

Before the
Office of the United States Trade Representative
Washington, D.C.

In re Request for Public Comments and
Notice of a Public Hearing Regarding the
2019 Special 301 Review

Docket No. USTR-2018-0037

**COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

Pursuant to the request for comments published by the Office of the United States Trade Representative in the Federal Register at 83 Fed. Reg. 67,468 (Dec. 28, 2018), the Computer & Communications Industry Association (CCIA) submits the following comments for the 2019 Special 301 Review.¹ CCIA represents technology products and services providers of all sizes, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. CCIA members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion.

I. Introduction

The digital economy is a key driver of international trade. The United States exported \$439.1 billion and imported \$266.6 billion in digitally deliverable services, resulting in a trade surplus of \$172.5 billion.² Value added by the U.S. electronic services sector was \$989.0 billion, and the sector accounted for 6.9 % of U.S. private sector GDP in 2016.³ The growth of the digital economy has also led to new opportunities for audiovisual services that rely on copyright protection. As the U.S. International Trade Commission observed last year, streaming service providers are “making vast libraries of content available through video on demand (VoD) and subscription video on demand (SVoD) services” which “creates opportunities and increases

¹ A list of CCIA members is available at <https://www.ccianet.org/members>.

² BUREAU OF ECON. AFFAIRS, U.S. Trade in ICT and Potentially ICT-Enabled Services, <https://apps.bea.gov/iTable/iTable.cfm?reqid=62&step=6&isuri=1&tablelist=357&product=4> (updated Oct. 18, 2018).

³ U.S. INT’L TRADE COMM’N, Recent Trends in U.S. Services Trade: 2018 Annual Report, *available at* <https://www.usitc.gov/publications/332/pub4789.pdf>.

competition for established U.S. content producers.”⁴

Critical to the expansion of digital trade and the export of Internet-enabled goods and services is a robust intellectual property framework with provisions that enable innovation.⁵ As rightsholders,⁶ CCIA members value intellectual property protection and have devoted significant resources to develop tools to combat online piracy. However, these strong U.S. exporters are discouraged from entering new markets that lack adequate protections, in addition to strong protection and enforcement measures. A robust framework must include protections for online intermediaries and flexible limitations and exceptions to copyright that are necessary for the development of next-generation technologies such as artificial intelligence and machine learning.⁷

Foreign countries are increasingly prone to imposing onerous intellectual property-related regulations, aimed at U.S. Internet companies. These countries are pursuing legislation that disadvantages American Internet platforms, and online and cloud services. CCIA supports USTR engagement on these issues through multiple venues: the Special 301 Report, National Trade Estimate (NTE) Report, pursuit of trade agreements, and increased discussions with key partners.

CCIA reiterates that a strong intellectual property system is one that reflects the needs of all participants in the content creation, discovery, and distribution supply chains. Any discriminatory practices under the guise of intellectual property that target U.S. exports should

⁴ *Id.* at 58. The report also observed: “Video streaming services are the fastest-growing segment of the global audiovisual services industry. SVoD penetration is projected to increase from 1.6 percent of global households in 2010 to 13.4 percent in 2020, while global SVoD revenues are projected to grow from \$11.0 billion in 2016 to \$18.7 billion by 2022. The global footprint of Netflix, the largest provider, is projected to grow from less than 20 million households in 2010 to 115 million by 2020. Amazon Prime Video, the second-largest global supplier, is projected to increase its subscriptions outside the United States from 9.3 million in 2017 to 17.8 million in 2020, with much of this growth coming from Europe and Asia.” *Id.*

⁵ See CCIA, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use* (2017), available at <https://www.cciagnet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>.

⁶ For example, CCIA members invest heavily in content creation. See *supra* note 4. CCIA members comprise several of the leading rebuttable global brands. According to internal estimates, CCIA members hold over 100,000 active US patents which is approximately 3% of all active patents in the United States. See <https://www.electronicweekly.com/news/business/samsung-no-1-us-patent-holder-2018-04/>.

⁷ CCIA, *Fair Use in the U.S. Economy* at 8 (“New machine learning technologies depend on flexible copyright law. Machine learning by artificial intelligence requires programs ingesting and analyzing data and information, which may include material protected by copyright. Courts have found this type of intermediate copying to be a non-infringing, transformative use. Machine learning helps power innovation in a variety of areas, including autonomous vehicles, medical diagnostics, image recognition, augmented and virtual reality, and drones.”).

be identified and discouraged by USTR in the 2019 Special 301 Report.⁸

These comments renew concerns that CCIA has raised in previous Special 301 inquiries regarding persistent obstacles to U.S. exporters that rely on intellectual property protections. Reports from industry indicate that these concerns have not been addressed. Part II outlines why USTR should address intermediary liability and ancillary rights in the Special 301 process. Part III addresses concerns regarding countries' failures to create an intermediary liability framework for online services. Part IV of these comments addresses implementation of "snippet taxes" which deny market access and effective protection of rights guaranteed under international intellectual property law. Part V addresses countries who are noncompliant with existing intellectual property obligations under free trade agreements with the United States. Part VI addresses forced transfer of intellectual property through discriminatory cloud computing and platform regulations. Part VII highlights the opportunity presented by the announced negotiations with key U.S. trading partners to build on the success of the U.S.-Mexico-Canada Agreement (USMCA) in order to address many IP-related market access barriers raised in the Special 301 proceeding.

