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 2021 Special 301 Review

Docket No. USTR-2020-0041
85 FR 81263

COMMENTS OF
INTERNET ASSOCIATION

I. Statement of Interest

Internet Association (IA) represents over 40 of the world's leading internet companies.[1] IA is the only trade association that exclusively represents leading global internet companies on matters of public policy. IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet. The internet creates unprecedented benefits for society, and as the voice of the world's leading internet companies, we ensure stakeholders understand these benefits.

The internet sector is now the fourth largest sector in the U.S. economy. The sector accounts for 10.1 percent of U.S. GDP, 6 million direct jobs, and supports another 13.1 million indirect jobs. In 2018, U.S. internet sector companies invested $64 billion in the U.S. economy through capital expenditures, with IA's members investing over $42 billion.[2]

The U.S. is the global internet and digital content leader. The digital economy has led to innovative products, lower prices, and new jobs. America has spearheaded digitally-driven export growth across borders, with digital trade now accounting for more than 59 percent of all U.S. services exports.

America's digital leadership didn't just happen – existing U.S. law and policy are central to the country's success and fostering the adoption and use of digital technologies both here and around the world. They are also central to supporting American small business growth.

To preserve and expand the internet's role as a key driver of jobs, innovations, exports, economic development, and opportunity, the United States Trade Representative (USTR) should make open internet policies abroad a top trade priority while pushing back on distorted or discriminatory copyright measures that target U.S. firms.

Proper enforcement of intellectual property rules abroad is essential for our members. However, it is just as critical for USTR to highlight countries that misuse copyright and intermediary liability rules to set up regulatory barriers aimed at internet companies and that deny market access to U.S. platforms and small businesses.

Increasingly, governments such as the European Union (EU) are proposing onerous systems of copyright liability for internet services. The EU's Copyright Directive directly conflicts with U.S. law and requires a

[1] https://internetassociation.org/our-members/
[2] https://internetassociation.org/wp-content/uploads/2019/09/IA_Measuring-The-US-Internet-Sector-2019.pdf

broad range of U.S. consumer and enterprise firms to install filtering technologies, pay European organizations for activities that are entirely lawful under the U.S. copyright framework, and face direct liability for third-party content. At the same time, countries such as Australia, Colombia, and Peru are out of compliance with commitments made under U.S. free trade agreements to adopt copyright safe harbor systems. A wide range of countries completely lack innovation-oriented copyright rules, such as the U.S.-style system of fair use, which significantly increases the legal risk for American AI firms seeking to export to those markets.

The growth of American digital exporters depends on the adoption of innovation-oriented and nondiscriminatory intellectual property measures in foreign markets. Internet platforms are a key driver of the U.S. economy. All industries — and businesses of all sizes — reap the rewards of the U.S.'s digital leadership. Small businesses and entrepreneurs in every U.S. state and every community use the internet to sell and export across the globe. Internet-connected small businesses are three times as likely to export and create jobs, grow four times more quickly, and earn twice as much revenue per employee. The internet cuts the trade deficit in every sector of the economy. Figures from BEA show that in 2019 the U.S.' overall digital exports were $517.5 billion and U.S. digital trade surplus increased to $219.9 billion from $179.6 billion in 2016.[3]

IA members have a significant stake in our trading partners adopting strong and innovation-oriented IP systems. Many of our members produce and deliver original content. They lead the world in creating innovative internet services and technology-enabled content that bring music, films, and other creative works to worldwide audiences. IA members provide digital distribution for award-winning content while also creating services that address the challenge of piracy by allowing consumers to legally access content globally.

In the U.S., we are fortunate to have an innovation-oriented and well-functioning system of intellectual property rights that enables the operation and growth of the internet. However, as U.S.-based internet companies expand services around the globe – and as all U.S. exporters increasingly rely on the internet to power trade – they are encountering distorted or discriminatory frameworks that deny adequate protection of rights granted under U.S. law. Many countries have adopted or are currently debating unbalanced copyright laws that will impede the growth of U.S. services and the small businesses that use online services to reach foreign markets. Given that much of the current and future growth of the U.S. industry will be generated through overseas business, problematic copyright frameworks in other countries present a clear danger to the strength of the U.S. economy.

If the U.S. does not stand up for the U.S. copyright framework abroad, U.S. innovators and exporters will suffer. Other countries will increasingly misuse ostensible copyright enforcement measures to limit market entry, which ultimately disadvantages all U.S. stakeholders. Critical limitations and exceptions to copyright under U.S. law enable digital trade by providing the legal framework that allows nearly all internet services to function effectively. This has been considered an important part of "adequate and effective" protection of copyright in the U.S. Web search, machine learning, computational analysis, text and data mining, and cloud-based technologies all, to some degree, involve making use of copyrighted content. These types of innovative activities – areas where U.S. businesses lead the world – are possible under copyright law because of innovation-oriented limitations and exceptions. In the U.S., industries that benefit from fair use and other copyright limitations generate $4.5 trillion in annual revenue and employ 1 in 8 U.S. workers.[4] Unfortunately, foreign trading partners lack these innovation-oriented rules, which limit the export opportunities for U.S. industries in those markets.

Accordingly, under the request for comments issued by USTR and published in the Federal Register at

[3]https://apps.bea.gov/iTable/iTable.cfm?reqid=62&step=6&isuri=1&tablelist=357&product=4
[4]http://www.ccianet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf.

85 FR 81263 (December 15, 2020)[5], IA respectfully submits the following comments regarding the 2020 Special 301 Report.

II. Inadequate and distorted systems of intellectual property and intermediary liability penalties in other countries result in the denial of market access to U.S. platforms and small businesses. USTR should address these issues in the 2021 Special 301 Report.

Under Section 182 of the Trade Act of 1974, USTR is required to identify countries that (a) "deny adequate and effective protection of intellectual property rights" or (b) "deny fair and equitable market access to United States persons that rely upon intellectual property protection." This filing identifies a range of particularly onerous foreign measures that meet one or both of these criteria, and which are harming U.S. digital businesses. Digital businesses rely on intellectual property protection. They hold copyrights, patents, trademarks, trade secrets, and other rights. They also rely on countries to provide clear copyright protection principles that provide adequate and effective protections advanced by U.S. law.

To adequately advance U.S. interests in intellectual property, USTR should not only highlight IP enforcement measures that may be necessary to deter illicit activity, but also address unbalanced, inadequate, and ineffective systems of intellectual property and intermediary liability protection in other countries, while advancing the well-established set of copyright limitations, exceptions, and other balanced protections that are critical for the success of U.S. stakeholders as they do business abroad. Below, IA explains how USTR can address these and other copyright issues in the 2021 Special 301 Report – both in an overarching section that shows why copyright limitations and exceptions are necessary to enable market access, and within specific country reports.

The Special 301 Report should highlight that limitations, exceptions, and intermediary liability protections are critical components of copyright law, and that U.S. internet businesses depend on limitations and exceptions to access foreign markets.

The U.S. copyright framework both ensures a high level of copyright protection and drives innovative internet and technology products and services. Internet services rely on balanced copyright protections such as Section 107 of the Copyright Act ("fair use") and Section 512 of the Copyright Act, as enacted by the DMCA ("ISP safe harbors"), to create jobs, foster innovation, and promote economic growth. The U.S. internet sector – as well as small businesses that rely on the internet to reach customers abroad – requires balanced copyright rules to do business in foreign markets.

In countries that lack a balanced model of copyright law, U.S. innovators are at a significant disadvantage. Increasingly, governments like the EU (including Spain, Germany, and France), Australia, Brazil, Colombia, India, and Ukraine are proposing new onerous systems of copyright liability for internet services and several of these countries are out of compliance with commitments made under U.S. free trade agreements. The EU's Copyright Directive directly conflicts with U.S. law and requires a broad range of U.S. consumer and enterprise firms to install filtering technologies, pay European organizations for activities that are entirely lawful under the U.S. copyright framework, and face direct liability for third-party content. Critically, such "must carry and must pay laws" are not only antithetical to U.S. copyright theory, but also designed to subsidize and protect domestic industries at the expense of U.S. digital innovators and exporters.

