

*Before the*  
United States Trade Representative  
Washington, DC

*In re*

2013 Special 301 Review: Identification  
of Countries Under Section 182 of the  
Trade Act of 1974

Docket No. USTR-2012-0022

**COMMENTS OF  
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the request for comments issued by the United States Trade Representative (USTR) and published in the *Federal Register* at 77 Fed. Reg. 77,178 (Dec. 31, 2012), the Computer & Communications Industry Association (CCIA) submits the following comments regarding pending legislation in Germany that would deny market access, deny adequate and effective protection of intellectual property rights, and violate commitments that facilitate Internet commerce made in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

**I. Introduction**

CCIA is a nonprofit membership organization for a wide range of companies in the computer, Internet, information technology, and telecommunications industries. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition.

These comments address a troubling new legislative proposal in Germany that would violate long-established rights of Internet services to make use of information online. The legislation would create a new *Leistungsschutzrecht* for press publishers, such as newspapers and magazines. Contrary to Article 10(1) of the Berne Convention, this proposed legislation would prohibit Internet platforms from displaying snippets of news stories without obtaining the publisher's permission and paying a license fee for these quotations. While it is as of yet

unclear, we expect that the new right will be administered by a collecting society,<sup>1</sup> with newspapers that wish to exercise the new right being required to join. If this comes to pass, no search engine or affected social media platform will be able to directly negotiate with any publisher; they would instead be forced to enter into a blanket, compulsory license, or be penalized as an infringer of IP rights. Thus, the proposed legislation is simply a government-mandated compulsory license, transferring money from one industry to another.

As such, it would constitute a costly new market access barrier. Some commentators have even speculated that the legislation might force news search services and affected social media out of the German market, by not returning results for German IP addresses.<sup>2</sup> At the same time, this proposal would have obvious debilitating effects on German-based Internet platforms.

The resulting commercial harm illustrates a principle that CCIA has discussed in previous Special 301 comments: the U.S. Internet economy depends on a balanced copyright regime combining strong protection and enforcement with robust limitations and exceptions.<sup>3</sup> For instance, it is only by virtue of limitations and exceptions in U.S. copyright law that search engines are able to generate and present meaningful online search results in response to user queries: without limitations and exceptions, a search engine could not index material displayed on the World Wide Web and thereby display search results. The economic significance of limitations and exceptions in the U.S. economy cannot be understated. Industries that rely on the various limitations and exceptions in the Copyright Act add approximately \$2.4 trillion to the U.S. economy, approximately 17 percent of total U.S. current dollar GDP – roughly one-sixth of the economy.<sup>4</sup> Those industries participating in this fair use economy employ 17 million people and generate a payroll that averaged \$1.2 trillion in 2008-2009. More significant to the trade context, exports of goods and services related to fair use industries increased by 64% between

---

<sup>1</sup> In the ongoing legislative process, proposals have been made to require publishers to have their rights collectively administered by a third party entity. (Consistent with this, we note that the current text of the bill would permit the transfer of the new *Leistungsschutzrecht*.) A third party entity of this nature could easily be administered in a manner that would function as a *de facto* non-tariff trade barrier.

<sup>2</sup> Gerritt Wiesmann, “Google warns on German copyright bill,” *Financial Times*, Nov. 4, 2012.

<sup>3</sup> See Comments of Computer & Communications Industry Association, Dkt. No. USTR-2010-003, filed Feb. 16, 2010, available at <http://www.cciainet.org/CCIA/files/ccLibraryFiles/Filename/000000000321/CCIA-2010-Spec301-cmts.pdf>.

<sup>4</sup> See Thomas Rogers & Andrew Szamoszegi, *Fair Use in the U.S. Economy: The Economic Contribution of Industries Relying Upon Fair Use* (CCIA 2011), at 6-7.

2002 and 2009, from \$179 billion to \$266 billion. In fact, exports of trade-related services, including Internet or online services, were the *fastest growing* segment of exports in the previous decade, increasing nearly ten-fold from \$578 million in 2002 to more than \$5 billion over 2008 and 2009.<sup>5</sup>

The economic and legal significance of these important principles has long been noted. In fact, when appearing before USTR in 2010, CCIA noted the risk of the issue before us today, arguing then that 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.”<sup>6</sup> This prediction now verges on manifesting, and must be addressed in this proceeding.

