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 2025 Special 301 Review	Docket No. USTR-2024-0023

COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

Pursuant to the request for comments published by the Office of the United States Trade Representative in the Federal Register at 89 Fed. Reg. 97,161 (Dec. 6, 2024),[1] the Computer & Communications Industry Association (CCIA) submits the following comments for the 2025 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.[2]

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.[3] As rightsholders, CCIA members value intellectual property protection and have devoted significant resources to develop tools to combat online infringement. 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 solid protection and enforcement measures. Such exceptions and limitations, deeply embedded in U.S. law and policy, are a critical safeguard against an IP regime actually thwarting its constitutional purpose, the promotion of innovation.[4] Accordingly, ensuring that trade partners fully respect treaty-based exceptions and limitations furthers the U.S. broader economic interests, and should be central to

[1] Office of the United States Trade Representative, *Request for Comments and Notice of a Public Hearing Regarding the 2025 Special 301 Review*, 89 Fed. Reg. 97161 (Dec. 6, 2024), https://www.federalregister.gov/documents/2024/12/06/2024-28559/request-for-comments-and-notice-of-a-public-hearing-regarding-the-2025-special-301-review.

[2] For more, visit www.ccianet.org.

[3] *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.

[4] U.S. Const. art. 1, § 8, cl. 8.

the Special 301 review. For example, a robust framework must include protections for online intermediaries and flexible limitations and exceptions to copyright that are necessary for the development and training[5] of next-generation technologies such as artificial intelligence and machine learning.[6]

Foreign countries are increasingly imposing onerous intellectual property-related regulations aimed at U.S. internet companies. CCIA supports USTR engagement on these issues through multiple venues, including 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 2025 Special 301 Report.[7]

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

[5] CCIA, *CCIA Comments on Korea Copyright Commission Surveys on Copyright and AI* (Dec. 6, 2024), https://ccianet.org/library/ccia-comments-on-korea-copyright-commission-surveys-on-copyright-and-ai/.

[6] 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. 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).").

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

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."[8] 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) being 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.[9] These include unbalanced ancillary rights and bargaining regimes, failure to adopt adequate intermediary liability protections, and discriminatory treatment of foreign services to advantage domestic competitors often in the name of cultural preservation policies.

[8] 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 (1988).

[9] 19 U.S.C. § 2242(d)(3).

Ancillary protection conflicts with international copyright obligations.[10] The imposition of ancillary rights through link taxes, or through mandatory bargaining codes and forced arbitration, conflict with long-standing international law that prohibits nations from restricting quotation of published works. These regulations compel one group of businesses to subsidize another and 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 2025 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."[11] CCIA supports highlighting these trade concerns in *both* the NTE Report and the Special 301 Report.[12]

[10] 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.

[11] Office of the U.S. Trade Rep., *2018 National Trade Estimate Report on Foreign Trade Barriers* 27–28 (2018), https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf.

[12] 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 Report* at 69 ("The United States urges Egypt to provide deterrent-level penalties for IP violations, ex officio authority for customs officials to seize counterfeit and pirated goods at the border, and necessary additional training for enforcement officials.") with *2018 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.").

Consistent with prior reports, the Special 301 Report should also consider measures that introduce content quotas, a market intervention that most obviously constitutes a "discriminatory non-tariff barrier."[13] This includes any investment obligations to acquire or produce local content that affects U.S. IP-intensive industries (including online streaming services) that are engaged in the global distribution of content. Given these proposals have proliferated in recent years to be adopted or considered in countries such as Canada, Australia, France, and Colombia,[14] urgent attention to this issue from USTR is warranted.

The nexus between Special 301 and content restrictions is further supported by the special obligations Canada has under the U.S.-Mexico-Canada Agreement (USMCA). USMCA recognizes Canada's right to adopt measures in support of Canadian content. The agreement also authorizes countermeasures (Article 32.6.4) in the event that such policies adversely affect the United States' economic interests. USMCA implementing legislation retains Section 182(f) of the Trade Act of 1974 (introduced in the implementing legislation of the North American Free Trade Agreement) detailing special rules for actions in Canada affecting U.S. cultural industries and Article 32.6 of USMCA. The U.S. Trade Representative is directed to identify as part of the Special 301 process any "act, policy, or practice of Canada" affecting a cultural industry.[15] As noted below, recent measures now being implemented in Canada are so extensive and distortive that USTR can no longer ignore their impact on U.S. firms and must address them in this proceeding.

III. ANCILLARY COPYRIGHT AND MANDATORY NEWS BARGAINING CODES

CCIA reiterates concerns regarding the spread of unbalanced ancillary copyright regimes in foreign markets in the form of link and snippet taxes as well as related regulatory initiatives including mandated collective bargaining.[16]

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[13] The 2023 *Special 301 Report* called attention to legislation in Thailand that allows for content quota restrictions for films and regulation in Indonesia that includes screen quotas and dubbing bans for foreign films. *2023 Special 301 Report* at 84, 60.

[14] https://www.crcom.gov.co/es/proyectos-regulatorios/9000-38-2-22.

[15] "Cultural industries" includes: (1) the production, distribution, sale, or exhibition of film or video recordings; and (2) the production, distribution, sale, or exhibition of audio or video music recordings. 19 U.S.C. § 182(f)(3)(B).

[16] *See* CCIA, *The Harms of Forced Online News Payments* (2023), https://ccianet.org/library/the-harms-of-forced-online-news-payments/**.** CCIA also 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.

