



# Understanding “Ancillary Copyright” in the Global Intellectual Property Environment

In recent years, some European governments have moved to impose a special levy on search engines and other online platforms providing the public with short fragments of news text, including quotations and headlines. This so-called “ancillary copyright” has been implemented in Germany and Spain, and traditional news publishers have called for similar rights in other countries.

This paper explores the nature and background of ancillary rights proposals, reviewing the jurisdictions in which rights in news and/or quotations have been extended thus far. It explains the background of ancillary rights, and discusses how these proposals violate existing international copyright law, as established by the Berne Convention, as well as trade laws and norms. The paper concludes that existing ancillary rights statutes could result in a valid claim before an international trade dispute resolution body.

## 1. The Birth of Ancillary Rights

Ancillary rights in news snippets and quotations are different from any existing intellectual property right. They are not patents, or trademarks, nor are they a form of industrial design or trade secret. Nor are ancillary rights equivalent to copyrights, since they create entitlements in content that international

copyright law specifically declares to be ineligible for such protection. In this sense, they are *sui generis*. While couched in terms of an intellectual property right, ancillary rights are in fact an instrument of industrial policy. Aimed at rectifying perceived economic imbalances between industries, they act like a private tax or levy.<sup>1</sup> The purpose of these “snippet levies” is to compel one group of businesses—Internet businesses—to subsidize another group of businesses—news publishers.<sup>2</sup> International copyright law, however, does not regulate short phrases or facts, and it mandates that the right to quote not be abridged.<sup>3</sup>

This notion of a tax or levy on links or quotations (uses permitted under international law) is relatively new. The idea has been prompted by the well-documented difficulties of traditional print media in responding to and competing in the online environment. In the past few years certain European publishers’ hostility to news aggregation and social media has grown, even though online services drive considerable traffic to the websites of news publishers, who then monetize that traffic by selling advertisements and/or subscriptions. To publishers who prefer that their content not be indexed or introduced to social media, long-standing protocols already provide highly granular control: news publishers can easily

<sup>1</sup> While ancillary copyright is frequently characterized as a tax (even by its supporters), the term ‘tax’ usually refers to monetary exactions imposed *and collected* by the state. Ancillary copyrights are monetary exactions imposed by the state but collected by a private actor. Thus, although the term ‘tax’ is accurate in a generic sense, ancillary copyrights may be more specifically characterized as a “levy.”

<sup>2</sup> Ancillary rights are generally enforced by a “collective management entity,” designated to act on behalf of news publishers and demand payment from regulated online platforms, aggregators and search providers.

<sup>3</sup> Berne Convention for the Protection of Literary and Artistic Works, art. 10(1), last revised July 24, 1971, amended Oct. 2, 1979, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221 (hereinafter “Berne Convention”).

prevent that by complying with the robots.txt exclusion protocol, an Internet industry standard. By adding two short lines of code (containing fewer characters than this aside) in the header of a website, website administrators can prevent automated programs from copying headlines, snippets, or any other content from that site.

Some European news publishers, however, want it both ways. They want to maintain the high page-views and advertising rates associated with high search visibility, and they also want to be paid for the indexing necessary to send that traffic. They insist that online platforms must drive traffic to their sites, but also demand that online platforms pay for the “privilege” of being compelled to do so.

## 2. Nations Which Have Created “Rights” in Quotations or News Content

### Germany

The first ancillary copyright statute was enacted in Germany. It resulted from demands by the German newspaper trade association BDZV<sup>4</sup> for payments from news aggregators in 2009. Opposition to the proposal within relevant governmental agencies, civil society groups, and academia kept legislation at bay for several years, until Germany’s Federal Ministry of Justice (“*Bundesministerium der Justiz*”) issued a draft proposal in July 2012 that would establish a new exclusive right for press publishers.<sup>5</sup> Germany enacted this proposal into its ancillary copyright law (“*Leistungsschutzrecht*”) in August 2013.<sup>6</sup> This enactment upset the status quo under which search and social media platforms had the right to quote short excerpts from web content (as is the case with offline content),

including content from newspapers, periodicals, and other press publishers.

This *Leistungsschutzrecht* expressly holds search engines liable for making available to the public parts of “press products” in search results, thereby creating direct liability for the automated indexing processes by which search results are generated. In a last minute change, however, the German legislature decided to exclude “smallest text excerpts” from the scope of the law. This created some legal uncertainty, as that term was given no definition. In theory, this phrase could include quotations and snippets, but such an interpretation might also be argued to render the provision largely irrelevant.

The law is specifically aimed at news aggregation.<sup>7</sup> It states that providing access to press publications remains permissible, as long as the access provider is not a commercial search service or similar entity.<sup>8</sup> The draft legislation’s official background explanation clarified that this new restriction would not apply to “bloggers, other commercial businesses, associations, law firms or private and unpaid users.”<sup>9</sup> In this manner, a German law firm (for example) might be permitted to compile links to news coverage on a particular topic, with accompanying snippets, without obtaining permission, but a search engine or social media provider would not. (If the hypothetical law firm were to use a social media provider to advertise its compilation, it remains unclear whether a remuneration obligation would accrue, and to whom.)