CCIA's comment address concerns in the following regions: Australia, China, Colombia, the European Union, France, Germany, Greece, Italy, Mexico, Peru, Russia, and Ukraine.⁹

II. Addressing Intermediary Liability Concerns and Ancillary Rights in the Special 301 Report

As CCIA has argued in previous submissions, the Special 301 process should not only account for gaps in enforcement but also identify areas where countries have failed to implement substantive IP-related commitments to the United States or have used intellectual property to target leading U.S. firms.¹⁰ In the 2019 Special 301 Report, USTR should identify countries whose intermediary liability protections fall short and countries who have introduced ancillary

⁸ CCIA was pleased to see issues such as snippet taxes highlighted in the 2018 National Trade Estimate Report, and CCIA believes it is relevant to discuss these policies in both the NTE context and the Special 301 report. See OFFICE OF U.S. TRADE REP., 2018 Special 301 Report, *available at* <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf>, at 27-28 [hereinafter "2018 Special 301 Report"].

⁹ CCIA does not make any specific recommendations on countries to place on the Priority Watch List or Watch List.

¹⁰ Comments of CCIA, In re 2010 Special 301 Review, Docket No. 2010-003, filed Feb. 16, 2010, *available at* <http://www.cciainet.org/wp-content/uploads/library/CCIA-2010-Spec301-cmts.pdf>; Comments of CCIA, In re 2018 Special 301 Review, Docket No. 2017-0024, filed Feb. 8, 2018, *available at* http://www.cciainet.org/wp-content/uploads/2018/02/CCIA_2018-Special_301_Review_Comments.pdf [hereinafter "CCIA 2018 Special 301 Comments"].

rights protections that fail to comply with international commitments.

This is within USTR’s statutory mandate to conduct the Special 301 process. USTR has the authority to conduct the annual Special 301 Review under 19 U.S.C. § 2242. The phrase “adequate and effective protection of intellectual property rights” in section 2242(a)(1)(A) refers to protection of intellectual property rights; it is not limited to infringement and it should not be interpreted as being solely limited to the infringement of exclusive rights. Moreover, section 2242(a)(1)(B) empowers USTR to address barriers to “fair and equitable market access” which confront “United States persons that rely upon intellectual property protection.”¹¹ The latter include CCIA members, and other U.S. industry stakeholders confronted with regulations such as snippet taxes and intermediary liability regimes that fail to lead to effective enforcement. Even with the phrase “fair and equitable market access” in section 2242(a)(1)(B) limited to U.S. persons engaged in the distribution of works protected by intellectual property rights, this still includes the U.S. exporters at whom the regulations described below are directed.

The market access barriers contemplated by the statute include regulations that violate provisions of international law or constitute discriminatory nontariff trade barriers.¹² Ancillary protection is also a violation of international copyright obligations.¹³ The imposition of ancillary rights through a snippet tax conflicts with U.S. law and violates long-standing international law that prohibits nations from restricting quotation of published works. These regulations undermine market access for U.S. services, as USTR highlighted in the 2018 National Trade

¹¹ The market access provision was added to the final text of the Omnibus Trade and Competitiveness Act of 1988 during conference. The Conference Report notes that “[t]he purpose of the provisions dealing with market access is to assist in achieving fair and equitable market opportunities for U.S. persons that rely on intellectual property protection. As a complement to U.S. objectives on intellectual property rights protection in the Uruguay Round of trade negotiations, the conferees intend that the President should ensure, where possible, that U.S. intellectual property rights are respected and market access provided in international trade with all our trading partners. . . . *Examples of foreign barriers to market access for products protected by intellectual property rights which this provision is intended to cover include, but are not limited to—laws, acts, or regulations which require approval of, and/or private sector actions taken with the approval of, a government for the distribution of such products; the establishment of licensing procedures which restrict the free movement of such products; or the denial of an opportunity to open a business office in a foreign country to engage in activities related to the distribution, licensing, or movement of such products*” (emphasis added). Bernard D. Reams Jr., Mary Ann Nelson, Trade Reform Legislation 1988 A Legislative History of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418.

¹² 19 U.S.C. § 2242(d)(3).

¹³ A full analysis of how ancillary rights conflict with international law and copyright norms is available in the following CCIA publication: *Understanding “Ancillary Copyright” In the Global Intellectual Property Environment* (2015), <http://www.ccianet.org/wp-content/uploads/2015/02/CCIA-Understanding-Ancillary-Copyright.pdf>.

Estimate Report,¹⁴ and depart from established copyright law. These regulations also contravene World Trade Organization (WTO) Commitments. By imposing a levy on quotations, these entitlements violate Berne Convention Article 10(1)'s mandate that "quotations from a work . . . lawfully made available to the public" shall be permissible. As TRIPS incorporates this Berne mandate, compliance with Article 10(1) is not optional for WTO Members; non-compliance is a TRIPS violation and should be addressed by USTR in its 2019 Special 301 Report.

