

October 23, 2023

Submitted via Electronic Mail to www.regulations.gov

Trade Representative Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street, N.W.
Washington, District of Columbia 20036

RE: Comments of ACT | The App Association on Significant Foreign Trade Barriers for the 2024 National Trade Estimate Report

In response to the Federal Register notice issued on September 11, 2023,¹ ACT | The App Association hereby submits comments to the United States Trade Representative (USTR) in response to its request for public input on the 2024 National Trade Estimate (NTE) Report on Foreign Trade Barriers report.

The App Association represents thousands of small business innovators and startups in the software development and high-tech space located across the globe.² As the world embraces mobile technologies, our members create the innovative products and services that drive the global digital economy by improving workplace productivity, accelerating academic achievement, and helping people lead more efficient and healthier lives. Today, that digital economy is worth more than \$1.8 trillion annually and provides over 6.1 million American jobs.³

While the global digital economy holds great promise for App Association member companies, our members face a diverse array of challenges when entering new markets. These challenges, commonly referred to as “trade barriers,” reflect in the laws, regulations, policies, or practices that protect domestic goods and services from foreign competition, artificially stimulate exports of particular domestic goods and services, or fail to provide adequate and effective protection of intellectual property rights. These barriers take many forms but have the same net effect: impeding U.S. exports and investment.

¹ Office of the United States Trade Representative, *Request for Comments on Significant Foreign Trade Barriers for the National Trade Estimate Report*, 88 FR 62421 (September 11, 2023), available at <https://www.federalregister.gov/documents/2023/09/11/2023-19521/request-for-comments-on-significant-foreign-trade-barriers-for-the-2024-national-trade-estimate>.

² ACT | The App Association, *About*, available at <http://actonline.org/about>.

³ ACT | The App Association, *State of the U.S. App Economy: 2023*, <https://actonline.org/wp-content/uploads/APP-Economy-Report-FINAL-1.pdf>

We applaud USTR's efforts to understand and examine the most important foreign barriers affecting U.S. exports of goods and services, foreign direct investment, and intellectual property rights. We commit to working with USTR and other stakeholders to reduce or eliminate these barriers. With respect to digital trade, the small business innovators we represent prioritize the following principles:

- ***Enabling Cross-Border Data Flows:*** The seamless flow of data between economies and across political borders is essential to the functioning of the global economy. Small business technology developers must be able to rely on unfettered data flows as they seek access to new markets.
- ***Prohibiting Data Localization Policies:*** American companies looking to expand into new markets often face regulations that force them and other foreign providers to build and/or use local infrastructure in the country. Data localization requirements seriously hinder imports and exports, reduce an economy's international competitiveness, and undermine domestic economic diversification. Our members do not have the resources to build or maintain unique infrastructure in every country in which they do business, and these requirements effectively exclude them from commerce.
- ***Prohibiting Customs Duties and Digital Service Taxes on Digital Content:*** American app developers and technology companies must take advantage of the internet's global nature to reach the 95 percent of customers who live outside of the United States. However, the tolling of data crossing political borders with the purpose of collecting customs duties directly contributes to the balkanization of the internet. These practices jeopardize the efficiency of the internet and effectively block innovative products and services from market entry.
- ***Ensuring Market Entry is Not Contingent on Source Code Transfer or Inspection:*** Some governments have proposed policies that require companies to transfer, or provide access to, proprietary source code as a requirement for legal market entry. Intellectual property is the lifeblood of app developers' and tech companies' innovation; the transfer of source code presents an untenable risk of theft and piracy. Government policies that pose these requirements are serious disincentives to international trade and a non-starter for the App Association's members.
- ***Preserving the Ability to Utilize Strong Encryption Techniques to Protect End User Security and Privacy:*** Global digital trade depends on the use of strong encryption techniques to keep users safe from harms like identity theft. However, some governments continue to demand that backdoors be built into encryption keys for the purpose of government access. These policies jeopardize the safety and security of data, as well as the trust of end users, by creating known vulnerabilities that unauthorized parties can exploit. From a privacy and security standpoint, the viability of an app company's product depends on the trust of its end users.
- ***Securing Intellectual Property Protections:*** The infringement and theft of intellectual property and trade secrets threatens the success of the App Association's members and hurts the billions of consumers who rely on these

app-based digital products and services. These intellectual property violations can lead to customer data loss, interruption of service, revenue loss, and reputational damage – each alone a potential “end-of-life” occurrence for a small app development company. The adequate and effective protection and enforcement of intellectual property rights is critical to the digital economy innovation and growth.

Avoiding the Misapplication of Competition Laws to New and Emerging Technology Markets: Various regulators, including key trading partners, are currently considering or implementing policies that jeopardize the functionality of mobile operating systems and software distribution platforms that have enabled countless American small businesses to grow. Since its inception, the app economy has successfully operated under an agency-sale relationship that has yielded lower overhead costs, greater consumer access, simplified market entry, and strengthened intellectual property protections for app developers with little-to-no government influence. Foreign governments regulating digital platforms inconsistent with U.S. law will upend this harmonious relationship enjoyed by small-business app developers and mobile platforms, undermine consumer privacy, and ultimately serve as significant trade barriers.

We also wish to draw attention to activities in certain international fora that are responsible for the creation of potential digital trade barriers or seek to legitimize policies that inhibit digital trade. For example, the App Association is a leading advocate against efforts within the United Nations’ International Telecommunications Union (ITU) to develop pro-regulatory approaches to “over-the-top” (OTT) services – any service accessible over the internet or utilizing telecommunications network operators’ networks.⁴ In the ITU, the App Association worked to highlight the benefits of OTT to economies of all sizes across sectors. We continue to work to educate the public and other governments on how a new layer of regulation over OTT services will stifle growth, and we continue to oppose pro-regulatory OTT service proposals. The App Association has called on the ITU to seek consensus across stakeholder groups to reduce barriers to the digital economy, which will benefit the billions of internet users around the globe. We recommend that the Trade Policy Staff Committee include the concerning proposals from international fora like the ITU that inhibit the free flow of data and digital commerce in the NTE.

Below, we highlight numerous country-specific trade barriers that our members face, and we urge their inclusion in the Trade Policy Staff Committee’s (TPSC) 2023 NTE report. The practices highlighted below include both implemented and proposed policies, both of which should be considered by USTR.

⁴ *Comments of ACT | The App Association to the ITU Council Working Group on International Internet-Related Public Policy Issues Regarding its Open Consultation, Public Policy Considerations for OTTs*, ITU, August 18, 2017, available at <https://www.itu.int/en/Lists/consultationJune2017/Attachments/31//App%20Assn%20Comments%20re%20ITU%20OTT%20Consultation%20081817.pdf>.

