Before the
Office of the United States Trade Representative
Washington, D.C.

In re

Request for Comments and Notice of a Public Hearing Regarding the 2018 Special 301 Review	Docket No. USTR-2017-0024

COMMENTS OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA) FOR 2018 SPECIAL 301 REPORTING

February 8, 2018

I. Introduction

Pursuant to the request for comments published by the Office of the United States Trade Representative (USTR) in the Federal Register at 82 Fed. Reg. 61,363 (Dec. 27, 2017), the Computer & Communications Industry Association (CCIA)[1] submits the following comments in the 2018 Special 301 Review.

Digital goods and services are now an integral component to international trade. Critical to the expansion of digital trade and the export of Internet-enabled goods and services are carefully balanced intellectual property laws. Foreign countries, however, are frequently prone to imposing onerous intellectual property-related regulations increasingly aimed at U.S. Internet companies for the conduct of third parties. These protectionist policies deter U.S. companies from expanding services abroad and also deny Internet-enabled access to the global marketplace to small and medium-sized U.S. enterprises. U.S. Internet companies have thrived domestically under carefully crafted intellectual property legal frameworks. International asymmetries and protectionist regulations impede the export of services, and by extension the export of goods that depend upon those services. As CCIA has argued previously, a strong intellectual property system is one that reflects the needs of *all* participants in the content creation, discovery, and distribution supply chains.[2] Discriminatory practices under the guise of intellectual property that target U.S. exports should be identified and discouraged by USTR in the 2018 Special 301 Report.

These comments renew concerns that CCIA has raised in previous Special 301 inquiries regarding persistent obstacles to U.S. exports.[3] Part II of these comments addresses implementation of "snippet taxes" which deny market access and effective protection of rights guaranteed under international intellectual property law. Part III addresses concerns regarding intermediary liability. Part IV addresses countries who are noncompliant with existing intellectual property obligations under free trade agreements with the United States. Part V addresses forced transfer of intellectual property through discriminatory regulations directed at

[1] A list of CCIA members is available at https://www.ccianet.org/members.

[2] Comments of the Computer & Commc'ns Indus. Ass'n, *In re Request for Public Comment for 2017 Special 301 Review*, Dkt No. 2016-0026, filed Feb. 9, 2017, *available at* http://www.ccianet.org/wp-content/uploads/2017/04/CCIA_2017_Special_301_Reply_Comments-1.pdf [hereinafter "CCIA 2017 Special 301 Comments"].

[3] *Id.*

cloud service providers. Part VI discusses the opportunity in the renegotiation of the North American Free Trade Agreement (NAFTA) to leverage trading partners to adopt copyright frameworks that are reflected under U.S. law. These comments specifically identify the following countries as regions of concern: Australia, China, the European Union, France, Germany, Greece, Italy, Mexico, Russia, Spain, and Ukraine.

II. Ancillary Copyright and Snippet Taxes

CCIA reiterates concerns about snippet taxes in foreign markets.[4] Snippet taxes and related regulatory initiatives are sometimes branded as "ancillary copyright", but are in fact regulations on the quotation of published web content. USTR has confirmed that these taxes raise concerns from a trade perspective[5] and a recent USITC report observed that these laws have acted as a trade barrier.[6]

Ancillary protection is a violation of international copyright obligations. The imposition of a snippet tax conflicts with U.S. law and violates longstanding international law that prohibits nations from restricting quotation.[7] These regulations not only undermine market access for U.S. online services and depart from established copyright law; they also contravene World Trade Organization (WTO) commitments.[8] 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.[9] As TRIPS incorporates this Berne

[4] Previous administrations have failed to resolve industry concerns regarding snippet taxes, with only minor references in previous Special 301 and National Trade Estimates Reports. *See* Office of the U.S. Trade Rep., *2016 Special 301 Report* at 25 (2016), https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf [hereinafter 2016 Special 301 Report]; OFFICE OF THE U.S. TRADE REP., *2016 National Trade Estimates Report* at 178 (2016), https://ustr.gov/sites/default/files/2016-NTE-Report-FINAL.pdf.

[5] OFFICE OF THE U.S. TRADE REP., *2017 National Trade Estimate Report on Foreign Trade Barriers* at 162 (2017), https://ustr.gov/sites/default/files/files/reports/2017/NTE/2017%20NTE.pdf [hereinafter "*2017 NTE"*].

[6] U.S. INT'L TRADE COMM'N, *Global Digital Trade 1: Market Opportunities and Key Foreign Trade Restrictions* at 291-92 (Aug. 2017), https://www.usitc.gov/publications/332/pub4716.pdf ("[I]ndustry experts have stated that ancillary copyright laws have not generated increased fees to publishers; rather, they have acted as a barrier to entry for news aggregators.").

[7] *See* Raquel Xalabarder, *The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law*, IN3 WORKING PAPER SERIES (Sept. 30, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504596.

[8] *Id.*

[9] Berne Convention for the Protection of Literary and Artistic Works, Sept. 28, 1979, art. 10(1), amended Oct. 2, 1979 (emphasis supplied). Moreover, if the function of quotations in this context – driving millions of ad-revenue generating Internet users to the websites of domestic news producers – cannot satisfy "fair practice", then the term "fair practice" has little meaning. Imposing a levy on quotation similarly renders meaningless the use of the word "free" in the title of Article 10(1). The impairment of the mandatory quotation right represents a TRIPS violation,

mandate, compliance with Article 10(1) is not optional for WTO Members; non-compliance is a TRIPS violation.[10]

Snippet taxes also fall squarely within the terms of the statute providing for the Special 301 process, and are well within the scope of identified problems that have been included in prior Special 301 Reports. USTR has the authority to conduct the annual Special 301 Review under 19 U.S.C. section 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 has never been interpreted as being solely limited to the infringement of exclusive rights. 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."[11] The latter include CCIA members, and other U.S. industry stakeholders confronted with a snippet tax. Even if the phrase "fair and equitable market access" in section 2242(a)(1)(B) were 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 snippet taxes are directed.

