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

In re:

Review

Request for Comments and Notice of a Public Hearing Regarding the 2019 Special 301

Docket No. USTR-2018-0037

COMMENTS OF
INTERNET ASSOCIATION

I. Statement of Interest

Internet Association (IA) represents over 45 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.

In order to preserve and expand the internet's role as a key driver of U.S. exports, economic development, and opportunity, the United States Trade Representative (USTR) should make open internet policies abroad a top trade priority. To maintain and expand U.S. digital trade leadership, the United States should push back on market access barriers and inadequate legal frameworks abroad that threaten the internet's global growth and its transformation of trade.

One foundational foreign barrier faced by IA members, and by the hundreds of thousands of U.S. businesses that use internet platforms to reach global customers, stems from inadequate and unbalanced systems of copyright and intermediary liability protection in other countries. While proper enforcement of intellectual property rules abroad is essential for our members, 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 deny market access to U.S. platforms and small businesses.

Balanced and nondiscriminatory implementation of intellectual property laws and enforcement of intellectual property rights enables the U.S. internet sector to operate in markets worldwide. Internet platforms are a key driver of the U.S. economy. All industries — and businesses of all sizes — reap the rewards of U.S. digital leadership. Small businesses and entrepreneurs in every American 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. Each year, U.S. manufacturers export $86.5 billion of products and services through digital trade. Newly released figures from BEA show that the 2017 U.S. digital trade surplus increased 7.8 percent to

[1] Internet Association represents the interests of leading internet companies including Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Eventbrite, Expedia, Facebook, Google, Groupon, Handy, HomeAway, IAC, Intuit, letgo, LinkedIn, Lyft, Match Group, Microsoft, Pandora, PayPal, Pinterest, Postmates, Quicken Loans, Rackspace, Rakuten, reddit, Salesforce.com, Snap Inc., Spotify, Stripe, SurveyMonkey, Thumbtack, TransferWise, TripAdvisor, Turo, Twilio, Twitter, Uber Technologies, Inc., Upwork, Vivid Seats, Yelp, Zenefits, and Zillow Group.

$172.6 billion[2] from $160.2 in 2016.[3] The internet is a borderless medium and the movement of electronic information enables virtually all global commerce.

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, leading 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 take for granted a balanced 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 unbalanced 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 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, then U.S. innovators and exporters will suffer, and other countries will increasingly misuse copyright to limit market entry. For example, 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. Web search, machine learning, computational analysis, text/data mining, and cloud-based technologies all, to some degree, involve making copies 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, pursuant to the request for comments issued by USTR and published in the Federal Register at 83 FR 67468 (December 28, 2018)[5], IA respectfully submits the following comments regarding the 2019 Special 301 Report.

II. Inadequate and unbalanced systems of intellectual property and intermediary liability protection in other countries result in the denial of market access to U.S. platforms and small businesses. USTR should address these issues in the 2019 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

[2]This filing previously stated totals for "total digital service exports" and "digital service trade surplus" that summed together ICT-enabled service exports and potential ICT-enabled service exports. These figures should not have been summed together as potential ICT-enabled service exports includes ICT-enabled service exports. The correct totals are approximately $439 billion in digital service exports and a surplus of $172.6 billion for digital service trade balance. The previous, incorrect figures were $470 billion in digital service exports and $196.1 for for digital service trade balance.
[3] https://apps.bea.gov/iTable/iTable.cfm?ReqID=62&step=1#reqid=62&step=9&isuri=1&6210=4
[4] Capital Trade. "Fair Use in the U.S. Economy." http://www.ccianet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf.
[5]https://www.federalregister.gov/documents/2018/12/28/2018-28319/request-for-comments-and-notice-of-a-public-hearing-regarding-the-2019-special-301-review

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 having an adverse impact on U.S. businesses.

In order 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 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 issues in the 2019 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.

Internet services rely on balanced copyright protections such as fair use (17 U.S.C. § 107) and safe harbors from copyright liability (17 U.S.C. § 512) to foster innovation, promote growth, and preserve the free and open internet. The U.S. internet industry – as well as small businesses that rely on the internet to reach customers abroad – require balanced copyright rules to do business in foreign markets. These critical limitations and exceptions to copyright enable digital trade by providing the legal framework that allows nearly all internet services to function effectively. However, as described below, these critical components of U.S. law are under threat abroad, creating significant market access barriers for U.S. companies doing business globally as well as a barrier to the open internet. Foreign governments are exerting a heavier hand of control on the internet and are subjecting online platforms to crippling liability for the actions of individual users.

