

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

In re Request for Public Comments and
Notice of a Public Hearing Regarding the
2021 Special 301 Review

Docket No. USTR-2020-0041

**COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

Pursuant to the request for comments published by the Office of the United States Trade Representative in the Federal Register at 85 Fed. Reg. 81,263 (Dec. 15, 2020), the Computer & Communications Industry Association (CCIA) submits the following comments for the 2021 Special 301 Review. CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy.¹

I. INTRODUCTION

Critical to the expansion of digital trade and the export of Internet-enabled goods and services is a robust intellectual property framework with provisions that enable innovation.² As rightsholders,³ CCIA members value intellectual property protection and have devoted significant resources to develop tools to combat online piracy. However, these strong U.S. exporters are discouraged from entering new markets that lack adequate and technologically necessary limitations and exceptions to copyright, in addition to strong protection and enforcement measures. A robust framework must include protections for online intermediaries and flexible limitations and exceptions to copyright that are necessary for the development of next-generation technologies such as artificial intelligence and machine learning.⁴

¹ A list of CCIA members is available at <https://www.cciagnet.org/members>.

² See CCIA, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use* (2017), available at <https://www.cciagnet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>.

³ For example, CCIA members invest heavily in content creation, comprise several of the leading rebuttable global brands, and according to internal estimates, CCIA members hold over 100,000 active U.S. patents which is approximately 3% of all active patents in the United States. See <https://www.electronicweekly.com/news/business/samsung-no-1-us-patent-holder-2018-04/>.

⁴ CCIA, *Fair Use in the U.S. Economy* at 8 (“New machine learning technologies depend on flexible copyright law. Machine learning by artificial intelligence requires programs ingesting and analyzing data and information,

Foreign countries are increasingly prone to imposing onerous intellectual property-related regulations, aimed at U.S. Internet companies. These countries are pursuing legislation that disadvantages U.S. Internet platforms and online cloud services. CCIA supports USTR engagement on these issues through multiple venues: the Special 301 Report, National Trade Estimate (NTE) Report, pursuit of trade agreements, and increased discussions with key trading partners.

CCIA reiterates that a strong intellectual property system is one that reflects the needs of all participants in the content creation, discovery, and distribution supply chains. Any discriminatory practices under the guise of intellectual property that target U.S. exports should be identified and discouraged by USTR in the 2021 Special 301 Report.⁵

II. ADDRESSING INTERMEDIARY LIABILITY CONCERNS AND ANCILLARY RIGHTS IN THE SPECIAL 301 REPORT

As CCIA has argued in previous submissions, the Special 301 process should not only account for gaps in enforcement but also identify areas where countries have failed to implement substantive IP-related commitments to the United States or have used intellectual property regulation to target leading U.S. firms. In the 2021 Special 301 Report, USTR should identify countries whose intermediary liability protections fall short and countries that have introduced ancillary rights protections that fail to comply with international commitments.

This is within USTR's statutory mandate to conduct the Special 301 process. USTR has the authority to conduct the annual Special 301 Review under 19 U.S.C. § 2242. The phrase "adequate and effective protection of intellectual property rights" in section 2242(a)(1)(A) refers to protection of intellectual property rights; it is not limited to infringement, and it should not be

which may include material protected by copyright. Courts have found this type of intermediate copying to be a non-infringing, transformative use. Machine learning helps power innovation in a variety of areas, including autonomous vehicles, medical diagnostics, image recognition, augmented and virtual reality, and drones."); Jonathan Band, *Fair Use, Artificial Intelligence, and Creativity*, PROJECT DISCO (Jan. 20, 2020), <http://www.project-disco.org/intellectual-property/012019-fair-use-artificial-intelligence-and-creativity/> ("Fair use is essential to a new category of creative works: works generated by an artificial intelligence ('AI') process. Currently these works include translations, music, and poetry. As AI gets more sophisticated, the works AI processes can generate will also get more sophisticated, and more pleasing to human sensibilities. Many AI processes rely on the ingestion of large amounts of copyrighted material for the purposes of 'training' an AI algorithm. Fair use is the legal theory in the United States that allows the copying of these works. Numerous appellate courts have found the mass copying of raw material to build databases for uses by AI processes to be fair use under 17 U.S.C. § 107. *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015); *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009); *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003).").

⁵ CCIA does not make any specific recommendations on countries to place on the Priority Watch List or Watch List, but identifies regions of concern.

so interpreted. Moreover, section 2242(a)(1)(B) empowers USTR to address barriers to “fair and equitable market access” which confront “United States persons that rely upon intellectual property protection.”⁶ The latter include CCIA members, and other U.S. industry stakeholders confronted with regulations such as snippet taxes and intermediary liability regimes that fail to lead to effective enforcement. Even with the phrase “fair and equitable market access” in section 2242(a)(1)(B) limited to U.S. persons engaged in the distribution of works protected by intellectual property rights, this still includes the U.S. exporters at whom the regulations described below are directed.