AUSTRALIA

Issue: Protection of Privacy and Encryption

The App Association remains concerned with Australian policymaking efforts that stand to undercut the ability to leverage end-to-end encryption and otherwise undermine privacy protection practices, notably through its failure to revise the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018. The App Association continues to work with the Australian government to reform surveillance and privacy frameworks while protecting online privacy and security.

BRAZIL

Issue: Brazilian General Data Protection Law

The National Congress of Brazil passed the Lei Geral de Proteção de Dados Pessoais (LGPD)⁵ in August of 2018. The LGPD was enacted on August 27, 2020, and came into force, allowing for penalties and sanctions to be imposed, on August 1, 2021.⁶ Various provisions of the LGPD, much like the EU's General Data Protection Regulation (GDPR) mentioned below, impose additional requirements on non-Brazilian firms (due to its extraterritorial reach) that increase the cost and risk associated with handling data pertaining to Brazilian citizens. Furthermore, Article 33-36 does not permit cross-border data transfers based on the controller's legitimate interest. The countries with which cross-border data transfers will be allowed has not been determined yet, and the App Association urges USTR to advocate for the United States' inclusion on the list of permitted countries.⁷ Such provisions can be an insurmountable hurdle to our small business members seeking to enter the Brazilian market. Anything that can be done throughout the LGPD's implementation process to ease the burden for small and medium-sized companies could have tremendously positive economic implications.

Issue: Intervention into Competitive Digital Markets

The App Association remains concerned with the introduction of PL 2768/2022 in the Brazilian House of Representatives, which would designate certain digital platforms as "essential access control power holders" and intervene into their operations, oblige the payment of an inspection fee amounting to 2% of their annual gross operating revenue, and empower Brazil's National Telecommunications Agency (ANATEL) to sanction

⁵ Chris Brook, *Breaking Down LGPD, Brazil's New Data Protection Law*, DATAINSIDER, June 10, 2019, available at <https://digitalguardian.com/blog/breaking-down-lgpd-brazils-new-data-protection-law#targetText=What%20is%20the%20LGPD%3F,scheduled%20date%20of%20February%202020>.

⁶ Robert Healy, *The Brazil LGPD: How Organizations Can Ensure Compliance*, LEXOLOGY, Oct. 7, 2021, available at <https://www.lexology.com/library/detail.aspx?g=465b3d85-2f7d-40a2-aa19-b200cb819f8a>.

⁷ Renata Neeser, *Is the Brazilian Data Protection Law (LGPD) Really Taking Off?*, LITTLER, June 7, 2021, available at <https://www.littler.com/publication-press/publication/brazilian-data-protection-law-lgpd-really-taking>.

platforms with a fine of up to 2% of the national revenue and suspend certain business activities. The App Association is also concerned about the development of a report on digital markets by Brazil's Department of Economic Studies (DEE) of the Administrative Council for Economic Defense (CADE) intended to substantiate the Brazilian government's competition-themed intervention into digital markets. Brazilian government intervention into the digital economy would jeopardize the functionality of mobile operating systems and software distribution platforms that have enabled countless American small businesses to grow.

Issue: OTT Regulatory Requirements

The App Association is concerned with the launch of a public consultation by ANATEL proposing mandates for financial contributions by OTTs (termed "value added services") for the improvement, expansion, and maintenance of the network infrastructure and a related push to establish ANATEL as a regulator for the digital economy in Brazil. The expansion of network infrastructure support fees to OTTs would imperil countless network edge technology innovators' efforts to grow and create new jobs and contradicts well-established U.S. policy on universal service contribution base expansion.

Issue: Patent Prosecution

The Brazilian government implemented a Patent Prosecution Highway program to address its patent examination backlog.⁸ This program was extended through December 24, 2024, increasing the allowed frequency of applications to the program and explicitly denying the ability to appeal rejections.⁹ It is important for Brazil to enter into compliance with the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement because the current standards of patentability are not compatible with international requirements. The App Association encourages USTR to make efforts to ensure that Brazil continues these efforts and meets its international obligations.

Issue: Discriminatory Localization Policies

Brazil has made changes to its tax laws with respect to information and communications technology (ICT) and digital goods in response to findings that the laws were in violation of World Trade Organization (WTO) rules, but Brazil's Basic Production Process law continues to inappropriately favor "local content" production of these categories.

Issue: Artificial Intelligence

⁸ Ricardo D. Nunes and Rafael S. Romano, *Brazil's Backlog Days Are Numbered*, MANAGING IP, September 23, 2019, available at <https://www.managingip.com/article/b1kbn141jmzzwm/brazils-patent-backlog-days-are-numbered>.

⁹ Dr. Pegah Karimi, *Brazil's Phase II of the Patent Prosecution Highway Program*, JDSUPRA (Jan. 27, 2021), <https://www.jdsupra.com/legalnews/brazil-s-phase-ii-of-the-patent-1256066/> (last visited October 19, 2021).

Brazilian federal officials have introduced several bills on artificial intelligence (AI) in the Congress as they continue to revise their national AI strategy. This new strategy introduces standards that are inconsistent with international norms, adopting a broad definition of AI with a stringent framework.¹⁰ We support the adoption of an adaptable regulatory approach that is informed by strong public-private collaboration and thoughtful development of AI.

CANADA

Issue: Digital Economy Taxation

The App Association writes to express its concern with the Canadian government's recent positioning with respect to DSTs, including its opposition to the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting's agreement extending a moratorium on imposing DSTs. The unilateral imposition of DSTs on the digital economy are unreasonable and discriminatory, disjoint the digital economy, and impede Canadian exports and investment abroad. A Canadian DST will negatively impact Canada's most innovative markets, including software development and IoT connected devices, in which App Association members lead.

The App Association agrees that some tax changes may be needed due to the rise of the digital economy. We have long supported the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) process, which is a crucial multilateral construct intended to foster a fair, equitable, and competitive tax environment. Currently enjoying the support of nearly 140 countries, the Inclusive Framework reflects a collective understanding of the global challenges and the need for a comprehensive solution to address them.

We urge the Canadian government to support the ongoing OECD efforts to reach consensus on needed tax changes and to develop a solution as soon as possible. Country-specific digital service taxes put into place while the OECD solution is being pursued will ultimately undermine the global consensus needed to reach a workable international taxation agreement that addresses the global digital economy and damage the ability of Canadian digital economy small businesses to innovate and create new jobs. The imposition of unilateral DSTs by the Canadian government also contravenes its commitments under international treaties, including commitments made under the World Trade Organization and the Canada-U.S.-Mexico Agreement.

CHINA

Issue: China's Encryption Law

¹⁰ "Recommendations to the Brazilian Congress on the Development of Artificial Intelligence Regulation" (June 10, 2022), <https://www.itic.org/news-events/news-releases/iti-offers-recommendations-to-the-brazilian-congress-on-the-development-of-artificial-intelligence-regulation>.

