Docket Number:
180124068–8068–01

Re: International Internet Policy Priorities

SUBMISSION OF THE AD HOC COALITION FOR COPYRIGHT AND DIGITAL PROSPERITY

The individuals and organizations identified below are a diverse group of performers, songwriters, musicians, authors, academics and others who share an abiding interest in expanding opportunities for the creative sector through internet commerce. The internet has the capacity to fuel a cultural renaissance, and enhance economic competitiveness. Alas, far too much of that potential has been lost as a result of the culture of lawlessness and lack of accountability that define broad swaths of the internet ecosystem. Recent events have helped to promote an awareness that societies are not prepared to accept lack of responsibility as the default setting for judging conduct on the internet. For internet commerce to drive global prosperity, it must be built on a framework that demands accountability. The NTIA document makes the following observation: "restrictions on the free flow of information are jeopardizing the economic, social, and educational opportunities provided by the internet. Perhaps even more importantly, the free flow of information on the internet enables basic human rights, such as the freedom of expression." We believe that is misleading and incomplete. It is a more accurate reflection of the world to observe that while some restrictions jeopardize economic, social and educational opportunities, these opportunities are even more fundamentally limited and challenged by the absence of modern copyright laws to protect expression—the lack of accountability in the internet ecosystem rather than a surfeit thereof.

While the NTIA observation may be true for a certain limited number of countries operating under authoritarian rule, it does not accurately capture the nature of challenges in the US and other democracies. In short, we find the underlying premise of this exercise to be ill-considered and incomplete. NTIA is in fact not making a neutral observation of the world, but setting forth a partisan perspective on the nature of the challenges we confront in the internet space. It is predicated on a definition of freedom that examines only the existence of restraints and not whether expression is empowered. This celebration of a negative freedom risks creating a freedom in which expression is legally possible but practically impossible to exercise. It is a flawed vision that assumes a fixed and culturally neutral definition of "free flow of information" and "freedom of expression" when neither concept is capable of being understood absent context. It is a reflection of the cyberlibertarianism that has served as the guide for the first twenty years of the commercial internet, and which has failed us in many respects. As articulated below, we urge a course correction based on the understanding that a failure to protect expression is inconsistent with freedom of expression, and that this more realistic freedom is dependent upon the rule of law and an appreciation for national sovereignty which reflects cultural, social and political distinctions between Nations.

In this relatively short submission, we highlight our belief in the potential of the internet to drive creativity and prosperity, but note that this potential will not be realized unless societies demand the technology neutral application of the law. We can not allow conduct to take place via the internet that we would find intolerable in the physical world, yet there are many who would lead us down that path. Internet freedom can not, in a civilized world, mean the freedom to act without regard to legality, and to be free of the consequences of one's conduct.

To pave the way for the transformation to healthy digital commerce, it is necessary to establish the conditions for digital commerce to succeed in ways that have thus far eluded us. That includes a number of elements, but ultimately requires the development of more mature principles of law and business than those that propelled the first 20 years of innovation on the internet. As with many paradigm shifts, the first generation of internet policy-making was mostly predicated on governments and institutions getting out of the way of private actors. While that must remain a core element of future governance strategies, it is clear that it is, on its own, inadequate in addressing the needs of societies, workers and businesses in the new economy. Securing the technological application of the rule of law — and modifying the law where appropriate — are the prerequisites for advancing the digital economy and creating global prosperity.

We should strive to eliminate barriers and reduce costs for operating global services, including a liberalized framework for cross-border transmission of data, while providing means for governments to enforce their sovereign authority and to protect their nationals through the application of national laws. Web 1.0 assumed an homogenized global market without legal or cultural differences, and treated national prerogatives as impediments to the free flow of information. If we want to expand the growth of the "digital economy," we must develop new modalities and tools for segmenting markets. While that seems a heretical thought from the standpoint of Web 1.0, it is increasingly obvious that it is a critical condition of expanding trust in the expansion of the digital economy. Web 1.0 thinking was too binary to sustain the development of a new global economy. To capture the potential of new technologies to drive global and shared prosperity, we need to marry discipline, restraint and freedom, understanding the multi-faceted nature of a freedom that doesn't only contemplate lack of restraints on the actor.

