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## Exporting Internet Law through International Trade Agreements: Recalibrating U.S. Trade Policy in the Digital Age

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# EXPORTING INTERNET LAW THROUGH INTERNATIONAL TRADE AGREEMENTS: RECALIBRATING U.S. TRADE POLICY IN THE DIGITAL AGE

Markham C. Erickson & Sarah K. Leggin \*

## I. INTRODUCTION

The United States recently concluded negotiations over a major, new multi-lateral trade agreement known as the Trans-Pacific Partnership (“TPP”).<sup>1</sup> Negotiations continue over two other major trade agreements. One is a negotiation with the European Union over what is known as the Transatlantic Trade and Investment Partnership (“T-TIP”).<sup>2</sup> The other involves negotiations with twenty-three countries over what is known as the Trade in Services Agreement (“TiSA”).<sup>3</sup> In total, the three agreements involve 54 countries, representing a total of 40%, 50%, and 70% of global gross domestic product (“GDP”) respectively and will serve as a global template for future trade agreements for many years.<sup>4</sup> In short, in the trade universe, they are a big deal.

Unfortunately, from what we can discern from these agreements, they fail to

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<sup>1</sup> *The Trans-Pacific Partnership*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1BmqjX> (last visited Feb. 7, 2016).

<sup>2</sup> *Transatlantic Trade and Investment Partnership (T-TIP)*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1RwnYhc> (last visited Feb. 7, 2016) [hereinafter *T-TIP*].

<sup>3</sup> *Trade in Services Agreement (TiSA)*, EUROPEAN COMM’N ON TRADE, <http://bit.ly/1rJKR2H> (last visited Feb. 7, 2016) [hereinafter *TiSA-EU*].

<sup>4</sup> Lydia DePillis, *Everything You Need to Know About the Trans-Pacific Partnership*, WASH. POST (Dec. 11, 2013), <http://wapo.st/1TzUpMR>; Samuel Benka, *What Are the Benefits of the TTIP?*, AM. TRADE POL’Y (Feb. 3, 2014), <http://bit.ly/1WJr4yV>; *The Trade In Services Agreement (TiSA)*, COAL. OF SERV. INDUS., <http://bit.ly/1rJKR2H> (last visited Feb. 7, 2016).

adequately address a key driver in today's global economy, namely the Internet. Indeed, current U.S. trade policy does not adequately address the importance of the Internet's many contributions.<sup>5</sup> Given the Internet's importance to the future of economic growth, innovation, and democratic discourse, Congress and the executive branch should recalibrate asymmetrical trade policies that overweigh priorities of an older economy and under emphasize priorities of today's Internet economy.

This article proposes a recalibration of U.S. trade policy and the existing trade apparatus to better reflect the importance of the Internet and the laws that have made its rise possible. First, this article will review the current status of negotiations and amendments to U.S. trade legislation and agreements, which provide opportunities to implement these proposed reforms. Second, this article will discuss the four laws that make the Internet work. Third, it will review the evolution of U.S. trade policy with changing economies and consumer demands, and identify areas within U.S. trade authorities where reforms could be made. Finally, this article will propose structural and administrative reforms that would promote stronger Internet trade policy.

#### A. Status of Trade Promotion Authority and Current Trade Negotiations

Negotiations over TPP began in November 2009 when leaders of Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam, and the United States announced consensus over the framework for a new trade agreement.<sup>6</sup> Since that time, Canada and Mexico have been added to the negotiations.<sup>7</sup> Negotiations resulting in an agreement concluded on October 5, 2015.<sup>8</sup> The agreement was the culmination of nineteen formal negotiating rounds involving more than twenty negotiating groups and undoubtedly countless more informal multilateral and bilateral discussions.<sup>9</sup>

T-TIP is a trade and investment agreement being negotiated between the U.S. and European Union, which is intended to increase trade, create over 13

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<sup>5</sup> See generally WILLIAM H. COOPER, CONG. RESEARCH SERV., R41145, THE FUTURE OF U.S. TRADE POLICY: AN ANALYSIS OF ISSUES AND OPTIONS FOR THE 112TH CONGRESS 6-7, 16-17 (2011), <http://bit.ly/1QSF4wM>.

<sup>6</sup> *Overview of the Trans Pacific Partnership*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1K2rx9p> (last visited Feb. 7, 2016).

<sup>7</sup> *Trans-Pacific Partnership: Summary of U.S. Objectives*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1BmqjX> (last visited April, 16, 2016) [hereinafter *TPP U.S. Objectives*].

<sup>8</sup> Press Release, John Kerry, U.S. Dep't of State, Successful Conclusion of Trans-Pacific Partnership (TPP) Negotiations (Oct. 5, 2015), <http://1.usa.gov/1QFVYKm>.

<sup>9</sup> *Chronology of Events and Key Milestones*, GLOB. AFFS. CANADA (Feb. 2, 2016), <http://bit.ly/1qL48D5>.

million jobs, and stimulate economic growth for both parties.<sup>10</sup> The combined GDP of the U.S. and EU represent 50% of the world GDP, so the impact of T-TIP on both economies is projected to be significant.<sup>11</sup> Negotiations began in 2013, and the latest round of negotiations were conducted in October 2015 in Miami, Florida.<sup>12</sup>

TiSA is an agreement aimed at improving and expanding trade in services.<sup>13</sup> The agreement was initiated by the U.S. and Australia, and its participants have grown to fifty-one countries—representing 70% of the world’s trade in services.<sup>14</sup> This is the first update to the latest major services agreement, the General Agreement on Trade in Services (“GATS”), which was established by the World Trade Organization (“WTO”) in 1995.<sup>15</sup>

The key to the Obama Administration’s ability to successfully conclude the agreements was passage by Congress of so-called fast track negotiating authority.<sup>16</sup> Such power is contained in Trade Promotion Authority (“TPA”) legislation, in which Congress defines U.S. negotiating objectives and maintains the authority to review and ultimately decide whether any proposed U.S. trade agreement submitted by the executive branch will be implemented.<sup>17</sup> TPA gives Congress the ability to vote, to approve, or disapprove a negotiated trade agreement; however, it precludes the legislative body from amending the negotiated agreement. Administrations in both the past and present argue that this straight, up-or-down voting process gives the Office of the United States Trade Representative (“USTR”) greater ability to successfully negotiate complex trade agreements.<sup>18</sup> Congress passed TPA legislation on June 25, 2015,<sup>19</sup> and President Obama signed it into law on June 29, 2015.<sup>20</sup> Prior to this legislation, Congress last approved TPA legislation in 2002.<sup>21</sup> This means that it had been

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<sup>10</sup> *T-TIP*, *supra* note 2.

<sup>11</sup> Benka, *supra* note 4.

<sup>12</sup> *11<sup>th</sup> Round Transatlantic Trade and Investment Partnership Negotiations*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1U53zSJ> (last visited Feb. 7, 2016).

<sup>13</sup> *TiSA-EU*, *supra* note 3 (“TiSA aims at opening up markets and improving rules in areas such as licensing, financial services, telecoms, e-commerce, maritime transport, and professionals moving abroad temporarily to provide services.”).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *‘Fast-track’ trade bill passes US Senate and awaits Obama nod*, BBC NEWS (June 25, 2015) [hereinafter *‘Fast-track’ trade bill*], <http://bbc.in/1LwlnCt>.

<sup>17</sup> *Trade Promotion Authority*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1F3Gq9c> (last visited Feb. 7, 2016).

<sup>18</sup> *Id.* (“Updating TPA ensures our trading partners know U.S. negotiators have the support of Congress when we call for greater ambition and stronger, high-standard trade agreements.”).

<sup>19</sup> *‘Fast-Track’ trade bill*, *supra* note 16.

<sup>20</sup> Greg Nelson, *On Trade, Here’s What the President Signed into Law*, WHITE HOUSE (June 29, 2015, 3:55 PM), <http://1.usa.gov/1egmEzi>.

<sup>21</sup> IAN F. FERGUSSON & RICHARD S. BETH, CONG. RESEARCH SERV., R43491, TRADE

fifteen years—or nearly 70% of the life of the commercial Internet—since Congress last gave an Administration the subject matter, objectives, and priorities for a trade negotiation. In those fifteen years, USTR negotiated nearly sixty agreements.<sup>22</sup>

Fifteen years ago, when Congress last assigned USTR its trade priorities, only 8.1% of the world was online.<sup>23</sup> Most consumers still used dial-up connections, as only 21% of Internet users had broadband service.<sup>24</sup> Many consumers still accessed content through the “walled garden” of information provided by portals, with no significant choice of websites or service providers.<sup>25</sup> There were only 3% of the number of websites available today.<sup>26</sup> Facebook had not yet launched, and there were no significant video streaming video services like Netflix.<sup>27</sup> In other words, the nature and use of the Internet have evolved significantly since Congress last provided the Administration with a list of trade priorities. Consequently, it is no wonder that U.S. trade policy did not meaningfully evolve during this key fifteen-year timeframe. Unfortunately, even though Congress is updating “goals-and-objectives” mandate for USTR,<sup>28</sup> Congress likewise does not appear poised to comprehensively change its priorities in light of the role that Internet plays on the global stage.

The USTR has described TPP as a new kind of agreement that reflects the

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PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS 6 (2015), <http://bit.ly/1QqNDYS>.

<sup>22</sup> Forty-two Trade and Investment Framework agreements have been initiated from 2002 to present. See *Trade and Investment Framework Agreements*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1obJai7> (last visited Jan. 7, 2016). 17 Free Trade agreements have been initiated from 2002 to present. See *Free Trade Agreements*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1T5hRT7> (last visited Jan. 7, 2016).

<sup>23</sup> *Internet Users*, INTERNET LIVE STATS, <http://bit.ly/1w1NWRy> (last visited Feb. 6, 2016).

<sup>24</sup> JOHN B. HARRIGAN & LEE RAINIE, PEW RESEARCH CTR., *THE BROADBAND DIFFERENCE: HOW ONLINE BEHAVIOR CHANGES WITH HIGH-SPEED INTERNET CONNECTIONS* 9 (2002), <http://pewrsr.ch/1KLjWBE>.

<sup>25</sup> Salil K. Mehra, *Paradise is a Walled Garden? Trust, Antitrust, and User Dynamism* 18 GEO. MASON L. REV. 889, 894 (2011) (“The term ‘walled garden’ typically refers to restrictions on user access or abilities that are, in some way, limited.”).

<sup>26</sup> *Total Number of Websites*, INTERNET LIVE STATS, <http://bit.ly/1UxmqaH> (last visited Feb. 6, 2016); see also Anna Jane Grossman, *What Online Internet Websites Looked Like in 2001*, MOTHERBOARD (Sept. 12, 2011, 9:41 AM), <http://bit.ly/1QFFAcB> (noting that in 2001 the majority of Americans did not have internet).

<sup>27</sup> Facebook was founded on Feb. 4, 2004. Nicholas Carlson, *At Last – The Full Story of How Facebook Was Founded*, BUS. INSIDER (Mar. 6, 2010, 4:10 AM), <http://read.bi/1BtwXGn>. Netflix added an online streaming service in mid 2007. Nate Anderson, *Netflix offers streaming movies to subscribers*, ARSTECHNICA (Jan. 16, 2007, 11:02 AM), <http://bit.ly/20XyEZx>.

<sup>28</sup> See generally OFFICE OF U.S. TRADE REP., EXEC. OFFICE OF PRESIDENT, *STRATEGIC PLAN FY 2013 – FY 2017*, at 6-26 (2013), <http://1.usa.gov/1oBQF1y>.

characteristics of the modern economy.<sup>29</sup> As the outlines to the agreement states, the TPP is “a landmark, 21st-century trade agreement, setting a new standard for global trade and incorporating next-generation issues that will boost the competitiveness of TPP countries in the global economy.”<sup>30</sup>

USTR has promised that T-TIP “will be a cutting edge agreement aimed at providing greater compatibility and transparency in trade and investment regulation, while maintaining high levels of health, safety, and environmental protection. T-TIP presents an extraordinary opportunity to strengthen the bond between vital strategic and economic partners.”<sup>31</sup>

According to USTR:

TiSA will encompass state-of-the-art trade rules aimed at promoting fair and open trade across the full spectrum of service sectors—from telecommunications and technology to distribution and delivery services. TiSA will also take on new issues confronting the global marketplace, like restrictions on cross-border data flows that can disrupt the supply of services over the Internet—a rapidly expanding market for U.S. small businesses and entrepreneurs. And TiSA will support the development of strong, transparent, and effective regulatory policies, which are so important to enabling international commerce.<sup>32</sup>

The public’s ability to verify the veracity of such statements is limited. That is because the United States and its negotiating partners keep the texts of the agreements secret until the end of the negotiations.<sup>33</sup> Select members of Congress are able to review drafts of various provisions, which seems the very minimum kind of accommodation that can be afforded to the branch of government that has been given the constitutional authority to regulate trade.<sup>34</sup> In addition, there are hundreds of “cleared advisors” representing various sectors of the economy that are able to review portions of the drafts confidentially.<sup>35</sup>

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<sup>29</sup> *Summary of the Trans-Pacific Partnership Agreement*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1QUf3UC> (last visited Feb. 7, 2016) (“The TPP promotes innovation, productivity, and competitiveness by addressing new issues, including the development of digital economy...”).

<sup>30</sup> *Outlines of TPP*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1GprfLV> (last visited Feb. 7, 2016).

<sup>31</sup> *T-TIP*, *supra* note 2.

<sup>32</sup> *Trade in Services Agreement*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1SgvBtl> (last visited Sept. 14, 2015).

<sup>33</sup> JOHN HILARY, WAR ON WANT, THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP: 2015 UPDATE 26-27 (2015), <http://bit.ly/1VEGkws> (“In a move reminiscent of Cold War espionage, the European Commission has even tagged official TTIP documents with secret markings in order to be able to trace any leaks back to their source.”).

<sup>34</sup> U.S. CONST. art. 1 § 8, cl. 3 (“United States Congress shall have power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

<sup>35</sup> Henry Farrell, *Five Key Questions – and Answers – about the Leaked TPP Text*, WASH. POST (Nov. 15, 2013), <http://wapo.st/1QejN6z>; *TTIP: Already Disrupting Europe’s Precautionary Principle?* AGRIC. & RURAL CONV. 2020 (Aug. 10, 2014), <http://bit.ly/1QejPv9>.

However, until drafts are final, they are not made available to the larger public, which has caused critics of these agreements to complain that there should be more transparency in the process as well as a means for the general public to provide more meaningful input.<sup>36</sup> Whether texts of negotiations should be made public, and when, is beyond the scope of this article.

Of course, it may not be surprising that throughout the negotiations, unofficial leaked versions of the agreements are routinely made available on the Internet.<sup>37</sup> The usefulness of leaked texts is limited, however, because they represent only a snapshot of the negotiations. Governments are forced to disavow any allegiance or opposition to the texts, so there is no way of knowing with certainty how up-to-date or accurate is any given leaked text.

## B. The Significance of the Internet

The Internet<sup>38</sup> has become in its short commercial lifespan a key engine for global economic growth, innovation, and democratic discourse. Beginning in earnest with the Internet's commercial launch in the mid-1990s, by 2011 the Internet increased per capita GDP by \$500 in mature countries over fifteen years.<sup>39</sup> This growth generated by the Internet Revolution is equivalent to the growth generated by the Industrial Revolution after fifty years.<sup>40</sup> Between 2004 and 2009, the digital economy was the fastest growing sector of the U.S. economy, representing 15% of U.S. GDP growth during that period.<sup>41</sup>

Over \$8 trillion are exchanged through e-commerce each year.<sup>42</sup> About two-

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<sup>36</sup> Farrell, *supra* note 35; Taylor Wofford, *What is the Trans-Pacific Partnership and Why are Critics Upset By It?*, NEWSWEEK (June 12, 2015, 1:12 PM), <http://bit.ly/1cYWBLX>.

<sup>37</sup> Wofford, *supra* note 36.

<sup>38</sup> When this article discusses the value that the Internet provides to the economy, it means the value created by Internet-related activities. The article does not define "Internet-related activities," but its use of this term refers generally to categories of activities developed by McKinsey in its reports on the economic impact of the Internet on the economy and refer generally to (i) activities that use the World Wide Web as support (e.g., e-commerce, online content, online advertising); (ii) communication using Internet Protocol; (iii) software and service activities linked to the World Wide Web; and (iv) hardware manufacturers or services that provide maintenance of Web-specific tools (e.g., computers, smartphones, other devices, Internet servers). See MATTHIEU PÉLISSÉ DU RAUSAS ET AL., MCKINSEY GLOBAL INST., INTERNET MATTERS: THE NET'S SWEEPING IMPACT ON GROWTH, JOBS AND PROSPERITY 7, 10 (2011), <http://bit.ly/1XGLdGK>.

<sup>39</sup> *Id.* at 19.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 16.

<sup>42</sup> JAMES MANYIKA & CHARLES ROXURGH, MCKINSEY GLOBAL INST., THE GREAT TRANSFORMER: THE IMPACT OF THE INTERNET ON ECONOMIC GROWTH AND PROSPERITY 1 (2011), <http://bit.ly/1T7D2oe>.

thirds of all businesses have a web presence in developed markets, and over a recent five-year period, the Internet accounted for 21% of GDP growth in countries that represent more than 70% of global GDP and 15% GDP growth over the same time period in the United States.<sup>43</sup> The Internet creates a 10% increase in productivity for small- and medium-sized businesses (“SMEs”), and SMEs that heavily utilize Internet-related technologies export twice as much as competitors who do not.<sup>44</sup>

At the individual level, the Internet adds to consumer surplus. Economists define “consumer surplus” as the monetary gain that consumers obtain as a result of purchasing a product at a lower price than the highest price that he would be willing to pay.<sup>45</sup> In 2009, France received \$10 billion in consumer surplus through the Internet and the United States received \$64 billion.<sup>46</sup> Viewed another way, the Internet created between \$18 to \$28 per month in added value per user in Germany and the United Kingdom respectively.<sup>47</sup> Even when the Internet disrupts older industries, the Internet creates 2.4 jobs for every job that is eliminated through such disruption.<sup>48</sup> In fact, the Internet economy comprises a significant portion of the global economy as a whole. From 2006 to 2011, the Internet in mature economies accounted for 21% of the GDP growth, with traditional industries capturing around 75% of the benefits.<sup>49</sup> From 2007 to 2012, Internet-related industries increased the nominal value added to the U.S. economy by approximately 110.4%.<sup>50</sup> Just two years ago, in 2014, Internet industries were estimated to be responsible for 6% of real U.S. GDP—over \$966 billion, and the Internet sector continues to grow.<sup>51</sup> Internet industries comprise the sector of the economy that has generated the larger increases in nominal value added to the economy than many traditional industries including chemical products, accommodation and food services, and finance and insurance.<sup>52</sup>

Today, over 3.3 billion people use the Internet.<sup>53</sup> In the U.S. alone, since 2006, the number of Internet users has risen by approximately 100 million, and

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<sup>43</sup> PÉLISSIE DU RAUSAS ET AL., *supra* note 38, at 16.

