

Aug. 3, 2015

**Free-market groups urge International Trade Commission not to assert authority over digital transmissions**

Hon. Meredith M. Broadbent  
Chairwoman, U.S. International Trade Commission  
500 E Street SW  
Washington, D.C. 20436

Dear Chairwoman Broadbent,

On behalf of the undersigned free-market organizations, we write to express our deep concern about the International Trade Commission's April 9, 2014 decision in investigation 337-TA-833. The commission declared in that decision that "electronic transmission of digital data" over the Internet constituted "importation... of articles" subject to regulation under Section 337 of the Tariff Act of 1930. This decision currently is under appeal to the Federal Circuit in *ClearCorrect Operating, LLC v. ITC*.

We believe treating cross-border digital transmissions as acts of importation is an injudiciously broad interpretation of the Tariff Act and would open a Pandora's Box of new complaints and investigations that concern a wide range of business activities heretofore untouched by the commission. Proceeding down this path would undermine traditional legal structures and encumber a broad slice of the innovation economy with unnecessary government strictures. The effects would be felt by everyone from Internet service providers, to telecommunications companies, to small businesses and even individual Internet users.

Our specific concerns include:

**I. The commission's decision is an unprecedented expansion of its power, far beyond what the statute contemplated.**

Transmission of digital data is not the same as importation of a physical good. It's clear that electronic transmissions were never intended to be part of the commission's purview. There are numerous cases, going back to *W. Union Tel. Co. v. Pendleton* (1887), that debunk the notion that Congress could not have foreseen the need to regulate electronic transmissions of data under the powers granted to the commission.

While the commission argues the Tariff Act was written "at a time when Internet downloads were not in existence," this argument does not hold water. As the Electronic Frontier Foundation and Public Knowledge noted in a jointly filed *amicus* brief, "although Internet downloads did not exist in 1930, plenty of other transmissions of telecommunications data, including cross-border transmissions, did exist and were certainly known to Congress at that time." Indeed, cross-border radio communications and trans-Atlantic telegraph cables had been in place for decades before the Tariff Act. In addition, there had been widely documented discussion of their use as a form of commerce posing new intellectual property concerns. Thus, the exclusion of electronic communications from the commission's jurisdiction under Section 337 should be seen as a deliberate choice by Congress.

## **II. The commission should not defy the will of Congress on site blocking.**

An exclusion order, the commission's primary remedy, cannot easily be applied to the Internet. If the commission were to exercise its enforcement powers through wholesale site blocking, this would have radical implications for global commerce that pose a serious threat to free access to lawful content on the Internet.

Indeed, Congress already has rejected the Stop Online Piracy Act (SOPA) and PROTECT IP Act (PIPA), both of which attempted to do just that. If the commission were to implement similar strategies by fiat, it would contradict the will of the legislative branch and the statutory limits of the commission's powers. It also would open new avenues for abuses that circumvent traditional legal structures for resolving intellectual property disputes, with potentially drastic unintended consequences.

## **III. There is absolutely no need to manufacture new agency powers over digital data.**

Markets for digital goods have thrived for decades without the commission exercising these powers. They represent one of the most vital segments of the U.S. economy. The authority of domestic courts has been more than sufficient to handle disputes over intellectual property rights concerning digital goods. The commission's entry into this space is a wholly unwelcome and unnecessary government intervention and will only complicate matters concerning digital commerce.

## **IV. Free-market principles are fundamental to the success of the Internet and ITC-imposed trade barriers would fracture that free market.**

The Internet's explosive growth over the past quarter-century has been due largely to the hands-off regulatory approach taken by governments. The growth of Internet services around the world largely has been a result of "permissionless innovation," the idea that innovators and entrepreneurs need not ask permission before embarking on new experimental endeavors. Additional barriers to overcome in "exporting" new ideas and services in digital form will only forestall continued progress in this emergent industry and lead to further balkanization of the Internet economy.

For all of these reasons, the undersigned organizations contend that the commission should reconsider its attempt to regulate the "electronic transmissions of digital data."

Sincerely,

Niskanen Center

R Street Institute

FreedomWorks