For this reason, IA urges USTR to use future trade negotiations to promote a strong and balanced copyright framework that benefits all U.S. stakeholders. Without 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.[6] 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 require fair use 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 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

[6] How Stuff Works, How Internet Search Engines Work, available at http://computer.howstuffworks.com/internet/basics/search-engine1.htm (last visited Feb.8, 2017).

using a software-based audiovisual player. Fair use not only enables portability, but it also allows for more seamless upgrades and transitions to new or multiple devices via cloud storage, because content does not need to be laboriously copied from one device to another. In addition, 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 strong need to ensure that fair use or an analogous framework is in place 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 this 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 in order 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 are necessary for the digital environment.[7] 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 Digital Millennium Copyright Act (DMCA) provides online service providers with a safe harbor 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 its site or seek information about copyright infringement on its service.

Adoption of the DMCA's safe harbors has been critical to the growth of the internet and enabled online platforms to transform trade. Copyright is a strict liability regime with a unique statutory damages component and a judicially-developed secondary liability construction. 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 development of the internet. It is not feasible for an internet service to proactively "police the internet" for infringing activity on its platform. In most cases, it is difficult if not

[7] 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."

impossible for a third party to know whether any particular distribution of a work is infringing; whether the distribution is a fair use; whether the sender has a license; or even who owns the copyright.

USTR has promoted IP safe harbors in trade agreements for the last fifteen years. 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 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 do not have the ability to 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 proposal will deny market access to U.S. stakeholders.

The European Union is readying 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 U.S. copyright framework is a model for balancing the rights of content owners while also guarding the rights of users to engage in legitimate speech and activity. The framework achieves this balance by providing online platforms with limited protection and clarity for their obligations to address complaints of copyright infringement by users of their platforms. The U.S. recently negotiated a provision in USMCA (Article 20.89) reflecting this core principle. Proposed Article 13 in Europe destroys that balance – it effectively mandates content filtering systems for internet services without regard to whether the content filtering would adequately address unlawful conduct without also removing protected speech, ignoring fair use, and misidentifying legally distributed works.

The intended purpose of Article 13 is to target U.S. tech platforms and mandate the installation of filtering technologies if license negotiations do not produce suitable "value" to European copyright owners. Numerous key EU officials have highlighted that the purpose of Article 13 (and Article 11) is to "protect the creative sector in Europe . . . against the large U.S. platforms."[8] It raises insurmountable hurdles for startups and new businesses who will not be able to afford the necessary technologies, and whose existing notice and takedown tools and practices may actually be more effective at combating copyright infringement concerns. (Recent proposals by Germany for an "SME exception" were significantly narrowed by France, making it unlikely that U.S. startups or SMEs would meet the extremely restrictive criteria under the exception.) Article 13 of the European proposal would also hold user-upload services directly liable for copyright infringement committed by others. Recent proposals would even vitiate existing cooperative arrangements between service providers and rightsholders that

[8]Axel Voss, Protecting Europe's creative sector against the threat of technology, https://www.theparliamentmagazine.eu/articles/opinion/protecting-europe%E2%80%99s-creative-sector-against-threat-technology.

are essential to fighting piracy online. At this point, Article 13 includes a grab-bag of measures that alarm all sides of U.S. industry, as evidenced by a January letter from MPAA and other rightsholders calling for "suspension of negotiations on Article 13."[9] Clear guidance from U.S. government on these issues is urgently needed.

Article 11 was also drafted to compel U.S. companies to pay for activities that are entirely lawful under U.S. copyright law. Copyright has always allowed for 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 exercise this right when they provide services that index websites, aggregate news headlines, and refer online users to third-party articles. Yet Article 11 of the European proposal includes vague measures that would create a "quasi-copyright" publisher right whose primary goal is to require U.S. services to remunerate or obtain authorization for the use of such content for uses otherwise permitted by copyright law. The U.S. government has repeatedly recognized that these measures are "key barriers to digital trade [that] impose financial and operational burdens on U.S. firms that help drive traffic to publishing sites."Even the European Parliament and European Commission have expressed "doubt that the proposed right will do much to secure a sustainable press."[10] Yet at the behest of a small subset of European stakeholders, they have pressed on with a highly discriminatory and unwaivable right that would make it very difficult to deliver meaningful search and news results in the EU.