Identifying snippet taxes as a barrier in the context of the Special 301 Report would also fall squarely within subject matter that previous Special 301 Reports have identified. For

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because Berne Article 10 is incorporated into TRIPS Article 9. See TRIPS Agreement, art. 9 ("Members shall comply with Articles 1 through 21 of the Berne Convention (1971)") TRIPS compliance, in turn, is a WTO obligation.

[10] USTR has previously watchlisted countries that fail to properly implement TRIPS obligations. *See, e.g.*, OFFICE OF THE U.S. TRADE REP., *2010 Special 301 Report* (2010), https://ustr.gov/sites/default/files/uploads/gsp/speeches/reports/2010/301/2010%20Special%20301%20Report%20(3).pdf (watchlisting China for, in part, failing to implement its TRIPS obligations regarding intellectual property); OFFICE OF THE U.S. TRADE REP., *2009 Special 301 Report* (2009), https://ustr.gov/sites/default/files/2009%20Special%20301%20Report%20FINAL.pdf [hereinafter 2009 Special 301 report]; OFFICE OF THE U.S. TRADE REP., *2008 Special 301 Report* (2008), https://ustr.gov/sites/default/files/2008%20Special%20301%20Report.pdf .

[11] 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." Bernard D. Jr., Mary Ann Reams, Trade Reform Legislation 1988 A Legislative History of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418.

example, the 2017 Special 301 Report properly identified "Localization, Indigenous Innovation, and Forced Technology Transfer" as Special 301 concerns and lists examples of foreign countries using non-IPR laws to discriminate against U.S. companies in favor of domestic interests.[12] Snippet taxes do precisely that. These laws directed at U.S. technology companies create novel entitlements for the purpose of granting them to a domestic constituency that is empowered to make unjustifiable demands on U.S. exporters.

CCIA first raised concerns about ancillary copyright in 2012.[13] Since that time, the Internet industry has witnessed the spread of these detrimental proposals throughout European Member States. Left unchecked, these taxes will impede market access for U.S. exporters throughout the European Union (EU). CCIA identifies the following countries that have adopted or are considering such legislation below: the EU, France, Germany, and Spain.

a. European Union

In 2016, the European Commission put forth a troubling copyright proposal, which is now under consideration in the European Parliament.[14] The proposed directive includes a Europe-wide snippet tax, framed as a "neighboring" right in news publications. This proposal would limit access to news content and hamstring search and social media functionality in an attempt to compel principally U.S.-based online services to subsidize EU publishers.[15]

The EU's proposal is more expansive than previous efforts in Germany and Spain. Article 11 of the proposal empowers a new class of plaintiffs with a twenty-year, retroactive entitlement to control reproduction and making available of "press publications," independent of the journalist's underlying rights. Unlike the German law, the new EU proposal lacks any exception for short snippets and is not limited only to search engines. Accordingly, it threatens to sweep in social networking and other services whose users rely on snippets when sharing

[12] OFFICE OF THE U.S. TRADE REP., *2017 Special 301 Report* at 18-19 (2017), https://ustr.gov/sites/default/files/301/2017%20Special%20301%20Report%20FINAL.PDF [hereinafter "2017 Special 301 Report"].

[13] *2017 CCIA Special 301 Comments*, *supra* note 2.

[14] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM (2016)593 final (July 14,2016) [hereinafter "Copyright Proposal"] art. 13.

[15] This proposal does not have the support of the entire publishing industry, as some proponents of these new rights have claimed. Press publishers including the Spanish Association of Periodical Publications, the Italian Online Publishers Association, El Diario, Golem.de, the European, and Les Echos sent a letter opposing the introduction of an European ancillary copyright. *See* Statement on the Digital Single Market, Dec. 4, 2015, http://www.aeepp.com/pdf/151204_Statement_on_Digital_Single_Market_FINAL.pdf.

content with friends. Retroactivity means that these problems would extend to news content dating from the prior century.

The Bulgarian presidency of the European Council has requested "political guidance" from Member States on the proposed neighboring right for publishers under the proposed Copyright Directive.[16] The request for such guidance indicates that negotiations are not progressing, due to questions regarding the scope and consequences of the proposal.[17]

b. France

In addition to creating ancillary rights, other EU Member States are expanding the scope of existing exclusive rights of reproduction and communication to the public. In January 2017, a French regulation took effect that created a new royalty for indexing images on the Internet.[18] One provision of this legislation transfers rights in reproduction and communication to the public of pictures that are automatically indexed by search and ranking services to a French collecting society. While not a snippet tax *per se*, this law reflects the same intent as the German and Spanish taxes, insofar as it creates a regulatory structure intended to be exploited against U.S. exporters — a "right to be indexed." By vesting the ability to monetize this entitlement in a domestic collecting society, the law directly targets an industry that consists largely of U.S. exporters. CCIA is among several industry and civil society organizations that have shown how the law will impact online services and mobile applications.[19]

In addition, in September 2017, the French government adopted a decree implementing a tax on revenues of paid video-on-demand services, even when the provider is based abroad, as well as a tax on online advertising revenues of video-sharing platforms even when these videos

[16] *See* Council of the European Union, Presidency of the European Parliament and the Council on Copyright in the Digital Single Market, Dec. 13, 2017, https://www.parlament.gv.at/PAKT/EU/XXVI/EU/00/56/EU_05681/imfname_10772880.pdf (contemplating two different compromises, one that goes beyond the European Commission's proposal by expressly targeting new snippets and the other that creates a relatively reasonable solution, by replacing the new right with a "presumption of entitlement to license and enforce the rights in their press publications.").