Many of the elements of driving the global digital economy have been expressed in one forum or another, and many of them are quite obvious. We should eliminate unnecessary restraints on cross-border data flows. That has been a clear objective for businesses and some governments for some time now, but has been understood by others as a scorched earth campaign resting on the assumption that any restraint is unnecessary. It is time to move on — the only way that we can liberalize data flows is through explicit recognition that this doesn't eliminate sovereignty. Governments have a responsibility to their people to uphold national laws regardless of the means by which commerce/information is distributed. Enhancing the legal and practical ability to uphold national laws should allow us to drive greater consensus about removing impediments to global data flows. Again, the key is to moderate the pervasive winner-takes-all approach of web 1.0 ideology.

That begins with a clear recognition that all restraints on data flows are not a form of digital protectionism. That includes various measures related to what we might deem censorship, as well as measures aimed at protecting privacy or otherwise applying the rule of law to communications or conduct affecting the relevant jurisdiction. A 21st century digital trade agenda needs to be far more pluralistic than the simple flat-earth, idealistic and culturally insensitive notions underlying the early development of the internet. Technology may allow information to easily cross borders, but that doesn't eliminate national differences and the continued importance of national sovereignty.

Acknowledging that will facilitate the development of normative structures and global legal commitments that will foster global commerce based on countries taking the least restrictive measures to limit the flow of information and ability to do business across borders. But to achieve that, we need to cultivate trust at various levels — including trust that facilitating the growth of global digital markets does not equate to a loss of sovereignty. Governments have chosen to limit data flows or to force

localization as a means of sustaining control, and have thereby increased costs and the stymied the development of global commerce that could bring significant benefits to their consumers.

Clarifying the jurisdiction of national courts to adjudicate online conduct without regard to the geographic location of the actor (assuming a proper nexus with the state asserting jurisdiction that doesn't offend due process and fairness) could go a long way towards eliminating business costs associated with localization or other restrictions on data flows. But we will not prevail if our agenda for liberalization is seen as a demand for countries to demur to US practices and cultural preferences. That is not a winning strategy. There was much discussion of balkanization standing in the way of globalized prosperity and freedom during web 1.0. But this vision failed to acknowledge that our virtual world touches and affects people and businesses in ways that are very tangible, and that governments were not prepared — and more importantly, were right to not be prepared — to be relegated to addressing 20th century conduct. That technology allows borders to be crossed instantaneously doesn't make those borders any less meaningful. By labeling every restriction as leading to a balkanized net or as an impediment to the free flow of information, we failed to articulate a sustainable model for internet governance which allowed us to make the critical distinctions between digital protectionism and reasonable efforts to uphold national laws in a technology neutral manner.

USTR has set out its "Digital 2 Dozen" which usefully sets out some basic trade objectives for expanding digital commerce, essentially outlining the framework for the least restrictive rules for digital trade while allowing flexibility to protect national sensitivities. We support these particulars, but note that they address only one aspect of expanding digital commerce — agreement of governments to refrain from overt digital protectionism. However, to sustain the growth and vitality of global digital commerce, nations need to work together to develop consensus on underlying issues of trust and security that, left unaddressed, will undermine the health of the global trading system. Gaps in cybersecurity, privacy and consumer protection will inevitably create unbearable strains on the digital ecosystem, leading to new restrictions on data flows and/or the introduction of new inefficiencies in global commerce. It is therefore critical that we seek to harmonize, to the greatest extent possible, national approaches to these key issues to engender greater trust in the ability of global institutions and bodies to address harms. Enhancing accountability of all actors in the internet ecosystem is a critical component of driving trust in the digital economy. Attempts to liberalize the rules of digital commerce will fail if advocacy is understood as an endorsement of lawlessness and/or an attempt to apply the First Amendment or other US laws as the default principles for global commerce. To support a global digital economy, and not just propel a global information commons, nations and businesses must coalesce around a series of rules that establish certainty and security in commercial transactions. We must build rules from the ground up and not merely encourage government restraint.

