

Before the
Office of the United States Trade Representative
Washington, DC

In re

2016 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing

Docket No. USTR-2015-0022

**COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the request for comments issued by the U.S. Trade Representative (USTR) and published in the Federal Register at 81 Fed. Reg. 1,277 (Jan. 11, 2016), the Computer & Communications Industry Association (CCIA)¹ submits the following comments for consideration as USTR composes its annual Special 301 Report. CCIA's comments focus on laws in several European countries that deny market access and adequate and effective protection of rights guaranteed under international IP law, and violate commitments that facilitate Internet commerce made in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). These comments also address Australia's lack of FTA compliance with trade obligations regarding intermediary safe harbors, as well as several other countries that are considering copyright reforms that may be out of step international norms.

I. Ancillary Copyright Laws in Germany and Spain Violate TRIPS and Deny Market Access and Effective Protection of Intellectual Property Rights Guaranteed Under International Treaties.

As CCIA has noted in prior Special 301 filings,² a problematic trend of TRIPS violations referred to as "ancillary copyright" laws has developed in Europe. Several European nations

¹ CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. A list of CCIA members is available at <https://www.cciagnet.org/members>.

² See CCIA Comments, Docket No. USTR-2014-0025 (Feb. 2015), <http://cdn.cciagnet.org/wp-content/uploads/2015/02/CCIA-Special-301-Comments-2015.pdf>; CCIA Comments, Docket No. USTR-2012-0022 (Feb. 2013), [http://cdn.cciagnet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20\[2013\].pdf](http://cdn.cciagnet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf); CCIA Comments, Docket

have enacted quotation levies designed to tax online services and cross-subsidize domestic news producers. These pseudo-copyright “neighboring rights” can be invoked against online services reproducing or linking to quotations or snippets from news. Their effect is to compel search providers and other online services (many of which are U.S. exporters) to pay for the “privilege” of quoting from publicly available news publications.

Sui generis “snippet taxes” violate long-standing international law which prohibits nations from restricting the right to quote.³ These regulations not only undermine market access for U.S. online services and depart from established copyright law; they also contravene WTO commitments.⁴ By imposing a levy on quotations, these government-imposed entitlements for news publishers violate the clear terms of Article 10(1) of the Berne Convention. Article 10(1) (“Free Uses of Works”) states that:

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.⁵

By citing “quotations from newspaper articles and periodicals” to exemplify fair practice, the Berne Convention leaves little question that permitting the free use of quotations from new articles is obligatory. The impairment of the mandatory quotation right represents an actionable TRIPS violation, because Berne Article 10 is incorporated into TRIPS article 9.⁶ Because WTO Members are obligated to comply with TRIPS, restrictions on or taxation of quotations from a lawfully publicly available work could constitute the basis of a WTO dispute. Indeed, USTR has

No. USTR-2010-0003 (Feb. 2010), <http://www.cciainet.org/wp-content/uploads/library/CCIA-2010-Spec301-cmts.pdf>.

³ 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.

⁴ *Id.*

⁵ Berne Convention for the Protection of Literary and Artistic Works, art. 10(1), amended Oct. 2, 1979 (emphasis supplied). Moreover, if the function of quotations in this context – driving millions of ad-revenue generating Internet users to the websites of domestic news producers – cannot satisfy “fair practice”, then the term “fair practice” has little meaning. Imposing a levy on quotation similarly renders meaningless the use of the word “free” in the title of Article 10(1).

⁶ TRIPS Agreement, art. 9 (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971).”).

repeatedly watchlisted China for failure to properly implement its TRIPS obligations.⁷ Europe's obligation to adhere to Berne Article 10(1) is no different.

As CCIA's prior submissions indicated, Germany and Spain continue to be the most problematic examples of snippet taxes, although European Commission officials have also expressed support for this approach.⁸ A December 2015 European Commission Communication implied continuing interest in ancillary copyright on the part of the Commission,⁹ and in the absence of any U.S. response, other countries have entertained the proposal.