[17] Maud Sacquet, *New Year, New Copyright Developments*, DISRUPTIVE COMPETITION PROJECT (Jan. 17, 2018), http://www.project-disco.org/intellectual-property/011718-new-year-new-copyright-developments/#.WnnhrJM-c8Z.

[18] French Act No. 2016-925, 7 July 2016, *available at* https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032854341&categorieLien=id.

[19] Open Letter to Minister Azoulay, Mar. 2016, *available at* http://www.ccianet.org/wp-content/uploads/2016/03/OpenLetter-to-Minister-Azoulay-Image-Index-Bill-on-Creation-Eng.pdf.

are generated by users.[20] These two taxes were portrayed by the French media as the "Netflix tax" and the "YouTube tax," respectively, creating great uncertainty and hindering the provision of video services across borders.

c. Germany

The 2013 German law known as *Leistungsschutzrecht*[21] targeted principally U.S.-based exporters of news aggregation services. Enacted with support from German news publishers,[22] the *Leistungsschutzrecht* broke with international copyright norms. Elsewhere in the world, online platforms have the right to quote web content, as is the case with offline content. This includes newspapers, periodicals, and other press items.[23] The German law as enacted prohibits the making available to the public portions of "press products" in response to queries by search engine users. As a result, a search engine's automated indexing of online content can result in legal liability, notwithstanding that such a process is necessary to the operation of modern search engines. The legal dispute about the interpretation of ancillary copyright has reached the German civil courts.[24] Last year, the Court of Berlin referred questions to the Court of Justice for the European Union which will likely prolong legal uncertainty for years to come.[25]

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[20] Décret n° 2017-1364 du 20 septembre 2017 fixant l'entrée en vigueur des dispositions du III de l'article 30 de la loi n° 2013-1279 du 29 décembre 2013 de finances rectificative pour 2013 et des I à III de l'article 56 de la loi n° 2016-1918 du 29 décembre 2016 de finances rectificative pour 2016, JORF n°0221 du 21 septembre 2017, https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=EF7CB30D13C42B2ED3740B0441D1DEA2.tpdila21v_3?cidTexte=JORFTEXT000035595843&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000035595430.

[21] Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, BGBL. I at 1273, as amended Oct. 1, 2013, BGBL. I at 87f (Ger.).

[22] News publishers were represented by the association Bundesverband Deutscher Zeitungsverleger e.V. *See generally* Jakob Kucharczyk, *Ancillary Copyright in Germany: From Opt-out to Opt-in on Google News*, DISRUPTIVE COMPETITION PROJECT (July 1, 2013), http://www.project-disco.org/intellectual-property/070113-ancillary-copyright-ingermany-from-opt-out-to-opt-in-on-google-news.

[23] *See* English translation of German Copyright Act, at art. 87f(1), http://www.gesetze-iminternet.de/englisch_urhg/englisch_urhg.html#p0572 ("The producer of a press product (press publisher) shall have the exclusive right to make the press product or parts thereof available to the public for commercial purposes, unless this pertains to individual words or the smallest of text excerpts. If the press product was produced within an enterprise, the owner of the enterprise shall be deemed to be the producer."). "Smallest text excerpts" was subsequently construed to mean only seven words or less. Jakob Kucharczyk, *A Legal Snippet in Germany Could Mean... Seven Words, Maximum*, DISRUPTIVE COMPETITION PROJECT (Oct. 27, 2015), http://www.projectdisco.org/intellectual-property/102715-a-legal-snippet-in-germany-could-mean-seven-words-maximum/.

[24] Colin Dwyer, *German Publishers' Lawsuit Against Google Threatens to Backfire*, NPR (May 10, 2017), https://www.npr.org/sections/thetwo-way/2017/05/10/527800498/german-publishers-lawsuit-against-google-threatens-to-backfire.

[25] The Court of Berlin has asked for guidance on whether the German legislature should have notified the European Commission under Directive 98/34/EC upon enacting the Leistungsschutzrecht into local law in 2013.

d. Spain

Spain's 2014 snippet tax, enacted in Article 32.2 of its *ley de propriedad intelectual*,[26] created an unwaivable right for online content publishers. This right is independent of the author's copyright. Under the law, "electronic content aggregation service providers" are compelled to license "nonsignificant fragments of aggregated content which are disclosed in periodic publications or on websites which are regularly updated, for the purposes of informing, shaping public opinion or entertaining".[27] Thus, any quotation gives rise to an obligation of equitable compensation, and where quoted fragments are "significant," an actual license is required. The tariffs are arbitrary and excessive: one small company was asked to pay 7,000 euros a day (2.5 million euros a year) for links or snippets posted by its users.[28]

Even Spain's own national competition enforcement authority has described this provision as a barrier to marketplace innovation,[29] one which gives rise to potential anticompetitive practices by the collecting society levying the snippet tax.[30] Unlike the comparatively narrower German law, the Spanish snippet tax could arguably be interpreted to cover virtually all online content, insofar as it extends to any content made for "purposes of informing, shaping public opinion or entertaining." Before the legislation took effect on January

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German Court Refers Publishers' Case vs Google to European Court, REUTERS (May 9, 2017 10:48 AM), https://www.reuters.com/article/google-media-germany/update-1-german-court-refers-publishers-case-vs-google-to-european-court-idUSL8N1IB4LX.

[26] Law No. 21/2014, amending the Consolidated Text of the Law on Intellectual Property and Law No. 1/2000 on Civil Procedure, art. 32.2 (B.O.E. 2014, 268) (Spain).

[27] *Id.* The revised Article 32.2 also curtails the right to reproduce images and photographic works that are disclosed in periodic publications or websites that are regularly updated. This provision is also problematic but is not addressed in these comments.

[28] *Nuevo Intento de Imponer el Canon AED: Piden a Meneame 2,5 Millones de Euros al Ano*, EL CONFIDENCIAL (July 2, 2017), https://www.elconfidencial.com/tecnologia/2017-02-07/canon-aede-meneame-internet-facebook-agregadores_1327333/.