As participants in the creative community, we have witnessed first hand how the absence of adequate rules related to internet conduct can have dramatic and negative consequences on the ability of cultural/creative workers to sustain themselves from their craft—much to the detriment of societies. Luckily governments around the world have begun to understand how economic stability and cultural diversity have been harmed by rules which fail to require internet platforms to operate with a reasonable duty of care, and are beginning to reexamine internet governance principles adopted twenty years ago.

The European Commission has been particularly engaged, and is presently considering amendments to its framework of internet governance, work on which began in 2015 with the issuance of a Communication which reflected its recognition that the framework of legislation established in the mid-

1990's was no longer adequate. The Commission wisely observed: "An effective and balanced civil enforcement system against commercial scale infringements of copyright is central to investment in innovation and job creation. In addition the rules applicable to activities of online intermediaries in relation to copyright protected works require clarification, given in particular the growing involvement of these intermediaries in content distribution. Measures to safeguard fair remuneration of creators also need to be considered in order to encourage the future generation of content."

The understanding of the need to rebalance rules is a very welcome reexamination of internet rules adopted in the late 1990's (i.e. the era of dial-up and bulletin boards) that were designed to ensure that intermediaries were not held liable for third party content uploaded onto their networks over which they had no control or knowledge. The principles underlying safe harbors in the US and EU were sound, and helped to drive innovation in the digital space. However, they are clearly showing their age and are no longer operating as intended. Instead of providing reasonable protection to intermediaries that are operating responsibly, they have created incentives for online services involved in content distribution to implement architectures and practices to create plausible denial of knowledge of infringement, or willful blindness. One often hears the term "DMCA license" when no license is established under the DMCA. Safe harbors were not intended as alternatives to licensing for content distributors, but too often they have become just that. And takedown has replaced reasonable care in the conduct of intermediaries. But takedowns only occur once injury has already taken place, and infringing content is quickly re-uploaded in any event. In short, while notice and takedown may have worked in a more innocent and less technologically advanced age, it operates as a continuing injustice in an environment in which platforms engage in the willful distribution of infringing materials, subject only to the requirement to delete specific files when they are notified.

It is a matter of the first importance that we achieve clarification that only intermediaries that are truly passive and neutral with respect to the content that they host or communicate are eligible for safe harbors. Creators are dependent upon the effective functioning of the internet in order to grow and thrive, and would join others in opposing measures which placed unreasonable burdens on internet platforms or services. But simply clinging to 20 year old norms in an environment of rapid technological change is irresponsible, and we should encourage examination and experimentation. There are some in the US who, while touting "disruption" will insist on absolute fealty to the status quo. But if we are going to seize the potential for economic growth and job creation presented by developments in technology, we must look forward, and not merely cling to the past.

Particularly as the world's greatest producer of copyright works, we believe that the United States should be as supportive as possible of efforts to create a more robust digital marketplace for the creative sector. Ensuring that safe harbors meet their intended purpose of promoting responsible conduct is a key element of a healthy digital future, and deserves your support. There has been an explosion of interest in the United States due in large part to issues which arose in connection with Cambridge Analytica/Facebook, but the underlying issues of internet governance go far beyond that. Facebook is not an outlier — they are an example, and far from the worst one, of maintaining governance strategies that essentially abandon democratic governance. Of pursuing a parochial vision of freedom based on cyberlibertarian principles that ignore the effects of one's actions. Of celebrating permissionless innovation without due regard for making distinctions about what actions should require permission and/or oversight. Of believing that disruption on its own is worthwhile without regard for consequences.

We in the arts community have been canaries in the coal mine, and our experience is instructive. We have witnessed first hand how language of freedom is used to justify theft, and how the protection of expression is characterized as inconsistent with freedom of expression. As societies around the globe confront the implications of present internet business models, it seems a most appropriate occasion to recognize the unique role of artists in the flowering of free expression, and in creating the kind of world that we wish to inhabit. The author, Marty Rubin captured this nicely: “Artists, by their free expressions, encourage others to be free. This is the quality that makes works of art enduring.”