The market access barriers contemplated by the statute include regulations that violate provisions of international law or constitute discriminatory nontariff trade barriers.⁷ Ancillary protection is also a violation of international copyright obligations.⁸ The imposition of ancillary rights through a snippet tax conflicts with U.S. law and violates long-standing international law that prohibits nations from restricting quotation of published works. These regulations undermine market access for U.S. services, as USTR highlighted in the 2020 National Trade Estimate Report,⁹ and depart from established copyright law. These regulations also contravene World Trade Organization (WTO) Commitments. By imposing a levy on quotations, these entitlements violate Berne Convention Article 10(1)’s mandate that “quotations from a work . . .

⁶ The market access provision was added to the final text of the Omnibus Trade and Competitiveness Act of 1988 during conference. The Conference Report notes that “[t]he purpose of the provisions dealing with market access is to assist in achieving fair and equitable market opportunities for U.S. persons that rely on intellectual property protection. As a complement to U.S. objectives on intellectual property rights protection in the Uruguay Round of trade negotiations, the conferees intend that the President should ensure, where possible, that U.S. intellectual property rights are respected and market access provided in international trade with all our trading partners. . . . *Examples of foreign barriers to market access for products protected by intellectual property rights which this provision is intended to cover include, but are not limited to—laws, acts, or regulations which require approval of, and/or private sector actions taken with the approval of, a government for the distribution of such products; the establishment of licensing procedures which restrict the free movement of such products; or the denial of an opportunity to open a business office in a foreign country to engage in activities related to the distribution, licensing, or movement of such products.*” (emphasis added). Bernard D. Reams Jr. & Mary Ann Nelson, Trade Reform Legislation 1988: A Legislative History of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418.

⁷ 19 U.S.C. § 2242(d)(3).

⁸ A full analysis of how ancillary rights conflict with international law and copyright norms is available in the following CCIA publication: *Understanding “Ancillary Copyright” In the Global Intellectual Property Environment* (2015), <http://www.ccianet.org/wp-content/uploads/2015/02/CCIA-Understanding-Ancillary-Copyright.pdf>.

⁹ OFFICE OF THE U.S. TRADE REP., *2020 National Trade Estimate Report on Foreign Trade Barriers* (2020), available at https://ustr.gov/sites/default/files/2020_National_Trade_Estimate_Report.pdf at 210-11 (“Measures that disproportionately affect only one group of foreign-based service suppliers in the digital ecosystem may exacerbate those challenges to the detriment of all participants in the marketplace.”).

lawfully made available to the public” shall be permissible. As TRIPS incorporates this Berne mandate, compliance with Article 10(1) is not optional for WTO Members; non-compliance is a TRIPS violation and should be addressed by USTR in its 2021 Special 301 Report.

In the 2018 Special 301 Report, USTR referred to the 2018 National Trade Estimate Report regarding “laws and legislative proposals in the EU that may hinder the provision of some online services, such as laws that would require certain online service providers—platforms providing short excerpts (‘snippets’) of text and images from other sources—to remunerate or obtain authorization from the original sources.”¹⁰ CCIA supports highlighting these trade concerns in *both* the NTE Report and the Special 301 Report.¹¹

III. COPYRIGHT INTERMEDIARY LIABILITY PROTECTIONS DEPARTING FROM GLOBAL NORMS

U.S. firms operating as online intermediaries face an increasingly hostile environment in a variety of international markets. This impedes U.S. Internet companies from expanding services abroad. These adverse conditions manifest through court decisions and new copyright regulations that depart from global norms on intermediary responsibility. In the case of the EU’s copyright reform, the motivation to target primarily U.S. firms is clear.¹² The Special 301 process serves as a valuable tool to identify areas where these liability rules fall short. USTR has

¹⁰ OFFICE OF THE U.S. TRADE REP., *2018 National Trade Estimate Report on Foreign Trade Barriers* (2018), available at <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf> at 27-28.

¹¹ CCIA notes that USTR has highlighted IP-related trade concerns in both the Special 301 and NTE. *Compare 2018 Special 301 Report*, at 76 (“The United States strongly encourages Costa Rica to build upon initial positive momentum to strengthen IP protection and enforcement, and to continue to draw on bilateral discussions to develop clear plans to demonstrate progress to tackle longstanding problems.”) *with 2018 NTE Report* at 123 (“The United States strongly encourages Costa Rica to build on these initial positive steps it has taken to protect and enforce IPR, and to continue with bilateral discussions of these issues and the development of a clear plan that will demonstrate additional progress to tackle longstanding problems.”); *2018 Special 301 Report* at 69 (“The United States urges Egypt to provide deterrent-level penalties for IP violations, ex officio authority for customs officials to seize counterfeit and pirated goods at the border, and necessary additional training for enforcement officials.”) *with 2018 NTE Report* at 140 (“The United States continues to recommend that Egypt provide deterrent-level penalties for IPR violations, provide customs officials with ex officio authority to seize counterfeit and pirated goods at the border, and provide necessary additional training for enforcement officials.”).

