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 2021 Special 301 Review	Docket No. USTR-2020-0041

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 85 Fed. Reg. 81,263 (Dec. 15, 2020), the Computer & Communications Industry Association (CCIA) submits the following responses to questions posed by the Special 301 Interagency Committee. CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms.

1. Regarding the European Union's Copyright Directive, your submission "identifies Articles 15 and 17 as concerns and as they represent a departure from global IP norms and international commitments, and will have significant consequences for online services and users. These rules diverge sharply from U.S. law, and will place unreasonable and technically impractical obligations on a wide range of service providers, resulting in a loss of market access by U.S. firms."

a. In stating that these articles "represent a departure from global IP norms and international commitments," are you asserting that the Copyright Directive violates international treaties? If so, would you please explain what international commitments the Copyright Directive violates?

CCIA has long held the view that ancillary rights such as press publisher's rights and "link taxes" conflict with international commitments.[1] Article 15 of the Directive on Copyright in the Digital Single Market (hereinafter "the EU Directive"), which establishes a press publisher's right, conflicts with commitments under the Berne Convention regarding freedom of quotation. Under international copyright treaties, copyright protection does not extend to short

[1] *See* CCIA, *Understanding Ancillary Copyright* (2015), *available at* https://www.ccianet.org/wp-content/uploads/2015/02/CCIA-Understanding-Ancillary-Copyright.pdf; Comments of CCIA, In Re 2015 Special 301 Review, Dkt. No. USTR 2014-0025, filed Feb. 6, 2015, *available at* http://cdn.ccianet.org/wp-content/uploads/2015/02/CCIA-Special-301-Comments-2015.pdf; Matt Schruers, *Germany Looks to Prop Up News Publishers With Snippet Subsidy, But Is a Quotation Tax Legal?*, DISRUPTIVE COMPETITION PROJECT (Nov. 14, 2012), https://www.project-disco.org/intellectual-property/111412-germany-looks-to-prop-up-news-publishers-with-snippet-subsidy-but-is-a-quotation-tax-legal/ (analyzing the previous national attempts in Germany and Spain to create a link tax).

phrases or facts, and mandates that the ability to quote is not abridged. Article 10(1) of the Berne Convention provides that:

> it shall be permissible to make quotations from a work which already has 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.[2]

As TRIPS incorporates this Berne mandate, compliance with Article 10(1) is not optional for WTO Members; non-compliance is a TRIPS violation and should be addressed by USTR in its 2021 Special 301 Report.[3] Jurisdictions generally view displaying a short quotation or snippet to be permissible because it may be too short to qualify for copyright protection; it may also fall under an exception to copyright law like fair use or fair dealing.[4]

The exception for "very short extracts" under the text of the EU Directive does not meet the commitment to "quotations" and "press summaries". The European Union's obligation under Berne with respect to "quotations," "press summaries," "news of the day," and "items of press information" goes significantly further than this cramped exception. It is important to monitor Member State implementation to ensure that national frameworks depart from international commitments as little as possible.

b. Although the Copyright Directive provides the framework, Member States must transpose these requirements into their national laws. Are you concerned that Member States will not be able to transpose the Copyright Directive in a manner that does not depart from international norms and commitments?

CCIA is concerned with Member State implementation of the EU Directive in national legislation where the national law does not provide the same safeguards required in the Directive. EU Member States have until July 7, 2021 to implement the EU Directive and are at varying stages of legislation, although at least one Member State (Denmark) has announced they will conclude the implementation process after the July deadline.

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[2] Berne Convention for the Protection of Literary and Artistic Works, Art. 10(1) (as amended on Sept. 28, 1979) https://wipolex.wipo.int/en/text/283698#P144_26032. Berne Art. 10(1) must also be read consistently with Art. 2(8), which also constrains contracting parties' legislation on this topic.

[3] *See also* Jonathan Band, *Australian Link Code May Violate Berne Convention and Provoke Trade Litigation*, INFOJUSTICE (Feb. 8, 2021) (citing analysis from Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyrighted Works*, which concludes that the EU's press publisher's right has the effect of preventing, or charging for, quotations and thus violates Article 10(1).).

