

Before the
DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration

In the Matter of)	
)	
Global Free Flow of Information)	Docket No. 100921457-0457-01
on the Internet)	
)	
)	

COMMENTS OF AT&T INC.

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AT&T Inc., on behalf of itself and its affiliates, hereby submits these comments in response to the Department of Commerce Internet Policy Task Force (“the Department” or “Task Force”) Notice of Inquiry, “Global Free Flow of Information on the Internet” (“NOI” or “Notice”).¹

INTRODUCTION

Governments world-wide have a legitimate interest in addressing important public policy objectives in the context of the Internet. As they do so, it is critical for governments to also take into account the balancing factors that foster and derive from an open Internet, such as human rights, privacy, innovation, market based competition, and consumer confidence in electronic communications. Other public policy objectives such as national security, public safety, law enforcement and preventing harm to children² can present challenges to the free flow of information, which can create tension with the positive social factors that derive from an open

¹ 75 Fed. Reg. 60068, Notice of Inquiry (Sep. 29, 2010) (“NOI”).

² AT&T, Human Rights in Communication Policy (“AT&T Human Rights Policy”), available at: http://www.att.com/Common/about_us/downloads/Human_Rights_Communications_Policy.pdf

Internet.³ It is therefore increasingly important for businesses engaged in international commerce to establish a framework for appropriate engagement within this context, both within the private sector, and through dialogue with the public sector. AT&T desires to be a part of both efforts in all jurisdictions in which it does business in order to encourage both public and private sector policies that are designed and implemented to advance “the free flow of information, research, innovation, entrepreneurship and business transformation,”⁴ and that are consistent with other important legal obligations related to information security, human rights and privacy.⁵

To the extent a government believes there are legitimate reasons for limiting information availability and accessibility online, AT&T believes that such restriction should comport with five basic principles in order to minimize any adverse impact and to reflect an appropriate balance with, at times, competing commercial, legal and social values.

- First, governments should be as *transparent* as possible about any action taken to restrict Internet content or to otherwise limit the flow of information on the Internet through Internet intermediaries such as Internet service providers (ISPs). To this end, Governments should make clear to end users the reason for any such restriction as well as the fact that ISPs are compelled to comply with the government restriction as a matter of law.

³ NOI at 60069.

⁴ Seoul Declaration for the Future of the Internet Economy, June 2008, available at <http://www.oecd.org/dataoecd/49/28/40839436.pdf>.

⁵ International Chamber of Commerce, *Global Business Recommendations and Best Practices for Lawful Intercept Requirements* (June 2010) (“ICC Best Practices”) at 1, available at <http://iccwbo.org/uploadedFiles/ICC/policy/e-business/Statements/373492LawfulInterceptPolicyStatementJune2010final.pdf> (last accessed Nov. 12, 2010)

- Second, any government-imposed restriction on information should be as *narrowly tailored* as possible in order to avoid stifling investment in and expanded access to information and communications technology (ICT), as well as in consideration of the critical human rights and privacy implications of such government mandates.
- Third, in tailoring government action, governments should pursue *less-restrictive alternatives* to direct government information suppression such as expanding law enforcement capacity coupled with due process protections, development of alternative property rights dispute resolution mechanisms, digital citizenship education and the development of digital tools that will allow end users to manage their individual Internet experience.
- Fourth, because end users worldwide have an important and critical interest in exchanging ideas, goods, and services on the Internet, governments should encourage *clear standards and processes* for determining both the lawfulness of Internet content and appropriate and proportionate consequences for trafficking in material that has been authoritatively determined to be unlawful.
- Finally, but critically, while government must retain its primary law enforcement and adjudicatory roles, any role for Internet intermediaries must be *clearly defined* in advancing legitimate public policy objectives so that such intermediaries are neither discouraged from continuing to invest in ICT globally nor compelled, either formally or informally, to exercise harmful restrictions on the free flow of information, goods and services online.⁶

