

26 July 2021

Before the
United States International Trade Commission
Washington, DC

In re:
Investigation No. 332-585:
Foreign Censorship Part 1: Policies and Practices Affecting U.S. Businesses and
Investigation No. 332-586: Foreign Censorship Part 2: Trade and Economic Effects on U.S.
Businesses

The [Asia Internet Coalition \(AIC\)](#) is pleased to submit the following comments to the United States International Trade Commission's (USITC) investigation of Foreign Censorship. The AIC is an industry association composed of leading Internet and technology companies. AIC seeks to promote the understanding and resolution of Internet and ICT policy issues in the Asia Pacific region. Our members are Airbnb, Amazon, Apple, Cloudflare, Expedia Group, Facebook, Google, SAP, Grab, LinkedIn, LINE, Rakuten, Twitter and Yahoo (Verizon Media), and Booking.com.

AIC supports policies that promote and enable Internet innovation, and the free flow of data, information, knowledge and trade across national borders, uninhibited by frictions and restrictions that are fundamentally inconsistent with the freedom to do business and with the open and decentralized character of the Internet.

AIC has raised on a number of occasions in recent years concerns about proposed or enacted regulations of the technology sector in the Asia-Pacific region which would impact freedom of expression and users' rights generally, in ways that would in effect constitute or reinforce censorship, with a direct or indirect negative impact on (US) companies' ability to innovate, trade, invest and expand their service offerings in certain markets. This worrying trend seems to be intensifying - and this is true across a range of political systems, whether with a strong democratic and legal due process heritage or not. In the worst cases, we have witnessed governments going beyond mere regulation of online content to impose shutdowns of access to all Internet resources, either regionally or nationally.

Recently, the world has witnessed more than ever before the social and economic importance of Internet access, applications and services, which have proven crucial to keep economies running and people and families connected through an unprecedented global pandemic.

But the emergency measures and legislations introduced to handle Covid have often included elements that threaten the free flow of information and cross-border trade and investment. This is particularly salient with regards to some of the so-called 'fake news', misinformation regulations that have arisen in the Asia-Pacific region, which AIC has publicly raised an

alarm bell against¹. Content regulations more broadly introduced during this troubled period have increased the likelihood that censorship could be deployed at scale through regulation of the Internet.

Beyond these emergency measures, the trend shows an increasing amount of regulations targeting digital companies whose requirements will lead to over-removal and censorship of legitimate content, including political speech. Because of the threat of harsh sanctions in particular, digital platforms will be forced to take a “better safe than sorry” approach — implementing a “take down first, ask questions later (or never)” approach to online content.

For a start, digital platforms regularly receive overly broad removal requests from both users as well as government agencies. Analyses of cease-and-desist and takedown letters have found that many seek to remove potentially legitimate or protected speech. One analysis of cease and desist and takedown letters found almost 50% of requests targeted potentially legitimate or protected speech.²

Together with the imposition of an ever tighter timeline for content removal (down to just 4 hours in some cases), strict rules also oblige Internet companies to provide extensive assistance to law enforcement, including such requirements as traceability of users and extensive retention of data). The practical implementation of these combined obligations means that Internet companies’ ability to conduct appropriate, due process assessments and push back on unreasonable legal requests is severely constrained.

Moreover, the threat of imposing severe sanctions which range from blocking access to an entire platform all the way to introducing personal criminal liability for the employees of foreign digital platforms has the consequence of encouraging online platforms to conduct little to no review of requests and over-block content - otherwise they risk severe penalties including a genuine and serious threat for the safety of their employees.

In the wrong environment, this is a sure way of putting in place a censorship regime for online content, with the additional risks for freedom of expression and communication and for democracy that this entails [particularly when coupled with parallel additional regulation of news media which may affect freedom of the press].

The only way to avoid these sanctions for technology companies would be not to invest and offer their services in those countries, or offer only a subset of their services. This deprives local businesses and consumers of a wealth of information, knowledge, tools and services, and ability to express their opinions. Importantly, it is also a non-tariff barrier for foreign companies looking to invest and operate in those markets.

In this context, the erosion of limitations of intermediary liability in regulatory regimes in Asia is a particularly worrisome development which plays into the hands of censorship. The so-called safe harbour protections - which limit an intermediary’s liability for the actions of

¹ See for example Op-Ed by Jeff Paine, AIC, June 2021: ‘The future of Asia’s battle against online misinformation’: <https://thediplomat.com/2021/06/the-future-of-asias-battle-against-online-misinformation/> and <https://www.nst.com.my/opinion/columnists/2021/06/701298/future-battle-against-online-misinformation>.

² See Brennan Center for Justice: <https://ncac.org/fepp-articles/will-fair-use-survive-free-expression-in-the-age-of-copyright-control>

others - are important for the economy and for the wider economic well-being - as well as for human rights including freedom of speech and access to information. Studies have indeed shown that safe harbor protections have fostered innovation and economic growth, and that online intermediaries' contributions to the economy and to the free flow of knowledge and information would not be possible at the current level without these protections. (One survey by startup group Engine, found that safe harbor "protects startups not only by preventing massive monetary judgments for hosting user-generated content but, more importantly, by sparing them from the high legal costs of defending even meritless lawsuits. India's Center for Internet and Society published similar considerations focused on India in '[How Safe is Your Harbour](#)' in 2020.)

Even though the USTR has identified clearly in recent years that "unreasonable burdens on internet platforms for non-IP-related liability for user-generated content and activity" are a barrier to digital trade, things have not improved: the opposite, in fact, as we see more and more trade- and freedom-restricting approaches to content regulation being introduced, reinforcing certain governments' control over speech on the Internet by threatening online platforms with untenable liability and sanctions such as blockages for the actions of individual users for defamation, political dissent, and other opinions and behaviours.

It is important that the US take concrete and forceful action to stem the proliferation of such regulatory trends negatively impacting human rights and freedom of speech in Asia, which has a real economic impact on US commercial opportunity abroad. Failure to do so would send a signal that the US is greenlighting the practices of these techno authoritarian regimes.

We would encourage the US and other governments to use trade and other bilateral and international instruments to champion the adoption of digital regulatory frameworks across the world that ensure unfettered access to information and the Internet for all.

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact us directly at Secretariat@aicasia.org. Thank you for your time and consideration.

Sincerely,



Jeff Paine
Managing Director
Asia Internet Coalition (AIC)