[4] CCIA, *The Ancillary Copyright for News Publishers: Why It's Unjustified and Harmful* (2016), *available at* https://www.ccianet.org/wp-content/uploads/2016/05/CCIA_AncillaryCopyright_Paper_A4-1.pdf.

With regards to Article 15, there is a risk that the implementation of the press publisher's right is inconsistent with or more expansive than what is established at the EU level. France is the first country which implemented Article 15. Industry experienced difficulties with complying under the French model, which involved aggressive actions by competition authorities that effectively led to forced negotiations with publishers. As CCIA noted in its original comments, some Member States have proposed drafts that contain far-reaching licensing schemes, which include mandatory collective licensing, unilateral extended collective licensing, or mandatory and unwaivable remuneration for publishers. European policymakers have been pressured[5] to go further than the press publisher's right in the negotiations on the Digital Services Act to impose an arbitration model for licensing in a way that could incite further trade conflicts. For example, a similar mandatory bargaining framework that is being finalized in Australia has raised additional trade concerns under Australia's commitments to the World Trade Organization and the U.S.-Australia Free Trade Agreement.[6] Before considering any new regulatory layer, CCIA would urge EU lawmakers to prioritize a balanced implementation of the new EU Directive.

With regards to Article 17, it is important that the obligations imposed on intermediary services at the national level are consistent with the EU Directive text and that service providers are able to take steps to discharge liability.[7] As CCIA noted in its original comments, CCIA believes that mitigation measures are necessary to make Article 17 workable. How the "best efforts" requirement in Article 17 is interpreted into national law may impose a higher compliance standard.[8] Member States should also include the requisite balancing provisions detailed in Article 17(7) that act as safeguards to lessen the negative impact that the new obligations may have on users.

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[5] Press Release, *Europe's Press Publishers & Microsoft Call for Australian-style Arbitration Mechanism in Europe* (Feb. 22, 2021), https://www.epceurope.eu/post/europe-s-press-publishers-microsoft-call-for-australian-style-arbitration-mechanism-in-europe.

[6] *See The Dangers of Australia's Discriminatory Bargaining Code*, DISRUPTIVE COMPETITION PROJECT (Feb. 19, 2021), https://www.project-disco.org/21st-century-trade/021921-the-dangers-of-australias-discriminatory-media-code/. *See also* Jonathan Band, *Australian Link Code May Violate Berne Convention and Provoke Trade Litigation*, INFOJUSTICE (Feb. 8, 2021), https://infojustice.org/archives/42925.

[7] For further context of CCIA's views on implementation of Article 17, *see* CCIA's submission to the European Commission's consultation on the guidelines on Article 17, *available at* https://www.ccianet.org/library-items/ccias-submission-to-the-eu-consultation-on-art-17-of-the-copyright-directive/.

[8] Victoria de Posson, *What Should Be Considered as "Best Efforts" to Prevent the Availability of Copyright-protected Material?*, DISRUPTIVE COMPETITION PROJECT (Feb. 10, 2020), https://www.project-disco.org/european-union/021020-best-efforts-to-prevent-the-availability-of-copyright-protected-material/.

2. Your submission states that "China has sought to block these U.S. cloud service exporters through discriminatory practices that force the transfer of intellectual property and critical know-how, reputable brand names, and operation over to Chinese authorities and companies in order to operate in the market." Has there been any improvement with respect to the forced transfer of intellectual property and critical know-how, reputable brand names, and operation in the past year?

Industry reports that the market in China for cloud services remains very restrictive. Despite new commitments agreed to by China such as those outlined in the U.S.-China Trade Agreement, long-standing practices continue to severely limit the ability for U.S. exporters to compete in the region. As U.S. and Chinese technology companies, including cloud services, compete in the global market it is critical that U.S. policymakers enforce trade obligations and address unfair trade practices and engage with like-minded partners to ensure China follows through on its commitments.

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Sincerely,

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