Yet, many groups continue to suggest that the protection of expression is a form of censorship or restriction on fundamental freedoms. We must end this assault on our humanity and the misappropriation of fundamental human rights. If the protection of expression is itself a restriction on freedom of expression, then we have entered a metaphysical Wonderland that stands logic on its head, and undermines core, shared global values about personhood. It is time to open the curtains and see these practices for what they are.

We must use this “Facebook moment” to rethink the celebration of disruption for its own sake. Disruption as a way of shaking up the status quo may be great, but not where the disruption is effected by facilitating theft or otherwise ignores the consequences of conduct. No reasonable definition of innovation should serve as an invitation to, or protection of, a business model based on the theft of intellectual property. It is a matter of the greatest importance — to our economy, our culture and our very humanity, to fully reflect the importance of consent and rules in the networked environment — a framework which promotes openness, not anarchy, and firmly rooted in celebrating works of expression that reflect and fuel our appreciation of the freedoms associated with expression.

There will always be individuals or enterprises who are prepared to steal whatever they can, but we can — and must — stop providing moral cover by conflating copyright enforcement with censorship, or by misapplying notions of internet freedom or permissionless innovation so that they extend to an embrace of lawlessness.

The potential of the internet and other communications technologies to drive economic growth, prosperity and cultural production has been greatly undermined by distortions in the marketplace caused by the lack of adequate governance that allows companies to illegally traffic in what are essentially stolen goods. Many of those who profit from the status quo like to disguise their self-interest in rhetoric about free expression. It is long past time to end this dangerous charade. We are not serving free speech by making it harder for creators to earn a living from their original expression. Free societies can no longer tolerate the continued indifference to the rights of creators.

We define our society by the extent to which we empower the exercise of free will and the ability — legal and practical, to determine the use of our identities and our property. Recent focus on the relationship between privacy and consent must serve as an invitation to examine the broader issues of consent and platform responsibility, or we will end up addressing only a symptom and not the cause. If the lesson of recent developments is that we should delete Facebook, then we will have sorely missed the point, and will continue to rely on a false narrative that human agency is a sufficient check on the functioning of tech platforms even as human agency is effectively eroded. What’s needed is democratic governance — the application of law and incentives for accountability.

Neil Turkewitz, on behalf of the following individuals and organizations who have come together in this ad hoc coalition for copyright and digital prosperity.

Richard Bennett, Founder, High Tech Forum
Jason Berman, former Chairman & CEO of the Recording Industry Association of America (RIAA) and IFPI
William Buckley Jr., Executive Director, FarePlay
Stephen Carlisle, Copyright attorney and former law professor
Chris Castle, Attorney
Dean Kay, Songwriter: "That's Life" Curator: The Dean's List
Phil Galdston, songwriter, co-founder Music Answers
David Golumbia, Associate Professor of Digital Studies, Virginia Commonwealth University
Alan Graham, Author, CTO & Co-Founder OCL
Devlin Hartline, Assistant Director, Center for the Protection of Intellectual Property
Hugh Hansen, Professor of Law & Director, Fordham IP Institute
Andrew Keen, Author of "How To Fix The Future"
David Lowery, Singer/Songwriter Camper Van Beethoven and Cracker
Brian McNelis, Music Executive
Blake Morgan, Artist & songwriter, founder of #IRespectMusic campaign
David Newhoff, Writer
Mary Rasenberger, Executive Director, The Authors Guild
East Bay Ray, guitarist, co-founder, songwriter of Dead Kennedys
Marc Ribot, Guitarist, and Chair of Artist Rights Caucus of Local 802 AFM
Chris Ruen, author of "Freeloading"
Maria Schneider, Composer, bandleader
John Simson, Executive in Residence and Program Director, Business & Entertainment, Kogod School of Business, American University
Jonathan Taplin, Director Emeritus, Annenberg Innovation Lab, University of Southern California
Amanda Colleen Williams on behalf of Songpreneurs Community,
https://www.songpreneurs.com/about
David Wolfert, songwriter/composer, co-founder Music Answers
Doug Wood, composer, co-founder Music Answers

Note: Unless otherwise specified, members of this Ad Hoc Coalition are signatory in a personal rather than representational capacity