This Administration itself has recognized the importance of promoting balanced copyright abroad, stating in its 2010 Joint Strategic Plan on Intellectual Property Enforcement that U.S. trade enforcement efforts “will be conducted in a manner consistent with the balance found in U.S. law.”<sup>7</sup> More recently, the U.S. Trade Representative also acknowledged the importance of such principles by introducing a new limitations and exceptions provision at the San Diego round of TPP talks, which would “obligate Parties to seek to achieve an appropriate balance in their copyright systems in providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research.”<sup>8</sup>

In this case, Germany threatens to upend this delicate balance by granting German publishers (or their collecting society) the power to reap a windfall at the expense of Internet businesses – and in doing so, violating long-standing international commitments. From a legal

---

<sup>5</sup> *Id.*

<sup>6</sup> CCIA Comments, *supra* note 3, at 5.

<sup>7</sup> Executive Office of the President of the United States, *2010 Joint Strategic Plan on Intellectual Property Enforcement*, at 15. *See also* Statement of U.S. Delegation, WIPO Standing Committee on Copyright and Related Rights, 19th Sess., Dec. 14-18, 2009, *available at* [http://www.uspto.gov/ip/global/copyrights/wipo\\_sccr\\_19session.pdf](http://www.uspto.gov/ip/global/copyrights/wipo_sccr_19session.pdf) (“[t]he United States is committed to both better exceptions in copyright law and better enforcement of copyright law”).

<sup>8</sup> USTR Website, “USTR Introduces New Copyright Exceptions and Limitations Provision at San Diego TPP Talks”, July 3, 2012, *available at* <http://www.ustr.gov/about-us/press-office/blog/2012/july/ustr-introduces-new-copy67right-exceptions-limitations-provision>; *see also* Congressional Research Service, *The Trans-Pacific Partnership Negotiations and Issues for Congress*, at 32 (Jan. 24, 2013) (noting inclusion of obligation in negotiation proposal).

point of view, the German law is particularly troubling because it signals a willingness to depart from over a century of domestic and international legal traditions in order to tax Internet businesses.<sup>9</sup>

Since its inception in 1886, the Berne Convention has protected the right to quote from newspaper articles against newspaper copyright holders.<sup>10</sup> Ironically, as discussed below, Germany itself has been at the forefront of efforts to protect this right – that is, until quite recently, when it became more attractive for German newspapers to tax Internet platforms than to adapt to the digital marketplace. Thanks in part to Germany’s past efforts, Article 10(1) of the Berne Convention – which is incorporated into WTO law<sup>11</sup> – protects the right to quote newspaper articles, and prohibits the “snippet subsidy” now proposed by Germany itself.

Germany’s legislation would violate its TRIPS obligations if enacted. CCIA urges USTR to use all of the tools at its disposal, including the Special 301 process, to definitively address this violation. Germany should continue to respect the balance of rights and obligations enshrined in international IP law, and USTR can play an important role in ensuring that it does so.

## II. Germany’s Draft Law

Under current German law, as well as the law of most other countries (including the United States) and the Berne Convention, online search engines and social media platforms have the right to quote short excerpts from the websites that appear in search results, including when such websites belong to newspapers, periodicals, and other press publishers. However, in July 2012, Germany’s Federal Ministry of Justice (“*Bundesministerium der Justiz*”) issued a draft proposal for legislation that would upset this status quo, establishing a new exclusive right for

---

<sup>9</sup> While some proponents intend this legislation to target U.S. industry, it would also adversely affect German start-ups and other, domestic Internet platforms.

<sup>10</sup> See 1886 Convention, art. 7 (reprinted in 3 William F. Patry, *Copyright Law & Practice* Appx. F, at 1947 (1994 ed.)). The right was originally far more expansive, including the right to reproduce entire articles.

<sup>11</sup> See TRIPS Agreement, art. 9.

press publishers.<sup>12</sup> It is now reportedly under consideration by the German Bundestag, and could quickly pass by early spring.<sup>13</sup> Time is, therefore, of the essence.

