must be implemented "taking into account the interests of relevant stakeholders, including rights holders, service providers, users and the public,"<sup>15</sup> future agreements should provide more specific guidelines..

### a. COPYRIGHT TERM

Excessive copyright terms harm the public domain, which "provides an immense social and economic benefit to all sectors of society.," without providing corresponding benefits.<sup>16</sup> The last extension to the U.S. copyright term, from the life of the author plus 50 years to the life of the author plus 70 years, "revealed that the term extension had a negligible effect on investment decisions."<sup>17</sup> This is because "from the perspective of investors, 'the term of protection in the USA had nearly the same present value as a perpetual copyright term.'"<sup>18</sup> An international study on copyright term confirmed that term extension "[had] no impact on the output

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<sup>11</sup> See generally Griffin.

<sup>12</sup> See *id.*, 8-9 citing Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth ("Hargreaves"), 24 (2011) ("For low income countries with a weak scientific and technological infrastructure, stronger IP protection has little effect on their own economic growth and may even hinder it - while having no significant effect on the likelihood of developed country industry seeking to sell goods there"); see also Growers Review of Intellectual Property, HM Treasury, 59 (2006) ; Fisher & McGeeveran, The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age, Berkman Center for Internet and Society, 12-13, (2006).

<sup>13</sup> Exporting Internet Law at 341.

<sup>14</sup> TPP Art. 18.15.

<sup>15</sup> TPP Art. 18.4.

<sup>16</sup> Letter from Public Knowledge et al. to ministers and lawmakers of TPP negotiating countries("Coalition Letter") (July 9, 2014), <https://www.publicknowledge.org/documents/tpp-letter-on-copyright-term>.

<sup>17</sup> Griffin at 4; HM Treasury, Growers Review of Intellectual Property, 52 (2006).

<sup>18</sup> *Id.*

of creative works.”<sup>19</sup>

But overly long copyright terms harm those who depend on access to works in the public domain – including technology companies, libraries, archives, museums, students, artists and independent content creators, and the public at large. According to one study, “[e]conomic evidence is clear that the likely deadweight loss to the economy exceeds any additional incentivizing effect which might result from the extension of copyright term beyond its present levels.”<sup>20</sup>

Given the scant benefits and high social and economic costs of overly long copyright terms, it’s clear that such terms exact “a net welfare loss to society, and effectively amount[] to a transfer of wealth to a small number of multinational copyright-holding companies... at the cost of those who depend upon access to copyright works that would otherwise be in the public domain[.]”<sup>21</sup> Unfortunately, the copyright term provisions in the TPP require that some countries extend their terms, and further lock in the U.S.’s already excessive term.<sup>22</sup> Going forward, U.S. trade policy should avoid this policy mistake.

## **b. LIMITATIONS AND EXCEPTIONS IN COPYRIGHT**

Limitations and exceptions to copyright protection are essential to the internet’s continued success – as a platform for economic growth, dynamic innovation, and free expression.<sup>23</sup> In the United States, these limitations include the idea/expression and fair use doctrines.

### *Idea/Expression*

The limitation of copyright protection to creative expressions<sup>24</sup> “recognizes that copyright law should give the public flexibility to use, share, analyze, arrange and redistribute facts, news, and information without fear of liability.”<sup>25</sup> This “has had a very real, practical effect on the Internet and the information economy. One need only think of how often, every day, the Internet is used to investigate facts and how this adds to our lives,” including through the ability to fact check news sources, investigate investment opportunities, and research and evaluate products and services online.<sup>26</sup> Not all U.S. trading partners have such protections.<sup>27</sup>

### *Fair Use*

Section 107 of the United States copyright law permits certain uses of creative works notwithstanding the author’s exclusive rights in the work. It explicitly allows for “criticism, comment, news reporting, teaching including multiple copies for classroom use), scholarship, or research” as well as for uses that may be

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<sup>19</sup> *Id.* at 5; I.P.L. Png and Qiu-hong Wang, “Copyright Law and the Supply of Creative Work: Evidence from the Movies,” Review of Economic Research on Copyright Issues (2009).

