

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
2023 Special 301 Review

Docket No. USTR-2022-0016

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 87 Fed. Reg. 76,660 (Dec. 15, 2022), the Computer & Communications Industry Association (CCIA) submits the following comments for the 2023 Special 301 Review. CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For over 50 years, CCIA has promoted open markets, open systems, and open networks.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, 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 and flexible limitations and exceptions to copyright that are necessary for the development of next-generation technologies such as artificial intelligence and machine learning.³

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), <https://www.ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>.

³ 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.”); Jonathan Band, *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.*

Foreign countries are increasingly prone to imposing onerous intellectual property-related regulations, aimed at U.S. Internet companies. 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.⁴

II. ADDRESSING CONCERNS 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 in an inappropriate manner to target leading U.S. firms.

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.”⁵ 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

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).”

⁴ CCIA does not make any specific recommendations on countries to place on the Priority Watch List or Watch List, but identifies regions of concern.

⁵ 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.

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.⁶ These include unbalanced ancillary rights protection, failure to adopt adequate intermediary liability regimes, and discriminatory treatment of foreign services to advantage domestic competitors often in cultural preservation policies.

Ancillary protection conflicts with international copyright obligations.⁷ 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 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. While Article 1 of TRIPS permits Members to implement their law with more extensive protection, they can only do so "provided that such protection does not contravene the provisions of the Agreement". Non-compliance is a TRIPS violation and should be addressed by USTR in its 2023 Special 301 Report.

CCIA notes that 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."⁸ CCIA supports highlighting these trade concerns in *both* the NTE Report and the Special 301 Report.⁹

⁶ 19 U.S.C. § 2242(d)(3).

⁷ 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>.

⁸ 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.

⁹ 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,

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 copyright frameworks that depart from global norms. 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.¹⁰

a. European Union

In the case of the EU's copyright reform, the motivation to target primarily U.S. firms is clear.¹¹ On May 17, 2019, the Copyright Directive was published in the Official Journal of the European Union.¹² The Member States had until June 7, 2021 to transpose the EU requirement into their national law or domestic framework, and the Commission has already opened up infringement procedures against Member States that have not transposed the copyright rules in time.¹³

Articles 15 and 17 represent a departure from global IP norms and international commitments, and pose significant consequences for online services and users. These rules diverge sharply

provide customs officials with ex officio authority to seize counterfeit and pirated goods at the border, and provide necessary additional training for enforcement officials.”)

¹⁰ 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.”).

¹¹ 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>.

¹² 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>.

¹³ Press Release, European Comm’n, Copyright: Commission urges Member States to fully transpose EU copyright rules into national law (May 19, 2022), *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2692.

from U.S. law, and places unreasonable and technically impractical obligations on a wide range of service providers, resulting in a loss of market access by U.S. firms.

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 absolutely necessary in order 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 necessary 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 in order to demonstrate best efforts. Any requirement to render content 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 also 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.

b. Brazil

The Ministry of Citizenship held a consultation in 2019 on Brazil’s Copyright Law.¹⁴ 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.

¹⁴ 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/>.

There is also the pressure to change the Brazilian copyright regime in order to create a press publishers' right, following the EU's adoption of a press publisher right pursuant to the Digital Single Market Copyright Directive.¹⁵

c. India

Amendments to India's Information Technology Act (IT Act) went into effect May 2021, effectively 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 depart from international practice with respect to intermediary provisions.

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. A number of stakeholders have raised concerns with the proposed changes and the threat posed to Internet services and its users.¹⁶

IV. ANCILLARY COPYRIGHT

CCIA reiterates concerns regarding the spread of unbalanced ancillary copyright regimes in foreign markets in the form of snippet taxes and related regulatory initiatives.¹⁷

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 stated 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."¹⁸ A European

¹⁵ See Latham & Watkins LLP, *Copyright, Competition, and Controversy: Press Publishers' Right under the Copyright Directive*, JD Supra (June 30, 2020), <https://www.jdsupra.com/legalnews/copyright-competition-and-controversy-74664/>.

¹⁶ *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/>.

¹⁷ CCIA filed comments with the U.S. Copyright Office 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, In Re Publishers' Protections Study: Request for Additional Comments, Docket No. 2021-5, filed Jan. 5, 2022, available at <https://www.cciainet.org/wp-content/uploads/2022/01/2022-01-05-CCIA-Additional-Comments-on-Copyright-Office-Publishers-Protections-Study.pdf>.

¹⁸ 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).