<sup>44</sup> *Id.* at 17.

<sup>45</sup> Mansur G. Abdullah et al., *Consumer surplus*, ENCYC. BRITANNICA, <http://bit.ly/1VPmfnx> (last visited Feb. 7, 2016).

<sup>46</sup> MANYIKA & ROXURGH, *supra* note 42, at 5 exh.4.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 4.

<sup>49</sup> PÉLISSIE DU RAUSAS ET AL., *supra* note 38, at 16, 22.

<sup>50</sup> STEPHEN E. SIWEK, INTERNET ASS'N, MEASURING THE U.S. INTERNET SECTOR 48 tbl.F-1 (2015), <http://bit.ly/20VFHQV>.

<sup>51</sup> *Id.* at 52 tbl.F-11.

<sup>52</sup> *Id.* at 5.

<sup>53</sup> *Internet Users*, *supra* note 23.



user penetration of the Internet has reached 92%.<sup>54</sup> Now, the Internet is used in every country, in every sector, and by most businesses.<sup>55</sup> Consumption and expenditure that may be attributed to the Internet are higher than the agriculture or energy sectors.<sup>56</sup> If Internet consumption and expenditure were a sector, its total contribution to GDP would be bigger than Spain's or Canada's GDPs and is growing faster than Brazil's economy.<sup>57</sup> Additionally, more than three quarters of the value created by the Internet accrues to traditional industries.<sup>58</sup> In 2012, U.S. manufacturers exported \$86.5 billion in products and services ordered on-line, and during the same year, they only imported \$50.7 billion in goods and services on-line the same year.<sup>59</sup> In other words, there is a \$36 billion "digital trade surplus" that the U.S. could expand across a range of trade agreements. This could benefit not only technology companies and manufacturers, but also companies and workers in every sector of the economy, and consumers across the globe.<sup>60</sup>

## II. THE LAWS THAT MAKE THE INTERNET WORK

Internet companies born in the United States dominate their worldwide competitors.<sup>61</sup> This control of the market is largely due to the fact that America invented the Internet.<sup>62</sup> Today, however, the Internet has become a decidedly global product and platform. So what explains the continued worldwide dominance of U.S.-born Internet companies? The answer in no small part is the fact that the United States, the incubator of those dominant firms, has the most Internet-friendly legal system in the world.<sup>63</sup> A friendlier incubator, in terms of the legal environment, quite naturally results in a healthier and stronger firm

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<sup>54</sup> SIWEK, *supra* note 50, at 10.

<sup>55</sup> PÉLISSÉ DU RAUSAS ET AL., *supra* note 38, at 9-10.

<sup>56</sup> *Id.* at 14 exh.3; *see also* BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, GROSS-DOMESTIC-PRODUCT-(GDP)-BY-INDUSTRY DATA-VALUE ADDED (2016) [hereinafter VALUE ADDED GDP DATA], <http://1.usa.gov/1Ld3eek> (showing that agriculture and energy sectors accounted for 1.4% and 1.6% of value added to GDP in 2013 respectively).

<sup>57</sup> PÉLISSÉ DU RAUSAS ET AL., *supra* note 38, at 14.

<sup>58</sup> Robert W. Holleyman II, Deputy U.S. Trade Representative, Digital Economy and Trade: A 21st Century Leadership Imperative, Address Before the New Democratic Network (May 1, 2015) [hereinafter Holleyman NDN Address], <http://1.usa.gov/1FoOvJY>.

<sup>59</sup> *Id.*

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

<sup>61</sup> *Id.*

<sup>62</sup> *The Invention of the Internet*, HIST. CHANNEL, <http://bit.ly/NcHeDF> (last visited Feb. 7, 2016); *see also* Matt Krantz, *5 Companies Grab 70% of Your Online Dollars*, USA TODAY (Nov. 5, 2015, 2:52 PM), <http://usat.ly/1Ld3TfI>.

<sup>63</sup> INTERNET ASS'N, THE INTERNET IS A CRITICAL STAKEHOLDER IN TRADE (2013), <http://bit.ly/1SV0eWo>.

relative to those firms born in less accommodating environments.

The open, innovation-without-permission Internet ecosystem enjoyed in the United States was not the teleological result of its conception or of any immutable characteristics of its technology. The Internet's architecture was the result of specific policy decisions to design an open platform free of centralized control.<sup>64</sup> Just as easily, the Internet could have been designed as a closed system, controlled by a ruling oligarchy of firms. Dr. Vint Cerf, who has been described as the "Father of the Internet,"<sup>65</sup> discussed this policy choice in a congressional testimony:

The Internet's open, neutral architecture has proven to be an enormous engine for market innovation, economic growth, social discourse, and the free flow of ideas. The remarkable success of the Internet can be traced to a few simple network principles—end-to-end design, layered architecture, and open standards—which together give consumers choice and control over their online activities. This "neutral" network has supported an explosion of innovation at the edges of the network, and the growth of companies like Google, Yahoo, eBay, Amazon, and many others. Because the network is neutral, the creators of new Internet content and services need not seek permission from carriers or pay special fees to be seen online. As a result, we have seen an array of unpredictable new offerings—from Voice-over-IP to wireless home networks to blogging—that might never have evolved had central control of the network been required by design.<sup>66</sup>

Dr. Cerf's testimony was given in the context of a debate over Congress' consideration of network neutrality legislation.<sup>67</sup> He testified that broadband Internet access providers, which had the technical means of manipulating the end-to-end connections among users of the Internet, could change the design characteristics of the open Internet.<sup>68</sup>

Beyond the scope of his testimony, however, Dr. Cerf took for granted the patchwork of laws that enabled his design choices to be fully realized. This legal quilt is comprised of four laws.

- First Amendment to the United States Constitution<sup>69</sup>
- Section 107 of the Copyright Act of 1976 (codification of the doctrine of "fair use")<sup>70</sup>
- Section 230 of the Communications Decency Act of 1996<sup>71</sup>
- Digital Millennium Copyright Act<sup>72</sup>

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<sup>64</sup> *Net Neutrality: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 109th Cong. (2006) [hereinafter *Net Neutrality Hearings*], <http://1.usa.gov/1FRNo3M> (prepared statement of Vinton G. Cerf, Vice President & Chief Internet Evangelist, Google Inc.).

<sup>65</sup> Grant A. Yang, *Can-Spam: A First Step to No-Spam*, 4 CHI.-KENT J. INTELL. PROP. 1, 44 (2004).

<sup>66</sup> *Net Neutrality Hearings*, *supra* note 64.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> U.S. CONST. amend I.

<sup>70</sup> Copyright Act of 1976 § 107, 17 U.S.C. § 107 (2012).

<sup>71</sup> Communications Decency Act of 1996 § 230, 47 U.S.C. § 230 (2012).

These four critical and uniquely American laws serve as the cornerstones to the legal foundation that supports the open, innovation-without-permission Internet. Obviously, the first two laws were conceived prior to anyone's contemplation of the Internet. The First Amendment was adopted on December 15, 1791, as part of the Bill of Rights.<sup>73</sup> The legal concept of fair use was codified in the Copyright Act on October 19, 1976 and went into effect January 1, 1978.<sup>74</sup> Congress adopted the second batch of laws at the dawn of the commercial Internet in a two-year period of perhaps unprecedented congressional prescience. These laws represent the recognition that the success of the Internet would not occur without government intervention.

This article will next briefly describe the role played by each of these four laws relative to the Internet. Each law's influence on the Internet could be—and has been—the subject of its own article. Consequently, this article is meant only to provide a summary of how the law interacts with the Internet.

#### A. First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.<sup>75</sup>

The first case to analyze the First Amendment's broad application to the Internet was *Reno v. ACLU*.<sup>76</sup> In this critically important case, the Supreme Court ruled that certain provisions of the Communications Decency Act violated the First Amendment because of its provisions amounted to a content-based blanket restriction of free speech.<sup>77</sup> In its opinion, the Court noted and affirmed the trial court's finding that "content on the Internet is as diverse as human thought."<sup>78</sup> The Court, in applying strict scrutiny to the restrictions, concluded that there was "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."<sup>79</sup> Justice Stevens, writing for the majority, said, "[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any

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<sup>72</sup> Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1999) (codified at 17 U.S.C. §§ 512, 1201-1205, 1301-32; 28 U.S.C. § 4001).

<sup>73</sup> See S. DOC. NO. 112-9, at 25 n.2 (2012).

<sup>74</sup> Copyright Act § 107.

<sup>75</sup> U.S. CONST. amend I.

<sup>76</sup> *Reno v. Am. Civ. Liberties Union et al.*, 521 U.S. 844 (1997).

<sup>77</sup> *Id.* at 868.

<sup>78</sup> *Id.* at 852 (internal citations omitted).

<sup>79</sup> *Id.* at 870.

soapbox.”<sup>80</sup>

At the time this case was being litigated in 1997, Internet companies had approximately 12 million individual subscribers.<sup>81</sup> There were about 100,000 new messages posted daily in newsgroups.<sup>82</sup> “Tens of thousands” of users engaged in conversations on a huge range of subjects.<sup>83</sup> No doubt these facts influenced the Court’s determination that the Internet should be protected from laws that would chill speech or deny access to speech that was flourishing on this new medium.<sup>84</sup> Given the medium’s nascence, these statistics were cited with some degree of awe. Consider, today, how much more compelling are the statistics from just two companies on the Internet: Facebook has over 1.5 billion active users and Twitter facilitates more than 500 million new tweets every day.<sup>85</sup>

First Amendment jurisprudence also protects anonymous speech,<sup>86</sup> which allows for robust discourse without fear of retaliation or embarrassment.<sup>87</sup> This not only facilitates political speech, it facilitates user comments that can help others decide whether to buy a product, see a movie, or eat at a restaurant. This broad application of the First Amendment to the medium of the Internet (as contrasted with other mass media such as broadcast radio, broadcast television, and cable television) contributed to the invention of more recent groundbreaking companies such as Facebook, Twitter, and Yelp.<sup>88</sup>

The First Amendment also helps the Internet by ensuring limitations to overbroad application of exclusivity rights given creators under copyright law. Courts have in a number of cases said that the fair use doctrine is a safety valve that protects certain applications of exclusive rights from arguments that such rights violate the First Amendment.<sup>89</sup>

Finally, the First Amendment compels a limitation on the interpretation of the Copyright Clause to the creative expression of an author and not to facts. In *Feist*, the Supreme Court held that the Constitution mandates originality—“a modicum of creativity”—as a prerequisite for copyright protection.<sup>90</sup> While it is possible to arrange facts in a way that renders the composition a new work of authorship, the decision recognizes that copyright law should give the public

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 850-51.

<sup>82</sup> *Reno*, 521 U.S. at 851.

<sup>83</sup> *Id.* at 852.

<sup>84</sup> *See id.* at 871-72.

<sup>85</sup> *Live*, INTERNET LIVE STATS, <http://bit.ly/1cWKuda> (last visited Sept. 14, 2015).

<sup>86</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341 (1995).

<sup>87</sup> *Id.* at 341-42.

<sup>88</sup> *See* Brief of Automattic, Inc. et al., as Amici Curiae Supporting Appellant at 25-26, *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440 (Va. 2015) (No. 140242).

<sup>89</sup> *See e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *Harper & Row Pubs., Inc., v. Nation Enters. et al.*, 471 U.S. 539 (1985).

<sup>90</sup> *Feist Pub’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 346 (1991).

flexibility to use, share, analyze, arrange, and redistribute facts, news, and information without fear of liability.

The *Feist* decision has 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 value to our lives. For example, the vast resources available on the Internet have made it much easier to quickly verify facts and has increased the integrity of news journalism.<sup>91</sup> The U.S. Securities and Exchange Commission warns would-be investors to “arm yourself with information,”<sup>92</sup> and most consumers use the Internet for research before making purchases.<sup>93</sup>

Perhaps because Europe does not have an equivalent to the First Amendment, the European Commission’s reaction to the *Feist* decision was to enact the Database Directive.<sup>94</sup> The Database Directive—adopted in February 1996—created a “sui generis” right for database creators to protect their databases regardless of whether it qualifies for copyright protection for a period of fifteen years.<sup>95</sup> Whether the Directive had an actual impact on potential start-up activity in Europe is not known.<sup>96</sup> At least one study, however, notes that the Directive has not meaningfully benefited the stakeholders that the Directive was meant to protect—the publishing industry.<sup>97</sup>

Consider also that a lack of First Amendment protections, where countries regulate speech, has caused in some instances the total ban on an Internet company’s services. For instance, countries like Russia and Turkey have taken

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<sup>91</sup> Glenn Kessler, *The Global Boom in Political Fact Checking*, WASH. POST (June 13, 2014), <http://wapo.st/1pTfJ05> (“[S]ince 2010, scores of fact-checking Web sites have sprung up across the world.”).

<sup>92</sup> *Microcap Stock: A Guide for Investors*, U.S. SEC. & EXCHANGE COMM’N (Sept. 18, 2013), <http://1.usa.gov/1LGSOhY>.

<sup>93</sup> JOHN B. HARRIGAN, PEW INTERNET & AM. LIFE PROJ., THE INTERNET AND CONSUMER CHOICE 28, 32-33 (2008), <http://pewrsr.ch/1oI0Baz>.

<sup>94</sup> Council Directive 96/9/EC, 1996 O.J. (L 77/20) (EU).

<sup>95</sup> *Id.* art. 7.

<sup>96</sup> JOSEFA MONTEAGUDO ET AL., EUROPEAN COMM’N, ECON. PAPERS 456, THE ECONOMIC IMPACT OF THE SERVICES DIRECTIVE: A FIRST ASSESSMENT FOLLOWING IMPLEMENTATION 52 (2012), <http://bit.ly/ecp456en>.

<sup>97</sup> See Comm’n of the European Cmtys., First evaluation of Directive 96/EC on the legal protection of databases 24-25 (Dec. 12, 2005) (DG Internal Market and Services Working Paper), <http://bit.ly/WP1st96EC> (finding that although the Directive was aimed to create a level-playing field between U.S. and European database industries, “the European share decreased from 33% to 24% [between 2002 and 2004] while the US share increased from 62% to 72%. The ratio of European/US database production, which was nearly 1:2 in 1996, has become 1:3 in 2004”); see also Peter K. Yu, *The Political Economy of Data Protection*, 84 CHI.-KENT L. REV. 777, 799 (2009) (“The [Commission] report found that the Directive not only failed to benefit the European Community much, but also might have harmed the European publishing and database industries.”); James Boyle, *Two Database Cheers for the EU*, FIN. TIMES (Jan. 2, 2006, 5:31 PM), <http://on.ft.com/1QeDFqb>.

steps toward restricting free speech online. Russia signed a new law requiring popular online personalities to register with the government, which would enable the government to more easily track them online.<sup>98</sup> In 2014, Turkey infamously blocked the social-media platform, Twitter, ahead of its elections in order to prevent users from sharing information about alleged government corruption.<sup>99</sup>

In the United States, the government largely has refrained from attempting to impose speech restrictions on the Internet.<sup>100</sup> The U.S. government's general hands-off approach to speech on the Internet facilitates investment in, and use of, interactive Internet sites such as Facebook, Twitter, and countless others.<sup>101</sup>

#### B. Section 107 of the Copyright Act (Fair Use Doctrine)

Copyright law in the United States is centered on strong, exclusive rights for authors. Specifically, Section 106 of the Copyright Act gives authors five exclusive rights:

- the right to reproduce a work
- the right to create derivative works of the original work
- the right to distribute copies of the work to the public
- the right to display the work publicly, and
- the right to perform the work publicly.<sup>102</sup>

These exclusive rights are balanced by Section 107 of the Copyright Act.<sup>103</sup> Section 107 permits certain uses of the copyrighted work notwithstanding the author's exclusive rights in it, and explicitly allows its use for criticism, news reporting, teaching, scholarship, or research purposes in qualified circumstances.<sup>104</sup> In addition to these specific uses, Section 107 provides four factors to be considered in determining whether a use qualifies as a fair use:

- the purpose and character of the use (e.g., transformative or reproductive);
- the nature of the copyrighted work (e.g., the degree of creativity);
- the amount and substantiality of the portion of the original work used; and

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<sup>98</sup> Neil MacFarquhar, *Russia Tightens Reins on Web With 'Bloggers Law'*, N.Y. TIMES (May 6, 2014), <http://nyti.ms/1sIgNL3>.

<sup>99</sup> *Turkey: Pre-election Twitter Shutdown Brings Internet Freedom to New Low*, AMNESTY INT'L (Mar. 12, 2014), <http://bit.ly/21sBrup>.

<sup>100</sup> *See, e.g., Reno*, 521 U.S. at 844.

<sup>101</sup> Brief of Automattic, Inc. et al., as Amici Curiae Supporting Appellant at 25-26, *Yelp, Inc.*, 770 S.E.2d 440 (No. 140242).

<sup>102</sup> Copyright Act § 106.

<sup>103</sup> *Id.* § 107.

