

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
2022 Special 301 Review

Docket No. USTR-2021-0021

**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 86 Fed. Reg. 70,885 (Dec. 13, 2021), the Computer & Communications Industry Association (CCIA) submits the following comments for the 2022 Special 301 Review. CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy.¹

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 and technologically necessary limitations and exceptions to copyright, in addition to strong protection and enforcement measures. A robust framework must include protections for online intermediaries

¹ For more, visit www.ccianet.org.

² See CCIA, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use* (2017), available at <https://www.ccianet.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, comprise several of the leading rebuttable global brands, and 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/>.

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

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 Internet platforms and online 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 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 2022 Special 301 Report.⁵

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 regulation to target leading U.S. firms. In the 2022 Special 301 Report, USTR should identify

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 drones.”); *Fair Use, Artificial Intelligence, and Creativity*, DISRUPTIVE COMPETITION PROJECT (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.

countries whose intermediary liability protections fall short and countries that 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 so interpreted. 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.”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 is also a violation of international copyright obligations.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

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

undermine market access for U.S. services, as USTR highlighted in the 2021 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 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 2022 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 CCIA supports highlighting these trade concerns in *both* the NTE Report and the Special 301 Report.¹¹

III. COPYRIGHT 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

⁹ OFFICE OF THE U.S. TRADE REP., *2021 National Trade Estimate Report on Foreign Trade Barriers* (2021), available at <https://ustr.gov/sites/default/files/files/reports/2021/2021NTE.pdf> at 220 ("Measures that disproportionately affect only one group of foreign-based service suppliers in the digital ecosystem may exacerbate those challenges to the detriment of all participants in the marketplace.").

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 27-28.

¹¹ CCIA notes that USTR has highlighted IP-related trade concerns in both the Special 301 and NTE. *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 NTE 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."); *2018 Special 301* 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* 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.").

copyright reform, the motivation to target primarily U.S. firms is clear.¹² The Special 301 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 had until June 7, 2021 to transpose the EU requirement into their national law/framework, and the Commission has already opened infringement procedures against Member States that have not transposed the copyright rules in time.¹⁵

Articles 15 and 17 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 U.S. law, and will place unreasonable and technically impractical

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 #GAFAM et ont voté en faveur de la culture et de la création #art13”), <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>.

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 Directive (EU) 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) 92, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2019:130:FULL&from=EN>.

¹⁵ Press Release, European Comm’n, Copyright: Commission calls on Member States to comply with EU rules on copyright in the Digital Single Market (July 26, 2021), available at <https://digitalstrategy.ec.europa.eu/en/news/copyright-commission-calls-member-states-comply-eu-rules-copyright-digital-singlemarket>.

obligations on a wide range of service providers, resulting in a loss of market access by U.S. firms.

Only four days before the deadline, the European Commission released guidelines on implementation of Article 17 in June 2021.¹⁶ Online services would be directly liable 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. 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.

As Member States transpose the EU Directive and issue guidance, 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 necessary to make Article 17 workable. Moreover, any measures taken by a service provider for Article 17 should be based on the notification of infringing uses of works, not just notification of works. A functional copyright system 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.

USTR should work with its EU counterparts to ensure the Directive is implemented in a technologically neutral and future proof manner. EU countries should not in their implementing laws mandate either the use of a technological solution nor impose any specific technological solutions on service providers to demonstrate best efforts. Any requirement to render content

¹⁶ Communication from the Commission to the European Parliament and the Council, Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, <https://eur-lex.europa.eu/legalcontent/EN/TXT/?qid=1625142238402&uri=CELEX%3A52021DC0288>.

unavailable must be proportionate and allow platforms the latitude needed to manage their systems without negatively impacting lawful user expression and legitimate uses of creative content.

It is imperative that national implementation does not impact the freedom of contract and therefore diverge from the terms of the Directive by imposing mandatory licensing, “must carry and must pay” obligations. Moreover, EU Member States should refrain from inserting new payment obligations for authors and performers into their national laws (such as recently adopted in Germany) which would create commercial confusion that affects all stakeholders in the value chain.

b. Brazil

The Ministry of Citizenship held a consultation in 2019 on Brazil’s Copyright Law.¹⁷ Industry reports that officials 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.

