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

In re

Request for Comments and Notice of a Public Hearing Regarding the 2018 Special 301 Review	Docket No. USTR-2017-0024

POST-HEARING WRITTEN COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

This post-hearing submission supplements the oral testimony by CCIA[1] at the Special 301 hearing on March 8, 2018, as well as written comments supplied in response to the U.S. Trade Representative's December Federal Register notice, at 82 Fed. Reg. 61,363 (Dec. 27, 2017).

I. The European Commission's Snippet Tax Proposals Are a Violation of International Commitments.

At the hearing, CCIA was asked whether its members view the European Commission's proposal to create a new publishers' right as a violation of international commitments. CCIA appreciates the opportunity to provide an analysis in this post-hearing submission.

CCIA has long argued that snippet taxes and *sui generis* rights to domestic industries serve as a trade barrier, and are in fact a violation of international copyright commitments.[2] As noted in CCIA's written comments, by imposing a tax on quotations, these entitlements violate Berne Convention Article 10(1)'s mandate that "quotations from a work . . . lawfully made available to be public" shall be permissible.[3] As TRIPS incorporates this Berne mandate, compliance is not optional for WTO Members. Snippet taxes violate this by granting a separate exclusive right to control

[1] A list of CCIA members is available at https://www.ccianet.org/members.

[2] Comments of the Computer & Commc'ns Indus. Ass'n, In re Request for Public Comment for 2013 Special 301 Review, Dkt No. 2012-0026, filed Feb. 8, 2013, *available at* http://www.ccianet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf.

[3] Berne Convention for the Protection of Literary and Artistic Works, Sept. 28, 1979, 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). The impairment of the mandatory quotation right represents a TRIPS violation, because Berne Article 10 is incorporated into TRIPS Article 9. *See* TRIPS Agreement, art. 9 ("Members shall comply with Articles 1 through 21 of the Berne Convention (1971).") TRIPS compliance, in turn, is a WTO obligation.

quotation of published online content to domestic constituencies. This is the case in Spain, Germany, and France's new "image indexing" law, as explained in CCIA's written comments.[4]

This is also true for the European Commission's proposal. Article 11 of the EU's proposed Copyright Directive creates a new right for press publishers.[5] Despite a study from the European Parliament criticizing the proposed publishers' right,[6] the proposal continues to proceed. This new right would be detrimental to small press publishers, to Internet users, and more generally to the free flow of information.

A compromise is currently being discussed among EU Member States' permanent representatives. One compromise creates a relatively more reasonable solution, replacing the new right in the proposed Directive with a "presumption of entitlement to license and enforce the rights in their press publications." The legal presumption does raise some questions, but CCIA does not have a position on whether it is inconsistent with international law.[7]

The other compromise goes further than what is proposed in Article 11 of the draft Copyright Directive towards an explicit neighboring right for extracts of press publications. This compromise option would provide "that the uses of extracts of press publications should be subject to the

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[4] Comments of the Computer & Commc'ns Indus. Ass'n, In re Request for Public Comment for 2018 Special 301 Review, Dkt No. 2017-0024, filed Feb. 8, 2018, *available at* http://www.ccianet.org/wp-content/uploads/2018/02/CCIA_2018-Special_301_Review_Comments.pdf at 5-8 [hereinafter "CCIA 2018 301 Comments"]. A more extensive discussion of incompatibility with Berne may be found in *Understanding "Ancillary Copyright" in the Global Intellectual Property Environment* (CCIA 2015), *available at* http://www.ccianet.org/wp-content/uploads/2015/02/CCIA-Understanding-Ancillary-Copyright.pdf at 5-6.

[5] Proposal for a Directive of the European Parliament and the of the Council on Copyright in the Digital Single Market, COM/2016/0593, Art. 11, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0593.

