



## Comments of EFF to the USTR 2015 Special 301 Review

### Docket number USTR-2014-0025

The Electronic Frontier Foundation (EFF) appreciates the opportunity to submit the following comments to the Office of the United States Trade Representative (USTR) in connection with the Request for Public Comment and Announcement of Public Hearing In The Matter of 2015 Special 301 Review: Identification of Countries under section 182 of the Trade Act of 1974 published in the *Federal Register* on December 29, 2014.

EFF is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development.

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## 1. Summary

Trade in copyright works and innovative technologies is an important segment of the U.S. economy that showcases its creativity and ingenuity to the rest of the world, while also allowing its people to benefit from the best that other countries have to offer. The rules of the global trading system, at their best, are designed to ensure that such trading relationships are conducted fairly and provide mutual benefits.

The Special 301 process, however, exists outside the global trading system established

under the World Trade Organization—indeed, it predates the WTO by six years. It is not designed towards the maximization of mutual benefit, but is avowedly partial in favor of the interests of U.S.-based intellectual property holders. Experts regard it as an ambit claim of extravagant demands, rather than as neutral, fact-based recommendations of good trade policy.

Unfortunately however, over the quarter-century that the Special 301 Report has been issued, this distinction has frequently been lost by foreign governments and media, who have too often mistaken the Special 301 Report for a legitimate dispute mechanism, and been misled into responding with changes to their intellectual property laws and policies that were not required under international law, to the considerable long-term disadvantage of their citizens—while providing dubious and unquantified benefits to the United States.

These comments provide some examples of this unwelcome phenomenon from a sampling of countries who were called out in the 2014 Special 301 Report. We also offer some overall observations about the shortcomings of the Special 301 process, which we believe has become increasingly irrelevant to U.S. interests, besides being increasingly damaging to our trading partners, to the point where it is now overdue for retirement. Short of this, we also conclude with some recommendations to address some of the worst shortcomings of the process.

## **2. Comments on Special 301 Process**

### **2.1. Legality**

As others have documented at length in previous submissions<sup>1</sup> and publications,<sup>2</sup> there are serious questions over the very legality of the Special 301 process, to the extent that it purports to be a mechanism for raising trade disputes. The WTO agreement provides:

Members shall not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this understanding.<sup>3</sup>

Under Section 306 of the Trade Act, the USTR is empowered to apply sanctions if a

<sup>1</sup> *Submission of Global Health Organizations*, February 15, 2011, available at <http://infojustice.org/wp-content/uploads/2011/02/Submission-of-International-Health-NGOs-for-the-2011-Special-301-Report.doc>.

<sup>2</sup> Jagdish Bhagwati and Hugh T. Patrick (eds.), *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System*, pp. 113-14 (University of Michigan 1993).

<sup>3</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 23.2, Legal Instruments – Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994).

country fails to satisfactorily implement measures to redress the concerns it has unilaterally raised of that country in the Special 301 report. This is facially incompatible with the WTO agreement, and has only survived WTO scrutiny to date on the basis of U.S. undertakings, notwithstanding the language of the Trade Act, that the USTR would not apply such sanctions outside of WTO dispute resolution mechanisms. The WTO panel that ruled to that effect however explicitly cautioned that:

should [the US Administration's undertakings] be repudiated or in any other way removed by the US Administration or another branch of the US Government, the findings of conformity contained in these conclusions would no longer be warranted.<sup>4</sup>

In practice, even without the need for sanctions to be applied or explicitly threatened, the mere listing of a country on the Priority Watch List has applied a heavy extra-legal influence on that country to amend its intellectual property laws and policies to accord with the USTR's unilateral demands, and the result—as demonstrated in section 3 below—has often been to the detriment of those countries' citizens, and the very unclear benefit, if any, for the United States.

## **2.2. Lack of Balance**

The inclusion of copyright flexibilities in domestic intellectual property laws and policies creates considerable trade benefits, as well as serving many legitimate domestic public interests. The economic value of the “fair use” limitation in U.S. copyright law, for example, has been repeatedly estimated in the trillions of dollars—eclipsing the value of Hollywood's output.<sup>5</sup> Yet the Special 301 Report completely overlooks copyright flexibilities such as these when assessing other countries' copyright laws—or worse, treats them as trade barriers.

To give a random sampling, Russia has been criticized in the most recent report for “introducing confusion into the available scope of copyright exceptions and limitations”, although what exactly is meant by this is unclear. It expressed concern about “several broad limitations on rights” in China in 2005, again with no specifics as to why, and the scope of Korea's private copy exception was remarked upon in the same year. Lebanon was criticized in 2002 for an “overly broad software exception for certain educational uses”. Many more examples could be given.

The fact is that without copyright limitations and exceptions such as these, the United

4 WTO Panel, WT/DS152/R, United States—Sections 301–310 of the Trade Act 1974, available at <http://www.sice.oas.org/DISPUTE/wto/tract01e.asp>.

5 Rogers, T and Szamoszeg, A (2011) Fair use in the U.S. economy. Economic contribution of relying on Fair Use, prepared for the Computer & Communications Industry Association, available at <https://www.ccia.net.org/2011/07/ccia-to-release-2011-study-calculating-economic-value-of-fair-use/>.

