



February 3, 2025

To: Claire Avery-Page, Director for Innovation and Intellectual Property, USTR
From: James Love, Knowledge Ecology International (KEI)

Via: Special301@ustr.eop.gov

Re: KEI Comments and Request to Testify at Public Hearing regarding the Special 301 Review for 2025 (docket number USTR-2024-0023)

Knowledge Ecology International (KEI) requests the opportunity to testify at the public hearing on February 19, 2025, and to also provide the following comments for this year's Special 301 Review.

The Annex attached includes the KEI comments from the 2024 Special 301 Review, which are incorporated by reference for this year's comments.

KEI appreciates that USTR will be under new leadership and direction this year following the election of President Donald Trump, and it may be a while before we know what the new policies will look like for this administration. That said, the issue of artificial intelligence (AI) and intellectual property (IP) seems an important one to raise now.

The Presidential Executive Order of January 23, 2025, titled "Removing Barriers To American Leadership In Artificial Intelligence," states:

Sec. 2. Policy. It is the policy of the United States to sustain and enhance America's global AI dominance in order to promote human flourishing, economic competitiveness, and national security.

The details to implement that policy are left to be determined later, after reviews led by the Assistant to the President for Science and Technology (APST), the Special Advisor for AI and Crypto, and the Assistant to the President for National Security Affairs (APNSA), among others.

As regards AI and IP, one pressing set of issues concern the extent to which the developers of AI services can use copyrighted materials and non-copyrighted data to train AI services. This has burst on the scene as a policy question of high importance, and state practice is not harmonized, at all. Among the policies proposed around the world are policies that would consider unauthorized use of copyrighted material to be an infringement, or subject to text and data mining exceptions. There are various statutory licensing regimes that may be of an opt-in or opt-out nature, and a diversity of approaches regarding whether the training or use is considered commercial or noncommercial for purposes of an exception or statutory licensing regime, among other nuances.

The United States currently is the center of much of the most significant progress in developing AI services, but the future is anything but clear, and not just because of the recent success of DeepSeek in China.

There are many intellectual property issues raised by AI, on both the input and the output sides, but in the near term, perhaps the landscape of copyright policies regarding the use of works to train AI are the most pressing.

Any country that provides robust exceptions for using copyrighted material for AI will have a significant advantage in terms of training such services. But a lack of harmonization may create a situation where services developed in one country, such as in the United States, will not be legal in another, because of non-authorized use of copyrighted works to train the service. This makes it a significant trade issue.

The most emotive and politically important voices to make it an infringement of copyright to train AI services are cultural industries and journalism. KEI has been concerned that restrictive policies on the uses of copyrighted works to train AI will be extended to much broader classes of works. We have singled out science, drug development and legal issues, to illustrate cases where society is best off if AI services have access to everything possible in terms of data, and where omissions may have considerable downsides. (2023. James Love. We Need Smart Intellectual Property Laws for Artificial Intelligence: “One-size-fits-all” regulation will sideline medical and research benefits promised by the advent of artificial intelligence, Scientific American, August 7, 2023.)

In regard to scientific and medical information, note that authors are rarely paid for their works, and a handful of companies control a large number of journals, many of them foreign-owned. It would be a very bad outcome if the Holtzbrinck Publishing Group, the private equity firm BC Partners, Wiley and the Relx Group, are able to significantly limit which companies can use the leading medical journals to train AI services, or for that matter, if any publisher can opt-out of the science being used to train programs that are used for drug discovery or to treat and protect patients.

Down the road governments may develop more forward-looking policy frameworks to address the myriad of issues concerning copyright and AI, and also access to non-copyrighted data, in ways that are equitable, respect privacy, do not limit competition to undermine innovation, and otherwise benefit and protect society.

USTR should develop policies to ensure that policies are not enacted in haste that will not only undermine the global commercial markets for services provided by US companies, but also have bad outcomes for society in the longer run.

