

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

**COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the request for comments published by the Office of the United States Trade Representative in the Federal Register at 81 Fed. Reg. 95,722 (Dec. 28, 2016), the Computer & Communications Industry Association (CCIA)¹ submits the following comments on the 2017 Special 301 Review. These comments renew certain items that CCIA has raised in previous Special 301 inquiries. Part II of these comments concerns European regulations implementing snippet taxes, sometimes called “ancillary copyright,” which deny market access and adequate and effective protection of rights guaranteed under international IP law. Part III addresses specific country concerns relating to copyright intermediary liability, including Australia and Colombia’s non-compliance with intermediary-related Free Trade Agreement obligations.

I. Overview

The Internet has become a central component of cross-border trade in goods and services. Balanced intellectual property law has helped to enable digital trade and the export of Internet-enabled products and services. Foreign jurisdictions, however, are prone to imposing onerous

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>.

IP-related regulations which are frequently aimed at U.S. Internet companies, including penalties for the conduct of unrelated third parties. These actions impede the ability of U.S. online services to be a platform for trade, and prevent U.S. Internet companies from expanding services abroad. Protectionist regulations not only harm Internet companies; they also deny Internet-enabled access to the global marketplace to small and medium-sized U.S. enterprises. Regulatory ambiguity in turn discourages the growth of domestic startups.² While U.S. Internet businesses have thrived domestically under carefully crafted legal frameworks, international asymmetries impede the export of U.S. services, and by extension the export of goods that depend upon those services.

II. Ancillary Copyright/Snippet Taxes

As CCIA has previously noted, non-TRIPS compliant ancillary copyright laws (sometimes referred to as “snippet taxes”) continue to impede the export of Internet services to Europe. As discussed below, Germany and Spain limit market access to U.S. services by vesting rights in the quotation of news content to domestic press publishers, independent of the author’s copyright. These snippet taxes are enacted to disadvantage primarily U.S.-based online services that index quotations or snippets of news content. The effect of these laws is to force U.S. search providers and other online services to pay simply to quote from publicly available news publications.

The imposition of a snippet tax conflicts with U.S. law and violates long-standing international law that prohibits nations from restricting quotation.³ These regulations not only

² Matthew Le Merle *et al.*, *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study*, Booz & Co. (2011), <http://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/54877560e4b0716e0e088c54/1418163552585/Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>.

³ See Raquel Xalabarder, *The Remunerated Statutory Limitation for News Aggregation and Search Engines*

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 entitlements violate Berne Convention Article 10(1)'s mandate that "quotations from a work... lawfully made available to the public" "shall be" permissible.⁵ Thus, restrictions on quotations from a lawfully available work may form the basis of a WTO dispute. Objections to TRIPS violations in the Special 301 report are nothing new; USTR has repeatedly watchlisted China for failure to properly implement its TRIPS obligations.⁶

As CCIA's prior submissions have indicated, Germany and Spain continue to be the most problematic examples of snippet taxes. However, other EU member states have entertained the idea, and as discussed in Section II.D. below, an EU-wide measure is now being contemplated in Brussels by the European Parliament.⁷

A. *Germany*

The 2013 German law known as *Leistungsschutzrecht*⁸ targeted principally U.S.-based exporters of news aggregation services. Enacted with support from German news publishers,⁹

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). 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.

⁶ *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).

⁷ Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, COM(2016)593, articles 11, 18.2.

⁸ 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.).

⁹ 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*

the *Leistungsschutzrecht* broke with international copyright norms. Elsewhere in the world, online platforms have the right to quote web content, as is the case with offline content. This includes newspapers, periodicals, and other press items.¹⁰ The German law as enacted prohibits the making available to the public portions of “press products” in response to queries by search engine users. As a result, a search engine’s automated indexing of online content can result in legal liability, notwithstanding that such a process is necessary to the operation of modern search engines. The legal dispute about the interpretation of ancillary copyright has reached the German civil courts, likely prolonging legal uncertainty for years to come.