[29] Paul Keller, *Research Confirms: New Spanish Ancillary Copyright is Actually Good For No One*, COMMUNIA (Sept. 9, 2015), http://www.communia-association.org/2015/09/09/research-confirms-new-spanish-ancillary-copyright-isactually-good-for-no-one/. Even a small social news site in Spain could be expected to pay many millions of euros a year in snippet taxes. *See* Manuel Ángel Méndez, *Nuevo intento de imponer el canon AEDE: piden a Menéame 2,5 millones de euros al año*, EL CONFIDENCIAL (Feb. 7, 2017), http://www.elconfidencial.com/tecnologia/2017-02- 07/canon-aede-meneame-internet-facebook-agregadores_1327333/.

[30] News publishers cannot waive this right; equitable compensation is obligatory whether the content originator desires it or not. *See* Comisión Nacional de Los Mercados y La Competencia, Proposal Relating to the Modification of Article 32.2 of the Draft Act Modifying the Redrafted Text of the Intellectual Property Act (May 16, 2014), http://cnmcblog.es/wp-content/uploads/2014/05/140516-PRO_CNMC_0002_14-art-322PL.pdf.

1, 2015, Google closed news.google.es.[31] USTR has previously identified the loss of "valuable Internet traffic" as a cognizable injury for purposes of the Special 301 process.[32]

III. Copyright Intermediary Liability

Foreign countries have frequently imposed substantial penalties on U.S. Internet companies for conduct of third parties — something that is circumscribed under U.S. law and that impedes the ability of U.S. online services to be a platform for trade.[33] U.S. firms operating as online intermediaries face an increasingly hostile environment in a variety of international markets which impedes U.S. Internet companies from expanding services abroad. This hurts not only Internet companies, but also denies local small and medium-sized enterprises Internet-enabled access to the global marketplace, similarly discouraging investment in and growth of domestic startups.[34] While U.S. Internet businesses have thrived domestically under carefully crafted legal frameworks, international asymmetries in liability rules frequently favor domestic plaintiffs.[35]

The Special 301 process serves as a valuable tool to identify areas where these liability rules exist. USTR often places countries on the watch list for failing to implement a clear and predictable intermediary liability regime that provides rightsholders an adequate process for protecting content without overburdening Internet services.[36] That is, countries are regularly placed on watch lists for failing to ensure the correct balance in copyright laws. The Special 301

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[31] Google Support, *Google Noticias en España*, https://support.google.com/news/answer/6140047#English (last visited Feb. 7, 2018).

[32] *2017 Special 301 Report*, *supra* note 12 at 17.

[33] *See generally* Ali Sternburg & Matt Schruers, *Modernizing Liability Rules to Promote Internet Trade*, CCIA (2013), http://cdn.ccianet.org/wp-content/uploads/2013/09/CCIA-Liability-Rules-Paper.pdf.

[34] Matthew Le Merle *et al.*, *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study*, BOOZ & CO. (2011), http://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/54877560e4b0716e0e088c54/1418163552585/Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf.

[35] For a general overview of these issues, *see* Ignacio Garrote Fernández-Díez, *Comparative Analysis on National Approaches to the Liability of Internet Intermediaries for Infringement of Copyright and Related Rights*, http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries_garrote.pdf (last visited Feb. 7, 2018)(offering comparative analysis on national approaches to the liability of Internet intermediaries for infringement of copyright and related rights).

[36] 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.").

Report should continue to include inadequate intermediary liability frameworks that do not reflect the successful U.S. model and that discriminate against U.S. services as a concern. CCIA's 2018 comments identify: the EU, Greece, Italy, Mexico, Ukraine, and Russia.

a. European Union

In September 2016, the European Commission (EC) submitted a copyright proposal to the European Parliament and European Council that proposed to eliminate protections that limit online services' liability for misconduct by those services' users and require proactive screening by service providers.[37] These proposals would upend nearly two decades of established law, threatening U.S. digital exports by eliminating longstanding legal protections for online services that are a cornerstone of Internet policy.

The EC proposal disrupts settled law protecting intermediaries by weakening established protections from U.S. Internet services in the 2000 EU E-Commerce Directive, and by imposing an unworkable filtering mandate on hosting providers that would require automated "notice-and-staydown" for a wide variety of copyrighted works. The EC proposal would dramatically weaken these longstanding liability protections, and suggests that most modern service providers may be ineligible for its protections.[38]

Like U.S. law, EU law contains an explicit provision stating that online services have no obligation to surveil users, or monitor or filter online content.[39] Online services have invested heavily in developing international markets, including Europe, in reliance on these provisions. The EC copyright proposal now implies that online services must procure or develop and implement content recognition technology. The proposal to compel affirmative filtering of all Internet content, including audiovisual works, images, and text, based on that content's copyright status, is alarming, and profoundly misguided.

Moreover, the EC proposal provides no specifics for what filtering a hosting provider must implement, effectively empowering European rightsholders to dictate U.S. services' technology in potentially inconsistent ways across Europe.[40] In short, a provider will never

[37] *Copyright Proposal*, *supra* note 14.

[38] *Id*. at recital 38 (suggesting that entities engaged in "optimizing the presentation of the uploaded works or subject matter or promoting them" may now be ineligible for existing protection).

[39] *Compare* 17 U.S.C. § 512(m)(1) (2012) *with* Directive 2000/31/EC art. 15(1).

[40] *See Copyright Proposal*, *supra* note 14 at art. 11.

know when it has done 'enough,' short of litigating in every EU Member State. Until the CJEU eventually addresses the question, affected hosting providers can expect inconsistent rulings and injunctions from lower courts in different countries. The proposal also appears to compel online services to enter into contracts with an indeterminate set of copyright holders, involving indeterminate subject matter, and withholds protection on *all* subject matter (not just copyright) for failure to do so.