A responsible copyright regime also must enable continued innovation in the field of artificial intelligence to benefit customers worldwide. The ability to engage in informational analysis of lawfully acquired works, using technologies such as machine learning, provides the foundation for artificial intelligence and is used by all manner of researchers, businesses, and startups for data analytics. Copyright law has never been used to stop people from understanding and analyzing copyrighted works that they have lawfully accessed, nor has it prevented the use of unprotected facts and ideas contained in any copyrighted work. However, Article 3 of the European proposal attempts to prevent U.S. companies from engaging in informational analysis or using text and data mining in Europe.

IA encourages USTR to reiterate the U.S. government's opposition to these and other measures as currently drafted, to raise concerns directly with EU counterparts about damaging market access barriers associated with the proposed Copyright Directive, 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 we have followed to date on both sides of the Atlantic risk thwarting the continued growth of innovative and creative industries alike.

B. <u>"Ancillary copyright" and "neighboring rights" proposals in the European Union violate international copyright obligations and will deny market access to U.S. IPR stakeholders.</u>

"Ancillary copyright" or "neighboring rights" laws refer to legal entitlements for quotations or snippets 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

[9]https://www.politico.eu/wp-content/uploads/2019/01/Creative-Sector-Calls-for-a-Suspension-of-Negotiations-on-Article-13.pdf.

[10] http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf.

justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries."[11] 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 member states to allow for lawful quotations.[12]

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 in order 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 EU member states such as Germany and Spain have generated direct and immediate market access barriers for U.S. services.[13] The EU's new proposal, 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.[14]

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.

Finally, 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.[15] 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. We urge USTR to monitor this situation and engage with European counterparts to prevent other negative impacts from this ruling.

C. Other intermediary liability problems in the European Union.

Finally, despite existing protections under the E-Commerce Directive for internet services that host third-party content, courts in some European Union 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

[11] 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").
[12] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, art. 9.
[13] *EU Lawmakers Are Still Considering This Failed Copyright Idea*, Fortune (March 24, 2016), 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).
[14] 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.
[15] C–*GS Media BV v Sanoma Media Netherlands BV* et al., ECLI:EU:C:2016:644, European Court of Justice (8 September 2016).

indexing" to users.[16] Another U.S.-based platform was found liable because it engaged in indexing or other organization of user content.[17] 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."[18] 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. As part of broader engagement by USTR and other U.S. government officials with counterparts in the EU and its member states, IA urges USTR to highlight the importance of maintaining strong liability protections under the E-Commerce Directive to enable open internet platforms.

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. France recently passed legislation creating a new royalty for indexing images on the internet.[19] This "image indexation" law, which took effect in January 2017, creates a compulsory collective management system for the reproduction and communication to the public of plastic, graphic, and photographic works by online public communication services. Under the new system, automated image search services must negotiate agreements with collecting societies for royalties and permissions regarding the publication of the work.

While not a snippet tax per se, 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.[20] IA urges USTR to engage with counterparts in France to address this new legal barrier, and to monitor other developments around the world related to compulsory collective management schemes.

In addition, in September 2017, the French Government adopted a decree[21] implementing a tax on revenues of paid video-on-demand services, even when the provider is based abroad, as well as a tax on online advertising revenues of video-sharing platforms even when these videos are generated by users. These two taxes were portrayed by the French media as the "Netflix tax" and the "YouTube tax," respectively, creating great uncertainty and hindering the provision of video services across borders.

Germany

Ancillary copyright laws in Germany and Spain have proven detrimental for U.S. companies, EU

[16] RTI v. Kewego (2016).
[17] Delta TV v. YouTube (2014).
[18] RTI v. TMFT (201
[19] Art. L. 136-4, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032854341&fastPos=1&fastReqId=6434284&categorieLien=id&oldAction=rechTexte. Loi 2013-46du 10 décembre 2013 Project de Loi Dispositions relatives aux objectifs de la politique de défense et à la programmation financière, rapport du Sénate http://www.senat.fr/petite-loi-ameli/2015-2016/695.html.
[20] 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.
[21] Décret n° 2017-1364 du 20 Septembre 2017, available at https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=EF7CB30D13C42B2ED3740B0441D1DEA2.tpdila21v_3?cidTexte=JORFTEXT000035595843&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000035595430.

consumers, publishers, and the internet ecosystem that require 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.[22] The statute excludes the "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."[23] 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.

In addition, the German film levy law extends film funding levies from German to foreign pay video on demand (VOD) services despite the EU Audiovisual Media Services Directive's Country of Origin principle, according to which providers only need to abide by the rules of a Member State rather than in multiple countries. The new law that came into force on January 1, 2017 further extends the levy to foreign ad-funded VOD services insofar as they make cinematographic works available to Germans. Such services have to pay a proportion of their German revenues to the regulatory body, thus hindering cross-border businesses and raising costs for consumers.

