

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

In re Request for Public Comments and
Notice of a Public Hearing Reading the
2020 Special 301 Review

Docket No. USTR-2019-0023

**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 84 Fed. Reg. 70,613 (Dec. 23, 2019), the Computer & Communications Industry Association (CCIA) submits the following comments for the 2020 Special 301 Review.¹ CCIA represents technology products and service providers of all sizes, including computer hardware and software, electronic commerce, telecommunications and Internet products and services.

I. INTRODUCTION

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.² As rightsholders,³ 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 intermediary 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.⁴

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

² See CCIA, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use* (2017), available at <https://www.cciainet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>.

³ For example, CCIA members invest heavily in content creation. CCIA members comprise several of the leading rebuttable global brands. According to internal estimates, CCIA members hold over 100,000 active U.S. 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/>.

⁴ 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

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, the National Trade Estimate Report, pursuit of trade agreements, and increased discussions with key trading 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 be identified and discouraged by USTR in the 2020 Special 301 Report.⁵

II. ADDRESSING INTERMEDIARY LIABILITY CONCERNS AND ANCILLARY RIGHTS IN THE SPECIAL 301 REPORT

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. In the 2020 Special 301 Report, USTR should identify countries whose intermediary liability protections fall short and countries who have introduced ancillary 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

drones.”); *Fair Use, Artificial Intelligence, and Creativity*, PROJECT DISCO (Jan. 20, 2020), <http://www.project-disco.org/intellectual-property/012019-fair-use-artificial-intelligence-and-creativity/> (“Fair use is essential to a new category of creative works: works generated by an artificial intelligence (“AI”) process. Currently these works include translations, music, and poetry. As AI gets more sophisticated, the works AI processes can generate will also get more sophisticated, and more pleasing to human sensibilities. Many AI processes rely on the ingestion of large amounts of copyrighted material for the purpose of “training” an AI algorithm. Fair use is the legal theory in the United States that allows the copying of these works. Numerous appellate courts have found the mass copying of raw material to build databases for uses by AI processes to be fair use under 17 U.S.C. § 107. *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015); *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009); *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003).”).

⁵ CCIA does not make any specific recommendations on countries to place on the Priority Watch List or Watch List, but identifies regions of concern.

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.”⁶ 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.⁷ Ancillary protection of the type some have sought to implement in the EU is also a violation of international copyright obligations, and therefore cannot be “adequate and effective.”⁸ 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 2019 National Trade Estimate Report,⁹ 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

⁶ 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.

⁷ 19 U.S.C. § 2242(d)(3).

⁸ 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.cciainet.org/wp-content/uploads/2015/02/CCIA-Understanding-Ancillary-Copyright.pdf>.

⁹ OFFICE OF THE U.S. TRADE REP., *2019 National Trade Estimate Report on Foreign Trade Barriers* (2019), available at https://ustr.gov/sites/default/files/2019_National_Trade_Estimate_Report.pdf at 210-211 [hereinafter “2019 Special 301 Report”].

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 2020 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.”¹⁰ The 2019 Special 301 Report appears to have removed this reference. In light of the significance of this trade barrier and its claim to be related to copyright protection, CCIA supports highlighting these trade concerns in *both* the 2020 National Trade Estimate Report and the 2020 Special 301 Report.¹¹

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.¹² The Special 301

¹⁰ 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%20Special%20301.pdf> at 27-8.

¹¹ CCIA notes that USTR has highlighted IP-related trade concerns in both the annual Special 301 and National Trade Estimate Reports. *Compare 2018 Special 301 Report* 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 National Trade Estimate Report* 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.”). *Compare 2018 Special 301 Report* 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 National Trade Estimate Report* 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.”).

¹² 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-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”), <https://twitter.com/PervencheBeres/status/1009365360234123264>; Statement of Virginie Roziere, June 20, 2018, (“Directive #droitdauteur : après plusieurs mois de débats houleux marqués par un lobbying

process serves as a valuable tool to identify areas where these liability rules fall short. USTR has placed 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.¹³

a. European Union

On May 17, 2019, the Copyright Directive was published in the Official Journal of the European Union.¹⁴ The Member States will have until June 7, 2021 to implement this new EU law. Articles 15 (*infra* p. 11) and 17 represent a departure from global IP norms and international commitments and will have significant consequences for online services and users. These rules could place unreasonable and technically impractical obligations on a wide range of service providers, resulting in a loss of market access by U.S. firms.