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."[17] 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.[18]

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."[19] 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

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Comments of CCIA, *In re Publishers' Protections Study: Request for Additional Comments*, Docket No. 2021-5, filed Jan. 5, 2022, https://www.ccianet.org/wp-content/uploads/2022/01/2022-01-05-CCIA-Additional-Comments-on-Copyright-Office-Publishers-Protections-Study.pdf.

[17] 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, at 18–19, 21 (Sept. 2017), http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf.

[18] 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.

[19] 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), https://clabe.org/pdf/Informe_NERA_para_AEEPP_(INGLES).pdf.

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."[20]

CCIA first raised concerns about ancillary copyright in 2013.[21] There is now an EU-wide obligation for Member States to implement ancillary measures in the form of the press publishers' right. As explained below, frameworks with more discriminatory elements targeting U.S. service suppliers have been adopted in Australia, Canada, and Indonesia and are being pursued in New Zealand and the United Kingdom.

a. Australia

In February 2021, the Australian Government passed the News Media and Digital Platforms Mandatory Bargaining Code.[22] 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.[23]

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.

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

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

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

[23] 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/.

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,[24] competition,[25] trade,[26] and intellectual property[27] 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 remain Google and Meta.[28] In January 2021, USTR strongly objected to the first version of Australia's news media code and called it "fundamentally unbalanced" and "clearly detrimental" to U.S. companies.[29]

As initial deals expire, it will be important to closely monitor the political pressure news businesses exert on the Treasury to extract more revenue from U.S. firms as a condition of market access, further distorting Australia's internet services market. This is particularly true

[24] 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/.

[25] 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/.

[26] 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/.

[27] 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/.

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

[29] Australian House of Representatives, Explanatory Memorandum, Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021, https://www.aph.gov.au/DocumentStore.ashx?id=cb2c2ac0-ad05-43ae-bddb-afaa018124aa&subId=699981.

given the decision in 2024 of one of the U.S. companies targeted by the law to discontinue the carriage of domestic news.[30]

Further, in December 2024, Australia's government doubled down on this flawed policy through the announcement of a discriminatory digital services tax to force companies to comply with the News Media Bargaining Code, in the form of a "news media bargaining incentive."[31] The tax, which Australia has signaled will be legislated in 2025 but apply from January 1, is a retroactive tax on a handful of companies applied as a percentage of a company's attributable revenue from Australia. Rather than seek other means of funding within its own government or treasury, the Australian government is looking to other countries' economies to foot the bill. Australia's proposed retroactive news tax will fall on select foreign companies and exempt numerous competing local services, including the ones that many Australians use to consume their news most, while failing to implement a genuine solution to Australia's news industry needs.[32] As such, Australia's efforts to mandate revenue transfers from U.S. online service providers to news publishers should be investigated and addressed by USTR to ensure this harmful policy does not spread.

b. Canada

The Online News Act, entered into law in June 2023,[33] and implementing regulations were published on December 15.[34] Digital platforms must self-designate if they have a "strategic advantage" in the online news market under specific thresholds. Under the law, these designated platforms have an obligation to negotiate payment agreements with news businesses, or will be subject to final offer arbitration. The law also prohibits these firms from giving "undue preference" to news content, which could restrict the ability of platforms to moderate content and prevent misinformation online.

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[30] Meta, Update on Facebook News in the US and Australia, *Meta Newsroom* (Feb. 2024), https://about.fb.com/news/2024/02/update-on-facebook-news-us-australia/.

[31] Australian Treasury, News Bargaining Incentive Fact Sheet (Dec. 2024), https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2024-12/news-bargaining-incentive-fact-sheet.docx.

[32] CCIA, News Media Bargaining Incentive: A Coercive and Discriminatory Digital Tax, *CCIA Library* (2024), https://ccianet.org/library/news-media-bargaining-incentive-a-coercive-and-discriminatory-digital-tax/.

[33] Bill C-18, Online News Act, 44th Parl., 1st Sess., Royal Assent (Can.), https://www.parl.ca/DocumentViewer/en/44-1/bill/C-18/royal-assent.

[34] Regulations Amending the Copyright Regulations, SOR/2024-276, *Canada Gazette*, Part II, Vol. 158, No. 1 (Jan. 3, 2024), https://www.gazette.gc.ca/rp-pr/p2/2024/2024-01-03/html/sor-dors276-eng.html.

The effect of this law is now in question. One of the U.S. companies subjected to the law has secured an exemption from the law under criteria that would require it to pay C$100 million annually to Canadian news organizations and the second U.S. company has ceased to host links to news content in Canada. Even if not fully tested, the law remains an incipient threat to U.S. companies and is the government's leverage to extract fees. The law has already resulted in harm to the internet landscape, consumers, and small publishers in Canada given the chilling of innovation within the news sphere and a continued decrease in traffic.[35]

Absent repeal, this law still conflicts with several of Canada's international trade obligations, so USTR should remain vigilant of action against these two U.S. companies and any others they may seek to scope into the law.[36] Other U.S. companies that link to news articles (e.g. Microsoft's Bing) could still come under consideration by the CRTC or Canadian Heritage. The fact that the popular Chinese social media service TikTok is not subject to this law, despite a clear role in news distribution raises clear MFN issues under both USMCA and the GATS.

c. European Union

CCIA continues to monitor implementation of Article 15 of the EU's Directive on Copyright in the Digital Single Market, creating a press publishers' right. The forthcoming review process will be an opportunity to ensure national legislation follows the terms of the Directive in order to achieve maximum harmonization in the EU. National legislation should follow 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

[35] CCIA, Panel Urges Policymakers to Consider Past Lessons on Link Tax Policies, *CCIA Articles* (2024), https://ccianet.org/articles/panel-urges-policymakers-consider-past-lessons-link-tax-policies/.