Also, Section 512 of the Copyright Act, as enacted by the DMCA, is a foundational law of the U.S. internet economy. It provides a 'safe harbor' system that protects the interests of copyright holders, online

[5]https://www.federalregister.gov/documents/2020/12/15/2020-27515/request-for-comments-and-notice-of-a-public-hearing-regarding-the-2021-special-301-review

service providers, and users, imposing responsibilities and rights on each. Safe harbors are critical to the functioning of cloud services, social media platforms, online marketplaces, search engines, internet access providers, and many other businesses. Weakening safe harbor protections would devastate the U.S. economy, costing nearly half a million U.S. jobs.[6] And yet, key trading partners have failed to implement ISP safe harbors, including three countries (Australia, Colombia, and Peru) that have express obligations to enact safe harbors under trade agreements with the U.S.

USTR has promoted copyright safe harbors in trade agreements for the last 15 years, including in the USMCA. Increasingly, however, jurisdictions have chipped away at the principles behind this safe harbor framework. For example, some countries have proposed or implemented requirements that internet companies monitor their platforms for potential copyright infringement or broadly block access to websites, rather than adhere to the U.S. model of taking down specific pieces of infringing content upon notice. Other countries have failed to adopt safe harbors at all. Such efforts threaten the ability of internet companies to expand globally by eliminating the certainty that copyright safe harbors provide.

IA urges USTR to step up enforcement of copyright safe harbors in existing trade agreements and use upcoming trade negotiations to promote a strong and balanced copyright framework that benefits all U.S. stakeholders. Companies, especially startup platforms, need consistent and clear legal frameworks to compete globally. The developing patchwork of copyright liability frameworks has a variety of disadvantages for startups, including added risk and cost as well as an overall increased difficulty in navigating the international ecosystem. As a result, U.S. startups are hindered in their growth. USTR should adopt an even-handed approach to copyright enforcement and work to advance the interests of all U.S. industries and not just that of rights holders. Without the promotion and enforcement of these business-critical protections, internet services – and the industries they enable – face troubling legal risks, even when they follow U.S. law.

U.S. companies rely on fair use and other limitations and exceptions.

Internet services require copyright limitations and exceptions to crawl the World Wide Web for search results, store copies of this content, and create algorithms that improve relevance and efficiency of responses to user search queries.[7] These pro-innovation limitations and exceptions like fair use allow short 'snippets' of text or thumbnails of pictures to be used under limited circumstances by aggregation services, in support of Article 10(1) of the Berne Convention. U.S. social media services and other user-generated content platforms similarly depend on fair use and other related doctrines to enable people to post and share news stories, videos, and other content.

Fair use is also critical for cloud computing platforms. Faster broadband speeds, cheap storage costs, and ubiquitous, multi-device connectivity to the internet have shifted the storage of content from a user's personal computer to the "cloud." Cloud-based storage allows a user to keep copies of their content in a remote location that gives them access to such content anywhere they are connected to the internet. A user can download this content to multiple devices at different times or stream audiovisual content using a software-based audiovisual player. Fair use not only enables portability, but also allows for more seamless upgrades and transitions to new or multiple devices via cloud storage because the content does not need to be laboriously copied from one device to another. Also, taking advantage of economies of scale, cloud storage of data can be more secure than storage on local servers.

In sum, fair use enables the operation of countless business-critical technologies and services where obtaining the prior authorization of a rights holder is impractical and unwarranted. As a result, there is a

[6] http://internetassociation.org/wp-content/uploads/2017/06/NERA-Intermediary-Liability-Two-Pager.pdf
[7] How Stuff Works, How Internet Search Engines Work, available at http://computer.howstuffworks.com/internet/basics/search-engine1.htm (last visited Feb.8, 2017).

strong need to ensure that fair use or an analogous framework is in places where U.S. companies do business. For example, a cloud technology company operating in a jurisdiction lacking a fair use principle must weigh the potential of litigation before innovating and bringing a product or service to market. Without a flexible fair use standard, technology companies in most jurisdictions must rely on a regulatory or legislative body to approve specific uses or technologies.

The rise of unbalanced copyright frameworks in other countries – and the lack of fair use or other balancing principles abroad – threatens future growth. Such threats may come through intentional decisions to target U.S. internet services through laws and policies. Market access barriers also emerge through requirements to monitor or prevent the availability of certain types of third-party content or through new compulsory collective management schemes. Finally, these threats may emerge when a country increases its level of copyright protection and enforcement to comply with trade obligations or diplomatic pressure, but fails to balance these new rules with flexible limitations and exceptions such as fair use that is necessary for the digital environment.[8] In all of these cases, unbalanced copyright frameworks serve as significant market barriers to U.S. services. To combat this trend, the U.S. must ensure that current and future trading partners have balanced copyright frameworks in place.

U.S. companies rely on safe harbors from intermediary liability.

Another fundamental reason that the internet has enabled trade is its open nature – online platforms can facilitate transactions and communications among millions of businesses and consumers, enabling buyers and sellers to connect directly on a global basis. This model works because platforms can host these transactions without automatically being held responsible for the vast amounts of content surrounding each transaction.

Section 512 of the Copyright Act, a key part of the Digital Millennium Copyright Act (DMCA), provides online service providers with safe harbors from liability for copyright infringement, so long as the providers comply with certain obligations. These measures explicitly do not impose an affirmative duty on service providers to monitor their sites or seek information about copyright infringement on their services.

Adoption of the DMCA's safe harbors has been critical to the growth of the internet and has enabled online platforms to transform trade. In the U.S., copyright is a strict liability regime with judicially-developed secondary liability doctrines and the possibility of extensive statutory damages for service providers operating at an internet-scale. Absent safe harbors that limit liability for service providers, this framework would result in astronomical claims for statutory damages against internet companies, often for the very caching and hosting functions that enable the internet to exist as we know it. The absence of analogous safe harbors abroad has the potential to significantly chill innovation, information sharing, and the development of the internet. In most cases, it is difficult if not impossible for a third party to know whether any particular distribution of work is infringing; whether the distribution is a fair use; whether the distributor has a license; or even who owns the copyright.

USTR has promoted IP safe harbors in trade agreements for the last 15 years, most recently in USMCA. Increasingly, however, jurisdictions have chipped away at the principles behind this safe harbor framework. For example, some countries have proposed or implemented requirements that internet companies monitor their platforms for potential copyright infringement or broadly block access to

[8] See Supplemental Comments of Computer & Communications Industry Association, In re 2016 Special 301 Review, Docket No. USTR-2015-0022. As the level of copyright enforcement in a foreign jurisdiction increases, market access issues in that jurisdiction often shift from infringement-related barriers to barriers regarding "liability for copying incidental to common Internet services and communications platforms."

websites rather than take down specific content that is claimed to be infringing. Other countries have failed to adopt safe harbors, even in light of ongoing trade obligations to do so. Such efforts threaten the ability of internet companies to expand globally by eliminating the certainty that the IP safe harbor framework provides and introducing potential liability to platforms that cannot make legal determinations about the nature of specific content.

III. USTR should highlight the following countries that have taken specific actions to deny adequate and effective protection of IP rights and/or fair and equitable market access to U.S. companies that rely on IP protection.

EUROPE

European Union

A. The European Union's copyright plan denies market access to U.S. stakeholders.

Since the European elections in 2019, EU leaders have actively promoted a multi-pronged approach towards "technological sovereignty" or "digital sovereignty" as the main policy objective.[9] In updates to the EU's digital and industrial agenda calls for "technology sovereignty" have been advanced with regards to data, artificial intelligence, cloud services, as well as on the responsibility of online platforms and competition policy with the latter two packaged as the Digital Services Act and Digital Markets Act.

