October 23, 2023

Laura Buffo, 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 2024 Reporting [including discussion of the European Union, the United Kingdom, Canada, India, Australia, Indonesia, Colombia, New Zealand, Pakistan, South Korea, Sri Lanka, and South Africa], Docket no. USTR-2023-0010

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 2024 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. As of 2020, U.S. small and medium enterprises (SMEs) accounted for over 97% of aggregate exports.[1] Furthermore, U.S. exports of information and communications technology (ICT) services reached over $93 billion in 2022, while U.S. exports of potentially ICT-enabled services reached nearly $626 billion.[2] Accordingly, digital trade is

[1] *ITA Exporter Database: Profile of U.S. Exporting Companies, 2020*, International Trade Administration (Oct. 2022), https://www.trade.gov/report/2020-ita-us-exporter-database.
[2] *Table 3.1. U.S. Trade in ICT and Potentially ICT-Enabled Services, by Type of Service*, Bureau of Economic Analysis (July 6, 2023), https://apps.bea.gov/iTable/iTable.cfm?reqid=62&step=9&isuri=1&6210=4#reqid=62&step=9&isuri=1&6210=4.

important to the overall U.S. economy, with the digital economy making up over ten percent of the U.S. GDP in 2021.[3]

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. 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.[4] 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.[5]

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]."[6]

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[3] *Digital Economy*, Bureau of Economic Analysis (Nov, 2022), https://www.bea.gov/data/special-topics/digital-economy.
[4] *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/.
[5] *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.
[6] 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.

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.

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.[7] Privacy Shield was invalidated in July 2020 and a replacement to the program, called the EU-U.S. Data Privacy Framework (DPF) only recently went into effect.[8]

In the earlier lapse of these programs, U.S. companies, especially startups, 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.[9] In the absence of transfer mechanisms like Privacy Shield, businesses 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.[10] But SCCs are shrouded in uncertainty. Earlier this year, a decision by EU Data Protection Authorities would have invalidated the use of SCCs as a legal transfer mechanism,[11] and only the DPF avoided potential catastrophic repercussions for U.S.-EU trade.

But the DPF itself is already under threat, meaning data flows critical to serving the EU market are in a tenuous position. Policymakers and activists are currently challenging or have announced plans

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[7] *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.

[8] *See, Data Privacy Framework Program Launches New Website Enabling U.S. Companies to Participate in Cross-Border Data Transfers*, Dept. of Com. (July 17, 2023), https://www.commerce.gov/news/press-releases/2023/07/data-privacy-framework-program-launches-new-website-enabling-us.

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

[10] *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/.

[11] *See, e.g.*, *In re Meta Platforms Ireland Limited*, Ireland Data Protection Commission (May 12, 2023), https://edpb.europa.eu/system/files/2023-05/final_for_issue_ov_transfers_decision_12-05-23.pdf; Vincent Manancourt, *Europe faces Facebook blackout*, PoliticoEU (July 7, 2022) https://www.politico.eu/article/europe-faces-facebook-blackout-instagram-meta-data-protection/.

to imminently challenge the new framework.[12] Given the fundamental importance of free flows of data underpinning U.S. startups' ability to serve the EU market, U.S. trade policymakers must be vigilant about potential data-related barriers to 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).[13] Disguised as a national security safeguard, the EUCS threatens U.S. cloud service providers (CSPs) in Europe through an anticompetitive preference for domestic EU firms.[14] 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, Spain, and Italy likely to have little impact on cybersecurity.[15] For example, France has launched the Trusted Cloud Doctrine, a regulation that prohibits the certification of any company that is greater than 39 percent foreign owned, forcing U.S. businesses to collaborate with French entities deemed "operators of vital importance."[16]

The EU cloud requirements will impact the availability and cost of cloud services, which will be felt by end users like U.S. startups who rely on such services to provide their own services.[17] If the U.S. cloud providers startups rely on for infrastructure are not able to operate in the EU or on the same terms, startups will face heightened trade barriers to the EU market. The EUCS is secondary legislation to the Cybersecurity Act and is technically a voluntary framework, but the European Commission and EU member states like France successfully pushed to include sovereignty requirements in the recent Data Act.[18] Their inclusion, alongside other de-facto localization requirements in the Data Act—which is designed to regulate non-personal data—threatens to

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[12] *See, e.g.*, Lawson Faulkner, et al., *It's the spying, stupid — How U.S. Internet spying endangers digital trade and impacts startups*, Engine (Oct. 19, 2023), https://engineadvocacyfoundation.medium.com/its-the-spying-stupid-how-u-s-internet-spying-endangers-digital-trade-and-impacts-startups-0a6556c056c8.