<sup>104</sup> *Id.*

- the effect of the use upon the market (or potential market) for the original work.<sup>105</sup>

In the past, fair use was a regime most vocally supported by consumers, libraries, and academics.<sup>106</sup> Quite naturally, corporate America—to the extent it cared about copyright law—was more concerned about Section 106 and the exclusive rights afforded authors.<sup>107</sup>

The Internet economy has created a new voice in corporate America. These voices are made up of companies that benefit more from the exceptions to copyright protection than from the exclusive rights.<sup>108</sup> For the first time in U.S. history, there is an increasingly vocal corporate voice advocating for ensuring that U.S. copyright law remains balanced—supporting both the strong protections for authors but ensuring equally strong limitations as well as exceptions.<sup>109</sup>

Moreover, the Internet industry has been able to document its tangible, economic contribution to the U.S. economy. For example, in 2007, fair use industries generated total revenue averaging \$4.7 trillion, representing a 36% increase from 2002.<sup>110</sup> In that same year, these industries contributed on average about \$2.2 trillion in added value—just over 16% of total U.S. GDP.<sup>111</sup>

As noted earlier, there is a constitutional dimension to fair use. Legal scholars have long recognized the tension between Article I, Section 8 of the U.S. Constitution, which authorizes Congress to provide copyright protection to authors, and the First Amendment, which prohibits Congress from passing legislation restricting speech.<sup>112</sup> Interested parties have exploited this tension in an

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<sup>105</sup> *Id.*

<sup>106</sup> *Fair Use: Its Effects on Consumers and Industry: Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H.R. Comm. on Energy and Commerce, 109th Cong. 20 (2005)* (prepared statement of Peter Jaszi, Professor, American University, Washington College of Law).

<sup>107</sup> Laura A. Heymann, *A Tale of (At Least) Two Authors: Focusing Copyright Law on Process Over Product*, 34 J. CORP. L. 1009, 1012 (2009).

<sup>108</sup> JODIE GRIFFIN, PUB. KNOWL., *THE ECONOMIC IMPACT OF COPYRIGHT* 9 (2012), <http://bit.ly/1WJclEg>.

<sup>109</sup> *The Digital Media Consumers' Rights Act: Hearing on H.R. 107 Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H.R. Comm. on Energy and Commerce, 108th Cong. 18 (2004)* (prepared statement of Lawrence Lessig, Professor, Stanford Law School).

<sup>110</sup> THOMAS ROGERS & ANDREW SZAMOSSZEGLI, COMP. & COMM'NS INDUS. ASS'N, *FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTIONS OF INDUSTRIES RELYING ON FAIR USE* 20 cht.1 (2011), <http://bit.ly/1MIoZnp>.

<sup>111</sup> *Id.* at 21-22 cht.2.

<sup>112</sup> Compare U.S. CONST. art. I § 8 with U.S. CONST. amend. I; see, e.g., Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1180 (1970) (“[V]iews of copyright and the first amendment, held ‘side by side,’ may, in fact, be contradictory.”); Paul Goldstein, *Copyright and*

attempt to convince courts to declare various provisions of the Copyright Act unconstitutional.<sup>113</sup>

Why is the constitutional import of fair use significant? It is so because fair use provides constitutional balances to the limiting effects of exclusive rights.<sup>114</sup> In other words, fair use provides constitutional symmetry in U.S. copyright law, which provides a balanced, strong foundation to both the exclusive rights of authors—established pursuant to the intellectual property clause of the constitution—and the limitations and exceptions to those rights—established pursuant to both the intellectual property clause (relative to the limited duration of such rights) and the first amendment (relative to the rights of others to use authors' works without consent notwithstanding the authors' exclusive rights).<sup>115</sup> In sum, fair use is the constitutional safety valve that permits the limited monopolies provided to authors. Fair use reconciles the Constitution's intellectual property clause with the First Amendment.

None of the United States' trading partners possesses the same constitutional framework. In fact, only a handful of countries around the world have a similar fair use statute.<sup>116</sup> In other parts of the world, legal systems incorporate specific statutory limitations and exceptions created by regulators or legislatures.<sup>117</sup> The reliance of an ex-ante regulatory or legislative approval system has obvious

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*the First Amendment*, 70 COLUM. L. REV. 983, 984 (1970) (“[C]opyright persists in its potential for conflict with the [F]irst [A]mendment.”).

<sup>113</sup> See, e.g., *Harper & Row*, 471 U.S. at 555-58 (stating that the Nation magazine argued, unsuccessfully, that First Amendment values required its publication of unpublished manuscript excerpts to be considered a fair use, given the public import of the matter).

<sup>114</sup> See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 479 (1984) (Blackmun, J., dissenting) (“The fair use doctrine must strike a balance between the dual risks created by the copyright system: on the one hand, that depriving authors of their monopoly will reduce their incentive to create, and, on the other, that granting authors a complete monopoly will reduce the creative ability of others.”); *Roy Export Co. Establishment of Vaduz, Liechtenstein v. Columbia Broadcasting Sys., Inc.*, 672 F.2d 1095, 1099 n.9 (2d Cir. 1982) (“Fair use balances the public interest in the free flow of ideas and information with the copyright holder's interest in exclusive proprietary control of his work.”); *Wainwright Secs., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977) (“Conflicts between interests protected by the first amendment and the copyright laws thus far have been resolved by application of the fair use doctrine.”).

<sup>115</sup> Compare Copyright Act § 106 with Copyright Act § 107; see also *Harper & Row*, 471 U.S. at 556 (“[C]opyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.” (internal citation omitted)).

<sup>116</sup> Countries including Israel, Singapore, Australia, and the United Kingdom have enacted exceptions to copyright protection for certain uses that resemble the fair use doctrine in the U.S. See, e.g., Copyright Act, 2007 (as amended on July 28, 2011), 5768-2007, SH No. 2199 p. 34 (Isr.) (Section 19: Fair Use); Copyright Act (Cap 64, 2006 Rev Ed) s 38A (Singapore); *Copyright Act 1968* (Cth) s 40-42 (Austl.); United Kingdom Copyright, Designs and Patents Act 1988, c. 48, § 30 (Eng.) (Fair Dealing).

<sup>117</sup> See, e.g., *Copyright Act 1968*, s 40-47H (Austl.).



shortcomings when applied to the fast-moving pace of Internet technologies and business models.

There are two key examples of activities permitted by fair use that are critical to the digital environment.

### *1. Fair Use and Search Engines*

Perhaps the most high-profile Internet company benefiting from fair use is Google. Early search engines were inefficient.<sup>118</sup> Yahoo's search engine, for example, involved human editors who organized websites on the World Wide Web into categories, such as "finance," "entertainment," "movies," "health," "style," "politics," and numerous other categories.<sup>119</sup> Search engine technology became less reliant on human editors when they began dispatching software<sup>120</sup> that scanned a website's metadata, which the website's creators filled with key words that described the contents of the website.<sup>121</sup> These early search engines were totally reliant on websites' creators to fill the sites' metadata with accurate descriptions of the content of the sites. Not surprisingly, website creators sometimes inaccurately described the website to manipulate search results. Still, this system was much more efficient than its prior iteration that relied on human editors.

Google significantly upgraded search technology by not just searching a website's metadata, but instead enabling its robots to copy the entire content of the site. When a user enters a query into Google's search box, the user is searching not the Internet but rather a recently stored copy of the Internet that resides on Google's computers. Today, all major search engines "crawl" and copy the World Wide Web and store such copy on their computers.<sup>122</sup> The storage of the contents of entire websites allows these search engines to create algorithms that can make the responses to a user's search query much more relevant than prior search engine iterations that used only the descriptive terms in a site's metadata.<sup>123</sup> Relevant for our purposes, these search engines engage in widespread, automatic copying of other people's content without the authority

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<sup>118</sup> See Danny Sullivan, *The Yahoo Directory – Once The Internet's Most Important Search Engine – Is To Close*, SEARCH ENGINE LAND (Sept. 26, 2014, 2:21 PM), <http://selnd.com/YkCGzR>.

<sup>119</sup> See Vangie Beal, *Web Search Engines & Directories*, WEBOPEDIA (June 19, 2009), <http://bit.ly/21sBvu1>; see also Sullivan, *supra* note 118.

<sup>120</sup> Curt Franklin, *How Internet Search Engines Work*, HOWSTUFFWORKS, <http://bit.ly/1k8T25v> (last visited Feb. 8, 2016).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

of the content creators.<sup>124</sup> Notwithstanding the content creator's exclusive right under the Copyright Act to limit the copying of her work, fair use allows search engines to engage in such permission-less copying.<sup>125</sup>

It is worth noting that while U.S. courts have upheld such permission-less copying, this activity is not expressly permitted under Internet laws in the European Union.<sup>126</sup> Article 5(1) of the EU Copyright Directive establishes an exception for temporary and incidental copies that do not have economic significance, but a search engine's ability to rely on this law has not been tested in the European courts.<sup>127</sup> The EU E-Commerce Directive includes safe harbors for mere-conduit, caching, and hosting functions, however, the exceptions do not encompass information location tools (as search engines are known under the DMCA, for example).<sup>128</sup>

## 2. Fair Use and Cloud Computing

Faster broadband speeds, cheap storage costs, and ubiquitous, multi-device connectivity to the Internet have shifted storage of content from a user's personal computer to the "cloud."<sup>129</sup> Cloud-based storage allows a user to keep copies of her content in a remote location that gives her access to such content anywhere she is connected to the Internet.<sup>130</sup> A user can download this content to multiple devices at different times or stream audiovisual content using a software-based audiovisual player.<sup>131</sup>

The growth of the cloud-based ecosystem has been dramatic. Since 2014, cloud-based traffic has grown from 3.5 to 5.6 zettabytes, and is projected to triple to 10.4 zettabytes by 2019.<sup>132</sup> Mobile cloud apps made up 81% of mobile

<sup>124</sup> See *Field v. Google Inc.*, 412 F.Supp.2d 1106, 1121-22 (D.Nev. 2006); see also Brendan Gibbons, *Search Engines, Indexing and Copyright Law*, PRACTICAL ECOMMERCE (Dec. 14, 2009), <http://bit.ly/1VF0KWC>.

<sup>125</sup> See *Field*, 412 F.Supp.2d at 1121-22; see also Gibbons, *supra* note 124.

<sup>126</sup> Compare *Field*, 412 F.Supp.2d at 1123 with Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, art. 5, 2001 O.J. (L. 167) [hereinafter Directive 2001/29/EC].

<sup>127</sup> Directive 2001/29/EC, *supra* note 126, art. 5, ¶ 1.

<sup>128</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, arts. 12-14, 2000 O.J. (L. 178) [hereinafter Directive 2000/31/EC].

<sup>129</sup> Qusay F. Hassan, *Demystifying Cloud Computing*, CROSS TALK, Jan.–Feb. 2011, at 16, 17-18, <http://bit.ly/1R2V2tP>.

<sup>130</sup> Johnathan Strickland, *How Cloud Computing Works*, HOWSTUFFWORKS, <http://bit.ly/1je4wqN> (last visited Feb. 8, 2016).

<sup>131</sup> *Cloud AV*, INFOCOMM INT'L (Nov. 1, 2010), <http://bit.ly/1p6pahm>.

<sup>132</sup> CISCO, CISCO GLOBAL CLOUD INDEX: FORECAST & METHODOLOGY, 2014-2019, at 5-6 fig.1 (2015) [hereinafter CISCO GLOBAL CLOUD FORECAST], <http://bit.ly/1BNhCTZ>.

data traffic in 2014.<sup>133</sup> Mobile cloud traffic is projected to grow eleven-fold from 2014 to 2019.<sup>134</sup> In that time, over 80% of workloads will be processed by cloud data centers, with cloud workload growth tripling compared to traditional data center workloads growing at a much slower rate.<sup>135</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.<sup>136</sup> Global spending on IaaS was projected to reach \$16.5 billion in 2015, an increase of over 30% from 2014.<sup>137</sup>

The benefits of cloud-based storage are clear. In a recent article, *The Economist* described cloud computing as “a business-critical issue,” enabling organizations to avoid the problems associated with aging IT systems and “to better position themselves to sell and compete on global platforms.”<sup>138</sup> It not only provides portability, but it allows for more seamless upgrades and transitions to new or multiple devices, because content does not need to be laboriously copied from one device to another. In addition, taking advantage of economies of scale, storage of data can be more secure than storage on local servers.<sup>139</sup>

While a user practically and intuitively understands the benefits of cloud storage, the importance of fair use to this fast-growing ecosystem, is less clear. An understanding of fair use, however, quickly illuminates why it is fundamental to cloud computing. Put simply, fair use allows a user to copy and send a copyrighted work, if done so for personal purposes or other limited uses, without prior authorization of the copyright owner.<sup>140</sup> Imagine a world where a user who stores her music library remotely would need to obtain consent from each music file’s copyright owner prior to streaming a single song. Significantly, because of judicially developed theories of secondary liability, the cloud computing service without fair use very well could determine it needed to disable copying and sharing features for third-party content.<sup>141</sup> Because copying is unavoidable in the cloud ecosystem (i.e., copies of a work must be made to

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<sup>133</sup> Louis Columbus, *Roundup of Cloud Computing Forecasts and Market Estimates Q3 Update, 2015*, FORBES (Sept. 27, 2015, 6:48 PM), <http://onforb.es/1VFMN11>.

<sup>134</sup> *Id.*

<sup>135</sup> CISCO GLOBAL CLOUD FORECAST, *supra* note 132, at 8 fig.3.

<sup>136</sup> Allan Krans & Jillian Morandi, *The Developers’ Coup: 2015 Development Demands and Vendor Opportunities: Insights from TBR’s Cloud Platform and Developer Research 4* (2015) (unpublished presentation), <http://bit.ly/1VzUByI>.

<sup>137</sup> Press Release, Gartner, *Gartner Says Worldwide Cloud Infrastructure-as-a-Service Spending to Grow 32.8 Percent in 2015* (May 18, 2015), <http://gtr.it/1R3F2tu>.

<sup>138</sup> *Mapping the Cloud Maturity Curve*, THE ECONOMIST (May 14, 2015), <http://bit.ly/1Q2juxG>.

<sup>139</sup> *Id.*

<sup>140</sup> Copyright Act § 107.

<sup>141</sup> See Marc Aaron Melzer, *Copyright Enforcement in the Cloud*, 21 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 403, 416 (2011)

move or stream it),<sup>142</sup> cloud technologies without fair use would come to a grinding halt.

Again, 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. In Europe, for example, Article 5(2)(b) of the Copyright Directive allows for limited sharing of copyrighted works but only if the rights holders receive “fair compensation.”<sup>143</sup> Such compensation typically manifests itself through the form of a tax on the products and services that facilitate copying.<sup>144</sup>

### C. Section 230 of the Communications Decency Act

The Internet as it exists today would not be possible without Section 230 of the Communications Decency Act (“CDA”).<sup>145</sup> Section 230 generally protects Internet companies from civil liability under federal and state law for content provided by a third person.<sup>146</sup> Specifically, Section 230(c)(1) states:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.<sup>147</sup>

Therefore, a defendant would be immune from state law liability under the Act if:

(1) [I]t is a “provider or user of an interactive computer service”; (2) the complaint seeks to hold the defendant liable as a “publisher or speaker”; and (3) the action is based on “information provided by another information content provider.”<sup>148</sup>

Section 230 was adopted in response several cases, including *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, in which the court treated the Internet company as a publisher of content developed by a third party user of the Internet company’s platform.<sup>149</sup> At the time of the decision, Prodigy’s site received 60,000 postings a day—far too many to review in their entirety.<sup>150</sup> The court imposed potential liability on Prodigy for *all* posts.<sup>151</sup>

In Section 230, Congress created an important precedent in Internet policy

<sup>142</sup> *See id.* at 406-07.

<sup>143</sup> Directive 2001/29/EC, *supra* note 126, art. 5, ¶ 2(b).

<sup>144</sup> *Id.* Pmbl. ¶¶ 35-36, 38.

<sup>145</sup> Communications Decency Act § 230.

<sup>146</sup> *Id.* § 230(c)(2).

<sup>147</sup> *Id.* § 230(c)(1).

<sup>148</sup> *Shiamili v. Real Estate Grp. of N.Y.*, 952 N.E.2d 1011, 1015 (N.Y. Ct. App. 2011).

<sup>149</sup> *See Stratton Oakmont Inc. v. Prodigy Serv. Co.*, 1995 WL 323710 at \*5 (S.C.N.Y. 1995), *superseded by statute as stated in Shiamili*, 952 N.E.2d at 1011.

<sup>150</sup> *Stratton Oakmont*, 1995 WL 323710 at \*3.

<sup>151</sup> *Id.*

that has endured for 20 years. Legislators decided to refrain from holding Internet companies liable for the conduct of third parties who use their platforms in order to promote innovation by Internet companies and to ensure that the Internet would continue to grow.<sup>152</sup> Congress recognized that the scale of the Internet would make it impossible for Internet companies to police their platforms or pre-screen user activity and that the potential of such liability under traditional concepts of publisher liability would create a perverse incentive for an Internet company to avoid acquiring knowledge of potentially unlawful activity. By eliminating such liability, Congress chose instead to incentivize companies to respond to notices of potentially unlawful or unsavory activity.

Section 230 provides four exceptions to its limitations on liability.<sup>153</sup> Section 230 does not provide immunity for violations of federal criminal law, limit or expand intellectual property law, prevent consistent State law actions, or limit Electronic Communications Privacy Act of 1986.<sup>154</sup> Courts have interpreted Section 230 broadly. In the seminal case interpreting this provision, *Zeran v. Am. Online, Inc.*,<sup>155</sup> the court explained:

Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.<sup>156</sup>

The Court also recognized Section 230's complimentary purpose: by immunizing service providers from liability based on content posted on their sites, Section 230 also removes the incentive for providers *not* to edit their sites for fear of potential liability as a "publisher."<sup>157</sup> In that case, the court held that AOL was "plainly immune. . . from liability for information that originates with third parties that was posted on its site."<sup>158</sup> After *Zeran* established that service providers are generally immune from liability under Section 230, other courts followed, resounding support for the protections Section 230 provides. In particular, courts recognize the scale of the Internet renders it impossible for a service provider, particularly small companies or nascent services, to police the Internet:

[S]creening, though lawful, is hard. Simple filters along the lines of "postings may not contain the words 'white'" can't work. Statements such as "red brick house with white trim" do not violate any law, and prospective buyers and renters would be worse off if

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<sup>152</sup> *CDA 230: Legislative History*, ELEC. FRONTIER FOUND., <http://bit.ly/1SVViR4> (last visited Feb. 7, 2016).

<sup>153</sup> Communications Decency Act § 230(e).

