



October 28, 2022

William Shpiece, Chair  
Trade Policy Staff Committee  
United States Trade Representative  
600 17th Street NW  
Washington, DC 20508

VIA ONLINE SUBMISSION

**Re: Comments of Engine Advocacy Regarding Foreign Trade Barriers to U.S. Exports for 2023 Reporting, Docket no. USTR-2022-0013**

To whom it may concern:

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship. Lowering barriers to trade unlocks markets for U.S. startups to expand, compete, and find success and is a vital part of promoting domestic technology entrepreneurship. As such, Engine appreciates the opportunity to submit these comments as the Trade Policy Staff Committee and USTR compile the 2023 NTE report.

**I. Digital trade and startups.**

The Internet and digitization of world economies has enabled startups to reach markets beyond their borders. Through digital trade, startups are able to further the outsized contributions they make to domestic economic growth and job creation. And startups help others reach markets abroad too, whether they be artists, farmers, or manufacturers. U.S. Exports of information and communications technology (ICT) services reached nearly \$90 billion in 2021, while U.S. exports of potentially ICT-enabled services reached nearly \$600 billion.<sup>1</sup> Accordingly, digital trade is important to the overall U.S. economy, with the digital economy making up over 10% of U.S. GDP in 2020.<sup>2</sup>

While the importance of digital trade cannot be overstated, as it has grown, barriers to digital trade have grown along with it. Startups encounter these barriers as they grow and scale beyond U.S.

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<sup>1</sup> *Table 3.1. U.S. Trade in ICT and Potentially ICT-Enabled Services, by Type of Service* Bureau of Economic Analysis (July 7, 2022),

<https://apps.bea.gov/iTable/iTable.cfm?reqid=62&step=9&isuri=1&6210=4#reqid=62&step=9&isuri=1&6210=4>.

<sup>2</sup> *Digital Economy*, Bureau of Economic Analysis (May 3, 2022), <https://www.bea.gov/data/special-topics/digital-economy>.

borders and serve users abroad, which dictate where startups can feasibly reach users. These barriers—data localization measures, imbalanced intermediary liability frameworks, technology sector-specific levies, and more—particularly impact startups who lack the resources of multinational companies of eras past.

## II. Key barriers impacting startups.

### i. Cross-border data transfers and data localization policies

The Internet allows startups to access foreign markets with little additional investment. Indeed, cross-border data transfers underpin trillions in trade.<sup>3</sup> Despite this, many jurisdictions around the world have imposed local storage requirements or other impediments to cross-border transfers of data. Governments that impose or propose data-localization measures often justify them on privacy and security grounds. However, this justification is a thin-shroud for what amounts to a protectionist policy, given evidence that data localization measures do not increase privacy and security.<sup>4</sup>

Policies that restrict how and when data can be transferred across borders erect barriers to trade and increase costs that startups with limited resources have difficulty overcoming compared to their larger rivals. Such restrictions steer where and how startups can scale. As Rishi Ranjan, founder of the AR/VR cloud computing startup GridRaster laid out, data-localization measures impact what is economical for the company to offer to their users. “[As a startup] there’s a lot of things that can go away. We have to be very innovative, and will have to really start choosing to keep local data or drop it if it might not be worth it price-wise for customers [ . . . ] at the moment, we are a smaller company and cannot handle [these issues].”<sup>5</sup>

#### *European Union*

Several developments in the EU have created barriers to or threaten to frustrate cross-border data flows. The 2018 General Data Protection Regulation (GDPR) bars the collection and transfer of data out of the EU to any jurisdiction that does not have an equivalent level of privacy protections for users. While jurisdictions are free to pursue their own domestic legislative prerogatives, legislation with extraterritorial reach like GDPR hampers international trade. Several outgrowths of GDPR enforcement have created barriers to trade.

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<sup>3</sup> See, e.g., *FACT SHEET: President Biden Signs Executive Order to Implement the European Union-U.S. Data Privacy Framework*, White House (Oct. 7, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/07/fact-sheet-president-biden-signs-executive-order-to-implement-the-european-union-u-s-data-privacy-framework/>.

<sup>4</sup> See generally Joshua Meltzer, *Data and the transformation of international trade*, Brookings (Mar. 6, 2020), <https://www.brookings.edu/blog/up-front/2020/03/06/data-and-the-transformation-of-international-trade/#:~:text=Th>.

<sup>5</sup> Nathan Lindfors, *The Nuts and Bolts of Competing Globally: How startups compete abroad*. (July 21, 2021), <https://engineadvocacyfoundation.medium.com/the-nuts-bolts-of-competing-globally-how-startups-compete-abroad-72d4f93ef659>.

To create certainty for digital trade, the EU and US have negotiated several transatlantic data transfer agreements, but the first two of those agreements—Safe Harbor and Privacy Shield—have been invalidated as a result of EU privacy concerns about U.S. government access to EU user data.<sup>6</sup> Privacy Shield was invalidated in July 2020 and though both governments have made moves toward replacement, a new program is not expected to be fully implemented until the second quarter of 2023.<sup>7</sup>

In the lapse of these programs, U.S. companies, especially startups, have experienced difficulties serving the EU market due to uncertainty around transatlantic transfers of data. For example, in the wake of Privacy Shield's invalidation, the U.S.-based startup Onfleet lost EU clients and faced increased costs as they responded to the change.<sup>8</sup> Without transfer mechanisms like Privacy Shield, businesses have turned to relying on Standard Contractual Clauses (SCCs), but these are more expensive and out of reach for many startups, thereby heightening barriers to accessing the EU market.<sup>9</sup> But even these mechanisms are shrouded in uncertainty. Proposed enforcement by EU Data Protection Authorities would narrow or invalidate the use of SCCs as a legal transfer mechanism,<sup>10</sup> the repercussions of which would be catastrophic for U.S.-EU trade.

In addition to these transfer barriers, the EU has also included requirements in draft legislation that are protectionist and threaten competitiveness and the flow of data. In 2020, the EU Agency for Cybersecurity launched a consultation to update the Cybersecurity Certification Scheme for Cloud Services (EUCS).<sup>11</sup> While the stated intent of updating the EUCS is to enhance trust and security in cloud services, it includes sovereignty and local storage requirements pushed by EU member states like France likely to have little impact on cybersecurity.<sup>12</sup> The requirements will, however, impact the availability and cost of cloud services, which will be felt by end users like startups who rely on such services to provide their own services.<sup>13</sup> The EUCS is secondary legislation to the Cybersecurity Act

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<sup>6</sup> See, Evan Engstrom, *What the EU Data Safe Harbor Ruling Means for Startups*, Engine (Oct. 9, 2015), <https://www.engine.is/news/issues/what-the-eu-data-safe-harbor-ruling-means-for-startups/5973>; *Startups Stand the Most to Lose after Privacy Shield Rollback* Engine, (July 21, 2020), <https://www.engine.is/news/startups-stand-the-most-to-lose-after-privacy-shield-rollback>.