When in response to the *Leistungsschutzrecht* Google announced that it would de-index snippets from German publishers, the publishers’ collecting society VG Media complained to German competition authorities. It took the position that Google was

<sup>4</sup> An acronym from the formal name, “Bundesverband Deutscher Zeitungsverleger e.V.”

<sup>5</sup> Bundesministerium der Justiz, *Entwurf eines Siebenten Gesetzes zur Änderung des Urheberrechtsgesetzes* (July 7, 2012), art. 87g(4).

<sup>6</sup> German Copyright Act (1965, as last amended in 2013), at art. 87f(1), [http://www.gesetze-im-internet.de/englisch\\_urhg/englisch\\_urhg.html#p0572](http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0572). Matt Schruers, *Germany Looks to Prop Up News Publishers With Snippet Subsidy, But Is a Quotation Tax Legal?*, Disruptive Competition Project (Nov. 14, 2012), <http://www.project-disco.org/intellectual-property/111412-germany-looks-to-prop-up-news-publishers-with-snippet-subsidy-but-is-a-quotation-tax-legal>.

<sup>7</sup> 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-in-germany-from-opt-out-to-opt-in-on-google-news>.

<sup>8</sup> See *supra* note 6, at art. 87g(4) (discussing “commercial providers of search engines or commercial providers of services which process the content accordingly”).

<sup>9</sup> See *supra* note 5.

obligated to continue indexing its sites (and sending it traffic), and nevertheless still pay the levy.

The enactment of the law divided the German news publishing industry. While several major news outlets publicly refrained from exercising their right and explicitly allowed online aggregators to index their content, a second group of publishers gathered in the VG Media collecting society, which is trying to enforce the right for their members. In an interesting move, Axel Springer, one of Germany's biggest publishers and the most vocal supporter of the *Leistungsschutzrecht* at first insisted on enforcing the right, but ultimately granted a gratis license to Google only. Accordingly, the ancillary right has produced the inadvertent result of punishing smaller services.

CCIA and others have argued that this statute is inconsistent with Germany's international obligations.<sup>10</sup> In addition to representing a trade barrier, the statute has also been the subject of a challenge under German constitutional law, which remains pending.<sup>11</sup>

## Spain

In Spain, the legislature introduced a similar snippet levy in 2014 in an omnibus reform of its *ley de propiedad intelectual* in July 2014.<sup>12</sup> Included within a broader reform known as the "canon AEDE,"<sup>13</sup> the snippet levy provision was enacted late in 2014, notwithstanding domestic criticism and substantive legal concerns. As enacted, Article 32.2 provides that:

The making available to the public by electronic

content aggregation service providers of non-significant 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, shall not require authorization, without prejudice to the publisher's right, or if appropriate, other right holders to receive equitable compensation. This right shall be unwaivable and will be given effect by means of intellectual property rights management entities...<sup>14</sup>

Depending upon whether quoted fragments are "significant" or "non-significant," regulated service providers appear to be obligated to obtain the publishers' permission to reproduce content, and provide "equitable compensation." If quoted fragments are "non-significant," regulated service providers need not obtain authorization to quote, but must still provide "equitable compensation."<sup>15</sup>

Spain's national competition enforcement authority ("CNMC") stated that a new exclusive right would form a barrier to market entry.<sup>16</sup> The CNMC further noted that the collecting society contemplated by the law might itself restrict competition, and recommended against a collecting society and also against creating an "unwaivable" right. Unlike its German counterpart, the Spanish legislation declares that the right is unwaivable, or inalienable. That is, news publishers cannot waive it and are prohibited from negotiating over the right to be remunerated; money must be paid for links whether it is desired by the content originator or not. This appears to include even cases

<sup>10</sup> See generally Comments of CCIA, Dkt. No. USTR-2012-0022, filed Feb. 8, 2013, [http://www.cciainet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20\[2013\].pdf](http://www.cciainet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf) (pointing out inconsistency of ancillary right proposal with international trade obligations in USTR's Special 301 proceeding).

<sup>11</sup> See Loek Essers, *German copyright law is unconstitutional, Yahoo says in complaint*, PCWorld (Aug. 1, 2014), <http://www.pcworld.com/article/2460720/german-copyright-law-is-unconstitutional-yahoo-says-in-complaint.html> (explaining Yahoo's claim that the law conflicts with the German constitutional protections to freedom of information and from government action restricting access to information).

<sup>12</sup> See *Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Informe de la Ponencia: Proyecto de Ley por la que se modifica el Texto Refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*, No. 81-3 (July 22, 2014), [http://www.congreso.es/public\\_oficiales/L10/CONG/BOCG/A/BOCG-10-A-81-3.PDF](http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-81-3.PDF).

<sup>13</sup> This informal label for the legislation is a reference to the Spanish news publishers' trade organization, the Association of Spanish Editors and Newspapers (AEDE).

<sup>14</sup> See *supra* note 12. 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 this paper.

<sup>15</sup> While not explicitly stated in the legislation, this is implied by the provision's recognition of the "publisher's right, or if appropriate, other right holders to receive equitable compensation." The text indicates that the publisher's/right holder's right to equitable compensation applies at least in the case of non-significant fragments. Accordingly, it likely also applies in the case of significant fragments. It is unclear from the legislation whether there is an independent provision conferring this right directly.