[6] L. Bently, *Strengthening the Position of Press Publishers and Authors and Performs in the Copyright Directive*, Legal Affairs Committee of the European Parliament (2017), *available at* http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf (expressing doubts that "proposed right will do much to secure a sustainable press" and that the "implications of article 11 for the re-use of snippets are […] extremely serious", that there is "no concrete need to extend" this provision to cover print as well as digital uses, cautioning the EU Parliament strongly against this extension, and stating that extending the scope of this provision to cover academic journals would strongly undermine open access policies). *See also* Draft Opinion, Committee on the Internet Market and Consumer Protection (2017), *available at* http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-599.682&format=PDF&language=EN&secondRef=01 ("The Rapporteur believes that the introduction of a press publishers right under Article 11 lacks sufficient justification.").

[7] *See* Maud Sacquet, *The EU Copyright Reform: Will the EU Parliament Fix the EU Commission's Disastrous Proposal?*, THE DISRUPTIVE COMPETITION PROJECT (Mar. 29, 2017), http://www.project-disco.org/intellectual-property/032917-eu-copyright-reform-will-eu-parliament-fix-eu-commissions-disastrous-proposal/#.WqLZfxPwZTa ("[The presumption proposal] needs to be looked at carefully, as it does not seem as if it would solve all issues raised by the 'publisher's right'. What impact, for instance, would this legal presumption have on the open access? What about journalists granting non-exclusive licenses for one article to two different publishers?").

authorization of the press publisher".[8] This option would be a clear violation of international commitments as it restricts the mandatory quotation right for online publications, just as is the case with the Spanish and German legislation. CCIA continues to follow the developments and fears that the EU may be inclined to ignore the evidence provided by their own committees and pursue this option.

II. There Is an Urgent Need to Address Australia's Non-Compliance with the U.S.-Australia Free Trade Agreement.

At the hearing, CCIA was asked about the urgency of Australia's noncompliance with the U.S.-Australia Free Trade Agreement ("AUSFTA"). CCIA has repeatedly cited Australia's non-compliance with the AUSFTA commitment to provide intermediary liability protections for service providers in its domestic copyright laws.[9] Australia remains non-compliant, and the length of non-compliance should increase, rather than diminish, the urgency of the problem, lest other trading partners conclude that some commitments to the United States may be disregarded with impunity. Moreover, under current law, U.S. exporters of online services still face legal risk due to the statutory basis for secondary liability[10] in Australia without any protections for online intermediaries for third party content.[11]

However, the subject is particularly timely in that there is proposed legislation to bring Australian copyright law into compliance with the FTA. In December of 2017, legislation was introduced in the Australian Senate to amend the Copyright Act's provisions on safe harbors. The bill would expand the intermediary protections to some service providers including organizations assisting persons with a disability, public libraries, archives, educational institutions and key cultural institutions — effectively acknowledging that the scope of the current safe harbor is too narrow.[12]

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[8] Discussion Paper on Article 11 and Article 13, Council of the European Union, Doc. No. 5902/18, Feb. 6, 2018, *available at* http://data.consilium.europa.eu/doc/document/ST-5902-2018-INIT/en/pdf.

[9] CCIA 2018 301 Comments, *supra* note 4; Comments of the Computer & Commc'ns Indus Ass'n, In re Request for Public Comments to Compile the National Trade Estimate Report on Foreign Trade Barriers, Dkt. No. 2017-0013, *available at* http://www.ccianet.org/wp-content/uploads/2017/10/CCIA-Comments-for-2018-NTE-1.pdf.

[10] Australian Copyright Act, Section 36(1).

[11] Cooper v. Universal Music Australia Pty Ltd (2006) 156 FCR 380 (finding a website that providing links to infringing content was found liable for "authorizing" infringement, as was the firm that hosted the website on its servers); Pokémon Company International v. Redbubble Ltd (2017) FCA 1541 (finding that defendant, an online marketplace, had engaged in "authorization" infringement when third parties uploaded Pokémon works to the website, because defendant had the ability to prevent the infringement).