<sup>7</sup> See, FACT SHEET, *supra* note 2.

<sup>8</sup> #StartupsEverywhere profile: Mikel Carmenes Cavia, Co-Founder & VP of Engineering, Onfleet Engine (May 7, 2021), <https://www.engine.is/news/startupseverywhere-sanfrancisco-ca-onfleet>.

<sup>9</sup> See, e.g., Daniel Castro, et. al, *The Role and Value of Standard Contractual Clauses in EU-U.S. Digital Trade* ITIF (Dec. 17, 2020), <https://itif.org/publications/2020/12/17/role-and-value-standard-contractual-clauses-eu-us-digital-trade/>.

<sup>10</sup> See, e.g., Vincent Manancourt, *Europe faces Facebook blackout*, PoliticoEU (July 7, 2022)

<https://www.politico.eu/article/europe-faces-facebook-blackout-instagram-meta-data-protection/>.

<sup>11</sup> See, *Consultation on the draft of the candidate Certification Scheme on Cloud Services (EUCS) - Closed*, The European Union Agency for Cybersecurity, <https://www.enisa.europa.eu/topics/standards/certification/public-consultation-on-cybersecurity-schemes/draf-eucs>.

<sup>12</sup> See, e.g., *Sovereignty requirements remain in EUCS draft, despite opposition from Member States*, Support Centre for Data Sharing (July 5, 2022), <https://eudatasharing.eu/news/sovereignty-requirements-remain-eucs-draft-despite-opposition-member-states>.

<sup>13</sup> See, e.g., Laura Kabelka, *Sovereignty requirements remain in cloud certification scheme despite backlash*, Euractiv (June 16, 2022) <https://www.euractiv.com/section/cybersecurity/news/sovereignty-requirements-remain-in-cloud-certification-scheme-despite-backlash/>.

and is technically a voluntary framework, but the European Commission and EU member states like France are pushing to include the sovereignty requirements in the proposed Data Act.<sup>14</sup> Their inclusion in the Data act—which is designed to regulate non-personal data—threatens to expand the impact of GDPR to all data and would negatively impact U.S. startup competitiveness and access to the EU market.<sup>15</sup>

## ***India***

In 2018, India first began drafting a data protection law that included data localization requirements. The bill was eventually abandoned in August 2022 in part because of these local storage requirements, especially following outcries from domestic Indian startups.<sup>16</sup> While the Indian government was responsive to the concerns of domestic startups, the eventual proposed replacement could still include tailored local storage requirements impacting foreign, i.e., U.S., startups and companies. India is an important market for U.S. startups as they look to scale globally, and significant barriers to data flows will undermine startups ability to compete there.<sup>17</sup>

### **ii. Connectivity and network access fees**

Technology startups delivering services across borders over the Internet need access to affordable, quality Internet service so they can reach their customers at competitive rates. In contravention of international norms,<sup>18</sup> however, some jurisdictions impose or are considering fee models that charge entities to send packets of data over the network—an arrangement often called “sender pays.”<sup>19</sup> These models lead to lower-quality service and higher costs for network interconnection—neither of

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<sup>14</sup> See, e.g., Luca Bertuzzi, *Germany calls for political discussion on EU’s cloud certification scheme*, Euractiv (Sept. 22, 2022), <https://www.euractiv.com/section/cybersecurity/news/germany-calls-for-political-discussion-on-eus-cloud-certification-scheme/>.

<sup>15</sup> *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on harmonised rules on fair access to and use of data (Data Act)* Eur Lex (2022), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A68%3AFIN> (In particular, Article 27 re: International Data Transfers).

<sup>16</sup> See, e.g., Soumyarendra Barik, *As start-ups complain, Govt looks to ease data localisation norms*, Indian Express (July 28, 2022), <https://indianexpress.com/article/business/startups/as-start-ups-complain-govt-looks-to-ease-data-localisation-norms-8034036/>; Sameer Yasir and Karan Deep Singh, *India Withdraws a Proposed Law on Data Protection*, New York Times (Aug. 4 2022), <https://www.nytimes.com/2022/08/04/business/india-data-privacy.html>.

<sup>17</sup> See, e.g., Achint Das, *Trade Engagement Can Improve India’s Friendliness Towards U.S. Startups*, Engine (Apr. 14, 2022), <https://engineadvocacyfoundation.medium.com/trade-engagement-can-improve-indias-friendliness-towards-u-s-startup-s-6d6ab0ba42ac>; *Written Submission to the International Trade Commission Foreign Censorship, Part 1: Policies and Practices Affecting U.S. Businesses, Investigation No. 332-585*, Engine (July 22, 2021), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/60f99d33b43e000a12d67ba9/1626971443808/Written+Submission+to+the+International+Trade+Commission+of+Engine+Advocacy+re+inv+no.+332-585.pdf>.

<sup>18</sup> See, e.g., *Internet governance must ensure access for everyone – UN expert*, UN News (May 18, 2012), <https://news.un.org/en/story/2012/05/411292-internet-governance-must-ensure-access-everyone-un-expert>; *THE IMPORTANCE OF INTERNET NEUTRALITY TO PROTECTING HUMAN RIGHTS ONLINE*, Center for Democracy and Technology (Oct. 1, 2013), <https://cdt.org/wp-content/uploads/pdfs/internet-neutrality-human-rights.pdf>.

<sup>19</sup> See, e.g., Carl Gahnberg, et. al, *Internet Impact Brief: South Korea’s Interconnection Rules*, Internet Society (May 11, 2022), <https://www.internetsociety.org/resources/doc/2022/internet-impact-brief-south-koreas-interconnection-rules/>.

which startups seeking to break into a new market can afford. Often these policies are conceived as ways to make sites that send large amounts of traffic over the network (i.e., large technology companies) pay for upgrades to telecom companies' networks.<sup>20</sup> Those increased costs would be passed on to end users, who are already paying for Internet service—the equivalent of “to energy companies trying to collect fees from appliance makers for the energy use of washing machines, while consumers are already being charged for the actual amount of energy used to do their laundry.”<sup>21</sup> And even though startups may not be directly subject to such a regime in all cases, increased costs for the services they rely upon to build and offer their services would hamper their ability to compete.