B. Spain

Spain’s 2014 snippet tax, enacted in Article 32.2 of its *ley de propiedad intelectual*,¹¹ created an unwaivable right for online content publishers, independent of the author’s copyright. Under the law, “electronic content aggregation service providers” are compelled to license “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”.¹² Thus, any quotation gives rise to an obligation of equitable compensation, and where quoted fragments were “significant,” an actual license is required.

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>.

¹⁰ See English translation of German Copyright Act, 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.”). “Smallest text excerpts” was subsequently construed to mean only seven words or less. 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/>.

¹¹ 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).

¹² *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.

Even Spain's own national competition enforcement authority has described this provision as a barrier to marketplace innovation,¹³ one which gives rise to potential anti-competitive practices by the collecting society levying the snippet tax.¹⁴ Unlike the somewhat narrower German law, the Spanish snippet tax could arguably be interpreted to cover virtually all online content, insofar as it extends to any content made for "purposes of informing, shaping public opinion or entertaining."

Before the legislation took effect on January 1, 2015, Google closed news.google.es.¹⁵ USTR has previously identified the loss of "valuable Internet traffic" as a cognizable injury for purposes of the Special 301 process.¹⁶

C. France

In the 2016 Special 301 process, CCIA flagged as a subject of concern a French bill pertaining to "Creation, Architecture and Heritage Sites". One provision of this legislation transfers rights in reproduction and communication to the public (similar to the 17 U.S.C. § 106(5) display right) of pictures that are automatically indexed by search and ranking services to a French collecting society.¹⁷ While not a snippet tax, this legislation reflects the same spirit as the German and Spanish snippet taxes insofar as it creates a regulatory structure intended to be

¹³ 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/>. Even a small social news site in Spain could be expected to pay many millions of euros a year in snippet taxes. See Manuel Ángel Méndez, *Nuevo intento de imponer el canon AEDE: piden a Menéame 2,5 millones de euros al año*, El Confidencial, Feb. 7, 2017, http://www.elconfidencial.com/tecnologia/2017-02-07/canon-aede-meneame-internet-facebook-agregadores_1327333/.

¹⁴ 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.

¹⁵ Google Support, *Google Noticias en España*, <https://support.google.com/news/answer/6140047#English> (last visited Feb. 3, 2017).

¹⁶ 2015 Special 301 Report at 16.

¹⁷ Law on freedom of creation, architecture, and heritage, Art. 30, n° 2016-925, 7th July 2016 (codified in French IP code at arts. L. 136-1 to L.136-4).

exploited against U.S. exporters — a “right to be indexed”. By vesting indexing “rights” in a domestic collecting society, the law clearly targets an industry that consistently largely of U.S. exporters. This provision empowers a quasi-governmental French organization to tax the routine indexing of images online. This law has already been formally notified to the European Commission and is expected to enter into force shortly. At that point, the relevant French collecting society can be expected to make demands from U.S. services.¹⁸

D. European Union

On September 14, the European Commission put forth a troubling copyright proposal, which is now under consideration in the European Parliament. Included among other items in a new proposed directive is a proposal for a Europe-wide snippet tax, framed as a “neighboring” right in news publications. This proposal would limit access to news content and hamstring search and social media functionality in an attempt to compel principally U.S.-based online services to subsidize EU publishers.

The EU’s proposal is more expansive than previous efforts in Germany and Spain, discussed above. Article 11 of the proposal empowers a new class of plaintiffs with a 20-year, retroactive entitlement to control reproduction and making available of “press publications,” independent of the journalist’s underlying rights. Unlike the German law, the new EU proposal lacks any exception for short snippets and is not limited only to search engines. Accordingly, it threatens to sweep in social networking and other services whose users rely on snippets when sharing content with friends. Retroactivity means that these problems would extend to news content dating from the prior century.

¹⁸ A similar French tax on video sharing platforms is currently undergoing notification review before the European Commission, but has not yet entered into force.

Policymakers interested in ensuring digital exporters' continued access to European markets should communicate concern and opposition to European officials about these problematic proposals.