Further, the document requesting "political guidance" published by the Bulgarian Presidency of the EU confirms industry's fears regarding the scope of the EU's copyright proposal and its threat to disrupt the legal foundation of the Internet. The document expressly contemplates removing websites hosting user-generated content from the established limited liability regime of intermediaries under Article 14 of the E-Commerce Directive.[41]

The vagueness of the language in the EU's copyright proposal, and the likelihood of inconsistent rulings in different countries, threatens to give the EU control over U.S. innovation. U.S. platforms, especially small businesses and startups, will be deterred from innovating and competing due to the ambiguity, harming U.S. companies and their consumers across the world. This would likely cause incalculable damage to the U.S. economy.

For example, surveys of venture capitalists show that 88% of investors are less likely to invest in user-generated content platforms in regions that have this kind of ambiguous legal framework for intermediaries.[42] If the EU proposal were to pass, there would likely be a corresponding increase in risk for U.S. platforms doing business in the EU, resulting in significant economic consequences for the U.S. digital economy that depends on the EU market. Furthermore, there is likely to be a ripple effect on the rest of the world, given the EU's international influence. By effectively revoking long-established protections upon which U.S.

[41] Council of the European Union, Presidency of the European Parliament and the Council on Copyright in the Digital Single Market, Dec. 13, 2017, https://www.parlament.gv.at/PAKT/EU/XXVI/EU/00/56/EU_05681/imfname_10772880.pdf at 9 ("On communication to the public: (a) should there be a clarification in Article 13 that service providers that store and give access to user uploaded content perform, under certain conditions, an act of communication to the public . . . (b) should there also be an explicit provision in Article 13 clarifying that such services are not eligible for the limited liability regime under Article 14 of the E-Commerce Directive, meaning that they would be taken out of Article 14 of the E-Commerce Directive and be primarily liable for copyright infringements when their users upload content not authorized by rightsholders?").

[42] Matthew LeMerle, *The Impact of Internet Regulation on Early Stage Investment* at 20 (Fifth Era 2014), http://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/55200d9be4b0661088148c53/1428163995696/Fifth+Era+report+lr.pdf.

services relied when entering European markets, the proposal would limit U.S. companies' investments for the benefit of EU rightsholders, establishing a market access barrier for many U.S. services and startups.

Brussels is not the sole risk to established norms on limiting intermediary liability. EU courts are increasingly hostile to this principle. For example, the June 2015 European Court on Human Rights decision against Estonia-based news portal Delfi, imposing liability for comments posted under news articles on its site, is another example of a growing tendency to "shoot the messenger."[43] *Delfi* is difficult to reconcile with 47 U.S.C. section 230 and Europe's own E-Commerce Directive. Absent suitable intermediary liability protection for third party content, many U.S. services may be unable to enter foreign markets like Estonia due to liability risks.[44]

Internet companies are also experiencing concerning developments across EU Member States. Italy recently passed a new amendment that further[45] empowers the Italian Communications Authority (AGCOM). The amendment permits AGCOM to "require information providers to immediately terminate infringements of copyright and related rights, if the violations are evident, on the basis of a rough assessment of facts."[46] This law further empowers AGCOM to identify appropriate measures to prevent repeat infringements, amounting to a copyright "staydown" requirement that conflicts with both Section 512 of the Digital Millennium Copyright Act (DMCA)[47] and the E-Commerce Directive. Departures from established law serve as a market access barrier for U.S. services in Italy.

In addition, as the copyright proposal has been developed through the European Council, several countries including France, Spain, and Portugal have proposed language that would make

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[43] Delfi AS v. Estonia, Eur. Ct. H.R. 64569/09 (2015).

[44] Beschlussempfehlung und Bericht [Resolution and Report], Deutscher Bundestag: Drucksache [BT] 18/13013, http://dip21.bundestag.de/dip21/btd/18/130/1813013.pdf (Ger.). Unofficial English translation *available at* https://medium.com/speech-privacy/what-might-germanys-new-hate-speech-take-down-law-mean-for-tech-companies-c352efbbb993.

[45] Italy passed regulations in 2013 that granted AGCOM the authority to order the removal of alleged infringing content and block domains at the ISP level upon notice by rights holders, independent of judicial process. In March 2017, the Regional Administrative Court of Lazio upheld AGCOM's authority to grant injunctions without a court order. *See* Gianluca Campus, *Italian Public Enforcement on Online Copyright Infringements*, KLUWER COPYRIGHT BLOG (June 16, 2017), http://copyrightblog.kluweriplaw.com/2017/06/16/italian-public-enforcement-online-copyright-infringements-agcom-regulation-held-valid-regional-administrative-court-lazio-still-room-cjeu/.

[46] Proposta emendativa pubblicata nell'Allegato A della seduta del 19/07/2017. 1.022, *available at* http://documenti.camera.it/apps/emendamenti/getPropostaEmendativa.aspx?contenitorePortante=leg.17.eme.ac.4505&tipoSeduta=0&sedeEsame=null&urnTestoRiferimento=urn:leg:17:4505:null:A:ass:null:null&dataSeduta=null&idPropostaEmendativa=1.022.&position=20170719.