¹² See Axel Voss, *Protecting Europe’s Creative Sector Against the Threat of Technology*, THE PARLIAMENT MAGAZINE (Feb. 5, 2019), <https://www.theparliamentmagazine.eu/articles/opinion/protecting-europe%E2%80%99s-creative-sector-against-threat-technology> (criticizing U.S. platforms specifically). This is also clear from statements made by MEPs following Parliament adoption of text. See, e.g. Pervenche Beres (@PervencheBeres), TWITTER (June 20, 2018), <https://twitter.com/PervencheBeres/status/1009365360234123264> (“Bravo aux membres de #JURI qui ne sont pas tombés dans le piège tendu par les #GAFAM et ont voté en faveur de la culture et de la création #art13”); Virgine Roziere (@VROziere), TWITTER (June 20, 2018), <https://twitter.com/VROziere/status/1009383585885892609> (“Directive #droitdauteur : après plusieurs mois de débats houleux marqués par un lobbying intense des #GAFAM, la commission #JURI du #PE s’est enfin prononcée en faveur d’une réforme qui soutient les #artistes européens et la #création ! Une avancée pour mettre fin au #Valuegap !”).

placed countries on the Watch List in part for failing to implement a clear and predictable intermediary liability regime that provides rightsholders an adequate process for protecting content without overburdening Internet services.¹³

a. European Union

On May 17, 2019, the Copyright Directive was published in the Official Journal of the European Union.¹⁴ The Member States will have until June 7, 2021 to transpose the EU requirement into their national laws. CCIA identifies Articles 15 and 17 as concerns and as they represent a departure from global IP norms and international commitments, and will have significant consequences for online services and users. These rules diverge sharply from U.S. law, and will place unreasonable and technically impractical obligations on a wide range of service providers, resulting in a loss of market access by U.S. firms.

Online services will likely have to use filtering technologies in order to comply with the requirements under Article 17. While Article 17 avoids the word “filter”, practically speaking, content-based filtering will be required if a service is to have any hope of achieving compliance. This upends longstanding global norms on intermediary liability. Absent obtaining a license from all relevant rightsholders, online services would be directly liable unless they did all of the following: (1) made best efforts to obtain a license, (2) made best efforts to “ensure the unavailability of specific works and other subject matter” for which the rightsholders have provided necessary information to the online service, and (3) “in any event” acted expeditiously to remove content once notified by rightsholders and made best efforts to prevent their future uploads. The last requirement effectively creates an EU-wide ‘notice-and-staydown’ obligation. The other requirements are not mitigated by the inclusion of a “best efforts” standard, in part because “best efforts” is a subjective but still mandatory standard open to abuse and inconsistent interpretations at the Member State level.

¹³ OFFICE OF THE U.S. TRADE REP., 2013 Special 301 Report at 7 (2013), *available at* <https://ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf> (observing that the failure to implement an effective means to combat the widespread online infringement of copyright and related rights in Ukraine, including the lack of transparent and predictable provisions on intermediary liability and liability for third parties that facilitate piracy, limitations on such liability for ISPs, and enforcement of takedown notices for infringing online content.”); 2018 *Special 301 Report* at 56 (“The creation of a limitation on liability in this law is another important step forward. Notwithstanding these improvements, some aspects of the new law have engendered concerns by different stakeholder groups, who report that certain obligations and responsibilities that the law imposes are too ambiguous or too onerous to facilitate an efficient and effective response to online piracy.”).

¹⁴ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2019:130:FULL&from=EN>.

Lawful user activities will be severely restricted. Some have noted that requirements would not affect lawful user activity such as sharing memes, alluding to the exceptions and limitations on quotation, criticism, review, and parody outlined in the text. This is inaccurate for two reasons. First, while the text itself does not explicitly “ban memes,” the effect of the actions online services would have to take to avoid direct liability is the restriction of lawful content. Algorithms used to monitor content on platforms cannot contextualize to determine whether the content was lawfully uploaded under one of the exceptions listed. Second, under the final text of Article 17, the exceptions and limitations provided for only apply to users, not the services themselves (¶ 5: “Member States shall ensure that users in all Member States are able to rely on the following existing exceptions and limitations when uploaded and making available content generated by users”). This makes the exceptions largely meaningless if the services used to take advantage of this exception do not also receive the same rights.