<sup>20</sup> Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth, 19 (2011).

<sup>21</sup> Coalition Letter at 1.

<sup>22</sup> TPP Art. 18.63.

<sup>23</sup> See Joshua P. Meltzer, *Maximizing the Opportunities of the Internet for International Trade*. E15 Expert Group on the Digital Economy – Policy Options Paper. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum (“E15 Paper”) (2015). (“Initial research shows that when a country adopts balanced copyright rules and other limitations such as fair use, companies in these countries generate higher revenues, create more jobs, and spend more on R&D, when compared to countries with more closed lists of copyright exceptions.”)

<sup>24</sup> See *Feist Pub’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 346 (1991)

<sup>25</sup> Exporting Internet Law at 328.

<sup>26</sup> *Id.*

<sup>27</sup> See *id.*

considered “fair” under an application of a four-part test. Courts in the United States “have relied upon fair use and other limitations in copyright in upholding the legality of internet search engines and temporary copies that facilitate interoperability between computer programs and the development of web hosting services.”<sup>28</sup> Without fair use, “a website could not provide snippets and links to other websites; an internet service could not ‘cache’ copies of files, which allows an internet browser to respond in a matter of milliseconds; and artists could not produce mash-ups of existing content to create new works.”<sup>29</sup> And, innovations in cloud computing service, which rely on fair use,<sup>30</sup> have proven a substantial contributor to the global market for internet services.<sup>31</sup>

Limitations and exceptions like fair use are also critical to the ability consumers and end users of technology to make new uses of existing technologies and creative works. As one study found, “millions of citizens innovate to create and modify consumer products to better meet their needs.”<sup>32</sup> Where users may freely innovate and share the results of their creativity, “social welfare is very probably increased . . . relative to a world in which only manufacturers innovate.”<sup>33</sup> User innovations likewise drive innovation at the industrial level.<sup>34</sup> Therefore, U.S. trade policy should promote the inclusion of limitations and exceptions provisions in trade agreements that permit flexible fair use-like systems. Future agreements should clarify this point.

### C. PROPORTIONATE REMEDIES

To the extent trade agreements require the implementation of particular remedies for intellectual property infringement, those remedies should be proportionate. This includes limits on exemplary and deterrent damage awards under copyright laws. Such awards can be many magnitudes larger than any actual harm caused to the copyright holder. Even the threat of high statutory damages can discourage investment in business models or technologies that rely on uses of copyrighted content, “increase[ing] the costs of regulatory uncertainty for technology and start-up inventors.”<sup>35</sup>

A diverse array of stakeholders have recognized the need for reform of the copyright statutory damages regime in the United States, including consumer advocates, technology companies and trade organizations, federal judges, and the Department of Commerce.<sup>36</sup> U.S. trade policy should avoid locking in this

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<sup>28</sup> Griffin at 9; *see also* Exporting Internet Law at 333.

<sup>29</sup> Expanding Digital Trade and Reducing Barriers to U.S. Digital Exports: Hearing Before the H. Subcomm. On Trade, 114th Cong. (2015), Written Testimony of Internet Association, 10.

<sup>30</sup>*Id.* at 334-335 (“a cloud technology company operating in a jurisdiction lacking a fair use principle must weigh the potential of litigation before innovating and bringing a product or service to market. Without a flexible fair use standard, technology companies in most jurisdictions must rely on a regulatory or legislative body to approve specific uses or technologies.”)

<sup>31</sup> “The global market for cloud services (or Infrastructure-as-a-Service, “IaaS”) is projected to grow from \$23 billion in 2015 to \$34 billion in 2018.136 Global spending on IaaS was projected to reach \$16.5 billion in 2015, an increase of over 30% from 2014.”Exporting Internet Law at 334.

<sup>32</sup> Eric von Hippel et al., The Age of the Consumer-Innovator (“von Hippel (2011)”), MIT Sloan Mgmt. Rev., Fall 2011, at 28.

<sup>33</sup> Eric von Hippel, Democratizing Innovation, 12 (2005) (citing Joachim Henkel and Eric von Hippel, “Welfare Implications of User Innovation,” MIT Sloan Working Paper No. 4327-03 (2005)).