In the 2018 Special 301 Report, USTR referred to the 2018 National Trade Estimate Report regarding "laws and legislative proposals in the EU that may hinder the provision of some online services, such as laws that would require certain online service providers—platforms providing short excerpts ("snippets") of text and images from other sources—to remunerate or obtain authorization from the original sources."¹⁵ CCIA appreciates that the Administration is monitoring these issues, and supports highlighting these trade concerns in *both* the 2019 NTE Report and the 2019 Special 301 Report.¹⁶

III. Intermediary Liability Protections Departing from Global Norms

U.S. firms operating as online intermediaries face an increasingly hostile environment in a variety of international markets. This impedes U.S. Internet companies from expanding services abroad. These adverse conditions manifest through court decisions and new copyright regulations that depart from global norms on intermediary responsibility. In the case of the EU's copyright reform, the motivation to target primarily U.S. firms is clear.¹⁷ The Special 301

¹⁴ OFFICE OF THE U.S. TRADE REP., *2018 National Trade Estimate Report on Foreign Trade Barriers* (2018), available at <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20National%20Trade%20Estimate%20Report.pdf> at 199-200 [hereinafter "*2018 NTE Report*"].

¹⁵ *2018 Special 301 Report*, *supra* note 8 at 27-8.

¹⁶ CCIA notes that USTR frequently highlights IP-related trade concerns in both the Special 301 and NTE. Compare *2018 Special 301 Report*, *supra* note 8 at 76 ("The United States strongly encourages Costa Rica to build upon initial positive momentum to strengthen IP protection and enforcement, and to continue to draw on bilateral discussions to develop clear plans to demonstrate progress to tackle longstanding problems.") with *2018 NTE Report*, *supra* note 14 at 123 ("The United States strongly encourages Costa Rica to build on these initial positive steps it has taken to protect and enforce IPR, and to continue with bilateral discussions of these issues and the development of a clear plan that will demonstrate additional progress to tackle longstanding problems."); *2018 Special 301*, *supra* note 8 at 69 ("The United States urges Egypt to provide deterrent-level penalties for IP violations, ex officio authority for customs officials to seize counterfeit and pirated goods at the border, and necessary additional training for enforcement officials.") with *2018 NTE Report*, *supra* note 14 at 140 ("The United States continues to recommend that Egypt provide deterrent-level penalties for IPR violations, provide customs officials with ex officio authority to seize counterfeit and pirated goods at the border, and provide necessary additional training for enforcement officials.").

¹⁷ See Axel Voss, *Protecting Europe's Creative Sector Against the Threat of Technology*, THE PARLIAMENT MAGAZINE (Feb. 5, 2019), <https://www.theparliamentmagazine.eu/articles/opinion/protecting-europe%E2%80%99s->

process serves as a valuable tool to identify areas where these liability rules fall short. USTR often places countries on the Watch List in part for failing to implement a clear and predictable intermediary liability regime that provides rightsholders an adequate process for protecting content without overburdening Internet services.¹⁸

a. European Union

As mentioned above, the EU's proposed Copyright Directive is entering final negotiations. Controversial updates to EU copyright law are expected to be politically agreed to in the near future, which would have a detrimental impact on Internet services exporting to the EU and to the EU's own startup community.¹⁹ The EU's proposed Copyright Directive is in final negotiations to reconcile the positions of the European Commission, European Council and European Parliament. The changes being contemplated would upend nearly two decades of established law, threatening U.S. digital exports by eliminating long-standing legal protections for online services that are a cornerstone of Internet policy. Article 13 of the proposed Copyright Directive disrupts settled law protecting intermediaries by weakening established protections for U.S. Internet services in the 2000 EU E-Commerce Directive, and making them directly liable for the actions of Internet users, which would require the implementation of unworkable filtering mandates on hosting providers and automated "notice-and-stay-down" requirements for every copyrighted work in existence. If adopted, the Directive would dramatically weaken these long-standing liability protections and exclude many modern service providers from its protections.

These concerns remain with both the European Parliament (EP) and Council's proposed

creative-sector-against-threat-technology (criticizing U.S. platforms specifically). This is also clear from statements made by MEPs following Parliament adoption of text. *See, e.g.* Pervenche Beres, June 20, 2018 ("Bravo aux membres de #JURI qui ne sont pas tombés dans le piège tendu par les #GAFA et ont voté en faveur de la culture et de la création #art13"), [//twitter.com/PervencheBeres/status/1009365360234123264](https://twitter.com/PervencheBeres/status/1009365360234123264); Statement of Virgine Roziere, June 20, 2018, ("Directive #droitdauteur : après plusieurs mois de débats houleux marqués par un lobbying intense des #GAFAM, la commission #JURI du #PE s'est enfin prononcée en faveur d'une réforme qui soutient les #artistes européens et la #création ! Une avancée pour mettre fin au #Valuegap !"), <https://twitter.com/VRoziere/status/1009383585885892609>.

¹⁸ OFFICE OF THE U.S. TRADE REP., 2013 Special 301 Report at 7 (2013), *available at* <https://ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf> (observing that the failure to implement an effective means to combat the widespread online infringement of copyright and related rights in Ukraine, including the lack of transparent and predictable provisions on intermediary liability and liability for third parties that facilitate piracy, limitations on such liability for ISPs, and enforcement of takedown notices for infringing online content."); 2018 *Special 301 Report*, *supra* note 8 at 56 ("The creation of a limitation on liability in this law is another important step forward. Notwithstanding these improvements, some aspects of the new law have engendered concerns by different stakeholder groups, who report that certain obligations and responsibilities that the law imposes are too ambiguous or too onerous to facilitate an efficient and effective response to online piracy.")