III. Copyright Intermediary Liability

Foreign countries have frequently imposed substantial penalties on U.S. Internet companies for conduct of third parties. U.S. law, by contrast, aims to prevent such outcomes, which impede the ability of U.S. online services to export or provide other exports a platform for global trade.¹⁹ U.S. firms operating as online intermediaries face an increasingly hostile environment in a variety of international markets, including India, Kenya, Ukraine, and Vietnam. While some countries have adopted safe harbors from liability, others maintain outdated legal frameworks that could expose U.S. services to crippling liability, even when those services are in compliance with Section 512 of the Digital Millennium Copyright Act. As discussed further below, some European Union Member States' law is particularly problematic, and the European Union is now considering a proposal to eliminate EU-wide intermediary protections. Most concerning, however, are U.S. trading partners whose safe harbor laws (or lack thereof) are inconsistent with FTA implementation commitments to the United States, including Australia and Colombia.

A. European Union

Several recent European court decisions have imposed unreasonable intermediary liability on service providers. In the 2016 *GS Media* opinion, the European Union's highest court determined that hyperlinking could violate Europe's sweeping "communication to the

¹⁹ Matthew Le Merle *et al.*, *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study*, Booz & Co. (2011), <http://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/54877560e4b0716e0e088c54/1418163552585/Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>.

public” right²⁰ (a right not found in the corresponding section of the U.S. Copyright Act)²¹, while the 2015 European Court on Human Rights decision against Estonia-based news portal Delfi, imposing liability for comments posted under news articles on its site, is another example of a growing tendency to “shoot the messenger.”²² *Delfi* is difficult to reconcile with modern approaches to intermediary liability, such as 47 U.S.C. § 230 and Europe’s own E-Commerce Directive. Absent suitable protection for intermediaries from liability for third party content, many U.S. services may be unable to enter foreign markets due to liability risks.

In addition to these issues, the European Union’s ongoing consideration of directives on the Digital Single Market raises potential problems for intermediaries as well. While the objective of unifying the European market for digital content and services is laudable, certain proposals appear to be targeting U.S. services exporting to Europe and have little relation to achieving a single market.

In particular, a recently proposed European Commission Copyright Directive, released in September 2016, would disrupt settled copyright intermediary liability law by removing established protections for online platforms and creating blanket liability for user misconduct in an attempt to compel services to surveil users — all of which is inconsistent with both EU and U.S. law. This proposal would endorse the “shoot the messenger” approach, threatening U.S. digital exports by compelling affirmative filtering of all Internet content, including audiovisual works, images, and text, based on that content’s copyright status — an impossible task.

Further, the proposal requires online services that host user content to affirmatively implement content filtering technologies, empowering European rightsholders to dictate U.S.

²⁰ GS Media BV v Sanoma Media Netherlands BV (C-160/15).

²¹ 17 U.S.C. § 106.

²² Delfi AS v. Estonia, Eur. Ct. H.R. 64569/09 (2015).

services' technology in potentially inconsistent ways across Europe. This threatens to harm video hosting services like YouTube, social media providers like Twitter, blogging platforms like WordPress and Medium, file hosts like Dropbox and Google Drive, and photo hosts like Pinterest, among others. Each of these services host many millions of files on behalf of users and small businesses.

The proposal is doubly dangerous because it fails to specify what filtering measures an online service must implement. In short, a provider will never know when it has done 'enough,' short of litigating the question in every EU member state. Until the CJEU eventually addresses the question, affected services can expect inconsistent rulings and injunctions from lower courts in different countries.

The proposal also appears to compel online services to enter into contracts with an indeterminate set of copyright holders involving indeterminate subject matter. European Commission officials privately acknowledge this ambiguity, but concerns by the Commission's legal division were reportedly ignored in drafting. In fact, both European Commission and member state policymakers confirmed that political forces in the Commission steamrolled substantive concerns about the proposed Directive's language.