⁶ Internet intermediaries provide access to, host, transmit or index information created by third parties, or provide Internet-based services to third parties, and include Internet service providers as well as website hosts,

I. AT&T, AS AN INFORMATION AND COMMUNICATIONS TECHNOLOGY INFRASTRUCTURE PROVIDER, IS A CRITICAL STAKEHOLDER

At a most basic level, the integrated infrastructure and services that AT&T invents, builds and operates is part of a global platform which enables the ability of end users worldwide to connect and communicate.⁷ Through the services and platforms it provides, AT&T and other providers enable individual, enterprise, civil society and government users to engage in a wide range of commercial, personal, social and political activities. At present, AT&T provides voice data and mobile roaming service to over 220 countries and territories. In order for people around the world to continue to communicate through the Internet using the full range of available and emerging applications and services, the Internet's fundamental infrastructure and existing bilateral agreements must remain in place and continue to receive massive capital investments to accommodate traffic growth. Without such connectivity, the free flow of information is a mere academic aspiration.

In light of these activities, AT&T has a deep appreciation for the importance of the free flow of information to our millions of enterprise and individual customers as well as to societal goals of economic growth, democratic values and civil progress. Indeed, our Human Rights in Communication Policy acknowledges the rights of the users of AT&T products and services to hold and freely share opinions without interference, and to access the full range of ideas and information.⁸ Our Human Rights Policy further acknowledges that restrictions on freedom of expression using communications services and the Internet will diminish their usefulness,

blogging site hosts, social media sites and other services that allow individuals to provide and post information to be hosted online. *See* NOI at 70072.

⁷ AT&T Human Rights policy, *supra*, n.1

⁸ *Id.*

dampen the exchange of ideas and reduce innovation and commercial opportunities. These concerns are precisely the outcomes that the Department should seek to avoid.⁹

In addition, as a global company we are engaged in a number of multi-stakeholder initiatives, such as the International Chamber of Commerce's Global Business Recommendations and Best Practices on Lawful Intercept,¹⁰ which seek to promote international cooperation and best practices for minimizing barriers to the exchange of information around the globe. Active engagement among service providers, governments, users and other stakeholders is the single most effective way to address legitimate concerns about unlawful and harmful Internet information flows, while at the same time ensuring a balanced and narrowly tailored process that promotes the paramount human rights, privacy and commercial interests of users to exchange information and ideas on the Internet.

II. GOVERNMENT POLICIES SHOULD ASSURE THE CONTINUED INVESTMENT IN AND DEPLOYMENT OF A GLOBAL INFORMATION AND COMMUNICATIONS TECHNOLOGY INFRASTRUCTURE

Before there can even be a global free flow of information on the Internet, there must be a global information and communications technology (ICT) infrastructure that is interconnected with a global network. Because deployment, access, and inclusiveness are all essential components of a national policy for promoting the free flow of information, the USG has consistently encouraged the deployment of communications infrastructure in the developed and developing world, while at the same time recognizing that the resulting population benefits – and continued infrastructure investment - may be either facilitated or discouraged by local government policies. In light of the fact that a robust and stable ICT infrastructure serves the

⁹ *Id.*

¹⁰ <http://iccwbo.org/uploadedFiles/ICC/policy/e-business/Statements/373492LawfulInterceptPolicyStatementJune2010final.pdf> (last accessed Nov. 12, 2010)

long-term interests of individual nations and the global information society, government-mandated service provider withdrawal from countries with restrictive information flow practices does not necessarily promote the free flow of information to citizens from that country, particularly if from the perspective of those citizens some Internet connectivity is better than no Internet connectivity.