<sup>154</sup> *Id.*

<sup>155</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

<sup>156</sup> *Id.* at 331.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 328.

craigslist blocked descriptive statements. An online service could hire a staff to vet the postings, but that would be expensive and may well be futile: if postings had to be reviewed before being put online, long delay could make the service much less useful, and if the vetting came only after the material was online the buyers and sellers might already have made their deals. Every month more than 30 million notices are posted to the craigslist system . . . . It would be necessary to increase that staff (and the expense that users must bear) substantially to conduct the sort of editorial review that the [plaintiff] demands—and even then errors would be frequent . . . . Automated filters and human reviewers may be equally poor at sifting good from bad postings unless the discrimination is blatant; both false positives and false negatives are inevitable.<sup>159</sup>

While courts have generally ruled in favor of ISP immunity, some courts have also begun to question such blanket immunity in certain cases.<sup>160</sup> The Ninth Circuit clarified that a service provider was not immune from liability where a website operator developed the content selected by a user of the website's platform.<sup>161</sup>

There have been over 184 cases involving Section 230 since 1996.<sup>162</sup> A vast majority of those cases have found that Internet companies are immune from liability consistent with the Fourth Circuit's holding in *Zeran*.<sup>163</sup> By now, nearly every single Circuit has considered Section 230, and interpreted it as providing broad protections for service providers, consistent with *Zeran*'s first interpretations.<sup>164</sup>

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<sup>159</sup> Chi. Lawyers' Comm. for Civ. Rts. Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668-69 (7th Cir. 2008), *as amended* (May 2, 2008).

<sup>160</sup> See Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1164 (9th Cir. 2008) ("The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet.")

<sup>161</sup> See *id.* at 1165-66 (holding CDA did not immunize website for induced third parties to express illegal preferences on its website by posting a questionnaire and displaying its answers on its site).

<sup>162</sup> David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 448 tbl.8 (2010).

<sup>163</sup> See, e.g., Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006) ("The majority of federal circuits have interpreted the CDA to establish broad 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'" (quoting *Zeran*, 129 F.3d at 331)); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124-25 (9th Cir. 2003). Courts have even extended their reading of Section 230 to bar claims for injunctive relief against service providers. See generally Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 983-86 (10th Cir. 2000) (holding that section 230 immunized a computer service provider from a suit for damages and injunctive relief); see also generally Doe v. America Online Inc., 783 So.2d 1010, 1013-17 (Fla. 2001). "We specifically concur [with *Zeran*] that section 230 expressly bars 'any actions' and we are compelled to give the language of this preemptive law its plain meaning." *Id.* at 1018.

<sup>164</sup> All of the following cases held service operators qualified for immunity under Section 230. See, e.g., Universal Commc'ns Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 422 (1st Cir. 2007); Ricci v. Teamsters Union Local 456, 781 F.3d 25, 28 (2d Cir. 2015); DiMeo v. Max, 248 Fed.Appx. 280, 282 (3rd Cir. 2007); Westlake Legal Grp. v. Yelp, Inc., 599

In just *one second* online, Internet users send over 2.4 million emails, view over 100,000 YouTube videos, and generate over 50,000 Google searches, 7,000 tweets, 1,100 Tumblr posts, and 700 Instagram photos.<sup>165</sup> It is clearly impossible to monitor all activity online. Without the protections of Section 230, many if not most of these companies would not exist.

#### D. Digital Millennium Copyright Act of 1998

The Digital Millennium Copyright Act (“DMCA”) limits the remedies available against online intermediaries based on the activities of their users.<sup>166</sup> President Clinton signed the DMCA into law in 1998 and contains five operable titles:

- Title I-WIPO Treaties Implementation
- Title II-Online Copyright Infringement Liability Limitation
- Title III-Computer Maintenance or Repair Copyright Exemption
- Title IV-Miscellaneous Provisions
- Title V-Protection of Certain Original Designs<sup>167</sup>

Title I of the DMCA updates U.S. copyright law in order to comply with the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”), which was adopted at the WIPO Diplomatic Conference in December 1996 (“WIPO Treaty”).<sup>168</sup>

Title II of the DMCA, the Online Copyright Infringement Liability Limitation Act, provides critical protection for Internet companies.<sup>169</sup> Specifically, Title II provides online service providers with a safe harbor from liability for copyright infringement, so long as the providers comply with certain obligations.<sup>170</sup> The safe harbor applies to Internet companies that host, link to, or provide access to content on the Internet and to four categories of conduct by these companies: transitory communications, system caching, storage of information on systems or networks at the direction of users, and information loca-

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Fed.Appx. 481, 485 (4th Cir. 2015); *Doe v. MySpace*, 528 F.3d 413, 422 (5th Cir. 2008); *Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398, 417 (6th Cir. 2014); *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003); *Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010); *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2008); *Ezra & Co.*, 206 F.3d at 986; *Almeida*, 456 F.3d at 132; *Klayman v. Zuckerberg*, 753 F.2d 1354, 1357-59 (D.C. Cir. 2014).

<sup>165</sup> *In 1 Second*, INTERNET LIVE STATS, <http://bit.ly/1Sj5QVX> (last visited Apr. 10, 2016).

<sup>166</sup> Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* §§ 101-105.

<sup>169</sup> *Id.* §§ 201-203.

<sup>170</sup> Copyright Act § 512.

tion tools.<sup>171</sup> A party must be a ‘service provider’ to qualify for a safe harbor.<sup>172</sup> The safe harbor for transitory communications requires the provider to be “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”<sup>173</sup> The safe harbors for caching, user-directed storage, and information location tools require only that a party be “a provider of online services or network access, or the operator of facilities therefor...”<sup>174</sup> To be eligible for the safe harbor, the service provider must fulfill two other obligations: (1) adopt and reasonably implement a policy of terminating the accounts of subscribers who are repeated infringers and (2) “accommodates and does not interfere with standard technical measures.”<sup>175</sup> These ‘measures’ do not impose an affirmative duty on service providers to monitor its site or seek information about copyright infringement on its service.

After meeting these baseline obligations, the service provider must comply with the DMCA’s notice-and-take-down provisions.<sup>176</sup> These provisions affords copyright owners the opportunity to notify a service provider of allegedly infringing material on the provider’s site or system, and requires the provider to remove or block access to the infringing material.<sup>177</sup> The service provider must designate an agent for receiving and processing notices from copyright owners to the Copyright Office and on its service.<sup>178</sup> The agent must be clearly designated to the Copyright Office and on its service.<sup>179</sup> The Act exempts providers from liability if a provider, in good faith, removes or blocks access to material after receiving a notice of alleged infringement or after becoming aware of infringing material.<sup>180</sup>

The adoption of the DMCA’s safe harbors were critical to the growth of the

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<sup>171</sup> *Id.* “Information location tools” generally cover service provider referral to material at other websites through a search engine, list of recommended sites, or a hypertext link. *Id.* § 512(d).

<sup>172</sup> *Id.* § 512(a).

<sup>173</sup> *Id.* § 512(k)(1)(A).

<sup>174</sup> *Id.* § 512(k)(1)(B).

<sup>175</sup> *Id.* § 512(i)(1)(A)-(B). Standard technical measures are defined as measures that copyright owners use “to identify or protect copyrighted works [that] (A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair and voluntary multi-industry process, (B) are available to anyone on reasonable nondiscriminatory terms; and (C) do not impose substantial costs or burdens on service providers.” *Id.* § 512(i)(2)(A)-(C). These may include digital watermarks or other technological means of preventing copying of a work. *See id.*

<sup>176</sup> Copyright Act § 512(j)(3).

<sup>177</sup> *Id.* § 512(g)(2)(A).

<sup>178</sup> *Id.* § 512(c)(2).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* § 512(g)(1). The material that is the subject of the notice must fall within one of the four activities provided by the act. *Id.* § 512(g)(4).



Internet. Copyright is a strict liability regime with a unique statutory damages component and a judicially developed secondary liability construction.<sup>181</sup> Absent safe harbors that limit liability for service providers, this framework would result in astronomical claims for statutory damages against Internet companies for performing the very functions that enable the Internet to exist.

The combination of copyright's strict liability provisions and the massive scale of the Internet have the potential to significantly chill innovation, information sharing, and the development of the Internet. Today, there are well over 1 billion websites online, and over three billion people in the world using the Internet—and potentially posting, sharing, or creating content or software that violates copyright law.<sup>182</sup> It is impossible for an Internet company to proactively “police the Internet” for infringing activity on its platform.<sup>183</sup> That is, it is difficult - if not impossible - for a third party to know in most instances whether any particular distribution of a work is infringing, whether the distribution is a fair use, whether the sender has a license, or even who owns the copyright.

Crucially, the DMCA adopted the policy decision made by Congress in Section 230, which is that Internet companies should not be required to police the Internet or be liable for third party actions.<sup>184</sup> Unlike Section 230, the DMCA requires Internet companies to respond to notices from rights holders of potentially infringing activity.<sup>185</sup>

The notice-and-take down procedure strikes the right balance by providing a way for rights holders to protect their works and a reasonable way for Internet companies to assist rights holders in doing so.<sup>186</sup> The provision places responsibility for resolving disputes on the owner of the work, and the person who displayed, posted, or sent it without the owner's permission.<sup>187</sup> The DMCA immunizes Internet companies if they promptly remove potentially infringing

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<sup>181</sup> See generally Kent Sinclair Jr., *Liability for Copyright Infringement – Handling Innocence in a Strict Liability Context*, 58 CAL. L. REV. 940, 941-61 (1970).

<sup>182</sup> *Total Number of Websites*, *supra* note 26.

<sup>183</sup> See generally Jonathan Schulman, *Liability of Internet Service Providers for Infringing Activities of their Customers: Will the Induce Act Solve the Problem?*, 13 U. BALT. INTEL. PROP. L.J. 121, 121 (2005) (“To address the growing concern of copyright infringement, the courts have decided several landmark cases in the past twenty years; however, no Congressional law or decision by the courts has stopped the illegal distribution of copyrighted materials.”).

<sup>184</sup> Communications Decency Act § 230(a).

<sup>185</sup> Copyright Act § 512(c)(1).

<sup>186</sup> If the subscriber serves a counter notification complying with statutory requirements, including a statement under penalty of perjury that the material was removed or disabled through mistake or misidentification, then the Internet company must put the material back up within 10-14 business days after receiving the counter notification, unless the copyright owner files an action seeking a court order against the subscriber. *Id.* § 512(c)(3).

<sup>187</sup> *Id.* § 512.

works after receiving a takedown notice.<sup>188</sup> The Internet companies would also have to promptly notify the subscriber once the material has been removed or access disabled.<sup>189</sup> In which case, if there is a dispute, the Internet company is not in the middle of it—the owner of the work may file an action against the subscriber who posted the material, and the subscriber may seek a penalty against the owner for knowing material misrepresentations in the notice to the Internet company.<sup>190</sup> Again, Congress declined to make the Internet company the arbiter of what is or is not lawful activity in the ether.

The bottom line is that the DMCA provides Internet companies, and the venture capitalists that fund start-ups, with all-important certainty that as long as they comply with fairly simple obligations, they can operate without fear of litigation. The obligations do not require any great degree of internal legal sophistication, allowing a start-up to launch without the need for in-house lawyers.<sup>191</sup> But even the smallest start-up knows that it must put in place a process to comply with DMCA obligations. It is impossible to overstate the DMCA safe harbor's importance to the Internet. Former YouTube General Counsel Zahavah Levine stated, “[w]ithout this safe harbor, sites like YouTube could not exist.”<sup>192</sup>

### III. U.S. TRADE POLICY NEEDS TO BE UPDATED TO REFLECT TODAY'S INTERNET ECONOMY

In today's globally-oriented competitive business landscape, U.S. trade policy does not fully export the laws that make it possible for U.S. Internet companies to succeed abroad. Rather, trade policy still largely reflects the priorities of a pre-Internet era. Of the few laws that make the Internet work, USTR has only successfully incorporated the safe harbors of the DMCA into trade agreements.<sup>193</sup> USTR incorporated a fair use-like provision into trade negotiations only three years ago, and this provision has been included in the proposed TPP—which awaits ratification by the Senate.<sup>194</sup> Section 230 and First Amendment-like protections have yet to become trade objectives. The failure to incorporate half of the legal framework (and if the TPP is not adopted, three-

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<sup>188</sup> *Id.* § 512(c).

<sup>189</sup> *Id.* § 512(g)(1).

<sup>190</sup> U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT 12 (1998), <http://bit.ly/DMCApdf>.

<sup>191</sup> *See generally id.*

<sup>192</sup> David Kravetz, *10 Years Later, Misunderstood DMCA is the Law That Saved the Web*, WIRED (Oct. 27, 2008, 3:01 PM), <http://bit.ly/1rgxInf>.

<sup>193</sup> CABINET SECRETARIAT OF JAPAN, TRANS-PACIFIC PARTNERSHIP AGREEMENT SUMMARY 10 (2015) <http://bit.ly/1XHm7Yq>.

<sup>194</sup> Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977, 1027-28 (2014).

quarters of the framework) that makes the Internet work impairs U.S. companies' global competitiveness.<sup>195</sup>

The primary trade authorities in the U.S. lack sufficient high-ranking officials and inter-agency groups dedicated to promoting the Internet and access to information access policy.<sup>196</sup> The administration has some trade-focused offices—such as the International Trade Administration (“ITA”)—that seem to address telecommunications and information technologies, however, these entities are not primarily focused on the four basic laws that make the Internet work.<sup>197</sup> For instance, the Department of Commerce’s ITA divisions on e-commerce, information, and telecommunications do not report on intermediary liability, information access barriers, or many of the key priorities of today’s Internet industry.<sup>198</sup> The latest available e-commerce “tool kit” and telecommunications statistics reports on the division’s site are from 2011.<sup>199</sup> And while Congress oversees trade, it has not focused on prioritizing the interests of Internet companies.

Not surprisingly, the administration’s institutional priority relative to promoting the Internet is reflected in USTR’s current trade priorities and in the recently negotiated trade agreements themselves. When trade agreements do discuss the Internet, it is most often mentioned in the context of promoting strong intellectual property (“IP”) enforcement related to pirated software,

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<sup>195</sup> The international nature of the Internet renders companies vulnerable to liability in markets that have not recognized the benefits of a balanced IP regime for online content. Several jurisdictions have declined to adopt liability limitations for online service providers similar to those available in the U.S. For example, France, Italy, and Germany have imposed fines or harsh requirements on websites for allowing access to certain information or content. See *Ruling on Nazi Memorabilia Sparks Legal Debate*, N.Y. TIMES (Nov. 24, 2000), <http://nyti.ms/1NkGiL9>; Landgericht Hamburg (LG), Sept. 26, 2008, 308 O 42/06, <http://bit.ly/308O4206>; Giulio Coraggio, *Yahoo! Liable for Searchable Contents!*, IPT ITALY (May 28, 2011), <http://bit.ly/1XHmd28>.

<sup>196</sup> Cf. Cameron Kerry & Christopher Schroeder, *White House Council Launches Interagency Subcommittee on Privacy & Internet Policy* (Oct. 24, 2010, 10:10 PM), <http://1.usa.gov/23IELWH> (discussing one interagency subcommittee created in 2010 to promote the Internet and information access).

<sup>197</sup> See *About the International Trade Administration*, INT’L TRADE ADMIN., <http://1.usa.gov/1Sj6frg> (last visited Apr. 12, 2016) (“The International Trade Administration, U.S. Department of Commerce, manages this global trade site to provide access to ITA information on promoting trade investment, strengthening the competitiveness of U.S. industry, and ensuring fair trade and compliance with trade laws and agreements.”).

<sup>198</sup> See *Research by Industry/Sector: Internet and E-commerce Technologies*, OFFICE OF TECH. & ELEC. COMMERCE, <http://1.usa.gov/1ruSAqQ> (last visited Apr. 12, 2016).

<sup>199</sup> See *generally Telecommunications Equipment Trade Statistics*, OFFICE OF TECH. & ELEC. COMMERCE, <http://1.usa.gov/1qD0tJH> (last updated Sept. 18, 2012); see also *generally* KEN WALSH, DEPT. OF COMMERCE, *PREPARING YOUR BUSINESS FOR GLOBAL E-COMMERCE 1* (2011), <http://1.usa.gov/1rqwXrD>.

trademark infringement, and cybersecurity.<sup>200</sup> While these are important priorities, they say nothing of the need to promote access to and use of the near-limitless resources the Internet provides. In May 2015, USTR Robert Holleyman II laudably promoted policies “to ensure the Internet remains open, free, and a platform for global innovation,” but USTR advocacy did not address these objectives before this moment.<sup>201</sup> This was the first time we are aware of a trade official making such a case.

Consequently, we propose that Congress create trade ambassadors for the Internet and for access to information. Congress and the administration should create trade offices that promote the Internet and the laws that make it work. And, USTR should create additional Industry Trade Advisory Committees (“ITACs”) to support the Internet and access to information. The current asymmetry in U.S. trade policy will only persist if the organizational structure in the U.S. continue to focus on outdated issues unless structural changes of this kind are made.

#### A. History of Copyright in U.S. Trade Agreements

With its passage of the DMCA in 1998, the U.S. took a vital step toward opening new revenue streams and markets by providing certain rules of the road for the Internet.<sup>202</sup> The DMCA has been critical law for Internet companies and has exemplified the benefits of incorporating exceptions and limitations to balance strong IP protections.<sup>203</sup>

Only over the last twenty years or so has the U.S. used trade agreements to advance interests beyond pure import and export goals. Beginning with its accession to the Berne Convention in 1988, the U.S. began to recognize the importance of IP protections in trade policy.<sup>204</sup> But U.S. adherence to the Berne convention was only a small step forward. Berne was not self-executing under U.S. law, meaning that domestic copyright principles were not exported, and

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<sup>200</sup> See, e.g., United States–Australia Free Trade Agreement art. 17.3, ¶ 1, U.S.–Austl., Jan. 1, 2005 [hereinafter Australia FTA], <http://bit.ly/AUSFTA> (requiring trademark dispute settlement procedure for domain names); United States–Colombia Trade Promotion Agreement art. 16.4, ¶ 1, U.S.–Col., May 15, 2012 [hereinafter Colombia TPA], <http://bit.ly/ColTPA> (requiring trademark dispute settlement procedure for domain names).

<sup>201</sup> See Holleyman NDN Address, *supra* note 58.

<sup>202</sup> LILIAN EDWARDS, ROLE AND RESPONSIBILITY OF INTERNET INTERMEDIARIES IN THE FIELD OF COPYRIGHT AND RELATED RIGHTS 12-14 (2010), <http://bit.ly/23W94JN>.