### *European Union*

In 2021, large European Internet service providers (ISPs) renewed their calls for tech companies to pay for a specific portion of the ISPs' network upgrade costs, alleging that technology companies and other content providers create the majority of Internet traffic and are “free-riding” on the network (despite the fact that Internet users, including individual consumers and businesses, already pay ISPs for access to their networks). Then, earlier this year, the telecom lobby laid out proposals to facilitate such payments which found favor with some EU policymakers, and the EU is now planning to launch a consultation in early 2023 to decide if network access fees should be imposed.

These developments in the EU reopen a decade old debate about net neutrality in the bloc. The EU Electronic Communications Regulator rebuffed similar proposals from telecom companies in 2012,<sup>22</sup> and in 2015 the EU adopted the Open Internet Access Regulation cementing net neutrality and rejecting “sender-pays” approaches.<sup>23</sup> Unless the EU again affirms their commitment to these principles, and rejects the distortive proposals, competition and trade there will be negatively impacted.

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<sup>20</sup> See, e.g., *Europe's internet ecosystem: socio-economic benefits of a fairer balance between tech giants and telecom operators*; European Network Telecom Operators' Association (May 2, 2022), <https://etno.eu/library/reports/105-eu-internet-ecosystem.html>.

<sup>21</sup> Kasper Peters, *EU Telcos' Demand for Network Traffic Payments is Fundamentally Flawed*, Computer & Communications Industry Alliance (May 2, 2022), <https://www.cci-net.org/2022/05/eu-telcos-demand-for-network-traffic-payments-is-fundamentally-flawed/>.

<sup>22</sup> BEREC's comments on the ETNO proposal for ITU/WCIT or similar initiatives along these lines, Bureau of European Regulators for Electronic Communications (Nov. 14, 2012) [https://www.berec.europa.eu/sites/default/files/files/document\\_register\\_store/2012/11/BoR%2812%29120rev.1 BE REC Statement on ITR 2012.11.14.pdf](https://www.berec.europa.eu/sites/default/files/files/document_register_store/2012/11/BoR%2812%29120rev.1 BE REC Statement on ITR 2012.11.14.pdf).

<sup>23</sup> REGULATION (EU) 2015/2120 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, Official Journal of the European Union (Nov. 25, 2015), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015R2120>.

## *South Korea*

South Korea began imposing fees based on traffic sent between ISPs in 2016, which has resulted in high costs for content providers.<sup>24</sup> Proposed changes would expand those fees to online content providers and allow ISPs to deny traffic from those that do not pay the network access fees. As a result of the high cost of doing business because of the fees, and in anticipation of adoption of the proposals that will further increase costs, content providing companies have reduced the quality of their offerings in the country.<sup>25</sup> If large companies struggle to overcome such barriers, it is hard to imagine startups choosing to enter or serve the South Korean market.

### **iii. Digital services taxes (DSTs)**

Digital services taxes are levies imposed on multinational companies based on the novel concept of a “digital presence” in a particular jurisdiction rather than tax norms like physical presence.<sup>26</sup> Many DSTs also contravene tax orthodoxy by basing the levies on revenue rather than profit.<sup>27</sup>

DSTs are discriminatory frameworks often geared at U.S. companies, and though they typically target larger businesses, they will have trickle-down effects in the form of increased costs for services, inflicting harm on startups and their users. For example, as a result of DSTs in the UK, Spain, and France, large technology companies announced price increases—passing along the effects of the tax to end users like startups.<sup>28</sup> And some countries have created DSTs with very low thresholds, like India and Columbia, which could ultimately ensnare startups directly—and which could become an alarming trend. Growth and late-stage startups can have millions in revenue but not yet be profitable,<sup>29</sup> risking being subject to some jurisdictions’ DSTs and potentially impacting how and where such companies can reasonably scale.

In response to several countries enacting DSTs over the past several years, USTR initiated Section 301 investigations and retaliatory tariffs for the unfair tax schemes. At the same time, the U.S. Government worked through multilateral fora like the G20 and OECD to negotiate a fair system for international taxation. In October 2021, those negotiations led 136 countries to agree to a groundbreaking deal that would prevent new digital services taxes and allow governments to tax

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<sup>24</sup> See e.g., *Impact Brief*, *supra* note 19.

<sup>25</sup> See e.g., Ethan Shin, *The drop in Twitch’s video quality in South Korea might just be the beginning*, One ESports (Oct. 1, 2022), <https://www.oneesports.gg/culture/twitch-video-quality-south-korea/>.

<sup>26</sup> Gordon Gray and Jennifer Huddleston, *Digital Services Taxes: A Primer*, American Action Forum (Mar. 26, 2021), <https://www.americanactionforum.org/insight/digital-services-taxes-a-primer/>.

<sup>27</sup> *Id.*

<sup>28</sup> See e.g., James Vincent, *Apple, Google, and Amazon respond to European tech taxes by passing on costs*, The Verge (Sept. 2, 2020), <https://www.theverge.com/2020/9/2/21418114/european-uk-digital-tax-services-apple-google-amazon-raise-prices>; Sam Edwards, *Google Will Pass Digital Tax on to Spanish, French Customers*, (Mar. 4, 2021), <https://news.bloombergtax.com/daily-tax-report-international/google-will-pass-digital-tax-on-to-spanish-french-customers>.

<sup>29</sup> Per a review of such sized companies on Crunchbase. See generally <https://www.crunchbase.com/home>.



companies based on where their products and services are consumed (itself representing a major shift from taxation norms based on physical presence).<sup>30</sup> The framework would set a global corporate minimum tax rate of 15 percent on overseas profits for multinational companies exceeding 750 million euros in global sales. The deal must be implemented by countries' legislatures—and faces uphill battles in many, including the U.S.<sup>31</sup>

The deal pausing DSTs led USTR to announce but immediately suspend the retaliatory tariffs resulting from the 301 investigations. But in anticipation of the deal failing to be implemented, many countries—including key trading partners like Canada—have continued to prepare DSTs to come into force when the moratorium on DSTs agreed to under the deal ends in 2024.