States itself would be far less competitive internationally. Among the United States' export brands that depend upon copyright flexibilities include YouTube, Apple iPod, TiVo, Wikipedia, and many more. The Special 301 Report, far from deriding or ignoring the flexibilities that make such innovations possible for U.S. businesses both at home and abroad, should encourage their adoption more broadly.

Also ignored in the Special 301 Report are the legitimate uses of circumvention tools, which the report treats as devoid of any legitimate purpose. For example, the 2014 report's criticism of the "Any DVD HD" tool which can be used for backing up and space-shifting Blu-Ray media. Circumvention tools are made necessary by the harsh application of Technological Protection Mechanisms (TPMs) that impede the lawful exercise of fair uses of copyright works.

This has been recognized by the United States in the negotiation of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, which in Article 7 requires that contracting parties "not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty" in their laws on circumvention of technological protection measures. But the impact of technological locks on lawful fair uses is not restricted to those with disabilities—it also affects librarians, educators, and ordinary users. The Special 301 should recognize that legitimate uses of general-purpose circumvention tools exist, and target only any illegitimate uses that a country's laws or policies may sanction.

### **2.3. Lack of Differentiation**

Despite its claims to the contrary, the Special 301 Report generally fails to differentiate between intellectual property laws and policies that suit highly industrialized countries, from those that better suit developing countries—or worse, the report actually discriminates against developing countries, holding them to higher standards than their more developed neighbors.

As a wealth of research shows, the appropriate level of intellectual property protection varies markedly depending on a country's level of development, with fewer benefits accruing to countries that are less industrialized.<sup>6</sup> Indeed, the United States itself flourished from its own failure to respect foreign copyrights and patents during its early years of economic development.<sup>7</sup>

<sup>6</sup> Kim, Yee Kyoung, Keun Lee, Walter G. Park, and Kineung Choo. "Appropriate intellectual property protection and economic growth in countries at different levels of development." *Research Policy* 41, no. 2 (2012): 358-375.

<sup>7</sup> Khan, B. "An Economic History of Copyright in Europe and the United States". EH.Net Encyclopedia, edited by Robert Whaples. March 16, 2008, available at <http://eh.net/encyclopedia/an-economic-history-of-copyright-in-europe-and-the-united-states/>.

Although the USTR generally forbears from listing least-developed countries in the Special 301 Report, nonetheless *all* of the countries on the 2014 Priority Watch List are developing countries by World Bank and IMF standards, as well as all but five (that is, almost 80%) of those on the Watch List.

It might be assumed that this is simply because there is a close correlation between countries with low levels of IP protection and low levels of economic development. But this is not exactly true; although there are certainly fewer resources devoted to IP enforcement in developing countries on average, the legal level of protection is ironically often higher. This is because external forces such as bilateral demands from trading partners such as the U.S. (including the Special 301 Report itself), WIPO “technical assistance” programs, and the conditions of entry to the WTO, have already required developing countries to levels of IP protection to inappropriately high levels.<sup>8</sup> But as those same forces have not required the adoption of broad exceptions or limitations for users such as fair use, these are much less common in countries with lower levels of development.

Conversely, highly industrialized countries have been free to craft broad copyright flexibilities, typically without any retaliation from the USTR. For example, the Netherlands has never been listed in the Special 301 Report, although (at least until 2014<sup>9</sup>) its law allowed personal downloading of unlicensed files from peer-to-peer filesharing networks. We have little doubt that if a developing country had allowed this practice, it would immediately have found its way onto the Priority Watch List.

## **2.4. Arbitrariness**

This is just one instance of a broader problem: that the methodology of the Special 301 Report lacks rigor in respect to the criteria that qualify a country for inclusion on the Watch List or Priority Watch List. There is no numerical scoring or weighting of criteria, nor indeed is there even a defined set of criteria that a country can have reference to when attempting to assess the grounds for its placement. In place of defined criteria, the USTR takes recourse to the very vague language of the Trade Act, purporting to identify “onerous or egregious acts, policies or practices”. In practice, this elastic phrase that can be used to discredit a foreign country for whatever grounds the USTR wishes.

We find that a country is very often upgraded or downgraded in a Watch List due to the USTR’s assessment that the country has shown “improved enforcement efforts” to justify

<sup>8</sup> Deere, Carolyn. *The Implementation Game: The TRIPS Agreement, Developing Countries and the Global Politics of Intellectual Property*. Oxford University Press, 2008

<sup>9</sup> *ACI Adam BV v Stichting de Thuiskopie*, Case C-435/12, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=131555&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=447274>.

a change in its placement. For example, Italy was removed from the Watch List in 2014 due to its introduction of regulations establishing a notice-and-takedown regime (though it had not been removed for making previous reforms of a similar magnitude, such as outlawing the supply of circumvention devices and the unauthorized making available of copyright works online).

But what amounts to a sufficient threshold of effort to justify a change in a country's placement on the Watch List remains quite obscure. A country may make very significant reforms to its IP laws or enforcement practices, with no effect on its placement on the Watch List. A country can simply not assume that there is any rhyme or reason to its placement at all, and this seriously lessens the perceived legitimacy of the Special 301 Report.

These problems are very obvious from even a cursory analysis of the countries that have been included and excluded from the Watch List over time. For example, Turkey has been included in *every* Special 301 Report ever released, whereas neighbouring Georgia—which has similar IP laws, and was nominated as the “World Leader in Software Piracy”<sup>10</sup> by the Business Software Alliance—has *never* been listed.