On May 11, 2020, China issued the Commercial Encryption Product Certification Catalogue and the Commercial Encryption Certification Measures. Manufacturers of products listed in the catalogue will not be subject to mandatory approval requirements before launching products into the market. The certification is voluntary, but its goal is to serve as an assurance to customers that the commercial encryption products conform to Chinese standards.¹¹ If effective, App Association members may be able to successfully get their products to customers in China. The certifications remain valid for a five-year period but are subject to further review if the product or entity producing the product undergoes any changes.

On October 26, 2019, China enacted an Encryption Law, which took effect on January 1, 2020. The new encryption law greatly impacts the regulatory landscape for foreign-made commercial encryption products, leaving unanswered questions. For example, the import licensing and export control framework provides an exemption for “commercial encryption” used in “products for consumption by the general population.” However, because the law does not sufficiently define either of these terms, businesses are left to speculate on how to apply the law. As a result, app developers experience legal uncertainty, and App Association members will suffer due to their inability to maintain customers’ trust regarding the security of their information. Furthermore, the lack of clear regulations will also impede American businesses’ ability to succeed in China’s large consumer market.

Issue: China’s Cybersecurity Law

China’s Cybersecurity Law imposes tough regulations, introduces serious uncertainties, and unreasonably prevents market access for American companies seeking to do business in China. This law is particularly difficult for App Association small business members seeking access to digital markets and consumers in China. The law includes onerous data localization requirements and uses overly vague language when outlining important provisions (such as when Chinese law enforcement bodies can access a business’s data or servers or how frequently a business must perform demanding safety assessments). Legal certainty is vital to app developers’ operations and their ability to maintain their customers’ trust in the protection of their data. In addition to creating obligations that are often infeasible for our members, the Cybersecurity Law’s vague language leaves businesses without clear guidelines about how the law will be applied and jeopardizes American businesses’ potential to succeed in China’s important market.

The law requires Critical Information Infrastructure operators to predict the potential national security risks that are associated with their products and services. It includes restrictive review requirements and will most likely cause supply disruptions.¹² Important

¹¹ Yan Luo and Zhijing Yu, *China Issued the Commercial Encryption Product Certification Catalogue and Certification*, INSIDE PRIVACY, May 15, 2020, available at <https://www.insideprivacy.com/data-security/china-issued-the-commercial-encryption-product-certification-catalogue-and-certification/>.

¹² Yan Luo and Zhijing Yu, *China Issued the Commercial Encryption Product Certification Catalogue and Certification*, INSIDE PRIVACY, May 15, 2020, available at

clarifications are needed to allow for American businesses to succeed in the Chinese market, including how to balance new requirements for data encryption to protect Chinese consumers' privacy while allowing on demand access to the Chinese government.¹³

The App Association continues to advocate on behalf of innovative American app developers who actively seek to conduct business in China. We have opposed data localization requirements in written comments and have identified numerous areas where China's law uses overly prescriptive and technically and/or economically infeasible mandates to address public safety goals.

Our comments also addressed concerns related to the vague definition of "network operator," as the "owner of the network, network managers and service providers." This definition can be interpreted to include app developers, even though most small business innovators operate on larger platforms or networks they do not manage. Including small app developers and software companies within this broad definition forces them to abide by cybersecurity responsibilities that do not apply to them. We separately contributed comments¹⁴ on the Cybersecurity Administration of China's implementation of the Cybersecurity Law's restrictive policies on data transfers outside of Chinese borders.

While we believe our advocacy has helped delay the implementation of some of the Cybersecurity Law's more onerous provisions and has limited its scope, our members seeking to reach new customers in China inevitably must assess the viability of entering the Chinese market.

<https://www.insideprivacy.com/international/china/china-issues-new-measures-on-cybersecurity-review-of-network-products-and-services/>

¹³ Lorand Laskai & Adam Segal, *The Encryption Debate in China: 2021 Update*, CARNEGIE ENDOWMENT INT'L PEACE, Mar. 31, 2021, available at <https://carnegieendowment.org/2021/03/31/encryption-debate-in-china-2021-update-pub-84218>.

¹⁴ See <http://actonline.org/wp-content/uploads/ACT-Comments-re-China-Data-Transfer-Proposed-Law-051117-EN-1.pdf>.

Issue: Personal Information Protection Law

The Personal Information Protection Law (PIPL) was enacted by the Chinese National People's Congress on August 20, 2021, and will take effect on November 1, 2021.¹⁵ The law applies to all companies processing personal information of Chinese individuals inside or outside China, exposing violators to fines up to 5 percent of annual revenue from the previous year. PIPL also sets out data transfer restrictions and localization requirements for those who exceed the amount of personal information allowed by the Cyberspace Administration of China (CAC). The CAC sets the threshold amount of personal data an organization may handle without restriction and decides what companies are exempted from the law's requirements. Article 24 of PIPA also sets out restrictions on the use of automated decision-making, including systems used to deliver targeted advertisements, potentially harming the ability of American companies to derive revenue from their products through advertising. The broad extraterritorial reach of this law, and the heavy penalties associated with non-compliance, pose a significant burden to App Association members and reduces their ability to do business in China. We therefore request the inclusion of the PIPL in the NTE report.

Issue: Various Data Localization Requirements (Proposed and Final)

China implemented or proposed numerous restrictions on the flow of data across its borders. These regulations limit or prohibit the transfer of data outside of China in areas like banking and financial credit, cybersecurity, counterterrorism, commercial information systems, healthcare, and insurance. Each represents a significant barrier to market entry and is a non-starter for small business innovators. When compared to large corporations, small businesses are often unable to overcome this barrier and will be ultimately left out of the market. Companies face large penalties for non-compliance. These events threaten to disrupt the free flow of information over the internet on a much larger scale.

EUROPEAN UNION

Issue: The EU's Digital Single Market (DSM)

The App Association has concern with numerous steps taken by the EU themed in advancing European sovereignty, which often are positioned to exclude American companies from entering and competing in the EU.

As a prime example, the European Commission's (EC) imposition of regulations on digital platforms, via the Digital Markets Act (DMA),¹⁶ to address contractual clauses and trading practices in relationships between platforms and businesses, continues to present a

¹⁵ Hui Xu et al., China Introduces First Comprehensive Legislation on Personal Information Protection, Latham & Watkins, Sept. 8, 2021, available at <https://www.lw.com/thoughtLeadership/china-introduces-first-comprehensive-legislation-on-personal-information-protection>.

¹⁶ European Commission, *Online Platforms*, available at <https://ec.europa.eu/digital-single-market/en/policies/online-platforms>.

significant protectionist barrier to trade. The DMA, without justification, intervenes in the operations of competitive and well-functioning digital markets that enable countless small businesses to grow and create jobs. The DMA has already been appropriately acknowledged by USTR as a barrier to digital trade and should remain designated as such in future NTEs.