<sup>34</sup> Von Hippel (2011) at 29.

<sup>35</sup> Griffin at 5; Matthew le Merle et al., The Impact of U.S. Internet Copyright Regulations on Early- Stage Investment: A Quantitative Study (“le Merle”), Booz & Co., 10 (2011). In one study, “89% of venture capitalists interviewed said that “uncertain and potentially large damages made them uncomfortable investing in [digital content intermediaries].” Griffin at 5; le Merle at 18; Computer and Communications Industry Association (CCIA), Copyright Reform for a Digital Economy (“CCIA Copyright whitepaper”), 18-20 (2015), <https://www.cciainet.org/wp-content/uploads/2015/08/Copyright-Reform-for-a-Digital-Economy.pdf>.

<sup>36</sup> *See, e.g.*, Jed. S. Rakoff, “Brace Lecture: Copyright Damages: A View from the Bench,” 62 J. Copyright Soc’y 377 (2015); Pamela Samuelson & Tara Wheatland, “Statutory Damages in Copyright Law: A Remedy in Need of Reform,” 51 Wm. & Mary L. Rev. 439 (2009); Public Knowledge, Internet Blueprint (2012), <http://internetblueprint.org/issues/strengthen-the-publics-fair-use-rights-in-copyright/>; Mitch Stoltz, Collateral Damages: Why Congress Needs to Fix Copyright Law’s Civil Penalties (Jul. 24, 2014), <https://www.eff.org/wp/collateral-damages-why-congress-needs-fix-copyright-laws-civil-penalties>; CCIA Copyright Whitepaper at

regime in the United States through trade agreements, and should not export its flaws to other countries.<sup>37</sup>

#### **d. EXHAUSTION AND PARALLEL IMPORTATION**

Exhaustion doctrines promote “alienability of goods,” enable consumer autonomy, and encourage more efficient use of resources.<sup>38</sup> Further, they encourage the development of secondary markets, which (i) increase access to works and technologies by driving down prices and increasing availability, (ii) support preservation, and (iii) enable users to maintain privacy.<sup>39</sup> In addition, robust exhaustion doctrines reduce transaction and information costs that users will incur if forced to navigate complex or inconsistent permissions schemes contained in license agreements, and therefore improve market efficiency.<sup>40</sup> And exhaustion encourages user and marketplace innovation by reducing cost barriers to experimentation and foster competition among distribution platforms by reducing consumer lock-in.<sup>41</sup> Finally, exhaustion enables the repair and resale industry to flourish.<sup>42</sup> Current U.S. law guarantees both domestic exhaustion<sup>43</sup> and international exhaustion (also known as parallel importation).<sup>44</sup> U.S. trade policy should preserve countries’ ability to enact rules that place exhaustion limitations on intellectual property, including preventing undue barriers to importation and other forms of trade.

#### **e. TECHNOLOGICAL PROTECTION MEASURES AND ANTI-CIRCUMVENTION**

Anti-circumvention laws prohibit bypassing digital locks used to control access to content. Where these laws can be interpreted to prohibit circumvention for noninfringing uses, they fail to take account of the interests of the public at large. Experience under the U.S. anti-circumvention law has demonstrated both its ineffectiveness in stemming copyright infringement<sup>45</sup> and its potential for abuse.<sup>46</sup> Despite the negative

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18-20; Dept. of Commerce, Internet Policy Task Force, White Paper on Remixes, Forst Sale, and Statutory Damages (Jan. 2016), 5, 85.

<sup>37</sup> Further, policymakers should be wary of using trade policy to increase criminalization of intellectual property issues. As we pointed out in our analysis of the TPP, “[e]fficient enforcement is most likely in situations where a single entity can [weigh the costs and benefits] of enforcement. By contrast, with criminal enforcement, the costs are borne by the public, but the benefits may be realized only by private parties” leading to inefficient, and costly enforcement regimes.

<sup>38</sup> See generally Margaret Jane Radin, “Property and Personhood,” 34 Stan. L. Rev. 957 (1982) (discussing the importance of autonomous control over personal property); Stavroula Karapapa, “Reconstructing Copyright Exhaustion in the Online World,” I.P.Q. 2014, 4, 307, 324.