[13] *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.

[14] *See, e.g.*, Meredith Broadbent, *The European Cybersecurity Certification Scheme for Cloud Services*, CSIS (Sept. 1, 2023), (https://www.csis.org/analysis/european-cybersecurity-certification-scheme-cloud-services#:~:text=The%20EU%20has%20proposed%20a,restrictions%20on%20domestic%20ownership%20requirements.

[15] *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.

[16] *Supra* note 14.

[17] *Tools to Compete: Lower Costs, More Resources, and the Symbiosis of the Tech Ecosystem*, Engine and the CCIA Research Center (Jan 2023), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/63d2b8d5bec96f502264fd1f/1674754266044/FINAL_CCIA-Engine_Tools-To-Compete.pdf.

[18] *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/.

expand the negative impact of GDPR on U.S. startups to all data and would therefore negatively impact U.S. startup competitiveness and access to the EU market.[19]

India

In August of 2023, India enacted the Digital Personal Data Protection Act (DPDP), which governs how businesses may interact with user data.[20] This legislation contains several new requirements for businesses serving the Indian market, even if located outside the country. Most problematically, the DPDP contains provisions that enable the Indian Government to restrict the cross-border transfer of data. The Indian government pulled previous versions of the legislation in response to concerns from its domestic startups,[21] and it has shown a willingness to use technology policy to favor domestic industry over U.S. entrants like startups, meaning U.S. trade policymakers should pay close attention to ensure the DPDP is not used to unfairly disadvantage U.S. startups and interests.[22] 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.[23]

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,[24] however, some jurisdictions impose or are considering fee models that charge entities to send packets of data over the network based on volume, in addition to what they already

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[19] *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).

[20] The Digital Personal Data Protection Act, 2023, Bill No. 22 of 2023 (Apr. 11, 2023) https://www.meity.gov.in/writereaddata/files/Digital%20Personal%20Data%20Protection%20Act%202023.pdf

[21] *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.

[22] *Infra* at §v.; Mike Masnick, *The Unintended Consequences of Internet Regulation*, Computer & Communications Industry Assoc. and Copia Inst. (Apr. 2023), https://research.ccianet.org/reports/unintended-consequences-of-internet-regulation/#main-content.

[23] *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-startups-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.

[24] *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.

pay for Internet service—an arrangement often called "sender pays."[25] These models lead to lower-quality service and higher costs for network interconnection—neither of 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.[26] Those increased costs would be passed on to end users, who are already paying for Internet service—the equivalent of "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."[27] 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.[28]

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, in 2022, the EU telecom lobby laid out proposals to facilitate such payments which found favor with some EU policymakers, resulting in the EU launching a consultation in early 2023 to decide if network access fees should be imposed.

The push for network fees in the EU reopened a decade old debate about net neutrality in the bloc. The EU Electronic Communications Regulator rebuffed similar proposals from telecom companies in 2012,[29] and in 2015 the EU adopted the Open Internet Access Regulation cementing net neutrality and rejecting "sender-pays" approaches.[30]

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[25] *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/.
[26] *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.
[27] Kasper Peters, *EU Telcos' Demand for Network Traffic Payments is Fundamentally Flawed*, Computer & Communications Industry Alliance (May2, 2022), https://www.ccianet.org/2022/05/eu-telcos-demand-for-network-traffic-payments-is-fundamentally-flawed/.
[28] *Supra* note 17.
[29] *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_BEREC_Statement_on_ITR_2012.11.14.pdf.
[30] *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.

In October 2023, the European Commission published the results of the consultation, and will thankfully not be imposing the network fees as of now.[31] However, the Commission is working on a draft regulation that could be used as a vehicle in waiting for network fees in the near future.[32] U.S. trade policymakers must monitor these policymaking efforts to ensure the distortive proposals do not advance and negatively impact competition and trade with the EU.