A. Germany

Germany's *Leistungsschutzrecht*¹⁰ targeted news aggregation at the behest of German news publishers.¹¹ The enactment of the *Leistungsschutzrecht* in August 2013 upset the status quo under which search and other online 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.¹² German law now imposes liability on search engines for making available to the public parts of "press products" in responses to online search queries. As a result of the *Leistungsschutzrecht*, the automated indexing processes by which a search engine's results

⁷ See, e.g., 2010 Special 301 Report (watchlisting China for, in part, failing to implement its TRIPS obligations regarding intellectual property); 2009 Special 301 Report (same); 2008 Special 301 Report (same).

⁸ Oettinger Floats Proposal for EU-wide 'Google-tax', EURACTIV (Oct. 29, 2014) (quoting Commissioner Oettinger saying that a levy is necessary to preventing the Internet from "hollow[ing] out" news publishers' rights), <http://www.euractiv.com/sections/innovation-enterprise/oettinger-floats-proposal-eu-wide-google-tax-309568>; Paul Keller, *European Parliament must not open the door to ancillary copyright for press publishers*, COMMUNIA, July 8, 2015, <http://www.communia-association.org/2015/07/08/european-parliament-must-not-open-the-door-to-ancillary-copyright-for-press-publishers/> (stating that "Commissioner Oettinger has not made any efforts to hide that he wants to introduce an ancillary copyright on the EU level"). 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, 2015 speech, Mr. Oettinger said a "Google 'levy' is an option" so that Internet platforms do not "hollow out" copyright. See <https://www.youtube.com/watch?v=jta92bxjMDw> (original German, with English subtitles).

⁹ Lisette Kalshoven, *83 MEPs say 'no' to ancillary copyright in Europe*, COMMUNIA, Dec. 18, 2015, <http://www.communia-association.org/2015/12/18/83-meps-say-no-to-ancillary-copyright-in-europe/>.

¹⁰ Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, BGBl. I at 1273, as amended Oct. 1, 2013, BGBl. I at 87f (Ger.).

¹¹ News publishers were represented by the association Bundesverband Deutscher Zeitungsverleger e.V. See generally Jakob Kucharczyk, *Ancillary Copyright in Germany: From Opt-out to Opt-in on Google News*, DISRUPTIVE COMPETITION PROJECT, July 1, 2013, <http://www.project-disco.org/intellectual-property/070113-ancillary-copyright-in-germany-from-opt-out-to-opt-in-on-google-news>.

¹² See English translation of German Copyright Act, *supra* note 10, at art. 87f(1), http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0572 ("The producer of a press product (press publisher) shall have the exclusive right to make the press product or parts thereof available to the public for commercial purposes, unless this pertains to individual words or the smallest of text excerpts. If the press product was produced within an enterprise, the owner of the enterprise shall be deemed to be the producer.").

are generated can lead to liability, although the statute ultimately excluded “smallest text excerpts.” The Copyright Arbitration Board of the German Patent and Trademark Office subsequently recommended construing this term to mean seven words.¹³ The legal dispute about the interpretation of the ancillary copyright has reached the German civil court, likely prolonging legal uncertainty for years to come.

It bears noting that Internet services have attempted to make accommodations to avoid running afoul of this particular snippet tax. Separately, a German constitutional challenge is already pending.¹⁴ For purposes of Special 301, however, neither addresses the fact that the *Leistungsschutzrecht* represents an ongoing violation of Germany’s obligations under TRIPS.

B. Spain

In late 2014, Spain enacted a similar snippet tax in an omnibus reform of its *ley de propiedad intelectual*.¹⁵ As enacted, Article 32.2 of the revision created an *unwaivable* right such that “electronic content aggregation service providers” were taxed for using “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”.¹⁶ Under the statute, quotation gives rise to an obligation of equitable compensation, and where quoted fragments were “significant,” an actual license is required.¹⁷ (While a license is not required for “non-significant” fragments, they are nevertheless taxed.)