<sup>39</sup> See Aaron Perzanowski & Jason Schultz, “Digital Exhaustion,” 58 UCLA L. Rev. 889, 894-896 (2011); see also eBay, Inc., “Commerce 3.0 for Development: The Promise of the Global Empowerment Network,” 25 (“The exhaustion doctrine promotes alienability of goods, rewards innovative sourcing methods, provides a backbone for a robust secondary market, and prevents harmful downstream market restrictions.”)

<sup>40</sup> See Perzanowski & Schultz at 896-897; see also *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363 (2013); Molly Shaffer Van Houweling, *The New Servitudes*, 96 Ge. L. J. 885, 921 (2007).

<sup>41</sup> See Perzanowski & Schultz, 897- 900.

<sup>42</sup> See *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 497 (1964).

<sup>43</sup> 17 USC § 109(a).

<sup>44</sup> *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363 (2013).

<sup>45</sup> See Initial Comments of Mozilla in Section 1201 Study, U.S. Copyright Office FR Doc. 2016-03515 at 4 (Mar. 4, 2016) (stating “[m]ass scale infringement of copyrighted works continues today, including with the most valuable and most heavily protected examples of such content. Section 1201 and TPMs don’t prevent all infringement: at best, they reduce its impact on market success”) available at <https://www.regulations.gov/document?D=COLC-2015-0012-0055>

<sup>46</sup> In the years since the passage of Section 1201, it has caused harm to a stunning array of stakeholders, including researchers, people with disabilities, students and educators, libraries, innovators and entrepreneurs, creators and remixers, and everyday technology users and consumers. See Electronic Frontier Foundation, *Unintended Consequences: Fifteen Years Under the DMCA* (Mar. 2013), <https://www.eff.org/pages/unintended-consequences-fifteen-years-under-dmca>. In two notable

externalities of anti-circumvention provisions, they have been widely included in international trade agreements.<sup>47</sup> Given the well-documented harms of anti-circumvention laws, U.S. trade policy should avoid them.

#### **f. WELL-CALIBRATED PATENT RIGHTS**

Trade agreement provisions relating patent rights must take into account that patents are not granted merely to reward inventors, but rather to benefit the public as a whole by providing tailored incentives for new inventions and facilitating access to those inventions. Trade agreements should require parties to carefully balance their patent system between granting monopolies to inventors and ensuring public access to and competition in ideas and products. U.S. policymakers should be cautious about expanding patent rights, for example, by extending the term of protection or by providing quasi-patent protection for certain subject matter, where such expansions may lack the balance of existing policies.

### **IV. PRESERVING AN OPEN AND ACCESSIBLE INTERNET**

#### **A. UNIVERSAL ACCESS**

Promoting universal, affordable access to broadband services also benefits the global digital economy because “the more users on the network, the more valuable the network becomes.”<sup>48</sup> Thus “[e]nsuring that citizens from every economic level and in every part of the country can access a high speed connection is an essential step in creating a robust digital economy.”<sup>49</sup> U.S. trade policy should therefore seek to promote universal access.

#### **B. NET NEUTRALITY**

The internet’s “legacy of openness and transparency . . . has been critical to the network’s success as an engine for creativity, innovation, and economic growth.”<sup>50</sup> “Closed systems are antithetical to the Internet’s success and will significantly disable its potential to support trade and innovation going forward.”<sup>51</sup> When internet service providers throttle, prioritize, or block certain traffic on their network, they can distort competition among providers of digital services, content, and applications, thwarting the kind of innovation that has driven the growth and success of the internet.<sup>52</sup> Such conduct jeopardizes the enormous net surplus value

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examples, a printer manufacturer used Section 1201 to prevent consumers the right to refill their toner cartridges, and a garage door opener manufacturer sought to prohibit its customers from using aftermarket clicker transmitters. *See Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004); *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004).

<sup>47</sup> Exporting Internet Law at 347.