If the legislation is enacted, online search engines would need to obtain publishers' permission to quote material that everyone else – including both commercial and non-commercial entities – may quote without such permission. The bill appears directly targeted at U.S. search engines and social media (although it will also have an adverse effect on German and other European Internet platforms as well). The draft law states:

The provision of public access to press publications or parts thereof shall be permissible to the extent that this access is not provided by commercial operators of search engines or commercial providers of services that process this content in a similar way.<sup>14</sup>

The legislation's official background explanation clarifies that this new restriction would not apply to “bloggers, other commercial businesses, associations, law firms or private and unpaid users.”<sup>15</sup> Thus, for example, a German law firm or association would be able to post a compilation of links to news websites on a particular topic, with accompanying snippets from each of the target websites, without obtaining permission from the relevant rights holders; however, a search engine would not. Such abuses are part of what the WTO law was designed to prevent – and not surprisingly, therefore, they are directly prohibited by TRIPS (as discussed in Section IV below).

---

<sup>12</sup> Bundesministerium der Justiz, *Entwurf eines Siebenten Gesetzes zur Änderung des Urheberrechtsgesetzes* (July 7, 2012) (“German Draft Legislation”), art. 87g(4). Publishers who do not want news content indexed or otherwise reproduced can easily prevent that today by complying with the established robots.txt exclusion protocol.

<sup>13</sup> Wiesmann, *supra* note 2. The draft legislation is the second such proposal issued by the German Federal Ministry of Justice; the first was circulated in June 2012. This proposal was the subject of a hearing at the end of January 2013.

<sup>14</sup> German Draft Legislation, art. 87g(4). With regard to “commercial providers of services that process this content in a similar way[.]”, the draft legislation’s official explanation states that the new “protection [for press publishers] . . . also applies to services which search specific selected areas rather than the entire Internet, regardless of their technical specifics, i.e. also so-called news aggregators, insofar as these services generate their hits and present their results in the same way as a search engine.” German Draft Legislation, Section A.II (translated).

<sup>15</sup> German Draft Legislation, Section B, “Solution” (translated).

### III. The Proposed German Legislation Would Impose a Market Access Barrier on Service Providers

Although Germany's draft legislation does not facially discriminate against businesses of any particular country, its purpose is to put certain Internet services at a disadvantage by making them, but not other, German commercial entities subject to government-ordered payments. Because U.S.-based providers account for an estimated 98 percent of general-purpose search engine page views in Germany,<sup>16</sup> it is apparent that the legislation is aimed at U.S. businesses. In the process, however, Germany would also hamstring its own start-ups and Internet platforms.

By denying search engines and social media the established right to reproduce snippets from the websites of newspapers and periodicals without permission, the draft legislation would constitute a market access barrier to online services that operate in the German market. The Special 301 Report should acknowledge this fact by highlighting Germany as a country that is bent on denying fair and equitable market access to U.S. persons who rely on IP protection.<sup>17</sup>

Additionally, the legislation would also impede market access for the many exporters of goods and services that rely on search engines as a platform to connect with customers or otherwise do business in Germany. According to a July 2011 report by the consulting firm McKinsey & Company, search engines contribute \$242 billion of value to the U.S. economy, 96 percent of which accrues to parties other than the search industry.<sup>18</sup> Partly for this reason, McKinsey estimated that search services contribute 1.2 percent to U.S. GDP.<sup>19</sup> The draft German legislation jeopardizes these tremendous follow-on economic benefits.

The legislation is also likely to prove counterproductive to German press publishers themselves. Online search engines have proven to be a boon to traditional media, constituting one of a few bright spots in a struggling industry. As a 2010 OECD report on *The Evolution of News and the Internet* states:

---

<sup>16</sup> StatCounter Global Stats customized search, available at <[http://gs.statcounter.com/#search\\_engine-DE-monthly-201202-201301-bar](http://gs.statcounter.com/#search_engine-DE-monthly-201202-201301-bar)> (displaying market share information for February 2012 to January 2013).

<sup>17</sup> See 19 U.S.C. § 2242(a).