There is also the pressure to change the Brazilian copyright regime to create a press publishers’ right, following the EU’s adoption of a press publisher right pursuant to the Digital Single Market Copyright Directive.¹⁸

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

¹⁷ Ministério Do Turismo, Secretaria Especial da Cultura, Ministério da Cidadania abre consulta pública sobre reforma da Lei de Direitos Autorais (June 28, 2019), <http://cultura.gov.br/ministerio-da-cidadania-abre-consultapublica-sobre-reforma-da-lei-de-direitos-autorais/>.

¹⁸ See *Copyright, Competition, and Controversy: Press Publishers’ Right under the Copyright Directive* (June 30, 2020), <https://www.jdsupra.com/legalnews/copyright-competition-and-controversy-74664/>.

removal of infringing content in exchange for a fee.¹⁹ Because this is 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

Amendments to India’s Information Technology Act (IT Act) went into effect May 2021, imposing additional requirements under the Intermediary Rules and imposing new obligations on intermediaries relating to user-generated content. To the extent that the amendments implicate copyright concerns, USTR should note where the new responsibilities conflict with intermediary provisions within U.S. law.

The amendments replace the 2011 Information Technology (Intermediary Guidelines) Rules and introduce new obligations on online intermediaries. These new requirements include strict timelines for content takedown demands (72- and 24-hour timelines), new local presence requirements, and traceability mandates which pose significant security risks. New rules were also announced separately for “publishers” to adhere to a prescribed Code of Ethics. Several stakeholders have raised concerns with the proposed changes and the threat posed to Internet services and its users.²⁰

e. Russia

In 2017, Russia extended its strict copyright enforcement rules under the “Mirrors Law”.²¹ The new scheme requires search providers to delist website links within 24 hours of a

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-takedown.html>.

²⁰ *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/>.

²¹ Under Russian copyright law, a copyright owner may seek a preliminary injunction to block the site hosting infringing content prior to a judgement. 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.

removal request, including for so-called “mirror” websites that are “confusingly similar” to a previously blocked website.²² The law came into effect on October 1, 2017.

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.²³

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 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.”²⁴ 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.²⁵

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.”²⁶

²² *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>.

²³ CCIA field comments with the U.S. Copyright Office regarding its Publishers’ Protections Study that speak further to the concerns with the creation of an ancillary press publishers’ right in the United States. Comments of CCIA & Internet Ass’n, Publishers’ Protections Study: Notice and Request for Public Comment, Docket No. 2021-5, filed Nov. 24, 2021, *available at* <https://www.cciagnet.org/wp-content/uploads/2021/11/2021-11-24-CCIA-IA-Comments-on-Copyright-Office-Publishers-Protections-Study.pdf>.

²⁴ 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).

²⁵ 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>.

²⁶ 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).

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.”²⁷

CCIA first raised concerns about ancillary copyright in 2013.²⁸ There is now an EU-wide obligation for Member States to implement ancillary measures in the form of the press publishers’ right, and a similar proposal with more discriminatory elements against U.S. services has been implemented in Australia.

a. Australia

In February 2021, the Australian Government passed the News Media and Digital Platforms Mandatory Bargaining Code.²⁹ Under the Code, designated platform services companies are required to engage in negotiations with Australian news publishers for online content. The new rules would dictate that online services negotiate and pay Australian news publishers for online content, and disclose proprietary information related to private user data and algorithms.³⁰

If forced negotiations break down, or an agreement is not reached within three months between a news business and designated platform, the bargaining parties would be subject to compulsory mediation. If mediation is unsuccessful, the bargaining parties would proceed with arbitration, with arbitrators seeking to determine a fair exchange of value between the platforms and the news businesses. In addition to the negotiation and arbitration requirements, the Bargaining Code imposes information sharing requirements, including a requirement that

²⁷ Joan Calzada & 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.

²⁸ Comments of CCIA, In re 2013 Special 301 Review, Dkt. No. USTR-2012-0022, filed Feb. 8, 2013, available at [http://www.ccia.net.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20\[2013\].pdf](http://www.ccia.net.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf).

²⁹ Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6652 [Aus.].

³⁰ *The Dangers of Australia’s Discriminatory Media Code*, DISRUPTIVE COMPETITION PROJECT (Feb. 19, 2021), <https://www.project-disco.org/21st-century-trade/021921-the-dangers-of-australias-discriminatory-mediacode/>.

platforms provide advance notice of forthcoming changes to algorithms if the change is likely to have a significant effect on the referral traffic for covered news content.