### ***European Union (and member states)***

Several member states have enacted DSTs—France, Austria, Spain, Italy, Turkey, Poland, Portugal, and Hungary—while still more are considering them.<sup>32</sup> Most of these countries will repeal their DSTs upon the enactment of the first pillar of the OECD deal, but Poland, Portugal, and Hungary have not made that commitment. The tax rates and taxed services vary widely among the member states,<sup>33</sup> threatening a cumbersome patchwork of tax rules to serve the EU market impacting any company, but especially startups—including via passed-on costs—should pillar one not be implemented. The EU commission is likely to step in to create a EU-wide DST in the hopes of unifying the EU single market should this come to pass, but the process is likely to take several years and would still not address the fundamental problems associated with DSTs.<sup>34</sup>

The EU had intended to implement the OECD deal earlier this year but ran into obstruction from Poland and Hungary. Poland eventually dropped its opposition following political horsetrading—but Hungary has continued to oppose the measure to implement pillars one and two.<sup>35</sup> The core concern for Hungary is that countries, like the U.S. in particular, will not implement pillar one, and those that do—in this case, some of those in the EU—will be at a disadvantage in taxing rights. In addition to

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<sup>30</sup> See e.g., Jennifer Weinhart, *Global Tax Deal Could Help Tech, but It Has to Survive Congress*, Engine (Oct. 15, 2021), <https://engineadvocacyfoundation.medium.com/global-tax-deal-could-help-startups-but-it-has-to-survive-congress-966b1a839cf2>.

<sup>31</sup> See e.g., Brady, *Crapo: Biden Global Tax Deal Puts Politics Over Progress, Surrenders Fate of U.S. Economy to Foreign Competitors* Senate Committee on Finance (Oct. 8, 2021), <https://www.finance.senate.gov/ranking-members-news/brady-crapo-biden-global-tax-deal-puts-politics-over-progress-surrenders-fate-of-us-economy-to-foreign-competitors>; Marton Kasnyik and William Horobin, *EU Clashes With Hungary Over Implementing Global Minimum Tax*, Bloomberg (June 17, 2022), <https://www.bloomberg.com/news/articles/2022-06-17/hungary-to-oppose-global-minimum-tax-at-eu-meeting-gulyas-says#xj4y7vzkg>.

<sup>32</sup> Daniel Bunn and Elke Asen, *What European Countries Are Doing about Digital Services Taxes*, Tax Foundation (Aug. 9, 2022), <https://taxfoundation.org/digital-tax-europe-2022/>.

<sup>33</sup> Id.

<sup>34</sup> See e.g., *Fair Taxation of the Digital Economy* European Commission [https://taxation-customs.ec.europa.eu/fair-taxation-digital-economy\\_en](https://taxation-customs.ec.europa.eu/fair-taxation-digital-economy_en).

<sup>35</sup> See e.g., Robert Goulder, *Pillar 1 Tax Reform: Will The EU Go It Alone?*, Forbes (July 5, 2022), <https://www.forbes.com/sites/taxnotes/2022/07/05/pillar-1-tax-reform-will-the-eu-go-it-alone/?sh=308a4e1e21bf>.

the DST attitudes that headwinds for the global tax deal implementation in the EU reveal, the opposition also underscores action required on behalf of the U.S. Congress to avoid the return of problematic DSTs.

### ***India***

India's DST, called the equalization levy, is uniquely problematic given the low threshold to trigger the tax could more easily ensnare startups. Expanded in 2020, the equalization levy imposed a 2% tax on non-resident Internet-based firms with the revenue above 20 million rupees, or about \$270,000 for 2021.<sup>36</sup> The tax is additionally problematic for startups given it taxes revenue rather than profit because startups may have high revenue but not yet make a profit. While the U.S. and India reached a deal to suspend the tax and retaliatory tariffs pending the implementation of the OECD deal, the low threshold of the levy remains of concern.

### ***Canada***

Canada seems intent on moving forward with implementing its DST in anticipation of the OECD deal falling through, something that has alarmed industry stakeholders in the U.S. and USTR alike.<sup>37</sup> Canada's DST proposal sets the threshold well above a direct tax on startups, but it does tax marketplace and online advertising services that startups use to break into new markets.<sup>38</sup> Canada is an important market for U.S. startups given its proximity, shared culture, language, and long history of free trade agreements, and status as the second largest trading partner of the U.S.<sup>39</sup> These elements make the country's DST ambitions more alarming for startups.

### ***Colombia***

Colombia is moving toward a DST with a relatively low threshold for tax to be implemented at the start of 2023. The DST country will impose a 5% corporate income tax on businesses providing digital services that meet an economic presence test—those with revenue greater than \$264,000 USD and more than 300,000 local users.<sup>40</sup> Colombia's DST efforts are another example of low thresholds that could ensnare startups and countries anticipating the failure of the OECD solution.

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<sup>36</sup> Daniel Bunn and Elke Asen, *Tax Foundation Comments on the Initiation of Section 301 Investigations of Digital Services Taxes*, Tax Foundation (Sept. 9, 2020), <https://taxfoundation.org/section-301-digital-tax-response/>; See also, *Yearly Average Currency Exchange Rates*, Internal Revenue Service, <https://www.irs.gov/individuals/international-taxpayers/yearly-average-currency-exchange-rates>.

<sup>37</sup> *Comments of the Office of the United States Trade Representative (USTR) on Canada's proposed Digital Services Tax Act*, United States Trade Representative (Feb. 22, 2022), <https://ustr.gov/sites/default/files/USTR%20Cmts%20on%20Canadian%20DST%20Proposal.2022.02.22.pdf>.

<sup>38</sup> *Digital Services Tax Act*, Department of Finance Canada (Dec. 2021), <https://www.canada.ca/en/department-finance/news/2021/12/digital-services-tax-act.html>.

<sup>39</sup> U.S.-Canada Trade Facts, USTR, <https://ustr.gov/countries-regions/americas/canada>.

<sup>40</sup> Richard Asquith, *Colombia proposes 5% SEP/ Digital Services Tax 2023*, VatCalc (Oct. 16, 2022), <https://www.vatcalc.com/colombia/colombia-proposes-5-digital-services-tax-2023/#:~:text=Colombian%20government%20has%20proposed%20introducing,customer%2C%20payment%20processor%20or%20other.>



#### iv. E-commerce moratorium

The WTO moratorium on e-commerce is critical to fostering digital trade, and it is especially important for startups. Since 1998, member countries have agreed to not impose customs duties on electronic transmissions, and the moratorium has been renewed at each WTO ministerial ever since. Should it be allowed to expire or not be renewed at the 13th WTO ministerial, the impact would fall heavily on small entities like startups given the likely compliance burden to be expected in its absence. In addition, startups build their services by leveraging dozens of other platforms, tools, and services (often for free or at low-cost),<sup>41</sup> meaning they will likely be impacted by increased input costs should the moratorium end.<sup>42</sup> Allowing duties on electronic transmissions would put startups at a competitive disadvantage.