While the precise meaning of sovereignty or autonomy in the realm of technologies remains ambiguous, EU leaders have emphasized the desire to limit the market position of U.S. providers. For example, some EU officials have called for a range of policies to support "a European way of digitization, to reduce our dependence on foreign hardware, software, and services."[10]

A recent draft document from the European Commission –A European Strategy for Data – calls the amount of data held by "Big Tech firms" a "major weakness" for Europe, and proposes several regulations to require sharing of data between public and private firms to create a "European data space." This document also proposes subsidizing European cloud providers while contemplating potential ex-ante competition rules that would be applied against foreign firms.

The U.S. needs to engage with the EU on this issue to ensure that any proposals on sovereignty and European data do not include tools that would result in protectionism and discrimination against U.S. firms.

The European Union's (EU) passage and adoption of the Copyright Directive in 2019 serves as a market access barrier for U.S. technology companies doing business in Europe and underscores the industry's position that the strong and balanced U.S. copyright system has continued vitality in promoting the strongest content and technology sectors in the world. The principles behind Articles 15 and 17[11] are at odds with fundamental principles of U.S. law and longstanding U.S. intellectual property policy and practice and should be resisted through U.S. foreign and trade policy. Regrettably, these aspects of the Directive appear to be part of a larger pattern of unfair actions by the EU against the innovative U.S. internet technology sector.

[9] https://ec.europa.eu/commission/commissioners/sites/comm-cwt2019/files/commissioner_mission_letters/president-elect_von_der_leyens_mission_letter_to_thierry_breton.pdf
[10] Axel Voss, A manifesto for Europe's digital sovereignty and geopolitical competitiveness, https://www.politico.eu/wp-content/uploads/2020/01/Axel-Voss-Digital-Manifesto-2.pdf
[11] Article 15 was previously known as Article 11 and Article 17 was previously known as Article 13.

The changes to copyright made by the Copyright Directive, specifically those requiring proactive filtering and licensing for snippets, impose significant unwarranted liability on internet companies and will have a disproportionately large impact on the ability of small companies to compete. The directive also risks limiting access to European content for American consumers, as platforms unable to negotiate licenses may be forced to block European-based publisher content from their sites.

The EU Copyright Directive effectively requires internet services of all sizes to implement comprehensive content filtering systems, without regard for the inevitable consequences of such filtering, including the removal of protected speech; content protected by the "fair use" doctrine; and misidentified, legally distributed works from all types of online platforms. This is completely at odds with U.S. policy as found in the USMCA. The USMCA maintains the U.S. law-endorsed balance among stakeholders by allowing (1) the public to legally enjoy copyrighted content, (2) rights holders to identify allegedly infringing material online, and (3) internet platforms to expeditiously remove access to such material without incurring legal risk for the actions of third parties about which they do not know. The new EU policy destroys that careful balance.

U.S. copyright law provides strong rights for publishers but has always protected permitted using brief snippets of copyrighted material for legitimate, referential purposes, and Article 10(1) of the Berne Convention further protects the right to provide "quotations from a work lawfully made available to the public." Online platforms consistently promote these goals when they provide services that index websites, aggregate news headlines, and refer online users to third-party articles. This benefits consumers by providing access to information, allowing users to share and connect, and promoting the ability for publishers to reach new audiences. Yet the new EU policy includes vague measures that would create a "quasi-copyright" publisher right whose primary goal is to require U.S. services to remunerate European authors or obtain authorization for the use of such content otherwise permitted by copyright law.

The internet industry and the creative ecosystem flourish under the balance of the U.S.'s innovation-oriented copyright regime.[12] The EU's efforts to hamstring U.S. companies by abandoning that balance risks thwarting the continued growth of the commercial internet. IA respectfully requests that USTR remain steadfast in efforts to include the elements of the U.S.'s innovation-oriented copyright system in trade agreement negotiations and find opportunities to highlight the problems with this directive when engaging with EU counterparts. Also, IA encourages USTR to engage with any other countries that are considering copyright proposals modeled on the EU's Copyright Directive. The EU passed changes to its copyright framework which will make it harder for U.S. businesses to effectively compete in Europe and will burden U.S. companies with compliance obligations if they decline to pay European companies or organizations for activities that are entirely lawful and legal under the U.S. copyright framework. The copyright proposal diminishes needed checks and balances, tilting rights in favor of just rights holders, in an approach that will significantly harm American exporters and innovators.

Particular problems with the Directive include new "neighboring rights" for news publishers that conflict with the Berne Convention (Article 15), broad and unclear monitoring and filtering obligations for service providers (Article 17), as well as potentially intrusive multi-stakeholder processes regarding the design and operation of content recognition technologies (Article 17). These barriers are discussed in more detail below, along with other concerns about restrictions on text and data mining and liability for hyperlinks.

While the EU Copyright Directive was enacted ostensibly as part of the Digital Single Market initiative, the implementing legislation in member states is causing widely diverging obligations that are doing anything but harmonizing the digital market in Europe.

[12] https://www.techdirt.com/skyisrising/

The industry encourages USTR to reiterate the U.S. government's opposition to these and other measures as currently drafted and to seek obligations through the upcoming U.S./EU bilateral trade negotiations to prohibit such measures. Departures by the EU from the proven, successful policies that both sides of the Atlantic have followed to date risk thwarting the continued growth of innovative and creative industries alike.

B. "Ancillary copyright" and "neighboring rights" laws in the European Union violate international copyright obligations and will deny market access to U.S. intellectual property rights (IPR) stakeholders.

"Ancillary copyright" or "neighboring rights" laws refer to legal entitlements for "must carry must pay" obligations that enable countries to impose levies or other restrictions on the use of this information. Such levies negatively impact the ability of U.S. services to use or link to third-party content, including snippets from publicly available news publications.

The subject matter covered by ancillary copyright is ineligible for copyright protection under international law and norms. Article 10(1) of the Berne Convention provides that "[i]t 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."[13] It is further provided as an example that "quotations from newspaper articles and periodicals in the form of press summaries" are fair practice. As incorporated into TRIPS Article 9, Article 10(1) of the Berne Convention creates an obligation on the Member States to allow for lawful quotations.[14]

However, ancillary copyright laws impose a levy on quotations in direct violation of these obligations under TRIPS and create new rights contradictory to international standards meant to protect market access. For example, these laws would require online services that aggregate news content to pay a tax to the news publisher for the ability to link to one of its articles. Rather than attempting to navigate complex individual negotiations with publishers to include a headline or other small amount of newsworthy content on a third-party site, online services might simply stop showing such content, causing traffic to news publishers to plunge. These laws create a stealth tax on U.S. internet services operating in foreign jurisdictions, and unfairly disadvantage internet services from offering services otherwise protected under copyright law by raising barriers to market entry.

Previous implementations of this principle in the EU Member States such as Germany and Spain have generated direct and immediate market access barriers for U.S. services.[15] The EU's Copyright Directive, like those earlier provisions, runs afoul of international obligations in the Berne Convention by giving some publishers the right to block internet services from making quotations from a work.[16]

[13] Berne Convention for the Protection of Literary and Artistic Works, art. 10(1), last revised July 24, 1971, amended Oct. 2, 1979, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221 (hereinafter "Berne Convention").

[14] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, art. 9.

[15] *EU Lawmakers Are Still Considering This Failed Copyright Idea*, Fortune (March 24, 2016), http://fortune.com/2016/03/24/eu-ancillary-copyright/http://fortune.com/2016/03/24/eu-ancillary-copyright/ (describing failed attempts in Germany and Spain, which included causing Google to shutdown its Google News service in Spain and partially withdraw its news service in Germany, and news publishers' revenue to tank in both countries).

[16] Eur. Comm'n, Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (Article 11), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0596&from=EN.

The threat posed by ancillary copyright laws to U.S. stakeholders is genuine and timely, especially as Europe considers more widespread proposals that would violate international copyright obligations to the detriment of U.S. copyright stakeholders, and hinder the growth of new business models. The discriminatory harm done by these stealth taxes on search engines and news aggregators creates economic and legal barriers to entry that effectively deny market access and fair competition to U.S. stakeholders whose business models include aggregation of quotations protected by international copyright standards. Expressing such concerns after legislation is enacted or is inevitable is too late.