Online services must implement filtering technologies in order to comply with the requirements under Article 17. While Article 17 avoids the word “filter”, practically speaking content-based filtering will be required if a service is to have any hope of achieving compliance. This upends longstanding global norms on intermediary liability. There is a reading of Article 17 that could conclude, absent obtaining a license from all relevant rightsholders of any possible piece of content that could be put online, online services would be directly liable for infringement unless they did all of the following: (1) made best efforts to obtain a license, (2) made best efforts to “ensure the unavailability of specific works and other subject matter” for which the rightsholders have provided to the online service, and (3) “in any event” acted expeditiously to remove content once notified by rightsholders and made best efforts to prevent their future uploads. This effectively creates an EU-wide ‘notice-and-staydown’ obligation. The

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>.

¹³ 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* 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.”).

¹⁴ 2019 J.O. (L130) 55, *available at* <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2019:130:FULL&from=EN>.

other requirements are not mitigated by the inclusion of a “best efforts” standard, in part because “best efforts” is a subjective but still mandatory standard open to abuse and inconsistent interpretations at the Member State level.

Despite claims from EU officials, lawful user activities will be severely restricted. EU officials are claiming that the new requirements would not affect lawful user activity such as sharing memes, alluding to the exceptions and limitations on quotation, criticism, review, and parody outlined in the text. This is a disingenuous argument for two reasons. First, while the text itself does not explicitly “ban memes,” the action online services would have to take to avoid liability for a massive volume of content is the restriction of lawful content when infringement cannot clearly be determined. Because algorithms used to monitor content on platforms cannot contextualize to determine whether the content was lawfully uploaded under one of the exceptions listed, the law requires platforms to err on the side of removing content. Second, under the final text of Article 17, the exceptions and limitations provided for appear to only apply to users, not the sharing services themselves (¶ 5: “Member States shall ensure that users in all Member States are able to rely on the following existing exceptions and limitations when uploaded and making available content generated by users”). This makes the exceptions largely meaningless if the services used to take advantage of this exception do not also receive the same rights. If a user has a right to share something but lawmakers make platforms liable for the same content, the lawmakers are forcing platforms not to provide this service.

Member States are currently working on implementation and a number have already launched public consultations to develop national legislation to implement the Directive.¹⁵ As Member States draft implementation legislation, CCIA emphasizes that a service provider which is made primarily liable for copyright infringements must be able to take steps to discharge this liability, otherwise this will ultimately lead to the demise of user-generated content services based in Europe — as it is materially impossible for any service to license all the works in the world and rightsholders are entitled to refuse to grant a license or to license only certain uses. Accordingly, CCIA believes that mitigation measures are absolutely necessary in order to make Article 17 workable. Moreover, any measures taken by a service provider under Article 17 should be based on the notification of infringing uses of works. A functional copyright system

¹⁵ See *Capitals Special Edition: The Copyright Directive*, EURACTIV (Oct. 2, 2019), <https://www.euractiv.com/section/politics/news/capitals-special-edition-the-copyright-directive/>.

requires cooperation between information society service providers and rightsholders. Rightsholders should provide robust and detailed rights information (using standard formats and fingerprint technology where applicable) to facilitate efforts to limit the availability of potentially infringing content.

France proposed legislation in October 2019 intending to implement the EU Copyright Directive, through the ongoing audiovisual reform.¹⁶ Previously, French officials indicated that filters would be required under implementing legislation.¹⁷ The proposal does not appear to reflect even the text of the Directive, omitting mention of protection of exceptions and limitations, the principle of proportionality, or that the actions required by the liability standard cannot amount to a duty to monitor. Specifically, the proposal replaces the prohibition on removal of safeguards that allow users to rely on exceptions granted in Article 17(7) of the Directive. Instead, there is only an obligation to inform users about relevant exceptions in terms and conditions.

b. Brazil

The Ministry of Citizenship is currently reviewing Brazil's Copyright Law.¹⁸ Industry reports that they are considering what approach to take with respect to intermediary liability protections, which do not currently exist within the existing statute for copyrighted content. The Marco Civil da Internet, Federal Law No. 12965/2014, granted limited intermediary protections that do not include copyrighted content. CCIA encourages Brazil to adopt an approach consistent with DMCA notice-and-takedown provisions that will allow legal certainty for Internet services in Brazil.

c. Greece

Greece amended its copyright law to establish a new model of copyright enforcement by creating an administrative committee that can issue injunctions to remove or block potentially infringing content. Under this system, a rightsholder may now choose to apply to the "Commission for the notification of online copyright and related rights infringement" for the

¹⁶ Available at <http://electronlibre.info/wp-content/uploads/2019/10/2019-09-30-PJL-audio-complet.pdf> [Fr.].