<sup>48</sup> eBay, Commerce 3.0 for Development (“eBay”), 27, [https://www.ebaymainstreet.com/sites/default/files/eBay\\_Commerce-3-for-Development.pdf](https://www.ebaymainstreet.com/sites/default/files/eBay_Commerce-3-for-Development.pdf).

<sup>49</sup> *Id.*; Google Trade Paper at 8 (“[i]mproving the speed and affordability of Internet access could lead to a 4 percent increase in trade in manufactured goods.”); E15 initiative at 9 (“In terms of the impact of the Internet on trade, one study concludes that a 10% increase in Internet access leads to a 0.2% increase in exports.”)

<sup>50</sup> Preserving the Open Internet et al., GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13069 (2009) (“Open Internet NPRM”).

<sup>51</sup> Google Trade Paper at 2.

<sup>52</sup> *See* Barbara van Schewick, “Towards an Economic Framework for Network Neutrality Regulation” (“van Schewick”), 5 J. on Telecomm. & High Tech. L. 329, 386–390 (2007); Institute for Policy Integrity, Free to Invest: The Economic Benefits of Net Neutrality (“IPI”), 24-32 (2010), [http://policyintegrity.org/documents/Free\\_to\\_Invest.pdf](http://policyintegrity.org/documents/Free_to_Invest.pdf); S. Derek Turner, Finding the

generated by internet information, applications, and services, which one study estimated at \$300 billion in 2009, and has only grown since then.<sup>53</sup>

Further, the internet's openness is key to its continued success as a platform for commerce. Where service providers can restrict access to information, products, or services, they increase costs for businesses and consumers. In particular, "[s]mall business entities are the most likely to be discriminated against or blocked because they do not have any leverage against Internet Service Providers (ISPs)."<sup>54</sup> U.S. trade policy therefore should preserve the open internet. Specifically, trade agreements should require countries to endeavor to preserve net neutrality and to foster competition in internet services. While the TPP requires signatories to "recognize the benefit" of net neutrality protections for internet users,<sup>55</sup> future trade agreements should go further. In addition, such agreements should clarify that a lack of clear and enforceable net neutrality rules can constitute a non-tariff barrier to trade.

### **C. INTERMEDIARY LIABILITY PROTECTIONS**

Imposing liability on ISPs for the conduct of third parties using their services can broadly restrict the value of the internet as a platform for free expression and innovation.<sup>56</sup> Thus, safe harbor provisions that limit the liability of ISPs for user conduct are often necessary in many national legal regimes. U.S. trade policy should be exceedingly wary of creating or extending intermediary liability schemes, and should promote robust protections against intermediary liability. In particular, no ISP should be required to actively police or monitor the behavior of its users.

### **D. A SINGLE, UNIFIED DOMAIN NAME SYSTEM (DNS) IS ESSENTIAL TO THE GLOBAL FLOW OF INFORMATION ON WHICH DIGITAL TRADE DEPENDS**

A unified DNS is essential to the end-to-end data flows that enable digital trade to flourish globally. A user who knows the domain name of the website with which she wants to transact can quickly and reliably reach that website whether she is located in Alaska or Abu Dhabi. From its inception, the internet has delivered seamless navigation for the world's users through a single addressing system. . While the internet can continue to function without individual websites and even without significant network infrastructure, it cannot operate if the DNS no longer functions.

Governments have a legitimate interest in preventing their citizens from engaging in illegal online transactions; however, increasing levels of DNS fragmentation are antithetical to the open flow of information that has made the internet a truly global engine for cultural and economic development. To secure open, end-to-end channels for digital trade, trade agreements should require participating parties to respect the unitary and global nature of the DNS and to limit DNS fragmentation caused by domain blocking and filtering.

### **E. PROTECTING THE FREE FLOW OF INFORMATION WHILE SAFEGUARDING USER PRIVACY**

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Bottom Line: The Truth About Network Neutrality and Investment (2009), available at [http://www.freepress.net/files/Finding\\_the\\_Bottom\\_Line\\_The\\_Truth\\_About\\_NN\\_and\\_Investment\\_0.pdf](http://www.freepress.net/files/Finding_the_Bottom_Line_The_Truth_About_NN_and_Investment_0.pdf); van Schewick at 378, 386; IPI at 26.