¹⁹ *See* Giovanni Maria Riccio, Ancillary Copyright and Liability of Intermediaries in the EU Directive Proposal on Copyright (Mar. 1, 2018), *available at* <https://ssrn.com/abstract=3149363>.

text. The EP’s text would increase the risk for U.S. exporters to the EU, resulting in significant economic consequences for the U.S. digital economy that depends on the EU market. The EP text lacks any language on mitigation measure, making it the most extreme departure from the current IP transatlantic framework. Furthermore, there is likely to be a ripple effect on the rest of the world, given the EU’s international influence. By effectively revoking long-established protections upon which U.S. services relied when entering European markets, the new Directive would impair U.S. companies’ investments for the benefit of EU rightsholders, establishing a market access barrier for many U.S. services and startups.

As negotiations continue, practically every impacted industry sector has come out in opposition of the direction of the Directive, including rightsholder organizations representing film, television, music, and publishing industries, and called for current negotiations to cease.²⁰

On a separate issue, it is also important that the EU does not take steps in the proposed platform-to-business regulation (*see infra* p. 15) to limit trade secret protections in a manner that makes it more difficult for Internet services to fight against spam and abuse on their platforms.

b. Australia

In November 2018, Australia amended the framework under its Copyright Act for granting injunctions relating to online locations outside Australia. Section 115A of the Copyright Act allows rightsholders to apply for an injunction that blocks access to online locations outside Australia that infringe or facilitate infringement and for which the “primary purpose” of the online location is to infringe copyright.²¹ The 2018 amendments lower the threshold test for obtaining an injunction, and now allow for rightsholders to apply for an injunction to capture online locations with the “primary effect” of facilitating copyright infringement. The amendments also broaden the category of service providers against which an injunction may be sought to include an “online search engine provider”.²² Industry notes that this is the first site-blocking scheme in the world to apply to online search engines.

The expansion of the framework to allow for injunctions against online locations that

²⁰ Letter from Audiovisual Services, Jan. 17, 2019, *available at* https://www.ifpi.org/downloads/17_Jan_2019_European_Creatives_and_Rightsholders_Caution_that_New_Draft_of_Article_13_Requires_Urgent_Changes_in_Key_Areas.pdf; Letter from Creative Sectors, Jan. 15, 2019, *available at* <https://assets.documentcloud.org/documents/5684818/Creative-Sector-Calls-for-a-Suspension-of.pdf>.

²¹ Copyright Act 1968 (Cth) s 115A (Austl.).

²² Copyright Amendments (Online Infringement) Act 2018, No. 157, 2018, <https://www.legislation.gov.au/Details/C2018A00157>.

have the “primary effect” of facilitating infringement risks capturing many legitimate websites. Some online storage websites, for example, can be abused by some users to facilitate copyright infringement against the website operators’ intent. The lack of a flexible, fair use exception to copyright also risks a number of websites being blocked that provide commonplace online services such as meme-generators, auto-translation services, and caching and indexing — all which may infringe copyright under current Australian law and are at risk of being blocked in Australia.

c. Greece

Greece recently created an administrative committee that can issue injunctions to remove or block potentially infringing content.²³ Instead of aligning with the U.S. system by submitting a notice under a regulatory process modeled after the Digital Millennium Copyright Act (DMCA), a rightsholder may now choose to apply to the committee for the removal of infringing content in exchange for a fee, outside a court process, such that the government restriction of online speech will occur without due process.

d. Italy

CCIA remains concerned with Italy’s copyright regulations on intermediary liability. Since 2014, the Italian Communications Authority (AGCOM) has had the authority to order the removal of allegedly infringing content and block domains at the ISP level upon notice by rightsholders, independent of judicial process. In March 2017, the Regional Administrative Court of Lazio upheld AGCOM’s authority to grant injunctions without a court order.²⁴

e. Mexico

Mexico does not currently have a copyright intermediary liability framework, but CCIA welcomes the progress made in USMCA to bring Mexico into alignment with the U.S. framework. CCIA is tracking implementation of Mexico’s obligations to create such a framework under USMCA and expects to see progress on fulfilling this commitment in 2019.

²³ Elenora Rosati, *Greece: New Notice and Take Down Administrative Mechanism for Online Copyright Cases Now in Force*, THE IP KAT (Mar. 5, 2018), <http://ipkitten.blogspot.com/2018/03/greece-new-notice-and-take-down.html>. (“The enactment of this mechanism occurred last summer by means of Law 4481/2017 and the introduction of a new analytical Article 66 E in the Greek Copyright Act (Law No. 2121/1993). However, its effective operation has just begun, as the necessary ministerial decisions for the implementation of the provision and the establishment of the Commission were adopted in February 2018.”).