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.¹⁹

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.”²⁰ 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.”²¹

CCIA first raised concerns about ancillary copyright in 2013.²² 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 and proposed in Canada.

a. Australia

In February 2021, the Australian Government passed the News Media and Digital Platforms Mandatory Bargaining Code.²³ 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.²⁴

¹⁹ 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>.

²⁰ 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).

²¹ 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.

²² Comments of CCIA, In re 2013 Special 301 Review, Dkt. No. USTR-2012-0022, filed Feb. 8, 2013, available at [http://www.ccianet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20\[2013\].pdf](http://www.ccianet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf).

²³ 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.]

²⁴ Project Disco, *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-media-code/>.

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 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 would have the utmost discretion to determine which companies these mandates are applied to by determining whether the platform holds significant bargaining power imbalance with Australia 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 (both American) have been identified throughout deliberations. There are significant concerns from a procedural,²⁵ competition,²⁶ trade,²⁷ and intellectual property²⁸ perspective that USTR should pay close attention to.

At time of filing, no platform has been officially designated, but it is clear from the Treasury's consultation paper reviewing the code, published in April 2022, that the main targets of the law are Google and Meta.²⁹ Further, the Australian Treasury released a report in November 2022 documenting the first year following the implementation of the News Media Bargaining Code, in which it finds that digital platforms reached at least 30 commercial agreements between those two companies and Australian news businesses that the Treasury claims would have otherwise been "highly unlikely" to materialize.³⁰

²⁵ *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/>.

²⁶ *Australian Regulations Detrimental to the Digital Economy: Competition (Part 2)*, DISRUPTIVE COMPETITION PROJECT (Aug. 13, 2020), <https://www.project-disco.org/competition/081320-australian-regulations-detrimental-to-the-digital-economy-competition/>.

²⁷ *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-regulations-detrimental-to-the-digital-economy-trade-part-3/>.

²⁸ *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-australian-regulations-detrimental-to-the-digital-economy-intellectual-property-part-4/>.

²⁹ Review of the News Media and Digital Platforms Mandatory Bargaining Code Consultation Paper (Apr. 2022), https://treasury.gov.au/sites/default/files/2022-04/c2022-264356_0.pdf at 10 (showing only deals struck by Google and Meta).

³⁰ The Australian Government the Treasury, *News Media and Digital Platforms Mandatory Bargaining Code: The Code's first year of operation* (Nov. 2022), <https://treasury.gov.au/sites/default/files/2022-11/p2022-343549.pdf> (showing that the regulations are not in the furtherance of competition, as the Treasury responded to criticisms that the Code failed to address issues of competition and media diversity by arguing that the goal of the

b. Canada

On April 5, 2022, Canadian Heritage Minister Pablo Rodriguez introduced into Canada's House of Commons Bill C-18. The Canadian House of Commons passed the Online News Act, Bill C-18, in December 2022 for the Senate's consideration in 2023.

Following the Australian model, the bill targets U.S. companies to extract and redistribute funds to local news incumbents. The legislation would effectively require designated "digital news intermediaries" to (1) carry Canadian news; (2) pay Canadian news organization for mandated carriage; and (3) provide a mechanism for setting a rate that Canadian news organization can force platforms to accept through mandatory arbitration. The targeted nature and imposition of performance requirements for U.S. services conflicts with Canada's trade obligations to the United States.³¹

c. European Union

CCIA has raised concerns with the EU's Digital Single Market 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 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 on the freedom of contract and thereby diverge from the terms of the Directive by imposing mandatory licensing, "must-carry and must-pay"

law is to "address bargaining power imbalances," not to "redistribute resources across the news sector or to guarantee that all news businesses receive funding.").

³¹ For further discussion of the proposed legislation in Canada: CCIA White Paper on Canada Bill-C18, the "Online News Act" (Sep. 2022), *available at* <https://ccianet.org/wp-content/uploads/2022/09/CCIA-White-Paper-on-Canadas-Bill-C-18-the-Online-News-Act.pdf>.