C. Other intermediary liability problems in the European Union.

Liability For Hyperlinks

IA has concerns about the Court of Justice of the CJEU's decision in GS Media v. Sanoma Media, which held that linking to copyrighted content posted to a website without authorization can itself be an act of copyright infringement.[17] This case is generating additional lawsuits testing the extent of the ruling, which may create new liability for online services doing business in the EU. It has also resulted in new monetary demands from publishers to those who provide links to content. IA urges USTR to monitor this situation and engage with European counterparts to prevent other negative impacts from this ruling.

Restrictions On Text And Data Mining

The European Commission's proposals for text and data mining further restrict technology startups and businesses of all types from engaging in cutting-edge research and data analytics. By limiting who can legally engage in machine learning, these restrictive proposals will have a significant impact on the emerging market and the jobs associated with data analytics, technology, and artificial intelligence.

Weakening Of E-Commerce Directive Protections For Internet Services In EU Member States

Despite existing protections under the E-Commerce Directive for internet services that host third-party content, courts in some EU Member States have excluded certain internet services from the scope of intermediary liability protections. For example, one platform that hosted third-party content in Italy was found liable because it offered "additional services of visualisation and indexing" to users.[18] Another U.S.-based platform was found liable because it engaged in indexing or other organization of user content.[19] A third internet service was held liable for third-party content because it automatically organized that content in specific categories with a tool to find "related videos."[20] All of these activities represent increasingly common features within internet services, and the existence of these features should not be a reason to exclude a service from the scope of intermediary liability protections under the E-Commerce Directive, in Italy or any other Member State.

France

In addition to creating ancillary rights, other EU Member States are expanding the scope of existing exclusive rights of reproduction and communication to the public. Under France's "image indexation" law, an "automated image referencing service" must negotiate with a French rights collection society and secure a license for the right to index or "reference" a French image. Individual artists or photographers cannot opt-out of this licensing regime. This law requires online services to seek a

[17] C–*GS Media BV v Sanoma Media Netherlands BV* et al., ECLI:EU:C:2016:644, European Court of Justice (September 2016).

[18] RTI v. Kewego (2016).

[19] Delta TV v. YouTube (2014).

[20] RTI v. TMFT (2016).

license for any indexation of an image published in France.[21] This law reflects the same spirit as the German and Spanish ancillary copyright regimes, insofar as it creates a regulatory structure intended to be exploited against U.S. exporters – a "right to be indexed." By vesting these indexing "rights" in a domestic collecting society, the law targets an industry that consists largely of U.S. exporters. As several industry and civil society organizations have previously noted, the law will impact a wide range of online services and mobile apps.[22] These requirements present significant market access barriers for the large number of online services in the U.S. and elsewhere that work with images.

Germany

Ancillary copyright laws in Germany and Spain have proven detrimental for U.S. companies, EU consumers, publishers, and the internet ecosystem that requires adequate protection of rights under copyright law. The German *Leistungsschutzrecht* was enacted in August 2013 and holds search engines liable for making available in search results certain "press products" to the public.[23] The statute excludes "smallest press excerpts," making the liability regime less clear and exposing search engines to confusing new rules. These laws specifically target news aggregation, imposing liability on commercial search engines and other online platforms while exempting "bloggers, other commercial businesses, associations, law firms, or private and unpaid users."[24] By extending copyright protection to short snippets or excerpts of text used by search engines and other internet platforms, this law violates Article 10(1) of the Berne Convention, directly violating the ability of online platforms to use permissible quotations under the TRIPS Agreement.

On December 24, 2018, the Higher Regional Court of Saarbrucken ruled that a domain registrar could be held secondarily liable for the infringing activities of a customer who offered access to copyright-infringing material on a website linked to a domain sold by the said registrar. Secondary liability can be established, according to the court, if the registrar fails to take action despite rightsholder notification.

Greece

Greece's "Committee for Online Copyright Infringement," an administrative committee that can issue injunctions to remove or block potentially infringing content, is now up and running. Instead of adhering to the U.S. system by submitting a DMCA notice, a rights holder may now choose to apply to the committee for the removal of infringing content in exchange for a fee.

On November 9, 2018, the committee ordered internet service providers to block access to 38 domains offering access to copyright-infringing material, specifically targeting pirated movies with added subtitles. The commission has previously attempted to have websites blocked that allows copyrighted material to be illegally displayed, but the Athens court had stated that barring access to torrent sites is disproportionate and unconstitutional. While examples of implementation are still limited, this measure represents a significant divergence from U.S. procedures on efficient removal of infringing content.

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[21] Art. L. 136-4, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032854341&fastPos=1&fastReqId=643428459&categorieLien=id&oldAction=rechTexte. Loi 2013-46 du 10 décembre 2013 Project de Loi Dispositions relatives aux objectifs de la politique de défense et à la programmation financière, rapport du Sénat, http://www.senat.fr/petite-loi-ameli/2015-2016/695.html.

[22] Open Letter to Minister Azoulay, March 2016, available at http://www.ccianet.org/wp-content/uploads/2016/03/OpenLetter-to-Minister-Azoulay-Image-Index-Bill-on-Creation-Eng.pdf.

[23] German Copyright Act (1965, as last amended in 2013), at art. 87f(1), http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0572.

[24] http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0572.

Italy

The Italian Communications Authority is empowered to "require information providers to immediately put an end to violations of copyright and related rights, if the violations are evident, on the basis of a rough assessment of facts." This law amounts to a copyright 'stay down' requirement that conflicts with both Section 512 of the DMCA and the E-Commerce Directive and will serve as a market access barrier for U.S. services in Italy.

Poland

In January 2017 the CJEU in the case of *OTK v. SFP*[25] concluded that Article 13 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (the Enforcement Directive) shall not preclude the EU Member States from allowing a rights holder in an infringement proceeding to demand payment in an amount higher than the appropriate fee which would have been due if permission had been given for the work concerned to be used. Also, in such a situation, the court clarified that there is no need for the rights holder to prove the actual loss caused to him as a result of the infringement. This equates to the introduction in EU law of punitive damages, without any appropriate safeguards.

Russia

Russia has taken additional steps to broaden the scope of an already unbalanced set of copyright enforcement measures. The "Mirrors Law," which came into effect on October 1, 2017, extends Russia's copyright enforcement rules into new domains by requiring search providers to delist all links to allegedly infringing websites within just 24 hours of a removal request. The law also applies to so-called "mirror" websites that are "confusingly similar" to a previously blocked website.

In practice, this law has resulted in overbroad removal and delisting requests for general-purpose websites that would not be subject to removal under Section 512 of the Copyright Act or other parts of U.S. copyright law. As USTR has noted elsewhere, 24 hours is an insufficient amount of time for service providers to review these types of requests. Also, the principle of removing entire websites that include a proportionally minor amount of potentially infringing content was squarely rejected by the U.S. Congress during the debate over the Stop Online Piracy Act in the 112th Congress.

IA urges USTR to engage with counterparts in Russia to address this measure, which is likely to generate market access barriers for U.S. internet services.

Spain

In Spain, reforms of the *ley de propriedad intelectual* in 2014 resulted in an unworkable framework, requiring "equitable compensation" for the provision of "fragments of aggregated content" by "electronic content aggregation service providers."[26] Like the German law, the Spanish law creates liability for platforms using works protected under international copyright obligations in the TRIPS Agreement. The Spanish law is arguably even worse than the German law because it does not allow

[25] C-367/15 Stowarzyszenie 'Oławska Telewizja Kablowa' v. Stowarzyszenie Filmowców Polskich, ECLI:EU:C:2017:36, European Court of Justice (January 25, 2017).
[26] Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Informe de la Ponencia: Proyecto de Ley por la que se modifica el Texto Refundido de la Ley de Propriedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, No. 81-3 (July 22, 2014), available at http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-81-3.PDF.

publishers to waive their right to payment: they have to charge for their content, irrespective of whether they have existing contractual or other relationships with news aggregators and irrespective of creative commons or other free licenses. The tariffs are arbitrary and excessive: one small company was asked to pay €7,000 per day (€2.5 million per year) for links or snippets posted by its users.[27]

The Spanish ancillary copyright law yielded similar results to the German law. Soon after the enactment of the Spanish law, Google News shut down in Spain.[28] An economic study prepared by the Spanish Association of Publishers of Periodical Publications found that *ley de propriedad intelectual,* which was meant to benefit publishers, instead resulted in higher barriers to entry for Spanish publishers, a decrease in online innovation and content access for users, and a loss in consumer surplus generated by the internet. The results are most concerning for smaller enterprises facing drastic market consolidation and less opportunity to compete under the law.[29]

These ancillary copyright laws have proven detrimental for U.S. companies, consumers, publishers, and the broader internet ecosystem. The threat posed by these laws to U.S. stakeholders is genuine and timely, and IA strongly urges USTR to address these laws in the 2021 Special 301 Report.