²⁴ See Gianluca Campus, *Italian Public Enforcement on Online Copyright Infringements*, KLUWER COPYRIGHT BLOG (June 16, 2017), <http://copyrightblog.kluweriplaw.com/2017/06/16/italian-public-enforcementonline-copyright-infringements-agcom-regulation-held-valid-regional-administrative-court-lazio-still-room-cjeu/>.

f. Russia

Legislation that came into effect in 2017 extended Russia’s strict copyright enforcement²⁵ rules into new territory by requiring search providers to delist website links within 24 hours of a removal request. The removal was also required for websites that are “confusingly similar” to a previously blocked website. The law is expected to be amended in the coming months to reflect a recent agreement between online platforms and rightsholders.²⁶

g. Ukraine

In March 2017, Ukraine adopted “On State Support of Cinematography in Ukraine” which established a notice and takedown system for copyright enforcement.²⁷ However, the final law goes beyond what the notice and takedown system under Section 512 of the DMCA requires in the United States and in the laws of many U.S. trading partners who have adopted similar systems for FTA compliance. The legislation revised Article 52 of Ukrainian copyright law to impose 24- and 48-hour “shot clocks” for online intermediaries to act on demands to remove content in order for them to avoid liability. This deadline may be feasible at times for some larger platforms who can devote entire departments to takedown compliance, but will effectively deny market access to smaller firms and startups, and is inconsistent with the “expeditious” standard under U.S. copyright law. The law also effectively imposed an affirmative obligation to monitor content and engage in site blocking, by revoking protections for intermediaries if the same content reappears on a site twice within three months, even despite full compliance with the notice and takedown system. USTR noted that the obligations and responsibilities are too ambiguous and onerous in the 2018 NTE Report and CCIA reiterates that these concerns should be included in the 2019 NTE Report.

IV. Ancillary Copyright

CCIA reiterates concerns regarding the spread of ancillary copyright in foreign markets in the form of snippet taxes and related regulatory initiatives.

Studies based on the experience of countries that have implemented such laws, including

²⁵ Under Russian copyright law, a copyright owner may seek a preliminary injunction to block the site hosting infringing content prior to a judgment. A website may be permanently blocked if it receives two preliminary injunctions. Federal Law No. 187-FZ, on Amending Legislative Acts of the Russian Federation Concerning Questions of Protection of Intellectual Rights in Information and Telecommunications Networks, July 2, 2013.

²⁶ *Russia Internet Providers and Media Companies Sign Anti-Piracy Memorandum* (Dec. 27, 2018), <https://www.lexology.com/library/detail.aspx?g=ddafd5c3-cab2-475e-9af4-2fc831348514>.

²⁷ Law of Ukraine No. 1977-VIII of March 23, 2017, on State Support of Cinematography in Ukraine, (translation available at http://www.wipo.int/wipolex/en/text.jsp?file_id=438250).

studies commissioned by the European Parliament and European Commission, show that they fail to meet objectives.

The European Parliament JURI Committee report observed that it was “doubtful that the proposed right will do much to secure a sustainable press” and that the “effect of the snippet tax was to add additional entry costs for new entrants into those markets. . . In turn, it cements the position of incumbents and reduces incentives to innovate.”²⁸ A European Commission document made available online stated that the “available empirical evidence shows that news aggregators have a positive impact on news publishers’ advertising revenue” and that a press publishers right would do little to address perceived risks created by news aggregation platforms.²⁹

The Spanish Association of Publishers likewise observed that “[t]here is no justification - neither theoretical nor empirical - for the existence of the fee since aggregators bring to online publishers a benefit rather than harm” and that “[t]he fee also has a negative impact for consumers, due to the reduction in the consumption of news and the increase in search time.”³⁰ Another academic study also looked at the failure of Spain’s and Germany’s ancillary rights legislation, observing that the snippet taxes led to a decrease in visits to online news publications. The report noted that the shutdown of Google News in Spain “decreased the number of daily visits to Spanish news outlets by 14%” and that “effect of the opt-in policy adopted by the German edition of Google News in October of 2014 . . . reduced by 8% the number of visits of the outlets controlled by the publisher Axel Springer.”³¹

²⁸ Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive, Legal and Parliamentary Affairs, European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs, Directorate General for Internal Policies of the Union, PE 596.810 (Sept. 2017) at 18-19, 21, *available at* [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU\(2017\)596810_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf).

²⁹ The draft paper was made available through a public records request and is available at <https://www.asktheeu.org/en/request/4776/response/15356/attach/6/Doc1.pdf>. *See also* IGEL, *EU Commission Tried to Hide a Study that Debunks the Publisher’s Right As Ineffective* (Mar. 1, 2018), <https://ancillarycopyright.eu/news/2018-01-03/eu-commission-tried-hide-study-debunks-publishers-right-ineffective>.

³⁰ NERA Economic Consulting, *Impact on Competition and on Free Market of the Google Tax*, Report for the Spanish Association of Publishers of Periodical Publications (AEEPP), (2017), *available at* [https://www.aeepp.com/pdf/Informe_NERA_para_AEEPP_\(INGLES\).pdf](https://www.aeepp.com/pdf/Informe_NERA_para_AEEPP_(INGLES).pdf)

³¹ Joan Calzada and Ricard Gil, *What Do News Aggregators Do? Evidence from Google News in Spain and Germany* (2016), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837553.

CCIA first raised concerns about ancillary copyright in 2013.³² Since that time, the Internet industry has witnessed the spread of these detrimental laws in the European market.

a. European Union

Article 11 introduces an EU-wide snippet tax, framed as a “neighboring” right in news publications.³³ This EU-wide proposal follows unsuccessful national laws in Spain³⁴ and Germany,³⁵ highlighted by CCIA in previous comments.

