

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

In re Request for Public Comments and
Notice of a Public Hearing Reading the 2020
Special 301 Review

Docket No. USTR-2019-0023

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

Pursuant to the request for comments published by the Office of the United States Trade Representative in the Federal Register at 84 Fed. Reg. 70,613 (Dec. 23, 2019), the Computer & Communications Industry Association (CCIA) submits the following post-hearing comments for the 2020 Special 301 Review.¹

I. France’s Implementation of the European Union Copyright Directive

As noted in CCIA’s written comments, European Union Member States have until June 2021 to implement the EU Copyright Directive into national law.² Countries are at varying stages of implementation. France and the Netherlands appear to have made the most progress, and a number of other Member States have opened consultations on key provisions including Article 15 (the press publishers’ right) and Article 17 (liability of online services and filtering obligations).

Improper implementation by Member States could have a substantial negative impact on U.S. Internet service exporters. It may disproportionately disadvantage smaller players and rightsholders in the marketplace, distorting online markets toward services capable of shouldering extreme regulatory burdens. In addition, inconsistent implementations will create legal uncertainty and compliance problems for services seeking to do business across the Single Market, harming online innovation. CCIA is also concerned that certain EU member states are implementing Article 15 in a manner inconsistent with best practices on copyright law.

CCIA takes this opportunity to expand upon its written submission to further detail concerns with France’s implementation of Article 15 and Article 17 of the EU Copyright Directive.

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

² 2019 J.O. (L130) 55, available at <https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=OJ:L:2019:130:FULL&from=EN>.

A. Article 15

With respect to Article 15, France’s motivations to seek payments from U.S. services under the name of copyright law warrant criticism from USTR. On July 23, 2019 the French National Assembly adopted legislation that transposes Article 15 of the EU Copyright Directive into French national law. The legislation was enacted on July 24, published on July 26 in the Official Journal, and took effect on October 26, 2019.³

French press publishers may now request payment from platforms when they display short previews or snippets of their content online. U.S. companies have made efforts to comply with this law. However, French officials, including the French competition authority, have indicated that companies must go further by complying with the “spirit of the law” rather than the text of the law.⁴

B. Article 17

With respect to Article 17, the proposed French legislation fails to consider mitigating provisions in the EU Copyright Directive, and could exacerbate harm to Internet services already disadvantaged under the new EU framework.

Article 17 of the EU Copyright Directive lays out requirements for online services to ensure the unavailability of copyrighted works on their platforms. While Article 17 avoids the word “filter”, practically speaking content-based filtering will be required if a service is to have any hope of achieving compliance. This upends longstanding global norms on intermediary liability. There is a reading of Article 17 that could conclude, absent obtaining a license from all relevant rightsholders of any possible piece of content that could be put online, that online services would be directly liable for infringement unless they did all of the following: (1) made best efforts to obtain a license, (2) made best efforts to “ensure the unavailability of specific works and other subject matter” for which the rightsholders have notified the online service of, and (3) “in any event” acted expeditiously to remove content once notified by rightsholders and made best efforts to prevent their future uploads. This effectively creates an EU-wide ‘notice-and-staydown’ obligation. The European Commission is expected to deliver guidance on the

³ Official text at: http://www.assemblee-nationale.fr/dyn/15/dossiers/droit_voisin_agences_editeurs_presse; https://www.senat.fr/espace_presse/actualites/201901/droit_voisin_au_profit_des_agences_de_presse_et_des_editeurs_de_presse.html.

⁴ On October 2, the French competition authority decided to open a preliminary investigation in relation to conduct aimed at complying with the French law.

practical application of Article 17, after a series of stakeholder discussions with industry and Internet services which are currently ongoing. However, some national legislatures are moving forward ahead of this guidance including France.

France is currently considering legislation, presented in December 2019, that will transpose a number of EU copyright-related Directives into national law including Article 17 of the EU Copyright Directive.⁵ The legislation, *Projet de loi relatif à la communication audiovisuelle et à la souveraineté culturelle à l'ère numérique*, is scheduled to be assessed by the National Assembly's culture committee in March and at the plenary session in April.