Sweden

A 2016 Supreme Court ruling[30] in Sweden resulted in the banning of websites displaying mere photos of public art exhibited in public spaces. Even though Sweden has a copyright exception for such photos, the Court found the commercial interest a site may have in using works of art is a limit to the application of the exception. The case was brought by a visual arts collecting society against offentligkonst.se, an open map with descriptions and photographs of works of public art across Sweden which is operated by Wikimedia SE. This means that even in the case of a webpage written by an amateur blogger, the mere reproduction of a photo of public art, which would elsewhere be deemed fair use, can now lead to fines when this page displays an ad.

On October 15, 2018, Sweden's Patent and Market Court ordered local ISP Telia to block torrent and streaming platforms offering access to copyright-infringing material, following a decision in February 2017 applying to a local ISP Bredbandsbolaget. Telia has since appealed the decision.

Ukraine

USTR has previously included Ukraine on the Special 301 Report watchlist in part due to "the lack of transparent and predictable provisions on intermediary liability" and the absence of "limitations on [intermediary] liability" in Ukraine's copyright law.[31] These problems have not been effectively addressed in the past.[32] Ukraine's intermediary liability law, which has now come into force, contains numerous problems, including an unfeasible requirement to remove information within 24 hours of a

[27] https://www.elconfidencial.com/tecnologia/2017-02-07/canon-aede-meneame-internet-facebook-agregadores_1327333/
[28] *An Update on Google News in Spain*, Google Europe Blog (Dec. 11, 2014) http://googlepolicyeurope.blogspot.com/2014/12/an-update-on-google-news-in-spain.html.

[29] *Economic Report of the Impact of the New Article 32.2 of the LPI (NERA for AEEPP)*, Spanish Association of Publishers of Periodicals (July 9, 2015), http://coalicionprointernet.com/wp-content/uploads/2015/07/090715-NERA-Report-for-AEEPP-FINAL-VERSION-ENGLISH.pdf.

[30] April 4, 2016, case Ö 849-15, Bildupphovsrätt i Sverige ek. för v. Wikimedia Sverige.
[31] 2016 Special 301 Report, available at https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf.
[32] See Tetyana Lokot, New Ukrainian Draft Bill Seeks Extrajudicial Blocking for Websites Violating Copyright, Global Voices (Feb. 1, 2016), https://advox.globalvoices.org/2016/02/01/new-ukrainian-draft-bill-seeks-extrajudicial-blocking-for-websites-violating-copyright/

complaint, a requirement to provide user data to third parties even if an intermediary disputes the presence of infringing content, and a requirement to implement "technical solutions" for repeat postings that likely requires intermediaries to monitor and filter user content.[33] These and other provisions are in direct conflict with Section 512 of the Copyright Act and are harming the ability of U.S. companies to access the Ukraine market.

United Kingdom

The UK has left the EU. IA applauds the UK's decision not to move forward with implementing the EU Copyright Directive and instead commit that any future changes to the UK copyright framework will be considered as part of the usual domestic policy process.[34]

The UK has previously debated but not implemented a private copying exception, which is necessary to ensure full market access for U.S. cloud providers and other services. The government's first attempt to introduce such an exception in October 2014 was quashed by the UK's High Court in July 2015.[35] Without such an exception in place in the UK, individual cloud storage services will continue to face significant market access barriers, and even an attachment to an email may be deemed to be an infringement.

In April 2019, the UK government published an Online Harms White Paper[36] that could create significant compliance issues for U.S. companies operating in the UK if it is enacted into law as originally drafted. In the White Paper, the UK government proposes, among other things, to apply a new legal "Duty of Care" on a "wide range of companies of all sizes, including social media platforms, file-hosting sites, public discussion forums, messaging services, and search engines." The Duty of Care would require companies to protect users from a wide range of "online harms." The paper covers both illegal harms (e.g. terrorist content, child sexual exploitation material) and those "harms with a less clear definition" (e.g. cyberbullying, disinformation). The UK proposes to set up a new independent regulator – funded by industry – to assess how well companies are complying with the Duty of Care. The White Paper further consults on a range of penalties for non-compliance with the regulations, including fines, ISP blocking of services, and individual liability for senior management of companies not found in compliance.

IA is concerned that the scope of the recommendations is extremely wide-ranging and the unintended consequences for American companies are still not fully understood, especially for small platforms. As drafted, the proposals would potentially restrict access to key digital services that enable small businesses to grow and reach new markets. IA is also concerned that the proposed rules would disrupt the ability of startups and small businesses to build new digital services and to use existing user review and feedback mechanisms to connect with global customers. IA urges USTR to engage with the UK government on these potential rules and to minimize any potential barriers to U.S.-UK trade in keeping with the U.S. and UK's shared values around a free and open internet.

AFRICA

Eastern African Region

[33] Law of Ukraine On State Support of Cinematography in Ukraine.

[34] https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-01-16/4371/#

[35] Case No. CO/5444/2014, EWHC 2041, 11 and 12 (Royal Court of Justice 2015), http://www.bailii.org/ew/cases/EWHC/Admin/2015/2041.html.

[36] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf

The East African Legislative Assembly passed the East African Community Electronic Transactions Act in 2015. While the Act provides for some level of protection of intermediaries from liability for third party content, it fails to include any 'counter-notice' procedures for a third party to challenge a content takedown request, and it removes legal protections if the intermediary receives a financial benefit from the infringing activity. Lack of a counter-notice provision exposes internet intermediaries to business process disruptions through frivolous takedown notices.

Even more problematically, the Act's vague language about 'financial benefits' can remove an entire class of commercially-focused intermediaries from the scope of liability protections, and can result in a general obligation on these intermediaries to monitor internet traffic, disadvantaging commercial services from entering numerous East African markets, including Kenya, Uganda, Tanzania, Burundi, Rwanda, and South Sudan.

The requirements in the Act diverge from prevailing international standards for intermediary liability frameworks and serve as market access barriers for companies seeking to do business in these countries. IA urges USTR to engage with counterparts in Kenya and elsewhere to amend this provision on the grounds highlighted above, and develop intermediary liability protections that are consistent with U.S. standards and international norms.

Nigeria

Nigeria continues to work on reforming its copyright laws. IA encourages USTR to be supportive of the development of a framework that is consistent with international best practices, including through the implementation of fair use provisions and safe harbors from intermediary liability. The absence of these provisions would create market access barriers in a key African market for U.S. companies.

In August 2020, Minister of Information Alhaji Lai Mohammed released amendments to the 6th edition of the National Broadcasting Code.[37] The new provisions of the Amended Code have been the subject of active debate since January 2020.[38] The Code gives the minimum standards required in the broadcast industry and is framed with the intent of increasing local content while also increasing advertising revenue for local broadcast stations and content producers. There are concerns around the far-reaching effect of the Code given that several provisions of the Code conflict with the Copyright Act and the powers of the FCCPC under the FCCPA to regulate competition.

The Code prevents Pay TV and other broadcasting/streaming platforms from making their content exclusive and directs them to sub-license content at prices the Commission will regulate. This would create an unfavorable environment for such platforms as it reduces their value to their subscribers with a potential plunge in revenue. The Code takes away the liberty rights holders have to use and license their content as they deem fit. This appears to go against intellectual property rights.