<sup>203</sup> Priyambada Mishra & Angsuman Dutta, *Striking a Balance between Liability of Internet Service Providers and Protection of Copyright over the Internet: A Need of the Hour*, 14 J. INTELL. PROP. RIGHTS 321, 326 (2009).

<sup>204</sup> The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, amended Oct. 2, 1979, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221, 102 Stat. 2853 (1979).

copyright disputes would be resolved under domestic law.<sup>205</sup> Shortly after, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) was signed in Morocco in 1994, and it aimed to promote uniformity in the way IP rights are protected around the world.<sup>206</sup> It established minimum levels of protection that each government must give to fellow World Trade Organization (“WTO”) members.<sup>207</sup> The creation of the WTO at the Uruguay Round of Multilateral Trade Negotiations in 1995 and the passage of the TRIPS agreement secured the link between copyright principles and trade negotiations.<sup>208</sup> In addition, mandating ratification of TRIPS established the priority of legal parity on IP principles among nations.<sup>209</sup> These two events helped the framework for exporting the IP principles of the U.S. overseas.<sup>210</sup>

The United States has been vigorous in its promotion of strong IP protections through trade.<sup>211</sup> However, the U.S. has exported an asymmetrical copyright regime that does not fully reflect the balance found in U.S. law. By focusing only on enforcement, protection, and prevention of illegitimate uses, Congress has given an excuse for other countries to engage in protectionist prosecutions against U.S. Internet companies for activity that is legal under U.S. law.<sup>212</sup>

Over the past decade or so, USTR has made small, but important, steps toward promoting more Internet-friendly priorities, including IP policies that provide the flexibility necessary for a balanced regime. In addition to the DMCA, the USTR recently promoted fair use-like language in the TPP negoti-

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<sup>205</sup> *Id.*

<sup>206</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement] (“Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade...”).

<sup>207</sup> *Id.* art. 4.

<sup>208</sup> See e.g., Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994); TRIPS Agreement, *supra* note 205, arts. 9-15, 69.

<sup>209</sup> Clarisa Long, *TRIPs and Intellectual Property Protection in Emerging Markets*, 1 INTELL. PROP. PRAC. GROUP. NEWSL., Fall 1997, <http://bit.ly/1NzSZws>.

<sup>210</sup> See Andrew Christie, Sophie Waller, & Kimerlee Weatherall, *Exporting the DMCA Through Free Trade Agreements*, in INTELLECTUAL PROPERTY & FREE TRADE AGREEMENTS 211, 211 (Christopher Heath & Anselm Kamperman Sanders eds., 2007); WORLD TRADE ORG., THE WORLD TRADE ORGANIZATION...IN BRIEF 6 (2014).

<sup>211</sup> Peter Drahos, *Global Property Rights in Information: The Story of TRIPS at the GATT*, 13 PROMETHEUS 6, 7-8 (1995).

<sup>212</sup> Anne Hiaring, *What's New in the Neighborhood - The Export of the DMCA in Post-TRIPS FTAs*, 11 ANN. SURV. INT'L & COMP. L. 171, 172 (2005).

ations.<sup>213</sup>

The DMCA was first added to the template for U.S. free trade agreements in 2003.<sup>214</sup> DMCA-like provisions were included in the Chile FTA.<sup>215</sup> These provisions allowed Chile to choose how to implement the relevant ban in its copyright liability regime, and apply to a slightly narrower category of uses.<sup>216</sup> Around the same time, the U.S. concluded FTAs with Singapore and Australia, that included provisions more closely resembling the DMCA.<sup>217</sup> The incorporation of DMCA principles provides an important protection for Internet companies; it was a significant first step toward amending trade policies to promote a more balanced system that accounted for not only the interests of rights holders, but of Internet companies and user communities. By negotiating FTAs with IP chapters containing DMCA provisions, the U.S. has provided increased assurance to Internet companies that their business in foreign countries will be protected.<sup>218</sup> Internet companies are prone to liability risks as they enter new markets and place servers and personnel in new jurisdictions.<sup>219</sup>

The United States began exporting the DMCA through trade agreements in 2003.<sup>220</sup> Between 2003 and 2007, the U.S. concluded free trade agreements with 16 countries.<sup>221</sup> Over that time, there has been a marked increase in the length, and technical detail, of chapters focused on IP compared to earlier trade agreements.<sup>222</sup> The anti-circumvention provisions of the DMCA have received a particularly increased amount of attention in recent years.<sup>223</sup>

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<sup>213</sup> *USTR Introduces New Copyright Exceptions and Limitations Provision at San Diego TPP Talks*, TRADEWINDS. (July 3, 2012) [hereinafter *USTR Introduces New Exceptions*], <http://1.usa.gov/1NkGkCP>.

<sup>214</sup> Hiaring, *supra* note 212, at 174; United States-Singapore Free Trade Agreement art. 16.4, ¶ 7, U.S.-Sing., May 6, 2003 [hereinafter Singapore FTA], <http://bit.ly/SingFTA>.

<sup>215</sup> See United States-Chile Free Trade Agreement art. 17.7, ¶ 5, U.S.-Chile, June 6, 2003 [hereinafter Chile FTA], <http://bit.ly/ChileFTA>.

<sup>216</sup> See *id.* art. 17.7, ¶ 5.

<sup>217</sup> See Singapore FTA, *supra* note 214, art. 16.4, ¶ 7; Australia FTA, *supra* note 200, art. 17.4, ¶ 7.

<sup>218</sup> OFFICE OF U.S. TRADE REP., 2004 SPECIAL 301 REPORT 5 (2004), <http://bit.ly/04SP301>.

<sup>219</sup> ALI STERNBURG & MATT SCHRUEERS, COMP. & COMMC'N INDUS. ASS'N, MODERNIZING LIABILITY RULES TO PROMOTE INTERNET TRADE 5 (2014) ("Internet companies are being forced to choose between forsaking foreign markets completely, thereby denying local users the benefits of Internet services and Internet-enabled commerce; or abandoning legal, innovative, and profitable practices due to pervasive legal uncertainty.").

<sup>220</sup> Christie, Waller & Weatherall, *supra* note 210, at 215; see *supra* notes 214-217.

<sup>221</sup> See *id.* at 212 n.4.

<sup>222</sup> *Id.* at 213-14.

<sup>223</sup> See, e.g., Parker Higgins, *EFF to Congress: Get Rid of DMCA's "Anti-Circumvention" Provisions*, ELEC. FRONTIER FOUND. (Sept. 17, 2014), <http://bit.ly/1VCb4BH> ("In recent years, concerns about the anti-circumvention provisions have hit the mainstream, as cell phone users realized that something as simple as unlocking their device to use a rival carrier could get them threatened with a crime.").

Table 1—Size of IP Chapters in US FTAs (1985–2007)

Year of Agreement	Agreement	Number of pages in IP Chapter <sup>5</sup>	Number of words in IP Chapter <sup>6</sup>
1985	US–Israel FTA	1/3 page	81
1992	North American FTA	7.5 pages	3,605
October 2000	US–Jordan FTA	8 pages, plus a Memorandum of Understanding (approx. 1 page)	2,438
May 2003	US–Singapore FTA	23 pages plus 2 side letters (12 pages)	8,737 (plus side letters)
June 2003	US–Chile FTA	32 pages (no relevant side letters)	11,105
February 2004	US–Australia FTA	30 pages plus 3 side letters (5 pages). <sup>7</sup>	11,581 (plus side letters)
Year of Agreement	Agreement	Number of pages in IP Chapter	Number of words in IP Chapter
June 2004	US–Morocco FTA	37 pages plus 3 side letters (4 pages)	10,536 (plus side letters)
August 2004	US–Central American FTA	32.5 pages plus 1 common side letter (1/2 page) <sup>8</sup>	12,251 (plus side letter)
September 2004	US–Bahrain FTA	23.5 pages plus 3 side letters (5.5 pages)	10,729 (plus side letters)
January 2006	US–Oman FTA	25 pages plus 3 common side letters (19.5 pages)	11,447 (plus side letters)
April 2006	US–Peru TPA <sup>9</sup>	33 pages plus 3 side letters (5 pages)	12,430 (plus side letters)
November 2006	US–Columbia TPA	31 pages plus 1 Memorandum of Understanding (1 page), 3 common side letters (12 pages), 1 side letter (1 page)	11,367 (plus side letters)
June 2007	US–Panama TPA	28 pages plus 1 common side letter (2 pages)	11,625 (plus side letters)
June 2007	US–Korea FTA	35 pages plus 3 common side letters (6 pages)	12,908 (plus side letters)

IP chapters in trade agreements have increased in detail and complexity over the years as countries have tailored the broader treaty language to embody their stance on IP—usually in the direction of stricter enforcement regimes.<sup>225</sup> Generally, the U.S. has been successful in exporting the DMCA almost verbatim as the way that WTO member countries implement the anti-circumvention provisions required by the WIPO copyright treaty.<sup>226</sup> The tendency for countries to add provisions that more strictly and specifically limit certain uses or technologies is indicative of the asymmetry in U.S. trade policy, and it shows the need for the U.S. to strengthen its export of Internet-friendly laws.

Introducing fair use-like language is an important development for Internet companies. The U.S.-Korea Free Trade Agreement, (“KORUS”) completed and enacted in 2012, for the first time referenced fair use in a trade agreement.<sup>227</sup> It authorizes parties to provide exceptions and limitations to copyright protections—the provisions resembling fair use principles to be adopted in a trade agreement.<sup>228</sup> KORUS provides in text:

Each Party shall provide that authors, performers, and producers of phonograms have the right to authorize or prohibit all reproductions of their works, performances, and phonograms, in any manner or form, permanent or temporary (including temporary storage in electronic form).<sup>229</sup>

In a footnote to the text, KORUS provides:

Each Party shall confine limitations or exceptions to the rights described in paragraph 1 to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder. For greater certainty, each Party *may* adopt or maintain limitations or exceptions to the rights described in paragraph 1 for *fair use*, as long as any such limitation or exception is confined as stated in the previous sentence.<sup>230</sup>

By providing that parties “may” adopt fair use provisions, KORUS uses permissive language to encourage acceptance of exceptions and limitations to copyright protections. While it may seem minor, this is an important step to-

<sup>224</sup> See Christie, Waller & Weatherall, *supra* note 210, at 212 tbl.1.

<sup>225</sup> *Id.* at 213; see also Beatrice Lindstrom, *Scaling Back TRIPS-Plus: An Analysis of Intellectual Property Provisions in Trade Agreements and Implications For Asia And The Pacific*, 42 INT’L L. & POL. 917, 963-64 (2010) (noting the Bush administration sought to ensure IP focused trade agreements would reflect United States law).

<sup>226</sup> See Mia K. Garlick, *Locking up the Bridge on the Digital Divide - A Consideration of the Global Impact of the U.S. Anti-Circumvention Measures for the Participation of Developing Countries in the Digital Economy*, 20 SANTA CLARA COMP. & HIGH TECH. L.J. 941, 960-62 (2003) (“The U.S. has clearly established the DMCA’s anti-circumvention measures as a trade issue in its bilateral and regional dealings with all countries.”).

<sup>227</sup> See U.S.-Korea Free Trade Agreement art. 18.4 n.11, U.S.-Kor., Mar. 15, 2012 [hereinafter KORUS], <http://bit.ly/korusFTA> (“[E]ach Party may adopt or maintain limitations or exceptions to the rights described in paragraph 1 for fair use . . .”).

<sup>228</sup> *Id.* art. 18.4, ¶ 7(d).

<sup>229</sup> *Id.* art. 18.4, ¶ 1.

<sup>230</sup> *Id.* art. 18.4 n.11 (emphasis added).



ward including much-needed flexibility into trade agreements.

The U.S. may be poised to take another step in this direction. The recently negotiated TPP contains a fair use-like provision, which USTR introduced, negotiated, and obtained from its trading partners.<sup>231</sup> The provision would require nations 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 research.”<sup>232</sup> The TPP, if ratified by the U.S. Senate, would impose an obligation on parties to adopt limitations and exceptions as part of its copyright framework:

Each Party shall endeavor to achieve an appropriate balance in its copyright and related rights system, *inter alia* by means of limitations or exceptions that are consistent with Article QQ.G.16.1, including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism, comment, news reporting, teaching, scholarship, research, and other similar purposes; and facilitating access to [AU oppose: published] works for persons who are blind, visually impaired, or otherwise print [AU propose: or perceptually] disabled.<sup>233</sup>

The draft consciously uses the word “shall” instead of “may.”<sup>234</sup> By mandating parties to at least “endeavor to achieve” a more balanced copyright scheme, the TPP inches forward towards a more Internet-company friendly ecosystem necessary for businesses to thrive internationally.<sup>235</sup>

Stakeholders have opposed exporting an IP policy through trade agreements. Particularly in recent years, industry members and even members of Congress pushed lawmakers not to incorporate fair use-like protections in the TPP.<sup>236</sup> These advocates oppose export of the fair use doctrine through trade agreements.<sup>237</sup> Consequently, USTR’s adoption of fair use-like language was institutionally significant because it faced intense pressure not to adopt fair use.

The decision to include fair-use like language represents a clear indication that the USTR is beginning to understand that more balanced IP policies must be included in trade agreements going forward. In addition, Congress also has made progress. While the 2007 TPA made no mention of limitations and ex-

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<sup>231</sup> *Trans-Pacific Partnership Agreement*, ELEC. FRONTIER FOUND., <http://bit.ly/1Vhy2OM> (last visited Apr. 13, 2016).

<sup>232</sup> *USTR Introduces New Exceptions*, *supra* note 213.

<sup>233</sup> *Trans-Pacific Partnership Agreement*, art. QQ.G.17, Oct. 5, 2015, <http://bit.ly/leakedTPP>.

<sup>234</sup> Michael Geist, *The Trouble with the TPP, Day 5: Rights Holders “Shall” vs. Users “May”*, MICHAEL GEIST (Jan. 8, 2016), <http://bit.ly/1Usy6cH>.

<sup>235</sup> Mike Masnick, *Why Does the TPP Repeatedly Require Stronger Copyright, But When It Comes to Public Rights... Makes it Voluntary?* TECHDIRT (Aug. 6, 2015, 1:38 PM) <http://bit.ly/1IMICTm>.

<sup>236</sup> Letter from Organizations Opposing TPP to Congress (Jan. 7, 2016), <http://bit.ly/1WQt1q>.

<sup>237</sup> *Id.*

ceptions, the recently proposed TPA does:

[T]his section reflects the view of the Committee that U.S. trade agreements should contain copyright provisions that provide adequate and effective protection for U.S. right holders as well as foster an appropriate balance in copyright systems, inter alia by means of limitations and exceptions consistent with the internationally recognized 3-step test.<sup>238</sup>

This directive is crucially stronger than USTR's leaked text. In modifying the promotion of limitations and exceptions, Congress dropped the "endeavor to achieve" modifier.

#### B. Today's Trade Priorities

The United States has taken steps toward reforming its trade bodies and policies to better reflect changing consumer needs and marketplace realities over the years. Yet, the structure and resource allocation within the primary trade offices in the U.S. demonstrate a clear gap in trade policy with regard to the Internet and access to information.

At other points in U.S. trade history, Congress has acted to recalibrate trade policy to address imbalances in trade priorities. The passage of the Trade Act of 1974 is exemplary.<sup>239</sup> Then, amidst a negative economic environment and disparate treatment of trade partners among countries, Congress was motivated by the need to "promote fairness and equity in the international trading system and to prevent a serious deterioration in the spirit of economic cooperation that is essential for the preservation of economic and political stability in a rapidly changing world."<sup>240</sup> It had been twelve years since Congress passed its most recent trade act in 1962, and the Senate recognized the global economic downturn at that time "ha[d] been unfavorable to this country, largely because of the antiquated rules of the international trade ... systems and the related lack of genuine cooperation and reciprocity in international economic relations."<sup>241</sup> Today, the U.S. is again at a crossroads where over twelve years have already passed since it substantially reviewed and renewed its trade policies.<sup>242</sup> While the economic conditions are not as dire as they were in the early 1970s, U.S. Internet companies are facing protectionist attacks around the globe.<sup>243</sup> And,

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<sup>238</sup> S. REP. NO. 114-42, at 17 (2015).

<sup>239</sup> Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1979 (1974); Kazimierz Grzybowski et al., *Towards Integrated Management of International Trade – The U.S. Trade Act of 1974*, 26 INT'L & COMP. L. Q. 283, 293 (1977) (stating that while trade liberalization was the main target of the Act, it also contained techniques and procedures that permitted the U.S. government to trade competition).

<sup>240</sup> S. REP. NO. 93-1298, at 5 (1974), <http://1.usa.gov/201S0fG>.

<sup>241</sup> *Id.* at 15.

<sup>242</sup> *Id.*

<sup>243</sup> See James Vincent, *Obama Accuses EU of Attacking American Tech Companies Be-*

many of the Internet policies we take for granted in the U.S. have not been adopted by other countries.<sup>244</sup>

Congress could adopt reforms to U.S. trade bodies and practices similar to those adopted as part of the 1974 Trade Act. First, Congress could establish an ambassador, an office, an ITAC, and a supporting data and analysis group for each major industry. Creating a clear, linear structure through which information on each industry could flow would achieve greater efficiency and consistency within and across agencies. Next, Congress should build upon perhaps the greatest reform implemented under the Act: establishment of the system of ITACs.<sup>245</sup>

At the time, Congress regarded the multilateral trade negotiations to be conducted under its legislation to be the “most comprehensive ever conducted” and determined “the need for the Government to seek information and advice from the private sector is more important than ever before.”<sup>246</sup> Further, the Senate noted that private advisory groups would provide “policy and technical advice prior to, and throughout, the negotiations” and would issue formal reports at the conclusion of agreements affecting their sectors, with an eye toward the equity and mutuality achieved.<sup>247</sup> In addition, the Act provided fast-track authority to the executive branch with the purpose of facilitating “fair and equitable conditions of trade.”<sup>248</sup> Finally, the Act empowered the U.S. International Trade Commission (USITC, the former U.S. Tariff Commission) to conduct renegotiation procedures, including public hearings and advisory reports to assess the probable economic effect of draft terms.<sup>249</sup> Generally, the act resulted in reduced overall trade barriers.<sup>250</sup> Transparency and information was

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*cause it ‘Can’t Compete’*, THE VERGE (Feb. 17, 2015, 7:06 AM), <http://bit.ly/1A2ivXw>.