Global ICT infrastructure investment and deployment demands a significant and sustained service provider investment and presence within any particular country. International market entry typically requires significant internal planning and myriad external regulatory approvals, as well as investment in a fixed network infrastructure and that typically involves an economic life of several years or more. Market exiting is correspondingly complex and often would require the cooperation of the government and other ICT providers, potentially at a substantive economic loss. Therefore, the Department should formulate policies that maintain USG focus on promoting international market entry and the maintenance of competitive markets. If the policy is oriented on forcing ICT providers to exit markets if certain future conditions occur, then that will have the effect of discouraging investments in developing countries.

Fostering an independent regulatory authority is the single most important factor in the successful liberalization of any market's telecommunications sector.¹¹ Just as in domestic markets, meaningful global ICT infrastructure deployment will only take place where there is legal predictability and transparency. A professionally competent regulatory authority independent of both regulated and government entities, possessing unambiguous jurisdiction over the subject matter it regulates and whose adjudicatory and rulemaking proceedings are open, on the record, and subject to judicial review, is in the best position to provide the kind of

¹¹ Principles of Competitive Entry: Independent Telecommunications Regulation and Interconnection Principles (Addendum), Council for Trade in Services - Special Session on Telecommunications Services, Communication from the United States, (World Trade Organization) (June 15, 1999).

legal predictability and transparency needed to maintain ICT infrastructure investment and deployment.¹²

With respect to the free flow of information, a policy approach that encourages US ICT providers to enter foreign markets and provide services globally should go hand-in-hand with a policy approach that promotes consumer confidence in the use of such ICT. Consumer confidence is especially critical for encouraging additional ICT infrastructure investment in developing markets, as well as for the overall adoption of ICT services in those markets. By contrast, government actions in developing markets that impose overly broad limitations on the flow of information on the Internet will invariably chill consumer confidence, service adoption, and additional ICT infrastructure investment. Here again, the role of the independent regulatory will be critical in providing the legal predictability and transparency to ensure consumer confidence.

III. GOVERNMENT POLICIES WITH REGARD TO INTERNET INTERMEDIARIES ARE ESPECIALLY CRITICAL IN PROMOTING THE FREE FLOW OF INFORMATION ON THE INTERNET

As the NOI acknowledges, Congress established the blueprint for a balanced approach to the role of stakeholders in the 1990s through forward-looking measures such as Section 230 of the Communications Decency Act (CDA) and Section 512 of the Digital Millennium Copyright Act (DMCA).¹³

For example, Section 230 of the CDA, establishes a cardinal principle that no provider or user of an interactive computer service shall be treated as the “publisher” or “speaker” of any information provided by another information content provider, and therefore generally permits

¹² *Id.*, *passim*.

¹³ NOI at 60072.

Internet intermediaries to take voluntary, good faith actions to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected, without incurring civil liability.¹⁴ Section 230 has spurred rapid growth in new Internet services and applications by allowing Internet service providers, Website hosts, social network sites, and others from worrying about potential liability for information stored on or moving across their networks.¹⁵

Similarly, the DMCA protects Internet Service Providers when they are engaged in good faith efforts to block or remove access to material alleged to be infringing.¹⁶ Section 512 of the DMCA also creates a conditional safe harbor from copyright infringement liability for qualified Internet intermediaries serving as a “mere conduit” for content.¹⁷ Both the DMCA and the CDA are examples of how a government may strike a balance where objectionable or illegal content is removed, while preserving the ability of Internet intermediaries to continue to provide their vital services.¹⁸

Consistent with those laws, Department policy recommendations should be aimed at preserving important human rights while at the same time identifying a balanced approach (as reflected in the CDA and DMCA) to focusing and fulfilling public and private sector shared responsibilities aimed at addressing unlawful content on the Internet. As the Internet has grown and become an essential platform for distributing content and applications around the globe,

¹⁴ 47 U.S.C. § 203

¹⁵ NOI at 60072.

¹⁶ 17 U.S.C. § 512(g)(1).

¹⁷ NOI at 60072.