[12] Draft Copyright Amendment (Service Providers) Bill 2017, http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s1115_first-senate/toc_pdf/1728220.pdf;fileType=application%2Fpdf. Further, Australian authorities have acknowledged this implementation flaw and are engaged in a copyright modernization process. *See* Australian Attorney-General's

The bill pointedly leaves out commercial service providers including search engines and commercial content distribution services, however, thereby failing to meet AUSFTA commitments.[13] The failure to meet these commitments disadvantages U.S. digital services in Australia.

Whereas raising AUSFTA non-compliance would have been less likely to achieve productive results in prior years, legislative action on this very subject is now possible. Some commenters at the 301 hearing framed calls for Australia to meet these long-standing commitments as an "expansion of safe harbor" protections and claimed that such proposals threaten the creative community. Calling on Australia to meet commitments made over a decade ago in Article 17.11.29 of AUSFTA, symmetrical with U.S. law dating from 1998, is neither new nor an "expansion." Rather, doing so would ensure that Australia adopt the long-recognized U.S. approach of the DMCA, which the U.S. now regularly requires of its trading partners. Commenters' arguments about the dangers of intermediary protections also fail to recognize the record of success in markets that implement robust protections for intermediaries. This is why creators, artists, and the startup community in Australia have advocated for intermediary protections consistent with those committed to by Australia in AUSFTA.[14]

III. The U.S. Model Provides the Adequate Balance in Enforcement and Should Serve as the International Model.

At the hearing, CCIA was asked to cite models that are providing effective enforcement for protection of intellectual property rights and striking the correct balance. CCIA responded that the United States is a great model and takes this opportunity to further expand on why the U.S. framework has been a model for success, enabling innovation and creativity online.

The combination of strong enforcement and robust limitations and exceptions for new technology, including the DMCA safe harbors, strikes the right balance of providing economic incentives for creative industries while encouraging technological innovation. The compromise at the heart of the DMCA imposes upon service providers the costs of responding to large volumes of complaints, in exchange for liability limitations. It guarantees to rightsholders rapid, *ex parte* extrajudicial relief from specific acts of alleged infringement upon affirmatively reporting those acts. Congress enacted this regulatory regime that mutually burdens and benefits rightsholders and service

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Department, Consultation Paper: Revising the Scope of the Copyright Safe Harbour Scheme (2011), https://www.ag.gov.au/Consultations/Documents/Revising+the+Scope+of+the+Copyright+Safe+Harbour+Scheme.pdf; Australian Government Productivity Commission, Intellectual Property Arrangements Recommendations (Sept. 2016), http://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property-overview.pdf.

[13] U.S.-Austl. Free Trade Agreement, May 18, 2004, 43 I.L.M. 1248, Article 17.11.29(b)(i)(A)-(D).

[14] Expand Safe Harbours Today, http://expandsafeharbours.today/resources (last visited Mar. 14, 2018).

providers to provide certainty and encourage "the necessary investment in the expansion" of the Internet.[15]

Both creators and the technology community have reaped the benefits of the U.S. model. Research shows that the U.S. intermediary liability framework has enabled the production of music, movies, books, and video games which are exported all over the world.[16] Further, reports show the cost of limiting such protections in the United States.[17] Similar frameworks have been exported around the world. When countries depart from the international norms set by the United States for intermediary protections, USTR should be quick to identify when these departures are done in a protectionist manner.

IV. Additional Clarifications.

CCIA's written comments did not recommend placing countries identified on particular watch lists. The comments identify areas of concern for the Internet industry and encourage USTR to highlight these issues in the 2018 Special 301 Report. Previous reports have identified areas of concern in certain key markets, without placing a country on a watch list.

Respectfully submitted,

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[15] S. Rep. No. 105-190, at 8 (1998).

[16] CCIA, *The Sky is Rising* (2014), https://www.ccianet.org/wp-content/uploads/2014/10/Sky-Is-Rising-2014.pdf.

[17] Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections* (2017), *available at* https://cdn1.internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf ("There are many more Internet intermediaries (other than search and cloud services), and a weakening of safe harbor protections would affect most of them. Based on our findings, we estimate that the decline in the U.S. Internet sector would eliminate over 425,000 jobs. The U.S. gross domestic product would decrease by $44 billion annually.").