Greece

Greece has created an administrative committee[24] that can issue injunctions to remove or block potentially infringing content.[25] 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. While implementation is still uncertain, this measure represents a significant divergence from U.S. procedures on efficient removal of infringing content.

Italy

Italy recently passed a new amendment that further empowers the Italian Communications Authority (AGCOM).[26] The amendment permits AGCOM to "require information providers to immediately terminate infringements of copyright and related rights, if the violations are evident, on the basis of a rough assessment of facts."[27] This law further empowers AGCOM to identify appropriate measures to prevent repeat infringements, amounting to a copyright "staydown" requirement that conflicts with both Section 512 of the DMCA and the Electronic Commerce Directive. Departures from established law serve as a market access barrier for U.S. services in Italy.

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

[23] Id.

[24] The enactment of this mechanism occurred by means of Law 4481/2017 and the introduction of a new analytical Article 66 E in the Greek Copyright Act (Law No. 2121/1993).

[25] http://ipkitten.blogspot.com/2018/03/greece-new-notice-and-take-down.html.

[26] Italy passed regulations in 2013 that granted AGCOM the authority to order the removal of alleged infringing content and block domains at the ISP level upon notice by rights holders, independent of judicial process. In March 2017, the Regional Administrative Court of Lazio upheld AGCOM's authority to grant injunctions without a court order. See Gianluca Campus, Italian Public Enforcement on Online Copyright Infringements, Kluwer Copyright Blog (June 16, 2017), available at http://copyrightblog.kluweriplaw.com/2017/06/16/italian-public-enforcementonline-copyright-infringements-agcom-regulation-held-valid-regional-administrative-court-lazio-still-room-cjeu/.

[27] Proposta emendativa pubblicata nell'Allegato A della seduta del 19/07/2017. 1.022, available at http://documenti.camera.it/apps/emendamenti/getPropostaEmendativa.aspx?contenitoreortante=leg.17.eme.ac.4505&tipoSeduta=0&sedeEsame=null&urnTestoRiferimento=urn:leg:17:4505:null:A:ass:null:null&dataSeduta=null&idPropostaEmendativa=1.022.&position=20170719.

Poland

In its judgment of January 25, 2017 in the case of *OTK v. SFP*,[28] the CJEU 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 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. In addition, 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 DMCA 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. In addition, 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 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 Intellectual Property Law in 2014 resulted in a similarly unworkable framework, requiring "equitable compensation" for the provision of "fragments of aggregated content" by "electronic content aggregation service providers."[29] 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 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 euros a day (2.5 million euros a year) for links or snippets posted by its users.[30]

[28] C-367/15 Stowarzyszenie 'Olawska Telewizja Kablowa' v. Stowarzyszenie Filmówcow Polskich, ECLI:EU:C:2017:36, European Court of Justice (January 25,2017).

[29] 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.

[30] Manuel Angel Mendez, Nuevo Intento de Imponer el Canon AEDE: Piden a Menéam 2,5 Millones de Euros al Año, El Confidencial, available at https://www.elconfidencial.com/tecnologia/2017-02-07/canon-aede-meneame-internet-facebook-agregadores_1327333/

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.[31] An economic study prepared by the Spanish Association of Publishers of Periodical Publications found that the result of Intellectual Property Law, which was meant to benefit publishers, was 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.[32]

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 2019 Special 301 Report.

Sweden

A 2016 Supreme Court ruling[33] in Sweden has 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.

Ukraine

USTR included Ukraine on the 2016 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.[34] These problems have not been effectively addressed in the past year.[35] 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 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.[36] These and other provisions are in direct conflict with Section 512 of the Digital Millennium Copyright Act, and are harming the ability of U.S. companies to access the Ukraine market.

United Kingdom

[31] An Update on Google News in Spain, Google Europe Blog (Dec. 11, 2014), available at http://googlepolicyeurope.blogspot.com/2014/12/an-update-on-google-news-in-spain.html.
[32] Spanish Association of Publishers of Periodicals, Economic Report of the Impact of the New Article 32.2 of the LPI (NERA for AEEPP), (July 9, 2015), available at http://coalicionprointernet.com/wp-content/uploads/2015/07/090715-NERA-Report-for-AEEPP-FINAL-VERSION-ENGLISH.pdf.
[33] April 4, 2016, case Ö 849-15, Bildupphovsrätt i Sverige ek. för v. Wikimedia Sverige.
[34] 2016 Special 301 Report, available at https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf.
[35] 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/
[36] Law of Ukraine On State Support of Cinematography in Ukraine.