[36] CCIA, Comments for the 2025 USTR National Trade Estimate Report, at 78 (Oct. 2024), https://ccianet.org/wp-content/uploads/2024/10/CCIA_Comments-for-the-2025-USTR-National-Trade-Estimate-Report.pdf ("These obligations include the U.S.-Mexico-Canada Free Trade Agreement Articles 14.4 (Investment) and 15.3 (Cross-border Services) regarding National Treatment; USMCA Articles 14.5 (Investment) and 15.4 (Cross-border Services) regarding Most-Favored Nation Treatment; USMCA Article 14.10 regarding Performance Requirements; USMCA Article 19.4 regarding Non-Discriminatory Treatment of Digital Products; and intellectual property obligations through the WTO's absorption of the Berne Convention and the right to quotation in the Agreement on Trade-Related Aspects of Intellectual Property Rights.").

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 obligations.

CCIA notes concerns with implementation in France,[37] Croatia,[38] the Czech Republic (see below), and Belgium (see below).

Rather than transposing Article 15 of the EU Copyright Directive (and incorporating the Berne-derived exception for quotation), Czech legislators created an expansive obligation on online services to negotiate payments to news publishers.[39] The 2022 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"; 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, a TRIPS obligation. U.S. services operating

[37] France created a new right for press publishers which entered into force in October 2019. The authorization of press publishers is required when platforms display their content online. Future licensing agreements should take into account criteria such as the publisher's audience, nondiscrimination and the publisher's contribution to political and general information.

[38] 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. Croatian Official Gazette 111/2021, Art. 15; 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/.

[39] *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/.

in the Czech Republic have changed service offerings due to this imposition of the DSM Copyright Directive, with functionality and consumer benefits in some cases sacrificed as the price of avoiding uncapped financial liability.[40]

Belgium implemented the Directive in August 2022.[41] The law implementing Article 15 goes further than the Directive to introduce an obligation for press publishers and information society providers to negotiate in good faith on "the exploitation of the remuneration due in that respect." If parties do not reach an agreement within four months, parties can launch proceedings before the Belgian Institute for Telecommunications and Postal Services, a regulatory body.[42] The Belgian Constitutional Court recently directed several questions on the legality of these new copyright rules to the EU Court of Justice.[43]

CCIA would also note concerns with the rise in new payment obligations specific to online platforms such as the Belgian implementation of Article 18 regarding remuneration.[44]

d. New Zealand

In August 2023, New Zealand introduced the "Fair Digital News Bargaining Bill," that would require designated digital platforms to pay news businesses for the ability to host news content, explicitly including news hyperlinks.[45] An impact assessment conducted by the New Zealand government reflected a clear targeting of two U.S. companies through this effort, and divulged that the government believes $40-$60 million per year could be extracted from registered digital platforms subjected to the law for the benefit of news businesses.[46]

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[40] *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.

[41] Belgian Law of Aug. 1, 2022, *Moniteur Belge*, https://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&pub_date=2022-08-01&caller=list&numac=2022015053.

[42] Bird & Bird, *Copyright Directive – Belgium* (last accessed Jan. 22, 2025), https://www.twobirds.com/en/trending-topics/copyright-directive/copyright-directive-countries/belgium.

[43] *Cour Constitutionnelle* [Constitutional Court], *Arrêt n° 98/2024* [Judgment No. 98/2024], https://www.const-court.be/public/f/2024/2024-098f.pdf.

[44] Bird & Bird, *Copyright Directive – Belgium* (last accessed Jan. 22, 2025), https://www.twobirds.com/en/trending-topics/copyright-directive/copyright-directive-countries/belgium.

[45] *Digital Platforms (Transparency and Fairness) Bill 2023*, https://www.legislation.govt.nz/bill/government/2023/0278/latest/LMS814468.html (N.Z.).

[46] *Proactive Release of Cabinet Material: Supporting Commercial Bargaining for Online News*, MINISTER FOR BROADCASTING AND MEDIA, 11 (2022), https://mch.govt.nz/sites/default/files/projects/cab-rel-online-

Under the proposal, digital platforms would be designated as subject to the law if "there is likely to be a bargaining power imbalance" with news companies, along with a host of other considerations. News businesses are defined as those that produce news or "observations on news" and that satisfy a "professional standards condition."[47] New Zealand's bill tracks closely with Canada and Australia's versions, with a few notable changes. Although New Zealand's version includes more specific parameters for designating digital platforms, news businesses can themselves apply to have a digital platform registered to be subjected to the mandatory bargaining code. This power undermines any incentive of platforms to negotiate deals to obtain exemptions, as any disgruntled news businesses could seek designation regardless of whether they have bargained in good faith with the digital services providers. The legislation also contains provisions regarding mandatory sharing of information and acting on requests for information or investigation from foreign regulators.