Further, the EC has already carried forward numerous regulations, directives, consultations, and proposals under the DSM that raise significant concerns for the App Association, including:

- EC efforts to regulate the free flow of information online through things such as the EU's Digital Services Act, intended to address removal of illegal content from the internet.
- Various provisions of the GDPR, which impose additional requirements on non-European firms (due to their extraterritorial reach) that increase the cost and risk associated with handling data pertaining to EU citizens. For example, Article 27 of the law requires firms to physically place a representative in the EU.¹⁷ Such provisions can be an insurmountable hurdle to our small business members seeking to enter the EU market. Anything that can be done throughout the GDPR implementation process to ease the burden for small and medium-sized companies could have tremendously positive economic implications.
- The EU's proposed ePrivacy Regulation, framed as a complement to the GDPR by addressing the rights of EU citizens using any electronic communication services, including IoT devices and OTT communications services, presents further difficulties and complications to small business innovators seeking to reach new EU markets. App Association members do not take lightly the extension of the proposed Regulation's scope to include non-EU companies that process the electronic communications data of EU individuals. While this Regulation is currently in development, we urge that it be included in the NTE.
- New proposals to enact sweeping regulations on the use of artificial intelligence (AI), which raise concerns for the App Association about regulation pre-empting new and innovative uses of AI.

Each of these concerns contains regulatory proposals for nascent economic segments and services that are solutions in search of a problem and should not move forward. Data-demonstrated public needs should form the basis for activities under the DSM, rather than hypotheticals and edge use cases.

¹⁷ See <https://www.privacy-regulation.eu/en/27.htm>.

FRANCE

Issue: Digital Services Tax

On March 6, 2019, the government of France released a proposal for a 3 percent levy on revenues that certain companies generate from providing certain digital services to, or aimed at, French users. USTR has since undertaken a Special 301 investigation, releasing its report in December of 2019.¹⁸ While the French government had initially delayed collecting the tax, since December 2020 it has resumed collection.¹⁹

France's digital services tax (DST) is contrary to the long-standing agreement by World Trade Organization (WTO) members not to apply customs duties to cross-border electronic transmissions and prejudices ongoing discussions at the WTO and the Organization for Economic Cooperation and Development (OECD). This action will harm U.S. goods and services exporters of all sizes in nearly every sector and threaten American jobs, creating a damaging precedent for a fragmented digital economy that will suppress American small business innovation and job growth.

We recognize that some countries have made a commitment to withdraw digital service taxes once the Organization for Economic Cooperation and Development (OECD) agreement is realized. However, until they are rescinded, we urge for the inclusion of digital service taxes in the NTE.

¹⁸ https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf.

¹⁹ <https://www.wsj.com/articles/global-digital-tax-detente-ends-as-u-s-and-france-exchange-blows-11609333200>.

GERMANY

Issue: Unbalanced German Patent Law as a Trade Barrier

Germany is a key market in the European Union and abroad due to its global influence. The App Association is a long-time advocate of strong intellectual property protections and works hard to include our members' voices in the relevant policy development processes taking place across the EU. Small tech businesses thrive in environments where they can enjoy legal certainty, and which reflect widely accepted fairness principles. However, tech small and medium enterprises (SMEs) have long faced difficulty in Germany. Under the current legal framework, courts issue injunctions against those accused of patent infringement without fully determining if infringement has occurred. The courts also do not consider whether the remedy they order is proportionate to the impact on the public interest. Fortunately, the German government just took an important step towards creating a more competitive and innovation-enabling environment in Germany by modernizing its Patent Act.

Throughout the last year, the App Association participated in every step of the legislative process. We submitted feedback to each draft released by the Federal Ministry of Justice and Consumer Protection, met with Members of the Bundestag and participated in stakeholder roundtables. We urged the German government to:

- Introduce a proportionality test into §139 of the Patent Act concerning injunctions and the inclusion of third-party interests.
- Align German patent law with the Intellectual Property Rights Enforcement Directive (IPRED) of the European Parliament and the Council and eliminate quasi-automatic injunctive relief that is possible in the German system. The IPRED's Article 11 states that "[t]he competent courts can issue an order against the infringing party upon finding an infringement of an intellectual property right, which prohibits the infringer from further infringing the right in question."
- Reduce the timespan between an injunction and a validity test (injunction gap) to avoid situations in which an injunction is granted for a patent that is later declared invalid or should not have been granted in the first place.

Amongst other things, the modernized Patent Act provides for a change to §139, which regulates injunctive relief for the patent holder in cases of patent infringement. The new revision now allows for the limitation of injunctions for proportionality reasons. This means an injunction can be restricted if claiming it would result in disproportionate hardship for the infringer or third parties due to the extraordinary circumstances of the individual case and the good faith requirement. Appropriately, the patent holder is not disadvantaged because they would then receive additional monetary compensation. A proportionality test is now codified into the law, providing courts with an express basis for temporary or permanent suspension of an injunction against fair compensation, in addition to potential damages, for past infringements. This proportionality test will help address cases related to aggressive patent trolls, or instances where a discrepancy exists between invention value and economic loss of the defendant or detriment to "paramount interests" of third parties. It remains to be seen over the next several years which cases will trigger these

restrictions of injunctive relief and how the modernized Patent Act will impact the way courts grant injunctions in patent litigation.

Additionally, the revised Patent Act provides for a rule under which the federal patent court (the Bundespatentgericht, which provides validity decisions) “shall” provide to the litigants a first indicative assessment/interim decision of the case within six months after a nullity action has been filed. This rule aims to accelerate patent nullity proceedings as well as improve the synchronization of infringement proceedings before civil courts and the nullity proceedings before the federal patent court. At the moment, infringement proceedings are often decided before a decision on the validity of a patent has been reached, and the often-mismatched timelines of both proceedings can be frustrating for those accused of infringement as they can’t point to an invalidated patent during infringement proceedings. While this new approach is meant to reduce unnecessary delays and inform both litigants and the infringement court before a decision is reached, the modernized Patent Act does not increase funding and staffing for the federal patent court so it remains unclear how significant the impact of this change will be. Funding and staffing of the federal patent court, however, is a separate and currently ongoing discussion.

Because an injunction can be devastating for SMEs whose business models and growth often depend entirely on one product line or offering, it’s so important that courts confirm an injunction is in the public interest. For this reason, considering the proportionality of a remedy before granting an injunction is essential to ensure continued small business competitiveness and a level playing field for all actors. We believe this modernized Patent Act addresses some of the current power imbalances in German patent law and aligns Germany meaningfully with many other leading markets, but we encourage USTR to monitor this development and determine the impact of its implementation.

INDIA

Issue: Various Proposed and Final Restrictive Data Localization Laws

India has both proposed and implemented policies that restrict the flow of data across its borders and create significant issues for small business innovators seeking to expand into the Indian market, including:

- India’s National Data Sharing and Accessibility Policy which requires that all data collected using public funds to be stored within the borders of India.²⁰
- The 2015 National Telecom M2M (“machine to machine”) Roadmap,²¹ which has

²⁰ Government of India Ministry of Science & Technology, *India’s National Data Sharing and Accessibility Policy*, (2012), available at <https://dst.gov.in/national-data-sharing-and-accessibility-policy-0>.