<sup>16</sup> 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 15, 2014), [http://cnmcblog.es/wp-content/uploads/2014/05/140516-PRO\\_CNMC\\_0002\\_14-art-322PL.pdf](http://cnmcblog.es/wp-content/uploads/2014/05/140516-PRO_CNMC_0002_14-art-322PL.pdf).

where the author desires the content to be available under a more permissible basis, such as a Creative Commons license or open publishing. Like its German counterpart, the Spanish snippet levy purports to exclude non-commercial actors. Unlike Germany's law, however, the Spanish ancillary copyright could arguably be interpreted to cover just about any content online, not only news. This is because its scope includes content for "purposes of informing, shaping public opinion or entertaining" – a very broad definition of subject matter covered by the law.

The Spanish legislation went into effect on January 1, 2015, and contemplates creation of a collecting society or rights management organization, but as of the time of publication of this paper, no such entity yet existed. As a result of the law, Google exited the market for Spanish news aggregation, closing down its news.google.es website on December 16, 2014, and delisting links to Spanish news publications in Google search results.<sup>17</sup> Domestic online service providers like InfoAliment, a portal providing information related to the foods sector, have closed down their service as well.<sup>18</sup>

### Other Jurisdictions

Similar proposals have also been aired in Austria, Italy, and Sweden, and in France with respect to images.<sup>19</sup> In addition, the European Commissioner for the Digital Economy and Society Günther Oettinger has called for an EU-wide measure, announcing in October 2014 that

"[i]f Google uses and processes intellectual property from the EU, the EU can protect this property and can demand a charge."<sup>20</sup> However, it is currently uncertain whether an ancillary copyright provision will be part of a broader EU copyright law review.

It is noteworthy that under EU law, the Court of Justice of the EU (CJEU) stated in the 2014 *Svensson* holding that there is no copyright infringement when providing hyperlinks to freely accessible copyright-protected content.<sup>21</sup> That is because in such circumstances hyperlinks do not address a "new public" (i.e., a public that was not taken into account by the rightholders when they authorized the initial communication). Insofar as ancillary copyrights negate the ability to link to freely accessible content online, they appear to conflict with this important right established by the CJEU in *Svensson*.

### 3. Quotation Rights Are Firmly Established in Many National Copyright Laws

U.S. law has historically denied copyright protection to facts<sup>22</sup> and titles,<sup>23</sup> while protecting the display of news snippets<sup>24</sup> and even lengthy quotations in news reporting.<sup>25</sup> The hostility to the protection of facts and news found in the U.S. legal system has also characterized the laws of many other countries—including European nations that are contemplating or have implemented ancillary rights provisions. As described in the Appendix, many countries' copyright

<sup>17</sup> Google Support, *Google Noticias en España*, <https://support.google.com/news/answer/6140047#English>.

<sup>18</sup> *InfoAliment.com Closes and Becomes First Victim of Google Tax*, Teinteresa (Dec. 11, 2014), [http://www.teinteresa.es/tecnoc/Cierra-InfoAlimentcom-convierte-primera-Google\\_0\\_1264675766.html](http://www.teinteresa.es/tecnoc/Cierra-InfoAlimentcom-convierte-primera-Google_0_1264675766.html) (translated from Spanish).

<sup>19</sup> Brad Spitz, *Thumbnails: French proposal for payment of royalties by search engines*, Kluwer Copyright Blog (Apr. 28, 2014), <http://kluwercopyrightblog.com/2014/04/28/thumbnails-france/>.

<sup>20</sup> *EU's Oettinger mulls levy on Google - Handelsblatt*, Reuters (Oct. 28, 2014), [http://www.euractiv.com/sections/innovation-enterprise/oettinger-floats-proposal-eu-wide-google-tax-309568](http://www.reuters.com/article/2014/10/28/eu-commission-oettinger-idUSL5N0SN34020141028;Oettinger Floats Proposal for EU-wide 'Google-tax', EurActiv (Oct. 29, 2014), <a href=); *EU plant Urheberrechtsabgabe im Internet*, Handelsblatt (Oct. 28, 2014), <http://www.handelsblatt.com/politik/international/schutz-geistigen-eigentums-bis-2016-eu-plant-urheberrechtsabgabe-im-internet/10900130.html> ("...Wenn Google intellektuelle Werte aus der EU bezieht und damit arbeitet, dann kann die EU diese Werte schützen und von Google eine Abgabe dafür verlangen"). See also Frances Robinson & Tom Fairless, *EU Considers Taxing Google, Other U.S. Internet Firms*, Wall St. J. (Jan. 19, 2015), <http://www.wsj.com/articles/eu-considers-taxing-google-other-u-s-internet-firms-1421699055>. In a January 28 speech, Mr. Oettinger said a "Google 'levy' is an option" so that Internet platforms do not "hollow out" copyright. Video available at <https://www.youtube.com/watch?v=jta92bxjMDw> (original German, with English subtitles).