Many have expressed significant concerns about the bill's emphasis on forced revenue transfers between sectors and its implications for news industry innovation.[48] Furthermore, this proposal has far-reaching implications for the principles of the open web, community-based news, and overall investment in the country's news sector.[49] The legislation remains pending in the New Zealand Parliament.

e. Indonesia

In February 2024, the government signed a Presidential Regulation directing specific digital platforms to pay news organizations for news content that appears on those platforms.[50] Digital platforms that would qualify are those that host content from Indonesian news outlets and make

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news-151222.pdf ("Should the Government introduce a news media and digital platforms bargaining framework, the expected scale of the revenue that could flow from digital platforms to New Zealand news media organisations could be between $40 and $60 million per annum (about one-fifth of what is estimated to have been agreed in Australia)").

[47] Fair Digital News Bargaining Bill, Government Bill 279—1 (2023), https://www.legislation.govt.nz/bill/government/2023/0278/latest/whole.html.

[48] Dr. Eric Crampton, The Fair Digital News Bargaining Bill, THE N.Z. INITIATIVE (July 10, 2024), https://www.nzinitiative.org.nz/reports-and-media/reports/the-fair-digital-news-bargaining-bill.

[49] Tricia McCleary, *The Harmful Consequences of New Zealand's Link Tax Proposal*, Project DisCo (Oct. 11, 2024), https://project-disco.org/competition/the-harmful-consequences-of-new-zealands-link-tax-proposal/

[50] *Gov't Issues Regulation on Publisher Rights*, CABINET SECRETARY OF THE REPUBLIC OF INDON. (Feb. 21, 2024), https://setkab.go.id/en/govt-issues-regulation-on-publisher-rights/.

up at least 1% of all internet traffic within Indonesia, and/or platforms with over 1 million daily active users in Indonesia in a 3-month period. Although these thresholds, albeit arbitrary, are facially neutral, the effects and intent of this measure make clear that U.S. companies are primary targets of this regulation. The goal of extracting revenues and subsidizing local news outlets is evident from the explicit goal of the regulation, which states that digital services companies have a "responsibility" to support news organizations.

The Regulations require platforms to collaborate with media companies, with collaboration entailing paid licenses, profit sharing, data sharing, or other forms of cooperation. It further empowers the Press Council, a third party made up of members of the press and media companies, to implement the regulations, prescribe further regulations, and oversee arbitration between digital platforms—a conflict of interest that greatly compromises any presumption of neutrality and objectivity between disputing parties. Under this regulation, Indonesia's Press Council can establish the rules of engagement and simultaneously oversee mediation or arbitration if any disputes materialize—an authority they do not currently have under the country's Press Law. The regulation could also direct digital platforms to share and disclose algorithm changes to news publishers and disclose commercially sensitive user activity to news publishers.

IV. LOCAL CONTENT QUOTAS

Although issues cited below are analyzed in terms of compliance with specific FTA provisions, where applicable, these listed measures would also fall under the Special 301 mandate to address measures that implicate "fair and equitable market access for United States persons that rely on protection of intellectual property rights."

a. Australia

In 2023, Australia signaled its intent to implement "requirements for Australian screen content on streaming platforms to ensure continued access to local stories and content."[51] While draft legislation has not been released, it has been reported the Federal government has held a series of consultations with stakeholders on proposed requirements under a new law, many iterations of

[51] Australian Gov't, *Revive, Australia's Cultural Policy for the Next Five Years*, (Feb. 8, 2023), https://www.arts.gov.au/sites/default/files/documents/national-culturalpolicy-8february2023.pdf at 89.

these proposals have been conducted in private with no text released to the public.[52] Australia has been considering frameworks where streaming services would be obligated to commit either a portion of their content acquisition expenditures, or commit a percentage of their Australian revenue to Australian content at the expense of U.S. content or international programs. "Australian programs" are defined as programs that are "produced under the creative control of Australians," with several thresholds for Australian employment in producing, directing, acting, and writing needing to be met to achieve "creative control."[53]

The most recent version of this proposal came in May, when the Australian government held a series of closed-door meetings with members of the streaming industry and verbally provided an outline of its current plan for funding obligations for streaming suppliers. The government did not publish its proposed rules, either publicly or privately, but industry reports that the government's proposed regime remained unreasonable—contribution requirements could go as high as 20% of expenditure for subscribership of 5 million or higher;definitions for Australian content remain highly prescriptive; oversight procedures would empower Screen Australia (a body tasked with funding Australian programming) with authority creating conflicts of interest; and intrusive obligations for sub genres of Australian content such as children's programs and documentaries could also be added.[54]

These proposed requirements, which by definition provide preferences for Australian content, are inconsistent with AUSFTA: they would discriminate against non-Australian content by requiring U.S. streaming suppliers to spend a certain portion of their total expenditures or revenues on Australian programs. "Australian programs" are defined as programs that are

[52] Sean Slatter, *Federal Government Weighs Revenue and Expenditure Models For Streaming Regulation*, IF (Nov. 8, 2023), https://if.com.au/federal-government-weighs-revenue-and-expenditure-models-for-streaming-regulation/

[53] https://www.legislation.gov.au/Details/F2020L01653/Html/Text#_Toc58939672 (at section 10, "Australian program - definition").

[54] Comments Of The Computer & Communications Industry Association Regarding Foreign Trade Barriers To U.S. Exports For 2025 Reporting, In re Request for Comments on Significant Foreign Trade Barriers for the 2025 National Trade Estimate Report (USTR-2024-0015), https://ccianet.org/wp-content/uploads/2024/10/CCIA_Comments-for-the-2025-USTR-National-Trade-Estimate-Report.pdf at 52.