Member States are currently working on implementation by the June 7, 2021 deadline, with many Member States in final stages of legislation. A worrying trend is the enactment, in a few Member States, of some forms of far-reaching licensing schemes (e.g., mandatory collective licensing, or unilateral extended collective licenses). As Member States craft legislation and guidance, CCIA emphasizes that a service provider which is made primarily liable for copyright infringements must be able to take steps to discharge this liability, otherwise this will ultimately lead to the demise of user-generated content services based in Europe — as it is materially impossible for any service to license all the works in the world, and rightsholders are entitled to refuse to grant a license or to license only certain uses. Accordingly, CCIA believes that mitigation measures are necessary to make Article 17 workable. Moreover, any measures taken by a service provider for Article 17 should be based on the notification of infringing uses of works, not just notification of works. A functional copyright system requires cooperation between information society service providers and rightsholders. Rightsholders should provide robust and detailed rights information (using standard formats and fingerprint technology where applicable) to facilitate efforts to limit the availability of potentially infringing content.

b. Brazil

The Ministry of Citizenship is currently reviewing Brazil's Copyright Law.¹⁵ Industry reports that they are considering what approach to take with respect to intermediary liability protections, which do not currently exist within the existing statute for copyrighted content. The Marco Civil da Internet, Federal Law No. 12965/2014, granted limited intermediary protections that do not include copyrighted content. CCIA encourages Brazil to adopt an approach consistent with DMCA notice-and-takedown provisions that will allow legal certainty for Internet services in Brazil.

c. Greece

Greece amended its copyright law to establish a new model of copyright enforcement by creating an administrative committee that can issue injunctions to remove or block potentially infringing content. Under this system, a rightsholder may now choose to apply to the "Commission for the notification of online copyright and related rights infringement" for the removal of infringing content in exchange for a fee.¹⁶ Because this is an extrajudicial process, there is a fear that government restriction of online speech will occur absent due process. The Commission issued its first decision in November 2018 under this process.

d. India

The Ministry of Electronics and Information Technology (MeitY) held a consultation in 2019 seeking comments on a proposal to amend rules created pursuant to Section 79 of the Information Technology Act (IT Act), which provides liability protections for online intermediaries. At time of filing, CCIA has not seen a finalized version of these amendments. To the extent that the finalized amendments implicate copyright concerns, USTR should note where the new responsibilities conflict with intermediary provisions within U.S. law.

The draft amendments would replace the 2011 Information Technology (Intermediary Guidelines) Rules and introduce new obligations on online intermediaries. Under the proposal, intermediaries must remove content within 24 hours upon receipt of a court order or Government notification and deploy tools to proactively identify and remove unlawful content (Amendment

¹⁵ Ministerio da Cidadania abre Consulta public sobre reforma da Lei de Direitos Autorais (June 28, 2019), <http://cultura.gov.br/ministerio-da-cidadania-abre-consulta-publica-sobre-reforma-da-lei-de-direitos-autorais/>.

¹⁶ Eleonora Rosati, *Greece New Notice and Takedown Administrative Mechanism for Online Copyright Cases Now in Force*, THE IP KAT (Mar. 5, 2018), <http://ipkitten.blogspot.com/2018/03/greece-new-notice-and-takedown.html>.

9, Amendment 8, and Amendment 3(5)).¹⁷ A number of stakeholders have raised concerns with the proposed changes and the threat posed to Internet services and their users.¹⁸

e. Russia

In 2017, Russia extended its strict copyright enforcement rules under the “Mirrors Law”.¹⁹ The new scheme requires search providers to delist website links within 24 hours of a removal request, including for so-called “mirror” websites that are “confusingly similar” to a previously blocked website.²⁰ The law came into effect on October 1, 2017.

IV. ANCILLARY COPYRIGHT

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

Studies based on the experience of countries that have implemented such laws, including studies commissioned by the European Parliament and European Commission, show that they fail to meet objectives. The European Parliament JURI Committee report observed that it was “doubtful that the proposed right will do much to secure a sustainable press” and that the “effect of the snippet tax was to add additional entry costs for new entrants into those markets. . . In turn, it cements the position of incumbents and reduces incentives to innovate.”²¹ A European Commission document made available online stated that the “available empirical evidence shows that news aggregators have a positive impact on news publishers’ advertising revenue” and that a

¹⁷ There are also concerning law enforcement assistance provisions, including a requirement for intermediaries to “enable tracing out of such originator of information on its platform” at the request of government officials (Amendment 3(5)), and local incorporation and local presence requirements (Amendment 7). See Comments of CCIA to India Ministry of Electronics and Information Technology, filed Jan. 31, 2019, *available at* <https://www.ccianet.org/wp-content/uploads/2019/02/Comments-of-CCIA-to-MeitY-on-Draft-Intermediary-Guidelines-2018-1.pdf>.