[47] 17 U.S.C. § 512.

platforms directly liable for content uploaded by users. These country-level proposals would eviscerate the protections in the E-Commerce Directive and would result in potential criminal as well as civil liability in certain countries.

b. Greece

Greece will soon have an administrative committee that can issue injunctions to remove or block potentially infringing content. Instead of adhering to the U.S. system by submitting a DMCA notice, a rightsholder may now choose to apply to the committee for the removal of infringing content in exchange for a fee. While implementation is still uncertain, this measure represents a significant divergence from U.S. procedures on efficient removal of infringing content.

c. Italy

As discussed in Section III.a above, Italy recently passed a new amendment that further empowers the Italian Communications Authority (AGCOM).[48] The amendment permits AGCOM to "require information providers to immediately terminate infringements of copyright and related rights, if the violations are evident, on the basis of a rough assessment of facts."[49] This law further empowers AGCOM to identify appropriate measures to prevent repeat infringements, amounting to a copyright "staydown" requirement that conflicts with both Section 512 of the DMCA and the E-Commerce Directive. Departures from established law serve as a market access barrier for U.S. services in Italy.

d. Mexico

Mexico does not have a comprehensive framework of copyright limitations and exceptions for the digital economy. Today, digital creators and innovators in Mexico must rely on a general provision that allows the use of works where there is no economic profit. This is in conflict with the principle under U.S. law that commercial uses are not a bar to invoking copyright limitations. In addition, Mexico does not have a comprehensive ISP safe harbor framework covering the full range of service providers and functions, with prohibitions on

[48] *Supra note* 45.

[49] Proposta emendativa pubblicata nell'Allegato A della seduta del 19/07/2017. 1.022, available at http://documenti.camera.it/apps/emendamenti/getPropostaEmendativa.aspx?contenitorePortante=leg.17.eme.ac.4505&tipoSeduta=0&sedeEsame=null&urnTestoRiferimento=urn:leg:17:4505:null:A:ass:null:null&dataSeduta=null&idPropostaEmendativa=1.022.&position=20170719.

monitoring duties. While Mexico has no specific international obligation to implement intermediary protections, Mexican law should be updated to reflect this emergent international norm. The absence of clear safe harbor measures for online services is a market barrier for U.S. companies, and U.S. policymakers should take advantage of the ongoing NAFTA renegotiations to address this subject.

e. Russia

The recently enacted "Mirrors Law" extends Russia's copyright strict enforcement rules[50] into new domains by requiring search providers to delist website links within twenty-four hours of a removal request, including for so-called "mirrors" or websites that are "confusingly similar" to a previously blocked website. This law, which came into effect on October 1, 2017, conflicts with principles in Section 512 of the DMCA and U.S. copyright jurisprudence.

f. Ukraine

CCIA remains concerned with Ukrainian intermediary liability law "On state support of cinematography" (3081-D), which was adopted in March 2017. The final law created a troublesome framework, which contradicts the international norm found in the DMCA and U.S. free trade agreements with roughly a dozen trading partners.[51] The legislation revises Article 52 of Ukrainian copyright law to impose twenty-four and forty-eight hour "shot clocks" for online intermediaries to act on demands to remove content. These deadlines may be feasible at times for some larger platforms who can devote entire departments to takedown compliance, but will effectively deny market access to smaller firms and startups, and are inconsistent with the DMCA's flexible "expeditiousness" standard. The law also imposes an affirmative obligation to monitor content and engage in site-blocking, by revoking protection for intermediaries if the same content reappears on a site twice within two months, even despite full compliance with the

[50] Under Russian copyright law, a copyright owner may seek a preliminary injunction to block the site hosting infringing content prior to a judgement. A website may be permanently blocked if it receives two preliminary injunctions. Federal Law No. 187-FZ, on Amending Legislative Acts of the Russian Federation Concerning Questions of Protection of Intellectual Rights in Information and Telecommunications Networks, July 2, 2013.

[51] *See* U.S-Austl. Free Trade Agreement, May 18, 2004, 43 I.L.M. 1248, art. 17.11, para. 29; U.S.-Bahr. Free Trade Agreement, Dec. 7, 2005, 44 I.L.M. 544, art. 14.10, para. 29; U.S.-Chile Free Trade Agreement, June 6, 2003, 42 I.L.M. 1026, art. 17.11, para. 23; U.S.-Colom. Free Trade Agreement, Nov. 22, 2006, art. 16.11, para. 29; U.S.-S. Kor. Free Trade Agreement, June. 30, 2007, art. 18.10, para. 30; U.S.-Morocco Free Trade Agreement, June 15, 2004, art. 15.11, para. 28; U.S.-Oman Free Trade Agreement, Jan. 19, 2006, art. 15.10, para. 29; U.S.-Pan. Trade Promotion Agreement, June 28, 2007, art. 15.11, para. 27; U.S.-Sing. Free Trade Agreement, May 6, 2003, 42 I.L.M. 1026, art. 16.9, para. 22.

notice and takedown system. This is inconsistent with 17 U.S.C. section 512(m)(1), parallel free trade agreement (FTA) provisions, and article 15 of the 2000 EU E-Commerce Directive.

CCIA thanks USTR for highlighting industry concerns in the 2017 Report and recognizing that failed implementation of a safe harbor system that does not provide adequate protections and certainty to online services is just as relevant as ineffective enforcement mechanisms.[52] As USTR noted, a way for Ukraine to remedy this is to adopt a system analogous to the DMCA safe harbors[53] which Ukraine has yet to do. We urge continued attention by USTR in the 2018 Report to troubling inconsistencies between Ukraine's law and the U.S. system.

IV. Non-compliance with U.S. Free Trade Agreement Commitments

Balanced copyright rules such as fair use and related limitations and exceptions have been critical to the growth of the U.S. technology and Internet economy.[54] They are also a defining aspect of U.S. trade policy. Beginning with free trade agreements with Chile and Singapore in 2003, every modern U.S. trade agreement has ensured some measure of copyright balance, at least through the inclusion of intermediary protections.[55] USTR also stated its commitment in 2017 to seek "the commitment of our free trade agreement partners to continuously seek to achieve an appropriate balance in their copyright systems, including through copyright exceptions and limitations."[56]

The United States must utilize trade agreements in order to rectify the barriers legal asymmetries create when countries fail to adopt liability regimes that follow international norms. Requiring U.S. trading partners to implement analogous intermediary protections has been a central U.S. trade policy for well over a decade, a policy aimed at enabling the export of U.S.