²¹ Government of India Ministry of Communications & Information Technology Department of Telecommunications, *National Telecom M2M Roadmap*, available at <http://www.gsma.com/connectedliving/wp-content/uploads/2015/05/150513-DoT-National-Telecom-M2M-Roadmap.pdf>.

not been implemented, states that all M2M gateways and application servers serving customers in India need to be located within India.

- India's 2018 Draft Cloud Computing Policy²² would require data generated within India to be stored within the confines of the country. As a result of this proposed regulation, cloud companies will either be forced out of the India market or be required to build local data centers to comply with India's policy. Therefore, this policy will deter or create a barrier to entry in the Indian marketplace for small and large companies alike.
- In 2021 the Indian Department of Telecommunications (IDoT) proposed replacing outdated provisions of the Indian Telegraph Act and Wireless Telegraphy Act. In consultation with the National Law University in Delhi, the IDoT is looking to update the laws with provisions controlling the use of M2M communications and the communications between IoT devices. This update has the potential to significantly affect American IoT device and application makers, as the Indian government looks to increase domestic production of telecommunications devices and related services.²³

Issue: Intellectual Property Rights Enforcement

App Association members continue to experience IP infringement originating from India and face challenges in enforcement through the Indian system. India has not yet implemented its obligations under the World Intellectual Property Organization (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty; further, Indian patent law is inconsistent with the TRIPS Agreement. Moreover, the 2020 Department of Industrial Policy and Promotion's proposal to decriminalize copyright infringement offenses as listed in the Copyright Act of 1957 would diminish copyright protections and discourage investment across industries.²⁴

Issue: Proposed Regulation of Over-The-Top Services

India continues to explore proposed regulation of OTTs (e.g., its draft India Telecommunications bill and through TRAI consultations), including through licensing and extending universal service contribution mandates to OTTs. The App Association strongly objects to these proposals and continues to engage with India to avoid OTTs being treated the same as telecommunications services, save for OTT communications services that have the primary purpose of providing real-time person-to-person telecommunication voice services using the network infrastructure (e.g., utilizing a

²² *India Corporate Update –Data Localisation*, SQUIRE PATTON BOGGS, (2018), available at <https://www.squirepattonboggs.com/~media/files/insights/publications/2018/10/india-corporate-update-data-localisation/india-corporate-update--data-localisation-client-alert.pdf>

²³ Ishita Guha, *Govt to Refresh Laws Before 5G Rollout*, MINT, Mar. 8, 2021, available at <https://www.livemint.com/industry/telecom/govt-to-refresh-laws-before-5g-rollout-11615141845898.html>.

telephone number) of a TSP. Consistent with the above, this development is of high concern to our community and we urge for its inclusion in the NTE.

Issue: Continuing Threats and Uncertainty Regarding the Ability to Use Strong Encryption

Currently, Indian internet providers must attain government approval from TRAI to employ encryption stronger than 40-bit encryption. Laws like this provide fewer touchpoints for our members' apps to reach consumers. The Indian government abandoned its proposed National Encryption Policy after widespread pushback and recognition that encryption is a key building block for trust in digital infrastructure. Nevertheless, after a petition from the Indian Supreme Court, the government is considering diluting end-to-end encryption in a variety of use cases.²⁵ This is an ongoing issue of serious concern to small business innovators; therefore, we recommend it be included in the NTE to ensure continued prioritization for the U.S. government and other stakeholders.

Issue: Sweeping Privacy Regulation in India

India's Personal Data Protection Bill includes rules for how personal data should be proposed and stored as well as lists the rights of people regarding their personal information. As the bill has evolved, the App Association believes that its provisions have improved much, though implementation of the law will be crucial in shaping App Association members' ability to operate and grow in this vital market. We therefore urge USTR to include the Indian Personal Data Protection Bill in its NTE.

Issue: Digital Services Tax

USTR has already launched an investigation of India's DST,²⁶ and we agree that this DST is discriminatory, inconsistent with international tax principles, and restricts U.S. commerce. India's digital services tax is also contrary to the long-standing agreement by WTO members not to apply customs duties to cross-border electronic transmissions and prejudices ongoing discussions at the WTO and the OECD. India's DST will harm U.S. goods and services exporters of all sizes in nearly every sector and threaten American jobs, creating a damaging precedent for a fragmented digital economy that will suppress American small business innovation and job growth.

We recognize that some countries have made a commitment to withdraw digital service taxes once the OECD agreement is realized. However, until they are rescinded, we urge for the inclusion of digital service taxes in the NTE.

²⁵ Trisha Ray, *The Encryption Debate in India: 2021 Update*, Carnegie Endowment Int'l Peace, Mar. 31, 2021, available at <https://carnegieendowment.org/2021/03/31/encryption-debate-in-india-2021-update-pub-84215>.

²⁶

<https://ustr.gov/sites/default/files/enforcement/301Investigations/Report%20on%20India%E2%80%99s%20Digital%20Services%20Tax.pdf>.

INDONESIA

Issue: Data Localization Requirements on Electronic System Providers of Public Services

Indonesia's Ministry of Communications and Information Technology (MCIT) has enacted regulations that require electronic system providers for public services to locate a data center and disaster recovery center within Indonesia.²⁷ In October 2019, Indonesia passed Regulation No. 71 of 2019 which revoked Regulation No. 82 of 2012.²⁸ It also relaxed the data localization rules for "public bodies." The 2019 regulation requires private Electronic System Operators (ESOs) to register with MCIT prior to their electronic systems being made accessible to users while existing ESOs must register with MCIT within a period of one year. Currently, the MCIT's online system only accommodates Indonesian individuals and entities, which prohibits outside small businesses to complete registration. The 2019 Indonesian regulation permits private ESOs to locate electronic systems and data outside of the territory of Indonesia so long as "the location does not diminish the effectiveness of the supervision conducted by a relevant state ministry or institution and law enforcement agencies; and access to the electronic system and electronic data must be provided for the purpose of supervision and law enforcement, in accordance with law." The 2019 regulation incorporates the "right to be forgotten" and requires ESOs to delete electronic information that is within their control and is no longer relevant. While the new Indonesian regulation is based on the GDPR, the App Association hopes that the implementation will properly reflect the structure of the GDPR.