"produced under the creative control of Australians,"[55] with several thresholds for Australian employment in producing, directing, acting, and writing needing to be met.

Given this rigid definition, the proposed rules would hinder U.S. streaming services' business plans while also harming the local content industry, as U.S. programming and U.S. programming done in partnership with other countries would receive discriminatory treatment.

The proposed requirements to promote and fund Australian programming would contravene the E-Commerce Chapter of AUSFTA, specifically Article 16.4 on Non-Discriminatory Treatment of Digital Products that prohibit preferential treatment for digital products based on the national origin of an "author, performer, producer, developer, or distributor." The proposed obligations would confer preferential treatment to Australian-based content (digital products) by requiring a certain proportion of streaming providers' spending to go towards "Australian" content.

It would likely also violate AUSFTA Investment Chapter Article 11.9 on Performance Requirements, which includes the specific prohibition on measures that "... impose or enforce any requirement, or enforce any commitment or undertaking, to... (b) achieve a given level or percentage of domestic content[.]"[56] By requiring the funding of Australian programming at specific levels (as either a percentage of revenue or a percentage of expenditure), the proposed obligations set a "given level of domestic content" using spending as the determinative criteria. In addition to being inconsistent with AUSFA, such a measure would also clearly be actionable under 19 USC 2242 as a "discriminatory non-tariff barrier."

While AUSFTA's inclusion of "non-conforming measures" does allow the Australian government to enact content requirements inconsistent with these commitments, such nonconformity is only permitted after the Australian government has found that the amount of

[55] Australian Gov't, Commercial television compliance with Australian content requirements 2022 compliance report – metropolitan networks and regional licensees (2022), https://www.acma.gov.au/sites/default/files/2023-07/2022%20Australian%20content%20results%20for%20metropolitan%20and%20regional%20commercial%20TV%20licensees_0.pdf.

[56] AUSFTA Investment Chapter 11, Art. 11.9, United States Trade Representative, https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file248_5155.pdf

Australian content in the market is "not readily available to Australian consumers."[57] This is a very high bar for the Australian government to meet, as the Australian Parliamentary report on AUSFTA concluded. One observation noted that "'measures to ensure that ... Australian audiovisual content or genres ... is not unreasonably denied to Australian audiences'— maybe a very tough test to satisfy."[58] This is because the ability to impose such discriminatory requirements on U.S. services and content, the government has to find that Australian content is being "unreasonably denied to Australian audiences." Further, this finding must be found across *all* services for the ecosystem as a whole, not as a requirement for each service to uphold. Finally, the Australian government would need to consult with the United States as part of this condition, which has not yet been satisfied.[59]

This condition is not remotely close to being met, meaning the Australian government does not have a basis to activate the exception. Australian programming is readily available, in large part thanks to the online streaming providers and their significant investments. Between 2022 and 2023, $2.34 billion was spent for drama productions in Australia, with $1.22 billion coming from foreign providers—this reflected a 31% increase from the 5-year average, according to Screen Australia,[60] while an ample supply of Australian content remains available on the streaming platforms.[61]

Although the Australian government has shelved the proposal for now, it remains a live issue with significant political support, and warrants close U.S. attention. USTR should ensure it continues to engage with Australian counterparts to underscore the potential violations to

[57] AUSTFA, Annex II.

[58] USAFTA Report, Chapter 11, *Cross Border in Trade Services*, https://www.aph.gov.au/~/media/wopapub/house/committee/jsct/usafta/report/chapter11_pdf.ashx at 42.

[59] *Id.* at 43 ("The Committee notes particular concerns from both the industry and the community that the implementation of new measures would require consultation with affected parties, including the US.").

[60] Australian Gov't, Streaming Services Reporting and Investment Scheme Discussion Paper, Analysis & Policy Observatory (Feb. 7, 2022), https://apo.org.au/sites/default/files/resource-files/2022-02/apo-nid316658.pdf.

[61] Comments Of The Computer & Communications Industry Association Regarding Foreign Trade Barriers To U.S. Exports For 2025 Reporting, In re Request for Comments on Significant Foreign Trade Barriers for the 2025 National Trade Estimate Report (USTR-2024-0015), https://ccianet.org/wp-content/uploads/2024/10/CCIA_Comments-for-the-2025-USTR-National-Trade-Estimate-Report.pdf at 53.

AUSFTA commitments, particularly as this argument reportedly served as a factor in the government opting to pause its work on the issue.[62]

b. Canada

Canada's Online Streaming Act received Royal Assent and entered into law on April 27, 2023. The law requires qualifying online content providers to fund and institute preferences for arbitrarily-defined "Canadian content" and to "clearly promote" Canadian programming. The Canadian Radio-Television and Telecommunications Commission (CRTC) is empowered to apply new "discoverability" obligations to any site of service hosting audio or audio-visual content (including "social media services"), which would compel the service to give preferential treatment to Canadian content and creators. Canadian Heritage published its policy direction to the CRTC for implementation of the Act on November 14, 2023.[63] CCIA filed in this proceeding requesting that Heritage Canada instruct the CRTC to revisit the definition of what constitutes Canadian content and introduce flexibility with respect to IP ownership,[64] but this suggestion was ignored by the Canadian government in their final directions to the CRTC.[65]

Despite the fact that U.S. streaming services have been recently investing billions of dollars every year into Canada's creative sector —which represents a significant portion of the total investment—neither the law nor the draft regulations require the CRTC to account for these investments when establishing mandatory minimum contribution requirements. The implementing regulations restrict those flows by disincentivizing such investments, while simultaneously harming customer choice, affordability, and companies' room to innovate in the Canadian sector. The obligations are expected to fall overwhelmingly on U.S. suppliers.