ANNEX: KEI’s 2024 comments that are still relevant

1. USTR policy on the use of exceptions to exclusive rights in patents, data, biologic resources and other knowledge goods should be consistent with Paragraph 4 of the WTO Doha Declaration on TRIPS and Public Health.

In 2001 the WTO adopted a declaration that stated the TRIPS agreement “can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.” The Declaration also reaffirmed “the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.”

DOHA WTO MINISTERIAL 2001: TRIPS
WT/MIN(01)/DEC/2
20 November 2001

Declaration on the TRIPS agreement and public health
Adopted on 14 November 2001

4. We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

The United States government has frequently cited and endorsed this declaration or similar language in a plethora of UN resolutions and bilateral or regional trade agreements, but in the past, USTR has also frequently criticized countries in the Special 301 Report for using or even proposing to use flexibilities in the TRIPS to obtain access to affordable medical products.

2. USTR should address the threats to two important copyright exceptions, the quotation right and the news of the day exception.

As KEI has noted in the past, important trading partners of the U.S. have sought to impose related or ancillary rights or fees to use quotations or the news of the day. Both news of the day and quotations are mandatory exceptions in the Berne Convention.

Berne Convention for the Protection of Literary and Artistic Works states:

Article 2, Protected works

(8) The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.

Article 10, Certain Free Uses of Works:

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

Two areas in general where these exceptions are being attacked are (a) to transfer income from companies providing Internet services such as search or social media to news organizations, and (b) to create commercial rights in the use of quotations or reported news of the day by generative artificial intelligence services.

KEI appreciates the intentions of governments that have attacked the quotation and news of the day exceptions in copyright law. There is a crisis in funding journalism, and a sense that there is unfair profiting from the work of others. That said, we are concerned and opposed to a remedy that undermines the quotation or news of the day exceptions. Rights or fees attached quotations or news of the day create harmful and potentially dangerous limits on access to knowledge.

KEI is not opposed to governments taxing technology companies, including such measures as taxes tied to profits, revenues or market valuation. What we specifically object to are taxes, fees or rights associated with using quotations or news of the day.

In 2022 the US Copyright Office issued “Copyright Protections for Publishers: A Report of the Register of Copyright.”¹

Included in the report is a June 30, 2022 letter to Senators Leahy, Tillis, Hirono, Cornyn, Klobuchar, and Coons, by Shira Perlmutter, the Register of Copyrights and Director of the U.S. Copyright Office. Her letter included these passages:

Following a series of hearings on reforms to digital copyright law, you requested that the Copyright Office undertake a study to assess the viability of establishing "ancillary copyright" protections for press publishers, similar to protections now being implemented in Europe, that would require online news aggregators to pay publishers for excerpts of content they provide for others to view.

. . .

After carefully evaluating the information provided, the Office does not recommend adopting additional copyright-like rights for press publishers in the United States. We have concluded that ancillary copyright protections have not been shown to be necessary in light of publishers' existing rights, and would likely be ineffective so long as publishers depend on news aggregators for discoverability. Moreover, to the extent that any ancillary copyright protections would lack traditional copyright limitations and exceptions, they would raise significant policy and Constitutional concerns. . .

¹ <https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf>

The Executive Summary of that report concludes with this paragraph:

The Office recognizes that adequate funding for journalism may currently be at risk, and that there are implications for the press's essential role in our system of government. But the challenges for press publishers do not appear to be copyright-specific. It has not been established that any shortcomings in copyright law pose an obstacle to incentivizing journalism or that new copyright-like protections would solve the problems that press publishers face.

USTR is often tasked with promoting US norms for intellectual property rights globally. USTR should defend the quotation or news of the day exceptions to copyright, and USTR should oppose the global adoption of ancillary copyright regimes or other laws that place liabilities on links to news stories.

3. Text and data mining exceptions are important for the development of article intelligence service, and under threat in some countries.

The European Directive on text and data mining provides a robust text and data mining exception for non-commercial researchers, but permits an opt-out for commercial uses.