Startups benefit from the predictability and low barriers afforded by the moratorium, and the U.S. should continue advocating for its renewal, including on a permanent basis.

#### *India, South Africa, Indonesia, Sri Lanka, and Pakistan*

Ahead of the 12th WTO Ministerial earlier this year, India and South Africa circulated remarks advocating for changes to the interpretation and applicability of the moratorium.<sup>43</sup> While the countries eventually voted for an extension of the moratorium to the 13th Ministerial (to be held in 2023) they were joined by Indonesia, Sri Lanka, and Pakistan in threatening to block its extension.<sup>44</sup>

#### v. Encryption

Encryption is essential for public safety, user trust, protecting Internet users around the world from malicious hackers, government surveillance, and more. Many startups use privacy- and security-enhancing measures, including encryption, as a competitive advantage. Undermining encryption through the mandated use of “backdoors” would be devastating for U.S. startups, since many startups lack the resources needed to adequately protect users’ information once they’ve

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<sup>41</sup> See, e.g., Trevor Wagener, *Key Services for Startups and Small Businesses Jeopardized by Antitrust Bills*, Project DisCo (May 23, 2022), <https://www.project-disco.org/competition/052322-key-services-for-startups-and-small-businesses-jeopardized-by-antitrust-bills/>.

<sup>42</sup> *Why the WTO moratorium on customs duties on electronic transmissions matters for startups*, Allied for Startups (Mar. 19, 2020), <https://alliedforstartups.org/2020/03/19/why-the-wto-moratorium-on-customs-duties-on-electronic-transmissions-matters-for-startups/>.

<sup>43</sup> See, e.g., *India’s joint submission with South Africa on ‘E-Commerce Moratorium*, India Department of Commerce (Mar. 10, 2020), <https://commerce.gov.in/international-trade/india-and-world-trade-organization-wto/e-commerce/indias-joint-submission-with-south-africa-on-e-commerce-moratorium/>.

<sup>44</sup> *WTO provisionally agrees to extend e-commerce tariff moratorium – sources*, The Indian Express (June 16, 2022), <https://indianexpress.com/article/world/wto-provisionally-agrees-to-extend-e-commerce-tariff-moratorium-sources-7974087/>.

created an intentional vulnerability, or “backdoor.”<sup>45</sup> They also lack the resources to establish the necessary robust internal processes to navigate the potentially overbroad and dangerous requests from foreign governments for backdoor access to encrypted products and services.<sup>46</sup> Nor do many startups have the resources to tailor their platforms to a global patchwork of laws that undermine encryption.

Despite the benefits of encryption, many countries have sought to undermine encryption—some for political ends (usually in authoritarian or authoritarian-leaning jurisdictions) or in the name of fighting heinous crimes like child sexual abuse material (CSAM) or terrorism. Even if policies undermining encryption are motivated by good intentions, they still create security risks and injure the ability of startups that leverage encryption to scale and compete abroad.

### *European Union*

The EU has taken several steps that undermine encrypted products and services in recent years, usually in the name of combatting CSAM. The most recent alarming proposal, the Child Sexual Abuse Regulation would incentivize general monitoring of user communications and could lead to mandatory scanning of messages, photos, videos, and other data.<sup>47</sup> Compliance with the law would necessarily be incompatible with encryption.<sup>48</sup> As a result it would harm privacy, security, and free-expression, and inhibit companies from offering encrypted services in the EU.

### **v. Intermediary liability (non-IP)**

Internet platforms and online services provided by U.S. startups and other American companies are an outlet for creativity, free expression, and a key driver of innovation. The ability to host and moderate content without being held liable for the actions of their users is central to online service providers’ competitiveness. Under 47 U.S.C. § 230, certain protections are guaranteed for online service providers (OSPs) functioning in the United States when a third-party posts illegal content on their platform. These protections recognize that OSPs are not the creators or the intentional distributors of potentially-illegal content and are distinguished from the user who uploaded the potentially-illegal material, while at the same time enabling them to act on or remove the problematic content. This arrangement has helped startups to flourish, but in several countries this is not the

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<sup>45</sup> See, e.g., *The Nuts & Bolts of Encryption* Engine (Dec. 2019), <https://static1.squarespace.com/static/571681753e44d835a440c8b5/t/5e28ae1678c38064efa025d2/1579724313903/Dec+2019+Encryption+REPORT-7.pdf>.

<sup>46</sup> See, e.g., *Engine Statement on FBI Data on Encrypted Devices*, Engine (May 23, 2018), <https://www.engine.is/news/category/engine-statement-on-fbi-data-on-encrypted-devices?rq=encryption>.

<sup>47</sup> See, e.g., Joe Mullin, *The EU Commission’s New Proposal Would Undermine Encryption And Scan Our Messages*, Electronic Frontier Foundation, <https://www.eff.org/deeplinks/2022/05/eu-commissions-new-proposal-would-undermine-encryption-and-scan-our-messages>.

<sup>48</sup> See, e.g., *Breaking encryption myths*, Global Encryption (Nov. 2020) <https://www.globalencryption.org/wp-content/uploads/2020/11/2020-Breaking-Encryption-Myths.pdf>.

case. Instead Internet companies—including startups—may be fully responsible for not acting on content defined by a particular jurisdiction as illegal, and will be held legally responsible if they fail to do so quickly enough.

Strict intermediary liability regimes abroad can create headwinds for U.S. companies hoping to break into international markets. This is especially true for startups that already spend disproportionately more per-user on content moderation.<sup>49</sup> Many of these laws envision or require the use of technology to ensure compliance, but content filtering technologies can be prohibitively expensive yet ultimately imperfect.<sup>50</sup> What's more, many laws about what constitutes illegal content can be very vague, making the use of technology in moderation impractical. Finally, to abide by a particular jurisdiction's legal standards, companies with comparatively few resources, like startups, may err toward removing flagged user content as failure to comply could result in costly legal penalties. These strict compliance requirements create a double bind for companies who may, in turn, lose users grieved by the over-removal of their content. Taken together, these elements can disincent entry into jurisdictions with such laws.