Under the Code, the Australian Treasury has the utmost discretion to determine which companies these mandates are applied to by determining whether the platform holds significant bargaining power imbalance with Australian news media businesses. The Treasurer must also consider if the platform has made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses. Only two companies have been identified throughout deliberations. There are significant concerns from a procedural,³¹ competition,³² trade,³³ and intellectual property³⁴ perspective that USTR should pay close attention to.

At time of filing, no platform has been officially designated, although the Code is subject to an annual review by the Treasurer commencing February 2022.

b. European Union

CCIA has raised concerns with the EU's Copyright Directive in previous Special 301 filings, notably 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 severely restricts how search engines, news aggregators, applications, and platforms can provide context on the information they link to, while negatively impacting the free flow of information to the detriment of users of these U.S. services.

As EU countries are now moving forward with implementation of Article 15, they should ensure that national legislation follows the terms of the Directive as closely as possible in order to ensure the maximum harmonization of rules in the EU and respect the exceptions and limitations inserted in the Directive (including the exceptions inserted in the Directive in Article

³¹ *Australian Regulations Detrimental to the Digital Economy: Process (Part 1)*, DISRUPTIVE COMPETITION PROJECT (Aug. 6, 2020), <https://www.project-disco.org/competition/080620-australian-regulations-detrimental-to-the-digital-economy-process/>.

³² *Australian Regulations Detrimental to the Digital Economy: Competition (Part 2)*, DISRUPTIVE COMPETITION PROJECT (Aug. 13, 2020), <https://www.project-disco.org/competition/081320-australian-regulationsdetrimental-to-the-digital-economy-competition/>.

³³ *Australian Regulations Detrimental to the Digital Economy: Trade (Part 3)*, DISRUPTIVE COMPETITION PROJECT (Sept. 4, 2020), <https://www.project-disco.org/21st-century-trade/090420-australian-regulationsdetrimental-to-the-digital-economy-trade-part-3/>.

³⁴ *Australian Regulations Detrimental to the Digital Economy: Intellectual Property (Part 4)*, DISRUPTIVE COMPETITION PROJECT (Oct. 9, 2020), <https://www.project-disco.org/intellectual-property/100920-australianregulations-detrimental-to-the-digital-economy-intellectual-property-part-4/>.

15 which allow linking and short news extracts to be posted without the need for a license) in order to maintain a fair balance between the various fundamental rights. Moreover, it is imperative that national implementation does not impact the freedom of contract and therefore diverge from the terms of the Directive by imposing mandatory licensing, “must carry and must pay” obligations and binding arbitration mechanisms.

France created a new right for press publishers which entered into force in October 2019 following the terms of the EU Copyright Directive. Germany adopted its legislation implementing the Copyright Directive and Article 15 and the law entered into force in June 2021. Separately, Germany’s review of the Competition Act came into force in June 2021 which would require a small number of U.S. companies to carry content from German publishers and compensate publishers for that content.

Belgian implementation is moving beyond the terms of the Directive, inserting an obligation for good faith negotiations and an expectation of remuneration as well as a binding arbitration mechanism.

Croatia completed implementation in October 2021.³⁵ The Croatian text implementing Article 15 includes a provision which makes it mandatory for all publishers to license these rights collectively.³⁶ Not only does this go against the spirit of the EU rules, but such a move would weaken the nature of publishers’ rights, forcing publishers to act collectively via a collective management organization (CMO) and creating unnecessary barriers to the functioning of the EU internal market. Other countries including Slovakia, Slovenia, and Czech Republic are following the same path in their draft laws.

c. Taiwan

Industry reports that the Taiwan government is under pressure from news media publishers to impose a mandatory news media bargaining code to regulate commercial relations between news publishers and digital platforms (resembling Australia’s Code).³⁷ While the Taiwan government has not released a draft, industry worries that such a Code would be in

³⁵ Available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2021_10_111_1941.html.

³⁶ See Victoria de Posson, *Croatia’s Diverging Implementation of EU Copyright Rules*, DISRUPTIVE COMPETITION PROJECT (Sept. 15, 2021), <https://www.project-disco.org/european-union/091521-croatias-diverging-implementation-of-eu-copyright-rules/>.

³⁷ *News Media Bargaining Code Considered*, TAIPEI TIMES (Sept. 3, 2021), <https://taipeitimes.com/News/taiwan/archives/2021/09/03/2003763729>.

tension with longstanding international trade principles of national treatment and most favored nation (MFN), by unfairly discriminating against foreign digital service suppliers and providing preferential treatment to local advertising and other digital service suppliers.