¹⁸ *Id.* at 60072-73.

there has been a corresponding increase in the risk of government-imposed limits on content and information flows. It is therefore vital that the U.S. continue to serve as a model internationally by demonstrating that legitimate concerns about unlawful and harmful content can be effectively addressed in a proportionate manner that preserves and promotes the free flow of information on the Internet.

History and experience have shown that when governments clearly define the rights and responsibilities of Internet intermediaries the free flow of information on the Internet is optimized. For example, in the 1990s, USG established primary leadership in establishing a model that provided certain liability protection for intermediaries that act in good faith.¹⁹ This model, which provides enterprise investors with clarity and certainty, has been successful beyond measure in promoting the rapid growth of the Internet. It should remain the foundation of USG Internet policy going forward.

The legitimate concerns that governments have about various types of unlawful and harmful content on the Internet do not warrant a re-thinking of the long-standing approach to Internet intermediaries under U.S. law. Internet intermediaries have a clear and important role to play in responding to government concerns within the context of the current domestic Internet intermediary liability legal framework. Therefore, the Task Force should focus on articulating the specific rights and responsibilities of Internet intermediaries within the existing framework. In particular, Internet intermediaries should not generally be placed in the position of having to make determinations about whether content is unlawful. Rather, governments should retain the primary responsibility for making sure that courts of jurisdiction make transparent and methodical legal determinations against alleged providers and users of unlawful Internet content in all cases, and that such providers and users, in every case, are afforded due process

¹⁹ NOI at 60072.

protections. Safeguarding the rights of Internet users as well as Internet intermediaries will instill consumer confidence and fuel a virtuous circle of international ICT investment, deployment and adoption.

In the 1990s, the overarching legal and policy focus was on the appropriate role of Internet Service Providers (ISPs), which remain in the business of providing access to content and services by way of the Internet. There are, however, many more types of Internet intermediaries operating in the market today, including search engines, content aggregation sites, peer-to-peer services and a wide variety of e-commerce and social networking sites.²⁰ These entities may exert various levels of control over content, which may mean that their roles and responsibilities with respect to government policies that would restrict the flow of information on the Internet will necessarily vary depending upon the nature of the service and the service provider's relationship with end users. Government policies should take into account the increasingly complex role of and the increasingly diverse range of intermediaries within the Internet space.

All customers have an important interest in using the Internet as a platform for legitimate commerce and civil discourse. Thus, significant legal and policy issues are implicated when service providers are required to impose information flow restrictions on these customers based solely on third party allegations. As a practical matter, Internet intermediaries are neither created nor organized to exercise discretionary prosecutorial or law enforcement authority or to administer authoritative adjudications and determinations of contested rights and liabilities. Indeed, US law is structured in such a way as to discourage ISPs from performing such duties typically reserved to the government by denying liability protection in the event an ISP performs such duties. Thus, the Department should formulate policies that promote the adoption of clear

²⁰ NOI at 60072.

standards and processes by which foreign governments (rather than Internet intermediaries) determine both the lawfulness of Internet content and appropriate and proportionate consequences for trafficking in material that has been authoritatively determined to be unlawful by a government-appointed entity.

Governments should limit mandates to restrict content availability and accessibility to addressing compelling social problems where there is broad social agreement, such as harm to children. Within these limited circumstances, Governments should be as transparent as possible about any action taken to restrict Internet content or to otherwise limit the flow of information on the Internet. Governments should make clear that their rules are the source of the restriction, and the reason for the restriction should be clearly articulated to end users. As the International Chamber of Commerce has observed, it is crucial for laws and regulations relating to law enforcement intercepts to be clear and for associated regulatory processes to be transparent, because uncertainty can be a major deterrent to service providers that are seeking to innovate or to enter or remain in new markets.²¹ Governments should also permit, wherever possible, service providers to inform their customers where any access to content is limited by government. In addition, any restriction on information should be as narrowly tailored as possible in order to avoid stifling investment in and expanded access to ICT, as well as in consideration of the critical human rights and privacy implications of such government intervention. In tailoring government action, governments should pursue less-restrictive alternatives to direct government information suppression such as expanding law enforcement capacity coupled with due process protections, development of alternative property rights dispute

²¹ ICC Best Practices, *supra*, n.5 at 8.

resolution mechanisms, digital citizenship education and the development of digital tools that will allow end users to manage their individual Internet experience.