South Korea

South Korea began imposing fees based on traffic sent between ISPs in 2016, which has resulted in high costs for content providers.[33] 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.[34] 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.[35] Many DSTs also contravene tax orthodoxy by basing the levies on revenue rather than profit.[36]

DSTs are discriminatory frameworks often targeted at U.S. companies, and though they typically target larger businesses, they lead to increased costs for services relied upon by U.S. startups, harming their competitiveness in markets with DSTs. 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.[37] Startups build their companies using these services—98

[31] *Results of the exploratory consultation on the future of the electronic communications sector and its infrastructure*, European Commission (Oct. 10, 2023), https://digital-strategy.ec.europa.eu/en/library/results-exploratory-consultation-future-electronic-communications-sector-and-its-infrastructure.
[32] *Id.*; *See also,* Théophane Hartmann, *Digital Networks Act: Breton lays out vision for EU telecom operators*, Euractiv (Oct. 12, 2023), https://www.euractiv.com/section/digital/news/digital-networks-act-breton-lays-out-vision-for-eu-telecom-operators/.
[33] *See e.g.*, *Impact Brief*, *supra* note 25.
[34] *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/.
[35] 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/.
[36] Id.
[37] *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.

percent of startups are using five or more digital services to build, market, and distribute their products and services.[38]

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,[39] risking being subject to some jurisdictions' DSTs, meaning the taxes pose trade barriers by impacting how and where such companies can reasonably scale, if at all.

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, in part, prevent new digital services taxes and allow governments to tax companies based on where their products and services are consumed (itself representing a major shift from taxation norms based on physical presence).[40] 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.[41]

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.

European Union (and member states)

Several EU member states have enacted DSTs—France, Austria, Spain, Italy, Turkey, Poland, Portugal, and Hungary—while still more are considering them.[42] Most of these countries are expected to repeal their DSTs upon the enactment of the first pillar of the OECD deal, but Poland,

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[38] *Supra* note 17.
[39] Per a review of such sized companies on Crunchbase. *See generally* https://www.crunchbase.com/home.
[40] *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.
[41] *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.
[42] 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/.

Portugal, and Hungary have not made that commitment. The tax rates and taxed services vary widely among the member states,[43] 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.[44]

The EU finally broke through opposition to implement parts of the global tax deal in late 2022, but may yet fall back on digital services taxes over taxing rights issues and concerns from member states like Poland and Hungary that they are missing potential revenue.[45] Continued headwinds around the global tax deal and specter of DSTs underscore the threat posed to U.S. startup competitiveness and potential for impending trade barriers.

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 imposes a 2% tax on non-resident Internet-based firms with the revenue above 20 million rupees, or about $250,000 for 2022.[46] 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 is moving forward with implementing its DST in anticipation of the OECD deal falling through, something that has alarmed U.S. startups, industry stakeholders, members of Congress, and USTR alike.[47] Canada's DST proposal sets the threshold well above a direct tax on startups, but it

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[43] *Id.*
[44] *See e.g.*, *Fair Taxation of the Digital Economy*, European Commission https://taxation-customs.ec.europa.eu/fair-taxation-digital-economy_en.
[45] *See, e.g.*, Paul Hannon & Richard Rubin, EU Greenlights 15% Corporate Minimum Tax, Advancing Global Deal, Wall St. J. (Dec. 15, 2022), https://www.wsj.com/articles/eu-greenlights-15-corporate-minimum-tax-advancing-global-deal-11671121966.
[46] 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.
[47] *See, e.g.*, *Letter from Engine Advocacy to MP Chrystia Freeland*, Engine (Sept. 8, 2023); *Letter from Sens. Wyden and Crapo to Ambassador Katherine Tai,* (Oct. 10, 2023), https://www.finance.senate.gov/imo/media/doc/20231010wydencrapolettertoustroncanadadst.pdf; *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.

does tax marketplace and online advertising services that startups use to break into new markets.[48] Canada is an important market for U.S. startups given its proximity, shared culture, language, and long history of free trade agreements, and its status as the second largest trading partner of the U.S.[49] These elements make the country's DST ambitions more alarming for startups.