<sup>21</sup> Case C-466/12 *Svensson and Others*, Judgment of the Court of 13 Feb. 2014, <http://curia.europa.eu/juris/liste.jsf?num=C-466/12>.

<sup>22</sup> See *Feist Publ'ns, Inc. v. Rural Tele. Serv. Co., Inc.*, 499 U.S. 340, 344-45 (1991).

<sup>23</sup> 37 C.F.R. § 202.1(a). This remains true "[e]ven if a name, title, or short phrase is novel or distinctive." U.S. Copyright Office Circular 34, <http://www.copyright.gov/circs/circ34.pdf>. See also *Arnstein v. Porter*, 154 F.2d 464, 474 (2d Cir. 1946) ("A title cannot be copyrighted.").

<sup>24</sup> See generally, e.g., *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003); *Perfect 10 v. Amazon.com*, 508 F. 3d 1146 (9th Cir. 2007); *Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

<sup>25</sup> See, e.g., *Swatch Grp. Mgmt. v. Bloomberg LP*, 742 F.3d 17 (2d Cir. 2014) (news publication of entire transcript of analyst call does not infringe); *Fox Network News, LLC v. TVEyes, Inc.*, 2014 WL 4444043 (S.D.N.Y. Sept. 9, 2014).

laws contain firmly established prohibitions against copyright protection for facts. Laws throughout the developed world also provide explicit limitations and exceptions for news reporting, as well as quotation for various purposes. Developing countries also have provisions in their laws excluding protection of facts, and permitting quotation for news reporting and other purposes.<sup>26</sup>

#### 4. Ancillary Rights and Similar “Snippet Taxes” Contravene International Obligations

The national laws discussed above arise from principles established in the earliest versions of the Berne Convention in 1886. Since its inception, Berne has guaranteed the right to quote from newspaper articles against newspaper copyright holders.<sup>27</sup>

Article 10(1) of the Berne Convention provides:

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.<sup>28</sup>

Notably, the placement of “quotations” and “press summaries” after the provisos illustrates that these two items *cannot be limited* by the fair practice or ‘exceeding the purpose’ requirement. Rather, they are inherently exemplary of what satisfies these requirements. This interpretation is reaffirmed in

the preparatory documents to the 1967 Stockholm Conference discussed further below. There, experts concluded after “exhaustive discussion” that these uses be included “by way of an example” of what was unambiguously permissible.

This interpretation also flows from the heading of Article 10, which refers to “Free Uses of Works”. “Free,” of course, is distinct from the “Permissible But Remunerated” uses contemplated by compulsory license schemes.<sup>29</sup> Consistent with this, the World Intellectual Property Organization characterized article 10(1) as permitting use “without the authorization of the owner of the copyright, and without payment of compensation.”<sup>30</sup>

The negotiating history of the Berne Convention confirms this interpretation. In the first diplomatic conference on the Convention in the 1880s, the delegations referred to a “right” of quotation.<sup>31</sup> The history of the Berne Convention also illustrates that the quotation right should be interpreted broadly. Whereas prior to 1967 the right existed only to make “short quotations,” the 1967 revision consciously deleted the word “short.” This was not accidental; the change was specifically recommended by nations’ international copyright experts. They reported:

Sufficient direction in these various fields [referring to ‘politics, economics, religion, and cultural life’] cannot be achieved unless it is possible to reproduce, in certain cases, fairly considerable portions of articles which constitute the contributions of other newspapers to public discussion.<sup>32</sup>

<sup>26</sup> See Appendix, *infra* (listing selected countries’ copyright exceptions regarding permissibility of quotation, limited protection of news reporting, and non-protection of facts). See also Master List: Excerpts of Representative Copyright Limitations and Exceptions, <http://infojustice.org/wp-content/uploads/2013/08/Masterlist-11262012.pdf>, at 9-18.

<sup>27</sup> See Berne Convention (as of 1886), art. 7 (reprinted in 3 William F. Patry, *Copyright Law & Practice* Appx. F, at 1947 (1994 ed.)). The right originally authorized reproduction of entire articles.

<sup>28</sup> Berne Convention, art. 10(1) (emphasis supplied).

<sup>29</sup> See, e.g., Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, WIPO Standing Committee on Copyright and Related Rights, SCCR/9/7 (Apr. 5, 2003) at 27 (“It is therefore clear that exceptions under Article 9(2) may take the form of either free uses or compulsory licenses, depending essentially on the number of reproductions made.”).

<sup>30</sup> See WIPO, *Summary of the Berne Convention for the Protection of Literary and Artistic Works* (1886), [http://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](http://www.wipo.int/treaties/en/ip/berne/summary_berne.html).

<sup>31</sup> See, e.g., World Intell. Prop. Org., *Berne Convention Centenary: 1886-1986*, at 120 (1986) (referring to a “right” in an 1885 draft of the Convention to reproduce materials “excerpted from newspapers or periodical journals published in one of the countries of the union”).

<sup>32</sup> World Intell. Prop. Org., 1 Records of the Intellectual Property Conference of Stockholm, June 11 to July 16, 1967, at 116 (1971).