¹⁸ *India’s Proposed Intermediary Liability Rules Could Limit Everyone’s Access to Information Online*, WIKIMEDIA (Dec. 26, 2019), <https://wikimediafoundation.org/news/2019/12/26/indias-proposed-intermediary-liability-rules-could-limit-everyones-access-to-information-online/>; *GitHub, Mozilla, and Cloudflare Appeal to India to be Transparent About Changes in its Intermediary Liability Rules*, TECHCRUNCH (Jan. 7, 2020), <https://techcrunch.com/2020/01/07/github-mozilla-and-cloudflare-appeal-india-to-be-transparent-about-changes-in-its-intermediary-liability-rules/>

¹⁹ 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.

²⁰ *Russia: New Law on Blocking Copies of Pirate Websites Without Launching a Lawsuit*, LEXOLOGY (Aug. 9, 2017), <https://www.lexology.com/library/detail.aspx?g=ccd719d9-6628-4935-8ed9-e944dca4118e>.

²¹ Legal and Parliamentary Affairs, European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs, Directorate General for Internal Policies of the Union, *Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive*, PE 596.810 (Sept. 2017) at 18-19, 21, *available at* [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU\(2017\)596810_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf).

press publishers' right would do little to address perceived risks created by news aggregation platforms.²²

The Spanish Association of Publishers likewise observed that “[t]here is no justification - neither theoretical nor empirical - for the existence of the fee since aggregators bring to online publishers a benefit rather than harm” and that “[t]he fee also has a negative impact for consumers, due to the reduction in the consumption of news and the increase in search time.”²³ Another academic study also looked at the failure of Spain’s and Germany’s ancillary rights legislation, observing that the snippet taxes led to a decrease in visits to online news publications. The report noted that the shutdown of Google News in Spain as a result of the legislation “decreased the number of daily visits to Spanish news outlets by 14%” and that “effect of the opt-in policy adopted by the German edition of Google News in October of 2014 . . . reduced by 8% the number of visits of the outlets controlled by the publisher Axel Springer.”²⁴

CCIA first raised concerns about ancillary copyright in 2013.²⁵ There is now an EU-wide obligation for Member States to implement ancillary measures in the form of the press publishers’ right, and a similar proposal with more discriminatory elements against U.S. services has recently been introduced in Australia.

a. Australia

In December 2020, the Australian Parliament published draft legislation introducing the “News Media and Digital Platforms Mandatory Bargaining Code.”²⁶ The draft Code, originally proposed by the Australian Competition and Consumer Commission, seeks to regulate

²² The draft paper was made available through a public records request and is available at <https://www.asktheeu.org/en/request/4776/response/15356/attach/6/Doc1.pdf>. See also IGEL, *EU Commission Tried to Hide a Study that Debunks the Publisher’s Right As Ineffective* (Mar. 1, 2018), <https://ancillarycopyright.eu/news/2018-01-03/eu-commission-tried-hide-study-debunks-publishers-right-ineffective>.

²³ NERA Economic Consulting, *Impact on Competition and on Free Market of the Google Tax*, Report for the Spanish Association of Publishers of Periodical Publications (AEEPP) (2017), available at [https://www.aepp.com/pdf/Informe_NERA_para_AEPP_\(INGLES\).pdf](https://www.aepp.com/pdf/Informe_NERA_para_AEPP_(INGLES).pdf).

²⁴ Joan Calzada & Ricard Gil, *What Do News Aggregators Do? Evidence from Google News in Spain and Germany* (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837553.

²⁵ Comments of CCIA, In re 2013 Special 301 Review, Dkt. No. USTR-2012-0022, filed Feb. 8, 2013, available at [http://www.cciagnet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20\[2013\].pdf](http://www.cciagnet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf).

²⁶ Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020, available at https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6652.

commercial relationships between media companies and digital platforms.²⁷ The Code of Conduct would be applied to companies designated by the Government at its own discretion.²⁸ At present, the only companies that Australia has indicated would have to comply with the Code are two U.S. companies: Google and Facebook.