Similarly, Canada has been included in every edition of the Special 301 Report since its inception, despite been rated highly—only one place behind the United States—by law firm Taylor Wessing in its survey of IP protection in 36 countries around the world.<sup>11</sup> Meanwhile countries like Fiji, Kenya and Morocco, where pirated music and movies continue to be sold openly on the street, have never been listed.

We give these examples not to suggest that the countries that have never been listed should be listed; on the contrary, it is to show how utterly meaningless is the listing of countries overall, in that their inclusion or non-inclusion is apparently influenced by foreign policy considerations that bear no relation to the state of the country's intellectual property laws and policies.

## **2.5. Deficiencies of the Consultation Process**

Despite improvements in the consultation process for the 2014 report, namely the institution of a post-submission hearing, the conclusions of the Special 301 Report remain unduly influenced by a small number of well-resourced industry associations, to which other stakeholders are not given an effective opportunity to respond.

<sup>10</sup> Lopicic, Masa. “Georgia: World Leader in Software Piracy”. November 15, 2010, available at <http://www.mondaq.com/x/115600/Information+Security+Risk+Management/Georgia+World+Leader+in+Software+Piracy>

<sup>11</sup> Taylor Wessing. *Global IP Index*. Fourth edition, 2013, available at <http://www.taylorwessing.com/ipindex/>.

The time period given for countries to respond to the detailed and lengthy comments submitted about them by industry stakeholders such as the International Intellectual Property Alliance (IIPA) and the Pharmaceutical Research and Manufacturers of America (PhRMA) is only one week. This is manifestly insufficient. But they are fortunate in comparison to public interest groups, who have no additional time to respond to industry comments at all.

The recently-instituted post-submission hearing does ameliorate this to some degree, but the disparity of resources available to public interest representatives to participate in this hearing, compared to those available to industry, makes it inaccessible to most and ensures that many good arguments that could be raised against industry submissions are never heard.

There is no neutral arbitrator to assess the merits of the factual claims made in submissions in areas of dispute, and no formal means of challenging the USTR's acceptance of those claims, other than to retroactively respond during the following year's Special 301 comment period. Consequently, the Special 301 Report is frequently based on unsourced, unverifiable, and factually dubious claims.

### **3. Comments on 2014 Special 301 Report**

Across all countries covered in the 2014 Special 301 Report and in previous reports, there are a number of unwarranted criticisms that are made time and time again that intrude upon a country's sovereign right to determine its own laws and policies within the bounds of its existing international obligations. These unwarranted criticisms include the fact that a country has not acceded to the already-outdated WIPO Internet Treaties, that it has not enacted narrow special interest laws to criminalize camcording in movie theatres, that it does not have a U.S.-style notice-and-takedown system of intermediary liability (even if it has an alternative system such as notice-and-notice), and that its patent law incorporates higher utility standards than U.S. law.

On the other hand, we can also recognize some criticisms made in the Special 301 Report that are more legitimate. While the Special 301 Report has traditionally been characterized by its insatiable demands for higher and higher levels of intellectual property protection and enforcement by U.S. trading partners, there is some evidence in recent Special 301 Reports of a pivot away from this fixation towards a broader concern with other innovation policies that adversely affect U.S. intellectual property holders, such as preferential government procurement policies (as in China), systemic problems of trade secret misappropriation (as allegedly in China and India), and government use of unlicensed software.

In general we regard this pivot as welcome, to the extent that the complaints raised are

factual and based on countries' existing international legal obligations, such as Article 39 of the TRIPS Agreement covering trade secrets. However to the extent that they complain about innovation policies that are not grounded in a country's international legal obligations—such as the fact that they do not have specialized courts or police for IPR enforcement, or that customs officers do not have *ex officio* enforcement authority—there is no more legitimacy to these complaints than complaints about failure to adopt TRIPS+ levels of intellectual property protection.

The terminology used in the report is frequently inexact, with “counterfeit” being used often without clearly differentiating between trademark-infringing, copyright-infringing and patent-infringing products. The report also exaggerates the harms from IP infringement. Unsourced statements such as “trade in counterfeit and pirated products often fuels cross-border organized criminal networks” are either tautologous (to the extent that the commercial-scale production or trade in counterfeited products is itself criminal), or if interpreted more broadly, have been disproved by recent research.<sup>12</sup>

These flaws in the 2014 Special 301 Report stem from the broader systemic problems that we identified in the Special 301 process as a whole, in section 2 above, and reinforce the need for that process to be thoroughly overhauled, if not retired altogether.

### **3.1. Argentina<sup>13</sup>**

The Special 301 Report on Argentina is full of factual errors and exaggerations. Although Argentina is painted as failing to adequately enforce intellectual property violations, in fact there have been several significant court cases that show otherwise. One of them was resolved in the Supreme Court (the Rodriguez vs. Google case on search engine thumbnails), and a high-profile criminal case against Taringa is also not referenced in the Report.

In several respects, Argentina's intellectual property laws exceed TRIPS minima. For example, its Intellectual Property Law which covers copyright and related rights establishes a TRIPS+ copyright duration of life plus 70 years. Amongst the WTO cases against Argentina, not one has alleged a deficiency in its intellectual property protection.