The diplomatic conference minutes from 1967 reveal an unsuccessful French-Swiss proposal to re-insert the word “short” before “quotation.” Diplomats considered and then overwhelmingly rejected the proposal, reaffirming the experts’ recommendation that the quotation right should not be limited to “short” quotes.<sup>33</sup> The West German diplomat, one Mr. Reimer, said that his

country could not support the proposal to insert the adjective “short” before the word quotations, because cases occurred in which quotations were permissible when they were not short; Article 51 of the Law which was in force in Germany was drafted on those lines and it placed no restriction on quotations in scientific or literary works, for instance, or on quotations from musical works. The Delegation of the Federal Republic of Germany thought it should be possible to delete the phrase “compatible with fair practice” or to replace it by some other phrase corresponding to the English term “fair use” or “fair dealing.”<sup>34</sup>

These records demonstrate that the views of West Germany in 1967 – which were not openly contested at the time – were that quotations should not be restricted, and moreover, that the interpretation of “fair practice” should closely resemble fair dealing and fair use, which are *unremunerated*. This is consistent with WIPO’s interpretation today that the phrase “*free use*” means without remuneration.<sup>35</sup>

Consistent with this conclusion, Berne art. 2(8) similarly states that its protection “shall not apply to news of the day or to miscellaneous facts having the

character of mere items of press information.” WIPO construed this limitation to mean that

[t]he correct meaning of this provision is to exclude from protection articles containing news of the day or miscellaneous information, provided such articles have the character of simple press information, since news of this kind does not fulfil [sic] the conditions essential for admission to the category of literary or artistic works.<sup>36</sup>

More recently, UNESCO and WIPO collaborated on the development of a “model” law to aid nations in drafting copyright legislation that would comply with these international obligations: the Tunis Model Law on Copyright.<sup>37</sup> Article 7 of the Tunis instrument outlines “fair use” exceptions, including one for the quotation of news “without the author’s consent.”<sup>38</sup> (Several countries have already implemented very similar exceptions in their copyright statutes.<sup>39</sup>)

In sum, German and Spanish laws, and similar efforts under consideration, upend established international copyright law. As noted above, most jurisdictions view displaying a short quotation or snippet to be permissible because: (a) it may be too short to qualify for copyright protection; (b) it may fall under an exception to copyright law – e.g., because it is considered a fair practice, fair use, or fair dealing of the copyrighted work, including exceptions mandated by the Berne Convention; or (c) the copyright owner is considered to have granted its implied consent to showing such snippets (because it has made its work available on the Internet and is not blocking its work from being indexed by search engines).

<sup>33</sup> *Id.*, vol. 2, at 860.

<sup>34</sup> *Id.*

<sup>35</sup> See *supra* note 30.

<sup>36</sup> See *supra* note 32, vol. 1, at 115.

<sup>37</sup> UNESCO & WIPO, *Tunis Model Law on Copyright* (1976), [http://portal.unesco.org/culture/en/files/31318/11866635053tunis\\_model\\_law\\_en-web.pdf/tunis\\_model\\_law\\_en-web.pdf](http://portal.unesco.org/culture/en/files/31318/11866635053tunis_model_law_en-web.pdf/tunis_model_law_en-web.pdf).

<sup>38</sup> Article 7(i)(b) (“[T]he following uses of a protected work, either in the original language or in translation are permissible without the author’s consent: [i]n the case of any work that has been lawfully published... the inclusion, subject to the mention of the source and the name of the author, of quotations from such work in another work, provided that such quotations are 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.” (emphasis added)).

<sup>39</sup> See generally International Copyright Table, *infra* in Appendix.

## 5. Potential Trade Law Consequences of Ancillary Rights Statutes

Because established international copyright rules prohibit nations from restricting the right to quote, national legislation that contradicts these obligations breaches commitments made under the WTO.<sup>40</sup> This is because the provisions of Berne discussed here are incorporated in the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS),<sup>41</sup> which is part of the WTO Agreement. Thus, WTO Members have a mandatory, affirmative obligation to permit anyone to quote from a work that is already lawfully publicly available.<sup>42</sup> An ancillary right or any other form of snippet tax would abrogate this right in violation of TRIPS obligations.

If there were any doubt that Berne obligations were enforceable under the WTO, that doubt was erased by a dispute brought by the European Union against the United States in 1999.<sup>43</sup> European rights-holders objected to Section 110(5) of the U.S. Copyright Act, which permits the public performance of music and television in certain public places (chiefly, small businesses, bars, and restaurants), without any royalty being paid. European trade authorities took up the complaint at the WTO, arguing that the provision violated Berne, and therefore TRIPS. While the U.S. Government argued that Section 110(5) was consistent with Berne, a WTO dispute resolution panel disagreed,

and the United States agreed to pay \$3.3 million to the European Union to seek to resolve the dispute.<sup>44</sup>

Ancillary rights are also difficult to reconcile with the market-opening objectives of the General Agreement on Trade in Services (GATS). For example, the EU committed not to limit market access, and to provide national treatment, to service suppliers of other WTO Members providing data processing services, advertising, and news and press agency services, including on a cross-border basis.<sup>45</sup> Imposing a levy upon service providers that applies disproportionately to foreign businesses may undermine these commitments.

