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Internet Association

December 20, 2016

The Honorable John Kerry  
Secretary of State  
U.S. Department of State  
2201 C Street, NW  
Washington, DC 20520

The Honorable Penny Pritzker  
Secretary of Commerce  
U.S. Department of Commerce  
1401 Constitution Ave., NW  
Washington, D.C. 20230

The Honorable Michael Froman  
United States Trade Representative  
Office of the United States Trade  
Representative  
600 17th Street NW  
Washington, DC 20508

*Re: EU Copyright Measures Threaten U.S. Exporter Market Access*

Dear Secretary Kerry, Secretary Pritzker and Ambassador Froman:

We write to express serious concern about a recent copyright proposal from the European Commission that would harm U.S. digital exporters operating in the European Union. We ask that you engage with European officials to ensure that the EU does not depart from shared, well-established principles regarding copyright protection.

The Commission's *Proposal on copyright in the Digital Single Market*<sup>1</sup> risks undermining trans-Atlantic commerce and internet openness. If implemented, it would substantially impede U.S. digital exports and, more broadly, threaten innovation and commerce on both sides of the Atlantic.

As discussed below, the Commission proposes imposing a mandate on online platforms to design content filtering technology that identifies copyright protected material. This is a significant departure from well-established, internationally recognized principles that protect responsible online platforms from liability for users' misconduct, provided they respond expeditiously to specific complaints of infringement. It would also create blanket liability for user misconduct and potentially compel services to surveil users, which would be inconsistent with both EU and U.S. law.

The Commission also proposes creating a new quasi-copyright called a "neighboring right," which would give news publishers the right to charge fees to online services that display small snippets of news content, such as headlines. This would result in mostly American online services in effect subsidizing EU publishers, with the likely result that the businesses of both the publishers and the online services would suffer.

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<sup>1</sup> Available at <https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market>.

Overall, the proposal would undermine what has become mutually beneficial trade in digital commerce. For example, it recommends a copyright provision to encourage innovative text and data mining, but the provision only extends to universities and research institutes, not businesses. It thus casts a legal cloud over text and data mining initiatives across the commercial sector.

The internet is the greatest American export of the 21st century. In fact, U.S.-based internet companies have over 70% of their users and earn over 50% of their revenues from abroad.<sup>2</sup> Thanks to U.S. ingenuity and stewardship, the internet has democratized access to information, created platforms for new voices, spread American values, and enabled the global e-commerce that brings all manner of goods directly to our homes in a matter of hours. At home, the internet is a crucial domestic industry as online services are a fundamental enabler of the U.S. economy, and contributed 6% of GDP, or one trillion dollars, in 2014.<sup>3</sup>

### **I. A content filtering obligation breaks with open internet principles and free speech norms. (article 13)**

The requirement for online services to deploy content filtering technology would represent a significant departure by the EU from its shared approach with the United States on the foundational principles of a free and open internet. The internet is a vibrant and economically valuable platform in large part because of intermediary safe harbors, which permit people to post material—such as videos, reviews, and pictures—online without unduly exposing platforms to liability for the misdeeds of a tiny minority of users.

Indeed, both U.S. law (under the Digital Millennium Copyright Act) and EU law (under the E-Commerce Directive) contain a safe harbor that protects online services from liability for user misconduct, as long as the service acts responsibly, such as by taking down content after being given proper notice that it infringes copyright. A bedrock principle of both the U.S. and EU safe harbors is that online platforms are not required to proactively seek out potential infringements, given the difficulties of knowing what is authorized, what is permitted by copyright exceptions, and who owns the millions of works that could appear on online platforms. The Art. 13 proposal threatens to upend that principle, imposing a wide-ranging, uncertain, and technically unworkable filtering obligation on all online platforms. Increasing risk and uncertainty would dramatically impair online platforms' ability to attract investment for continued innovation.<sup>4</sup>

Filtering technology is incredibly expensive to develop and maintain. YouTube spent \$60 million on filtering technology alone. The EU proposal would require hosts of all forms of user-generated content—not just music or videos—to implement filtering technology for all types of copyrighted works. No startup or entrepreneur could afford even a fraction of that \$60 million cost, and no venture capitalist would fund a company that required so much money to create a rights enforcement tool. The proposal is particularly unwarranted in light of the many voluntary efforts by leading platforms that have the resources and where the needs are greatest.<sup>5</sup> This also seems at odds with reliance on multi-stakeholder best practices, as emphasized in the U.S. Joint Strategic Plan On

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<sup>2</sup> Interactive Advertising Bureau, *Economic Value of the Ad Supported Internet Ecosystem* (Hamilton Consultants 2009), <http://www.iab.net/media/file/Economic-Value-Report.pdf>.

<sup>3</sup> Internet Association, *New Report Calculates the Size of the Internet Economy* (Economists Incorporated 2015), <https://internetassociation.org/121015econreport/>.

<sup>4</sup> Matthew Le Merle *et al.*, *The Impact of U.S. Internet Regulation on Investment* (Fifth Era 2016) at 7, 25-26, <http://www.fifthera.com/perspectives-blog/2016/1/7/report-the-impact-of-internet-regulations-on-investment>.

<sup>5</sup> For example, YouTube's Content ID system, as well as similar systems used by DailyMotion, SoundCloud, Scribd, and others platforms attempt to match content against reference material that has been supplied by rights holders.

Intellectual Property Enforcement for 2017 - 2019, as just released this week.<sup>6</sup> Because adoption of the Commission's proposal would serve as a significant entry barrier to future U.S. online services from entering EU markets, it poses a real threat to U.S. digital exports.

## **II. The twice-failed neighboring right proposal will drive valuable U.S. services from EU markets.**

The Commission's proposal would create a new 20-year right allowing news publishers to demand payment or block online services from accessing even small snippets of their content. Similarly misguided national measures have already failed in Germany and Spain. Rather than paying to provide users with headlines or other news "snippets," online services might simply stop showing such content, causing traffic to news publishers to plunge. In Germany, many publishers decided against charging a fee for this reason, ultimately undermining the entire purpose of the measure.

The European Commission appears to ignore the positive and symbiotic relationship between online services and news publishers. Searching for news and information online is as ubiquitous as turning on a television or radio. Online services direct significant amounts of traffic to news publishers that supports their businesses. A "neighboring right" would jeopardize that traffic, which is why many German publishers chose not to exercise it.

We encourage you to engage EU policymakers on this issue and ensure that U.S. trade policy reflects the integral role that digital trade and the internet play in our modern economy. Should Europe break ways with our mutual approach toward online platforms, it will chill innovation on both sides of the Atlantic.

Sincerely,



Ed Black  
President & CEO  
Computer and Communications  
Industry Association



Gary Shapiro  
President & CEO  
Consumer Technology Association



Dean Garfield  
President & CEO  
Information Technology Industry Council



Michael Beckerman  
President & CEO  
Internet Association

Cc: The Honorable Anthony L. Gardner, United States Ambassador to the European Union

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<sup>6</sup> Supporting Innovation, Creativity & Enterprise, Charting A Path Ahead, U.S. Joint Strategic Plan on Intellectual Property Enforcement, FY 2017 – 2019, <https://www.whitehouse.gov/sites/default/files/omb/IPEC/2016jointstrategicplan.pdf>.