### *European Union*

In 2022, the EU adopted the Digital Services Act (DSA) which will deeply impact U.S. startups ability to serve EU users.<sup>51</sup> The legislation builds upon the EU's existing knowledge-based content moderation framework and will require companies to create several new mechanisms for compliance. Companies must create new mechanisms for users to notify companies about illegal content, work with “trusted flaggers,” have a “point of contact,” and appoint a “legal representative” in the EU to ensure compliance with Union law. Furthermore, companies must allow users to contest illegal content claims via an appeal mechanism—a process many companies will have to create in the wake of the DSA. And if the user does not agree with the results of the appeal mechanism, they can move to an external out-of-court dispute resolution mechanism, which companies almost always have to pay for. Devoting resources to support these compliance mechanisms will not be possible for all startups currently functioning or looking to expand to the EU due to the costly nature of the requirements.

Luckily for U.S. startups, EU lawmakers narrowly decided to avoid general monitoring obligations in the DSA, which would have further required companies to actively monitor their services for potentially illegal activity by users and would likely be an insurmountable barrier for most startups.

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<sup>49</sup> *Startups, Content Moderation*, § Section 230, Engine (Dec. 2021) <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/61b26e51cdb21375a31d312f/1639083602320/Startups%2C+Content+Moderation%2C+and+Section+230+2021.pdf>.

<sup>50</sup> Evan Engstrom & Nick Feamster, *The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools* (Mar. 2017), <https://www.engine.is/the-limits-of-filtering>.

<sup>51</sup> Lauren Koop, *The EU's Digital Services Act is one step closer to becoming law. How will it impact U.S. startups?*, Engine (July 28, 2022), <https://medium.com/@engineadvocacyfoundation/the-eus-digital-services-act-is-one-step-closer-to-becoming-law-how-will-it-impact-u-s-startups-7be702180582>.

Despite avoiding general monitoring obligations in the DSA, the debate around such provisions in the EU continues and remains of particular concern, especially as the EU and member states undergo further legislative steps during the DSA's implementation.

### ***Indonesia***

Indonesia has recently introduced new Internet regulations, including its Ministerial Regulation 5 (MR5), which sets up strict content moderation rules for online service providers functioning in the country.<sup>52</sup> Under MR5, companies must register with the regulator before operating in the country or otherwise face being blocked. They must ensure prohibited content (broadly defined as any content that violates Indonesian law or creates public unease) stays off their platforms. Indonesia's vague definition of illegal content has raised serious concerns over online free speech as companies and users may opt to over-moderate their posts due to uncertainty around the definition. Companies are charged with removing illegal content within 24 hours and 'urgent illegal content' within 4 hours. Companies that fail to expeditiously remove illegal content will face steep consequences, including large fines, platform bans, or even criminal charges on local staff. Indonesia's approach to content moderation will disincent the participation of U.S. companies, including startups in the Indonesian Internet economy due concerns around the lack of clarity on what constitutes illegal content and the harsh punishments that may follow accidental violations of the law.

### ***India***

In 2021, India noticed and implemented new rules to govern intermediaries in the country, adding to a regulatory environment encumbering U.S. startups looking to operate there.<sup>53</sup> The intermediary liability guidelines have severely restricted the social media and digital news sectors by increasing costs, compliance burdens for organizations, and workloads for employees.<sup>54</sup> Though the provision has yet to be enforced, the encryption requirements in the rules threaten to undermine end-to-end encryption and have drawn legal challenges.<sup>55</sup> Reviews of compliance reports—documents required by the rules—reveal that companies have increased the use of proactive monitoring systems. And proactive monitoring—to ensure that previously removed content is not reuploaded—is required for companies with over five million users in the country. Such systems—whether required by the letter

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<sup>52</sup> See, e.g., *Indonesia: Regulation of the Minister of Communication and Informatics Number 5 of 2020 on Private Electronic System Operators (Ministerial Regulation 5)*, Article 19 (Sept. 29, 2021),

<https://www.article19.org/wp-content/uploads/2021/09/Legal-Analysis-Indonesia-Ministerial-Regulation-5.pdf>.

<sup>53</sup> See, e.g., Udbhav Tiwari, *India's new intermediary liability and digital media regulations will harm the open internet*, Mozilla (Mar. 2, 2021),

<https://blog.mozilla.org/netpolicy/2021/03/02/indias-new-intermediary-liability-and-digital-media-regulations-will-harm-the-open-internet/>.

<sup>54</sup> See generally *IT Rules 2021*, Hasgeek,

<https://hasgeek.com/PrivacyMode/it-rules-2021/sub/conclusion-and-recommendations-52QhoWEjWX53uBGieDJVQ3>.

<sup>55</sup> Mike Isaac, *WhatsApp Sues India's Government to Stop New Internet Rules*, The New York Times (May 25, 2021),

<https://www.nytimes.com/2021/05/25/technology/whatsapp-india-lawsuit.html#:~:text=SAN%20FRANCISCO%20%E2%80%94%20WhatsApp%20sued%20the,parties%20for%20the%20first%20time>.

of the law or implicitly necessary for compliance with other provisions—are prohibitively expensive for startups and ultimately imperfect.<sup>56</sup> Unsurprisingly, companies in India continued to struggle with moderation following the rules.<sup>57</sup>

Earlier this year, India proposed amendments to the 2021 Intermediary rules that would further heighten barriers for companies to serve Indian users, adding burdensome due diligence obligations, creating the role of a Grievance Officer, and outlining a new government-led Grievance Appellate Committee.<sup>58</sup>

### ***United Kingdom***

Despite recent domestic turmoil that has delayed its consideration, the U.K. has continued toward implementing a framework that would drastically alter the environment for intermediaries serving users in the country. Beginning with its “Online Harms” white paper in 2020 that eventually became the Online Safety Bill, the country has considered imposing a “duty of care” upon intermediaries and threatened stiff penalties for noncompliance.<sup>59</sup> The proposed bill has lacked concrete definitions or compliance thresholds, instead largely leaving them to regulatory processes, injecting uncertainty for companies.<sup>60</sup>

The scope of covered services also sweeps up many types of services beyond traditional social media, which might include marketplace startups or other innovative companies that facilitate user interaction only as part of their service. These types of companies are likely to encounter fewer pieces of problematic content, but would be subject to the same obligations. Burdening innovative companies that pose little risk may serve to entrench larger rivals.