## 6. Conclusion

Ancillary rights statutes contradict more than a century's worth of international copyright law, and disturb the harmony and balance within the international copyright system. By creating an independent government-granted right in content that is too short and often too insignificant to qualify for copyright protection, countries violate consensus, and more importantly, international trade law. Because the mandatory limitations of the Berne Convention are enforceable with trade law mechanisms, ancillary rights statutes should be challenged before the World Trade Organization, and elsewhere.

<sup>40</sup> 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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504596).

<sup>41</sup> TRIPS Agreement, art. 9 ("Members shall comply with Articles 1 through 21 of the Berne Convention (1971)").

<sup>42</sup> This position has been advanced previously by CClA in the USTR Special 301 process. See, e.g., Comments of CClA, Dkt. No. USTR-2010-003, filed Feb. 16, 2010, at 5, <http://www.cclanet.org/wp-content/uploads/library/CCIA-2010-Spec301-cmts.pdf> (if a Berne Contracting Party "were to prohibit the making of quotations from newspaper articles, for example, this would constitute denial of 'adequate and effective protection' under § 2242(a)(1), possibly necessitating identification as 'acts, policies, or practices' having actual or potential impact on relevant United States products."); see also Comments of CClA, Dkt. No. USTR-2012-0022, filed Feb. 8, 2013, at 11-12, [http://www.cclanet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20\[2013\].pdf](http://www.cclanet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf) ("By virtue of Berne's incorporation in TRIPS, Article 10(1) imposes a mandatory, affirmative obligation on WTO Members to permit anyone to quote from a work that is already lawfully publicly available").

<sup>43</sup> *Panel Report, United States – Section 110(5) of US Copyright Act*, WT/DS160/R, adopted July 27, 2000, ¶ 6.63 (finding not only that certain articles of the Berne Convention are incorporated into the TRIPS Agreement by way of Article 9.1, but also certain elements of the Berne Convention's *acquis*).

<sup>44</sup> Office of the U.S. Trade Representative, *Section 110(5) of US Copyright Act Dispute Settlement Proceeding Summary*, <http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/united-states-%E2%80%94-section-1105-us-copyright-ac>.

<sup>45</sup> See *Communication from the European Communities and its Member States*, WTO Doc. S/C/W/273, Oct. 9, 2006.

## Appendix: Selected Countries' Copyright Exceptions Regarding Quotations, Facts, and News Reporting

The table below lists selected countries' copyright exceptions regarding permissibility of quotation, limited protection of news reporting, and non-protection of facts. This list is necessarily under-inclusive, since many common law countries' jurisprudence provides similar limitations which remain uncoded, such as the United States.<sup>46</sup>

Country	Statute	Article	Specific Language
Belgium	Law on Copyright and Neighboring Rights, <a href="http://www.wipo.int/edocs/lexdocs/laws/en/be/be064en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/be/be064en.pdf</a>	21	"Short quotations taken from a lawfully published work for the purpose of criticism... shall not infringe copyright."
Benin	Law No. 2005-30 of April 5, 2006 relating to Copyright and Related Rights of the Republic of Benin, <a href="http://www.wipo.int/edocs/lexdocs/laws/en/bj/bj002en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/bj/bj002en.pdf</a>	9	"The protection afforded by the present Law shall not extend to... the news of the day"
		15	"On condition that the title of the work and the name of its author are mentioned, analyses and short quotations from a work already lawfully made accessible to the public shall be lawful, provided that they are compatible with fair practice and insofar as they are justified by the intended scientific, critical, polemic, educational or informatory purpose, including quotations from newspaper articles and periodicals in the form of press summaries."
Brazil	Law No. 9610 of February 19, 1998, on Copyright and Neighboring Rights, <a href="http://www.wipo.int/edocs/lexdocs/laws/en/br/br002en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/br/br002en.pdf</a>	46(III)	"[T]he quotation in books, newspapers, magazines or any other medium of communication of passages from a work for the purposes of study, criticism or debate, to the extent justified by the purpose, provided that the author is named and the source of the quotation is given" is not a violation of copyright
China	Decision of the Standing Committee of the National People's Congress on Amending the Copyright Law of the People's Republic of China, <a href="http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn031en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn031en.pdf</a>	22	"Allow[ing] any 'appropriate' quotation from a published work in the context of one's own work. For a quotation to be appropriate, the quotation must be made solely for the purpose of introducing or commenting the quoted work in question for illustrating a point in one's own work."
		5(2)	"This law shall not be applicable to... news on current affairs."
Germany	Law on Copyright and Neighboring Rights, <a href="http://www.wipo.int/wipolex/en/text.jsp?file_id=126248">http://www.wipo.int/wipolex/en/text.jsp?file_id=126248</a>	49	"It shall be permissible to reproduce and distribute individual broadcast commentaries and individual articles... from newspapers."
Greece	Law No. 2121/1993 on Copyright, Related Rights and Cultural Matters (as last amended by Law No. 3057/2002 (article 81) and by Law No. 3207/2003 (art. 10 par. 33), <a href="http://www.wipo.int/edocs/lexdocs/laws/en/gr/gr221en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/gr/gr221en.pdf</a>	2(5)	"The protection afforded under this Law [shall not apply] to expressions of folklore, news information or simple facts and data."
Hungary	Act No. LXXVI of 1999 on copyright, <a href="http://www.wipo.int/edocs/lexdocs/laws/en/hu/hu084en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/hu/hu084en.pdf</a>	1(5)	"Copyright protection shall not extend to facts and news items consisting of mere information serving as basis for press communications."

