

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 2019 Special
301 Review

Docket No. USTR-2018-0037

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

This post-hearing submission supplements the oral testimony by CCIA¹ at the Special 301 hearing on February 27, 2019, as well as written comments supplied in response to the U.S. Trade Representative’s Federal Register notice, at 83 Fed. Reg. 67,468 (Dec. 28, 2018).

I. Updates on European Union Legislation Highlighted in CCIA’s Written Comments

After the submission of CCIA’s written comments, the EU appears to have reached agreement on the final texts of the Copyright Directive and Platform-to-Business Regulation, pending final votes. CCIA supplements its written comments on these proposals to update on the status and express concerns with the agreed text.

A. Copyright Directive

On February 13, 2019, a political agreement was reached on the final text of the EU Copyright Directive, pending votes in the EU Parliament.² Articles 11 and 13 represent a departure from global IP norms and international commitments, and will have significant consequences for online services and users. These rules diverge sharply from provisions in the U.S.-Mexico-Canada Agreement and U.S. law, and will 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 13. While Article 13 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. Absent obtaining a license from all relevant rightsholders, online services would be directly liable unless they did all of the

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

² The final negotiated text is available at <https://www.fichier-pdf.fr/2019/02/17/copyright-final-agreement-february-16/copyright-final-agreement-february-16.pdf>.

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. The last requirement effectively creates an EU-wide ‘notice and staydown’ obligation. The 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 effect of the actions online services would have to take to avoid direct liability is the restriction of lawful content. Algorithms used to monitor content on platforms cannot contextualize to determine whether the content was lawfully uploaded under one of the exceptions listed. Second, under the final text of Article 13, the exceptions and limitations provided for 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.

CCIA also remains concerned with the text of the agreement on Article 11 and the creation of a press publishers’ right, as further explained in our written comments.³ Contrary to U.S. law and current commercial practices, Article 11 will 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 offer such services.

³ See Comments of CCIA, In Re 2019 Special 301 Review, Docket No. USTR-2018-0037, filed Feb. 7, 2019, available at http://www.cciainet.org/wp-content/uploads/2019/02/CCIA_2019-Special-301_Review_Comment-2.pdf, at 11.

B. Platform-to-Business Regulation

A political agreement was reached earlier in February.⁴ While changes to the regulations were made, CCIA will continue to monitor the following:⁵

- the operation of the exception for trade secret protection in Article 5;
- transparency requirements regarding vertical integration practices;
- a reference to “operating systems” that could result in expansion of regulatory scope in some contexts;
- the inclusion of monetary penalties in addition to injunctive relief; and
- prescriptive mechanisms for handling business complaints.

USTR should closely monitor its implementation to ensure that compliance does not have the effect of undermining market access.

II. The Spread of Ancillary Rights Outside the EU

As noted above, the final agreement of the EU Copyright Directive introduced EU-wide ancillary rights with the creation of a new press publishers’ right. This follows national ancillary rights legislation in Spain, Germany, and France. CCIA fears the continued spread of these proposals throughout Europe and other countries around the world without opposition from trading partners.

CCIA is already seeing the influence of the Directive outside the EU. The Swiss government has been negotiating a copyright reform package.⁶ However, just in February 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

⁴ Press Release, CCIA, EU Negotiators Reach Agreement on Platform Regulation Proposal (Feb. 14, 2019), <http://www.cciagnet.org/2019/02/eu-negotiators-reach-agreement-on-platform-regulation-proposal/>.

⁵ Press Release, European Commission, EU Negotiators Agree to Set Up New European Rules to Improve Fairness of Online Platforms’ Trading Practices (Feb. 14, 2019), http://europa.eu/rapid/press-release_IP-19-1168_en.htm.

⁶ CCIA notes that this Swiss legislation was raised by other stakeholders in written comments, who are critical of the legislation’s current failures to mandate siteblocking. CCIA does not believe that Switzerland, nor any country, should be included on the Watch List for failure to widely enforce siteblocking as a remedy to copyright infringement. U.S. law does not mandate siteblocking, nor do the Swiss have any obligation to the United States to provide this remedy. Moreover, no international treaty requires such measures.

content, explicitly not protected by copyright, for 10 years.⁷

As CCIA discussed in the hearing, industry remains concerned about link taxes and intermediary liability issues spilling over in other jurisdictions which have concluded that international commitments on these issues may be ignored. For this reason, it is important for USTR to continue to address shortcomings in copyright intermediary liability frameworks in other countries with longstanding obligations under U.S. free trade agreements to adopt adequate intermediary protections for Internet service providers.