South Africa

In recent years, several countries have adopted fair use-style measures, including Singapore, Korea, Malaysia, Hong Kong, Israel, and now South Africa. South Africa ran an inclusive proceeding to reform its copyright law by consulting a wide range of stakeholders. They appear to be moving in the direction of adopting balanced copyright frameworks. In these countries, the presence of a fair use system has been positive for both the creative sector and the tech sector. For example, one economic study found that "adoption of fair use clauses modeled on U.S. law is associated with positive outcomes . . . both [for

[37] https://www.banwo-ighodalo.com/resources/analysing-the-validity-of-the-amended-broadcasting-code-a-statutory-perspective

[38] https://www.channelstv.com/2020/08/13/nbc-board-disagrees-with-lai-mohammed-rejects-amended-nbc-code/

firms] that may be more dependent on copyright exceptions, and those that may be more dependent on copyright protection."[39]

South Africa's fair use measure is modeled on U.S. law (17 U.S.C. § 107) and includes a standard four-factor test that strikes an appropriate balance between the interests of authors, creators, and users. It is critical for the U.S. to support the adoption of fair use measures in other countries, and to avoid at all costs sending a message that the adoption of a fair use measure is problematic.

For this reason, IA strongly urges USTR to reject the elements of the recent IIPA petition that complain about South Africa's consideration of a U.S.-style fair use measure. If the U.S. does not stand up for the U.S. copyright framework abroad, then U.S. innovators and exporters will suffer, and other countries will increasingly misuse copyright to limit market entry.

IA respectfully urges USTR to support South Africa's inclusive processes and to highlight the importance of adopting copyright rules modeled on the U.S. legal framework. Additionally, IA strongly encourages the U.S. government to work closely with counterparts in South Africa to ensure effective implementation of this fair use measure, including through education and capacity building efforts.

ASIA-PACIFIC

Australia

Under the Australia-U.S. Free Trade Agreement (AUSFTA), Australia is obligated to provide safe harbors for a range of functions by online services providers. Australia has failed to comply with this commitment. Australia's Copyright Act of 1968's safe harbor provisions do not unambiguously cover all internet service providers, including the full range of internet services (cloud, social media, search, UGC platforms).[40] Instead, only a narrower subset of "service providers" are covered under Australian law,[41] rather than the broader definition of "internet service providers" in the AUSFTA. The lack of full coverage under this safe harbor framework creates significant liability risks and market access barriers for internet services seeking access to the Australian market. IA urges USTR and others in the U.S. government to engage with Australian counterparts to make necessary adjustments to Division 2AA of the Copyright Act to bring this safe harbor into compliance with AUSFTA requirements.

In June 2018, the Australian Parliament amended the Copyright Act's provisions on safe harbors. The amendments 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. However, the amendments pointedly left out commercial service providers including online platforms.[42] The amendments do not put Australian copyright law into compliance with the AUSFTA. The amendments were framed in such a way as to specifically exclude U.S. digital services and platforms from the operation of the scheme, with members of the Australian Parliament referencing the importance of their exclusion in the parliamentary debate.[43] Further amendments to these provisions are required to make sure that limitations on liability for commercial service providers are extended to

[39] American University Program on Information Justice and Intellectual Property, "Firm Performance In Countries With & Without Open Copyright Exceptions, 2015 http://infojustice.org/archives/34386
[40] Copyright Act 1968, Part V Div. 2AA.

[41] Section 116ABA of the Copyright Amendment (Service Providers) Act 2018.
[42] Copyright Amendment (Service Providers) Act 2018 https://www.legislation.gov.au/Details/C2018A00071.
[43] Copyright Amendment (Service Providers) Bill 2017, Second Reading https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/4a4f29d6-cec4-4a55-97d8-b11f23b85dd4/toc_pdf/Senate_2018_05_10_6092_Official.pdf;fileType=application%2Fpdf#search=%22chamber/hansards/4a4f29d6-cec4-4a55-97d8-b11f23b85dd4/0258%22

all functions provided for under Article 17.11.29(b)(i)(A-D). The failure to include online services such as search engines and commercial content distribution services disadvantages U.S. digital services in Australia and serves as a deterrent for investment in the Australian market.

Australia has also proposed amendments to the scope of the online copyright infringement scheme in section 115A of the Copyright Act 1968, including to allow injunctions to be obtained against online search providers.[44] The Australian Government has indicated that it anticipates these changes will only affect two U.S. companies.[45] In circumstances where the scheme already applies to carriage service providers, thus disabling access to Australian users to offending sites, there is no utility in the extension of these laws to other providers.

IA urges USTR to work with Australia to develop a clearer fair use exception to resolve uncertainty under the existing fair dealing regime. The Australian Law Reform Commission and the Australian Productivity Commission have both made positive recommendations on fair use that would enable Australia to achieve an appropriate balance in its copyright system and increase market certainty for both Australian and U.S. providers of digital services. The government should adopt these recommendations and implement "a broad, principles-based fair use exception."[46]

News Media and Digital Platforms Mandatory Bargaining Code

The government of Australia is in the process of developing the News Media and Digital Platforms Mandatory Bargaining Code ("Code").[47] IA has been engaging with the government on the Code in August 2020[48] and January 2021.

The Code is fundamentally discriminatory towards U.S. companies, sets a harmful global precedent, and undercuts critical principles of an open internet. The digital industry believes that key areas need to be revised in the Code including 1) the forced payment for links and snippets, which would undermine how search engines and the internet function; 2) a biased arbitration framework that does not provide a fair hearing for the digital platforms; and 3) unfeasible requirements to report and disclose algorithm changes.

The internet industry continues to have concerns that the Code violates Australia's trade obligations and unfairly discriminates against U.S. companies. While the Code only applies to two companies, it sets a concerning precedent. The Code requires U.S. digital companies to disclose proprietary information related to private user data and algorithms, as well as raises significant national treatment concerns. These requirements violate obligations in trade agreements, including National Treatment and Most-Favored Nation (MFN), performance requirements, and the minimum standard of treatment. They pose a fundamental threat to digital companies' ability to thrive in foreign markets.

[44] The Copyright Amendment (Online Infringement) Bill 2018 https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6209
[45] Explanatory Memorandum https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6209_ems_b5e338b6-e85c-4cf7-8037-35f13166ebd4/upload_pdf/687468.pdf;fileType=application/pdf.
[46] Australian Productivity Commission, April 2016 report.
[47] https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/news-media-and-digital-platforms-mandatory-bargaining
[48] https://internetassociation.org/files/ia_comments-on-accc-draft-news-media-bargaining-code_august-2020_trade-pdf

The Australian government should incentivize the development of dedicated news services that advances new ways of presenting, promoting, and funding online news. However, the current version of the Code is fundamentally flawed and inhibits the development of innovative news solutions.

China

Background

IA urges USTR to highlight China's numerous problematic laws and regulations that are putting U.S. cloud service providers (CSPs) at a significant disadvantage compared to Chinese cloud service providers in China.

U.S. CSPs are among the strongest American exporters, supporting tens of thousands of high-paying American jobs. While U.S. CSPs have been at the forefront of the movement to the cloud in virtually every country in the world, China has blocked them. Draft Chinese regulations combined with existing Chinese laws are poised to force U.S. CSPs to transfer valuable U.S. intellectual property, surrender use of their brand names, and hand over operation and control of their business to a Chinese company to operate in the Chinese market.

While U.S. CSPs are blocked in China, Chinese companies in the United States can fully own and control these data centers and cloud-related services with no foreign equity restrictions or technology transfer requirements, and they can do so under their brand name and without any need to obtain a license.