¹⁷ Mike Masnick, *After Insisting That EU Copyright Directive Didn't Require Filters, France Immediately Starts Promoting Filters*, TECHDIRT (Mar. 28, 2019), <https://www.techdirt.com/articles/20190327/17141241885/after-insisting-that-eu-copyright-directive-didnt-require-filters-france-immediately-starts-promoting-filters.shtml>.

¹⁸ Ministerio da Cidadania abre Consulta public sobre reforma da Lei de Direitos Autorais (June 28, 2019), <http://cultura.gov.br/ministerio-da-cidadania-abre-consulta-publica-sobre-reforma-da-lei-de-direitos-autorais/>.

removal of infringing content in exchange for a fee.¹⁹ As an extrajudicial process, there is a fear that government restriction of online speech will occur absent due process. The Commission issued its first decision in November 2018 under this process.

d. India

The Ministry of Electronics and Information Technology (MeitY) held a consultation in 2019 seeking comments on a proposal to amend rules created pursuant to Section 79 of the Information Technology Act (IT Act), which provides liability protections for online intermediaries. Last year, the Indian government informed the Supreme Court that the process of notifying the revised intermediary rules will conclude by January 15, 2020, likely without any additional consultation with industry. Recent reports suggest that officials are still evaluating the revised rules.²⁰ At time of this filing, industry has not seen a finalized version of these amendments.

To the extent that the finalized amendments implicate copyright concerns, USTR should note where the new responsibilities conflict with intermediary provisions within U.S. law in the Special 301 Report. The draft amendments would replace the 2011 Information Technology (Intermediary Guidelines) Rules and introduce new obligations on online intermediaries. Under the proposal, intermediaries must remove content within 24 hours upon receipt of a court order or Government notification and deploy tools to proactively identify and remove unlawful content

¹⁹ Eleonora Rosati, *Greece New Notice and Takedown 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>.

²⁰ *Revised IT Intermediary Rules in 2 Weeks After Law Ministry's Nod*, THE ECONOMIC TIMES (Feb. 4, 2020), <https://economictimes.indiatimes.com/tech/internet/revised-it-intermediary-rules-in-2-weeks-after-law-ministrys-nod/articleshow/73921179.cms> (“The government is expected to notify within two weeks the revised IT intermediary guidelines that seek to make social media companies more responsible for content on their platforms, two government officials told ET. The Ministry of Electronics and IT (MeitY) will seek the law ministry's views on the validity of the provisions in the draft document before notifying the rules, they said. MeitY wants to make sure that the provisions in the draft do not overshoot the due diligence requirement under the larger IT Act. The law ministry is expected to finalise the guidelines in a couple of days, and there is time of another two weeks from the Supreme Court,” a government official said, requesting not be identified.”).

(Amendment 9, Amendment 8, and Amendment 3(5)).²¹ A number of stakeholders have raised concerns with the proposed changes and the threat posed to Internet services and its users.²²

e. Italy

CCIA continues to have concerns regarding Italy's copyright enforcement framework as it applies to online intermediaries. 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.

f. Russia

In 2017, Russia extended its strict copyright enforcement rules under the "Mirrors Law".²³ The new scheme requires search providers to delist website links within 24 hours of a removal request, including for so-called "mirror" websites that are "confusingly similar" to a previously blocked website.²⁴ The law came into effect on October 1, 2017. Reports indicate that officials are in the process of revising this law.²⁵

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 studies commissioned by the European Parliament and European Commission, show that they

²¹ There are also concerning law enforcement assistance provisions, including a requirement for intermediaries to "enable tracing out of such originator of information on its platform" at the request of government officials (Amendment 3(5)), and local incorporation and local presence requirements (Amendment 7). See Comments of CCIA to India Ministry of Electronics and Information Technology, filed Jan. 31, 2019, *available at* <https://www.ccianet.org/wp-content/uploads/2019/02/Comments-of-CCIA-to-MeitY-on-DraftIntermediary-Guidelines-2018-1.pdf>.