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[62] Tom Lowrey and Claudia Long, *Federal Government Quietly Shelves Plans For Local Content Requirements*, ABC News (Nov. 5, 2024), https://www.abc.net.au/news/2024-11-06/government-quietly-shelves-plans-for-local-content-requirements/104564654.

[63] Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework): SOR/2023-239, 157 Canada Gazette 24 (Nov. 9, 2023), https://canadagazette.gc.ca/rp-pr/p2/2023/2023-11-22/html/sor-dors239-eng.html.

[64] CCIA, CCIA Comments to Canadian Heritage in the Canada Gazette Part I, Volume 157, Number 23 (June 6, 2023), https://ccianet.org/wp-content/uploads/2023/11/CCIA-Comments-to-Canadian-Heritage-on-the-Online-Streaming-Act-Regulations.pdf.

[65] Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework): SOR/2023-239, 157 Canada Gazette 24 (Nov. 9, 2023), https://canadagazette.gc.ca/rp-pr/p2/2023/2023-11-22/html/sor-dors239-eng.html.

In its implementing regulations, the CRTC has proposed an aggressively discriminatory regime to promote Canadian content, developed through a series of consultations and decisions prescribing contributions into various Canadian content funds. In a logically backwards move, the CRTC set initial contribution requirements before issuing an updated definition for what constitutes Canadian content. This included a June 2024 decision mandating streaming providers with at least C$25 million in annual revenue to contribute 5% of their revenue to funds supporting the production of Canadian content,[66] as part of an effort to generate C$200 million annually in new funding, a significant share of which would be extracted from U.S. suppliers. This onerous requirement would violate USMCA Articles 19.4, on the Non-Discriminatory Treatment of Digital Products; Article 15.3.1 on Cross-Border Trade in Services; and 14.10.1 (b)) on Performance Requirements in the Investment Chapter.[67] The CRTC has also ruled that streaming suppliers would be required to allocate 1.5% of the annual contribution revenues derived from their Canadian audio-visual activities to the Independent Local News Fund (ILNF), a grossly unreasonable obligation for companies expressly not in the news business that would also likely contradict Canada's commitments under USMCA.[68]

The CRTC is currently engaging stakeholders in a consultative process regarding the future of the definitions of "Canadian Content" (CanCon), but the proposed changes floated by the government would not fix the discriminatory nature of the definition, and in turn, the law.[69] For example, for content to be deemed Canadian, IP rights are required to be owned by Canadian entities and individuals, and a range of creative and financial positions related to the work must be filled by Canadian individuals. While the law is discriminatory regardless of this definition, the trajectory of the CRTC's proposal suggests the definition of CanCon could compound the harm from the overall mandates on U.S. suppliers and content providers.

[66] CRTC, CRTC 2024-121 (June 4, 2024), https://crtc.gc.ca/eng/archive/2024/2024-121.htm.

[67] CCIA, CCIA Comments on Canada's Obligatory Base Contribution for Streaming Suppliers (June 14, 2024), https://ccianet.org/library/ccia-comments-on-canadas-obligatory-base-contribution-for-streaming-suppliers/.

[68] CCIA, CCIA Comments on Mandatory Contributions to the Independent Local News Fund (Sept. 6, 2024), https://ccianet.org/library/ccia-comments-on-mandatory-contributions-to-the-independent-local-news-fund/.

[69] Canadian Radio-Television and Telecomm. Comm'n, Broadcasting Notice of Consultation CRTC 2024-288 (Nov. 15, 2024), https://crtc.gc.ca/eng/archive/2024/2024-288.htm.

As noted above, USMCA's implementing legislation directs USTR to evaluate, as part of its Special 301 review, any discriminatory measures pursued pursuant to the Cultural Industries exception, and consider appropriate actions to compensate for any adverse effects. USTR has used Special 301 in tandem with its other tools to tackle issues central to U.S. intellectual property in the past, as it did when it included Canada on its Watch List in the 1995[70] and 1996[71] Special 301 reports, partially as part of its ongoing Section 301 investigation[72] and World Trade Organization challenge[73] over Canada's discriminatory 80% tax on American periodicals. This is the perfect example of how USTR can leverage Special 301 to tackle barriers to U.S. exports that implicate U.S. IP. Since this measure would violate several USMCA provisions but for Canada invoking the cultural industries exception, and thus implicates 19 USC 2242 (f) (A), CCIA urges USTR not repeat this oversight in its forthcoming report to Congress. In fact, the 301 report is a perfect vehicle to begin detailing whether, and to what extent, Bill C-11 adversely affects United States' economic interests, as a patently "discriminatory non-tariff barrier."

V. NON-COMPLIANCE WITH U.S. FREE TRADE AGREEMENT COMMITMENTS ON LIABILITY LIMITATIONS FOR INTERNET SERVICES

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 online service providers, analogous to 17 U.S.C. § 512. However, Australia has failed to fully implement such obligations. 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

[70] Press Release, USTR Announces Two Decisions: Title VII and Special 301, United States Trade Representative (Apr. 29, 1995), https://ustr.gov/sites/default/files/1995%20Special%20301%20Report.pdf.