The revenue transfer obligations included in the draft legislation can also be classified as a “snippet tax.” In short, the Code of Conduct imposes an obligation on digital services to pay an amount to news businesses for including links and news snippets in their websites. This takes place *via* an opaque arbitration process — the terms of which have been set by the Australian government to favor local publishers. As noted above, such snippet taxes or ancillary rights both serve as a trade barrier and violate international copyright commitments that prohibit nations from restricting quotation of published works. While this potential framework may not be structured in the same way as previously implemented “snippet taxes”, this proposal still conflicts with the same international commitments, as well as U.S.-Australia Free Trade Agreement (AUSFTA) rules requiring national treatment of foreign providers and precluding the use of performance requirements.²⁹ It is important for the U.S. government to challenge these discriminatory measures and ensure that Australia is in compliance with its international obligations.

b. European Union

CCIA remains concerned with Article 15 of the Copyright Directive and the creation of a press publishers’ right. Contrary to U.S. law and current commercial practices, Article 15 severely restricts how search engines, news aggregators, applications, and platforms can provide context on the information they link to, while negatively impacting the free flow of information

²⁷ See *Australian Regulations Detrimental to the Digital Economy: Process*, DISRUPTIVE COMPETITION PROJECT (Aug. 6, 2020), <https://www.project-disco.org/competition/080620-australian-regulations-detrimental-to-the-digital-economy-process/>.

²⁸ *Australian Regulations Detrimental to the Digital Economy: The ACCC’s Code of Conduct Reaches Parliament*, DISRUPTIVE COMPETITION PROJECT (Jan. 22., 2021), <https://www.project-disco.org/competition/012221-australian-regulations-detrimental-to-the-digital-economy-accc-code-of-conduct-reaches-parliament/>.

²⁹ The selective application of this new Code also implicates non-IP related trade conflicts. Under Australia’s current trade commitments (both under WTO agreements and the Australia-U.S. Free Trade Agreement (AUSFTA)), a country must afford the same market access to foreign investors as they do to its domestic companies. A country cannot impose regulations that would treat foreign investors differently than their domestic counterparts, subject to limited exceptions. Singling out two U.S. companies for this new Code conflicts with these obligations. The Code also imposes obligations on Facebook and Google to carry certain local content on their platforms, which conflicts with investment provisions in AUSFTA.

to the detriment of users of these U.S. services. There is a risk that Member States will implement Article 15 in an even more restrictive fashion. If interpreted narrowly, the exception for “very short extracts” and single words is highly unlikely to provide any real certainty for Internet services who wish to continue operating aggregation services, and conflicts with the current practice of many U.S. providers who offer such services.³⁰

The Copyright Directive also does not harmonize the exceptions and limitations across the EU. The freedom of panorama exception (the right to take and use photos of public spaces) was left out of the proposal entirely. Moreover, while a provision on text and data mining is included, the qualifying conditions are too restrictive.³¹ The beneficiaries of this exception are limited to “research organizations,” excluding individual researchers and startups.

France has already started to implement this provision of the EU Copyright Directive as it created a new right for press publishers which entered into force in October 2019. The press can request money from platforms when the platform displays their content online. Future licensing agreements will be based on criteria such as the publisher’s audience, nondiscrimination and the publisher’s contribution to political and general information. Recently, Google and the “Alliance de la Presse d’Information Générale”, which represents newspapers such as Le Monde, announced an agreement to comply with the new law.³²

Germany released its discussion draft in January 2020 regarding implementation of the Copyright Directive and Article 15. The proposed implementation of Article 15 builds upon Germany’s 2013 *Leistungsschutzrecht*.³³ The new press publishers’ right would be broad, with limited exceptions for individual words or short extracts including a heading, a small-format

³⁰ Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 15:

1. Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of directive 2001/29/EC for the online use of their press publications by information society service provider. The rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users. The protection granted under the first subparagraph shall not apply to acts of hyperlinking. The rights provided for in the first subparagraph shall not apply in respect of the use of individual words or very short extract of a press publication.

³¹ *Id.* at Article 3(2).

³² Google France Blog, *L’Alliance de la Presse d’Information Générale et Google France signent un accord relatif à l’utilisation des publications de presse en ligne* (Jan. 21, 2021), <https://france.googleblog.com/2021/01/APIG-Google.html>.

³³ The 2013 German law known as *Leistungsschutzrecht* targeted principally U.S.-based exporters of news aggregation services. Enacted with support from German news publishers, the *Leistungsschutzrecht* broke with international copyright norms, and failed to achieve its desired outcomes for publishers.

preview image with designated resolution, and a three-second sequence of audio or visual content.³⁴ Separately, recent draft amendments to Germany’s Competition Act would require a small number of U.S. companies to carry content from German publishers and compensate publishers for that content.

Also in relation to the press publishers’ right, some Member States have proposed drafts that contain far-reaching licensing schemes, which include mandatory collective licensing (despite criticism from EU policymakers on this approach³⁵), unilateral extended collective licensing, or mandatory and unwaivable remuneration for publishers.