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[52] *2017 Special 301 Report, supra* note 12 at 49 ("The creation of a copyright safe harbor system in this law is an important step forward. However, aspects of the new law have engendered concern by many different stakeholder groups, who report that certain obligations and responsibilities are too ambiguous or too onerous to facilitate an efficient and effective response to online piracy.").

[53] *Id*. ("The United States' concerns with respect to online piracy in Ukraine, which have been set forth in prior Special 301 Reports, would be ameliorated by a system similar to that in U.S. law.").

[54] In 2014, fair use industries accounted for 16 % of the economy, employed one in eight workers, and contributed $2.8 trillion to the GDP. Exports of goods and services related to fair use increased by twenty-one percent from $304 billion in 2010 to $368 billion in 2014 driven by increases in service-sector exports. COMPUTER & COMM'NS INDUS. ASS'N., *Fair Use in the U.S. Economy* (2017), *available at* http://www.ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf.

[55] *Supra* note 51.

[56] OFFICE OF U.S. TRADE REP., *The Digital 2 Dozen* (2017), https://ustr.gov/sites/default/files/Digital-2-Dozen-Updated.pdf.

online services by preventing other countries from imposing crippling liability on these services.[57]

U.S. trading partners whose intermediary liability protections are inconsistent with free trade agreement commitments to the United States are of particular concern to CCIA members. USTR regularly places countries on the watch list based on non-compliance with existing free trade agreement obligations with respect to intellectual property commitments.[58] CCIA's comments identify Australia and Colombia as noncompliant with existing obligations under trade agreements with the United States. Australia and Colombia's failure to implement critical protections for service providers under the intellectual property chapters of free trade agreements should be considered just as egregious as a country's failure to implement enforcement mechanisms under FTAs.

a. Australia

As CCIA has illustrated previously, Australia has been out of compliance with obligations under the U.S.-Australia Free Trade Agreement (AUSFTA) for years.[59] AUSFTA contains an obligation to provide liability limitations for service providers, analogous to protections under the DMCA.[60] However, Australia has failed to fully implement these obligations. Current protections are far narrower than what is required. Australia's current statute limits protection to what it refers to as "carriage" service providers, not service providers generally.[61] Article 17.11.29 of AUSFTA makes clear that the protections envisioned should be available to all online service providers, not merely "carriage" service providers.[62] The

[57] However, a concerning trend among U.S. trading partners is a failure to fully implement carefully negotiated intermediary protections in the context of copyright liability, as discussed in the next section. CCIA has further expanded on this issue in other forums. *See 2017 CCIA Special 301 Comments*, supra note 13.

[58] OFFICE OF THE U.S. TRADE REP., *2009 Special 301 Report* (2009) (watching Chile for failing to implement provisions of the FTA regarding Internet service provider liability); OFFICE OF THE U.S. TRADE REP., *2016 Special 301 Report* at 47 (2016) (watch listing Ukraine, which has no specific intermediary liability FTA commitment as being based in part upon the "lack of transparent and predictable provisions on intermediary liability").

[59] *CCIA 2017 Special 301 Comments*, *supra* note 2.

[60] 17 U.S.C. § 512.

[61] Copyright Act 1968 (Cth) ss 116AA-116AJ (Austl.).

[62] U.S.-Austl. Free Trade Agreement, May 18, 2004, 43 I.L.M. 1248 ("Consistent with Article 41 of the TRIPS Agreement, for the purposes of providing enforcement procedures that permit effective action against any act of copyright infringement covered under this Chapter, including expeditious remedies to prevent infringements and criminal and civil remedies, each Party shall provide, consistent with the framework specified in this Article . . . *limitations in its law regarding the scope of remedies available against service providers for copyright infringements* that they do not control, initiate, or direct, and that take place through systems or networks controlled or operated by them or on their behalf, as set forth in this sub-paragraph (emphasis added).").

consequence of this limitation is that intermediary protection is largely limited to Australia's domestic broadband providers. Online service providers exporting information services into the Australian market remain in a precarious legal situation. Even Australian authorities have acknowledged this implementation flaw, but no action has been taken to remedy it.[63]

In December of 2017, legislation was introduced in the Australian Senate to amend the Copyright Act's provisions on safe harbors. The bill would expand the intermediary protections to some service providers including organizations assisting persons with a disability, public libraries, archives, educational institutions and key cultural institutions — effectively acknowledging that the scope of the current safe harbor is too narrow.[64] However, the bill pointedly leaves out commercial service providers including online platforms. The "fix" does not put Australian copyright law into compliance with AUSFTA. The bill should make sure that limitations on liability for service providers are extended to all functions provided for under Article 17.11.29(b)(i)(A-D). Under current Australian law, protection is only extended to functions described in Article 17.11.29(b)(i)(A) through the narrow inclusion of only "carriage" service providers. 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

As CCIA observed in its 2017 Special 301 filing, Colombia has failed to comply with its obligations under the U.S.-Colombia Free Trade Agreement to provide protections for Internet service providers.[65] Without a safe harbor that meets the requirements of the FTA, intermediaries exporting services to Colombia remain exposed to potential civil liability for services and functionality that is lawful in the United States and elsewhere. USTR rightly identified this in the 2017 Report, urging Colombia to move quickly to introduce into the legislature and enact the copyright law amendments, and urges Colombia to begin working on

[63] 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; Australian Government Productivity Commission, Intellectual Property Arrangements Recommendations (Sept. 2016), http://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property-overview.pdf.

[64] Draft Copyright Amendment (Service Providers) Bill 2017, http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s1115_first-senate/toc_pdf/1728220.pdf;fileType=application%2Fpdf.

