

**BEFORE THE
U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR
OFFICE OF MANAGEMENT AND BUDGET**

In re:

Development of the Joint Strategic Plan on
Intellectual Property Enforcement

80 Fed. Reg. 52800

**COMMENTS OF PUBLIC KNOWLEDGE, THE R STREET INSTITUTE,
ENGINE ADVOCACY, DEMAND PROGRESS, THE NISKANEN CENTER,
THE ELECTRONIC FRONTIER FOUNDATION, OPENMEDIA, THE
INTERNET INFRASTRUCTURE COALITION, THE CENTER FOR
DEMOCRACY AND TECHNOLOGY, THE HARRY POTTER ALLIANCE,
RE:CREATE, AND NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE**

The above-identified 12 organizations respectfully submit the following comments in response to the Request for Public Comments dated September 1, 2015.¹ Briefly, the commenters wish to express their strong concerns about the recent decision of the U.S. International Trade Commission to regulate transmissions of data over the Internet as if they were acts of importation of goods, and asks the Office of the U.S. Intellectual Property Enforcement Coordinator to take appropriate steps, described below, to mitigate the harmful effects that such a decision, if left standing, could have on American innovation and competitiveness.

In its April 2014 decision *Certain Digital Models*, the International Trade Commission decided that its statutory authority to exclude “importation . . . of articles” that infringe patents, copyrights, and other intellectual property rights extended to a power to block downloads of Internet data from foreign websites, on the theory that electronic data transmissions were “articles.”² This decision is now on appeal before the U.S. Court of Appeals for the Federal Circuit. And it has been widely discussed and criticized: the *New York Times* wrote, for example, that the decision is “bound to hamper the exchange of ideas and information on the Internet.”³

¹Certain commenters will be submitting individual comments in response to this Request for Comments, in addition to the present document. This joint submission is intended to facilitate IPEC’s review of comments and to avoid unnecessary duplication of matter in individual filings.

²*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).

³Editorial Bd., *Keep the Internet Free of Borders*, N.Y. TIMES, Aug. 10, 2015, A18, available at <http://www.nytimes.com/2015/08/10/opinion/keep-the-internet-free-of-borders.html>; see also Brent Kendall, *U.S. Puts Teeth into Digital Dispute*, WALL ST. J., Aug. 3, 2015, B1, available at <http://www.wsj.com/articles/imports-of-digital-goods-face-test-1438554684>; Glenn G. Lammi, *A Case With Teeth? Federal Circuit To Review ITC Jurisdiction Over Digital ‘Articles’*,

The Request for Public Comments seeks “recommendations from the public for improving the U.S. Government’s intellectual property enforcement efforts,” particularly with respect to “combating emerging or potential future threats” to “American innovation and economic competitiveness.”⁴ The ITC’s decision has enormous ramifications for American innovation and economic competitiveness, which could be easily stifled by allowing an administrative agency to throw a heavy wrench into the innovative engine that is the open Internet. Those concerning ramifications are only heightened by the apparent intent of certain industries to leverage the decision into website blocking orders of the sort that Congress has previously rejected.

The Request further asks for suggestions on “[i]dentifying weaknesses, duplication of efforts, waste, and other unjustified impediments to effective enforcement actions.”⁵ Allowing the ITC to maintain jurisdictional power over patent cases that could perfectly well be decided within the United States creates “duplication of efforts, waste, and other justified impediments” to effective and proper enforcement of intellectual property.

To prevent these undue consequences to innovation, the economy, and the government, IPEC should seek steps to limit the ITC’s attempt to regulate Internet content, as described in the following comments.

I. THE ITC’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.”⁶

FORBES (Aug. 3, 2015), <http://www.forbes.com/sites/wlf/2015/08/03/a-case-with-teeth-federal-circuit-to-review-itc-jurisdiction-over-digital-articles/>; 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>.

⁴Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement, 80 Fed. Reg. 52800, 52801 (Office of the U.S. Intellectual Prop. Enforcement Coordinator, Office of Mgmt. & Budget Sept. 1, 2015).

⁵*Id.* at 52800.

⁶OECD COUNCIL RECOMMENDATION ON PRINCIPLES FOR INTERNET POLICY MAKING 6 (2011), available at <http://www.oecd.org/internet/ieconomy/49258588.pdf>; see also *In re 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.*

Indeed, the ITC itself has highlighted the economic benefits of free information flow. In its report from August last year—just four months after *Certain Digital Models*—the ITC 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.”⁷

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 its purview, 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. IPEC has recognized previously that “innovation requires both competitive markets and the protection of intellectual property, as each drives innovation in complementary ways,”⁸ and thus should seek to forestall this incursion on competitive markets through excessive ITC jurisdiction.