²² *India's Proposed Intermediary Liability Rules Could Limit Everyone's Access to Information Online*, WIKIMEDIA (Dec. 26, 2019), <https://wikimediafoundation.org/news/2019/12/26/indias-proposed-intermediary-liability-rules-could-limit-everyones-access-to-information-online/>; *GitHub, Mozilla, and Cloudflare Appeal to India to be Transparent About Changes in its Intermediary Liability Rules*, TECHCRUNCH (Jan. 7, 2020), <https://techcrunch.com/2020/01/07/github-mozilla-and-cloudflare-appeal-india-to-be-transparent-about-changes-in-its-intermediary-liability-rules/>

²³ 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.

²⁴ *Russia: New Law on Blocking Copies of Pirate Websites Without Launching a Lawsuit*, LEXOLOGY (Aug. 9, 2017), <https://www.lexology.com/library/detail.aspx?g=ccd719d9-6628-4935-8ed9-e944dca4118e>.

²⁵ <https://www.vedomosti.ru/technology/articles/2019/07/30/807670-onlain-kinoteatri>; *Russia Plans to Block Pirate Sites Without Trial & De-Anonymize Their Operators*, TorrentFreak (Mar. 15, 2019), <https://torrentfreak.com/russia-plans-to-block-pirate-sites-without-trial-de-anonymize-operators-190315/>.

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.”²⁶ 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.²⁷

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.”²⁸ 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 the “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.”²⁹

CCIA first raised concerns about ancillary copyright in 2013.³⁰ There is now an EU-wide obligation for Member States to implement ancillary measures in the form of the press publishers’ right.

²⁶ 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).

²⁷ 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>

²⁸ 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.aepp.com/pdf/Informe_NERA_para_AEPP_\(INGLES\).pdf](https://www.aepp.com/pdf/Informe_NERA_para_AEPP_(INGLES).pdf).

²⁹ 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.

³⁰ Comments of CCIA, In re 2013 Special 301 Review, Dkt. No. USTR-2012-0022, filed Feb. 8, 2013, *available at* [http://www.cciagnet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20\[2013\].pdf](http://www.cciagnet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf).

a. European Union

CCIA remains concerned with Article 15 of the Copyright Directive and the creation of a press publishers' right. Contrary to U.S. law and current commercial practices, Article 15 could be interpreted to require search engines, news aggregators, applications, and platforms to enter into commercial licenses before including snippets of content in search results, news listings, and other formats. The exception for "short excerpts" and single words is highly unlikely to provide any real certainty for Internet services who wish to continue operating aggregation services, and conflicts with the current practice of many U.S. providers who offer such services.³¹

The Copyright Directive also does not harmonize the exceptions and limitations across the EU. The freedom of panorama exception (the right to take and use photos of public spaces) was left out of the proposal entirely. Moreover, while a provision on text and data mining is included, the qualifying conditions are too restrictive.³² The beneficiaries of this exception are limited to "research organizations," excluding individual researchers and startups.

France has already started to implement this provision of the EU Copyright Directive as it created a new right for press publishers which entered into force in October.³³ French press publishers may now request payment from platforms when they display a short preview of snippets of their content online in ways that would be treated as fair use under U.S. law. Following this development, Google announced on September 25 that it would stop showing preview content in France for European news publications.³⁴ On October 2, the French competition authority decided to open a preliminary investigation into Google in relation to conduct aimed at complying with the French law.³⁵

³¹ Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 15:

1. Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of directive 2001/29/EC for the online use of their press publications by information society service provider. The rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users. The protection granted under the first subparagraph shall not apply to acts of hyperlinking. The rights provided for in the first subparagraph shall not apply in respect of the use of individual words or very short extract of a press publication.

³² *Id.* at Article 3(2).

³³ Loi 2019-775 du 24 juillet 2019 à créer un droit voisin au profit des agences de presse et des éditeurs de presse [Law 2019-775 of July 24, 2019 Law creating a neighboring right for press publishers and news editors], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE] [OFFICIAL GAZETTE OF FRANCE], Oct. 5, 2019.

³⁴ Richard Gingras, *How Google Invests in News*, GOOGLE BLOG (Sept. 25, 2019), <https://www.blog.google/perspectives/richard-gingras/how-google-invests-news/>.