<sup>46</sup> See, e.g., *Feist Publ'ns, Inc. v. Rural Tele. Serv. Co., Inc.*, 499 U.S. 340, 344-45 (1991); *Fox Network News, LLC v. TVEyes, Inc.*, 2014 WL 4444043 (S.D.N.Y. Sept. 9, 2014).



Country	Statute	Article	Specific Language
India	Copyright Act, 1957 (as last amended by Act No. 49 of 1999), <a href="http://www.wipo.int/edocs/lexdocs/laws/en/in/in007en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/in/in007en.pdf</a>	52(1)(m)	"The reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction [is not infringement]."
Israel	Copyright Act of 2007, <a href="http://www.wipo.int/edocs/lexdocs/laws/en/il/il033en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/il/il033en.pdf</a>	5	"Copyright shall not extend to ideas,... facts or data, or news of the day."
Italy	Law No. 633 of April 22, 1941, for the Protection of Copyright and Neighboring Rights, <a href="http://www.wipo.int/wipolex/en/text.jsp?file_id=128286">http://www.wipo.int/wipolex/en/text.jsp?file_id=128286</a>	65	"The reproduction or the communication to the public of works or protected subject-matters utilized during current events shall be permitted for the purposes of reporting the above current events and to the extent justified by the informatory purpose..."
		70	"The abridgment, quotation or reproduction of fragments or parts of a work and their communication to the public for the purpose of criticism or discussion, shall be permitted within the limits justified for such purposes, provided such acts do not conflict with the commercial exploitation of the work..."
Jordan	Law No. 22 of 1992 on Copyright and its Amendments up to 2005, <a href="http://www.wipo.int/edocs/lexdocs/laws/en/jo/jo070en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/jo/jo070en.pdf</a>	7(b)	"The protection stipulated under this law does not include the following products unless the groups of these products were characterized by a personal effort comprising innovation or order... [t]he published, broadcast or publicly notified news."
Korea	Copyright Act of 1957 (Act No. 432 of January 28, 1957, as amended up to Act No. 9625 of April 22, 2009), <a href="http://www.wipo.int/wipolex/en/text.jsp?file_id=190145">http://www.wipo.int/wipolex/en/text.jsp?file_id=190145</a>	28	"It shall be permissible to make quotations from a work already made public: provided that they are within a reasonable limit for news reporting, criticism... and compatible with fair practices."
Malawi	Copyright Act of 1989, Law No. 9 April 26, 1989, <a href="http://www.wipo.int/edocs/lexdocs/laws/en/mw/mw004en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/mw/mw004en.pdf</a>	10(a)(ii)	"The following uses of a work under this Part, either in its original language or in its translation, shall be permissible without the author's consent and without the obligation to pay remuneration for the use of such work... in the case of any work that has been lawfully published... the inclusion, subject to mention of the source and the name of the author, of quotations from such work in another work, provided that such quotations are 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."
Malaysia	Copyright Act 1987 (Act 332, as of 1 January 2006), <a href="http://www.wipo.int/edocs/lexdocs/laws/en/my/my054en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/my/my054en.pdf</a>	13(2)(a), (m)	"[T]he right of control under that subsection does not include the right to control — the doing of any of the acts referred to in subsection (1) by way of fair dealing for purposes of non-profit research, private study, criticism, review or the reporting of current events, subject to the condition that if such use is public, it is accompanied by an acknowledgement of the title of the work and its authorship... [or] the making of quotations from a published work if they are 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: Provided that mention is made of the source and of the name of the author which appears on the work thus used."