The sales of counterfeit goods in the La Salada market has more to do with trademark than copyright infringement. Argentina's trademark law already reasonably prioritizes the protection of consumers' rights above those of trademark owners and it fully complies with WTO rules.

<sup>12</sup> *Media Piracy in Emerging Economies*, Karaganis, Joe (ed.). SSRN books, 2011, available at <http://piracy.americanassembly.org/the-report/>.

<sup>13</sup> Information contributed by Beatriz Busaniche, Fundación Via Libre.

The most misleading part of the report has to do with patents and pharmaceutical data. The assertion that Argentina has a lack of transparency for patentability criteria is totally wrong. INPI, the Patents Office in Argentina fully complies with the country's patents law which was adapted to meet the WTO Mandate after its accession to the TRIPS Agreement.

The same might be said about the exaggeration regarding the protection of data generated to obtain marketing approval for pharmaceutical products. While Argentina fully complies with WTO Standards, the USTR is calling for Argentina to meet TRIPS+ standards and to sign the Patent Cooperation Treaty (PCT). Those issues are not in the current Intellectual property agenda in Argentina, and neither does Argentina have any international obligation in this regard.

Strict TRIPS+ rules on copyright have several negative impacts on access to knowledge. The most important one is in the educational and academic field. Even while Argentina has an open access to academic research law, it is not yet in force and the academic sector is in constant violation of intellectual property law because of Argentina's lack of limitations and exceptions for that sector. The same applies to archives and libraries, a sector that has been lobbying for a copyright reform for a long time with little success. Students, librarians, and researchers are the ones in the worst situation regarding copyright.

Taking a positive perspective, we should note that there is a bigger debate regarding criminal law in Argentina. There is a project to change the whole criminal code and develop a new complete code that includes deep changes in the enforcement of intellectual property. Regarding copyright, the proposal is much more limited than the current law and establishes a set of conditions that might be considered before criminal prosecution (including the level of damage caused and the commercial intent of the offender).

A broad interpretation of the proposal may be the decriminalisation of sharing, where no damage is proved and there is no commercial intent. If this proposal succeeds, this will no doubt cement Argentina's position in the 301 Report in the following years! But it should not do so, as the overall benefits to Argentinian society of more balanced IP enforcement policies are obvious. In particular, an exception for libraries and academic uses would improve conditions in this sector where basic academic fair uses currently are treated as illegal.

In summary, the treatment of Argentina in the Watch List has overall been most unfair, in comparison to neighboring countries such as Uruguay (which unlike Argentina has more flexible copyright laws, such as a life + 50 years copyright duration), as well as Brazil.

### **3.2. Chile<sup>14</sup>**

Chile is a Berne Convention member since 1970. The Chilean Copyright Act (Ley N° 17.336 de Propiedad Intelectual) was passed in 1970 and has been amended several times since then to update the level of protection to international requirements. Chile is a WTO member, its adhesion to TRIPS became effective in May 1995. In 2001, Chile ratified the WIPO Copyright Treaty (WCT) and the treaty became effective in March 2002. On January 1, 2004 United States and Chile signed a free trade agreement that included a whole chapter devoted to require increased levels of protection for intellectual property rights.

In the subsequent years, Chile conducted a deep reform in its patent and copyright laws to update them to the acquired international obligations, but trying to address an implementation path to secure the balance necessary for a developing country.

The reforms implemented in that time in patent law included: new protected categories (geographic denominations and sound trademarks); protection for non-disclosed information prior to patent registration; enlargement of the term of protection to take into consideration administrative delay in the registration process; and improvement of the registration process.<sup>15</sup> Later, in 2012, the law was again amended to fulfill the standards of the Patent Cooperation Treaty (PCT) and the Trademark Law Treaty (TLT) through the improvement of the registration process for international patents.

The copyright law was amended also in the following aspects: increased civil and criminal remedies available to secure the protection of copyrights; reform to the exceptions and limitations regime; and introduction of a clear liability regime for Internet Service Providers.<sup>16</sup> In this last matter, the Special 301 Report's recommendation to Chile "to amend its Internet service provider (ISP) liability regime to permit effective action against piracy over the Internet" is a direct criticism of the policy decision made by the country through the democratic debate that ended in 2010 with the approval of a regime that differs from the "notice-and-takedown" adopted by US Copyright Act.

Despite the effort made in the implementation of the aforementioned reforms, Chile has been part of the Priority Watch List since 2007. A relevant fact is that Chile has never been forced to come before the WTO dispute resolution system to settle a dispute related with insufficient levels of intellectual property protection afforded by its internal legislation or non-fulfillment of its TRIPS obligations.

Finally, related with the concern expressed in the Special 301 Report about the spreading of the use of decoder boxes, Chile signed the Brussels Convention Relating to the

<sup>14</sup> Information contributed by Maria Paz Canales.

<sup>15</sup> Ley N° 20.160 de 2007.

<sup>16</sup> Ley N° 20.435 de 2010

Distribution of Programme-Carrying Signals Transmitted by Satellite, and it became effective on June 2011. During the approval of the treaty in the Congress, the executive power and Congress agree that Chile already had a provision in its Telecommunication Act (Ley N° 18.168 General de Telecomunicaciones) to afford protection to satellite signals, providing a specific remedy for the unauthorized uses,<sup>17</sup> so the treaty did not require further implementation. Also, Chile has border control measures that have been used to deter the entrance of proven counterfeit or substantial infringement devices.