Specific Measures

China's Ministry of Industry and Information Technology (MIIT) has proposed two draft notices – *Regulating Business Operation in Cloud Services Market* (2016) and *Cleaning up and Regulating the Internet Access Service Market* (2017). These measures, together with existing licensing and foreign direct investment restrictions on foreign CSPs operating in China under the *Classification Catalogue of Telecommunications Services (2015)* and the *Cybersecurity Law (2016)*, would require foreign CSPs to turn over essentially all ownership and operations to a Chinese company, forcing the transfer of incredibly valuable U.S. intellectual property and know-how to China.

More specifically, these measures prohibit licensing foreign CSPs for operations; actively restrict direct foreign equity participation of foreign CSPs in Chinese companies; prohibit foreign CSPs from signing contracts directly with Chinese customers; prohibit foreign CSPs from independently using their brands and logos to market their services; prohibit foreign CSPs from contracting with Chinese telecommunication carriers for internet connectivity; restrict foreign CSPs from broadcasting IP addresses within China; prohibit foreign CSPs from providing customer support to Chinese customers; require any cooperation between foreign CSPs and Chinese companies be disclosed in detail to regulators. These measures are fundamentally protectionist and anti-competitive.

Hong Kong

Previously, Hong Kong had considered measures to bring its copyright law in line with the realities of the digital age. These considerations included safe harbor provisions for internet intermediaries and exceptions for parody, both of which would form a strong foundation for future reforms as well as further discussion of flexible exceptions and limitations. The draft bill in question did not pass, and Hong Kong

has never reactivated a discussion on amending its copyright framework. USTR should urge Hong Kong counterparts to adopt reforms by introducing a safe harbor regime in line with international practice and a broad set of limitations and exceptions which would remove market access barriers for numerous U.S. businesses. These benefit U.S. stakeholders by establishing a more balanced copyright framework and support the growth of the national digital economy.

India

India's current intermediary liability framework poses a risk to U.S. internet services. While there is no clear safe harbor for intermediaries under the Copyright Act, there is Supreme Court precedent that lays out a safe harbor that says platforms aren't required to act on allegedly infringing or unlawful content without a court order. The lack of a clear safe harbor framework for online intermediaries in the Copyright Act[49] means that internet services are not necessarily protected from liability in India for user actions in case of copyright infringements.

USTR correctly highlighted numerous problems with India's non-IP liability framework in the 2019 National Trade Estimate[50]:

> The absence of a safe harbor framework for Internet intermediaries discourages investment in Internet services that depend on user-generated content. India's 2011 Information Technology Rules have provided an insufficient shield for online intermediaries from liability for third-party user content: any citizen can complain that certain content is "disparaging" or "harmful," and intermediaries must respond by removing that content within 36 hours. Draft regulations announced in late 2018 (the "Information Technology (Intermediary Guidelines) Rules 2018"), threaten to further worsen India's intermediary liability protections. These draft rules would require platforms to become proactive arbiters of "unlawful" content, shifting the onus of the state to private parties. If these draft rules come into force, they will incentivize overly restrictive approaches to policing user-generated content, and will undermine many Internet-based platform services.

Safe harbors from intermediary liability power digital trade and enable a wide range of U.S. companies to access new markets. Where such safe harbors are incomplete or nonexistent, U.S. stakeholders in the digital sector – and small businesses that rely on consumer reviews or other user-generated content platforms to reach new customers – face significant barriers in accessing these markets.

Unfortunately, the publication of draft rules to amend India's intermediary guidelines include additional problematic requirements on issues such as the "traceability" of originators of the content, local incorporation requiring certain intermediaries to establish a physical office in India, proactive filtering, and compressed timelines for content removal.[51]

Separately, on December 24, 2018, the IT ministry released draft changes to the Information Technology Act to impose more strict penalties for companies that fail to prohibit the spread of misinformation online. Platform "intermediaries" must trace the origins of information. This follows the IT ministry's attempt to amend Section 69A of the IT Act in 2018, which would enable the government to block apps and platforms that do not remove false information. On February 23, 2019, the Indian Draft National e-Commerce Policy was published with outlined proposals to change the country's rules for commerce online. The policy includes monitoring items listed for sale and requires companies to

[49] The Copyright (Amendment) Act, 2012, Section 52(1)(b)-(c) (allowing infringement exceptions for "transient or incidental storage" in transmission and, in part, "transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration . . .").

[50] https://ustr.gov/sites/default/files/2019_National_Trade_Estimate_Report.pdf
[51] http://meity.gov.in/writereaddata/files/Draft_Intermediary_Amendment_24122018.pdf

remove prohibited items from sale no later than 24 hours after the item is flagged, block the seller, and notify relevant authorities. The draft also discusses content liability, stating that "it is important to emphasize responsibility and liability of these platforms and social media to ensure the genuineness of any information posted on their websites."

Finally, the Supreme Court of India recently directed the government to issue guidelines to address social media misuse.[52] In 2018, India's Home Ministry ordered Facebook, Google, and WhatsApp to appoint local grievance officers to establish content monitoring systems to ensure the "removal of objectionable/malicious contents from public view." The Ministry reviewed actions taken to prevent misuse of the platforms to spread rumors, cause unrest, or incite cyber crimes or any activities going against national interest.

Japan

Japan should promote balance in its copyright system through exceptions and limitations to copyright for legitimate purposes, such as criticism, comment, news reporting, teaching, scholarship, and research – including limitations and exceptions for the digital environment. Despite limited exceptions for search engines[53] and some data mining activities,[54] Japanese law today does not provide for the full range of limitations and exceptions necessary for the digital environment[55] – which creates significant liability risks and market access barriers for the U.S. and other foreign services engaged in caching machine learning, and other transformative uses of content.

New Zealand

New Zealand has made commitments to promote balance in its copyright system through exceptions and limitations to copyright for legitimate purposes, such as criticism, comment, news reporting, teaching, scholarship, and research – including limitations and exceptions for the digital environment.

New Zealand relies on a static list of purpose-based exceptions to copyright. In practice, this means that digital technologies that use copyright in ways that do not fall within the technical confines of one of the existing exceptions (such as new data mining research technologies, machine learning, or innovative cloud-based technologies) are automatically ruled out, no matter how strong the public interest in enabling that the new use may be. For example, there is a fair dealing exception for news in New Zealand, but it is more restrictive than comparable exceptions in Australia and elsewhere, and does not apply to photographs – which limits its broader applicability in the digital environment.

As a result, New Zealand's approach to devising purpose-based exceptions is no longer fit for purpose in a digital environment. This approach creates a market access barrier for foreign services insofar as it is unable to accommodate fair uses of content by internet services and technology companies that do not

[52] https://www.livemint.com/news/india/sc-flags-tech-pitfalls-asks-centre-to-curb-social-media-misuse-1569350515906.html
[53] Copyright Law of Japan, Section 5 Art. 47-6, http://www.cric.or.jp/english/clj/cl2.html (narrowly defining the exception for search engine indexing as "for a person who engages in the business of retrieving a transmitter identification code of information which has been made transmittable . . . and of offering the result thereof, in response to a request from the public").

[54] Copyright Law of Japan, Section 5 Art. 47-7, http://www.cric.or.jp/english/clj/cl2.html (limiting the application of this data mining exception to "information analysis" done (1) on a computer, and (2) not including databases made to be used for data analysis).

[55] Approximately a decade ago, there was legislative discussion intended to facilitate the development of internet services in Japan by explicitly allowing copyright exceptions for activities such as crawling, indexing, and snippeting that are critical to the digital environment. This discussion resulted in a 2009 amendment to Japanese copyright law – however, the resulting amendment only provided narrowly defined exceptions for specific functions of web search engines, not for other digital activities and internet services. Japan continues to lack either a fair use exception or a more flexible set of limitations and exceptions appropriate to the digital environment.

fall within the technical confines of existing exceptions. To eliminate this barrier and comply with the U.S. standard and prevailing international norms, New Zealand should adopt a flexible fair-use exception modeled on the multi-factor balancing tests found in countries such as Singapore and the U.S.