<sup>18</sup> McKinsey & Company, *The impact of technologies: Search* (July 2011), at 7, available at [http://www.mckinsey.com/~media/mckinsey/dotcom/client\\_service/High%20Tech/PDFs/Impact\\_of\\_Internet\\_technologies\\_search\\_final2.ashx](http://www.mckinsey.com/~media/mckinsey/dotcom/client_service/High%20Tech/PDFs/Impact_of_Internet_technologies_search_final2.ashx)

<sup>19</sup> *Id.* at 6.

The Internet is now a critical source of information and news. “Reading news on line” is a favourite and increasingly important Internet activity . . . . In terms of frequency of Internet activity it scores just below the most popular Internet activities: e-mailing and searching information about goods and services. In some OECD countries, more than half of the population is using the Internet to read newspapers on line (up to 77% in Korea) but at the minimum 20% of the population.<sup>20</sup>

Search engines play a major role in facilitating this online traffic to newspapers’ and periodicals’ websites. Google alone accounts for more than 4 billion clicks each month.<sup>21</sup> German publishers in particular reportedly receive at least 70-80 percent of revenue from advertisements displayed on their websites through search engines.<sup>22</sup> By impeding market access for search engines and other exporters of goods and services, the German legislation’s reallocation of IP rights would be a “lose-lose” proposition for both U.S. and German businesses.

In addition to “denying market access” within the meaning of Special 301, the German legislation is also in tension with Germany’s and the EU’s commitments under 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>23</sup> Germany’s legislation may constitute a *de facto* violation of its obligations under GATS Articles XVI (market access) and XVII (national treatment).

#### **IV. The German Legislation Is TRIPS-Inconsistent**

Germany’s legislation, if enacted, would also violate Germany’s existing obligations under the Berne Convention and the TRIPS Agreement.<sup>24</sup> These treaties contain express rights to quote newspaper articles and periodicals. Germany’s proposed law would deprive U.S. online

---

<sup>20</sup> OECD, Working Party on the Information Economy, *The Evolution of News and the Internet* (June 11, 2010), DSTI/ICCP/IE(2009)14/Final (“OECD Report”), at 43.

<sup>21</sup> “Taxing times,” *Economist*, Nov. 10, 2012.

<sup>22</sup> Kevin J. O’Brien, “Google Fires a Rare Public Salvo Over Aggregators,” *N.Y. Times*, Nov. 28, 2012.

<sup>23</sup> See *Communication from the European Communities and its Member States*, WTO Doc. S/C/W/273, Oct. 9, 2006.

<sup>24</sup> See TRIPS Agreement, art. 9 (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.”).

search engines of this right, in violation of international law that Germany itself fought to establish.

**A. The Text of the Berne Convention and the TRIPS Agreement Prohibit Germany's Snippet Subsidy**

The TRIPS Agreement incorporates Articles 1 through 21 of the Berne Convention for the Protection of Literary and Artistic Works by reference.<sup>25</sup> The Convention has discretionary provisions (countries “may”) and mandatory provisions (countries “shall”).<sup>26</sup> Clearly, the Convention cannot be violated for failing to implement discretionary provisions, but equally clearly, it is violated when a Party fails to implement a mandatory provision. Article 10(1) is a mandatory provision, reading:

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>27</sup>

This provision confers a right to quote: “shall” here means must, not may. 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 – provided that such quoting is “compatible with fair practice”, and the extent of the quotation is not excessive. Berne also holds up “quotations from newspaper articles and periodicals in the form of press summaries” as an exemplary case of quotations that are necessarily compatible

---

<sup>25</sup> TRIPS Agreement, art. 9 (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.”); *see also* 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>26</sup> *Compare, e.g.*, Berne Convention for the Protection of Literary and Artistic Works, art. 10(1), as last revised July 24, 1971, amended Oct. 2, 1979, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 (hereinafter “Berne Convention”), art. 10(1) *with id.*, art. 6(1) (“Where any country outside the Union fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union, the latter country may restrict the protection given to the works of authors who are, at the date of the first publication thereof, nationals of the other country and are not habitually resident in one of the countries of the Union.”) (emphasis supplied).