Barring any response from EU trading partners, the snippet tax is likely to become a reality as per the adopted positions of the European Council and the European Parliament, respectively in May and September 2018.³⁶ Under Article 11 of the Directive, the EU would be creating a new right to press publications and restrict the freedom of quotation online. The European Parliament’s amended text provides that publishers of press publications and news agencies become beneficiaries of the rights provided by Article 2 and 3(3) of the EU Infosoc Directive for the digital use of their press publications by “information society providers.” The EP’s text also states that “the listing in a search engine should not be considered as fair and proportionate remuneration.”

The current negotiated text under discussion suggests that the supported approach is to exclude from the scope of the regulation facts, hyperlinks, and “insubstantial” parts defined as

³² Comments of CCIA, In re 2013 Special 301 Review, Dkt. No. USTR-2012-0022, filed Feb. 8, 2013, available at [http://www.ccianet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20\[2013\].pdf](http://www.ccianet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf).

³³ Copyright in the Digital Single Market, Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM (2016) 0593 – C8-0383/2016 – 2016/0280(COD) (Sept. 12, 2018), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0337+0+DOC+PDF+V0//EN>.

³⁴ Spain’s 2014 snippet tax, enacted in Article 32.2 of its *ley de propiedad intelectual*, created an unwaivable right for online content publishers. This right is independent of the author’s copyright. Under the law, “electronic content aggregation service providers” are compelled to license “nonsignificant fragments of aggregated content which are disclosed in periodic publications or on websites which are regularly updated, for the purposes of informing, shaping public opinion or entertaining”. Thus, any quotation gives rise to an obligation of equitable compensation, and where quoted fragments are “significant,” an actual license is required. The tariffs are arbitrary and excessive: one small company was asked to pay 7,000 euros a day (2.5 million euros a year) for links or snippets posted by its users. The law ultimately led to Google News leaving the market, as opposed to a revenue source for news publishers.

³⁵ The 2013 German law known as *Leistungsschutzrecht* targeted principally U.S.-based exporters of news aggregation services. Enacted with support from German news publishers, the *Leistungsschutzrecht* broke with international copyright norms, and failed to achieve its desired outcomes for publishers.

³⁶ European Commission, Joint Statement by Vice-President Ansip and Commissioner Gabriel on the European Parliament’s vote to start negotiations on modern copyright rules (Sept. 12, 2018), available at http://europa.eu/rapid/press-release_STATEMENT-18-5761_en.htm; September 2018 Draft Copyright Directive, supra note 179.

“individual words and very short excerpts.”³⁷ This forced remuneration would violate international copyright commitments under Berne regarding freedom of quotation³⁸ and “news of the day.”³⁹ The proposed maximum length of snippets is also inadequate for online services providers to provide necessary context to their users. Titles of webpages or articles accompanied by snippets and small thumbnail images have long been used to help users decide whether to click on a provided link. This context is beneficial to users and allows them to search more efficiently and save time by avoiding websites that use misleading titles. Additional information also protects users by enabling them to judge whether a website is low-quality or contains spam or malware.

The snippet tax as proposed will ultimately undermine the ability of free flow of information online by mandating fees for the quotation of published content. Small and medium sized-publishers have also expressed concern about the proposal’s ability to achieve its desired effect noting arguing that the “proposal fails to take into consideration market realities and the fact that digital publishers and online media outlets rely heavily on a broad variety of online channels to reach their readers and generate revenue.”⁴⁰

France has already tabled a proposal for a new ancillary copyright law based on Article 11 for swift adoption upon passage of the directive. France is likely to move forward with this law, even if the EU fails to reach agreement on the EU-wide Directive. This could encourage other EU member states to follow, joining France, Germany, and Spain who would all have ancillary copyright laws.

The EP’s text of the Directive would also expand the scope of existing exclusive rights of reproduction and communication to the public. Article 13b of the Parliament’s text would create

³⁷ Maud Sacquet, *Copyright Reform: The End?*, DISRUPTIVE COMPETITION PROJECT (Jan. 18, 2019), <http://www.project-disco.org/european-union/011819-copyright-reform-the-end/>.

³⁸ See Matt Schruers, *Germany Looks to Prop Up News Publishers With Snippet Subsidy, But Is a Quotation Tax Legal?*, DISRUPTIVE COMPETITION PROJECT (Nov. 14, 2012), <http://www.project-disco.org/intellectual-property/111412-germany-looks-to-prop-up-news-publishers-with-snippet-subsidy-but-is-a-quotation-tax-legal/> (explaining how Berne negotiators specifically rejected a proposal to confine the quotation right to "short" quotations).

³⁹ Berne Article 2(8): “The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.”

⁴⁰ Open Letter from European Innovative Media Publishers, Sept. 25, 2017, *available at* http://mediapublishers.eu/wp-content/uploads/2017/09/Coalition-of-Innovative-Media-Publishers_Open_Letter_neighbouring-right.pdf.

an EU-wide royalty for indexing images on the Internet.⁴¹ This would impact the everyday activities of online users, such as posting, linking, and embedding images online. This closely follows France’s 2016 legislation that CCIA has highlighted in previous submissions.⁴² By vesting indexing “rights” in a domestic collecting society, the French law targets an industry largely composed of American exporters. The EU-wide introduction of such a right would further disadvantage U.S. companies at the benefit of EU rightsholders.