Issue: New Indonesian Tariff Codes for "Intangible Goods" (Software and Other Digital Products) and Digital Services Tax

In February 2018, the Indonesian government issued Ministry of Finance Regulation No. 17/PMK.010/2018 on the Second Amendment of Regulation No. 6/PMK.010/2017 on Stipulation of Goods Classification System and Import Duty on Imported Goods (Regulation 17), which went into effect as of March 1, 2018. Regulation 17 provides Chapter 99 as a new addition to the Indonesian tariff system, covering intangible goods ("Software and Other Digital Goods"). While the import duty is currently at 0 percent, the App Association remains very concerned at the unprecedented addition of digital goods to a tariff system and fears the precedent Indonesia may create.

The Indonesian government implemented a digital services tax on July 1, 2020. All digital services providers are required to collect a 10 percent tax no matter where they are located. Foreign operators are required to remit the withheld taxes to the Indonesian government. A digital services tax applied extraterritorially affects American service providers, and the 10 percent rate applied by Indonesia is far above the tax rate set out

²⁷ See Mary R. Silaban, *Unleashing Indonesia's Digital Innovation*, American Chamber of Commerce in Indonesia (June 10, 2014), available at <http://www.amcham.or.id/fe/4614-unleashing-indonesia-s-digital-innovation>.

²⁸ *Indonesia Issues Important New Regulation on Electronic (Network and Information) Systems*, ABNR LAW, October 30, 2019, available at https://www.abnrlaw.com/news_detail.php?send_news_id=366&year=2019.

in various European countries.²⁹ We recognize that some countries have made a commitment to withdraw digital service taxes once the OECD agreement is realized. However, until they are rescinded, we urge for the inclusion of digital service taxes in the NTE.

We request that both Indonesia's software and other digital products tariff as well as its digital services tax be included in the NTE.

JAPAN

Issue: Digital Platform Regulation

Japan's Digital Market Competition Headquarters' (DMCH) has issued Interim Reports on *Evaluation of Competition in the Mobile Ecosystem* and *New Customer Contacts (Voice Assistants and Wearables)*, both of which lay the groundwork for a significant intervention by the Japanese government into the operation of digital platforms and the digital economy in ways that will distort and disrupt competition and the ability of the small businesses the App Association represents to grow and create jobs.³⁰ We continue to work with DMCH on its proposals and urge for its inclusion as a barrier to digital trade being included in the NTE.

KENYA

Issue: Digital Economy Taxation

Since 2021, Kenya has had a digital service tax in place that only applies to non-Kenyan entities. We have significant concerns with this tax, which contravenes WTO moratorium on ecommerce customs duties and undermines the OECD's consensus solution for digital economy taxation. We urge USTR to include this development in its NTE and to work with the Kenyan government to mitigate its damage and influence in the region.

Issue: Intellectual Property Rights Protection

Recently, Kenya took steps to strengthen its IP enforcement by updating its copyright and trademark legislation. The App Association sees this as a positive step to deter IP infringement in Kenya.³¹

NIGERIA

Issue: Data Localization & Nigerian Workforce Requirements

²⁹ A sample of European digital services tax rates can be found at <https://taxfoundation.org/digital-tax-europe-2020/>.

³⁰ <https://actonline.org/wp-content/uploads/ACT-Comments-re-DMCH-Final-Report-16-Aug-2023-EN-1.pdf>.

³¹ USTR, *2019 National Trade Estimate Report on Foreign Trade Barriers*, 312 (2019).

The Nigerian government enacted “Guidelines for Nigerian Content Development in Information and Communications Technology,”³² which raise a myriad of concerns for our members. The Nigerian government imposes data localization requirements on multinational companies. For instance, section 10.3 of the Nigerian government’s guidelines mandates multinational companies to not only store their data in Nigeria but also requires such companies to incorporate 50 percent of local products when manufacturing ICT devices in the region. Additionally, it requires companies to hire local engineers when manufacturing such products.

Issue: Digital Economy Taxation

Since 2020, Nigeria has been assessing taxes on non-resident companies based on their commerce over the internet/on digital platforms. We have significant concerns with this tax, which contravenes WTO moratorium on ecommerce customs duties and undermines the OECD’s consensus solution for digital economy taxation. We urge USTR to include this development in its NTE and to work with the Nigerian government to mitigate its damage and influence in the region.

Intellectual Property Rights Protection: While Nigeria has taken steps towards improving its IP protections³³, Nigerian enforcement agencies lack the resources needed to effectively enforce IP rights.

REPUBLIC OF KOREA

Issue: Telecommunications Business Act Amendments

On May 20, 2020, the National Assembly passed amendments of the Telecommunications Business Act (TBA).³⁴ The amendments to the TBA impose scope of service quality maintenance requirements on value added telecom service providers (VSPs) that meet certain thresholds which have not been defined yet. The VSPs that fall within the thresholds and do not have a local presence will have to appoint a local representative to receive user complaints and answer regulatory requests for information. Without knowing what the thresholds are, content providers may unfairly face requirements that do not apply to Korean competitors. The App Association asks the USTR to track the thresholds as they are defined and to advocate on behalf of U.S. businesses to avoid VSP disruptions.

³² NITDA, *Guidelines for Nigerian Content Development in Information and Communications Technology* (2017).

³³ See USTR, *2019 National Trade Estimate Report on Foreign Trade Barriers* (2019) (“In 2017, Nigeria submitted its instruments of accession and ratification of four World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, the Marrakesh Treaty, and the Beijing Treaty”).

³⁴ Ben Gu, et al., *Korea Technology Sector Legal Developments*, LEXOLOGY, (May 26, 2020), available at <https://www.lexology.com/library/detail.aspx?g=e6451c62-2f11-461d-b699-5b365532bda6>.

Further amendments were made to the TBA in August 2021. These amendments regulate app store pricing and payment processing. These changes to the TBA will only benefit global brands like Spotify, Epic Games, and Tile while also potentially freezing out small business app developers in South Korea and around the world that can't pivot so quickly to new payment processing methods. App Association members demand platform level privacy and security measures, removal of fraudsters and copyright thieves, and rigorous vetting of any new software. These are essential to maintain an ecosystem consumers trust enough to download apps from companies without name recognition. The TBA would prohibit core platform functions that benefit our members and consumers.

Issue: Regulation of "Pre-Installed Apps"

Since 2014, South Korea has implemented regulations that force telecommunication devices with smart capabilities to allow users to delete pre-installed applications on a device. In 2014, almost 60 apps installed by the country's three largest providers were put at risk, including more than half by Samsung and LG.³⁵ By allowing end-users to remove these apps, including those used for basic device functionality, the government is allowing changes to the operating system software. This negatively impacts the integrity of both the manufacturer and internet service provider platforms, as well as the larger app ecosystem. These regulations also impose unnecessary app developer registration requirements that add new barriers to entering a platform's market.

³⁵ Matt Brian, *South Korea rules smartphone users can delete Android bloatware*, ENGADGET, (January 24, 2014) available at <https://www.engadget.com/2014/01/24/south-korea-delete-preinstalled-android-apps/>.