[71] Press Release, USTR Announces Two Decisions: Title VII and Special 301, United States Trade Representative (Apr. 30, 1996), https://ustr.gov/sites/default/files/1996%20Special%20301%20Report.pdf.

[72] *1996 National Trade Estimate Canada*, United States Trade Representative (last accessed Jan. 22, 2025), https://ustr.gov/archive/Document_Library/Reports_Publications/1996/1996_National_Trade_Estimate/1996_National_Trade_Estimate-Canada.html ("On March 11, USTR officially opened a section 301 investigation and requested WTO consultations with the Government of Canada regarding certain measures concerning periodicals, including: measures prohibiting or restricting the importation into Canada of certain periodicals; tax treatment of so-called "split-run" periodicals; and the application of favorable postage rates to certain Canadian periodicals.").

[73] *U.S Takes Canada to WTO over 80 Percent Magazine Tax*, Reporters Committee (Mar. 25, 1996), https://www.rcfp.org/us-takes-canada-wto-over-80-percent-magazine-tax/.

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.[74] 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.[75] 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.[76] Legislation from 2018 that sought to update copyright law and implement the U.S.-Colombia FTA copyright chapter includes no language on online intermediaries.[77] The legislation that implements the U.S.-Colombia FTA copyright chapter also does not 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.

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[74] 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.

[75] 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/.

[76] *2020 Special 301 Report* at 80.

[77] *See* Colombia - Country Commercial Guide, *Protecting Intellectual Property*, International Trade Administration (Nov. 25, 2023), https://www.trade.gov/country-commercial-guides/colombia-protecting-intellectual-property. Jose Roberto Herrera, *The Recent and Relevant Copyright Bill in Colombia (Law 1915-2018)*, Kluwer Copyright Blog (Sept. 5, 2018), https://copyrightblog.kluweriplaw.com/2018/09/05/recent-relevant-copyright-bill-colombia-law-1915-2018/.

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 2025 Special 301 Report.[78] 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. 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.[79]

a. European Union

On May 17, 2019, the Copyright Directive was published in the Official Journal of the European Union.[80] The Member States had until June 7, 2021 to transpose the EU requirement into their national law or domestic framework. Article 17 represents a departure from global IP norms and

[78] *2020 Special 301 Report* at 86.

[79] OFFICE OF THE U.S. TRADE REP., 2013 Special 301 Report at 7 (2013), 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.").

[80] 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, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2019:130:FULL&from=EN.

international commitments, and poses significant consequences for online services and users. These rules diverge sharply from U.S. law, and place unreasonable and technically impractical obligations on a wide range of service providers, resulting in a loss of market access by U.S. firms.

Article 17(8) expressly provides that the Directive does not imply any general monitoring obligation for service providers. As a result, Member States transposing the EU Directive and issuing guidance should take account of the fact that service providers that can be made primarily liable for copyright infringements must be able to take steps to discharge this liability. 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 measures taken by a service provider pursuant to Article 17 should be evaluated in light of technical realities and 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 remainder of the Directive is implemented in a manner which gives service providers the flexibility to develop and maintain effective content recognition systems that also protect user freedoms. EU countries should not 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. Finally, it is imperative that national implementations endorse modern authorization mechanisms which include alternatives to traditional licensing approaches, based on the core principle of contractual freedom. To remain consistent with the Directive, national implementations should not diverge from its terms by imposing mandatory licensing.

CCIA would also note concerns with the rise in new payment obligations specific to online platforms such as the Belgian implementation of Article 18 regarding remuneration.[81]

VII. FORCED TECHNOLOGY TRANSFER, PROTECTION OF TRADE SECRETS, AND LACKING ENFORCEMENT OF IP PROTECTION

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 new development in this area is the potential mandatory disclosure of technological know-how and trade secret data involved in artificial intelligence, particularly with respect to mandatory disclosure of training datasets.

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.[82] 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.[83] Chinese cloud service suppliers face no constraints in the U.S. market, where many

[81] Bird & Bird, *Copyright Directive Belgium* (last accessed Jan. 22, 2025), https://www.twobirds.com/en/trending-topics/copyright-directive/copyright-directive-countries/belgium

[82] *Id*. at 39.

[83] 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

are active, underscoring the lack of reciprocal treatment. USTR should once again highlight China and its policies pursuant to the Cybersecurity Law in its 2024 Report.

Although China now rivals the United States in the breadth, innovation and global reach of its e-commerce marketplace, it remains far behind the United States with respect to effective protection against counterfeit and pirated products, a deficiency that can put Chinese firms at a competitive advantage in foreign markets. While U.S. companies operate in a good faith nature to address the sale of counterfeit and pirated goods online,[84] U.S. companies are competing against rapidly-expanding rivals, such as China's Temu and Shein that, in their home market, face notably weaker standards of transparency, accountability, and verification of sellers.[85] USTR has highlighted these concerns in the most recent Notorious Markets report.[86] As USTR considers measures to protect IP abroad, it should include the way that inconsistent protectionist enforcement abroad serves as a trade distortive measure that undermines U.S. companies' position globally in its analysis and remediation.

b. European Union

The Digital Markets Act (DMA) was adopted by the European Parliament and the Council of the EU on September 14, 2022. The measure entered into force on November 1, 2022, and became applicable on May 2, 2023.