AT&T believes that, where government-mandated information flow restrictions are necessary to achieve a legitimate purpose, such restrictions should be appropriately designed to achieve their intended purpose with input from relevant stakeholders. For instance, in the context of intellectual property enforcement, which we will address in more detail in our forthcoming comments responding to NTIA's notice on online copyright enforcement, AT&T has proposed a streamlined adjudication system for copyright holders to resolve civil infringement claims against end users.²² ISPs would be a partner in this structure, but government would retain its primary law enforcement and adjudicatory role. Other cooperative and collaborative approaches may be appropriate as well, but should not be used to replace or eclipse these critical government roles.

To reduce the need for such intervention in the first place, consumers should be empowered to control their own information flows so that they can self-determine the type of content they want to receive and to manage the online experience of their children. Such customer empowerment and experience will also spur the continued development of commercial services that enable the secure delivery of content to end-users on the Internet. There is an emerging consensus that digital citizenship efforts are an effective way to help address content concerns and may thus minimize government limitations on the free flow of information over the Internet. Education and outreach efforts are extremely important in both fostering responsibility on the part of end-users and stimulating a demand for user-generated online protection measures, thus minimizing the need for more intrusive government action. AT&T supports a number of

²² Letter from James W. Cicconi, Senior Executive Vice President, External and Legislative Affairs, AT&T to The Hon. Victoria Espinel, U.S. Intellectual Property Enforcement Coordinator (March 24, 2010) ("AT&T IPEC Letter") at 4.

such efforts currently, including the Family Online Safety Institute (FOSI). FOSI is an international, non-profit membership organization dedicated to working to develop a safer Internet through the four pillars of outreach events, public policy, technology and education.²³ FOSI members include a range of domestic and international service providers, including AT&T, that work to make the online world a safer place through fostering a culture of responsibility. While a private membership organization, FOSI is a trusted convener of all interested stakeholders, including governments, both nationally and internationally, to collaborate and innovate new solutions in the area of online safety. The experience of FOSI provides a great example to demonstrate that governments can rely on both formal and informal collaborations of the public and private sector to engage in the fundamental educational awareness that must take place rather than employ more prescriptive regulatory approaches.

IV. INTERNATIONAL AGREEMENTS AND MULTI-STAKE HOLDER AGREEMENTS SHOULD BE MAINTAINED TO PRESERVE AND PROMOTE THE GLOBAL FREE FLOW OF INFORMATION

AT&T supports the USG as it speaks out in support of the free flow of information as a component of foreign policy.²⁴ As a matter of company policy, we believe that Internet innovation rests on information exchanges, and that strong protections for freedom of expression and privacy coupled with greater user control ultimately promote free information flows.²⁵ We therefore support the continuing efforts of USG to move international bodies such as the United Nations toward recognition of the value of free information flows, privacy and freedom of

²³ <http://www.fosi.org/aboutfosi.html> (last accessed November 4, 2010).

²⁴ See, e.g., Secretary Clinton Remarks on Internet Freedom, *supra*, note 2.

²⁵ AT&T Human Rights policy, *supra* n .1

expression.²⁶ In addition to multilateral efforts, we recommend that the USG also make progress on bilateral agreements that will promote the free flow of information, such as mutual recognition agreements that enable cross border data flows, while accounting for data privacy or national security concerns. As a global leader in communications, AT&T understands well the need to rationalize international norms in order to promote innovation and progress.