The uncertainty created by the bill is likely to disincent U.S. startups from seeking or serving UK users. Large Internet companies with vast resources will continue to operate in the UK and will be able to overcome any headaches arising from the proposed regime. Innovative startups will struggle with the vague standards and resultant costs and may instead avoid the UK market, leaving less competition, and less vibrant trade than otherwise.

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<sup>56</sup> *Startups, Content Moderation*, *supra* note 49.

<sup>57</sup> See, e.g., Aditi Agrawal, *Can Koo be King? Perhaps with better content moderation*, Forbes India (Feb. 12, 2021), <https://www.forbesindia.com/article/take-one-big-story-of-the-day/can-koo-be-king-perhaps-with-better-content-moderation/66445/1>.

<sup>58</sup> See, e.g., Meri Baghdasaryan, *New Amendments to Intermediary Rules threaten Free Speech in India*, Electronic Frontier Foundation (July 21, 2022), <https://www.eff.org/deeplinks/2022/07/new-amendments-intermediary-rules-threaten-free-speech-india>.

<sup>59</sup> See, e.g., *In re Request for Comments to Compile the National Trade Estimate Report on Foreign Trade Barriers*, Engine (Sept. 2020), [https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5f9c3a03cf51f72e4e1d0b05/1604073989024/Engine\\_Comments\\_USTR+2021+NTE+Report.pdf](https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5f9c3a03cf51f72e4e1d0b05/1604073989024/Engine_Comments_USTR+2021+NTE+Report.pdf).

<sup>60</sup> *Response to the Digital, Culture, Media and Sport Sub-committee*, Engine (Sept. 16, 2021), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/61439fddd85bb20a2ac80f8d/1631821789925/Online+Safety+Bill+Comments.pdf>.

## vi. Intermediary liability (IP)

Imbalanced and uncertain IP laws can erect unfair and unjustified barriers to market access, especially for U.S. startups looking to expand globally. Well-tailored IP frameworks correctly focus on enforcement of legitimate rights. But a functioning IP system should not enable purported rightsholders to sanction non-infringing conduct and it must also have ample protections against abuse; provide certainty that startups that encounter user generated content will not be liable for alleged infringement they have no knowledge of or involvement in; prevent IP from creating unjustified barriers to entry; and avoid overly-rigid applications which stifle creativity, innovation, or free speech.

Domestic startups rely on balanced U.S. laws reflected in, for example, 17 U.S.C. § 512 and the doctrine of fair use, and efficient and affordable means of avoiding or curtailing abusive IP litigation. These features have enabled a healthy innovation ecosystem, and led to the creation of technical, economic, and creative sectors that would not have been possible without balanced IP frameworks.<sup>61</sup> That said, imbalances and uncertainties remain, even in U.S. law—startups and the users they serve still have to deal with abusive and anticompetitive accusations of infringement.<sup>62</sup> The results are harmful for startups and can even force them to close up shop.<sup>63</sup>

Like for non-IP intermediary liability discussed above, certainty in the law is essential to all businesses, but especially startups. Startups that encounter user-generated content need to know whether and when they can be sued for infringement—especially when the alleged infringement involves user-generated content of which the company has no knowledge or direct involvement.

However there are concerning trends in many countries—several of which are discussed herein—where IP frameworks are (becoming) less balanced. And the success of many (current and potential) startups could be jeopardized by a patchwork of such imbalanced laws.

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<sup>61</sup> See, e.g., *Is the DMCA's Notice-and-Takedown System Working in the 21st Century?: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary* 116th Congress, 3-5 (2020) (testimony of Abigail Rives) <https://www.judiciary.senate.gov/imo/media/doc/Rives%20Testimony.pdf>.

<sup>62</sup> See, e.g., *Id.*, at 11-17 (discussing examples of abusive or anticompetitive copyright takedown notices).

<sup>63</sup> See e.g., Emily Chasan, *Web Video Service Veoh to Liquidate, Founder Says*, Reuters (Feb. 12, 2010), <https://www.reuters.com/article/veoh-bankruptcyidCNN1216366120100212> (quoting founder saying “[t]he distraction of the legal [copyright] battles, and the challenges of the broader macro-economic climate have led to our Chapter 7 bankruptcy”). Veoh launched in 2005, and was sued by Universal Music Group in 2007, based on alleged copyright infringement by Veoh’s customers. That case was not resolved until 2013. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013). UMG eventually lost the suit, with the Ninth Circuit affirming that Veoh was operating within the protection of 17 U.S.C. § 512 safe harbors. But while the suit was pending, Veoh filed for bankruptcy.



## *European Union*

The EU adopted a copyright directive rife with problems for startups seeking to host any user-generated content and operate in the region. Article 17 of the Directive on Copyright in the Digital Single Market has teed up an unclear and seemingly impossible constellation of requirements and, as it is implemented by EU Member States, will open smaller and startup Internet platforms to substantial new costs and risks.<sup>64</sup>

While Article 17, on its face, seems to impose a de facto filtering mandate that requires platforms hosting user-generated content to review every post for potential infringement, recent court decisions cast uncertainty about implementation and which filters have to be (and can be) used.<sup>65</sup> By imposing a “staydown” requirement,<sup>66</sup> the directive effectively mandates the use of upload filtering technology, because use of such technology is the only way to implement staydown.<sup>67</sup> Such mandatory filtering substantially increases the costs of market entry. Moreover, not only are filtering tools very expensive, but for many companies and types of content they are inadequate and/or non-existent.<sup>68</sup> When the filtering tools fail (which they do, and will), Internet platforms will also face the massive liability that comes along with failure to implement staydown.

Moreover, earlier this year the Court of Justice of the European Union (CEJU) identified a number of limitations in Article 17 that Member States and startups will have to account for in implementing and abiding by the Directive. That ruling endeavors to provide important safeguards for Internet users, to protect the fundamental rights of EU citizens, but it also could increase confusion, complexity, and cost for startup service providers.<sup>69</sup> Poland had challenged Article 17 on the grounds that it violated the right of free expression. In responding to that challenge, CEJU acknowledged that Article 17’s requirements to filter content impacts free expression for Internet users, and it listed limitations in implementation that are needed to safeguard that expression. For example: platforms can only use filtering systems that can distinguish between lawful and unlawful content—likely a high bar for automating fact-specific infringement decisions with imperfect technology and incomplete information.

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<sup>64</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0790&rid=1>.

