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Can Trade Policy Set Information Free?

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There is a contradiction at the heart of the Internet. Although the Internet has become a platform for trade, trade policies have both enhanced and undermined Internet freedom and the open Internet. Two recent events illuminate this paradox. First, *The New York Times (*America's paper of record*)* reported it had been repeatedly hacked after it published several articles delineating the financial holdings of the families of China's highest leaders. The hackers inserted malware and stolen its employees' e-mail account passwords, allegedly to find out information about the Times' sources. Soon thereafter, *The Wall Street Journal, Washington Post, Bloomberg, Voice of America* and other media outlets publicly claimed their computers were hacked, allegedly also by Chinese hackers. And in late February the government of Antigua announced that it would retaliate against America's ban of Antiguan online gambling sites. The World Trade Organization (WTO) gave the small island nation approval to sell items protected under US copyright law as a means of compensation for trade practices that "devastated" its economy. Antigua plans to set up a website to sell US-copyrighted material without paying the copyright holders. In short, while China was using trade to steal information and in so doing reduce Internet openness, Antigua will use trade to undermine property rights while advancing information flows.

Although the global Internet is creating a virtuous circle of expanding growth, opportunity, and information flows, policymakers and market actors are taking steps that undermine access to information, reduce freedom of expression and splinter the Internet. Almost every country has adopted policies to protect privacy, enforce intellectual property rights, protect national security, or thwart cyber-theft, hacking, and spam. While these actions may be necessary to achieve important policy goals, these policies may distort cross-border information flows and trade. Meanwhile, US, Canadian and European firms provide much of the infrastructure as well as censor ware or blocking services to their home governments and repressive states such as Iran, Russia, and China.

Trade agreements and policies have become an important source of rules governing cross-border information flows. First, policymakers recognize that when we travel the information superhighway, we are often trading. And Internet usage can dramatically expand trade. Secondly, the Internet is not only a tool of empowerment for the world's people, but a major source of wealth for US, EU, and Canadian business. Moreover, Internet commerce will grow substantially in the future as much of the world's population is not yet online. US, EU, and Canadian policymakers want to both protect their firms' competitiveness and increase market share. Finally, these officials understand that while some domestic laws can have global reach, domestic laws on copyright, piracy, and Internet security do not have global legitimacy and force. Hence, they recognize they must find common ground on internationally accepted rules governing cross-border data flows.

In theory, the WTO should be an appropriate venue for such discussions. WTO members agreed not to place tariffs on data flows. However, the member states have not found common ground on how to reduce new trade barriers to information flows. In 2011, several nations nixed a US and EU proposal that members agree not to block Internet service providers or impede the free flow of information online. Moreover, the members of the WTO have made little progress on adding new regulatory issues such as privacy and cyber security that challenge Internet policymakers. However, many new online activities will require cooperative global regulation on issues that transcend market access -- the traditional turf of the WTO. These issues will require policymakers to think less about ensuring that their model of regulation is adopted globally but more about achieving interoperability among different governance approaches. Alas, policymakers are not consistently collaborating to achieve interoperability.

The US, the EU, and Canada use trade policies to govern the Internet at home and across borders. The three trade giants use bilateral and regional trade agreements to encourage e-commerce, reduce online barriers to trade, and to develop shared policies in a world where technology is rapidly changing and where governments compete to disseminate their regulatory approaches. Policymakers also use export controls, trade bans or targeted sanctions to protect Internet users in other countries or to prevent officials of other countries from using Internet related technologies in ways that undermine the rights of individuals abroad. Finally, policymakers may use trade agreements to challenge other governments' online rules and policies as trade barriers.

The US is actively pushing for binding provisions in trade agreements that advance the free flow of information while challenging other nations privacy and server location policies as trade barriers. However, the US provisions are incomplete; they do not include language related to the regulatory context in which the Internet functions: free expression, fair use, rule of law, and due process. Moreover, the US and other nations should coordinate policies to promote the free flow of information with policies to advance Internet freedom. Policymakers may need to develop principles for the proper role of government in balancing Internet freedom and stability at the domestic and global levels. Finally, governments may also need to develop shared principles for steps governments may take when countries do not live up to these principles (a responsibility to protect the open Internet).

The US, EU and Canada should also show their commitment to Internet openness by annually reporting when and why they blocked specific applications or technologies and/or limited content (or asked intermediaries to limit access) to sites or domains. With this information, policymakers may get better understanding of how to achieve a flexible and effective balance of Internet stability and Internet openness.

Policymakers don't know if censorship is also a barrier to trade. The US and EU have issued reports describing other countries' Internet policies (privacy, censorship, server location and security policies) as potential barriers to trade. However, none of the three governments has yet challenged Internet restrictions as a barrier to trade. We recommended that trade policymakers ask the WTO secretariat to analyze if domestic policies that restrict information (short of exceptions for national security or public morals) are also barriers to cross-border information flows which can be challenged in a trade dispute. Moreover, policymakers should develop strategies to quantify how such policies affect trade flows.

Finally w*ithout deliberate intent, domestic and trade policies may gradually fracture the one global Internet*. Given that countries have different priorities for privacy, free speech, national security etc…, international harmonization of strategies to advance the open Internet is unlikely. Thus, when they negotiate bilateral, regional or multilateral trade agreements, policymakers should use language that encourages interoperability among signatories' privacy, online piracy, and security policies.