The Department should develop policies that encourage governments to implement the practical global business recommendations issued by the International Chamber of Commerce for achieving consistency among economic goals, legal requirements related to human rights, and legitimate government public policy interests.²⁷ These recommendations are designed to facilitate private sector commerce as well as government interests by minimizing costs to service providers and focusing government intervention in Internet information in narrowly tailored ways. In the case of foreign trade agreements and agreements related to counterfeiting and piracy, the USG should be vigilant to preserve the Internet intermediary balance that Congress has struck in the CDA and the DMCA.

The free flow of information is impacted to the extent multiple jurisdictions enact multiple requirements with respect to dynamic new technologies that hold great prospects for world-wide economic growth, such as location-driven applications for wireless devices and cloud computing. Consumer adoption of and confidence in ICT is inextricably tied to these offerings, due to the ubiquity of mobile devices, the growing prominence of cloud computing. Yet the private sector faces challenging legal uncertainties with respect to these and other new

²⁶ See, e.g., Tunis Agenda For the Information Society, World Summit on the Information Society, WSIS-05/TUNIS/DOC/6(Rev.1) ¶ 42 (2005) (“We reaffirm our commitment to the freedom to seek, receive, impart and use information, in particular, for the creation, accumulation and dissemination of knowledge. We affirm that measures undertaken to ensure Internet stability and security, to fight cybercrime and to counter spam, must protect and respect the provisions for privacy and freedom of expression as contained in the relevant parts of the Universal Declaration of Human Rights and the Geneva Declaration of Principles.”).

²⁷ ICC Best Practices, *supra*, n.5 at 4-8.

technologies. Harmonization and clarification of divergent legal rules would help service providers understand their rights and responsibilities provide individuals assurance and confidence, and facilitated continued ICT infrastructure investment. In these forward looking areas of mobile device and cloud computing communications, AT&T encourages governments to enter into mutual recognition agreements that will foster the free flow of information. This will set an example that other countries can follow, and it will be a far better example than the alternative, which is the risk that some countries will begin to require balkanized national Internets and clouds.

U.S. leadership is essential to advancing the development of a strong international framework that will facilitate transborder data flows and the growth of the global Internet. Dramatic decreases in transport costs and increased connectivity arising from the Internet create an enormous opportunity for cloud computing and other service platforms that can overcome geography and distance limitations. Local data storage and similar requirements can be disruptive to transborder data flows and thus impact the global free flow of information. The U.S. government is a critical partner in helping to shape international dialogue toward technological neutrality and legal harmonization.

Finally, AT&T agrees with the Task Force that multi-stakeholder cooperation and engagement can be an effective way to promote international cooperation and the adoption of best practices on Internet policy issues, such as policies concerning the free flow of information.²⁸ As discussed in the NOI, the Internet Governance Forum (IGF) is a multi-stakeholder forum that places governments, the private sector, civil society and others on equal footing for an open dialog on Internet policy issues. The IGF has been a valuable forum to

²⁸ NOI at 60073.

discuss concerns about limitations on the free flow of information and develop best practices for promoting forward-looking policies such as digital citizenship programs. One of the most effective ways to promote the free flow of information is to help governments identify constructive approaches for addressing legitimate content concerns as an alternative to imposing overly broad content restrictions.²⁹

²⁹ Policymakers should not attempt to delegate the resolution of Internet content issues to organizations involved in the management of, or technical standards-setting process for, the Internet. In those contexts, some governments may inappropriately seek to establish new mechanisms for limiting the flow of information on the Internet or incorporating censorship capabilities into the workings of the global Internet.

CONCLUSION

The Task Force can have the most positive impact on the free flow of information on the Internet by establishing a policy framework that: supports open markets and regulatory frameworks conducive to infrastructure investment and deployment; re-affirms a balanced approach to Internet intermediaries and liability issues; and promotes the establishment of multi-jurisdictional agreements and removal of government barriers to trans-border information flows.

Respectfully Submitted,

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