³⁵ David Meyer, *French Publishers Have Gone to War With Google. They Are Not Likely to Win*, FORTUNE (Oct. 25, 2019), <http://www.fortune.com/2019/10/25/french-publishers-google-copyright-competition/>.

German policymakers released a discussion draft in January 2020 regarding implementation of the Copyright Directive and Article 15. The proposed implementation of Article 15 builds upon Germany’s 2013 *Leistungsschutzrecht*.³⁶ The new press publishers’ right is substantially better than the law passed in France, although there are still limited exceptions for individual words or short extracts including a headline, a small-format preview image with designated resolution, and a three-second sequence of audio or visual content.³⁷

b. Switzerland

The Swiss government recently finalized a copyright reform package. During negotiations, a proposal was tabled from the Science, Education and Culture Committee of the Council of States (SECC-S) that would introduce a press publishers’ right that goes beyond what is envisioned in the EU Copyright Directive. According to SECC-S amendments, this new right would provide both a remuneration right to journalists and a right to media companies to make available content, explicitly not protected by copyright, for 10 years. The amendments were reconsidered in April, and the SECC-S declined to pursue the amendments further. However, it did “recommend that the Federal Council examine the effectiveness of the revision with regard to copyright law developments within the EU” which should “include and pay special attention to the experiences of press publishers concerning the recently adopted related rights within the EU.”³⁸

V. NON-COMPLIANCE WITH U.S. FREE TRADE AGREEMENT COMMITMENTS

a. Australia

The U.S.-Australia Free Trade Agreement contains an obligation to provide liability limitations for service providers, analogous to 17 U.S.C. § 512.³⁹ However, Australia has failed to fully implement such obligations and current implementations are far narrower than what is

³⁶ 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.

³⁷ § 87g, Draft discussion of the Federal Ministry of Justice and Consumer Protection, First law to adapt copyright law to the requirements of the digital single market, Jan. 15, 2020, https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_Anpassung%20Urheberrecht_digitaler_Binnenmarkt.html.

³⁸ Parliamentary Deliberation, Revisions to Copyright Law, Swiss Federal Institute of Intellectual Property, <https://www.ige.ch/en/law-and-policy/national-ip-law/copyright-law/revision-to-copyrightlaw/parliamentarydeliberations.html>.

³⁹ U.S.-Austl. Free Trade Agreement, May 18, 2004, 43 I.L.M. 1248.

required. Australia's statute limits protection to "service providers", which it defines narrowly.⁴⁰ 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 concern in previous Special 301 proceedings regarding those amendments,⁴¹ which pointedly excluded commercial online service providers.⁴²

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 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.⁴³

b. Colombia

Colombia has not complied with its obligations under the U.S.-Colombia Free Trade Agreement to provide protections for Internet service providers, as noted in the 2019 Special 301 Report.⁴⁴ Legislation from 2018 that sought to update copyright law and implement the U.S.-Colombia FTA copyright chapter includes no language on online intermediaries.⁴⁵ 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. Without protections required

⁴⁰ Copyright 1968 (Cth) ss 116ABA(Austl.).

⁴¹ Post-Hearing Comments of CCIA in 2018 Special 301 Review, *available at* http://www.cciagnet.org/wp-content/uploads/2018/03/CCIA_2018-Special-301_Review_Post-Hearing-Submission.pdf.

⁴² 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/>.

⁴³ 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>.

⁴⁴ 2019 Special 301 Report, *supra* note 9 at 80.

⁴⁵ Text available at <http://es.presidencia.gov.co/normativa/normativa/LEY%201915%20DEL%2012%20DE%20JULIO%20DE%202018.pdf>.

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. CCIA encourages USTR to continue to engage with 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 2019 Special 301 report, and CCIA supports its inclusion in the 2020 Report.⁴⁶ 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 Law as highlighted in the 2019 Report.⁴⁷ 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. 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.⁴⁸ USTR should once again highlight China and its policies pursuant to the

⁴⁶ *2019 Special 301 Report*, *supra* note 9 at 85.

⁴⁷ *Id.* at 46.

⁴⁸ 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>.