<sup>53</sup> *Id.*

<sup>54</sup> eBay at 21.

<sup>55</sup> TPP Art. 14.10, *see also* PK TPP Analysis at 6-8.

<sup>56</sup> Carolina Rossini & Maira Sutton, "The Impact of Trade Agreements on Innovation, Freedom of Expression and Privacy: Internet Service Providers' Safe Harbors and Liability," Electronic Frontier Foundation, *available at* [https://www.eff.org/files/filenode/ispliability\\_fnl.pdf](https://www.eff.org/files/filenode/ispliability_fnl.pdf); *see also* Seth F. Kreimer, "Censorship By Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link," 155 U. Pa. L. Rev. 11 (2006).

Without adequate consumer privacy protections, policies encouraging the free flow of information and data can put consumers at risk and undermine trust in internet services.<sup>57</sup> This can have a deleterious effect on trade. A recent study on data collected by the Census Bureau revealed that “[f]orty-five percent of online households reported that [privacy and security] concerns stopped them from conducting financial transactions, buying goods or services, posting on social networks, or expressing opinions on controversial or political issues via the Internet, and 30 percent refrained from at least two of these activities,” a figure that amounts to “millions of households.”<sup>58</sup>

Likewise, awareness of government surveillance of online activities can lead consumers to avoid engaging online.<sup>59</sup> In the same study, “29 percent of households concerned about government data collection said they did not express controversial or political opinions online due to privacy or security concerns[.]”<sup>60</sup> Another study directly assessed the impact of awareness of government surveillance on the willingness of people to contribute and share content on social media, finding that when users’ were reminded that their activities may be subject to surveillance, they refrained from expressing perceived minority opinions.<sup>61</sup> This effect “severely undermines the Internet’s ability to serve as a neutral platform for information sharing and discussion,”<sup>62</sup> and likely impacts internet firms’ profitability.<sup>63</sup>

With the TPP, the USTR has affirmed that the TPP commits “to ensuring the free flow of the global information and data that drive the internet and digital economy, subject to legitimate public policy objectives such as personal information protection.” This is an important step towards recognizing the need for legitimate privacy protections for consumers, however it may not go far enough.<sup>64</sup> U.S. trade policy should therefore seek to promote the adoption of adequate privacy protections along with provisions that encourage the free flow of information. In addition, U.S. trade policy should avoid promoting unnecessary requirements for domain name registrars that harm user privacy by prohibiting the use of privacy or proxy services.<sup>65</sup>

## V. SPECTRUM MANAGEMENT

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<sup>57</sup> Alberto Cerda & Carolina Rossini, “Information Flow and Trade Agreements: History and Implications for Consumers’ Privacy”, Consumers International, 3 (May 2013), [http://a2knetwork.org/sites/default/files/tpp\\_and\\_free\\_flow.pdf](http://a2knetwork.org/sites/default/files/tpp_and_free_flow.pdf).

<sup>58</sup> Rafi Goldberg, Lack of Trust in Internet Privacy and Security May Deter Economic and Other Online Activities, NTIA (May 13, 2016), <https://www.ntia.doc.gov/blog/2016/lack-trust-internet-privacy-and-security-may-deter-economic-and-other-online-activities>.

<sup>59</sup> See *id.*, listing “data collection or tracking by government” as a “common concern” of people surveyed in the study.

<sup>60</sup> *Id.*

<sup>61</sup> Elizabeth Stoycheff, Surveillance Chills Online Speech Even When People Have “Nothing to Hide”, Slate Future Tense (“Nothing to Hide”) (May 3, 2016, 1:59 PM), [http://www.slate.com/blogs/future\\_tense/2016/05/03/mass\\_surveillance\\_chills\\_online\\_speech\\_even\\_when\\_people\\_have\\_nothing\\_to\\_hide.html](http://www.slate.com/blogs/future_tense/2016/05/03/mass_surveillance_chills_online_speech_even_when_people_have_nothing_to_hide.html); Elizabeth Stoycheff, Under Surveillance: Examining Facebook’s Spiral of Silence Effects in the Wake of NSA Internet Monitoring, 93 Journalism & Mass Communication Quarterly 296 (June 2016).