Therefore, from the extensive list of matters observed in the Special 301 Report, the issue related to the delay in the implementation of protections against the unlawful circumvention of technological protection measures seems to be the only one that has a real basis in the failure of Chile to fulfill on time an obligation assumed by the country in the Free Trade Agreement with U.S. Given the observed problems that TPMs pose to users throughout society, this hardly seems a substantial complaint.

### **3.3. Paraguay<sup>18</sup>**

Paraguay has been listed in the USTR's 2013 and 2014 Special 301 Reports, due to its failure to meet the objectives listed under Component 5 of the Millennium Challenge Corporation's THRESHOLD II Program. This program, which cooperates with USAID, ran from 2009-2011 and had a budget of 30.3 million dollars in its entirety.<sup>19</sup> Component 5 of the program centered on "anti-piracy", and the government institution responsible over such matters is the Ministry of Industry and Commerce (MIC).

According to the program's final report, 11,000 young people were educated about intellectual property and the potential damage involved in the violation of intellectual property rights. The trainings were conducted by officials of the Directorate General of Intellectual Property, that are part of the MIC, jointly with the Ministry of Education and Culture.<sup>20</sup> Also, the THRESHOLD Program worked to strengthen the Specialized Unit of Unlawful Acts Against Intellectual Property. It jointly prepared a manual of functions, including a catalog of offenses for investigation, among others.

17 Chilean Telecommunication Act provides in its article 36 B letter b) a criminal remedy for the intentional interception of a telecommunication service, which includes in executive power and Congress opinion the protection of satellite signals. The remedy provided by the law is prison and seizure of the equipment. Article 36 B b). "Comete delito de acción pública: b) El que maliciosamente interfiera, intercepte o interrumpa un servicio de telecomunicaciones, sufrirá la pena de presidio menor en cualquiera de sus grados y el comiso de los equipos e instalaciones."

18 Information contributed by Maricarmen Sequera, TEDIC.

19 "Se inicia la Segunda Fase del Programa Umbral". Official site of the US Embassy: [http://spanish.paraguay.usembassy.gov/pe\\_041309.html](http://spanish.paraguay.usembassy.gov/pe_041309.html). "Educando para crear propiedad intelectual a los estudiantes del nivel medio": [http://www.mec.gov.py/cms\\_v2/entradas/295111-educando-para-crear-propiedad-intelectual-a-los-estudiantes-del-nivel-medio](http://www.mec.gov.py/cms_v2/entradas/295111-educando-para-crear-propiedad-intelectual-a-los-estudiantes-del-nivel-medio)

20 Informe del Ministerio del Interior. "Plan umbral II. Lucha contra la piratería y falsificación": [http://www.ministeriopublico.gov.py/documentos/umbral/pro\\_justiciaII.pdf](http://www.ministeriopublico.gov.py/documentos/umbral/pro_justiciaII.pdf)

The 2012 Special 301 Report<sup>21</sup> concentrated on areas along Paraguay's borders with Argentina and Brazil. They argued there are insufficient customs actions to fight "piracy" that were not resolved by the actions of THRESHOLD. Also, the 2014 Special Report 301 emphasizes the expiration of the "Memorandum of Understanding (MoU) on Intellectual Property Rights with the US and the Republic of Paraguay".<sup>22</sup> The MoU is not legally in force, but there are several pushes to renew it again.

The Paraguayan government has not responded to Washington because there is an appendix that affects the Paraguayan national industry. Among some of the points in dispute is to increase the protection of "test data" in the area of patents, that will require to modify two laws: one that relates to the agrochemical industry and another the pharmaceutical industry, according to sources from the National Sanitary Surveillance Office (Dinavisa). The large domestic pharmaceutical industry is pressing the government to not renew the MoU.<sup>23</sup>

The United States' annual report gives a slanted perspective on the events that are happening in Paraguay. Our copyright laws are flexible with many exceptions, but Paraguay has sought to create more restrictions as they have in neighboring countries. Last year, the copyright law was amended to increase the term from life + 50, to life + 70 years.<sup>24</sup>

### **3.4. Peru<sup>25</sup>**

The 2014's Special Report 301 issued by USTR made two factual mistakes in assessing Peru's Intellectual Property system. Peru's obligations under the United States-Peru Trade Promotion Agreement regarding the prevention of government use of unlicensed software are already implemented. Since 2003, Peru has specific rules about the acquisition and administration of licensed software for government offices. (Resolución Ministerial No. 013-2003-PCM) Those rules were updated following the Trade Agreement on 2007 and had been in place since then. Additionally, the so-called "piracy" over the Internet is already an administrative infraction and a crime punished with up to eight years of prison, according to the modifications made in 2008 after the US-Peru FTA.