III. Using the Special 301 Proceeding to Address Failures to Comply with International Copyright Commitments

As CCIA indicated during the hearing and in previous Special 301 processes, the Special 301 process should focus primarily on objecting to trading partners' failures to meet commitments to the United States in bilateral and multilateral agreements, and secondarily on encouraging harmonization with U.S. law. Notwithstanding claims by other participants in the process, demands by USTR that trading partners uphold their commitments to the United States, or encouragement to harmonize their law with U.S. law, can hardly be characterized as 'weakening' copyright or 'diluting' the Special 301 process.⁸ It is particularly inconsistent for Special 301 participants to champion U.S. law as the proper baseline for Special 301 while simultaneously advocating for enforcement mechanisms not found in federal statutes, and yet also criticizing nations who are transposing portions of Title 17 into their own code, verbatim.

IV. Fair Use Provisions in the South Africa Copyright Amendment Bill

Some stakeholders at the February 27 hearing and in written comments expressed concern with provisions of South Africa's copyright reform to the extent the legislation introduces fair use provisions in South Africa.⁹ CCIA disagrees with these arguments regarding the provisions and its position on the South African copyright bill are further outlined in a submission in a separate docket.¹⁰ The adoption of a fair use provision that resembles U.S. law

⁷ 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-copyright-law/parliamentary-deliberations.html#c63032> (last visited Mar. 5, 2019).

⁸ CCIA expanded on these concerns in its written submissions. See Comments of CCIA, In Re 2019 Special 301 Review, Docket No. USTR-2018-0037, *supra* note 3.

⁹ Copyright Amendment Bill, 2017, Bill 13B (S. Afr.), *available at* https://www.gov.za/sites/default/files/gcis_document/201811/copyright-amendment-bill-b13b-2017.pdf.

¹⁰ Comments of CCIA, Annual Review of Country Eligibility for Benefits Under African Growth and Opportunity Act, Docket No. USTR-2018-0022, filed Aug. 30, 2018, *available at* <https://www.regulations.gov/document?D=USTR-2018-0022-0011>.

is a positive development toward international harmonization¹¹ and provides certainty to a wide variety of U.S. exporters that rely on fair use in the United States.

The Special 301 committee should be particularly wary of suggesting that a fair use provision which largely tracks both U.S. law and practice is inconsistent with Berne or TRIPS. Such unfounded charges could later be leveled against the United States itself, leaving trade officials in the unenviable position of having to contradict prior statements.

As is the case with the United States, countries are free to adopt national frameworks that are unique, while still in compliance with Berne. The approach taken with the South African legislation does this. The bill text largely reflects Section 107 of the U.S. Copyright Act¹² and it cannot be said that Section 107 is out of compliance with Berne.¹³ Further, additional illustrative uses in 12A(a)¹⁴ are consistent with internationally-recognized examples of fair use, fair dealing, or other applications of limitations and exceptions, including those in U.S. jurisprudence.¹⁵

V. Conclusion

CCIA appreciates the work of the Special 301 Committee to develop the 2019 Special 301 Report to identify and reduce international barriers to trade.

March 5, 2019

Respectfully submitted,

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¹¹ Jonathan Band, *The Fair Use/Fair Dealing Handbook* (as updated Mar. 10, 2015), <http://infojustice.org/archives/29136>.

¹² Compare 12A(b) of the Copyright Amendment Bill, *supra* note 9, with 17 U.S.C. § 512.

¹³ Stakeholder written comments also note that “[n]either the ‘fair use’ nor the ‘fair dealing’ aspects of the proposed bill are ideal,” indicating that concern is directed at the export of fair use in general. *See* Comments of IIPA, In Re 2019 Special 301 Review, Docket No. USTR-2018-0037, filed Feb. 7, 2019, at 67.

¹⁴ Some stakeholders argue that these provisions would cause confusion and further expand the fair use right outside what is permitted under Berne. However, the “such as” language indicates that these provisions are illustrative of the uses envisioned by the adoption of a fair use regime in South Africa, drawing from internationally-recognized examples of fair use, fair dealing, or other applications of limitations and exceptions. Any use would arguably have to be tested against the four factors, in step with the U.S. system.

¹⁵ CCIA has explained in other proceedings that fair use is compatible with both common and civil law traditions. *See* Comments of CCIA, Annual Review of Country Eligibility for Benefits Under African Growth and Opportunity Act, Docket No. USTR-2018-0022, filed Aug. 30, 2018, *available at* <https://www.regulations.gov/document?D=USTR-2018-0022-0011>.