[65] *CCIA 2017 Special 301 Comments*, *supra* note 2.

necessary provisions regarding Internet service providers.[66] Unfortunately, Colombia has not made any progress since its inclusion in the 2017 Report. Further, comments made by the government in the 2017 Special 301 Out-of-Cycle Review fail to address such noncompliance.[67] CCIA awaits the determination of USTR in the Special 301 Out-of-Cycle investigation of Colombia.[68]

V. Forced Transfer of Intellectual Property

U.S. cloud service providers (CSPs) are strong American exporters, supporting tens of thousands of high-paying American jobs.[69] U.S. cloud service providers have been at the forefront of the movement to the cloud worldwide.[70] However, many countries have taken steps to block U.S. CSP exports through discriminatory practices that force transfer of intellectual property from U.S. CSPs in order to operate in a foreign market. USTR recognizes the distorting effect these forced transfer practices have on trade and regularly includes countries who adopt such practices in the Special 301 Report.[71] CCIA's comments recommend that China be included in USTR's 2018 Report.

a. China

Draft regulations in conjunction with existing Chinese laws threaten to compel U.S. companies to transfer valuable U.S. intellectual property, surrender use of brand names, and hand over operation and control of their business to domestic companies in order to operate in the Chinese market. In contrast, Chinese companies in the United States are able to fully own and control these data centers and cloud-related services with no foreign equity restrictions or technology transfer requirements. They can continue to operate in the United States under their

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[66] *2017 Special 301 Report*, *supra* note 12 at 67.

[67] Comments of Ministerio de Comercio, Industria y Turismo, *In re* 2017 Special 301 Out-Of-Cycle-Review of Colombia, Dckt. No. 2017-0019-0008, Submitted Nov. 2, 2017, https://www.regulations.gov/document?D=USTR-2017-0019-0008.

[68] *In re* 2017 Special 301 Out-Of-Cycle-Review of Colombia, Dckt. No. 2017-0019-0008, Sept. 25, 2017, https://www.federalregister.gov/documents/2017/09/25/2017-20354/2017-special-301-out-of-cycle-review-of-colombia-request-for-public-comment.

[69] In 2015, the International Trade Administration estimated that there was a surplus of cloud computing services of approximately $18 billion in 2015. *See* U.S. DEPT. OF COMMERCE, *2017 Top Market Report: Cloud Computing Sector Snapshot* (2017), https://www.trade.gov/topmarkets/pdf/Sector%20Snapshot%20Cloud%20Computing%202017.pdf.

[70] Synergy Research Group, *Amazon Dominates Public IaaS and Ahead in PasS; IBM Leads in Private Cloud* (Oct. 30, 2016), https://www.srgresearch.com/articles/amazon-dominates-public-iaas-paas-ibm-leads-managed-private-cloud.

[71] *2017 Special 301 Report*, *supra* note 12 at 19.

brand name and without any need to obtain an license.

The draft regulations would significantly disadvantage U.S. cloud service providers in favor of domestic Chinese cloud service providers. The Ministry of Industry and Information Technology (MIIT) has issued two draft notices – *Regulating Business Operation in Cloud Services Market* (2016) and *Cleaning Up and Regulating the Internet Access Services Market* (2017). These proposals, together with existing licensing and foreign direct investment restrictions on foreign exporters in China,[72] would require foreign cloud service providers to turn over essentially all ownership and operations to a Chinese company – including valuable U.S. intellectual property and know-how to China.

Specifically, these measures do the following: prohibit licensing foreign CSPs for operations; actively restrict direct foreign equity participation of foreign CSPs in Chinese companies; prohibit foreign CSPs from signing contracts directly with Chinese customers; prohibit foreign CSPs from independently using their brands and logos to market their services; prohibit foreign CSPs from contracting with Chinese telecommunication carriers for Internet connectivity; restrict foreign CSPs from broadcasting IP addresses within China; prohibit foreign CSPs from providing customer support to Chinese customers; and require any cooperation between foreign CSPs and Chinese companies to be disclosed in detail to regulators. These measures are fundamentally protectionist, and anti-competitive and threaten to further discourage foreign investment.[73]

VI. Expanding U.S. Market Access Through NAFTA

USTR has placed Mexico on the watch list repeatedly and has encouraged Mexico to modernize its copyright regime by fully implementing the WIPO Internet treaties.[74] However, Mexico has yet to adopt an intermediary liability framework that reflects the international norm

[72] Classification Catalogue of Telecommunications Services (2015); Cybersecurity Law (2016).

[73] AmCham China's survey of its members showed that 81% of its companies felt less welcome in China, up from 77% in 2015 with 32% of companies citing inconsistent regulatory interpretation and unclear laws as the primary challenge to doing business in China. The survey also showed that 31% of its members said the investment environment was deteriorating — the most dire response AmCham has received since it started asking the question in 2011. *See China Business Climate Survey Report 2017*, AMCHAM CHINA, https://www.amchamchina.org/policy-advocacy/business-climate-survey/; Sui-Lee Wee, *As Zeal for China Dims, Global Companies Complain More Boldly*, N.Y. TIMES (Apr. 19, 2017), https://www.nytimes.com/2017/04/19/business/china-companies-complain.html.

[74] *2017 Special 301 Report, supra* note 12 at 63.

analogous to Section 512 of the DMCA.[75] With the renegotiation of NAFTA, the opportunity is presented to update the intellectual property chapter. CCIA does not recommend placing either Canada or Mexico on watch lists in the 2018 Report, but rather takes this opportunity to highlight the importance of getting modernization right. A 21st century trade agreement must reflect the digital age and recognize the protections that have allowed for the growth of the Internet sector in the United States and globally. The intellectual property chapter in NAFTA must include protections for online intermediaries and include relevant limitations and exceptions reflected in U.S. copyright law.

VII. Conclusion

A strong intellectual property system is one that reflects the needs of all participants in the content creation, discovery, and distribution supply chains. USTR should recognize the concerns of U.S. Internet services who not only hold intellectual property and value protection, but also rely on the implementation of careful balances that reflect the digital age.

Respectfully submitted,

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[75] *Supra* page 13.