¹³ Jakob Kucharczyk, *A Legal Snippet in Germany Could Mean... Seven Words, Maximum*, DISRUPTIVE COMPETITION PROJECT (Oct. 27, 2015), <http://www.project-disco.org/intellectual-property/102715-a-legal-snippet-in-germany-could-mean-seven-words-maximum/>; Paul Keller, *More evidence from Germany: ancillary copyright still not working*, COMMUNIA, Oct. 19, 2015, <http://www.communia-association.org/2015/10/19/more-evidence-from-germany-ancillary-copyright-still-not-working/>.

¹⁴ 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).

¹⁵ Law No. 21/2014, amending the Consolidated Text of the Law on Intellectual Property and Law No. 1/2000 on Civil Procedure, art. 32.2 (B.O.E. 2014, 268) (Spain).

¹⁶ *Id.* The revised Article 32.2 also curtails the right to reproduce images and photographic works that are disclosed in periodic publications or websites that are regularly updated. This provision is also problematic but is not addressed in these comments.

¹⁷ 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 or 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.

The law has since come under criticism. Spain's national competition enforcement authority determined it to be a barrier to market entry and innovation that creates regulatory uncertainty,¹⁸ and raised concerns about the anti-competitive implications of a collecting society administering an "inalienable" economic right.¹⁹ 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, because its broad scope includes content for "purposes of informing, shaping public opinion or entertaining."

Just prior to the January 1, 2015 effective date of the legislation, Google exited the market for Spanish news aggregation, closing down news.google.es.²⁰ USTR has previously identified the loss of "valuable Internet traffic" as a cognizable injury for purposes of Special 301.²¹ Local Spanish aggregators, including Planeta Ludico, NiagaRank, InfoAliment, and Multifriki also discontinued operation.²²

Although Spain was the subject of an out-of-cycle review in 2015, the assessment of whether Spain's Internet copyright law was consistent with its international obligations appears to have been limited to authors' rights. Thus far the application of the mandatory quotation right to the Internet has been overlooked.²³

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The Special 301 Report should specify that the identified ancillary rights laws (1) deny market access to U.S. online service providers, as well as other exporters of goods and services

¹⁸ Paul Keller, *Research confirms: new Spanish ancillary copyright is actually good for no one*, COMMUNIA, Sept. 9, 2015, <http://www.communia-association.org/2015/09/09/research-confirms-new-spanish-ancillary-copyright-is-actually-good-for-no-one/>.

¹⁹ News publishers cannot waive this right; equitable compensation is obligatory whether the content originator desires it or not. See Comisión Nacional de Los Mercados y La Competencia, *Proposal Relating to the Modification of Article 32.2 of the Draft Act Modifying the Redrafted Text of the Intellectual Property Act* (May 16, 2014), http://cnmcblog.es/wp-content/uploads/2014/05/140516-PRO_CNMC_0002_14-art-322PL.pdf.

²⁰ Google Support, *Google Noticias en España*, <https://support.google.com/news/answer/6140047#English> (last visited Feb. 4, 2016).

²¹ 2015 Special 301 Report at 16.

²² Joe Mullin, *Spain's "Google tax" has been a disaster for publishers, new study shows*, ARS TECHNICA, July 31, 2015, <http://arstechnica.co.uk/tech-policy/2015/07/new-study-shows-spains-google-tax-has-been-a-disaster-for-publishers/>. An economic consultancy later found that web traffic to smaller publications declined by about 14%, more than double the average traffic decline. NERA Econ. Consulting, *Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual*, xi, July 9, 2015, [http://www.nera.com/content/dam/nera/publications/2015/090715%20Informe%20de%20NERA%20para%20AEEP%20\(VERSION%20FINAL\).pdf](http://www.nera.com/content/dam/nera/publications/2015/090715%20Informe%20de%20NERA%20para%20AEEP%20(VERSION%20FINAL).pdf).

²³ 2015 Special 301 Report at 5.

that rely on these platforms; (2) violate TRIPS; and (3) deny adequate and effective protection of rights secured by international IP treaties. CCIA therefore urges USTR once again to watchlist Germany and Spain in the 2016 Special 301 Report.