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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, https://ustr.gov/sites/default/files/2018-USTR-Report-to-Congress-on-China%27s-WTO-Compliance.pdf.

[84] Reply Comments Of The Computer & Communications Industry Association (CCIA) at 6-9, In re 2024 Review of Notorious Markets for Counterfeiting and Piracy: Comment Request (2024) (No. USTR-2024-0013), https://ccianet.org/wp-content/uploads/2024/10/CCIA-Reply-Comments-to-USTR-in-the-2024-Review-of-Notorious-Markets.pdf at 6-9.

[85] Press Release, *Chairs Rodgers and Bilirakis Press China-Based Online Marketplaces on Potential Data Privacy and Human Rights Violations, House Committee on Energy and Commerce (Dec. 20, 2023),*https://energycommerce.house.gov/posts/chairs-rodgers-and-bilirakis-press-china-based-online-marketplaces-on-potential-data-privacy-and-human-rights-violations; Jessice Napoli et al, *Shein, Temu Branch Further into Toy Market Amid Worry over Fake Products*, Reuters (Nov. 29, 2024), https://www.reuters.com/business/retail-consumer/hot-wheels-gi-joes-aplenty-shein-temu-amid-worry-over-fake-products-2024-11-29/.

[86] *2024 Review of Notorious Markets for Counterfeiting and Piracy*, Office of the United States Trade Representative, at 41 (2024) ("Sellers of counterfeit merchandise continue to use their brick-and-mortar storefronts as points of contact for customers, sites for "sample/product testing," and centers for fulfillment of online sales."), https://ustr.gov/sites/default/files/2024%20Review%20of%20Notorious%20Markets%20of%20Counterfeiting%20and%20Piracy%20(final).pdf .

Under these 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 end and business users. These thresholds have been set at levels where primarily U.S. technology companies fall under scope, reflecting some policymakers' intent to ensure this outcome.[87] The list of "core platform services" furthermore carves out non-platform-based business models of large European rivals in media, communications, and advertising.

The European Commission has designated six companies as the so-called "gatekeepers" under the DMA, and in total 22 of their services will be subject to the new rules.[88] Five out of those six companies (the sixth is Chinese) and 21 of the 22 services are American. Although ByteDance is in scope of the law for some of the DMA's requirements, there are no indications that other major technology competitors in China or Russia—such as Alibaba, Tencent, Huawei, Baidu, and Yandex—will be subject to oversight or obstacles under the DMA. None of these Chinese and Russian firms will need to comply with the DMA's strict rules, but they are all potential beneficiaries of the DMA in terms of their ability to gain preferential regulatory treatments (e.g., an unconstrained ability to engage in self-preferencing) and access to data and IP from U.S. firms.

These 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. The DMA could result in the forced transfer and disclosure of intellectual property, trade secrets, and sensitive business and user data to state-sponsored Chinese and Russian companies, through obligations to disclose data under 6.1(h), (i), and (j). These requirements could result in the sharing of sensitive European data from both users and businesses—as well as trade secrets—to

[87] *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.

[88] European Comm'n, *Gatekeepers* (last updated Oct. 14, 2024), https://digital-markets-actcases.ec.europa.eu/gatekeepers.

foreign rivals and bad actors that could potentially misuse that data to further their own interests. And as the European Data Protection Board recognized in Nov. 2021,[89] such transfers would take place without any consultation with DPAs or other competent authorities to assess the potential harms related to security and privacy.

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.

As such, through the Special 301 process, USTR should investigate the applicability of TRIPS Article 39 in Section 7 on the "protection of undisclosed information," to the data-sharing obligations described above. This TRIPS article provides:

> 2. **Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices (10) so long as such information:**
>
> (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
>
> **(b) has commercial value because it is secret**; and
>
> (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.[90]

The European Union's AI Act requires a "comprehensive" summary of the content used for training the general-purpose model. While the act recognizes "the need to protect trade secrets

[89] European Data Protection Board, *Statement on the Digital Services Package and Data Strategy*, Nov. 18, 2021, https://www.edpb.europa.eu/our-work-tools/our-documents/statements/statement-digital-services-package-and-data-strategy_en.

[90] Agreement on Trade-Related Aspects of Intellectual Property Rights, Part II, Jan. 23, 2017, https://www.wto.org/english/docs_e/legal_e/31bis_trips_04d_e.htm#7 (emphasis added).

and confidential business information," the comprehensive disclosure requirement may be incompatible with maintenance of trade secrecy.

c. Türkiye

Türkiye amended 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, Türkiye's regulation requires designated companies to enable the interoperability of core platforms 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 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 gratuitous[91] 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.[92]

VIII. 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

[91] *See also* Joint Industry Letter on DMA Gratuitous Access Provisions (Mar. 2022), https://www.ccianet.org/wp-content/uploads/2022/03/Joint-Industry-Letter-on-DMA-Gratuitous-Access-Provisions.pdf.

[92] *See* CCIA Comments on Draft Amendment to Law No. 4054 of the Protection of Competition in Turkey (Nov. 17, 2022), 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.

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-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.

In 2022, the European Parliament issued a recommendation that the Union introduce transparency measures for litigation funding. In January 2023, the European Commission began studying the topic, including ways to ensure that such funding is not used to the detriment of consumers and technological progress. This represents a positive step forward and should be commended as an example to all nations.

IX. CONCLUSION

In the 2025 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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