RUSSIA

Issue: Data Localization Law

Federal Law No. 242-FZ, signed by President Vladimir Putin in July of 2014, requires companies that store and process the personal data of Russian citizens to maintain servers on Russian soil and to notify the federal media regulator, Roskomnadzor, of all server locations.³⁶ It empowers Roskomnadzor to block websites and to maintain a registry of data violators. Additionally, in August 2015, Russia passed a non-binding clarification suggesting that localization might apply to websites that include a built-in Russian-language options, transact in Russian rubles, or use a Russian top-level domain such as “.r.”³⁷

In July 2016, a package of amendments was released imposing extensive data storage requirements on telecommunications providers and companies classified as internet telecommunications services.³⁸ Per these changes, telecom operators will have to store metadata for three years and internet telecoms for one year, while both will have to retain the content for up to six months. Companies had until July 1, 2018, to begin implementing these requirements. Moreover, if the stored messages and files are encrypted, companies are required to provide Russian state security services with decryption keys upon request. In August 2016, Russia’s Federal Security Service (FSB) announced that it has the capability to obtain information necessary for decoding the electronic messaging received, “sent, delivered, and (or) processed by users of the internet.”³⁹

Further, on February 7, 2017, President Putin signed amendments to the Russian Code on Administrative Offences that increases fines for those violating Russian data protection laws. Effective on July 1, 2017, fines were raised substantially from RUB 10,000 to 75,000 or from approximately \$170 to \$1,260.⁴⁰ By raising the penalties for not abiding by this regulation, it is making it even harder to take a risk and creates additional barriers to digital trade and market entry.

Issue: Prohibitions on the Use of Strong Encryption

³⁶ Russian Federation, *Federal Law No. 242-FZ*, (July 21, 2014), available at <https://pd.rkn.gov.ru/authority/p146/p191/>.

³⁷ Russian Federation’s Ministry of Communications and Mass Media, *Clarifying Federal Law No. 242-FZ*, (Aug. 3, 2015), available at <http://www.bna.com/russia-clarifies-looming-n17179934521/>.

³⁸ Russian Federation, “*Yarovaya Package*” *Federal Law No 374-FZ*, (July 6, 2016), available at <http://www.globalprivacyblog.com/privacy/yarovaya-law-new-data-retention-obligations-for-telecom-providers-and-arrangers-in-russia/>.

³⁹ Federal Security Service of the Russian Federation, *Encryption Keys*, (August 1, 2016), available at <http://www.fsb.ru/fsb/science/single.html?id=10437866@fsbResearchart.html>.

⁴⁰ Hogan Lovells, *Chronicle of Data Protection*, “Russia Increases Fines for Violations of Data Protection Laws”, (February 9, 2017), available at <http://www.hldataprotection.com/2017/02/articles/international-eu-privacy/russia-increases-fines-for-violations-of-data-protection-laws/>.

Under Russia's current System of Operative-Investigative Measures (SORM), Russian internet service providers (ISPs) must install a special device on their servers to allow the FSB to track all credit card transactions, e-mail messages, and web use. In 2014, SORM usage was extended to monitoring of social networks, chats, and forums, requiring their operators to install SORM probes in their networks. Advances of the SORM force online communications providers to provide the authorities with a means to decrypt users' messages, a technically infeasible result when end-to-end encryption methods are used. This law presents serious issues for small business innovators seeking to enter the Russian marketplace.

Russia also requires companies to provide the FSB with encryption keys for applications. Telegram, a popular messaging app, was fined 800,000 rubles for not providing FSB with one of these encryption keys.⁴¹

Issue: Various Virtual Private Network Restrictions

On November 1, 2017, Russia enacted regulations that prohibit consumers' ability to use VPNs to access websites as an anonymous browser. The Russian government cites this regulation as an effort to keep people from accessing dangerous and illegal content. This regulation says that any internet providers that allow these to exist, or function without being blocked, will lose their market access. This is an obvious trade barrier and real threat to the free market.

Additionally, there are now regulations regarding the anonymity of citizens while using chat apps such as WhatsApp or Facebook Messenger. Regulations that went into effect on January 1, 2018, require these apps to provide the users' phone numbers to the government to limit or prohibit access to those attempting to spread illegal content. Therefore, there is no ability to remain anonymous when using these applications. Although this is done under the veil of safety for citizens, it restricts the free flow of information and provides an extremely tough trade barrier to infiltrate.

⁴¹ "Russia Fines Telegram App Over Encryption-Key Demand", *RadioFreeEurope RadioLiberty* (October 16, 2017), available at https://www.rferl.org/a/russia-fines-telegram-app-encryption-key/28797424.html?mkt_tok=eyJpIjoiTW1OaU5EUTBPFVZtTVdObCIsInQiOiIiwVVRcL1RkdDJjeXIsMFB6RkFQWStxMjBlaGV3cHFQRDZQK3BkRE1pVnE0TEtIQIZUVnFOeisyVkp6S3FISUJpUnJZT1EzT211d1FiYWlwRis4MHhxVWZPREdGV2xPUIb2cklseE4xOE4p3Mkx3aG1rc3FOTUs1RXFtWnRISDNXUHAifQ%3D%3D.

SOUTH AFRICA

Issue: Application of Antitrust Law to Digital Platforms

In 2021, the Competition Commission of South Africa (CCSA) launched an online intermediary platforms market inquiry.⁴² The App Association has provided detailed views on digital platforms and competition, as well as reactions and feedback on CCSA's specific proposals.⁴³ The App Association has significant concerns with the potential of the South African government interjecting itself into the digital economy without an evidence base to support such an intervention, which would jeopardize the functionality of mobile operating systems and software distribution platforms that have enabled countless American small businesses to grow. We therefore request that the CCSA's inquiry into online intermediary platforms, and the risks it poses to American small business innovators that rely on software distribution platforms, be captured in the 2023 NTE report, and that the U.S. government work with South Africa to mitigate the risks such an intervention would pose while supporting U.S. small business digital economy trade and leadership.

Issue: IP Rights Protection:

The South African government has attempted to take constructive first steps towards effective and efficient IP protections and enforcement by increasing the number of enforcement officials; improving the training program for these officials; and making the public more aware of its IP rights.⁴⁴ Further, the Department of Trade and Industry (DTI) completed the Intellectual Property Policy of the Republic of South Africa, which will be the guide post for future IP legislation in South Africa.⁴⁵ While both of these government actions appear to be positive steps forward many concerns have been raised about the ineffectiveness of the Copyright law and the new Policy. Concern remains that the copyright law may not meet international standards and may have overly broad exceptions to the copyright laws.⁴⁶ Additionally, some stakeholders have noted that the new Policy for South African IP will weaken exclusive patent rights.⁴⁷

⁴² <https://www.compcom.co.za/online-intermediation-platforms-market-inquiry/>.

⁴³ E.g., <https://www.compcom.co.za/wp-content/uploads/2021/07/App-Association-Comments-on-OIPMI-Statement-of-Issues-18-Jun-2021.pdf>.