II. Australia’s Safe Harbors Fail to Adequately Implement Obligations Under the United States-Australia Free Trade Agreement.

As a result of the U.S.-Australia Free Trade Agreement,²⁴ Australia has an obligation to provide liability limitations for service providers, consistent with TRIPS Article 41, which resemble Title 17, Section 512 of the Copyright Act — generally referred to as the “DMCA safe harbors.” Australia’s implementation of this obligation is narrower than what is required by the FTA, however, insofar as the Australian statute limits protection to *carriage* service providers, rather than service providers generally.²⁵ The consequence of this limitation is that protection is available for domestic broadband providers, who more easily fit within the definition of “carriage” (an entity primarily operating as a provider of network access to the public). Online service providers engaged in the export of information services into the Australian market, however, remain in a precarious legal situation. Not only is there no sound policy reason not to extend the safe harbor scheme to all online services, but this unduly narrow construction violates Australia’s trade obligations under Article 17.11.29 of the FTA. This article makes clear that the protections envisioned should be available to all online service providers, not merely *carriage* service providers.

In other cases, USTR has previously noted similar shortcomings in the Special 301 Report, even when foreign nations’ commitments are less specific. Of course, USTR frequently watchlists countries for failure to properly implement obligations under the IP chapter of an FTA,²⁶ but USTR has previously watchlisted countries for these precise circumstances: failing to

²⁴ U.S.-Australia Free Trade Agreement, May 18, 2004, 43 I.L.M. 1248.

²⁵ Copyright Act 1968 (Cth) ss 116AA-116AJ (Austl.).

²⁶ *See, e.g.*, 2015 Special 301 Report (watchlisting Chile for failing to implement FTA obligations regarding intellectual property); 2014 Special 301 Report (watchlisting Chile and Dominican Republic for failing to implement FTA obligations regarding intellectual property); 2013 Special 301 Report (watchlisting Chile, Costa Rica, Dominican Republic, Tajikistan, and Turkmenistan for failing to implement FTA obligations regarding intellectual property); 2012 Special 301 Report (watchlisting Chile, Costa Rica, Dominican Republic, Mexico, Tajikistan, and Turkmenistan for failing to implement FTA obligations regarding intellectual property); 2011 Special 301 Report (watchlisting Chile, Costa Rica, Dominican Republic, and Guatemala for failing to implement FTA obligations regarding intellectual property); 2010 Special 301 Report (watchlisting Chile, Costa Rica, Dominican Republic, Guatemala, Tajikistan, Turkmenistan, and Uzbekistan for failing to implement FTA obligations regarding intellectual property); 2009 Special 301 Report (watchlisting Chile, Costa Rica, Dominican

properly implement safe harbor-related obligations.²⁷ And USTR has objected to inadequate intermediary liability protections even in the absence of a specific FTA commitment. As recently as the 2015 Special 301 Report, USTR characterized its watchlisting of Ukraine (which has no specific intermediary liability FTA commitment) in 2013 as being based in part upon the “lack of transparent and predictable provisions on intermediary liability.”²⁸ Here Australia has a specific FTA commitment which has gone unfulfilled for over a decade.

In addition to violating obligations under the United States-Australia Free Trade Agreement to include all service providers in the statutory scheme, the current regime disadvantages startups and discourages competition, harming consumers and chilling innovation and expression. Although Australian authorities documented this implementation flaw years ago, no legislation has been enacted to remedy it.²⁹ This shortcoming is currently under consideration in an ongoing legislative consultation in Australia.³⁰

III. U.S. International Advocacy Should Ensure Adequate and Effective Protection for All Industries Regulated by Intellectual Property Law.

As the 2015 Special 301 Report acknowledges, increasing global broadband penetration rates are “generating significant benefits, ranging from economic activity based on new business models to greater access to information”. The Report then expresses concerns that many U.S. trading partners’ copyright laws are poorly suited for the Internet and inhibit the distribution of lawful content and services.³¹ As USTR urges trading partners to modernize their IP laws for the Internet economy, so as to ensure adequate and effective protection for intellectual property rights *and* “rights relating” to intellectual property, *see* 19 U.S.C. § 2242(d)(2), its advocacy should also include these related rights such as the quotation right.