In the recent years, markets for creative works are expanding in Peru. Thanks to the

21 "2012 Special 301 Report" page 51 [https://ustr.gov/sites/default/files/2012%20Special%20301%20Report\\_0.pdf](https://ustr.gov/sites/default/files/2012%20Special%20301%20Report_0.pdf)

22 "2014 Special 301 Report" page 55

y "2013 Special 301 Report" page 52. <https://ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf>

23 Comentario de Astrid Weiler. Representante legal de la Cámara de la Industria Química farmacéutica del Paraguay. (CIFARMA)

24 Modificación de ley de Derecho de Autor.

<http://sil2py.diputados.gov.py/formulario/VerDetalleTramitacion.pmf?q=VerDetalleTramitacion%2F1406>

25 Information contributed by Miguel Morachimo, Hiperderecho.

widespread availability of Internet and tools for creative production, this has triggered a popular demand for a more coherent copyright system. In 2014, Peru introduced new exceptions and limitations to the copyright law regarding online education and public libraries. Additionally, another bill with new exceptions will be discussed and is likely to be approved in the following months.

### **3.5. Russia<sup>26</sup>**

It is strange that Russia was still placed on the USTR's 2014 Priority Watch List. The finding that Russia does not provide strong IPR protection and enforcement does not correspond to actual circumstances.

Under pressure from the US, Russian authorities and the USTR signed the Intellectual Property Rights Action Plan in December, 21, 2012.<sup>27</sup> One month after signing the Plan, the Ministry of Culture of Russia introduced the first version of an “anti-piracy law”<sup>28</sup> that mirrored the United States' SOPA legislation. The bill provoked a broad discussion in Russia. Many Internet companies and the biggest Russian Association of IT companies<sup>29</sup> criticized the bill. They said that the proposed draft law did not comply with the principles of adequate and flexible legislative regulation, nor was it aimed at supporting innovation or ensuring the balance of interests of all participants in the current process of creation and consumption of intellectual property on the Internet (rightsholders, users, and intermediaries). The industry suggested the rejection of this kind of regulation, and consider the adoption of more soft law, similar to the United States' DMCA.

Despite all of this, in June 2013, the Russian Congress passed the “anti-piracy law” №187-FZ, which restricts user access to websites in the case of suspected copyright violation. Under this law, the rightsholders of motion pictures and any type of video content, got a chance to seek a preliminary court injunction to block the IP of web sites that allegedly distribute infringing materials. According to the law, websites can be blocked not only for hosting any content that violate copyright law, but also for “the presence of any information that allows users to get access to materials that are protected by copyright law” (even for hyperlinks, torrent-files, magnet links and others).

Under the Law, rightsholders can send a notice for takedown directly to the hosting provider. The hosting provider is obligated to forward the notice to the website operator.

<sup>26</sup> Information contributed by Sarkis Darbinyan, head of [Association of Internet Users](#) and the lawyer for Russian Internet watchdog, [RosKomSvoboda](#).

<sup>27</sup> United States - Russian Federation Intellectual Property Rights Action Plan <https://ustr.gov/sites/default/files/uploads/IPRAActionPlan%2014Dec12%20fin.pdf>

<sup>28</sup> <http://mkrf.ru/dokumenty/3974/detail.php?ID=272242>

<sup>29</sup> RAEC: <http://raec.ru/times/detail/2227>

If the website operator does not restrict access to the allegedly infringing material in one day after getting the notice, the hosting provider must restrict the access to the website in three days. If it is not done, the ISPs must add information about the website to the special registry by RosKomNadzor (the authorized media regulator) then restrict access to the website.

The law entered into force August 1, 2013. The adoption of the law caused massive outrage among Internet users because any website could be blocked even under one complaint from the rightsholder.

Offline and online protest actions were held across the country. August 1st was a black-out day for RUnet.<sup>30</sup> More than 100,000 Internet users signed a petition<sup>31</sup> to revoke the law, but finally the petition was rejected.

On November 24, 2014, the Russian Congress passed another law, #364-FZ,<sup>32</sup> which enters into force starting May 1, 2015. The Law amends several legislative acts and expands the anti-piracy law to all works under copyright (except photography) and introduces another very controversial provision—that access to a website can be forever restricted if it is found to host the “unlawful placement” of copyrighted materials two or more times.

In addition to the new legislation, it is quite noticeable that the enforcement of the existing criminal law has become tougher. In last two years we have seen an increase in the number of criminal cases against Internet users for file sharing on p2p networks. First it was a case in Moscow against the Lopukhov family.<sup>33</sup> Then there were some criminal convictions, over copyright infringement, of Internet users in Kazan.<sup>34</sup> Additionally there are more and more civil lawsuits for copyright infringement. In order to facilitate all of these new court proceedings, Moscow created a specialized court—a court for intellectual rights.

Nowadays, there are some more legislative proposals from the Ministry of Culture and lobby groups for new approaches for the regulation of copyright on the Internet. One of them suggests that ISPs be required to install DPI equipment<sup>35</sup> and pre-filter all content

30 More info in Russian: [https://ru.wikipedia.org/wiki/%D0%A4%D0%B5%D0%B4%D0%B5%D1%80%D0%B0%D0%BB%D1%8C%D0%BD%D1%8B%D0%B9\\_%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD\\_%D0%BE%D1%82\\_2\\_%D0%B8%D1%8E%D0%BB%D1%8F\\_2013\\_%D0%B3%D0%BE%D0%B4%D0%B0\\_%E2%84%96\\_187-%D0%A4%D0%97](https://ru.wikipedia.org/wiki/%D0%A4%D0%B5%D0%B4%D0%B5%D1%80%D0%B0%D0%BB%D1%8C%D0%BD%D1%8B%D0%B9_%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD_%D0%BE%D1%82_2_%D0%B8%D1%8E%D0%BB%D1%8F_2013_%D0%B3%D0%BE%D0%B4%D0%B0_%E2%84%96_187-%D0%A4%D0%97)

31 <https://www.roi.ru/4494/>

32 <http://publication.pravo.gov.ru/Document/View/0001201411250005?index=0&rangeSize=1&back=False>

33 <http://top.rbc.ru/economics/16/10/2013/882550.shtml>

34 <http://www.aif.ru/society/people/1401963>

35 <http://rublacklist.net/9689/>

that users download on their computers. This was one of the most notorious initiatives that could seriously violate the fundamental human rights of Russians.

