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ABSTRACT

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ONLINE INTERMEDIARY PROTECTIONS

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- *Intermediaries such as telecommunications and online service providers perform essential functions in promoting the Internet economy. Exposing these service providers to legal liability for the actions of users inhibits investment, retards growth, and raises the cost of service.*
- *The desire to hold businesses responsible when Internet users post inappropriate content must be balanced against the economic value that unencumbered communications add to the knowledge-based economy. Service provider protections must be a component of U.S. domestic and foreign policy if the Internet economy is to continue growing.*

Background: The modern, networked economy depends on intermediaries that provide functionality relating to communications networks, such as broadband Internet access providers (IAPs), websites, and online services that relay third party information. These services are often broadly described as “ISPs” – Internet service providers.

ISPs have enabled e-commerce to become a vital component of the U.S. and global economies, providing a unique opportunity to leverage American innovation in the international marketplace. According to White House estimates, the Internet adds \$2 trillion to annual GDP – over \$6,500 per person.¹ The U.S. Internet industry leads the world, dominating audience metrics throughout industrialized nations.

While powering the information economy, service providers must instantaneously reproduce and transmit vast amounts of data without knowledge of its content. Estimates indicate that the number of unique web pages passed 1 trillion in 2008, and major service providers are known to process many petabytes of data on a daily basis.² YouTube reports that 35 hours of video are uploaded *every minute*; Twitter reports 150 million tweets *per day*; the photo-sharing site Flickr now hosts more than 5 billion photographs.

As a result, various interests demand that ISPs police and censor third party speech – for example, defamatory postings, copyright infringement, or adult content – or face potentially ruinous liability. However, these service providers often lack control over content – either because it is hosted elsewhere online, or due to the extraordinary volume of communications that a service provider handles. Since the 1996 Telecommunications Act, Congress has recognized that holding Internet and e-commerce businesses liable for the conduct of their users would unreasonably burden service providers and the online communications that they facilitate.

¹ Exec. Ofc. of the President, Nat’l Econ. Council/OSTP, *A Strategy for American Innovation: Driving Towards Sustainable Growth and Quality Jobs*, Sept. 2009, at 5, available online at <<http://www.whitehouse.gov/administration/eop/nec/StrategyforAmericanInnovation>>.

² One petabyte is equivalent to approximately 68 billion pages of Word documents, or 100 billion pages of email.

Growing Foreign Liability: Overseas, online intermediaries are also threatened by expanding liability risks. American companies have been hauled before European courts to answer for the actions of Internet users, regardless of whether policing content is even possible. In several cases these have been actions expressly permitted by U.S. law. In France, eBay has been fined over \$60 million for the sale of legitimate used luxury goods on its U.S.-facing site to French consumers. An Italian court imposed *criminal* liability upon Google executives after Italian schoolchildren posted a video to YouTube of them bullying a child with disabilities, notwithstanding the fact that when notified YouTube promptly removed the video and assisted in apprehending the perpetrators. Similarly, another Italian court recently imposed liability on Yahoo, because among the thousands of results obtained when searching for the name of a movie, links were displayed that led websites allegedly offering unauthorized access to that film. These rulings would force upon online services the impossible task of policing and regulating online speech, at the risk of sacrificing the very nature of the Internet.

U.S. Legal Framework: Presently, two statutes mediate the liability of online intermediaries for user actions. The first, § 230 of the Communications Decency Act, protects intermediaries from liability for a variety of user actions (excluding matters such as federal criminal law and intellectual property). This allows Internet companies to review and remove undesirable or potentially illegal content without fear that investigating complaints will lead to additional liability. The second, § 512 of the Digital Millennium Copyright Act, limits remedies available against online intermediaries whose users are implicated in copyright infringement, provided that the intermediary complies with a ‘notice and takedown’ system specified by statute.

Providing online intermediaries the necessary statutory protections from their users’ actions takes on a heightened importance due to the current trajectory of innovation in the computer industry. The foundation of “cloud computing,” the recent phenomenon involving IT platforms and services moving from the user’s premises to remote data centers, is the third party storage of user data. As more and more data moves online, the harder it is for a host to preemptively screen it. If protections for ISPs erode, the rapid innovation and economic growth that has characterized the Internet sector will grind to a halt.

CCIA’s Position: Making intermediaries liable for transmitting particular content in the ordinary course of business will inhibit investment, retard growth, raise the cost of service, and hinder deployment of new and innovative products and services online. Due to the extraordinary volume of Internet communication, foreign courts that insist upon *ex ante* review of content by U.S. service providers effectively erect impenetrable trade barriers to Internet commerce. Nor is it good public policy to establish Orwellian legal regimes in which ISPs police all Internet communication. Just as we do not require commercial shippers to open packages that they carry, online intermediaries must not be obligated to invade users’ privacy and “read their mail.” Efforts to make service providers responsible for the nature of third party content must be balanced against the economic value that unencumbered communications add to the knowledge-based economy. Given the increasingly hostile application of domestic law to U.S. companies overseas, U.S. trade negotiators must make intermediary protections a requirement in trade negotiations, including the Trans Pacific Partnership (TPP) presently under negotiation.