V. Non-compliance with U.S. Free Trade Agreement Commitments

a. Australia

As CCIA has noted in previous Special 301 comments, the U.S.-Australia Free Trade Agreement contains an obligation to provide liability limitations for service providers, analogous to 17 U.S.C. § 512.⁴³ However, Australia has failed to fully implement such obligations and current implementations are far narrower than what is required. Australia’s statute limits protection to “services providers”, which it defines narrowly.⁴⁴ The consequence of this is that intermediary protection has been largely limited to Australia’s domestic broadband providers, and following recent passage of amendments to the Copyright Act, now includes organizations assisting persons with a disability, and bodies administering libraries, archives, cultural, and educational institutions. CCIA expressed immediate concern in the previous Special 301 proceeding regarding those amendments,⁴⁵ which pointedly excluded commercial online service providers.⁴⁶

Online service providers remain in a precarious legal situation when exporting services into the Australian market. This unduly narrow construction violates Australia’s trade obligations under Article 17.11.29 of the FTA. This article makes clear that the protections

⁴¹ “Member States shall ensure that information society service providers that automatically reproduce or refer to significant amounts of copyright-protected visual works and make them available to the public for the purpose of indexing and referencing conclude fair and balanced licensing agreements with any requesting rightholders in order to ensure their fair remuneration. Such remuneration may be managed by the collective management organisation of the rightholders concerned.”

⁴² *CCIA 2018 Special 301 Comments*, supra note 10 at 5-6.

⁴³ U.S.-Austl. Free Trade Agreement, May 18, 2004, 43 I.L.M. 1248.

⁴⁴ Copyright 1968 (Cth) ss 116ABA(Austl.).

⁴⁵ Post-Hearing Comments of CCIA in 2018 Special 301 Review, *available at* http://www.ccianet.org/wp-content/uploads/2018/03/CCIA_2018-Special-301_Review_Post-Hearing-Submission.pdf.

⁴⁶ Copyright Amendment (Disability Access and Other Measures) Bill 2017, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5832. *See also* Jonathan Band, *Australian Copyright Law Thumbs Nose at U.S. Trade Commitments*, DISRUPTIVE COMPETITION PROJECT (July 6, 2018), <http://www.project-disco.org/intellectual-property/070518-australiancopyright-law-thumbs-nose-at-u-s-trade-commitments/>.

envisioned should be available to all online service providers, not merely carriage service providers. Although Australian authorities documented this implementation flaw years ago, no legislation has been enacted to remedy it.⁴⁷

b. Colombia

Colombia has failed to comply with its obligations under the U.S.-Colombia Free Trade Agreement to provide protections for Internet service providers. Recently passed legislation that sought to implement the U.S.-Colombia FTA copyright chapter includes no language on online intermediaries. Without such protections required under the FTA, intermediaries exporting services to Colombia remain exposed to potential civil liability for services and functionality that are lawful in the United States and elsewhere. The recent legislation that seeks to implement the U.S.-Colombia FTA copyright chapter also does not appear to include widely recognized exceptions such as text and data mining, display of snippets or quotations, and other non-expressive or non-consumptive uses. CCIA urges USTR to engage Colombian counterparts and urge that they prioritize implementation of a complete intermediary framework as required by the U.S.-Colombia FTA.

c. Peru

Peru remains out of compliance with key provisions under the U.S.-Peru Trade Promotion Agreement (“PTPA”). Article 16.11, para. 29 of the PTPA requires certain protections for online intermediaries against copyright infringement claims arising out of user activities. USTR cited this discrepancy in its inclusion of Peru in the 2018 Special 301 report,⁴⁸ and CCIA supports its inclusion in the 2019 Report. CCIA urges USTR to engage with Peru and push for full implementation of the trade agreement and establish intermediary protections within the parameters of the PTPA.

VI. Forced Technology Transfer and Disclosure of Trade Secrets

a. China

CCIA reiterates concerns with certain Chinese regulations that discriminate against U.S. cloud service providers through forced technology transfer, including the 2017 Cybersecurity

⁴⁷ Australian Attorney-General’s Department, Consultation Paper: Revising the Scope of the Copyright Safe Harbour Scheme (2011), <https://www.ag.gov.au/Consultations/Documents/Revising+the+Scope+of+the+Copyright+Safe+Harbour+Scheme.pdf>.

⁴⁸ 2018 Special 301 Report, *supra* note 8 at 81.

Law as highlighted in the 2018 Report.⁴⁹ As previously noted, U.S. cloud service providers (CSPs) are strong American exporters and have been at the forefront of the movement to the cloud worldwide.⁵⁰ China has sought to block these U.S. cloud service exporters through discriminatory practices that force the transfer of intellectual property and critical know-how, reputable brand names, and operation over to Chinese authorities and companies in order to operate in the market.⁵¹ USTR should once again highlight China and its policies pursuant to the Cybersecurity Act in its 2019 Report.