<sup>244</sup> *Id.* (stating that Germany’s policies are more sensitive towards personal data intrusion, and that EU citizens petitioned Google to remove links from some search results).

<sup>245</sup> See Trade Act of 1974 § 135(f)(2) (stating that the provisions of the Federal Advisory Committee Act apply to all other advisory committees established by the President or requesting organizations); see also *Industry Trade Advisory Center*, INT’L TRADE ADMIN., <http://1.usa.gov/1LOni2Y> (last visited Feb. 16, 2016).

<sup>246</sup> S. REP. NO. 93-1298, at 101; see also Dennis A. Rondinelli, *Partnering for Development: Government-Private Sector Cooperation in Service Provision 1* (2002), <http://bit.ly/21BFQLE>.

<sup>247</sup> S. REP. NO. 93-1298, at 21.

<sup>248</sup> *Id.*; U.S. INT’L TRADE COMM’N, PUB. NO. 4094, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS 74 (2009) [hereinafter ITC, ECONOMIC EFFECTS], <http://1.usa.gov/1XTnclS> (“This authority signaled the seriousness of the administration’s intent when negotiating with trade partners and helped to speed up negotiations by limiting Congress’s role to setting negotiating objectives and active consultation.”).

<sup>249</sup> Trade Act of 1974 §§ 172-175. The 2002 Act later increased USITC’s authority to conduct probable economic effect investigations and other research initiatives. Andean Trade Preference Act of 2002 § 371, Pub. L. No. 107-210, 116 Stat. 933 (2002).

<sup>250</sup> *Trade Act of 1974*, INVESTOPEDIA, <http://bit.ly/21Gh8K6> (last visited Feb. 17, 2016).

the answer.

These reforms have been considered successful. The ITAC system in particular has been lauded as useful in identifying market-opening opportunities, and the GAO recognized that the advisory committee system's unique features "give it an important role in U.S. trade policy."<sup>251</sup> Together, the reforms—in addition to others adopted under the act—resulted in an increase in trade from less than 5% of GDP in 1974 to nearly 10% of GDP for exports and nearly 15% of GDP for imports in 2008.<sup>252</sup> Trade share has tripled to 27% by 2010 since 1970.<sup>253</sup>

Similarly today, the TPA, TPP, and T-TIP agreements individually, and together, will have a substantial effect on the economy both in the U.S. and abroad. For 2016, President Obama has made international trade a significant focus—laying out "the most ambitious trade agenda in a generation"—in his efforts to conclude the TPP agreement and the T-TIP.<sup>254</sup> Together, the partners to those agreements will make up a market that accounts for 85% of foreign direct investment, employs five million Americans, and buys 62% of U.S. exports.<sup>255</sup> The agreements thus have the potential of increasing U.S. exports by more than \$100 billion per year when implemented, which corresponds to supporting between 5,400 to 5,900 jobs.<sup>256</sup>

The stated objectives of these agreements are to establish transparency and consistency of the regulatory environments to enable businesses to operate across regions, support access to supplies and information, and promote innovation.<sup>257</sup> Again, in order to achieve these objectives, structural reforms to U.S. trade authorities are necessary. While the ITAC system established under the 1974 Trade Act is still intact, it must be updated to reflect one of the most important economic sectors to today's economies: the Internet. USTR could create an ITAC for the Internet and an ITAC for Access to Information composed of Internet representatives and representatives of the information economy, including consumer groups. Next, Congress could appoint an Ambassador for Access to Information and an Ambassador for the Internet, who each will promote Internet-friendly laws. Additionally, creation of an Office of Information

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<sup>251</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-876, INTERNATIONAL TRADE: ADVISORY COMMITTEE SYSTEM SHOULD BE UPDATED TO BETTER SERVE U.S. POLICY NEEDS 10 (2002) [hereinafter GAO, ADVISORY COMMITTEE].

<sup>252</sup> ITC, ECONOMIC EFFECTS, *supra* note 248, at 60 fig.3.1 (noting the share of exports and imports of GDP from 1930 to 2008).

<sup>253</sup> *Id.*

<sup>254</sup> OFFICE OF U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, FISCAL YEAR 2015 BUDGET 1 (2014) [hereinafter USTR FY2015 BUDGET], <http://bit.ly/USTRFY15>.

<sup>255</sup> EXEC. OFFICE OF THE PRESIDENT, CONGRESSIONAL BUDGET SUBMISSION: FISCAL YEAR 2016, at USTR-3 (2015) [hereinafter FY2016 BUDGET], <http://bit.ly/CBSFY2016>.

<sup>256</sup> *Id.*

<sup>257</sup> *TPP U.S. Objectives, supra* note 7.

Access and the Internet (“OIAI”) would allow the Department of Commerce (“DoC”) to provide an affiliated office with access to the DoC’s resources.

To the extent practicable, the balance of protections and exceptions provided by the free speech provisions, fair use, the DMCA, Section 230, as well as related policies, should be incorporated into future trade agreements. The U.S. will not succeed in advancing these legal and policy objectives, however, without support from and resources within trade authorities. Given the increasingly vital role of the Internet to not just sales of online goods, but to global trade, democratic discourse, and innovation, U.S. trade authorities should dedicate significantly greater resources to advancing trade policies that provide the legal certainty and symmetry necessary to promote information access and the Internet economy.

#### IV. CURRENT U.S. TRADE AUTHORITY STRUCTURE

The Office of the USTR has primary responsibility for a majority of U.S. trade policy.<sup>258</sup> The head of the USTR, the U.S. Trade Representative, is a cabinet member and serves as the President’s principal trade advisor.<sup>259</sup> About 30 senior officials, who are lawyers and economists, support USTR.<sup>260</sup> These include ambassadors, deputies, and assistant USTRs dedicated to specific policy objectives or industries.<sup>261</sup> In FY2015, USTR reported 233 full-time equivalent employees and a budget of nearly \$55 million.<sup>262</sup> In addition, other executive branch agencies, particularly the DoC, as well as the private sector, NGOs and local governments contribute to the development of trade policy.<sup>263</sup>

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<sup>258</sup> *Interagency Role*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1RkUEab> (last visited Feb. 13, 2016).

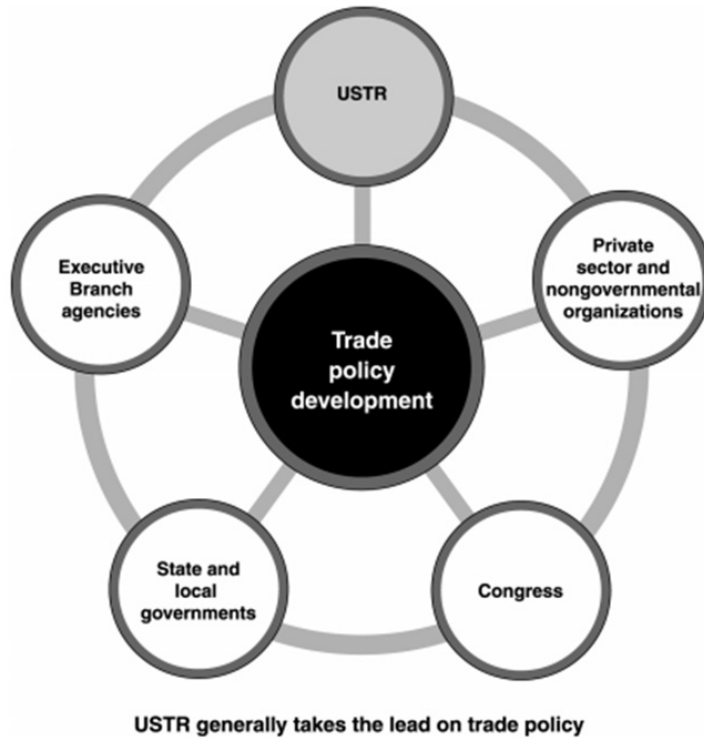
<sup>259</sup> *Mission of the USTR*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/24zOfkZ> (last visited Feb. 13, 2016).

<sup>260</sup> *Biographies of Key Officials*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1XZ6Anb> (last visited Feb. 13, 2016).

<sup>261</sup> *Id.*

<sup>262</sup> FY2016 BUDGET, *supra* note 255, at USTR-10 (2015) (estimating \$56,268,000 in appropriations for salaries and expenses and 240 full-time equivalent employees for FY2016).

<sup>263</sup> USTR FY2015 BUDGET, *supra* note 254, at 52.



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Source: GAO.

The Trade Expansion Act of 1962 created an interagency trade policy mechanism to assist USTR with implementation of these responsibilities.<sup>265</sup> The Trade Policy Review Group (“TPRG”) and the Trade Policy Staff Committee (“TPSC”) were established to create a consultative mechanism by which USTR would consult with other government agencies.<sup>266</sup> The TPSC comprises of members from twenty Federal agencies and offices, and more than ninety subcommittees responsible for specialized areas.<sup>267</sup> All decisions made by these organizations require consensus, and the Office of Policy Coordination advises USTR on how to resolve policy differences among the agencies.<sup>268</sup> “The Office is also responsible for eliciting advice from the public on policy decisions and

<sup>264</sup> GAO, ADVISORY COMMITTEE, *supra* note 251, at 6 fig. 1.

<sup>265</sup> *Interagency Role*, *supra* note 258.

<sup>266</sup> See Scott D. McBride, *Something Wicked This Way Comes: The United States Government’s Response to Unsafe Imported Chinese Toys and Subsidized Chinese Exports*, 45 TEX. INT’L L.J. 233, 269-70 (2009).

<sup>267</sup> *Id.*; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-167, USTR WOULD BENEFIT FROM GREATER USE OF STRATEGIC HUMAN CAPITAL MANAGEMENT PRINCIPLES 12-15 (2005) [GAO, USTR WOULD BENEFIT].

<sup>268</sup> *Interagency Role*, *supra* note 258. On average, the office negotiates agreement on 285 policy papers and negotiating documents annually and chairs 54 TPSC and TPRG meetings. *Id.*

negotiations through public hearings and Federal Register notices.”<sup>269</sup> The TPSC reports to the TPRG, who in turn reports to the National Economic Council (“NEC”) chaired by the President.<sup>270</sup>

USTR’s outside advisors include a system of Industry Trade Advisory Committees (“ITACs”).<sup>271</sup> The system is managed under the Office of Intergovernmental Affairs & Policy Engagement (IAPE), in cooperation with the Department of Agriculture, Commerce, Labor, and Environmental Protection Agency.<sup>272</sup> The IAPE is also tasked as the state coordinator for the WTO and NAFTA.<sup>273</sup> The Advisory Committees’ tasks are to provide information and advice regarding U.S. negotiating objectives and bargaining positions before entering into trade agreements, and on enforcement and compliance once the agreement has been entered.<sup>274</sup> The system consists of 16 ITACs, totaling approximately hundreds of industry representatives.<sup>275</sup> The committees are appointed either by USTR alone or in conjunction with other Cabinet officers.<sup>276</sup> Each committee is required to prepare an annual report on proposed trade agreements.<sup>277</sup>

The ITAC system is arranged into three tiers consisting of the President’s Advisory Committee for Trade Policy and Negotiations (“ACTPN”), four specialized policy advisory committees, and twenty-two technical and sectoral advisory committees.<sup>278</sup> The ACTPN is made up of forty-five members appointed by the President for two-year terms.<sup>279</sup> The Intergovernmental Policy Advisory Committee (“IGPAC”) and one of the specialized policy committees—the Trade Advisory Committee on Africa (“TACA”)—are managed solely by the USTR.<sup>280</sup> The USTR and the Department of Agriculture, Department of Labor, and the Environmental Protection Agency jointly manage the other three specialized policy committees: the Agricultural Advisory Committee, Labor Advisory Committee, and Trade and Environmental Policy Commit-

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<sup>269</sup> *Id.*

<sup>270</sup> WORLD TRADE ORG., WT/TPR/S/275, TRADE POLICY AND INVESTMENT REGIMES 14, ch.II.1 (2012), <http://bit.ly/1QPJYpD>.

<sup>271</sup> *Advisory Committees*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1oX4kkP> (last visited Feb. 13, 2016).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Industry’s Voice in U.S. Trade Policy*, INT’L TRADE ADMIN., <http://1.usa.gov/1QqObOD> (last visited Feb. 13, 2016).

<sup>275</sup> *Mission of the USTR*, *supra* note 259.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

tee.<sup>281</sup>

Additionally, the DoC supports the USTR.<sup>282</sup> The Department is comprised of 12 bureaus and 47,000 employees.<sup>283</sup> There is a dedicated bureau for International Trade Administration (“ITA”).<sup>284</sup> The ITA is organized into three business units that work together to strengthen the competitiveness of the US industry, promote trade and investment, and enforce fair trade and compliance with trade laws and agreements: Industry and Analysis; Enforcement and Compliance; and Global Markets.<sup>285</sup>

The USTR also works substantially with Congress on trade issues, primarily with the House Committee on Ways and Means and the Senate Committee on Finance, and their respective subcommittees.<sup>286</sup> In addition, five members from each chamber are appointed as official advisors on trade policy under statute.<sup>287</sup>

#### A. Weaknesses of U.S. Trade Authority Structure

Each trade body generally focuses on the same major industries.<sup>288</sup> However, there is a marked lack of consistency in the way resources are allocated both within trade entities and across the various agencies that contribute to trade policy.<sup>289</sup> Most trade bodies have a dedicated leader, office, advisory group, and industry analysis focus on the more traditional industries, like agriculture or labor.<sup>290</sup> However, for many other industry sectors, the agency lacks a dedicated high-ranking official, an office, advisory system or significant focus within the relevant industry analysis division.<sup>291</sup> This potentially causes any number of issues: incomplete coverage of developments or new data in the industry; breakdown in communication within the agency; lack of private sec-

<sup>281</sup> *Advisory Committees*, *supra* note 271.

<sup>282</sup> *International Trade Administration (ITA)*, U.S. DEP’T OF COMMERCE, <http://1.usa.gov/24vHssM> (last visited Feb. 14, 2016).

<sup>283</sup> *About Commerce*, U.S. DEP’T OF COMMERCE, <http://1.usa.gov/1n8zJyQ> (last visited Feb. 14, 2016).

<sup>284</sup> *International Trade Administration (ITA)*, *supra* note 282.

<sup>285</sup> *Id.*

<sup>286</sup> *Mission of the USTR*, *supra* note 259.

<sup>287</sup> *Id.*

<sup>288</sup> *Compare Issue Areas*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1QpSeas> (last visited Feb. 11, 2016), *with Data & Analysis*, INT’L TRADE ADMIN., <http://1.usa.gov/23bXs1r> (last visited Apr. 1, 2016), *and Trade*, U.S. HOUSE OF REPRESENTATIVES, <http://1.usa.gov/1MOPUxn> (last visited Apr. 1, 2016).

<sup>289</sup> *Industry & Analysis*, INT’L TRADE ADMIN. (Jan. 19, 2016), <http://1.usa.gov/1PQPAsP>; *Organization*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/23bXGp9> (last visited Apr. 1, 2016) [hereinafter *USTR Organization*].

<sup>290</sup> *See, e.g., Industry & Analysis*, *supra* note 289; *USTR Organization*, *supra* note 289.

<sup>291</sup> *See e.g., infra* note 311 and accompanying text; *infra* Section IV.A.2 (discussing the lack of an ITAC dedicated to the Internet); *infra* Section IV.A.2 (discussing the asymmetrical structure of the ITA’s OTEC).



tor perspective and expertise; or insufficient advocacy at the leadership level or to the public. Any one of these bottlenecks can leave certain objectives or industry issues under-represented or left out of trade policy. That is certainly the case with regard to the Internet economy.

### *1. Office of the United States Trade Representative*

The USTR focuses its trade policy in fourteen primary issue areas: Agriculture,<sup>292</sup> Economy and Trade,<sup>293</sup> Environment,<sup>294</sup> Government Procurement,<sup>295</sup> Industry and Manufacturing,<sup>296</sup> Intellectual Property,<sup>297</sup> Labor,<sup>298</sup> Preference Programs,<sup>299</sup> Services and Investment,<sup>300</sup> Small Business,<sup>301</sup> Textiles and Apparel,<sup>302</sup> Trade and Development,<sup>303</sup> and Trade Organizations.<sup>304</sup>

We recommend the appointment of Ambassadors for Information Access and for the Internet in order to bring the USTR's trade priorities closer to alignment with the Internet age. Under the current framework, it is too easy for "innovation" to take a second-seat to "intellectual property."<sup>305</sup> Indeed, the stated mission of the USTR's Office of Intellectual Property and Innovation ("IPN") is promoting "strong intellectual property laws and effective enforce-

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<sup>292</sup> *Agriculture*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1VOpJKM> (last visited Feb. 11, 2016).

<sup>293</sup> *Economy & Trade*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1QxeCxp> (last visited Feb. 11, 2016).

<sup>294</sup> *Environment & Natural Resources*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/231iTQO> (last visited Feb. 11, 2016).

<sup>295</sup> *Government Procurement*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1rd0eWz> (last visited Feb. 11, 2016).

<sup>296</sup> *Industry & Manufacturing*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1SuTc6l> (last visited Feb. 11, 2016).

<sup>297</sup> *Intellectual Property*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/21cOYFP> (last visited Feb. 11, 2016).

<sup>298</sup> *Labor*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1Tt5jD6> (last visited Feb. 11, 2016).

<sup>299</sup> *Preference Programs*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1NtN5Cd> (last visited Feb. 11, 2016).

<sup>300</sup> *Services & Investment*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1SuTppY> (last visited Feb. 11, 2016).

<sup>301</sup> *Small Business*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1WQqd20> (last visited Feb. 11, 2016).

<sup>302</sup> *Textiles & Apparel*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1NLYJDu> (last visited Feb. 11, 2016).

<sup>303</sup> *Trade & Development*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/24zOwEM> (last visited Feb. 12, 2016).

<sup>304</sup> *Trade Organizations*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1QSGcR2> (last visited Feb. 12, 2016).