obligations. In previous submissions, CCIA noted concerns with implementation in France,³² Germany,³³ and Croatia.³⁴

d. Czech Republic

Of particular concern for the 2023 Special 301 Report is the implementation of Article 15 in the Czech Republic. Rather than transposing the Copyright Directive (and incorporating the Berne-derived exception for quotation), Czech legislators instead have created an untethered and expansive obligation on online services to negotiate payments to news publishers.³⁵ The Czech law departs from other Member States' implementation of Article 15, particularly with respect to the creation of special rights and arbitrarily-categorized "dominant" platforms and the targeted obligations on these select few companies. Specifically, the law introduces a prohibition on "dominant" platforms from "arbitrarily restrict[ing] or adjust[ing] the service in a discriminatory manner" which equates to a must-carry, must-pay obligation; new arbitration procedures where either party can request the Ministry of Culture to determine remuneration, after 60 days of negotiation; an obligation to share "all data necessary" with the Ministry of Culture to determine remuneration, without safeguards for the protection of IP and/or trade secrets. Fines that the Ministry can impose are up to CZK 500,000 or 1% of the total global turnover for the previous financial year (whichever is highest) for non-compliance. While wrapped in the guise of copyright, this approach cannot meet the standard of fair and non-discriminatory application of copyright protection.

³² France created a new right for press publishers which entered into force in October 2019. The press can request money from platforms when they display their content online. Future licensing agreements will be based on criteria such as the publisher's audience, nondiscrimination and the publisher's contribution to political and general information.

³³ Germany released its discussion draft in January 2020 regarding implementation of the Copyright Directive and Article 15. The implementation of Article 15 builds upon Germany's 2013 *Leistungsschutzrecht*. The new press publishers' rights would be broad, with limited exceptions for individual words or short extracts including a heading, a small-format preview image with designated resolution, and a three second sequence of audio or visual content. § 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.

³⁴ Croatia completed implementation in October 2021. The Croatian text implementing Article 15 includes a provision which makes it mandatory for all publishers to license these rights collectively. 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 Organisation (CMO) and creating unnecessary barriers to the functioning of the EU internal market. Austria follows the same path. It would make it impossible for publishers and platforms to conclude pan-European licenses. https://narodne-novine.nn.hr/clanci/sluzbeni/2021_10_111_1941.html; 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/>.

³⁵ See Mathilde Adjutor, *Copyright Rules: Contradict National Implementation Threatens the Single Market*, DISRUPTIVE COMPETITION PROJECT (Oct. 28, 2022), <https://www.project-disco.org/european-union/102822-copyright-rules-contradictory-national-implementation-threatens-the-single-market/>.

U.S. services operating in the Czech Republic have already changed service offerings due to this imposition of the DSM Copyright Directive.³⁶

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.³⁷ This oversight was not addressed by the passage of amendments to Australia's Copyright Act in 2017, which expanded intermediary protections to some public organizations but pointedly excluded commercial service providers including online platforms.³⁸ 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 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, as noted in the 2020 Special 301 Report.³⁹ Legislation from 2018 that sought to update copyright law and implement the U.S.-Colombia

³⁶ *Updates to Google's Services in Czechia in Light of the Czech Transposition of the European Copyright Directive*, GOOGLE SEARCH CENTRAL BLOG (Dec. 12, 2022), <https://developers.google.com/search/blog/2022/12/google-services-in-czechia>.

³⁷ 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>.

³⁸ 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-australian-copyright-law-thumbs-nose-at-u-s-trade-commitments/>.

³⁹ 2020 Special 301 Report at 80.

FTA copyright chapter includes no language on online intermediaries.⁴⁰ The 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.

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 2023 Special 301 Report.⁴¹ 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 PROTECTION OF TRADE SECRETS

Forced technology transfer as a condition to operate in a region remains a key concern for U.S. services. Broad interoperability requirements should be avoided to lessen threats posed to privacy and security. Broad mandates on data disclosure, portability, and interoperability may have the unintended consequence of requiring U.S. online platforms to share sensitive or protected user data and IP with insecure third parties, and could lead to forced IP transfers to foreign competitors and entities controlled by authoritarian adversaries and non-market economies. It is vital to ensure that any new regulatory framework secures clear benefits while avoiding the harms to security, privacy, online safety, innovation, and IP protection.

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.⁴² 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.⁴³ Chinese cloud service suppliers face no constraints in the U.S. market, where many

⁴⁰ Text available at <http://es.presidencia.gov.co/normativa/normativa/LEY%201915%20DEL%2012%20DE%20JULIO%20DE%202018.pdf>.

⁴¹ *2020 Special 301 Report* at 86.

⁴² *Id.* at 39.

⁴³ 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

are active, underscoring the lack of reciprocal treatment. USTR should once again highlight China and its policies pursuant to the Cybersecurity Law in its 2023 Report.

b. European Union

The Digital Markets Act, introduced in December 2020, could 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.