Colombia

Colombia has implemented a DST with a low threshold for tax that will take effect at the start of 2024. 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.[50] Colombia's DST efforts are another example of low thresholds that could ensnare startups and could set a troubling benchmark for countries anticipating the failure of the OECD solution to reduce their DST thresholds.

New Zealand

Earlier this year, New Zealand introduced plans for a DST, that would tax at 3 percent digital services revenue from companies generating over 750 million euros in global revenue and over NZ$3.5 million from New Zealand users per year.[51] The digital services included in the tax include critical infrastructure and tools relied upon by startups. The country cited uncertainty around the global tax deal as the impetus for the planned tax, underscoring an impending global return to DSTs that threaten U.S. startup competitiveness in many major markets.

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 upcoming 13th WTO ministerial, the impact would fall heavily on small entities like startups given the costs and likely compliance burden to be expected in its absence. In addition, startups build their services by leveraging dozens of other

[48] *Explanatory Notes for the Draft Digital Services Tax Act and Related Regulations*, Dept. of Fin. Canada (Aug. 4, 2023), https://fin.canada.ca/drleg-apl/2023/ita-lir-0823-n-2-eng.pdf; *Digital Services Tax Act*, Dept. of Fin. Canada (Dec. 2021), https://www.canada.ca/en/department-finance/news/2021/12/digital-services-tax-act.html.
[49] U.S.-Canada Trade Facts, USTR, https://ustr.gov/countries-regions/americas/canada.
[50] Richard Asquith, Colombia proposes 5% SEP/ Digital Services Tax 2023, VatCalc (Oct. 16, 2022), https://www.vatcalc.com/colombia/columbia-proposes-5-digital-services-tax-2023/#:~:text=Colombian%20government%20has%20proposed%20introducing,customer%2C%20payment%20processor%20or%20other.
[51] Renju Jose, *New Zealand plans digital services tax for multinationals from 2025*, Reuters (Aug. 29, 2023), https://www.reuters.com/technology/new-zealand-plans-digital-services-tax-multinationals-2025-2023-08-29/.

platforms, tools, and services (often for free or at low-cost),[52] meaning they will likely be impacted by increased input costs should the moratorium end.[53] 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.[54]

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

Ahead of the 12th WTO Ministerial in 2022, India and South Africa circulated remarks advocating for changes to the interpretation and applicability of the moratorium.[55] While the countries eventually voted for an extension of the moratorium to March 2024 they were joined by Indonesia, Sri Lanka, and Pakistan in threatening to block its extension,[56] and continue to agitate against the moratorium.

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 created an intentional vulnerability, or "backdoor."[57] 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.[58] Nor do many

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[52] *See, e.g.*, *supra* note 17; 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/.

[53] *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/.

[54] *See, e.g.*, *WTO E-commerce Moratorium & Gender*, TradeExperettes (June 20, 2023), https://www.wto.org/english/tratop_e/womenandtrade_e/item5a_presentation_by_tradeexperettes.pdf.

[55] *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/.

[56] *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/.

[57] *See, e.g.*, *The Nuts & Bolts of Encryption*, Engine (Dec. 2019), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5e28ae1678c38064efa025d2/1579724313903/Dec+2019+Encryption+REPORT-7.pdf.

[58] *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.

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.[59] Compliance with the law would necessarily be incompatible with encryption.[60] As a result it would harm privacy, security, and free-expression, and inhibit companies from offering encrypted services in the EU.

United Kingdom

In 2023, the United Kingdom passed controversial encryption-related provisions as part of the country's Online Safety Bill which would enable their communications regulator, Ofcom, to require intermediaries to source or develop technology to scan and monitor user content—including encrypted private conversations—for CSAM and terrorist activity.[61] Should Ofcom decide to trigger the clause, it would necessarily require companies that offer encryption to break it in order to enable scanning for prohibited content.