The public's use of AI will not depend entirely on non-commercial services.

We can fruitfully debate the appropriateness of an opt-out of data for training AI for some purposes, particularly certain cultural works such as music and visual art. But for many other areas, an opt-out will inappropriately degrade important services and present risks of monopolistic outcomes or dangerously flawed services.

Among the several areas where an opt-out will be particularly harmful are those relating to data on development of new biomedical products, legal services and safety, to name a few.

Some of these issues are addressed in the attached article by James Love, "We Need Smart Intellectual Property Laws for Artificial Intelligence "One-size-fits-all" regulation will sideline medical and research benefits promised by the advent of artificial intelligence," *Scientific American*, August 7, 2023.

"Differences between who owns what matter. It's one thing to have the copyright holder of a popular music recording opt out of a database; it's another if an important scientific paper is left out over licensing disputes. When AI is used in hospitals and in gene therapy, do you really want to exclude relevant information from the training database?"

A variety of AI services will be developed, with enormous potential for benefits and risks, and society will have to manage both, but governments should not be enacting restrictive rules regarding the uses of data. In some fields, like the law or medicine, you want the AI services to

know everything possible. A freedom to operate regime should be the general rule, subject to limited and narrow exceptions. In other words, the right to opt-out of training data should be the exception and not the rule, even for commercial services.

4. Trade related aspects of funding biomedical R&D should focus less on intellectual property norms and more on the direct and indirect funding of research by the public sector.

During the COVID 19 pandemic, the United States public sector spending on biomedical R&D was enormous, both in levels and relative to other high income countries, when considered as a percentage of per capita income. The same is true for U.S. public sector spending on R&D relating to cancer, HIV/AIDS and countless other diseases. At times, the U.S. acquires rights in such research, such as the Bayh-Dole march in and government use rights in inventions funded by the federal government, or rights in clinical trial data. Other governments may also acquire rights in inventions, data, cell lines or know-how they fund.

The trade related aspects of biomedical R&D include many topics, including the levels and character of public sector funding, the rights that governments acquire, and transparency of the value chain. USTR needs to develop policy objectives for global public sector funding of biomedical R&D.

This is particularly important as the United States and indeed the entire world is experiencing a seismic shift in the age of our population.

In 2000, the US Bureau of the Census estimated that 11.9 percent of the U.S. population was 65 years and older, but things have changed, and are changing, a lot.

Year	Percent of population 65 or older
2000	11.9
2010	12.7
2020	16.8
2023	17.3
2030 est	20.6
2040 est	22.0
2050 est	22.8

For estimates:

<https://www2.census.gov/programs-surveys/popproj/tables/2023/2023-summary-tables/np2023-t2.xlsx>

Among other things, these changes mean there will be enormous challenges of providing access to biomedical innovations. The notion that biomedical inventions should continue to be given bullet-proof multi-decade monopolies on new products needs a reality check. Someone at USTR needs to start doing some math.

By taking a more balanced approach in the trade related aspects of biomedical R&D, it becomes more feasible to consider innovations in business models that are consistent with universal access,

fiscal discipline and innovation. The spending in Europe or other high income regions on public sector biomedical R&D is important, and arguably more important than the prices paid for products. Going forward, far more attention needs to be given to the trade related aspects of funding biomedical R&D, not just the granting of patents on inventions.

5. Trade related aspects of public goods continue to be a neglected area of trade policy.

Climate change, refugee assistance, pandemic preparedness and response, global poverty reduction, famine relief, policing poverty on the high seas, open sourced biomedical research, locus control, and countless other global challenges are costly to address. KEi has proposed a WTO agreement on the supply of public goods that is based upon a schedule that enables WTO members to voluntarily make binding commitments to provide or resource heterogeneous public goods.

Even without a new WTO schedule for public goods, USTR can and should develop a policy on the trade related aspects of the supply of public goods.

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