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

a. Australia

As CCIA has noted in previous Special 301 comments, the U.S.-Australia Free Trade Agreement (AUSFTA) contains an obligation to provide liability limitations for service providers, analogous to 17 U.S.C. § 512.³⁶ However, Australia has failed to fully implement such obligations and current implementations are far narrower than what is required. Australia’s statute limits protection to “services providers”, which it defines narrowly.³⁷ The consequence of this is that intermediary protection has been largely limited to Australia’s domestic broadband providers, and following recent passage of amendments to the Copyright Act, now includes organizations assisting persons with a disability, and bodies administering libraries, archives, cultural, and educational institutions. CCIA expressed concern in the previous Special 301 proceeding regarding those amendments,³⁸ which pointedly excluded commercial online service providers.³⁹ Online service providers remain in a precarious legal situation when exporting services into the Australian market. This unduly narrow construction violates Australia’s trade

³⁴ § 87g, Draft discussion of the Federal Ministry of Justice and Consumer Protection, First law to adapt copyright law to the requirements of the digital single market, Jan. 15, 2020, https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_Anpassung%20Urheberrecht_digitaler_Binnenmarkt.html.

³⁵ European Commissioner for the Internet Market Thierry Breton has expressly come out against this.

³⁶ U.S.-Austl. Free Trade Agreement, May 18, 2004, 43 I.L.M. 1248.

³⁷ Copyright 1968 (Cth) ss 116ABA(Austl.).

³⁸ Post-Hearing Comments of CCIA in 2018 Special 301 Review, *available at* http://www.ccianet.org/wp-content/uploads/2018/03/CCIA_2018-Special-301_Review_Post-Hearing-Submission.pdf.

³⁹ Copyright Amendment (Disability Access and Other Measures) Bill 2017, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5832. *See also* Jonathan Band, *Australian Copyright Law Thumbs Nose at U.S. Trade Commitments*, Disruptive Competition Project (July 6, 2018), <http://www.project-disco.org/intellectual-property/070518-australiancopyright-law-thumbs-nose-at-u-s-trade-commitments/>.

obligations under Article 17.11.29 of AUSFTA. This article makes clear that the protections envisioned should be available to all online service providers, not merely carriage service providers. Although Australian authorities documented this implementation flaw years ago, no legislation has been enacted to remedy it.⁴⁰

b. Colombia

Colombia has not complied with its obligations under the U.S.-Colombia Free Trade Agreement to provide protections for Internet service providers, as noted in the 2020 Special 301 Report.⁴¹ Legislation from 2018 that sought to update copyright law and implement the U.S.-Colombia FTA copyright chapter includes no language on online intermediaries.⁴² The recent legislation that seeks to implement the U.S.-Colombia FTA copyright chapter also does not appear to include widely recognized exceptions such as text and data mining, display of snippets or quotations, and other non-expressive or non-consumptive uses. Without protections required under the FTA, intermediaries exporting services to Colombia remain exposed to potential civil liability for services and functionality that are lawful in the United States and elsewhere. CCIA urges USTR to continue to engage with Colombian counterparts and ask that they prioritize implementation of a complete intermediary framework as required by the U.S.-Colombia FTA.

c. Peru

Peru remains out of compliance with key provisions under the U.S.-Peru Trade Promotion Agreement (PTPA). Article 16.11, para. 29 of the PTPA requires certain protections for online intermediaries against copyright infringement claims arising out of user activities. USTR cited this discrepancy in its inclusion of Peru in the 2020 Special 301 report, and CCIA supports its inclusion in the 2021 Report.⁴³ CCIA urges USTR to engage with Peru and push for full implementation of the trade agreement and establish intermediary protections within the parameters of the PTPA.

⁴⁰ 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>.

⁴¹ *2020 Special 301 Report* at 80.

⁴² Text available at <http://es.presidencia.gov.co/normativa/normativa/LEY%201915%20DEL%2012%20DE%20JULIO%20DE%202018.pdf>.

⁴³ *2020 Special 301 Report* at 86.

VI. FORCED TECHNOLOGY TRANSFER

a. China

CCIA reiterates concerns with certain Chinese regulations that discriminate against U.S. cloud service providers through forced technology transfer, including the 2017 Cybersecurity Law as highlighted in the 2020 Special 301 Report.⁴⁴ As previously noted, U.S. cloud service providers (CSPs) are strong American exporters and have been at the forefront of the movement to the cloud worldwide. China has sought to block these U.S. cloud service exporters through discriminatory practices that force the transfer of intellectual property and critical know-how, reputable brand names, and operation over to Chinese authorities and companies in order to operate in the market.⁴⁵ USTR should once again highlight China and its policies pursuant to the Cybersecurity Law in its 2021 Special 301 Report.

b. India

The Personal Data Protection Bill (PDPB), introduced in December 2019, remains under consideration in India by a Joint Committee in Parliament, and threatens the ability of U.S. firms to operate in India.⁴⁶ As of January 2021, the Committee is expected to submit its report in the upcoming Budget session.⁴⁷ There are two main provisions of the Bill that implicate industry concerns that are relevant to the Special 301 investigation: first, an expansive data portability right under section 19; and second, requirements for companies to share extensive datasets with the Central Government under section 91.