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

a. Australia

Failure to implement obligations under existing trade agreements serves as a barrier to trade. The U.S.-Australia Free Trade Agreement contains an obligation to provide liability limitations for service providers, analogous to 17 U.S.C. § 512. 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 what it refers to as "carriage" service providers, not service providers generally. The consequence of this limitation is that intermediary protection is largely limited to Australia's domestic broadband providers. Online service providers engaged in the export of information services into the Australian market remain in a precarious legal situation. 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.³⁸ This oversight was not addressed by the passage of amendments to Australia's Copyright Act, which expanded intermediary protections to some public organizations but pointedly excluded commercial service providers including online platforms.³⁹ These amendments specifically exclude U.S. digital services and platforms from the operation of the framework. The failure to include online services such as search engines and

³⁸ 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>.

³⁹ 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/>.

commercial content distribution services disadvantages U.S. digital services in Australia and serves as a deterrent for investment in the Australian market.

b. Colombia

Colombia has not complied with its obligations under the U.S.-Colombia Free Trade Agreement to provide protections for Internet service providers, noted in the 2020 Special 301 Report.⁴⁰ Legislation from 2018 that sought to update copyright law and implement the U.S.-Colombia FTA copyright chapter includes no language on online intermediaries.⁴¹ 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 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 urges 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 2020 Special 301 report, and CCIA supports its inclusion in the 2022 Report.⁴² CCIA urges USTR to engage with Peru and push for

⁴⁰ 2020 *Special 301 Report* at 80.

⁴¹ Text available at <http://es.presidencia.gov.co/normativa/normativa/LEY%201915%20DEL%2012%20DE%20JULIO%20DE%202018.pdf>.

⁴² 2020 *Special 301 Report* at 86.

full implementation of the trade agreement and establish intermediary protections within the parameters of the PTPA.

VI. FORCED TECHNOLOGY TRANSFER AND PROTECTION 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 2020 Report.⁴³ 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 to operate in the market.⁴⁴ USTR should once again highlight China and its policies pursuant to the Cybersecurity Law in its 2022 Report.

b. European Union

The Digital Markets Act (DMA) was introduced in December 2020 and is an example of the EU attempting to target only U.S. technology companies. Under the proposed rules, companies that operate a “core platform service” must notify the European Commission upon meeting pre-defined thresholds for European turnover, market capitalization, and number of European consumer users and business users. These thresholds have been designed to capture exclusively U.S. technology companies and exclude their foreign rivals,⁴⁵ and some policymakers have proposed amending the thresholds to ensure that U.S. firms will continue to

⁴³ *Id.* at 39.

⁴⁴ 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>.

⁴⁵ Bruegel, Which Platforms Will be Caught by the Digital Markets Act? The Gatekeeper Dilemma (Dec. 14, 2021), <https://www.bruegel.org/2021/12/which-platforms-will-be-caught-by-the-digital-markets-act-the-gatekeeper-dilemma/> (“[T]he Commission had a rough idea of the companies that the DMA should capture, it then crafted the thresholds accordingly, to be sure the bigger players would be included.”).

be the only companies that fall under scope well into the future.⁴⁶ The list of “core platform services” furthermore carves out non-platform-based business models of large European rivals in media, communications, and advertising.

Once under the scope of the DMA, companies will be prohibited from engaging in a range of pro-competitive business practices (e.g., benefiting from integrative efficiencies, reserving the use of their investments for themselves). Furthermore, the Commission will be vested with gatekeeping authority over approval for future digital innovations, product integrations, and engineering designs of U.S. companies.

The DMA would also in some cases compel the forced sharing of intellectual property, including firm-specific data and technical designs, with EU competitors, effectively requiring U.S. firms to subsidize rivals to promote competition. Unlike traditional competition enforcement, the Commission will be able to impose these interventions without an assessment of evidence, of any effects-based defenses, or of pro-competitive justifications put forth by the companies targeted. For example, Article 6.1 of the Commission text details several mandatory data sharing and interoperability obligations for covered companies deemed “gatekeepers” by authorities, without including any safeguards when these obligations conflict with EU IP/trade secret law. The data categories specified in these obligations are quite broad and likely to include data that is protected under EU law.