<sup>305</sup> *Intellectual Property*, *supra* note 297.

ment worldwide.”<sup>306</sup> Its reports detail progress in implementing IP policies under its agreements, but predominantly focus on infringement and enforcement, only mentioning the Internet in the context of “piracy” and domain name registry.<sup>307</sup> The “key areas of work” for IPN include “implementation of trade policy in support of U.S. innovations,” but this is highlighted in the context of pharmaceutical and medical technology industries.<sup>308</sup> These practices exemplify the asymmetrical focus of U.S. IP policy in trade on protections rather than promoting use and access and the failure of trade policy to include the Internet as a primary platform for innovation.<sup>309</sup>

USTR’s organizational structure should also be reformed to better reflect the focus of its trade policy.<sup>310</sup> While the Deputy USTR has jurisdiction over several issue areas, it lacks a dedicated branch for over half of them.<sup>311</sup> The USTR

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<sup>306</sup> *Id.*

<sup>307</sup> See, e.g., EXEC. OFFICE OF THE PRESIDENT OF THE U.S., OFFICE OF THE U.S. TRADE REP., 2014 OUT-OF-CYCLE REVIEW OF NOTORIOUS MARKETS 10 (2015), <http://1.usa.gov/1x0AJ7g>.

<sup>308</sup> *Intellectual Property*, *supra* note 297.

<sup>309</sup> See generally GOOGLE, ENABLING TRADE IN THE ERA OF INFORMATION TECHNOLOGIES: BREAKING DOWN BARRIERS TO THE FREE FLOW OF INFORMATION 8-11 (2010), <http://bit.ly/1oQPr3o> (examining how restrictions on Internet governance hamper innovation on trade within the Internet economy); Bob Boorstin, *Promoting Free Trade for the Internet Economy*, GOOGLE PUB. POL’Y (Nov. 15, 2010), <http://bit.ly/1UsuozW>.

<sup>310</sup> See *Organizational Chart*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/21BCRTg> (last visited Feb. 14, 2016) [hereinafter *USTR Org. Chart*].

<sup>311</sup> In the USTR, the number and type of staff devoted to each issue area varies greatly, and USTR leadership structure does not actually track the primary issue areas USTR names as its central focus for trade policy. For instance, USTR combines the “Industry & Manufacturing,” “Small Business,” and “Trade & Development” issues under the “Small Business, Market Access and Industrial Competitiveness” leadership division. As another example, it is unclear which employees focus on “Preference Programs” or “Textiles & Apparel” issues, as no leadership group appears dedicated to those areas. As of summer 2015, USTR leadership was comprised as follows: Agriculture and Cultural Affairs: 1 Chief Agricultural Negotiator (Ambassador), 1 Assistant US Trade Rep. 2 Deputy Assistant US Trade Rep., 6 Directors of Agricultural Affairs; Monitoring and Enforcement: 1 Assistant US Trade Rep, 2 Deputy Assistant US Trade Rep, 1 Senior Counsel for Dispute Settlement; Environment & Natural Resources: 1 Assistant US Trade Rep., 1 Deputy Assistant US Trade Rep., 2 Directors of International Environmental Pol., 1 Director of Natural Resources Policy; Intellectual Property and Innovation: 1 Assistant US Trade Rep., 2 Deputy Assistant US Trade Rep., 2 Director of Intellectual Property and Innov.; Labor: 1 Assistant US Trade Rep., 2 Deputy Assistant US Trade Rep.; Services and Investment: 1 Assistant US Trade Rep., 3 Deputy Assistant US Trade Rep., 1 Director of Investment Affairs, 1 Director of Services and Investments, 3 Director of Trade Negotiations; Small Business, Market Access and Industrial Competitiveness: 1 Assistant US Trade Rep., 3 Deputy Assistant US Trade Rep., 1 Director of Non-Tariff Barriers, 1 Director of Industry Trade Policy, 1 Director of Market Access, 1 Director of Steel Trade Policy, 1 Director of Tariff Policy; Trade Policy and Economics: 1 Assistant US Trade Rep., 1 Deputy Assistant US Trade Rep., 1 Director of Policy Planning; WTO and Multilateral Affairs: 1 Assistant US Trade Rep., 1 Deputy Assistant US Trade Rep., 1 Senior Director for Technical Barriers, 1 Senior Director for WTO Accessions, 1 Senior Director for WTO Affairs, 1 Director of Customs

should undertake further reforms to unify the flow of work on issue areas from the research and analysis division all the way up through leadership. The disjointed nature of the agency has likely contributed significantly to the disparate focus on various industries, and a reformed structure will prove to be more efficient.

Current free trade agreements (FTAs) provide insight into the effects of organizational issues on the advancement of various trade policy objectives to USTR. The FTAs generally include more discussion and detail for those traditional sectors of the economy in which the U.S. has been involved in either import or export of products for decades.<sup>312</sup> For example, FTAs dedicate by far the most pages to the finance and investment, and textiles and apparel industries: over 600 and nearly 300 pages, respectively.<sup>313</sup> Textiles and related materials, like cotton, have also traditionally been a major trade item for the US.<sup>314</sup> However, finance accounted for 7%—meriting significant focus in FTAs—while textiles made up less than 1% of GDP in 2014.<sup>315</sup> This disparate coverage indicates a failure of USTR to update its FTAs to reflect current economic realities.<sup>316</sup> Since textiles are one industry that lacks a coherent structure within USTR, inconsistencies in FTA coverage may be due to a weaknesses in organization and resource allocation within the USTR.<sup>317</sup>

While the proportion of FTAs dedicated to these industries may not track GDP, it is clear that FTAs fall short in their coverage of Internet-related poli-

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Affairs, 1 Director of Customs Subsidies, 1 Director of Trade Policy Reviews, 1 Director of Trade Remedies, 1 Director of WTO Affairs. See FEDERAL YELLOW BOOK, EXECUTIVE OFFICE OF THE PRESIDENT [EOP] 31-34 (2015).

<sup>312</sup> See generally North American Free Trade Agreement chs. 3, 11, 13, 17, U.S.-Can.-Mex., Jan. 1, 1994 [hereinafter NAFTA].

<sup>313</sup> Australia FTA, *supra* note 200, chs. 4, 11, 13; United States-Bahrain Free Trade Agreement chs. 3, 11, U.S.-Bahr., Sept. 14, 2004 [hereinafter Bahrain FTA], <http://bit.ly/BahFTA>; Dominican Republic-Central America Free Trade Agreement chs. 3, 10, 12, U.S.-Dom. Rep.-Costa Rica-El Sal.-Guat.-Hond.-Nicar., Aug. 2, 2005 [hereinafter CAFTA-DR], <http://bit.ly/CAFTADR>; Chile FTA, *supra* note 214, chs. 4, 10, 12; Colombia TPA, *supra* note 200, chs. 3, 10, 12; KORUS, *supra* note 227, chs. 4, 11, 13; United States-Morocco Free Trade Agreement, U.S.-Morocco, chs. 4, 10, 12, June 15, 2004 [hereinafter Morocco FTA], <http://bit.ly/MorocFTA>; United States-Oman Free Trade Agreement, U.S.-Oman, chs. 3, 10, 12, Sept. 26, 2006 [hereinafter Oman FTA], <http://bit.ly/OmanFTA>; Panama-United States Trade Promotion Agreement, Pan.-U.S., chs. 4, 10, 12, June 28, 2007 [hereinafter Panama TPA], <http://bit.ly/PanamaTPA>; United States-Peru Trade Promotion Agreement, U.S.-Peru, chs. 3, 10, 12, Apr. 12, 2006 [hereinafter Peru FTA], <http://bit.ly/PeruFTA>; Singapore FTA, *supra* note 214, chs. 5, 10, 15.

<sup>314</sup> *The Cotton Industry: Bloom Times*, THE ECONOMIST, Jan. 20, 2011, at 42 (“Last year America produced 18.3m bales—each bale weighing 480lb, or 218kg—and exported more than 80% of them.”).

<sup>315</sup> VALUE ADDED GDP DATA, *supra* note 56.

<sup>316</sup> Holleyman NDN Address, *supra* note 58.

<sup>317</sup> USTR Org. Chart, *supra* note 310.

cies.<sup>318</sup> There is no industry category tracking the Internet economy specifically to include companies that facilitate e-commerce, entertainment, social networking, and other Internet sectors.<sup>319</sup> Despite the clear importance of the Internet to the U.S. GDP, only 28 pages of all FTA agreements together mentioned the Internet and did so without advancing the important policy objectives that resulted in the success of the Internet economy to date.<sup>320</sup>

Promoting values related to IP protections have received more attention in recent years.<sup>321</sup> Since the finalization of the TRIPS Agreement in 1994 and the WIPO Copyright Treaties in 1996, FTAs have contained increasingly substantial IP sections;<sup>322</sup> IP chapters of at least 30 pages seem to be standard.<sup>323</sup> But these agreements fail to adequately address policies that provide protections similar to those available under the First Amendment, fair use, and Section 230.<sup>324</sup> Clearly, IP trade policy has focused predominantly on copyright enforcement and anti-piracy provisions, while fair use-like language has yet to be updated into an agreement.<sup>325</sup> Whether as an industry or policy focus area, the USTR should promote predictable Internet liability rules to ensure the continued growth of the Internet and the industries it supports.

Public advocacy by the USTR and USTR Ambassadors also shows the comparable lack of attention to the Internet or information access issues in current trade priorities. In the years since the commercial adoption of the Internet, only two speeches by USTR have addressed the Internet.<sup>326</sup> Only one of these meaningfully addressed the policy concerns relevant to the Internet today.<sup>327</sup> In

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<sup>318</sup> The “information” industry alone accounted for 4.8% of GDP in 2014. This industry includes publishers, software, motion pictures, sound recordings, broadcasting and telecommunications, data processing, Internet publishing, and other information services. Namely, the content that consumers increasingly access online. VALUE ADDED GDP DATA, *supra* note 56.

<sup>319</sup> Holleyman NDN Address, *supra* note 58.

<sup>320</sup> *See, e.g.*, Australia FTA, *supra* note 200, ch.16; Bahrain FTA, *supra* note 313, ch.13; CAFTA-DR, *supra* note 313, ch.14; Chile FTA, *supra* note 214, ch.15; Colombia FTA, *supra* note 200, ch.15; KORUS, *supra* note 227, ch. 15; Morocco FTA, *supra* note 313, ch.14; Oman FTA, *supra* note 313, ch.14; Panama TPA, *supra* note 313, ch.14; Peru TPA, *supra* note 313, ch.15; Singapore FTA, *supra* note 214, ch.14.

<sup>321</sup> *See* Anupam Chander, *Exporting DCMA Lockouts*, 54 CLEV. ST. L. REV. 205, 211 (2006).

<sup>322</sup> *See Keeping Our Balance in the Face of Piracy and Counterfeiting: Limiting the Scope of Intellectual Property Rights Enforcement Provisions in Free Trade Agreements*, 42 GEO. WASH. INT’L L. REV. 159, 171-72 (2010) [hereinafter *Keeping Our Balance*].

<sup>323</sup> Chander, *supra* note 321 at 216. *See, e.g.*, Australia FTA, *supra* note 200, ch.17 (29 pages); KORUS, *supra* note 227, ch.18 (34 pages); Panama TPA, *supra* note 313, ch.14 (32 pages).

<sup>324</sup> Kaminski, *supra* note 194, at 982.

<sup>325</sup> *See generally Keeping Our Balance*, *supra* note 322, at 173; *see also generally* Kaminski, *supra* note 194, at 982.

<sup>326</sup> Holleyman NDN Address, *supra* note 58.

<sup>327</sup> *Id.*

his speech, Deputy USTR Robert Holleyman recognized how the Internet has transformed the global economy and called for action to modernize the international trading system to promote an Internet-enabled economy for the future:

I am speaking today about the digital economy and trade as a 21st century leadership imperative, because we stand at a crossroad. The rules we have in place in the international trading system—historically championed by the U.S. I will add—have served us well, so far. They have helped enable the explosive growth of the Internet and dissemination of new technology, have led to rapid changes that have brought us closer together, allowed us to trade across borders, and have allowed some of the world's greatest innovations to emanate from our shores. However, as someone who has worked at the intersection of technology and international trade for over two decades, I can speak with confidence when I say this: the trading rules that have helped us get to where we are today are no longer sufficient.<sup>328</sup>

Deputy USTR Holleyman explained further that:

The United States is also supporting provisions—for the first time in any trade agreement—that will promote balance in copyright systems through exceptions and limitations for legitimate purposes, such as criticism, comment, news reporting, teaching, scholarship, and research, including with respect to the digital environment.<sup>329</sup>

The Office of the USTR should build on Deputy Holleyman's vision, especially as the Internet will become ubiquitous in increasingly more areas of commerce, entertainment, and social discourse.<sup>330</sup> As this occurs, the Internet will challenge existing legal and regulatory structures around the globe. With the appropriate high level leadership, USTR can become a force for ensuring that such structures are appropriately dismantled or modified to facilitate the Internet's growth.

## 2. Industry Trade Advisory Committees

The ITAC system is crucial to the formation of trade policy. As the GAO found:

The advisory committee system is unique in U.S. trade policy because it provides a forum in which business and other interested groups can consult confidentially with and provide advice to the executive branch on trade negotiations, U.S. trade policy, and implementation of trade agreements. The formal nature of advisory meetings helps ensure that representatives of the private sector and other groups have regular access to officials engaged in U.S. trade policy. Further, the system provides government officials with a body of private sector experts with whom they can develop an ongoing dialogue.<sup>331</sup>

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<sup>328</sup> *Id.* The USTR addressed the Internet or access to information in just one speech in 2008 and one speech in 2015. *Speeches/Transcripts*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1N5tFOJ> (last visited Apr. 4, 2016).

<sup>329</sup> Holleyman NDN Address, *supra* note 58.

<sup>330</sup> JANNA ANDERSON ET AL., PEW RES. CTR., *DIGITAL LIFE IN 2025*, at 5 (2014), <http://pewrsr.ch/InEvSoK>.

<sup>331</sup> GAO, *ADVISORY COMMITTEE*, *supra* note 251, at 10-11.

Former USTR officials have called the ITAC system “one of the great strengths of U.S. trade policy.”<sup>332</sup> USTR and officials from the Department of Commerce alike have reported that the ITAC system has made valuable contributions to U.S. trade policy over the years including in negotiations: (1) “multilateral agreements on information technology, financial services, and basic telecommunications; (2) the Uruguay Round of negotiations that led to establishment of the WTO; (3) as well as regional initiatives such as the North American Free Trade Agreement, the Summit of the Americas, and the Asia-Pacific Economic Cooperation forum.”<sup>333</sup> Negotiators commenting on the system in the early 2000s have said that because it is institutionalized and seeks to be representative, it is a preferred means of obtaining input on trade policy.<sup>334</sup> However, in its 2007 review of FTAs and private sector consultations under the 2002 TPA, GAO had found that USTR needed to improve its management of the ITAC system.<sup>335</sup> Its recommendations included improving information access for the committees, improving timeliness of re-chartering the committees, and providing more notice and time for the committees to meaningfully weigh in on trade policy.<sup>336</sup> USTR should review and reform all ITACs to ensure that they are representative of each issue area. But in particular, it should form a new ITAC dedicated to the Internet and a second dedicated to access to information.

There are sixteen technical and sectoral advisory committees that represent industry and agriculture.<sup>337</sup> Despite the fact that these industries make broadly varying contributions to the U.S. economy, each ITAC is given approximately the same budget, operating procedure, and membership.<sup>338</sup> In general, Congress

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<sup>332</sup> *Id.* at 11.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-59, INTERNATIONAL TRADE: AN ANALYSIS OF FREE TRADE AGREEMENTS AND CONGRESSIONAL AND PRIVATE SECTOR CONSULTATIONS UNDER TRADE PROMOTION AUTHORITY 67 (2007).

<sup>336</sup> *See generally id.* at 52-65.

<sup>337</sup> MICHAEL B. G. FROMAN, OFFICE OF U.S. TRADE REP., 2014 ANNUAL REPORT 206 (2014), <http://1.usa.gov/1oA1e1A>.

These committees are: Aerospace Equipment (ITAC 1); Automotive Equipment and Capital Goods (ITAC 2); Chemicals, Pharmaceuticals, Health/Science Products and Services (ITAC 3); Consumer Goods (ITAC 4); Distribution Services (ITAC 5); Energy and Energy Services (ITAC 6); Forest Products (ITAC 7); Information and Communication Technologies Services and Electronic Commerce (ITAC 8); Non-Ferrous Metals and Building Materials (ITAC 9); Services and Finance Industries (ITAC 10); Small and Minority Business (ITAC 11); Steel (ITAC 12); Textiles and Clothing (ITAC 13); Customs Matters and Trade Facilitation (ITAC 14); Intellectual Property Rights (ITAC 15); and Standards and Technical Trade Barriers (ITAC 16).

*Id.*

<sup>338</sup> Each ITAC has operating costs between \$40,000 to \$60,000 per year, irregular meetings at the call of the Secretary or USTR, and not more than 50 members. *See, e.g.*, Industry

should undertake a review of the ITAC system to ensure the resources allocated to an ITAC meet the needs of a given sector, particularly as sectors develop and change over time.

In particular, since the inception of the ITAC system, the Internet has revolutionized the economy.<sup>339</sup> But there is no ITAC dedicated to the Internet. The Information and Communications Technologies, Services, and Electronic Commerce ITAC is the closest to an Internet ITAC, but its focus goes well beyond the Internet.<sup>340</sup> This group is focused predominantly on the technologies and infrastructure that make e-commerce, and trade online possible.<sup>341</sup> However, the ITAC does not account for the consumer-facing benefits of the Internet, or that fact that the Internet is its own ecosystem of users, sellers, entrepreneurs, and creators.<sup>342</sup>

The membership of this ITAC is telling. There are sixteen members, which include representatives from NETGEAR, Inc., Intel, and the Internet Infrastructure coalition (“IIC”).<sup>343</sup> These companies serve an important function in the Internet ecosystem: they build the ‘nuts and bolts’ of the Internet, or other technologies that facilitate the transmission of information through the web, and to the user.<sup>344</sup> For instance, IIC configures the physical network of net-

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Trade Advisory Committee on Automotive Equipment and Capital Goods Charter arts. 7, 10, <http://1.usa.gov/1UUj01y>; Information and Communications Technologies, Services, and Electronic Commerce Charter arts. 7, 10, <http://1.usa.gov/1KVecVP>; Industry Trade Advisory Committee on Intellectual Property Rights Charter arts. 7, 10, <http://1.usa.gov/239umTV>.