Republic, Guatemala, and Israel for failing to implement FTA obligations regarding intellectual property); 2008 Special 301 Report (watchlisting Chile, Costa Rica, Dominican Republic, Guatemala, Israel, and Korea for failing to implement FTA obligations regarding intellectual property).

²⁷ 2009 Special 301 Report (watchlisting Chile for failing to implement provisions of the FTA regarding Internet service provider liability); 2008 Special 301 Report (same).

²⁸ *See, e.g.*, 2015 Special 301 Report at 55.

²⁹ Australian Attorney-General’s Department, Consultation Paper: Revising the cope of the Copyright Safe Harbour Scheme (2011), <https://www.ag.gov.au/Consultations/Documents/Revising+the+Scope+of+the+Copyright+Safe+Harbour+Scheme.pdf>.

³⁰ The consultation (which continues until February 12) and related legislative documents are available online at <https://www.communications.gov.au/have-your-say/updating-australias-copyright-laws>.

³¹ 2015 Special 301 Report at 17.

Just as the 2015 Special 301 Report urged numerous countries to provide “additional protections” or to “bolster”, “enhance”, or “strengthen” existing protections against piracy, USTR should similarly urge countries to enhance protection for industries that benefit from rights related to IP limitations and exceptions. While on some occasions attention has been paid to protections such as intermediary liability safe harbors, the Special 301 Report should consistently highlight acts, practices, and policies that deny adequate and effective protection of limitations and exceptions such as those contemplated by Berne article 10(1) and Article 18.66 of the proposed Trans-Pacific Partnership (TPP), which are essential to the success of significant U.S. exporting industries.

As countries including Australia, South Africa, Nigeria, and Ukraine explore reforming their copyright laws, USTR should advocate for the international norms presently embodied in Berne article 10(1) with respect to the mandatory quotation right, as well as intermediary safe harbors embodied in 17 U.S.C. § 512, articles 12-15 of the EU E-Commerce Directive,³² article 18.82 of TPP, and numerous FTAs. When nations propose to adopt similar exceptions, or to implement safe harbors in keeping with international norms (such as Australia and Hong Kong may be considering), USTR should affirmatively encourage these efforts to harmonize to U.S. standards. By contrast, when nations propose legislation such as a Ukrainian draft law³³ which CCIA understands to (a) require site-blocking of entire hosting services and Internet service providers, (b) impose obligations to affirmatively monitor users’ behavior, and (c) compel disclosure of personal information about users alleged to have infringed, and (d) require content removal within 24 hours,³⁴ USTR should object, just as it would if Ukraine proposed to repeal Berne-mandated authors’ rights. Such enforcement measures exclude basic protections embodied in international norms, such as the prohibition against an affirmative obligation to monitor content.

³² See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000, arts. 12-15.

³³ Про внесення змін до деяких законодавчих актів України щодо захисту авторського права і суміжних прав у мережі Інтернет [On amendments to some legislative acts of Ukraine on protection of copyright and related rights on the Internet] 2015, No. 3353 (Ukr.), http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=56869.

³⁴ Tetyana Lokot, *New Ukrainian Draft Bill Seeks Extrajudicial Blocking for Websites Violating Copyright*, Feb. 1, 2016, ADVOK, <https://advok.globalvoices.org/2016/02/01/new-ukrainian-draft-bill-seeks-extrajudicial-blocking-for-websites-violating-copyright/>

IV. Conclusion

Digital services represent a growing component of U.S. exports. In order to maintain international market access for U.S. online services doing business abroad, the U.S. Trade Representative must compel trading partners to maintain their IP-related commitments. For these reasons, USTR's Special 301 Report should make clear that the Berne Convention's quotation exception and the safe harbor provisions required by the Intellectual Property chapter of U.S. free trade agreements are mandatory commitments that the U.S. Government intends to enforce.

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February 5, 2016