Amendments on self-preferencing are discussed to be extended in the process in a way which may stifle rather than promote competition.

As of January 2022, the DMA is currently in the triilogue process, and is expected to be adopted during the French Presidency of the European Council, as early as March 2022. It would then start being enforced by the end of 2022.

c. India

The Personal Data Protection Bill (PDPB), introduced in December 2019, remains under consideration in India by a Joint Committee in Parliament, and threatens the ability of U.S. firms to operate in India.⁴⁷ On December 16, 2021, India’s Joint Parliamentary Committee (JPC) on

⁴⁶ *EU Should Focus on Top 5 Tech Companies, Says Leading MEP*, FINANCIAL TIMES (May 13, 2021), <https://www.ft.com/content/49f3d7f2-30d5-4336-87ad-eea0ee0ecc7b>.

⁴⁷ *See* CCIA Comments on the Personal Data Protection Bill, 2019 (Feb. 24, 2020), <https://www.ccianet.org/wp-content/uploads/2020/02/2020-02-24-CCIA-Comments-on-Personal-Data-ProtectionBill.pdf>.

Personal Data Protection Bill released a report detailing further recommended provisions for the pending PDPB (hereinafter “JPC Report”).⁴⁸

The JPC Report Recommendations, if imposed, would pose a greater threat to digital services operating in the region. One significant change recommended by the JPC Report recommends that the scope of the PDPB be expanded to cover both personal and non-personal data, overseen by the same Regulator, stating that it is “not possible to differentiate between personal or non-personal data not just in the initial stage but at later stages also.” This expansion to non-personal data is likely to conflict with protections granted to firms operating in the region including protection of trade secrets or business-sensitive information. Other revisions include new obligations not contemplated by the original PDPB.⁴⁹

CCIA remains concerned with two provisions of the Bill that implicate items 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, Clause 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.” 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 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.” These datasets may include data that qualifies as a proprietary asset or intellectual property of the data fiduciary,

⁴⁸ Joint Committee on the Personal Data Protection Bill (2019), *available at* <https://www.ahlawatassociates.com/wp-content/uploads/2021/12/17-Joint-Committee-on-the-Personal-Data-Protection-Bill-2019.pdf>.

⁴⁹ Clause 26 of the JPC Report details new rules for all social media platforms that do not act as intermediaries, and recommends that under the PDPB legislation that they be liable for hosted content. *See* Nitin Dhavate & Ramakant Mohapatra, *A look at proposed changes to India's (Personal) Data Protection Bill*, IAPP (Jan. 5, 2022), <https://iapp.org/news/a/a-look-at-proposed-changes-to-indias-personal-data-protection-bill/>.

such as sensitive company insights and protected analytics generated through the investment of significant financial and technical resources.

The JPC Report specifies that protection of trade secrets *may not* be used as grounds not to comply with the data portability right.⁵⁰ The new text would only allow a data fiduciary to deny a request on the ground of “technical feasibility” which is narrowly defined under the law.

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. Clause 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 “nonpersonal data” to “enable better targeting of delivery of services or formation of evidenced-based policies.”⁵¹

In addition to implicating serious privacy concerns, the ability for the Government to 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.⁵² A government mandate to share these categories of ‘non-personal’ data would therefore conflict with existing law.

VII. RULES ON E-COMMERCE AND COUNTERFEITS

a. China

Chinese government efforts against cross-border counterfeit crimes remain insufficient. Industry reports two key problems. First, there is a lack of border measures to prevent cross-border movement of counterfeit goods, especially the sharing of necessary data on counterfeits stopped at the border with right owners to track down bad actors. Second, extraterritorial evidence cannot be used as formal evidence in court. For evidence of selling counterfeits seized by foreign law enforcement or recognized by judicial procedures, if the case meets the threshold for starting a criminal investigation, the Public Security Bureau should file the case and

⁵⁰ JPC Report 2.85.

⁵¹ § 91 (2).

⁵² *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/>.

recognize the seizure value as the criminal amount to pursue the criminal liability of counterfeiters.

The Chinese government should enhance international cooperation on IPR protection, fully utilize the multilateral or bilateral mechanisms to strengthen cross-border judicial assistance, and work closely with judicial agencies in the U.S., EU, UK, ASEAN, etc. to achieve consensus on the fight against online crimes, and build the common rules for digital forensics across borders.

VIII. CONCLUSION

In the 2022 Special 301 Report, 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.

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