The proposed text does not appear to fully reflect the text of the EU Copyright Directive, omitting mention of protection of exceptions and limitations, the principle of proportionality, or that the actions required by the liability standard cannot amount to a duty to monitor. The proposed text does not include the prohibition on removal of safeguards that allow users to rely on exceptions granted in Article 17(7) of the Directive. Instead, there is only an obligation to inform users about relevant exceptions in terms and conditions.⁶ These failures to reflect even the limited safeguards will have a negative consequence on users.⁷

Across Member States, consistent interpretation of what can constitute the “best efforts” under Article 17 to remove copyrighted content is necessary in order to avoid fragmentation.⁸ France has indicated how it will interpret “best efforts” in enforcing this legislation. In January 2020, the French High Authority for the Dissemination of Works and the Protection of Rights on the Internet (HADOPI) published a report on content recognition tools (filters) in light of the implementation of the EU Copyright Directive.⁹ The Report outlines how blocking and removal procedures provided for in Article 17 will be based on the implementation of content recognition

⁵ *Projet de loi relatif à la communication audiovisuelle et à la souveraineté culturelle à l'ère numérique*, Dec. 5, 2019, available at http://www.assemblee-nationale.fr/dyn/15/textes/115b2488_projet-loi. Chapter IV of the legislation implements Article 17 of the EU Copyright Directive.

⁶ *Id.*

⁷ See generally <https://www.communia-association.org/2020/01/10/article-17-implementation-french-dutch-implementation-proposals-lack-key-user-rights-safeguards/>.

⁸ See Victoria De Posson, *What Should Be Considered as “Best Efforts” to Prevent the Availability of Copyright-Protected Material?*, DISRUPTIVE COMPETITION PROJECT (Feb. 10, 2020), <http://www.project-disco.org/european-union/021020-best-efforts-to-prevent-the-availability-of-copyright-protected-material/>.

⁹ French Ministry of Culture, *Mission Report: Towards more effectiveness of copyright law on online content sharing platforms: overview of content recognition tools and possible ways forward*, available at <https://www.culture.gouv.fr/content/download/265045/file/Mission%20Report%20Content%20ecognition%20Tools%20ENG%20V.pdf?inLanguage=fre-FR> (“the Report”).

tools, at least for audio and video content.¹⁰ The Report notes that “best efforts” should “be defined not on the basis of a theoretical approach, but on the basis of the existing state of the art, referring to the most efficient developments. [The Directive] does not prescribe any particular technology, but it makes the performance of existing technologies and the measures implemented by relevant platforms a crucial benchmark for defining the liability regime to be applied.” However, the Report continues, “[i]t is with this in mind that existing content recognition tools, and in particular fingerprint recognition algorithms for audio and video content deployed on certain platforms, appear to be an essential reference point in the implementation of Article 17.” French officials also previously indicated that filters would be required under implementing legislation.¹¹

II. Responding to Arguments Regarding the South Africa Copyright Amendment Bill

Participants in the Special 301 process discussed the pending South Africa Copyright Amendment Bill (CAB) and its introduction of fair use into South African copyright law.¹² As detailed further in comments to USTR in the ongoing Generalized System of Preferences (GSP) review process regarding South Africa, concerns regarding the CAB’s fair use provisions are unwarranted.¹³ The CAB is consistent with 17 U.S.C. § 107, and existing U.S. case law. It is in the interests of U.S. companies that countries adopt harmonized copyright regimes, which includes relevant limitations and exceptions such as fair use. USTR should not penalize countries for pursuing similar provisions by placing them on the Special 301 watchlist, or denying GSP benefits.

III. China E-Commerce Law

CCIA was asked to elaborate on concerns raised regarding China’s e-commerce law, passed in 2018, which took effect in January 2019. The law is broadly written, applying new regulations and requirements on all e-commerce activities in China defined as the “sale of goods

¹⁰ *Id.* at 3.1.1.

¹¹ Mike Masnick, *After Insisting That EU Copyright Directive Didn't Require Filters, France Immediately Starts Promoting Filters*, TECHDIRT (Mar. 28, 2019), <https://www.techdirt.com/articles/20190327/17141241885/after-insisting-that-eu-copyright-directive-didnt-requirefilters-france-immediately-starts-promoting-filters.shtml>.

¹² Comments of the International Intellectual Property Alliance, In re 2020 Special 301 Review (filed Feb. 6, 2020) <https://www.regulations.gov/document?D=USTR-2019-0023-0013> at 80-82.

¹³ See Comments of CCIA, In re GSP Notice Regarding a Hearing for Country Practice Review of South Africa, Docket No. USTR 2019-0020 (filed Feb. 28, 2020), *available at* <https://www.cciagnet.org/wp-content/uploads/2020/02/CCIA-USTR-2019-0020-Post-Hearing-Brief.pdf>.

or services through the internet or any other information network.”¹⁴ Requirements include the need to obtain a business license to operate, which could place a burden on small businesses.

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¹⁴ *A Game Changer? China Enacts First E-Commerce Law*, HOGAN LOVELLS (Sept. 21, 2018), <https://www.lexology.com/library/detail.aspx?g=f96bf736-db32-49fa-bec6-2e0a813ae03c>.