<sup>339</sup> See Internet Technical Advisory Committee to the OECD Charter art. II, <http://bit.ly/1VLNrDE>.

<sup>340</sup> Industry Trade Advisory Committee on Information and Communications Technologies, Services, and Electronic Commerce Charter art. 3, <http://1.usa.gov/1KVecVP>.

<sup>341</sup> *Id.* art. 4.

<sup>342</sup> MANYIKA & ROXURGH, *supra* note 42, at 1.

<sup>343</sup> *Industry Trade Advisory Committee On Information and Communications Technologies, Services, and Electronic Commerce ITAC 8*, INT’L TRADE ADMIN., <http://bit.ly/24zKVGy> (last visited Feb. 22, 2016). The full membership includes: Jacquelyn Ruff, Verizon Communications Inc.; Jennifer H. Sanford, Cisco Systems, Inc.; Arun K. Bhumitra, Arjay Telecommunications; Daniel W. Caprio, Jr., DC Strategies Consulting, LLC; Steven D. Domenikos, Ierion/Relay Dental, Inc., Dean Fealk, DLA Piper LLC Representing NETGEAR, Inc.; Arun P. Gupta, Caterpillar, Inc.; Jake E. Jennings, AT&T Services, Inc.; Todd R. Loewenstein, ArcoStream LLC; Jennifer A. Manner, EchStar Corp.; Noel H. Nevshehir, Automation Alley; Wendy E. Owens, Divitius LLC; Greg S. Slater, Intel Corp.; W. David Snead, Internet Infrastructure (i2) Coalition; Roszel C. Thomsen II, Alliance for Network Security; Stephen Zirschky, WatchGuard Technologies, Inc. *Industry Trade Advisory Committee On Information and Communications Technologies, Services, and Electronic Commerce ITAC 8*, INT’L TRADE ADMIN., <http://bit.ly/24zKVGy> (last visited Feb. 22, 2016).

<sup>344</sup> See JOHN DEIGHTON & JOHN QUELCH, HAMILTON CONSULTANTS, INC., ECONOMIC VALUE OF THE ADVERTISING-SUPPORTED INTERNET ECOSYSTEM 6-7 (2009), <http://bit.ly/1VLNsaP>.

works that connects users around the globe.<sup>345</sup> While this and other technology-focused functions are crucial to the continued growth of the Internet, and members in the ITAC should represent them, technology is less than half of the full picture. The companies in the ITAC are not representative of the full ecosystem of the Internet.<sup>346</sup>

### 3. Department of Commerce

Like the other entities that contribute to U.S. trade policy, the Department of Commerce's decentralized structure lacks consistency. Its Industry Analysis unit is focused on developing and executing innovative international trade and investment policies and strategies. To support its objectives, ITA provides data and analysis on various industries, which include: Aerospace;<sup>347</sup> Automotive;<sup>348</sup> Building Products, Construction, and Metals;<sup>349</sup> Construction;<sup>350</sup> Consumer Goods;<sup>351</sup> E-Commerce, Information and Telecomm;<sup>352</sup> Energy and Environmental Industries;<sup>353</sup> Financial Service;<sup>354</sup> Health;<sup>355</sup> Machinery;<sup>356</sup> Textiles and Apparel;<sup>357</sup> Service Industries;<sup>358</sup> and Travel and Tourism.<sup>359</sup>

<sup>345</sup> *About i2Coalition*, INTERNET INFRASTRUCTURE COAL., <http://bit.ly/1WQyLWK> (last visited Apr. 22, 2016).

<sup>346</sup> Zachary Scott Simmons, *Other-than-Industry Representation on Industry Trade Advisory Committees*, 31 U.C.L.A. PAC. BASIN. L.J. 147, 169-71 (2014) (arguing certain actors are underrepresented in Industry Trade Advisory Committees).

<sup>347</sup> *Office of Transportation and Machinery – Aerospace Team*, INT'L TRADE ADMIN., <http://1.usa.gov/1TPs0nt> (last visited Feb. 22, 2016).

<sup>348</sup> *Office of Transportation and Machinery – Automotive Team*, INT'L TRADE ADMIN., <http://1.usa.gov/1rvnCPk> (last visited Feb. 22, 2016).

<sup>349</sup> *Office of Materials Industries*, INT'L TRADE ADMIN., <http://1.usa.gov/1XYZu1O> (last visited Feb. 22, 2016).

<sup>350</sup> *Id.*

<sup>351</sup> *Office of Consumer Goods*, INT'L TRADE ADMIN., <http://1.usa.gov/1TPsIGR> (last visited Feb. 22, 2016).

<sup>352</sup> *Office of Technology and Electronic Commerce*, INT'L TRADE ADMIN., <http://1.usa.gov/1QlvtXo> (last updated May 6, 2014).

<sup>353</sup> *Office of Energy and Environmental Industries*, INT'L TRADE ADMIN., <http://1.usa.gov/1no9n52> (last visited Feb. 22, 2016).

<sup>354</sup> *Office of Finance and Insurance*, INT'L TRADE ADMIN., <http://1.usa.gov/1Sgr2zE> (last visited Feb. 14, 2016).

<sup>355</sup> *Health Industries*, INT'L TRADE ADMIN., <http://1.usa.gov/1RkLz19> (last visited Feb. 22, 2016).

<sup>356</sup> *Office of Transportation and Machinery – Machinery Team*, INT'L TRADE ADMIN., <http://1.usa.gov/1YQNJKU> (last visited Feb. 14, 2016).

<sup>357</sup> *Office of Textiles and Apparel*, INT'L TRADE ADMIN., <http://1.usa.gov/1pn3gGQ> (last visited Feb. 14, 2016).

<sup>358</sup> *Office of Supply Chain, Professional, and Business Services*, INT'L TRADE ADMIN., <http://1.usa.gov/1Uxexjt> (last visited Feb. 14, 2016).

<sup>359</sup> *Office of Travel and Tourism Industries*, INT'L TRADE ADMIN., <http://1.usa.gov/2177fmt> (last visited Feb. 14, 2016).



ITA has the Office of Technology and Electronic Commerce (“OTEC”) located within the Manufacturing and Services division.<sup>360</sup> It has three teams: e-commerce, information technology, and telecommunications.<sup>361</sup> And it produces numerous reports.<sup>362</sup> However, its coverage of the information industry suffers from similar issues as other “Internet”-focused trade entities: OTEC is asymmetrically focused on protections and enforcement.<sup>363</sup> Many of the documents produced by the group cover policy issues related to data protection, privacy, and cybersecurity.<sup>364</sup> While these areas are important, limiting intermediary liability, and promoting information sharing and access online are crucial to the continued growth of the Internet, yet receive comparably little attention.<sup>365</sup>

Within the Department of Commerce’s ITA Bureau, Congress could establish a bureau dedicated to the Internet and Access to Information (“IAP”). While the Department of Commerce does house other bureaus or offices whose responsibilities may partially cover the Internet or related industries,<sup>366</sup> a dedi-

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<sup>360</sup> *About OTEC*, OFFICE OF TECH. & ELEC. COMMERCE, <http://1.usa.gov/1Tg1IuV> (last updated Aug. 9, 2011).

<sup>361</sup> *Id.*

<sup>362</sup> OTEC’s site provides research by industry/sector for e-commerce, information technology, instrumentation, microelectronics, and telecommunications. However, these resources do not focus on current Internet law and policy issues. Instead, the resources available through each of these portals focus on equipment, infrastructure, hardware and software for communication or for facilitating e-commerce. *See Research by Industry/Sector*, OFFICE OF TECH. & ELEC. COMMERCE, <http://1.usa.gov/25HAEsG>, (last visited Apr. 4, 2016); *see also Publications and Newsletters*, OFFICE OF TECH. & ELEC. COMMERCE, <http://1.usa.gov/1Qng4n8> (last updated Feb. 28, 2016). The OTEC site also offers ExportIT reports and market briefs. These materials again focus on the products and services that enable the Internet to function. *See ExportIT Reports & Market Briefs*, OFFICE OF TECH. & ELEC. COMMERCE, <http://1.usa.gov/1UEXS3y> (last visited Apr. 4, 2016). ITA’s “Global Information and Communications Technology (ICT) Newsletter” focused most recently on international data protection, equipment and application export and competition trends. Its’ most recently released newsletters for most sectors date back to 2011. *See Global Information and Communications Technology Newsletter*, OFFICE OF TECH & ELEC. COMMERCE (Dec. 2, 2011), <http://1.usa.gov/25HAS31>.

<sup>363</sup> *Trade Policy Issues*, OFFICE OF TECH. & ELEC. COMMERCE, <http://1.usa.gov/1RxFPDz> (last visited Feb. 14, 2016).

<sup>364</sup> *See, e.g.*, Office of Tech. and Elec. Commerce, United States-Japan Joint Statement on Promoting Global Cyber Security - Final Draft (Sept. 9, 2003), <http://1.usa.gov/1TLjLss>; Letter from Paula J. Bruening, Staff Counsel, The Ctr. for Democracy and Tech., to Eric M. Holloway, Office of Tech. and Elec. Commerce (on file with The Office of Technology and Electronic Commerce).

<sup>365</sup> *Trade Policy Issues*, *supra* note 363.

<sup>366</sup> *See, e.g.*, *Information Technology Portal – Overview*, NAT’L INST. OF STANDARDS & TECH., <http://1.usa.gov/1QSdxa6> (last visited Feb. 14, 2016) (covering cybersecurity, cloud computing, and other internet standards issues), *About NTIS*, NAT’L TECH. INFO. SERV., <http://1.usa.gov/1WTWIKk> (last visited Feb. 14, 2016) (promoting American innovation through disseminating technical information to the public and industry).

cated bureau would dedicate a higher level of attention and importance to Internet-related trade policy issues. The National Telecommunications and Information Administration and the U.S. Patent and Trademark Office ought to supplement and support the IAI. Additionally, the existing OTEC's resources are clearly outdated, and do not cover large segments of the Internet economy.<sup>367</sup> OTEC could continue to collect data on technologies related to the infrastructure and function of the Internet, while the IAI office would focus more intensively on the content services. It is important that DoC have an office providing current data and analysis of one of the significant and fastest-growing sectors of the economy. A bureau focused on promoting the Internet and information access values through trade agreements is necessary to bring trade policy into the Internet age.

The Department of Commerce has taken an important step toward reforming Internet trade policy. Recently, the DoC borrowed a strategy that has worked well for the intellectual property sectors—coordinating with the Department of State to ensconce Internet law and policy attachés in key embassies throughout the world.<sup>368</sup> In March 2016, the DoC announced the launch of a “digital attaché program to address trade barriers.”<sup>369</sup> In announcing the program, Secretary of Commerce Penny Pritzker commendably recognized that “the entire world [is] living through one of the most remarkable economic and society transformations in history and it is being driven by technology. In this changing world, economic growth and competitiveness are increasingly tied to the digital economy.”<sup>370</sup> To promote continued growth in both the United States and abroad, the mission of such attachés should be to evangelize and educate lawmakers, judges, and regulators in other jurisdictions about the laws that make the Internet work.<sup>371</sup> Such attachés should also help U.S. Internet companies engage with appropriate jurisdictions when such companies face protec-

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<sup>367</sup> OTEC's Publications and Newsletters have not been updated since 2011. *See, e.g.*, Tim Miles, *Green IT*, OFFICE OF TECH. & ELEC. COMMERCE (May 5, 2010), <http://1.usa.gov/1UxgJHU>; *see also* *Global Information and Communications Technology Newsletter*, *supra* note 362.

<sup>368</sup> *Cf. Intellectual Property (IP) Attaché Program*, U.S. PAT. & TRADEMARK OFFICE, <http://1.usa.gov/1OX7EoW> (last visited Apr. 22, 2016).

<sup>369</sup> Penny Pritzker, *Commerce Launches Digital Attaché Program to Address Trade Barriers*, DEP'T OF COMMERCE (Mar. 11, 2016), <http://1.usa.gov/23bYr1r>. The DoC also rolled out an agency-wide Digital Economy Agenda, which will guide the mission of the attaché program in developing policies that reflect the Internet's role as a global platform for democratic discourse, innovation, and commerce. *See* Alan B. Davidson, *The Commerce Department's Digital Economy Agenda*, DEP'T OF COMMERCE (Nov. 9, 2015), <http://1.usa.gov/227B72z>.

<sup>370</sup> Pritzker, *supra* note 369.

<sup>371</sup> *See* EXEC. OFFICE OF THE PRESIDENT, INTERNATIONAL STRATEGY FOR CYBERSPACE: PROSPERITY, SECURITY, AND OPENNESS IN A NETWORKED WORLD 17-19 (2011), <http://1.usa.gov/1JALJ5T>.

tionist or non-protectionist regulatory and legal barriers to providing services in the jurisdiction. The Patent and Trademark Office and the Department of State have had a similar program for the intellectual property industries for years, where “intellectual property attachés” are placed in key embassies where intellectual property industries face legal, regulatory or marketplace challenges.<sup>372</sup>

#### 4. Congress

Since the elevation of USTR to cabinet level in 1974,<sup>373</sup> and the corresponding formation of the ITAC system, hundreds of hearings have been dedicated to trade issues.<sup>374</sup> From 1974 through 1980, there were 156 hearings on international trade.<sup>375</sup> However, only 13 of those—some 8%—covered IP-related issues, and none mentioned the Internet or access to information.<sup>376</sup> In the last five years, there were 178 hearings on international trade and 43 of those—roughly 24%—covered IP-related issues and only 12%—addressed Internet related issues.<sup>377</sup> While this does demonstrate an improvement especially with regard to IP issues, still more attention should be paid to ensuring that the in-

<sup>372</sup> *Intellectual Property (IP) Attaché Program*, *supra* note 368.

<sup>373</sup> Trade Act of 1974 § 141; *About Us*, OFFICE OF U.S. TRADE REP., <http://1.usa.gov/1QK5juo> (last visited Feb. 15, 2016).

<sup>374</sup> Search “International Trade”, PROQUEST CONG., <http://congressional.proquest.com/congressional> (last visited Feb. 15, 2015) (totaling 772 hearings; follow the “Search” hyperlink; then enter “international trade” and select “committee hearings”; filter only “Senate Committee on Finance” and “House Ways and Means Committee”; bounded by year 1974-2016).

<sup>375</sup> Search “International Trade”, PROQUEST CONG., <http://congressional.proquest.com/congressional> (last visited Feb. 14, 2015) (totaling 156 hearings; follow the “Search” hyperlink; then enter “international trade” and select “committee hearings”; filter only “Senate Committee on Finance” and “House Ways and Means Committee”; bounded by year 1974-1980).

<sup>376</sup> Search “International Trade”, PROQUEST CONG., <http://congressional.proquest.com/congressional> (last visited Feb. 14, 2015) (totaling 13 hearings; follow the “Search” hyperlink; then enter “international trade” and filter by “intellectual property”; select “committee hearings” and filter only “Senate Committee on Finance” and “House Ways and Means Committee”; bounded by year 1974-1980).

<sup>377</sup> Search “International Trade”, PROQUEST CONG., <http://congressional.proquest.com/congressional> (last visited Feb. 14, 2015) (totaling 178 hearings; follow the “Search” hyperlink; then enter “international trade” bounded by year 2010-2016); Search “International Trade”, PROQUEST CONG., <http://congressional.proquest.com/congressional> (last visited Feb. 14, 2015) (totaling 43 hearings; follow the “Search” hyperlink; then enter “international trade” and “intellectual property”; bounded by year 2010-2016); Search “International Trade”, PROQUEST CONG., <http://congressional.proquest.com/congressional> (last visited Feb. 14, 2015) (totaling 23 hearings; follow the “Search” hyperlink; then enter “international trade” and “internet”; bounded by year 2010-2016).

formation access is a more central focus of Congress.

## V. CONCLUSION: STRUCTURAL RECOMMENDATIONS

### A. Creation of an Ambassador for Access to Information and an Ambassador for the Internet within USTR

As the evidence above shows, USTR's speeches and trade agreements dedicate the least attention to the Internet economy of any industry sector. Congress should establish an Ambassador for Access to Information and an Ambassador for the Internet, which will focus on promoting sound legal policies that protect the Internet and promote access to information. These individuals will oversee the proposed ITACs on the Internet and Access to Information, and facilitate the relationship between USTR, ITACs, Congress, the Department of Commerce, and U.S. trade partners to advance these objectives.

### B. Establishment of ITACs for the Internet and for Access to Information

Consistent with the current trend of expanding the role of ITACs as trade policy develops, Congress should create an ITAC for the Internet and for Access to Information. Addressing these sectors of the economy and aspects of trade policy through dedicated groups with perspective and support would significantly increase the ability of U.S. trade to reflect the importance of the Internet and information access today.

### C. Creation of an Office of Information Access and the Internet with the Department of Commerce

Creation of an Office of Information Access and the Internet ("OIAI") would allow the Department of Commerce to focus anew on the Internet and information access.<sup>378</sup> Its OTEC teams could remain in place to support the new Office, which would be centered on the legal and policy goals necessary to protect and promote the Internet and Information access. OIAI could also draw on NTIA, the Census Bureau and other bodies housed within Commerce to advance its objectives.

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<sup>378</sup> *CDD and USPIRG Urge Commerce Department to Protect Consumers Online*, CTR. FOR DIG. DEM. (Jan. 28, 2011) <http://bit.ly/1LO6hV3> ("The Department of Commerce is not positioned to play a leading role formulating and enacting meaningful public policies ensuring that consumers can have trust in the digital marketing environment.").

D. Establish a Program within the Department of Commerce to Place “Internet attachés” in key embassies.

The Department should model its newly-launched digital attaché program after the existing “intellectual property attaché” program to place Internet policy experts in embassies around the world, where U.S. Internet companies face legal, regulatory, or marketplace challenges. Such attaches would serve to evangelize with local judges, lawmakers, and regulators the laws and policies that make the Internet work. In addition, such attaches could assist U.S. Internet companies that face specific challenges in jurisdictions abroad. Supported by stronger Internet-focused bodies and policies in other U.S. trade entities, the attaché will support U.S. businesses, promote trade, and export the laws and policies that have driven the rise of the Internet economy.