First, section 19 of the Bill provides for a right to data portability for individuals with respect to personal information processed by data controllers designated as “data fiduciaries.” Under the Bill, individuals can request specified datasets from data fiduciaries in either a

⁴⁴ *Id.* at 39.

⁴⁵ These regulations and other discriminatory regulations toward U.S. firms were outlined in USTR’s 2018 Report to Congress on China’s WTO Compliance. Specifically, these measures do the following: prohibit licensing foreign CSPs for operations; actively restrict direct foreign equity participation of foreign CSPs in Chinese companies; prohibit foreign CSPs from signing contracts directly with Chinese customers; prohibit foreign CSPs from independently using their brands and logos to market their services; prohibit foreign CSPs from contracting with Chinese telecommunication carriers for Internet connectivity; restrict foreign CSPs from broadcasting IP addresses within China; prohibit foreign CSPs from providing customer support to Chinese customers; and require any cooperation between foreign CSPs and Chinese companies to be disclosed in detail to regulators. OFFICE OF THE U.S. TRADE REP., *Report for Congress on WTO’s Compliance* (2019) at 43-44, available at <https://ustr.gov/sites/default/files/2018-USTR-Report-to-Congress-on-China%27s-WTO-Compliance.pdf>.

⁴⁶ See CCIA Comments on the Personal Data Protection Bill, 2019 (Feb. 24, 2020), <https://www.ccianet.org/wp-content/uploads/2020/02/2020-02-24-CCIA-Comments-on-Personal-Data-ProtectionBill.pdf>.

⁴⁷ *A Lowdown on Personal Data Protection Bill 2019*, FORBES INDIA (Jan. 28, 2021), <https://www.forbesindia.com/article/special/a-lowdown-on-personal-data-protection-bill-2019/66037/1/>

structured, commonly used and machine-readable format, or request that the data fiduciary transfer the specified datasets to another data fiduciary. Unfortunately, the Bill's right of data portability appears to extend to information that includes business confidential or proprietary information. Specifically, the data categories subject to the portability requirement designated in section 19(a)(ii)-(iii) include "the data which has been generated in the course of provision of services or use of goods by the data fiduciary", and "the data which forms part of any profile on the data principal, or which the data fiduciary has otherwise obtained." These datasets may include data that qualifies as a proprietary asset or intellectual property of the data fiduciary, such as sensitive company insights and protected analytics generated through the investment of significant financial and technical resources.

Second, the draft Bill would grant the Government power to demand the production of broad categories of business data that appear to conflict with established intellectual property rights in India. Section 91 of the Bill grants new authority for the Central Government to direct any data fiduciary or data processor to produce any "personal data anonymized" or other "nonpersonal data" to "enable better targeting of delivery of services or formation of evidenced-based policies."⁴⁸ In addition to implicating serious privacy concerns, the ability for the Government to demand the production of extensive datasets collected, inferred, or aggregated by companies, including personal information and confidential business information, may conflict with existing intellectual property law in India, which under the Copyright Act, 1957 extends 'literary work' protection to datasets in certain cases, as well as insights, analysis, and conclusions drawn from them.⁴⁹ A government mandate to share these categories of 'non-personal' data would therefore conflict with existing law.

The Ministry of Electronics and Information Technology is also currently considering a Report by the Committee of Experts on Non-Personal Data Governance Framework released in August 2020. The proposed Framework would require mandatory sharing and access to aggregated data held by private companies, and compel industry to share this data with competitors and government agencies. This would pose conflicts with obligations under international commitments relating to IP and trade secrets protection by mandating disclosure of protected and business confidential information. Further, the Framework would impose

⁴⁸ § 91(2).

⁴⁹ See Vidushpat Singhania, *Is There a Database Right Protection in India?* (Mar. 2013), <https://www.lakshmisri.com/newsroom/archives/is-there-a-database-right-protection-in-india/>.

additional localization mandates and disclosure requirements. A wide coalition of industry has raised concerns with these recommended measures that would “create powerful disincentives for India’s innovation ecosystem.”⁵⁰

VII. CONCLUSION

In the 2021 Special 301 Report, USTR should recognize the concerns of U.S. Internet services who not only hold intellectual property and value its protection, but also rely on innovation-enabling provisions that reflect the digital age.

January 28, 2021

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⁵⁰ Global Industry Statement on Non-Personal Data Report (Sept. 18, 2020), *available at* <https://www.cciainet.org/wpcontent/uploads/2020/09/Global-Industry-Statement-on-Non-Personal-Data-Report-final.pdf>.