<sup>27</sup> Berne Convention, art. 10(1) (emphasis supplied).

with fair practice.<sup>28</sup> And, as we shall see below, in the 1967 negotiations during the Stockholm Berne revision conference, Germany took the view that news snippets are precisely the sort of fair practices contemplated by Article 10(1).

Article 10(1) mandates that Germany and other WTO Members protect the right to quote snippets of newspaper articles, such as those generated by online search engines and social media. Berne’s specific textual reference to “quotations from newspaper articles and periodicals” confirms that such quotations are at the heart of Article 10(1)’s coverage.<sup>29</sup> Germany’s proposed legislation would violate this requirement, however, by creating an exclusive right to prevent such quotation. The right to be granted by the legislation is “*zu gewerblichen Zwecken öffentlich zugänglich zu machen*” (“to make available to the public for commercial purposes”). This right conflicts with Article 10(1)’s existing protection for search engines, social media, and others to make quotations: Article 10(1) itself refers to quotations from a work that has already been “made available to the public.” The Convention could not be more clear on this point: once a work has been made available to the public (and in particular once a newspaper article has been made available to the public), the owner’s rights in the work cannot extend as far as quotations of that work. The Convention establishes a limit, yet the German law – by its express terms – would overstep this limit and give rights in quotations of works made available to the public.<sup>30</sup>

In addition, beyond the textual reference to “quotations from newspaper articles and periodicals in the form of press summaries”, Article 10(1) includes a broader requirement for Parties to protect the right to make quotations from a work that has been made available to the

---

<sup>28</sup> See *id.*, art. 10(1); *accord* Berne Convention, art. 2(8).

<sup>29</sup> This interpretation is reinforced by the textual reference to “press summaries”. See Berne Convention, art. 10(1). The term “press summaries” refers specifically to what in the authoritative French text is called a “*revue de presse*,” a collection of quotations from a range of newspapers and periodicals, which is precisely what search engines and social media do.

<sup>30</sup> Germany could not legitimately claim that the proposed right under its legislation covers material that is not Berne subject matter. The subject matter of the right – that is, the material the right is intended to protect – is “*Presseerzeugnis*,” namely “press materials.” Section 7 of the proposal defines these materials in ways that include original journalistic articles and images. Press materials as used in the German proposal are covered by Berne, and this is reinforced by the provision that ensures authors will share in any monies collected: “authors” are, of course, only authors of Berne works, not of facts. If the subject matter of the German proposal was truly outside of Berne, then the proposal would not reference “authors”, since authors’ works are necessarily Berne subject matter.

public, provided that they are “compatible with fair practice, and their extent does not exceed that justified by the purpose”. Online search results satisfy both criteria. This language is reminiscent of that contained in common law countries’ fair dealing and fair use laws. In particular, the first fair use factor emphasizes purposes, and the third fair use factor examines the amount copied – in this case mere snippets, an amount necessary to inform readers of an article’s relevance.<sup>31</sup> Including snippets of newspaper articles in search results together with links to the newspaper’s own website has been widely regarded as comporting with fair dealing and fair use.

## **B. The Negotiating History of the Berne Convention Confirms that Germany’s Snippet Subsidy is Prohibited Under International Law**

The right in Article 10(1) has a long history in the Berne Convention, and represents a fundamental freedom that Parties have wished to ensure for their citizens and businesses. Ironically, Germany itself was historically at the forefront in fighting for a robust quotation right. According to the minutes of the second meeting for negotiations of the Berne Convention in 1884, the German representative, Counsellor Reichardt, proposed Question 6, which asked: “In line with what has been accepted for practically all literary conventions at present in force, would it not be appropriate to establish, for the whole Union, the reciprocal right... (c) To reproduce, in the original or in translation, articles excerpted from newspapers or periodical journals, with the exception of serialized novels and articles on science and art?”<sup>32</sup> The German proposal was eventually adopted in Article 7 of the first Berne Convention of 1886:

(1) Articles from newspapers or periodicals published in any of the countries of the Union may be reproduced in original or in translation in the other countries of the Union, unless the authors or publishers have expressly forbidden it. For periodicals it shall be sufficient if the prohibition is indicated in general terms at the beginning of each periodical.