It seems to me that USTR officials do not know about these facts. Based upon the adoption of new copyright enforcement laws, Russian legislation for copyright is now becoming one of the most strict in the world. That is why listing Russia among other countries with weak IPR laws is strange. Moreover, we think that the US government imposes hopelessly outdated digital content regulations onto the rest of the world. We believe that the time to change copyright has come.<sup>36</sup> We need to fix it now because these copyright rules are completely outdated and inadequate for our current digital world. USTR officials would be myopic to stand for such old regulations in a new reality.

### **3.6. Vietnam<sup>37</sup>**

Since its entry to the WTO in 2007, Vietnam has continuously improved its domestic Intellectual Property (IP) system to bring it into full conformity with the TRIPS Agreement. Generally speaking, Vietnam's IP legislation is relatively comprehensive, covering all aspects of IP protection in accordance with international standards.

In 2005, Vietnam's National Assembly passed the Law No. 50/2005/QH11 on Intellectual Property Rights (IPR) which was amended and supplemented in 2009. According to this Law, three major IP rights are protected in Vietnam: copyright and related rights; industrial property rights; and rights in plant varieties. The promulgation of a separate law on IPRs is generally in accordance with advanced IPR legal regimes of countries all over the world. In addition, a multitude of other laws govern other issues related to IPR, such as the 2004 Law on Competition and the 2005 Civil Code, along with various decrees, decisions, and circulars promulgated by various authorities to guide their implementation.

As stipulated in the IPR Law and relevant legislations, the Ministry of Science and Technology (MOSTE) assumes the functions of exercising State management and providing services in the field of intellectual property. Additionally, the IP enforcement system also includes various administrative and judicial agencies which belong to different ministries and departments of different levels. IP legislations also clearly provide for procedures for processing IP registration applications and a wide range of sanctions to deal with IP violations such as administrative measures, civil procedures, criminal prosecutions, or border measures.

In Vietnam, ineffective enforcement of its IP legal framework has long been attributable to three crucial factors which are: (i) limited public awareness on the protection of IP, (ii)

<sup>36</sup> <http://changecopyright.ru>

<sup>37</sup> Information contributed by Alice Pham and To Tam, CUTS HRC.

low capacity of IP enforcement agencies, and (iii) lack of effective coordination between such agencies. However, recent years have seen remarkable progress. First of all, there is an increase in public awareness, especially that of local small and medium sized enterprises (SMEs), with regard to the importance of industrial property rights. Harsher sanctions are imposed on infringers according to a number of decrees. A coordination regime between enforcement agencies, though mainly at the central level, does indeed exist, either through the operationalisation of inter-ministerial and inter-sectoral programs on IPR implementation or coordination of these agencies on specific activities. Though the rate of IP violation is still relatively high compared to the region and the world, IPR enforcement in Vietnam has made huge strides in such areas as software piracy, book piracy and music piracy. Notably, much progress is observed in protecting copyrights of foreign and domestic individuals and corporations regarding computer software, music discs, or books. Various advocacy and awareness-raising programmes on the subject of IPRs have been organized on a frequent and continuous basis in numerous and diverse forms, targeted at different communes, levels, and sectors.

There are a number of cases where a change to IP laws or policies may cause negative impact on freedom of expression. Specifically, the Decree 72 on the management, supply, and usage of Internet services recently promulgated in an attempt to prevent IP violations and ensure a fair and transparent trading environment for the development of new forms of Internet information has caused great controversy. However, as it is stipulated in the Decree that users are “not allowed to quote, gather or summarize information from press organizations or government websites”, it is criticized as seriously violating the freedom of expression and as being against Vietnam's laws, Constitution, and international commitments on human rights.

It is worth noting that, even though parallel import of pharmaceuticals in Vietnam was not permitted in Vietnam, now under Article 125.2 of the IP Law, parallel imports have become legal in Vietnam, putting an end to the monopoly of some companies in the fields of manufacturing and distributing pharmaceuticals and benefit consumers in the end. Besides, Vietnam also has some provisions to take advantage of certain “flexibilities” incorporated in the TRIPS Agreement.

## 4. Recommendations

The Special 301 Report is widely reviled as one of the worst excesses of U.S. exceptionalism,<sup>38</sup> and it is not difficult to see why based on the way it has been employed to selectively and arbitrarily impose TRIPS+ obligations on U.S. trading partners, through a process that is unduly influenced by industry and uncondusive to balanced factual determination. Ideally, we would like to see the Special 301 Report discontinued altogether.