Cybersecurity Law in its 2020 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.⁴⁹

b. India

As USTR recognized in the 2019 Special 301 Report, while India has taken steps to address intellectual property challenges and promote IP protection and enforcement, “many of the actions have not yet translated into concrete benefits for innovators and creators, and long-standing deficiencies persist.”⁵⁰ Unfortunately, India's pending Data Protection Bill (“the Bill”) threatens to further undermine the ability of U.S. firms to operate in India.⁵¹ The Bill is currently going through a public consultation process and industry expects passage of the Bill later this year. The current version of the Bill contains revisions to a 2018 draft of the legislation that pose significant threats to business-confidential and sensitive information. There are two main provisions of the Bill that implicate industry concerns that are relevant to the Special 301 investigation: first, an expansive data portability right under section 19; and second, requirements for companies to share extensive datasets with the Central Government under section 91.

First, Section 19 of the Bill provides for a right to data portability for individuals with respect to personal information processed by data controllers designated as “data fiduciaries.” While data portability can be a tool that enables users to assert control over personal information or try different products and services, it should not be used for anticompetitive ends by mandating the disclosure of proprietary information or undermining intellectual property protection. Under the Bill, individuals can request specified datasets from data fiduciaries in either a structured, commonly used and machine-readable format, or request that the data fiduciary transfer the specified datasets to another data fiduciary. Unfortunately, the Bill's right of data portability appears to extend to information that includes business confidential or

⁴⁹ 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/>.

⁵⁰ *2019 Special 301 Report*, *supra* note 9 at 51.

⁵¹ The Ministry of Electronics and Information Technology released a draft bill (Personal Data Protection Bill, 2018) in July 2018. Subsequent revisions were made to the bill, and the Personal Data Protection Bill 2019 was tabled in December 2019. CCIA's comments address the revised draft bill. The text is available at: <https://www.medianama.com/wp-content/uploads/Personal-Data-Protection-Bill-2019.pdf>.

proprietary information. Specifically, the data categories subject to the portability requirement designated in section 19 (a)(ii iii) include “the data which has been generated in the course of provision of services or use of goods by the data fiduciary”, and “the data which forms part of any profile on the data principal, or which the data fiduciary has otherwise obtained.”⁵² These datasets may include data that qualifies as a proprietary asset or intellectual property of the data fiduciary, such as sensitive company insights and protected analytics generated through the investment of significant financial and technical resources.

Furthermore, the revised Bill contains an expansive definition of “personal data” that threatens to create overbroad portability requirements that are inconsistent with emerging international standards. Under section 19 (a)(i), an individual also has a right to receive “personal data provided to the data fiduciary.” The revised Bill’s definition of “personal data”, includes “data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, whether online or offline, or any combination of such features with any other information, *and shall include any inference drawn from such data for the purpose of profiling*” [emphasis added]. In contrast, Article 20 of the General Data Protection Regulation (GDPR) in the EU provides for a right to data portability concerning only “personal data concerning him or her, which he or she has provided to a controller.” Official guidance clearly excludes “inferred data” and “derived data” from the right to portability under the GDPR.⁵³ As drafted, the Bill threatens to extend the right of portability to proprietary data including business insights and commercial information that are not encompassed by the commonly understood definition of personal information.

Second, the draft Bill would grant the Government power to demand the production of broad categories of business data that appears to conflict with established intellectual property rights in India. Section 91 of the Bill grants new authority for the Central Government to direct any data fiduciary or data processor to produce any “personal data anonymized” or other “non-personal data” to “enable better targeting of delivery of services or formation of evidenced-based policies.”⁵⁴ In addition to implicating serious privacy concerns, the ability for the Government to

⁵² *Id.* at § 19 (I)(a)(ii, iii).

⁵³ See Article 20 Data Protection Working Party Guidelines on the right to data portability (adopted Apr. 5, 2017), available at https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=611233 at 10.

⁵⁴ § 91 (2).

demand the production of extensive datasets collected, inferred, or aggregated by companies, including personal information and confidential business information, may conflict with existing intellectual property law in India, which under the Copyright Act, 1957 extends ‘literary work’ protection to datasets in certain cases, as well as insights, analysis, and conclusions drawn from them.⁵⁵ A government mandate to share these categories of ‘non-personal’ data would therefore conflict with existing law.

VII. 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 2020 Special 301 Report.

February 6, 2020

Sincerely,

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⁵⁵ *See Is There a Database Right Protection in India?* (Mar. 2013), <https://www.lakshmisri.com/newsroom/archives/is-there-a-database-right-protection-in-india/#>.