Some intellectual property enforcement aspects of China's new E-Commerce Law, effective January 1, 2019, also raise concerns and have the potential to raise barriers for U.S. exporters doing business in China.⁵²

b. European Union

In the 2018 Special 301 Report, USTR recognized the “growing need for trading partners to provide effective protection and enforcement of trade secrets”, praising the progress made by the EU to strengthen trade secret regimes.⁵³ However, CCIA notes that separate legislation may have negative consequences for the protection of trade secrets. The EU's Platform-to-Business proposal, introduced in 2017, is currently in final negotiations.⁵⁴ These rules would apply to all online intermediary services facilitating the initiating of direct transactions between these services' business users and consumers, and some of the regulation's provisions would also apply to online search engines. Among other obligations, online intermediaries would be

⁴⁹ *Id.* at 45.

⁵⁰ Synergy Research Group, Amazon Dominates Public IaaS and Ahead in PaaS; IBM Leads in Private Cloud (Oct. 30, 2016), <https://www.srgresearch.com/articles/amazon-dominates-public-iaas-paas-ibm-leads-managedprivate-cloud>.

⁵¹ These regulations and other discriminatory regulations toward U.S. firms were outlined in USTR's 2018 Report to Congress on China's WTO Compliance. Specifically, these measures do the following: prohibit licensing foreign CSPs for operations; actively restrict direct foreign equity participation of foreign CSPs in Chinese companies; prohibit foreign CSPs from signing contracts directly with Chinese customers; prohibit foreign CSPs from independently using their brands and logos to market their services; prohibit foreign CSPs from contracting with Chinese telecommunication carriers for Internet connectivity; restrict foreign CSPs from broadcasting IP addresses within China; prohibit foreign CSPs from providing customer support to Chinese customers; and require any cooperation between foreign CSPs and Chinese companies to be disclosed in detail to regulators. OFFICE OF THE U.S. TRADE REP., *Report for Congress on WTO's Compliance* (2019) at 43-44, available at <https://ustr.gov/sites/default/files/2018-USTR-Report-to-Congress-on-China%27s-WTO-Compliance.pdf>.

⁵² LIBRARY OF CONGRESS, Global Legal Monitor, *China: E-Commerce Law Passed* (Nov. 21, 2018), <http://www.loc.gov/law/foreign-news/article/china-e-commerce-law-passed/>.

⁵³ *2018 Special 301 Report*, *supra* note 8 at 18-19.

⁵⁴ Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediations services, 2018/0112 (COD).

required to “outline the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters.”⁵⁵ These and other obligations represent burdensome requirements that could create market access barriers for intermediary services, large and small, seeking access to the EU market. They could make it much harder for multi-sided businesses to strike the right balance between the interests of their various users while preserving their own interests, including brand protection, as well as users’ interests in not being subjected to spam, abuse, and other misconduct by entities who game online rankings.

While there currently is a narrow exception for disclosure of trade secrets, it is not clear whether companies will be able to fully comply with the regulation without disclosing some trade secrets or critical know-how.⁵⁶ Ranking parameters and their relative importance, both of which are contemplated by the EU’s proposal, are inherently trade secrets. Platforms have a legitimate interest in protecting these, as they provide important competitive advantages or differentiation. Further clarifications on this language in the current text are highly welcome to ensure that the disclosure process provides sufficient protection to this sensitive information.

VII. Opportunity to Build on Success of the USMCA in Future Agreements

USTR has many current opportunities to build off the success of the USMCA in the proposed trade negotiations with Japan, the United Kingdom, and the European Union.⁵⁷ Provisions reflecting U.S. law on intellectual property that have facilitated innovation for decades should be the cornerstone of future U.S. free trade agreements. The intellectual property chapter contains clear rules for online services, consistent with Section 512 of the Digital Millennium Copyright Act. While not as explicit as other international agreements’ text on balance,⁵⁸ the reference to the Berne three-step test was also welcome as an indication that copyright law should include standardized limitations and exceptions. Outside the intellectual property context, CCIA also supports the continued inclusion of protections from civil liability for intermediaries for third-party speech to align liability rules and provide certainty for Internet

⁵⁵ *Id.* at recital 17.

⁵⁶ *Id.* at article 5(4).

⁵⁷ CCIA recommendations to USTR on trade negotiating priorities for the three proposed trade agreements are available at the following links: Japan (Nov. 2018), <http://www.cciainet.org/wp-content/uploads/2018/11/CCIA-Comments-on-U.S.-Japan-Trade-Agreement.pdf>; European Union (Dec. 2018), <http://www.cciainet.org/wp-content/uploads/2018/12/CCIA-Comments-to-USTR-on-U.S.-EU-Trade-Objectives-.pdf>; United Kingdom (Jan. 2019), <http://www.cciainet.org/wp-content/uploads/2019/01/CCIA-Comments-on-U.S.-UK-Trade-Priorities.pdf>.

⁵⁸ *See* Comprehensive and Progressive Agreement for Trans-Pacific Partnership at Article 18.66.

exporters. USTR's continued pursuit of these provisions in U.S. trade agreements will provide certainty to all Internet stakeholders and further innovation, and address many items raised in the Special 301 context.

VIII. Conclusion

USTR should recognize the concerns of U.S. Internet services who not only hold intellectual property and value its protection, but also rely on innovation-enabling provisions that reflect the digital age, in the 2019 Special 301 Report.

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