Finally, this proposal conflicts with the longstanding U.S. (and EU) copyright principle — memorialized in Section 512 of the Digital Millennium Copyright Act — that online services need not affirmatively police the extraordinary volume of communication and information that transits their networks. By effectively revoking long-established protections upon which U.S. services relied when entering European markets, the proposal would hold hostage U.S. companies' investments for the benefit of EU rightsholders.

These items are also discussed in greater detail in CCIA's October submission in

response to the 2016 NTE inquiry.²³

B. Australia

CCIA renews another concern raised in its 2016 Special 301 submission, regarding Australia's failure to fully implement obligations under the U.S.-Australia Free Trade Agreement.²⁴ That FTA contains an obligation to provide liability limitations for service providers, similar to 17 U.S.C. § 512. Requiring U.S. trading partners to implement similar intermediary safe harbors has been a central U.S. trade policy for well over a decade, a policy aimed at enabling the export of U.S. online services by preventing other countries from imposing crippling liability on these services.

However, Australia's implementation of this obligation is far narrower than what is required by the FTA. Australia's statute limits protection to what it refers to as "carriage" service providers, not service providers generally.²⁵ The consequence of this limitation is that intermediary protection is largely limited to Australia's domestic broadband providers. Online service providers engaged in the export of information services into the Australian market remain in a precarious legal situation. 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. USTR frequently watchlists

²³ Comments of CCIA, Oct. 27, 2016, Request for Comments National Trade Estimate Report on Foreign Trade Barriers (16-0007), <http://www.cciagnet.org/wp-content/uploads/2016/10/CCIA-Comments-for-2017-NTE.pdf>.

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

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

countries for failure to properly implement obligations.²⁶ In fact, USTR has previously watchlisted a country for this precise circumstance: failing to properly implement safe harbor-related obligations.²⁷ USTR has also objected to inadequate intermediary liability protections even in the absence of a specific FTA commitment. As recently as the 2016 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 that 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 law disadvantages startups and discourages competition and innovation. 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

C. Colombia

A proposed 2016 bill to implement the U.S.-Colombia FTA copyright chapter lacked

²⁶ See, e.g., 2016 Special 301 Report (watchlisting Chile for failing to implement FTA obligations regarding intellectual property); 2015 Special 301 Report (same); 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).

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., 2016 Special 301 Report at 47.

²⁹ Australian Attorney-General's 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>.

³⁰ The consultation and related legislative documents are available online at <https://www.communications.gov.au/have-your-say/updates-australias-copyright-laws> (last visited Feb. 3, 2017).

intermediary liability safe harbor provisions that the Colombia FTA requires.³¹ Without a safe harbor that meets the requirements of the FTA, intermediaries exporting services to Colombia remain exposed to potential civil liability for services and functionality that is lawful in the United States and elsewhere.

D. Ukraine

CCIA understands the Ukrainian copyright law “On State Support of Cinematography in Ukraine”, whose details are being negotiated between the Ukrainian President and Parliament, to (a) impose obligations to affirmatively monitor users’ behavior, (b) compel disclosure of personal information about users alleged to have infringed, and (c) require content removal within 24 hours. CCIA urges USTR to maintain a strong opposition to these provisions (including any obligation to divulge users’ personally identifiable information in a manner inconsistent with U.S. law), just as USTR would object if Ukraine proposed to repeal Berne-mandated authors’ rights. Such enforcement measures conflict with Section 512 of the Digital Millennium Copyright Act and exclude basic protections embodied in international copyright norms, such as the prohibition against an affirmative obligation to monitor content.

³¹ Proyecto de Ley Por La Cual Se Modifica La Ley 23 de 1982 y Se Adiciona La Legislación Nacional en Materia de Derecho de Autor y Derechos Conexos (2016).

IV. Conclusion

To maintain international market access for U.S. online services doing business abroad, USTR must compel trading partners to maintain their IP-related commitments. For these reasons, USTR's 2017 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.

Respectfully submitted,

Matt Schruers
Ali Sternburg
Computer & Communications Industry Association
655 15th Street NW, Suite 410
Washington, D.C. 20005
(202) 783-0070

February 9, 2017