Singapore

In 2016, Singapore opened a public consultation on a comprehensive and forward-looking review of the national copyright regime. During this process, the government introduced a new exception for copying of works for data analysis. This exception, which is already available in the United States under existing fair use provisions, will be invaluable to support further scientific research, data analytics, and innovations in machine learning. IA urges USTR to support these reform efforts. Also, we encourage USTR to support Singapore's 2019 recommendations to adopt a fair use framework modeled on U.S. law.

Vietnam

Vietnam does not have a comprehensive framework of copyright exceptions and limitations for the digital economy. Vietnamese law provides a shortlist of exceptions that do not cover core digital economy activities such as text and data mining, machine learning, and indexing of content. IA urges USTR to work with Vietnam to implement a flexible fair use exception modeled on the multi-factor balancing tests found in countries such as Singapore and the U.S. [56]

Vietnam also inhibits U.S. digital trade by failing to provide adequate and effective ISP safe harbors. IA encourages USTR to work with Vietnam to implement safe harbors that are consistent with Section 512 of the Digital Millennium Copyright Act.

LATIN and SOUTH AMERICA

Argentina

The lack of a framework on intermediary liability protections in Argentina has led to significant uncertainty for foreign firms seeking to do business in Argentina. IA supports Bill 0942-S-2016, which provides a clear framework that limits the liability of intermediaries for content generated, published, or uploaded by users until they are given appropriate notice under Argentine law.

Brazil

Historically, the 'Marco Civil' law[57] has offered legal certainty for domestic and foreign online services and has created conditions for the growth of the digital economy in Brazil.[58] Recently, there have been attempts to revisit or change key provisions of this legal framework, including compelling online companies to assume liability for all user communications and publications.[59]

[56] Law on Intellectual Property (as amended, 2009), Art. 25, 26.

[57] Brazilian Civil Rights Framework for the Internet, Law No. 12.965 (2014).

[58] Angelica Mari, *Brazil Passes Groundbreaking Internet Governance Bill*, ZDNET, http://www.zdnet.com/brazil-passes-groundbreaking-internet-governance-bill-7000027740/.

[59] Andrew McLaughlin, *Brazil's Internet is Under Legislative Attack*, MEDIUM https://medium.com/@mcandrew/brazil-s-internet-is-under-legislative-attack-1416d94db3cb#.dy4aak1yk.https://medium.com/@mcandrew/brazil-s-internet-is-under-legislative-attack-1416d94db3cb#.dy4aak1yk.

Other Brazilian proposals would require online services to censor criticism of politicians and others via a 48-hour notice-and-takedown regime for user speech that is "harmful to personal honor." This is a vague and overbroad standard that would present a significant market access barrier for U.S. companies seeking access to the Brazilian market.

There is also a bill in the Brazilian Senate[60] that includes a provision requiring digital platforms to "pay news publishers for use of their content (other than hyperlinks)," distorting fair play and placing an unfair burden on digital platforms.

Chile

Chile does not have a comprehensive framework of copyright exceptions and limitations for the digital economy. Chilean *Intellectual Property Law* includes a long but inflexible list of rules[61] that does not provide for open limitations and exceptions that are necessary for the digital environment – for example, flexible limitations and exceptions that would enable text and data mining, machine learning, and indexing of content. This handful of limitations leaves foreign services and innovators in a legally precarious position. To reduce market access barriers to U.S. services, IA urges USTR to work with Chile to implement a multi-factor balancing test analogous to fair use frameworks in the U.S and Singapore, to enable copyright-protected works to continue to be used for socially useful purposes that do not unreasonably interfere with the legitimate interests of copyright owners.

Colombia

To date, Colombia has failed to comply with its obligations under the U.S.-Colombia Free Trade Agreement to provide copyright safe harbors for internet service providers. A bill to implement the U.S.-Colombia FTA copyright chapter is pending.[62] Without a full safe harbor, intermediaries remain liable for civil liability. Action should be taken by the government to provide a full safe harbor as required by the FTA.

Ecuador

Ecuador's recently enacted "Ingenios Law" provides for unclear copyright limitations and exceptions that do not address the full scope of digital activities engaged in by U.S. businesses.[63] Ecuadorian law also does not include a copyright safe harbor system, meaning that U.S. intermediaries are not protected from civil liability. Interpretation of these provisions is subject to the development of secondary regulation and case law that does not yet exist.

Also, the Ingenios Law recognizes an unwaivable right of interpreters and artists to receive compensation for the making available and renting of performances fixed in an audiovisual medium. The law, however, does not establish who is responsible for the payment of this compensation and makes no reference to the application of this provision in the digital environment.

Finally, the Ingenios Law grants powers to authorities to issue precautionary measures against intermediary services to (i) suspend the public communication online of protected content and (ii)

[60] PL 4255/2020 at https://www25.senado.leg.br/web/atividade/materias/-/materia/144233
[61] Law No. 17.336 on Intellectual Property (as amended 2014), Art. 71.

[62] USTR, Intellectual Property Rights in the US-Colombia Trade Promotion Agreement, US-U.S.-Colombia Trade Agreement, https://ustr.gov/uscolombiatpa/ipr visited Oct. 25, 2016).
[63] See, e.g., Ingenios Law, article 212.23 (allowing provisional reproduction of a work as part of a technological process by an intermediary within a network "with independent economic significance").

suspend the services of a web page for "alleged" violations of copyrights. These powers granted to Ecuadorian authorities lack critical safeguards and counter-notice provisions established under U.S. law. The general lack of clarity of the Ingenios Law, in combination with the broad powers granted to regulatory authorities, could generate situations where the authorities' orders result in censorship based merely on allegations.

Mexico

With the USMCA, Mexico is now developing a comprehensive ISP safe harbor framework covering the full range of service providers and functions and prohibiting the imposition of monitoring duties.

In June 2020, a copyright reform was approved for the correct implementation of the USMCA, which entered into force on July 1.

At present, an unconstitutional legal action was filed before the Supreme Court against the amendments and several bills that aim to modify approved wordings. A Private Copy Levy bill is being discussed in the House of Representatives, that will impose a tax for the manufacturing or importation of devices that can potentially store copyrighted material. The bill is being proposed and widely supported by collective societies.

Peru

Peru does not have a comprehensive framework of copyright exceptions and limitations for the digital economy. Peruvian law currently includes a long but inflexible list of rules that does not provide for open limitations and exceptions that are necessary for the digital environment[64] – for example, flexible limitations and exceptions that would enable text and data mining, machine learning, and indexing of content. To accomplish this objective, Peru should also remove the provision in *Legislative Decree 822 of 1996* stating that limitations and exceptions "shall be interpreted restrictively" – which has limited the ability of Peruvian copyright law to evolve and respond flexibly to innovations and new uses of works in the digital environment.[65]

Also, Peru is out of compliance with key provisions under the U.S.-Peru Trade Promotion Agreement that require copyright safe harbors for internet service providers.[66] IA urges USTR to address this significant market access barrier for U.S. services and push for full implementation of the agreement.

IV. Conclusion

USTR must continue to support policies that protect the interests of American holders of intellectual property rights while fostering innovation and creativity. U.S. internet companies and the businesses that use these services to reach global customers rely on copyright limitations and exceptions to ensure access to lawful content and to promote the ingenuity at the core of the United States' comparative advantage worldwide. These companies and users are denied adequate and effective protection of their interests when other countries diverge from the balance struck within U.S. copyright law.

USTR has promoted copyright safe harbors in trade agreements for the last 15 years, including in the recently enacted USMCA. Increasingly, however, jurisdictions have chipped away at the principles

[64] Legislative Decree No. 822 of April 23, 1996, Title IV Chapter 1.

[65] Legislative Decree No. 822 of April 23, 1996, Title IV Chapter 1, Art. 50.

[66] https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file437_9548.pdf

behind this safe harbor framework. Such efforts threaten the ability of internet companies to expand globally by eliminating the certainty that copyright safe harbors provide.

To ensure a comprehensive understanding of the IPR interests at stake in evaluating global enforcement policies, IA urges USTR to include substantive discussion in the 2021 Special 301 Report of the role of necessary limitations, exceptions, and intermediary liability protections in developing and advancing industries dependent on U.S. copyright law.