

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

In re

2017 Special 301 Review: Identification
of Countries Under Section 182 of the
Trade Act of 1974; Request for Public
Comment and Notice of Public Hearing

Docket No. USTR-2016-0026

**POST-HEARING WRITTEN COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

This post-hearing submission supplements the oral presentation by the Computer & Communications Industry Association (CCIA)¹ at the March 8 Special 301 hearing, as well as written comments supplied in response to the U.S. Trade Representative's December Federal Register notice. 81 Fed. Reg. 95,722 (Dec. 28, 2016).

I. Relevance of Balanced IP and Intermediary Protections to U.S. Exports

As CCIA and other witnesses noted in testimony, Internet companies and the producers of goods and services that rely upon the Internet frequently make decisions about where to launch, monetize, and expand services based on factors such as copyright limitations and exceptions for the digital environment, as well as intermediary liability protection. These decisions affect startups, creators, and other small and medium-sized enterprises that utilize the Internet to access markets abroad. Imbalanced IP regulations in trading partners' domestic law can therefore have a significant impact on U.S. exports. While some witnesses urged USTR to ignore concerns relating to IP imbalance on the basis that the Special 301 process should not

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.ccianet.org/members>.

“weaken” IP, an intellectual property system that does not serve the needs of all stakeholders is not “strong.” A stronger intellectual property system is one that reflects the needs of all participants in the content creation, discovery, and distribution supply chains.

II. Basis of Authority to Consider Ancillary Rights in Special 301 Process

A question presented in the March 8 hearing inquired whether ancillary or neighboring rights fell within the scope of USTR’s Special 301 authority. Ancillary rights fall squarely within the terms of the statute, and are well within the scope of problems that have been included in prior Special 301 Reports.

USTR has the authority to conduct the annual Special 301 Review under 19 U.S.C. § 2242. The phrase “adequate and effective protection of intellectual property rights” in § 2242(a)(1)(A) refers to protection of intellectual property *rights*; it is not limited to infringement and it has never been interpreted as being solely limited to the infringement of exclusive rights. Moreover, § 2242(a)(1)(B) empowers USTR to address barriers to “fair and equitable market access” which confront “United States persons that rely upon intellectual property protection.” The latter include CCIA members, and other U.S. industry stakeholders confronted with a so-called “snippet tax.” Even if the phrase “fair and equitable market access” in § 2242(a)(1)(B) were limited to U.S. persons engaged in the distribution of works protected by intellectual property rights, this still includes the U.S. exporters at whom snippet taxes are directed.

Identifying ancillary rights as a barrier in the context of the Special 301 Report would fall squarely within subject matter that previous Special 301 Reports have identified. For example, last year’s Special 301 Report properly identified localization and “indigenous innovation” issues as Special 301 barriers, listing examples of foreign countries discriminating against U.S.

companies in favor of domestic interests.² Ancillary rights legislation does precisely that. These laws create novel, *sui generis* exclusive rights from whole cloth for the purpose of assigning them to a domestic constituency that is empowered to make demands against an industry in which U.S. exporters excel.

In other cases, USTR has identified a limitation on the importation of foreign films as a barrier in the context of Special 301,³ even though the motivation for the limitation was not IP-related, as well as laws pertaining to geographical indications (GIs) that undercut market access for U.S. companies.⁴ USTR has also taken issue with national policies governing the pricing of goods that benefit from IP protection,⁵ even though price constraints have no direct bearing on IP infringement. In each of these cases, the policy at issue directly affects market access for a product provider that benefits from IP protection.

This is also the case for ancillary rights in quotations, as well as the French image indexing tax. In both cases, legislatures have departed from established international norms, with the objective of vesting a new entitlement in a domestic collecting entity to target U.S. exporters. Because these entitlements vest in publishers, “ancillary” to the existing rights of authors, they function to diminish authors’ interests – contrary to the goals of international copyright law – by creating new rights that must be cleared to license authors’ works. In Spain, the ancillary right is inalienable, and therefore cannot be plausibly argued to be a property right. As described more fully in previous CCIA submissions, these proposals violate international IP law, and are thus better viewed as levies on digital services being exported from the United States, which are being advanced under the guise of intellectual property rights.

² USTR, 2016 Special 301 Report, at 21-22.

³ *Id.* at 28.

⁴ *Id.* at 23-24, 28.

⁵ *Id.* at 23, 44.

III. Industry Concerns Regarding Ukrainian Intermediary Liability Rules

As CCIA and other witnesses noted in initial comments and testimony, the proposed Ukrainian intermediary liability law “On state support of cinematography” (3081-D),⁶ presents a troublesome framework, which contradicts the international norm found in the Digital Millennium Copyright Act, Title II,⁷ and U.S. Free Trade Agreements with roughly a dozen trading partners. This legislation would revise Article 52 of Ukrainian copyright law to impose 24- and 48-hour “shot clocks” for online intermediaries to act on demands to remove content. These deadlines may be feasible at times for some larger platforms who can devote entire departments to takedown compliance, but will effectively deny market access to smaller firms and startups, and are inconsistent with the DMCA’s flexible “expeditiousness” standard. The law also imposes an affirmative obligation to monitor content and engage in site-blocking, by revoking the safe harbor if the same content reappears on a site twice within three months. This is inconsistent with 17 U.S.C. § 512(m)(1), parallel FTA provisions, and article 15 of the 2000 EU E-Commerce Directive.⁸

IV. Industry Concerns Regarding Draft Chinese E-Commerce Law

During the March 8 public hearing the committee inquired about a proposed Chinese e-commerce law that was not addressed in CCIA’s initial submission. In response to this inquiry, industry has reported potential concerns with the text of a Chinese e-commerce law introduced in late December 2016.⁹ Article 53 of the draft “E-Commerce Law of the People’s Republic of China” addresses liability of online platforms. CCIA urges USTR to monitor the development of

⁶ Available at <http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=57258&pf35401=407422> (original Ukrainian version).

⁷ Codified at 17 U.S.C. § 512.

⁸ Global Voices, *New Ukrainian Draft Bill Seeks Extrajudicial Blocking for Websites*, Jan. 30, 2016, <https://globalvoices.org/2016/01/30/new-ukrainian-draft-bill-seeks-extrajudicial-blocking-for-websites-violating-copyright/>.

⁹ See Brad Herrold, *GC Agenda China: Jan 2017* (Practical Law Jan. 2017), <http://us.practicallaw.com/w-005-5479#a176075> (last accessed Mar. 13, 2017).

this proposal to ensure it maintains consistency with the international norm represented by Section 512(c) of the Digital Millennium Copyright Act. In particular, the knowledge standard for any intermediary liability rules should turn on actual knowledge of specific infringing material, *see* 17 U.S.C. § 512(c)(1)(A) (and parallel FTA provisions). A broader provision risks imposing liability beyond situations where an intermediary has actual knowledge, or knowledge of evidence from which infringing activity is plainly apparent. This would amount to an obligation to affirmatively monitor the behavior of users online, which would be inconsistent with Section 512(m)(1) and the EU E-Commerce Directive.

Respectfully submitted,

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