<sup>62</sup> Nothing to Hide.

<sup>63</sup> “[C]onsumer and business responses to government use of the Internet for national security purposes can have implications for digital trade. The Snowden leaks are estimated to cost the US cloud computing firms up to \$35 billion in lost revenue.” Joshua P. Meltzer, *Maximizing the Opportunities of the Internet for International Trade*. E15 Policy Options Paper (January 2016), <http://e15initiative.org/publications/maximizing-opportunities-internet-international-trade/>.

<sup>64</sup> See Burcu Kilic & Tamir Israel, “The Highlights of the Trans-Pacific Partnership E-Commerce Chapter,” Public Citizen (Nov. 5, 2015), <https://www.citizen.org/documents/tpp-ecommerce-chapter-analysis.pdf>.

<sup>65</sup> For arguments supporting broad availability of privacy and proxy services, see Comments of Center for Democracy and Technology, New America’s Open Technology Institute, and Public Knowledge to ICANN on the GNSO’s Initial Privacy & Proxy Services Accreditation Issues Working Group, <https://www.publicknowledge.org/documents/comments-to-icann-on-the-gnsos-initial-privacy-proxy-services-accreditation>.

Spectrum management is often necessarily international in character. Internationally, countries convene at the International Telecommunication Union to negotiate spectrum allocation and share technical best practices. To the extent trade agreements also address spectrum, they should (1) require countries to follow an “open and transparent process” for spectrum allocation “that considers the public interest, including the promotion of competition,”<sup>66</sup> (2) promote access to both licensed and unlicensed spectrum, and (3) encourage countries to fulfill their commitments in the WSIS+10 and Sustainable Development goals.

To enable innovation and the continued growth of internet communications, trade policies must ensure that spectrum can be put to a wide array of uses, by a wide variety of users. Too often, incumbent spectrum licensees, both private and public, can prevent or delay new, innovative spectrum uses and inhibit competition. This harms consumers, and an inability to access spectrum in particular markets can harm U.S. businesses as well. In particular, barriers to competition created by inadequate spectrum policy can limit users’ ability to access the internet, and businesses’ ability to reach users, both to the detriment of digital trade.

In general, spectrum policy should aim to achieve two goals. First, it should allow for a balance of unlicensed and licensed use. The ubiquity and usefulness of WiFi and Bluetooth shows how valuable unlicensed spectrum can be for consumers and commerce. Many people use these technologies everyday with their smartphones and laptops, and other connected devices (such as the emerging “Internet of Things”) typically rely on unlicensed spectrum as well. According to a 2014 study, “the technologies operating in unlicensed spectrum bands in the United States generated a total economic value of \$222 billion in 2013.”<sup>67</sup> In underserved locales, unlicensed spectrum can also expand internet access, which is a precondition to digital trade.

Second, spectrum policy should ensure that exclusive spectrum licenses are available to a wide variety of potential licensees. Spectrum is an essential input for many services, and restricting access to spectrum restricts competition. For example, mobile phone operators cannot compete unless they can access sufficient spectrum to serve and attract consumers. Policies that promote competition in the provisioning of mobile internet access are critical to keeping markets open. Without the benefits of competition, access to and the affordability of wireless services will decrease, reducing the number of consumers able to access U.S. goods and services via the mobile internet. Spectrum policy can be highly technical, and most of its details cannot and should not be addressed in the context of a trade agreement. However the U.S. trade policy can promote broader goals that benefit consumers by allowing for competition.

Respectfully submitted,

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*On behalf of*  
PUBLIC KNOWLEDGE

July 29, 2016

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<sup>66</sup> TPP Art. 13.19.4.

<sup>67</sup> Telecom Advisory Services, LLC, Assessment of the Economic Value of Unlicensed Spectrum in the United States, 8 (2014), <http://www.wififorward.org/wp-content/uploads/2014/01/Value-of-Unlicensed-Spectrum-to-the-US-Economy-Full-Report.pdf>.