II. THE ITC’S DECISION COULD BE ABUSED TO BRING ABOUT DISFAVORED INTERNET SITE BLOCKING STRATEGIES

The unexpectedly expansive nature of the ITC’s ruling is highlighted by the possibility that the ruling could potentially open the door to forcing Internet service providers to block their customers from accessing certain foreign websites.

There can be no doubt that ITC jurisdiction over Internet transmissions at least raises the possibility of ISP-level site blocking. Federal Circuit Chief Judge Prost specifically asked about the implications for ISPs during oral argument of the appeal of the ITC’s decision.⁹ And parties

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.”).

⁷U.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>.

⁸U.S. INTELLECTUAL PROP. ENFORCEMENT COORDINATOR, 2013 JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT 74 (2013), <https://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipeec-joint-strategic-plan.pdf>.

⁹*See* Jess Bravin, *Court Skeptical Trade Body Has Oversight of Digital Transmissions*, WALL ST. J., Aug. 11, 2015, *available at* <http://www.wsj.com/articles/court-skeptical-trade-body-has-oversight-of-digital-transmissions-1439320318>.

following the case have specifically commented on concerns that “the ITC is opening the door to Internet site-blocking”¹⁰—indeed, reports indicate that the Motion Picture Association of America has specifically contemplated a legal strategy for forcing ISPs to block access to websites “based on the ITC’s broad authority to render an effective remedy.”¹¹

IPEC should stand against such a sweeping interpretation of this trade agency’s powers. 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.¹² It is the exact bad policy rejected by Congress when it shelved the 2011 Stop Online Piracy Act and PROTECT IP Act (SOPA/PIPA),¹³ 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 ITC’s authority will be attempted with increasing frequency, now that the door has been opened to treating digital communications as “importation . . . of articles.”

III. IPEC SHOULD ACT TO AVOID THESE DELETERIOUS RESULTS

While IPEC obviously cannot reverse the decision of the ITC in *Certain Digital Models*, it can, in its role as coordinator of intellectual property enforcement efforts, take numerous steps to prevent that decision’s effects from harming American businesses, innovation, and freedom. Those steps include the following:

- **Coordinate with the ITC and the U.S. Trade Representative to 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 ITC has 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

¹⁰See Kendall, *supra* note 3.

¹¹See Brandom, *supra* note 3 (attaching memorandum of legal analysis prepared for MPAA).

¹²See 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.”).

¹³Stop 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>.

States consumers.” Furthermore, the USTR can disapprove ITC decisions on those or other grounds. Given the substantial economic and policy costs to blocking the free flow of information, IPEC should work with both entities to establish agency rules or policies to limit application of *Certain Digital Models* and preserve the openness of the Internet.

- **Refuse to impose liability on domestic consumer-level Internet service providers.** The ITC’s decision is particularly problematic in view of the possibility that it could be applied to force ISPs to block Americans from accessing certain foreign websites. IPEC should encourage the ITC to develop rules or policies against the ITC’s issuing orders against ISPs.
- **Support balanced, carefully considered Federal 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.¹⁴

In its 2013 Joint Strategic Plan, IPEC stated its “primary concerns” as including “promotion of the global competitiveness of American businesses and enterprises” and “preservation of the Constitutional rights of American citizens.” Nowhere are those concerns more prominent than in the space of the open Internet, which has been the platform for both incredible global competitiveness and freedom of expression. Indeed, the Plan specifically acknowledged “the Administration’s broader Internet policy principles emphasizing privacy, free speech, competition, and due process.” Internet openness is something that IPEC and the nation as a whole seek to promote.

But overreaching attempts to regulate Internet content would stifle those exact goals. 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 Office must seek to remove, rather than erect, barriers to trade that stymie rather than promote innovation and progress.

IV. CONCLUSION

For the foregoing reasons, IPEC should investigate the ITC’s role over digital data transmissions and take steps as outlined above to prevent the ITC from imposing on the numerous and important benefits of the open Internet.

¹⁴Some proponents of the ITC’s digital data jurisdiction have mistakenly pointed to support for the OPEN Act of 2012 as approving of the ITC having power over digital data. See Online Protection and Enforcement of Digital Trade Act, H.R. 3782, 112th Cong. (2012). But quite to the contrary, the OPEN Act imposed strict, carefully crafted limitations on the ITC’s authority over data transmissions, wholly different from the plenary power over Internet data that the ITC conferred upon itself in *Certain Digital Models*.

Commenters thank IPEC for providing the opportunity to submit these comments. If there are any remaining questions relating to the matters presented herein, the undersigned would be happy to provide further information as necessary.

Respectfully submitted,

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On behalf of:

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