

Before the
International Trade Commission
Washington, DC

In re

Global Digital Trade 2

Investigation No. 332-562

Global Digital Trade 3

Investigation No. 332-563

**POST-HEARING SUBMISSION OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

This post-hearing submission supplements the oral testimony by the Computer & Communications Industry Association (CCIA)¹ at the public hearing on March 6, 2018, as well as written comments supplied in response to the U.S. ITC’s January Federal Register notice, at 83 Fed. Reg. 3,185 (Jan. 23, 2018).

I. Status of the European Commission’s Proposal to Create a Publishers Right

The European Commission released its Proposal for an EU Copyright Directive in 2016.² Article 11 of the EU’s proposed Directive creates a new right for press publishers.³ Despite a study from the European Parliament criticizing the proposed publishers right,⁴ the proposal continues to proceed.⁵ This new right would be detrimental to small press publishers, to Internet users, and more generally to the free flow of information.

A compromise is currently being discussed among EU Member States’ permanent representatives. One compromise creates a relatively more reasonable solution, replacing the

¹ A list of CCIA members is available at <https://www.cciagnet.org/members>.

² Proposal for a Directive of the European Parliament and the of the Council on Copyright in the Digital Single Market, COM/2016/0593, *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0593>.

³ *Id.* at Art. 11.

⁴ L. Bently, Strengthening the Position of Press Publishers and Authors and Performs in the Copyright Directive, Legal Affairs Committee of the European Parliament (2017), *available at* [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU\(2017\)596810_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf) (expressing doubts that “proposed right will do much to secure a sustainable press” and that the “implications of article 11 for the re-use of snippets are [...] extremely serious”, that there is “no concrete need to extend” this provision to cover print as well as digital uses, cautioning the EU Parliament strongly against this extension, and stating that extending the scope of this provision to cover academic journals would strongly undermine open access policies). *See also* Draft Opinion, Committee on the Internet Market and Consumer Protection (2017), *available at* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-599.682+02+DOC+WORD+V0//EN&language=EN> (“The Rapporteur believes that the introduction of a press publishers right under Article 11 lacks sufficient justification.”).

⁵ At the European Parliament, the rapporteur has not yet started the negotiations on this article.

new right in the proposed Directive with a “presumption of entitlement to license and enforce the rights in their press publications.” The legal presumption does raise some questions.⁶

The other compromise goes further than the EU’s proposed Article 11 towards an explicit neighboring right for extracts of press publications. This compromise option would provide “that the uses of extracts of press publications should be subject to the authorisation of the press publisher.”⁷ This option would be a clear violation of international commitments as it restricts the quotation right for online publications.⁸ CCIA continues to follow the developments and fears that the EU may be inclined to ignore the evidence provided by their own committees and pursue this option.

II. Specifics on the Cloud Service Providers Regulation in China

U.S. cloud service providers have been at the forefront of the movement to the cloud worldwide⁹ and are strong American exporters.¹⁰ The International Trade Administration estimated that there was a surplus of cloud computing services of approximately \$18 billion in 2015.¹¹

China has adopted discriminatory practices against U.S. cloud service providers with increasing frequency in recent years. Draft regulations in conjunction with existing Chinese laws threaten to further disadvantage U.S. companies. There are two draft regulations that threaten to significantly disadvantage U.S. providers issued by the Ministry of Industry and Information Technology (MIIT): *Regulating Business Operation in Cloud Services Market* (2016) and

⁶ See Maud Sacquet, *The EU Copyright Reform: Will the EU Parliament Fix the EU Commission’s Disastrous Proposal?*, THE DISRUPTIVE COMPETITION PROJECT (Mar. 29, 2017), <http://www.project-disco.org/intellectual-property/032917-eu-copyright-reform-will-eu-parliament-fix-eu-commissions-disastrous-proposal/#.WqLZfxPwZTa> (“However, it needs to be looked at carefully, as it does not seem as if it would solve all issues raised by the ‘publisher’s right’. What impact, for instance, would this legal presumption have on the open access? What about journalists granting non-exclusive licenses for one article to two different publishers?”).

⁷ Discussion Paper on Article 11 and Article 13, Council of the European Union, Doc. No. 5902/18, Feb. 6, 2018, available at <http://data.consilium.europa.eu/doc/document/ST-5902-2018-INIT/en/pdf>.

⁸ By imposing a tax on quotations, these entitlements violate Berne Convention Article 10(1)’s mandate that “quotations from a work . . . lawfully made available to be public” shall be permissible. As TRIPS incorporates this Berne mandate, compliance is not optional for WTO Members. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 28, 1979, art. 10(1), amended Oct. 2, 1979.

⁹ Synergy Research Group, *Amazon Dominates Public IaaS and Ahead in PaaS; IBM Leads in Private Cloud* (Oct. 30, 2016), <https://www.srgresearch.com/articles/amazon-dominates-public-iaas-paas-ibm-leads-managedprivate-cloud>.

¹⁰ CCIA has discussed these restrictions in submissions to the United States Trade Representative. See Comments of the Computer & Comm’n’s Indus. Ass’n, In re Request for Public Comment for 2018 Special 301 Review, Dkt No. 2017-0024, filed Feb. 8, 2018, available at http://www.ccia.net/wp-content/uploads/2018/02/CCIA_2018-Special_301_Review_Comments.pdf.