India

India's Amendments to the IT Rules, 2021 include provisions that threaten end-to-end encryption by requiring companies to facilitate scanning, which would not be possible without breaking encryption.[62] In 2022, the country introduced legislation targeting encryption and in 2023 banned

[59] *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.
[60] *See, e.g.*, *Breaking encryption myths*, Global Encryption (Nov. 2020) https://www.globalencryption.org/wp-content/uploads/2020/11/2020-Breaking-Encryption-Myths.pdf.
[61] Online Safety Bill 2022-2023, HL Bill [170] cl.122, https://bills.parliament.uk/bills/3137.
[62] *Infra* at §v.

several end-to-end encryption services.[63] Any U.S. startup offering encryption services—especially encrypted messaging—will not be able to reasonably operate in India.

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 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.[64] 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.[65] 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.

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[63] *See,* Tim Cushing, *Indian Legislators Want The Government To Be Able To Intercept Encrypted Messages*, (Sept. 28, 2022), https://www.techdirt.com/2022/09/28/indian-legislators-want-the-government-to-be-able-to-intercept-encrypted-messages/; *India first democracy to ban encrypted messaging apps on massive scale*, Tutunota (May 11, 2023), https://tutanota.com/blog/posts/apps-banned-india.

[64] *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.

[65] 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.

European Union

In 2022, the EU adopted the Digital Services Act (DSA) which will deeply impact U.S. startups ability to serve EU users.[66] The law is in force for large platforms as of now, and will enter force for all others—including nearly all startups large enough to compete in the EU—in early 2024. The DSA 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. To further illustrate this burden for U.S. startups and the negative impact on their EU competitiveness, many of the DSA's requirements are measures that today's incumbents introduced when they had thousands of employees and hundreds of billions in revenue.[67] Startups will need to do the same once they have 50 employees and 10 million euros in revenue, clearly creating a competitive disadvantage and erecting a barrier to the EU market.

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. 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 ongoing 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.[68] Under MR5, companies must register with the regulator before operating in the country

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[66] 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.

[67] Daphne Keller, *The EU's new Digital Services Act and the Rest of the World*, (Nov. 7, 2022), https://verfassungsblog.de/dsa-rest-of-world/.

[68] *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.

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.[69] 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.[70] 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 of the law or implicitly necessary for compliance with other provisions—are prohibitively expensive for startups and ultimately imperfect.[71] Unsurprisingly, companies in India continued to struggle with moderation following the rules.[72]

In both 2022 and 2023 India has further amended the 2021 Intermediary rules in ways that 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.[73] In addition, intermediaries must remove content that the central government says is misleading or lose their safe harbor that enables them to reasonably host third-party content in the

[69] *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/.
[70] *See generally IT Rules 2021*, Hasgeek, https://hasgeek.com/PrivacyMode/it-rules-2021/sub/conclusion-and-recommendations-52QhoWEjWX53uBGieDJVQ3.
[71] *Startups, Content Moderation*, *supra* note 64.
[72] *Supra* note 70.
[73] *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.

first place.[74] India's intermediary liability rules create stiff barriers to competing in the country for U.S. startups, while favoring domestic companies that are willing to advance the government's objectives.[75]

United Kingdom

In fall 2023, the UK Parliament passed its Online Safety Bill, a years-long effort to create an expansive online content rulebook. The bill will soon become law following Royal Assent, at which point it will be the most stringent online regulation among democratic societies. The bill applies to user-to-user services and will impact over 25,000 businesses (and up to 180,000 other businesses that could be impacted) according to the UK government's estimates,[76] which stakeholders estimate to be low.[77] Many U.S. startups that serve UK users are likely to be in-scope, but exact applicability thresholds (and many other key elements of the law) are left to the country's communication's regulator, Ofcom, to prescribe.

The Online Safety Bill upends traditional intermediary liability regimes that have led to the flourishing of startups that serve consumers directly and facilitate user-generated content. It creates age-verification requirements which pose costs, privacy concerns, and practical business challenges for companies, especially startups.[78] It will require companies to remove content that they likely would not in other markets, like the U.S., with the threat of steep penalties if they do not. Practically speaking, compliance with the bill will likely be impossible without proactive monitoring technology, and Ofcom has the power to require its use, anyway. Such technology is flawed and prohibitively expensive for startups.[79]