The Digital Markets Act (DMA) entered into force in November 2022. Under the 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 set at levels where primarily U.S. technology companies will fall under scope, reflecting some policymakers’ intent to ensure that only U.S. firms fall under scope.⁴⁴ 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). 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 will 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. In this sense, the DMA represents a dramatic shift in competition enforcement, resulting in greater potential infringement on fundamental intellectual property rights and freedom to contract only in exceptional circumstances. Unlike traditional competition enforcement, the Commission will be able to impose these interventions without an assessment of evidence, without taking into consideration any effects-based defenses, and without considering procompetitive justifications put forth by the companies targeted. The first companies targeted by its provisions are expected to be designated as “gatekeepers” by the middle of 2023; obligations, including forced access to third-parties, will be enforced by early 2024. It is

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>.

⁴⁴ Press Release, European Commission, Digital Markets Act: Commission Welcomes Political Agreement on Rules to Ensure Fair and Open Digital Markets (Mar. 25, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1978; Press Release, European Commission, Digital Services Package: Commission Welcomes the Adoption by the European Parliament of the EU’s New Rulebook for Digital Services (July 5, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_4313.

concerning that this DMA “gatekeeper” designation is already being extended into new EU regulations including the forthcoming Data Act.⁴⁵

c. Turkey

Turkey released proposed amendments to its Law of the Protection of Competition, No. 4054, to impose a new regulatory framework for online platforms, targeted at U.S. firms. Borrowing concepts from the EU Digital Markets Act, Turkey’s regulation would require designated companies to enable the interoperability of core platform services and/or ancillary services in a manner that goes beyond what is required even under the EU’s DMA.

Specifically, the proposed rules require unbounded and “free of charge” interoperability for all digital services (Art. 6/A (j)) and “free access” to operating system, hardware, and software features (Art. 6/A (k)). The Draft Law requires platforms to “enable the operability of core platform services or ancillary services with other related products or services effectively and free of charge.” This rule could impose an unbounded and gratuitous⁴⁶ interoperability rule on any type of core platform service, even for services that are not designed to be interoperable and that require charging a fee to businesses to be viable.⁴⁷

VII. ABUSIVE THIRD-PARTY LITIGATION FUNDING

A new trend that CCIA members have raised is the increasing abuse of third-party litigation funding (TPLF) to weaponize patents against U.S. operating companies, at home and abroad. These funders increasingly target leading U.S. industries and critical technologies such as 5G, advanced manufacturing, and semiconductors. The investors of the TPLF funders remain anonymous, leaving to speculation who the real parties in interest actually are and what motivates them.

Given the increasingly clear economic and national security implications of TPLF, as well as the impact on individual U.S. operating companies and their workers, we must address these abuses of the U.S. and our trading partners’ IP systems. Transparency, including meaningful disclosure of funding sources, is key to curbing abusive TPLF. Transparency will discourage the worst actors, allowing efficient management and defense of legitimate claims against operating companies. Through Special 301, as well as its review of U.S. International Trade Commission exclusion orders, USTR can help protect U.S. IP-intensive industries from predatory TPLF practices supported by foreign governments. USTR is encouraged to lead a whole-of-

⁴⁵ Press Release, European Commission, Data Act: Commission Proposes Measures for a Fair and Innovative Data Economy (Feb. 23, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1113.

⁴⁶ See also Joint Industry Letter on DMA Gratuitous Access Provisions (Mar. 2022), available at <https://www.ccianet.org/wp-content/uploads/2022/03/Joint-Industry-Letter-on-DMA-Gratuitous-Access-Provisions.pdf>.

⁴⁷ CCIA submitted comments to the Turkish Competition Authority in 2022 detailing concerns with the legislation. See CCIA Comments on Draft Amendment to Law No. 4054 of the Protection of Competition in Turkey (Nov. 17, 2022), available at <https://ccianet.org/wp-content/uploads/2022/11/CCIA-Comments-on-the-Draft-Amendment-to-Law-No.-4054-of-the-Protection-of-Competition-in-Turkey.pdf>.

government approach to assess the extent of involvement in TPLF by strategic competitor economies and drive adoption of rigorous transparency requirements in all U.S. fora (i.e., USITC, USPTO, and federal courts) and relevant foreign jurisdictions to ensure the identification of funders and real parties in interest in IP litigation.

VIII. CONCLUSION

In the 2023 Special 301 Report, USTR should recognize concerns of U.S. services that rely on innovation-enabling provisions that reflect the needs of the digital age.

Respectfully,

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