(2) This prohibition cannot in any case apply to articles of political discussion, or to the reproduction of news of the day or miscellaneous facts.<sup>33</sup>

From its inception, the Berne Convention was actively quotation-friendly. The text of Article 7 remained essentially unchanged in subsequent conferences revising the Berne Convention at

---

<sup>31</sup> See 17 U.S.C. § 107.

<sup>32</sup> *The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1996*, at 91, (WIPO 1986).

<sup>33</sup> See 3 William F. Patry, *Copyright Law & Practice* Appx. F, at 1948 (1994 ed.).

Berlin (1908), Rome (1928), and Brussels (1948).<sup>34</sup> At the Stockholm Conference in 1967, the treaty drafters strengthened the quotation right even further. Whereas previous versions of the treaty protected only the right to quote from “newspapers and periodicals”, Article 10 of the 1967 revision stated:

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>35</sup>

In this text, quotations and press summaries are exemplars of a broader class of quotations that must be permitted.

Another indication of the treaty drafters’ staunch support for the quotation right was their rejection of a proposal to insert the word “short” before “quotation”, which was put forward by the French and Swiss delegations. Diplomats considered and then overwhelmingly rejected the proposal, reaffirming the experts’ recommendation that the quotation right should not be limited to “short” quotes. One such diplomat was a representative of West Germany, who 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>36</sup>

---

<sup>34</sup> At the Berlin conference in 1908, the text of Article 7(2) was revised as follows: “With the exception of serial novels and short stories, any newspaper article may be reproduced by another newspaper unless the reproduction thereof is expressly forbidden. Nevertheless, the source must be indicated: the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.” Article 7 later became Article 9(2). What became Article 10(1) was introduced in the 1948 Brussels conference. *Accord* art. 2(8) (withholding protection from news of the day or facts having the character of items of press information).

<sup>35</sup> World Intellectual Property Org., *Records of the Intellectual Property Conference of Stockholm*, (1967), vol. 1, at 115.

<sup>36</sup> World Intellectual Property Org., *Records of the Intellectual Property Conference of Stockholm*, (1967), vol. 3, at 860, ¶ 765, *et seq.*

Thus, according to West Germany in 1967, the length of permissible quotations should not be restricted, and international law should more closely resemble the Anglo-American tradition of fair dealing and fair use. The importance of this point is not necessarily that other countries should adopt fair use, but that the German government has in the past recognized the central importance of the Article 10(1) quotation right.

In fact, this was the same recommendation made by an international committee of government copyright experts, who explained that:

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>37</sup>

In sum, the drafters of Berne explicitly recognized the important right to quote newspaper articles and periodicals, as reflected in Article 10(1). The Berne provision reflects the same concern for a balanced approach to IP protection and enforcement that underpins Title 17, and which CCIA strongly supports.

By virtue of these provisions of the Berne Convention incorporated in TRIPS, Germany is obligated to permit precisely the types of quotations made by online services in presenting information results. Germany’s proposed law granting new rights for press publishers would fall afoul of this obligation.

## **V. Conclusion**

Germany’s proposed legislation would (1) deny market access to U.S. online services, including search providers and other social media, as well as other exporters of goods and services that rely on these platforms; (2) violate TRIPS; and (3) deny adequate and effective protection of IP rights. In addition, although Germany’s proposal may intend to protect the domestic press publishing industry, it would likely have the opposite effect.

To take no action here would signal that some “shalls” introduce real international obligations upon our trading partners, whereas other “shalls” can in fact be read as “mays,” and, moreover, that nations are at their liberty to choose which are real and which can be disregarded.

---

<sup>37</sup> World Intellectual Property Org., *Records of the Intellectual Property Conference of Stockholm*, (1967), vol. 1, at 116.

The consequence of this could not be more severe: it stands to undermine the very notion of a binding treaty commitment. CCIA urges USTR to raise the TRIPS and other concerns about the German legislation with the German and EU governments and to cite Germany in this year's Special 301 Report.

Respectfully submitted,

A handwritten signature in cursive script that reads "Matthew Schruers".

Matthew Schruers  
VP, Law & Policy  
Computer & Communications Industry Association  
900 Seventeenth Street NW, 11th Floor  
Washington, D.C. 20006  
(202) 783-0070

February 8, 2013