The UK's impending Internet regulations make the country a much less desirable market for U.S. startups, significantly increase barriers to entry, and introduce new challenges to reaching scale in the UK. Large Internet companies with vast resources may continue to operate in the UK and will be able to overcome any headaches arising from the proposed regime. Innovative startups will struggle

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[74] Ministry of Electronics and Information Technology, Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 275(E) (Notified June 4, 2023), https://www.meity.gov.in/writereaddata/files/Information%20Technology%20%28Intermediary%20Guidelines%20and%20Digital%20Media%20Ethics%20Code%29%20Rules%2C%202021%20%28updated%2006.04.2023%29-.pdf; *see also India: New amendment to the Information Technology Rules that threatens press freedoms must be withdrawn*, Access Now (May 12, 2023), https://www.accessnow.org/press-release/withdraw-india-it-rules/.

[75] Masnick, *supra* note 22.

[76] Department for Digital, Culture, Media and Sport, Impact Assessment, 2022-2023, HL 170 https://assets.publishing.service.gov.uk/media/6231dc9be90e070ed8233a60/Online_Safety_Bill_impact_assessment.pdf.

[77] *The Online Safety Bill is a Ticking Timebomb for Startups*, COADEC (Sept. 16, 2022), https://coadec.com/wp-content/uploads/2022/09/The-Online-Safety-Bill-a-Ticking-Timebomb-for-Startups.pdf.

[78] *See, e.g.*, *Privacy Patchwork Problem: Costs, Burdens, and Barriers Encountered by Startups*, 13 Engine (Mar. 2023), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/6414a45f5001941e519492ff/1679074400513/Privacy+Patchwork+Problem+Report.pdf.

[79] *Supra* note 64.

with the vague standards and resultant costs and may instead avoid the UK market, leaving less competition, and less vibrant trade than otherwise.[80]

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.[81] 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.[82] The results are harmful for startups and can even force them to close up shop.[83]

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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[80] *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.

[81] *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.

[82] *See, e.g.*, Id., at 11-17 (discussing examples of abusive or anticompetitive copyright takedown notices).

[83] *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.[84]

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, court decisions in 2022 cast uncertainty about implementation and which filters have to be (and can be) used.[85] By imposing a "staydown" requirement,[86] the directive effectively mandates the use of upload filtering technology, because use of such technology is the only way to implement staydown.[87] 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.[88] 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, in 2022, 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.[89] 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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[84] 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.

[85] *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/.

[86] Article 17(4)(c) (requiring platforms to implement measures to prevent further uploads of allegedly infringing works).

[87] *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.

[88] *Limits of Filtering*, *supra* note 65.

[89] *See, e.g.*, Cullen, *supra* note 85.

Finally, Article 17 inherently favors larger organizations and certain traditional rightsholder organizations, and disadvantages smaller service providers and the Internet-enabled creators they serve.[90] Many, if not most, larger and established Internet platforms have already developed technology needed to comply with Article 17. 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.[91]

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.[92] While Australian law does provide for a certain level of safe harbor protections, it is narrower than required by AUSFTA.[93]

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.[94] Redbubble was recently found liable for copyright infringement in Australia when a Redbubble user uploaded derivative images of a Pokémon character.[95] This result was reached even though Redbubble had undertaken a number of initiatives to prevent potentially infringing content from being uploaded to and remaining on its site.[96]

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[90] *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/.

[91] *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/5f5a64c6cb585e4abe0cf490/1599759563332/2020.09.10_Engine+Responses+to+Targeted+Consultation+on+Article+17.pdf.

[92] 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 (Article 17.11, Section 29).

[93] 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/.

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

[95] 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.

[96] *Pokémon v. Redbubble*, *supra* note 95 (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").

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.[97] As such, Australian law continues to lack the full coverage contemplated under AUSFTA. This harms startups and disincents expansion into the Australian market.[98] And to further illustrate these issues, several respondents to an Australian government consultation on copyright enforcement earlier this year highlighted the safe harbor shortcomings as a particular challenge in the country.[99]

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.

[97] 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/.
[98] *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.").
[99] Attorney-General's Department, Copyright Enforcement Review, Consultation (May 7, 2023), https://consultations.ag.gov.au/rights-and-protections/copyright-enforcement-review/consultation/published_select_respondent?_b_index=0.