⁴⁴ *Id.* at 446.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

TURKEY

Issue: Data Localization Requirement on Companies that Process Payments

Turkey's E-Payment Law requires the processing of e-payments occur within Turkey.⁴⁸ In mid-2016, Turkey's Banking Regulation and Supervising Industry (BDDK) initiated a policy that mandates companies locate their ICT systems in the country.⁴⁹ For instance, PayPal was forced to halt their operations after the Turkish government revoked their license. The Turkish government asserts that this action will affect "tens of thousands of businesses and hundreds of thousands of consumers."⁵⁰ These data localization requirements have largely chilled our members' plans to enter this important market should their app include e-payment capabilities.

Issue: Social Media Law

Turkey amended the Regulation of Internet Broadcasts and Prevention of Crimes Committed through Such Broadcasts (Law No. 5651), with these amendments coming into force October 1, 2020. These amendments are collectively known as the Social Media Law, and affect all businesses considered social network providers.⁵¹ The law's broad definition of social network providers – which includes any business allowing users to create, view, or share text or media for social interaction – may include many App Association members not traditionally considered social network providers, placing a heavy burden on the business and discouraging expansion into the Turkish market.

⁴⁸ U.S. Dep't of State Bureau of Economic and Business Affairs, *2016 Investment Climate Statement – Turkey* (July 5, 2016), available at <http://www.state.gov/e/eb/rls/othr/ics/2016/eur/254425.htm>.

⁴⁹ Turkey's Banking Regulation and Supervising Industry (BDDK), *Law on Payment and Security Settlement Systems, Payment Services and Electronic Money Institutions* numbered 6493, Official Gazette numbered 28690, (published June 27, 2013), available at https://www.bddk.org.tr/websitesi/english/Legislation/129166493kanun_ing.pdf.

⁵⁰ Lunden, Ingrid, "PayPal to halt operations in Turkey after losing license, impacts 'hundreds of thousands'" *Tech Crunch*, (May 31, 2016), available at <https://techcrunch.com/2016/05/31/paypal-to-halt-operations-in-turkey-after-losing-license-impacts-hundreds-of-thousands/>.

⁵¹ Begüm Yavuzdogan Okumus & Direnç Bada, *Turkish data localization rules in effect for social media companies*, IAPP, Oct. 20, 2020, available at <https://iapp.org/news/a/turkish-data-localization-rules-in-effect-for-social-media-companies/>.

UNITED KINGDOM

Issue: UK Law with Respect to Standard-Essential Patents

In the case *Unwired Planet v Huawei*,⁵² the United Kingdom Supreme Court recently upheld an injunction prohibiting the sale of wireless telecommunications products in Britain due to a party's failure to enter into a patent license for Unwired Planet's worldwide portfolio of standard-essential patents (SEPs), even though the party was willing to enter into a license for United Kingdom (UK) SEPs. The ruling also states that the plaintiff did not violate European Union (EU) competition law by seeking an injunction for infringement of its UK SEPs, even though those SEPs were subject to a commitment to license on fair, reasonable, and non-discriminatory (FRAND) terms. Controversially, the ruling rejects antitrust liability in concluding that a SEP holder's insistence on only agreeing to a worldwide license is consistent with its FRAND obligation. If a single patent in a single jurisdiction can be used to obtain an injunction unless the alleged infringer enters into a worldwide license, SEP owners will be highly incentivized to engage in global forum shopping, depressing the ability for American innovators like App Association members to compete abroad.

The *Unwired Planet* decision presents grave risks to those who rely on standards to innovate and threatens U.S. sovereignty by holding that a UK court can pre-empt U.S. law in mandating worldwide FRAND licensing, presenting a major barrier to trade for American small businesses in the digital economy and IoT that rely on standards to innovate and compete. The App Association strongly encourages the U.S. government to address this harmful development by including it in the NTE, within the ongoing U.S.-UK Free Trade Agreement negotiation, and through other avenues.

Additionally, the *Optis v. Apple* case seems to be compounding the damage caused in *Unwired Planet*. In any other business situation, a company would not agree to sign a contract without knowing what's in it, and it should be no different for SEP licensing agreements. Further, the extraterritorial application of court-determined royalty rates both harms the ability of parties to negotiate FRAND terms for licensing SEPs and discourages American businesses from operating in the UK due to the risk of having worldwide royalty rates set by the court there.⁵³

⁵² <https://www.supremecourt.uk/cases/docs/uksc-2018-0214-judgment.pdf>.

⁵³ Apple has threatened to leave the UK market over the decision see <http://patentblog.kluweriplaw.com/2021/07/23/what-does-the-optis-v-apple-case-mean-for-sep-litigation-in-the-uk/>.

VIETNAM

Issue: National Cybersecurity Law

Vietnam's broadly scoped National Cybersecurity Law applies to onshore and offshore companies/individuals directly involved or related to the management, provision or use of cyberspace; imposes forced localization (specifically, administrators of critical systems must store personal data and critical data within Vietnam); imposes discriminatory licensing requirements; and conflicts with Vietnam's pro-innovation and investment positions at the Asian-Pacific Economic Cooperation. Vietnam's Ministry of Public Security continues to tighten censorship and restrictions on social media and online freedom.⁵⁴

Issue: Digital Platform Regulation

The Ministry of Information and Communication's (MIC) Decree on Information Technology Services (Decree No.72/2013/ND-CP) makes every digital service or website locate at least one server within the borders of Vietnam.⁵⁵ The small to mid-size businesses that the App Association represents, face extreme barriers to the Vietnamese market due to this decree without it benefitting Vietnamese citizens or its economy. The App Association continues to engage with the MIC on Draft Decree 72, which would supersede Decree No. 72/2013/ND-CP (as amended) on the management, provision and use of internet services and online information. Decree 72, if finalized would obligations on "Regulated Cross-border Services", defined as those who provide public information on a cross-border basis and either (a) lease space in data centers in Viet Nam or (b) receive total monthly visits from Viet Nam of 100,000 or more for six consecutive months.

⁵⁴ Vu Lam, *Vietnam's Public Diplomacy and the Peril of Mixed Messages*, THE DIPLOMAT, (October 6, 2020), available at <https://thediplomat.com/2020/10/vietnams-public-diplomacy-and-the-peril-of-mixed-messages/>.

⁵⁵ <https://www.vnnic.vn/sites/default/files/vanban/Decree%20No72-2013-ND-CP.PDF>

The App Association appreciates the opportunity to submit these comments to the NTE. We stand ready to work with USTR and other stakeholders to address trade barriers for all of America's businesses and innovators.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian Scarpelli". The signature is fluid and cursive, with a prominent loop at the end.

Brian Scarpelli
Senior Global Policy Counsel

Leanna Wade
Regulatory Policy Associate

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