

April 10, 2015

The Honorable Meredith M. Broadbent
Chairman, United States International Trade Commission
500 E Street SW
Washington, DC 20436

Dear Chairman Broadbent:

We are 26 organizations, associations, and scholars of law, policy and economics, representing the public interest in the areas of technology, intellectual property, and consumer policy. We write regarding the Commission's decision of April 9, 2014, in the investigation 337-TA-833, *In re Certain Digital Models*, and in particular with regard to the decision of the Commission that transmissions of digital data constituted "importation . . . of articles" over which the Commission could maintain authority in a § 337 investigation.¹

Briefly, **we urge the Commission to reconsider, for future investigations, its decision that pure data transmissions are within the ambit of the Commission's powers.** The decision has enormous ramifications, opening the door to Internet content blocking efforts rejected by Congress and the public. But the Commission took this monumental step not after public debate or Congressional review, but rather in the context of a single, idiosyncratic patent case. And recent external developments not known to the Commission at the time of *Certain Digital Models* further demonstrate unintended but troubling possibilities that may result from the decision.

Though the Commission cannot alter that particular decision, it certainly can revisit the decision's effects going forward. The Commission should do so for at least the following reasons.

I. THE COMMISSION'S EXERCISE OF EXCLUSIONARY POWER OVER DATA CONTRAVENES WIDELY ACCEPTED OPEN INTERNET PRINCIPLES

The free flow of information, over the Internet and other systems, has been central to both incredible technological development of recent times and the attendant expansion of freedom of expression. The Organisation for Economic Cooperation and Development, Federal Communications Commission, and numerous scholars, for example, agree that information sharing, free expression, and innovation "depend on the global free flow of information."²

¹*In re Certain Digital Models, Digital Data, & Treatment Plans for Use in Making Incremental Dental Positioning Adjustment Appliances, the Appliances Made Therefrom, & Methods of Making the Same*, Inv. No. 337-TA-833, slip op. at 55 (U.S. Int'l Trade Comm'n Apr. 9, 2014).

²OECD COUNCIL RECOMMENDATION ON PRINCIPLES FOR INTERNET POLICY MAKING 6 (2011), available at <http://www.oecd.org/internet/ieconomy/49258588.pdf>; see also *Preserving the Open Internet*, 25 F.C.C.R. 17905, ¶ 12 (2010), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf ("the open Internet is an important platform for innovation, investment, competition, and free expression."); *vacated in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 2 (2006), available at http://www.benkler.org/Benkler_Wealth_Of_Networks.pdf (freedom of information "holds great practical promise: as a dimension of individual freedom; as a platform for better democratic participation; as a medium to foster a more critical and self-reflective culture; and, in an increasingly information-dependent global economy, as a mechanism to achieve improvements in human development everywhere."); TIM WU, *THE MASTER SWITCH* 5 (2010) (because of the "open character of the Internet . . . ours is a time without precedent, outside history").

Indeed, even this very Commission has highlighted the economic benefits of free information flow. In its report from August last year—just four months after *Certain Digital Models*—the Commission concluded based on a comprehensive survey that “the majority of large firms in content, digital communications, retail, services, and wholesale expected that their sales abroad would increase to some degree if trade barriers were removed.”³

Yet *Certain Digital Models* goes directly against these important principles, erecting new trade barriers for data flows rather than removing them. By declaring that all digital data transfers into the United States are “importation . . . of articles” within the purview of § 337, the Commission forces every business, small and large, who exchanges data over the Internet to contemplate the possibility of being brought before the ITC, in patent, copyright, and other contexts.

II. THE DECISION CAN BE ABUSED TO BRING ABOUT CONGRESSIONALLY-REJECTED INTERNET SITE BLOCKING STRATEGIES

The unexpectedly expansive nature of this ruling was recently brought sharply into focus, when it was revealed that the Motion Picture Association of America had developed a strategy for using the Commission’s powers under § 337 to force Internet service providers to block their customers from accessing certain foreign websites.