¹¹ U.S. DEPT. OF COMM., 2017 Top Markets Report Cloud Computing, available at <https://www.trade.gov/topmarkets/pdf/Sector%20Snapshot%20Cloud%20Computing%202017.pdf>.

Cleaning Up and Regulating the Internet Access Service Market (2017).¹² These proposals, together with existing licensing and foreign direct investment restrictions on foreign exporters in China, would require foreign cloud service providers to turn over essentially all ownership and operations to a Chinese company – including valuable U.S. intellectual property and know-how to China.¹³ These measures are fundamentally protectionist and anti-competitive, and threaten to further discourage foreign investment.¹⁴

III. Costs of Server Localization Compliance

Commissioners requested more information about the impact of data localization mandates to B2B and B2C markets, and the costs of compliance. CCIA reiterates that open data flows are critical for continued global economic development. A 2016 McKinsey Institute report observed the following:

Global flows of all types support growth by raising productivity, and data flows are amplifying this effect by broadening participation and creating more efficient markets. MGI’s analysis finds that over a decade, all types of flows acting together have raised world GDP by 10.1 percent over what would have resulted in a world without any cross-border flows. This value amounted to some \$7.8 trillion in 2014 alone, and data flows account for \$2.8 trillion of this impact.¹⁵

¹² The *Cleaning Up and Regulating the Internet Access Service Market* proposal is also aimed at restricting operations of virtual private networks (VPNs). The United States recently raised concerns at the World Trade Organization of the proposal’s impact to U.S. services, and its ability to “add to the burdens and restrictions that China’s Cybersecurity Law would place on cross-border transfers of information.” Communications from the United States, Measures Adopted and Under Development by China Relating to Its Cybersecurity Law, Feb. 23, 2018, available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=243365,243385,243363&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=False&HasSpanishRecord=False.

¹³ Specifically, these measures do the following: prohibit licensing foreign CSPs for operations; actively restrict direct foreign equity participation of foreign CSPs in Chinese companies; prohibit foreign CSPs from signing contracts directly with Chinese customers; prohibit foreign CSPs from independently using their brands and logos to market their services; prohibit foreign CSPs from contracting with Chinese telecommunication carriers for Internet connectivity; restrict foreign CSPs from broadcasting IP addresses within China; prohibit foreign CSPs from providing customer support to Chinese customers; and require any cooperation between foreign CSPs and Chinese companies to be disclosed in detail to regulators.

¹⁴ AmCham China’s survey of its members showed that 81% of its companies felt less welcome in China, up from 77% in 2015 with 32% of companies citing inconsistent regulatory interpretation and unclear laws as the primary challenge to doing business in China. The survey also showed that 31% of its members said the investment environment was deteriorating — the most dire response AmCham has received since it started asking the question in 2011. See *China Business Climate Survey Report 2017*, AMCHAM CHINA, <https://www.amchamchina.org/policy-advocacy/business-climate-survey/>; Sui-Lee Wee, *As Zeal for China Dims, Global Companies Complain More Boldly*, N.Y. TIMES (Apr. 19, 2017), <https://www.nytimes.com/2017/04/19/business/china-companies-complain.html>.

¹⁵ McKinsey Global Institute, *Digital Globalization: The New Era of Global Flows* (2016), available at <https://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows>.

As CCIA’s pre-hearing brief detailed, data localization policies tend to have detrimental effects to the domestic economy that introduces these mandates, decreasing growth while increasing security vulnerability. A 2016 report calculated changes in real GDP in countries that adopted strict data regulations including localization mandates.¹⁶

This is due to prohibitively high compliance costs. A 2014 report found that “for many countries that are considering or have considered forced data localization laws, local companies would be required to pay 30-60% more for their computing needs than if they could go outside the country’s borders.”¹⁷ These costs are felt even more by startups and SMEs who wish to compete in the international market. Complying with multiple localization regimes, many who require local presence, becomes prohibitive for these companies.

IV. Summary for Annex

At the hearing, the ITC requested that commenters submit a summary of their position to be included in the Global Digital Trade 2 and Global Digital Trade 3 reports. CCIA would like to submit the following to be included in the Annex of both reports:

The Internet is now integral to international trade in services and goods both the business-to-business and business-to-consumer markets. However, in recent years U.S. trading partners have begun adopting laws and regulations that hinder the further growth of cross-border delivery of Internet services and hardware. These barriers include restricted data flows, forced technology standards and localization requirements, unbalanced intermediary liability regimes, and creation of new ancillary copyrights. These policies impose barriers to entry on economic sectors that may not traditionally be considered part of the technology industry, but which now rely on Internet-enabled services and hardware to reach new customers. As the Internet continues its exponential growth and becomes even more intertwined with international commerce, it is essential that policymakers have the data and evidence available to understand the nature of these barriers.

Respectfully submitted,
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¹⁶ Matthias Bauer, et al, *Tracing the Economic Impact of Regulations on the Free Flow of Data and Data Localization*, Global Commission on Internet Governance (May 2016), available at https://www.cigionline.org/sites/default/files/gcig_no30web_2.pdf.

¹⁷ Leviathan Security Group, *Quantifying the Cost of Forced Localization* (2014), available at <https://static1.squarespace.com/static/556340ece4b0869396f21099/t/559dad76e4b0899d97726a8b/1436396918881/Quantifying+the+Cost+of+Forced+Localization.pdf>.