However, we acknowledge that this is not entirely within the hands of the USTR since the Trade Act does mandate, if not the Special 301 Report as such, at least some equivalent annual investigation. Therefore, until the Trade Act is amended, we have certain recommendations that we would urge the USTR to consider. Except for the last two points, these draw strongly on recommendations made in the 2014 Special 301 submission of Public Citizen, and to that extent we endorse that submission:<sup>39</sup>

- Special 301 should omit any reference, whether express or implied, to any country's TRIPS-compliant policies to advance a public interest.  
USTR should not sanction policies directly. Nor should it sanction policies indirectly, for example, through imprecise references to failings in transparency or intellectual property protection or through otherwise unwarranted elevation in a country's watch list status.
- The Special 301 Report should not criticize countries for a lack of transparency or due process, unless such criticism clearly articulates the alleged violation of a TRIPS standard.  
The TRIPS Agreement provides not only substantive standards, but also standards for transparency and due process. It is clearly inappropriate to list (and thereby sanction) a country for an allegedly non-transparent practice, if the criteria for the listing is itself non-transparent and not articulated.
- The Special 301 Report should treat public policy disagreement as a matter of clearly lower priority than criminal activity.  
If, in spite of the principles above, the Special 301 Report nevertheless cites countries for their TRIPS-compliant public policies, such country choices are clearly less objectionable than prevalence of criminal activity, such as alleged

<sup>38</sup> See for example the comments of Indian Commerce and Industry Minister Nirmala Sitharaman, reported in "India says US Special 301 process on IPR is a unilateral measure", *Economic Times*, Jul 30, 2014, available at [http://articles.economictimes.indiatimes.com/2014-07-30/news/52237815\\_1\\_ipr-regime-indian-patent-act-unilateral-measure](http://articles.economictimes.indiatimes.com/2014-07-30/news/52237815_1_ipr-regime-indian-patent-act-unilateral-measure).

<sup>39</sup> Public Citizen. "Comments of Public Citizen for the 2014 Special 301 Review", February 24, 2014, available at <https://www.citizen.org/documents/public-citizen-comments-for-special-301-at-hearing-Feb-2014.pdf>.

trade secret theft. The 301 Report should clearly reflect this ordering of priorities —e.g. failure to adopt a notice-and-takedown regime of intermediary liability or other public policy disagreements should never land a country on the Priority Watch List. The 301 Report should not conflate policy disagreement and allegedly criminal activity.

- The Special 301 Report should only address intellectual property, not ancillary public policies.

Past Special 301 Reports have criticized country policies that do not relate to the categories of intellectual property under the TRIPS Agreement. For example, cultural subsidies, cyber-espionage laws and software procurement policies are not intellectual property issues and are therefore outside of the scope of the Special 301 review.

- Special 301 should not list countries for not adopting U.S. policy preferences if those countries have no bilateral or international obligation to adopt the same. Even if Special 301 continues to cite countries for TRIPS-compliant policies, Special 301 should not list a country for the absence of a policy that the country is not bound to uphold. For example, a country should not be criticized for not adopting rules on camcording in movie theatres if that country does not have an agreement with the United States expressly and specifically requiring the same.
- At a bare minimum, even if Special 301 subjects wealthy countries to criticism for TRIPS-compliant public interest policies, developing countries should be given greater leeway.

This too-modest criterion reflects our understanding of USTR policy of differential treatment in the Trans-Pacific Partnership negotiations today. Though inadequate, Special 301 should, at a minimum, reflect this modest change.

- Criticism in the Special 301 Report should be accompanied by express and clearly articulated criteria.

If a critique is too vague to be disproven, as we would argue has been the case in past Special 301 Reports, then it is manifestly unfair.

- The USTR should give greater weight to the trade benefits of copyright flexibilities.

Countries should be given credit for their adoption of copyright limitations and exceptions and other intellectual property policies that promote grassroots innovation, non-profit and collaborative creation and sharing, and the preservation of cultural heritage, and the promotion of the public domain. Such policies both serve domestic public interests, as well as adding to the corpus of creative and

innovative works that can enrich global trade.

- The Special 301 process should adopt the same public comment process that applies to federal rulemaking procedures.

Under the Administrative Procedure Act, 5 U.S.C. §551, U.S. federal rulemaking requires an agency not only to receive public comments on proposed rules, but also to publish its response to issues raised in those comments and to provide its further analysis and justification for the rule, and to expose its decision to judicial review. This level of enhanced accountability would ameliorate some of the gravest flaws in the Special 301 process.

- The USTR should conduct and publish a human rights impact assessment in parallel to its Special 301 review process.

If the United States is to lead the world by example and work towards a sustainable, secure future, the USTR must consider the human rights implications of its Special 301 recommendations. Creativity and innovation cannot thrive without first guaranteeing fundamental human rights such as freedom of expression, privacy, and access to knowledge for education.

The “one size fits all” approach to intellectual property protection and enforcement that epitomizes the Special 301 report is outmoded, exclusionary, and does not promote a balanced and healthy system of global trade. This harmful emphasis has resulted from decades of undue influence by narrow special interest groups, most notably represented by the IIPA and Phrma, and the consequent exclusion of other stakeholder voices such as those of grassroots creators, innovators, and users.

This could be redressed if the USTR were to follow the recommendations that we have outlined above. In particular, by narrowing the Special 301 Report to focus on criminal conduct, and by acknowledging the pro-trade benefits of flexibility in intellectual property policy, the legitimacy and influence of the report would be much enhanced.