Country	Statute	Article	Specific Language
Namibia	Copyright and Neighbouring Rights Protection Act, 1994 (Act No. 6 of 1994), <a href="http://www.wipo.int/edocs/lexdocs/laws/en/na/na002en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/na/na002en.pdf</a>	15(3)	"The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by a quotation therefrom, including a quotation from an article in a newspaper, magazine or similar periodical that is in the form of a summary of that work, provided - (a) the quotation is compatible with fair practice; (b) the extent of the quotation does not exceed that justified by the purpose; and (c) the source and the name of the author, if that name appears on the work, are mentioned."
Norway	Copyright Act of 1961 (as of 1961), <a href="http://www.wipo.int/edocs/lexdocs/laws/en/no/no066en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/no/no066en.pdf</a>	22	"An issued work may be quoted, in accordance with proper usage and to the extent necessary to achieve the desired purpose."
Oman	Royal Decree No. 65/2008 promulgating the Law on Copyright and Related Rights, <a href="http://www.wipo.int/edocs/lexdocs/laws/en/om/om008en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/om/om008en.pdf</a>	4(b)	"Protection shall not cover mere ideas, procedures, working methods, mathematical concepts, principles, discoveries and data... [a]dditionally, protection shall not cover the following:... [n]ews of the day and current events which are mere journalistic information... [n]otwithstanding, all of the above in the previous paragraphs shall enjoy protection if their compilation or arrangement, or any creation or intellectual effort, eligible for protection, is distinguished."
Philippines	Intellectual Property Code of the Philippines (Republic Act No. 8293), <a href="http://www.wipo.int/edocs/lexdocs/laws/en/ph/ph001en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/ph/ph001en.pdf</a>	Chap VIII, §184.1(b)	"[T]he following acts shall not constitute infringement of copyright... he making of quotations from a published work if they are compatible with fair use and only to the extent justified for the purpose, including quotations from newspaper articles and periodicals in the form of press summaries: Provided, That the source and the name of the author, if appearing on the work, are mentioned."
Portugal	Code of Copyright and Related Rights (Law No. 45/85 of September 17, 1985, as last amended by Law No. 114/91 of September 3, 1991), <a href="http://www.wipo.int/edocs/lexdocs/laws/en/pt/pt002en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/pt/pt002en.pdf</a>	7	"The following may not be protected... news of the day and reports of events given simply for information, however disclosed."
South Africa	Copyright Act, 1978 (Act No. 98 of 1978, as amended up to Copyright Amendment Act 2002), <a href="http://www.wipo.int/edocs/lexdocs/laws/en/za/za002en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/za/za002en.pdf</a>	12	"The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work."
South Korea	Copyright Act of 1957 (Act No. 432 of January 28, 1957, as amended up to Act No. 5015 of December 6, 1995), <a href="http://www.wipo.int/edocs/lexdocs/laws/en/kr/kr001en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/kr/kr001en.pdf</a>	7(5) 25	"The following shall not be protected under this Act... [c]urrent news reports which transmit simple facts." "It shall be permissible to make quotations from a work already made public; provided that they are within a reasonable limit for news reporting, criticism, education and research, etc. and compatible with fair practice."
Sweden	Act on Copyright in Literary and Artistic Works (as of 1960), <a href="http://www.wipo.int/edocs/lexdocs/laws/en/se/se124en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/se/se124en.pdf</a>	22	"Anyone may, in accordance with proper usage and to the extent necessary for the purpose, quote from works which have been made available to the public."

Country	Statute	Article	Specific Language
Tunisia	Law No. 2009-33 of 23 June 2009 amending and supplementing Law No. 94 36 of 24 February 1994 on literary and artistic property, <a href="http://www.wipo.int/edocs/lexdocs/laws/en/tn/tn022en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/tn/tn022en.pdf</a>	Chap. II, Art. 11	“Quotations and borrowings from a work already lawfully made available to the public shall be authorized on condition that they are compatible with fair practice and are justified by a scientific, educational or informational purpose, including quotations and borrowings from articles in the form of press summaries. Such quotations and borrowings may be used in their original version or in translation and shall be accompanied by identification of the source and of the name of the author if his name is given in the source.”
Turkey	Law No. 5846 of December 5, 1951 on Intellectual and Artistic Works (as last amended by Law No. 5728 of January 23, 2008), <a href="http://www.wipo.int/edocs/lexdocs/laws/en/tr/tr049en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/tr/tr049en.pdf</a>	36	“[D]aily news and information communicated to the public by the press or radio may be freely quoted. Articles or features on social, political or economic issues of the day published in newspapers or journals may be freely quoted in their original or adapted form in other newspapers or journals and may be broadcast by radio or disseminated by any other means, except where the right to quote them has been expressly reserved. Even where the right to quote is reserved, it is permitted to abridge such articles and features as a press review and to so quote, broadcast by radio or disseminate them in any other manner. In all such cases, mention must be made of the name, the issue and the date of the newspaper, of the journal, of the agency and of any other source from which the quotations have been made, together with the name, the pseudonym or the mark of the author of the articles”
Uganda	The Copyright and Neighbouring Rights Act, 2006, <a href="http://www.wipo.int/edocs/lexdocs/laws/en/ug/ug001en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/ug/ug001en.pdf</a>	7(d)  15(1)(b)	“The right to protection of copyrights under this Act shall not extend to the following works... news of the day namely reports of fresh events or current information by the media whether published in a written form, broadcast, internet or communicated to the public by any other means”  “The fair use of a protected work in its original language or in a translation shall not be an infringement of the right of the author and shall not require the consent of the owner of the copyright where... a quotation from a published work is used in another work, including a quotation from a newspaper or periodical in the form of press summary, where — (i) the quotation is compatible with fair practice; and (ii) the extent of the quotation does not exceed what is justified for the purpose of the work in which the quotation is used, and (iii) acknowledgement is given to the work from which the quotation is made.”
United Arab Emirates	Federal Law No. 40 of 1992 on the Protection of Intellectual Works and copyright, <a href="http://www.wipo.int/edocs/lexdocs/laws/en/ae/ae024en.pdf">http://www.wipo.int/edocs/lexdocs/laws/en/ae/ae024en.pdf</a>	6	“Protection prescribed in this law does not include the following items... [n]ews published, broadcasted or publicly announced.”