<sup>65</sup> See, e.g., Elva Cullen et al., *Latest Developments in Controversial Article 17 Platform Liability for Infringing Content*, JD Supra (Sept. 22, 2022), <https://www.jdsupra.com/legalnews/latest-developments-in-controversial-6833972/>; *European Court Renders Judgment in Policy Challenge to Art 17*, Creative Commons (Apr. 25, 2022), <https://creativecommons.org/2022/04/25/european-court-renders-judgment-in-polish-challenge-to-art-17/>.

<sup>66</sup> Article 17(4)(c) (requiring platforms to implement measures to prevent further uploads of allegedly infringing works).

<sup>67</sup> E.g., Chris Sprigman & Mark Lemley, Opinion, *Why Notice-and-Takedown is a Bit of Copyright Law Worth Saving* L.A. Times (June 21, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-sprigman-lemley-notice-and-takedown-dmca-20160621-snap-story.html>.

<sup>68</sup> *Limits of Filtering* *supra* note 50.

<sup>69</sup> See, e.g., Cullen, *supra* note 65.

Finally, Article 17 inherently favors larger organizations and certain traditional rightsholder organizations, and disadvantages smaller service providers and the Internet-enabled creators they serve.<sup>70</sup> Many, if not most, larger and established Internet platforms have already developed technology needed to comply with Article 17 (although that may be subject to change in light of the CEJU ruling). And those larger companies have already, or are well-equipped to, negotiate licenses with rightsholder organizations (which inherently have, and have historically wielded, disproportionate leverage in such negotiations). Those are negotiations in which startups and smaller Internet platforms are at a distinct and substantial disadvantage. Further, large companies have the financial wherewithal to survive the increased risks associated with hosting user-generated content in the EU. Startups, operating on already-thin margins, do not.<sup>71</sup>

### *Australia*

The Australia-U.S. Free Trade Agreement (AUSFTA) required Australia to implement limitations on copyright liability for service providers, similar to U.S. law.<sup>72</sup> While Australian law does provide for a certain level of safe harbor protections, it is narrower than required by AUSFTA.<sup>73</sup>

The failure of Australia's efforts to implement the copyright safe harbors called for in AUSFTA can be seen in practical experience. For example, Redbubble owns and operates leading global marketplaces powered by independent artists. Independent artists share and sell their creative works to a worldwide audience, printed on everyday products like apparel, housewares, and wall art.<sup>74</sup> Redbubble was recently found liable for copyright infringement in Australia when a Redbubble user uploaded derivative images of a Pokémon character.<sup>75</sup> This result was reached even though

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<sup>70</sup> E.g., Felix Reda, *Article 17's Impact on Freedom to Conduct a Business - Part 1*, Kluwer Copyright Blog (Jan. 18, 2021), <http://copyrightblog.kluweriplaw.com/2021/01/18/article-17s-impact-on-freedom-to-conduct-a-business-part-1/>.

<sup>71</sup> See Letter of Engine Advocacy re: Targeted Consultation Addressed to Participants to the Stakeholder Dialogue on Article 17 of the Directive on Copyright in the Digital Single Market 7 (Sept. 10, 2020), [https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5f5a64c6cb585e4abe0cf490/1599759563332/20.09.10\\_Engine+Responses+to+Targeted+Consultation+on+Article+17.pdf](https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5f5a64c6cb585e4abe0cf490/1599759563332/20.09.10_Engine+Responses+to+Targeted+Consultation+on+Article+17.pdf).

<sup>72</sup> Chapter 17 of the Australia-U.S. Free Trade Agreement, available at [https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset\\_upload\\_file469\\_5141.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file469_5141.pdf) (Article 17.11, Section 29).

<sup>73</sup> Jonathan Band, *Australian Copyright Law Thumbs Nose at U.S. Trade Commitments*, Project Disco (July 6, 2018), <https://www.project-disco.org/intellectual-property/070518-australian-copyright-law-thumbs-nose-at-u-s-trade-commitments/>.

<sup>74</sup> Emma Clark, *Redbubble Group*, Redbubble Investor Presentations (Nov. 2019), [https://shareholders.redbubble.com/site/PDF/1994\\_1/investorpresentationnovember2019](https://shareholders.redbubble.com/site/PDF/1994_1/investorpresentationnovember2019).

<sup>75</sup> Isobel Taylor and Georgina Hey, *Australia: No safe Harbour: Online Platforms Face Choppy Waters When it Comes to Copyright Infringement*, Mondaq (May 8, 2019), <http://www.mondaq.com/australia/x/803964/Copyright/No+safe+harbour+Online+platforms+face+choppy+waters+when+it+comes+to+copyright+infringement>; *Pokémon Co. Int'l, Inc. v. Redbubble Ltd* [2017] FCA 1541, <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca1541>.

Redbubble had undertaken a number of initiatives to prevent potentially infringing content from being uploaded to and remaining on its site.<sup>76</sup>

In 2018, Australia expanded its safe harbor only to, e.g., organizations that provide legal protections to those with a disability and to public libraries, educational, and cultural institutions.<sup>77</sup> As such, Australian law continues to lack the full coverage contemplated under AUSFTA. This harms startups and disincentivizes expansion into the Australian market.<sup>78</sup>

### **III. Conclusion**

Engine appreciates the opportunity to provide comments to the Committee as it prepares the National Trade Estimate Report on foreign trade barriers. The barriers mentioned within the comments are significant with respect to the U.S. economy on the whole, and are uniquely challenging for U.S. startups that generally lack substantial resources, particularly in their early stages, despite being important trade policy stakeholders. We look forward to engaging with USTR on barriers to digital trade in the future.

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<sup>76</sup> *Pokémon v. Redbubble*, *supra* note 75 (Redbubble “require[d] that the users agree that they owned (or had permission to use) the copyright in any works uploaded to the site, systems allow[ed] copyright owners to notify Redbubble of infringing content then promptly remov[ed] such content, a content team monitor[ed] the accounts of users who had been flagged in the past, and block[ed] certain keywords as search terms”).

<sup>77</sup> Corinne Reichert, *Copyright Safe Harbour Expansion Bill Passes Parliament*, ZDNet (June 27, 2018), <https://www.zdnet.com/article/copyright-safe-harbour-expansion-bill-passes-parliament/>.

<sup>78</sup> See, e.g., Jessica Coates, *Australian Digital Alliance: Extension of Safe Harbour Welcomed as an Incremental Step* Info Justice (June 27, 2018), <http://infojustice.org/archives/40114> (“Australia technology companies are still exposed to greater risk than their international counterparts. Australian companies are being sued right now, spending hundreds of thousands of dollars in court even when they have been acting as model corporate citizens.”).