It may seem hard to believe that a § 337 action could result in an order against an ISP to block access to entire websites, but an MPAA memorandum shows this possibility to be under serious active consideration. The memorandum, made available last December, identifies legal arguments for bringing an ISP before the ITC in view of *Certain Digital Models*, and then concludes that “the ITC could reasonably order the ISPs” to block access to websites “based on the ITC’s broad authority to render an effective remedy.”⁴

The Commission should not even entertain such a theory. Wholesale blocking of websites is far, far afield from the Commission’s statutory mandate. Site blocking is furthermore an overbroad remedy that risks denying, to the entire American public, access to lawful content hosted on the blocked site.⁵ It is the exact bad policy rejected by Congress when it shelved the 2011 Stop Online Piracy Act and PROTECT IP Act (SOPA/PIPA),⁶ and policy that contravenes the carefully negotiated policies of ISP immunities from copyright liability embodied in 17 U.S.C. § 512.

Unless corrected, this overreaching misuse of the Commission’s authority will be attempted with increasing frequency, now that the door has been opened to treating digital communications as “importation . . . of articles.”

³U.S. INT’L TRADE COMM’N, PUB. NO. 4485, INV. NO. 332-540, DIGITAL TRADE IN THE U.S. AND GLOBAL ECONOMIES, PART 2, at 100 (2014), available at <http://www.usitc.gov/publications/332/pub4485.pdf>.

⁴See Russell Brandom, *The MPAA Has a New Plan to Stop Copyright Violations at the Border*, THE VERGE (Jan. 2, 2015), <http://www.theverge.com/2015/1/2/7481409/the-mpaa-has-a-new-plan-to-stop-copyright-violations-at-the-border> (attaching memorandum of legal analysis prepared for MPAA).

⁵See CTR. FOR DEMOCRACY & TECH., THE PENNSYLVANIA ISP LIABILITY LAW: AN UNCONSTITUTIONAL PRIOR RESTRAINT AND A THREAT TO THE STABILITY OF THE INTERNET 8–10 (2003), <https://cdt.org/files/speech/030200pennreport.pdf> (“Blocking an IP address . . . will in many cases block content wholly unrelated to the URL originally targeted.”).

⁶Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); PROTECT IP Act, S. 968, 112th Cong. (2011); see Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES, Jan. 20, 2012, B6, available at <http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html>.

III. THE COMMISSION SHOULD ACT TO AVOID THESE DELETERIOUS RESULTS

Accordingly, we urge the Commission to implement at least the following:

- **Forbear from or limit application of the holding of *Certain Digital Models*, by not blocking digital data.** Regardless of what the Federal Circuit does in the appeal of that investigation, the Commission may use its discretion under § 337(f) and refuse to issue data blocking orders in view of “the public health and welfare, competitive conditions in the United States economy, . . . and United States consumers.” Given the substantial economic and policy costs to blocking the free flow of information, the Commission should exercise such discretion here.
- **Refuse to impose liability on domestic consumer-level Internet service providers.** In particular, the Commission should not exercise its powers to order an ISP to block a site on the Internet.
- **Support balanced, carefully considered Congressional legislation that tailors the Commission’s role in the digital age.** It is the place of Congress to confer new powers over digital data after reasoned debate and stakeholder input, not the place of the Commission itself based on a single decision in an obscure patent case.

The Commission has a significant place in United States intellectual property policy. Thus it certainly is aware of the mandate, derived from the very words of the Constitution, that intellectual property rights be balanced “to promote the Progress of Science and the useful Arts.” In view of rapidly changing times, rapid developments in technology, and rapid innovation spurred by the unfettered exchange of information made possible by the unfettered Internet, this Commission must ensure that it does not erect barriers to trade that stymie rather than promote innovation and progress.

Sincerely,

The 26 organizations, associations, and individuals
identified on the following page

cc: The Honorable Dean A. Pinkert, Vice Chairman
The Honorable Irving A. Williamson, Commissioner
The Honorable David S. Johanson, Commissioner
The Honorable F. Scott Kieff, Commissioner
The Honorable Rhonda K. Schmidlein, Commissioner
The Honorable Lisa R. Barton, Acting Secretary to the Commission

The Honorable Meredith M. Broadbent

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Respectfully submitted by:

American Civil Liberties Union

American Library Association

Association of College and Research Libraries

Association of Research Libraries

Center for Democracy and Technology

Computer and Communications Industry
Association

Electronic Frontier Foundation

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