The U.K. 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 U.K.'s High Court in July 2015.[37] Without such an exception in place in the U.K., individual cloud storage services will continue to face significant market access barriers, and even an attachment to an e-mail may be deemed to be an infringement.

In addition, U.S. services have concerns about potential liability revisions in the context of the U.K. Internet Safety Strategy Green Paper.[38]

AFRICA

Eastern African Region

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, 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 has undertaken proceedings to reform its copyright laws. IA encourages USTR to be supportive of the development of a framework that is consistent with U.S. law, 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.

South Africa

South Africa has run an inclusive proceeding to reform its copyright law, consulting a wide range of stakeholders, and appears to be moving in the direction of adopting balanced copyright frameworks. IA

[37] 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.

[38] United Kingdom Department for Digital, Culture, Media & Sport, Government response to the Internet Safety Strategy Green Paper (May, 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/708873/Government_Response_to_the_Internet_Safety_Strategy_Green_Paper_-_Final.pdf

respectfully urges USTR to support these inclusive processes and to highlight the importance of balanced copyright rules for these countries, drawing upon the principles of copyright law and market access established above.

ASIA-PACIFIC

Australia

Under the Australia-U.S. FTA (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).[39] Instead, only a narrower subset of " service providers" are covered under Australian law,[40] rather than the broader definition of "internet service providers" in the Australia-U.S. FTA. 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 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.

On June 28, 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.[41] The amendments do not put Australian copyright law into compliance with the AUSFTA. In fact, it is clear that 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.[42] Further amendments to these provisions are required to make sure that limitations on liability for commercial service providers are extended to 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.[43] The Australian Government has indicated that it anticipates these changes will only affect two U.S. companies.[44] 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.

In addition, IA urges USTR to work with Australia to develop a clearer fair use exception in order to

[39] Copyright Act 1968, Part V Div. 2AA.
[40] Section 116ABA of the Copyright Amendment (Service Providers) Act 2018.
[41] Copyright Amendment (Service Providers) Act 2018 https://www.legislation.gov.au/Details/C2018A00071.
[42] 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
[43] The Copyright Amendment (Online Infringement) Bill 2018 https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6209
[44] 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.

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."[45]

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 in order to operate in the Chinese market.

While U.S. CSPs are blocked in China, Chinese companies in the United States are able to 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; and 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

In the past years, Hong Kong had considered measures to bring its copyright law in line with the realities of digital age; including safe harbor provisions for internet intermediaries and exceptions for parody

[45] Australian Productivity Commission, April 2016 report.

which would form a strong foundation for future reforms and further discussion of flexible exceptions and limitations. Since the draft bill in question did not pass, Hong Kong has yet to re-engage in a discussion to amend its copyright framework. USTR should urge Hong Kong counterparts to adopt reforms introducing a safe harbor regime in line with the international practice and a broad set of limitations and exceptions, which would remove market access barriers for numerous U.S. businesses by establishing a more balanced copyright framework and support the growth of national digital economy.

India

India's intermediary liability framework continues to pose a significant risk to U.S. internet services. In particular, India does not have a clear safe harbor framework for online intermediaries,[46] meaning 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 liability framework in the 2017 National Trade Estimate:

> Any citizen can complain that certain content is "disparaging" or "harmful," and intermediaries must respond by removing that content within 36 hours. Failure to act, even in the absence of a court order, can lead to liability for the intermediary. The absence of a safe harbor framework discourages investment to internet services that depend on user generated content.[47]

IA urges USTR to continue to highlight these and other market access barriers related to the absence of intermediary liability protections. As described above, safe harbors from intermediary liability are not just critical elements of balanced intellectual property enforcement frameworks; they also power digital trade and enable companies that are dependent upon intellectual property to access new markets. Where such safe harbors are incomplete in scope or nonexistent, stakeholders in the internet sector face greater difficulty and risk in accessing these markets.

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. However, despite limited exceptions for search engines[48] and some data mining activities,[49] Japanese law today does not clearly provide for the full range of limitations and exceptions necessary for the digital environment[50] – which creates

[46] 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 . . .").
[47] 2017 National Trade Estimate Report on Foreign Trade Barriers, at 217, available at https://ustr.gov/sites/default/files/files/reports/2017/NTE/2017%20NTE.pdf.
[48] 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").
[49] 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).
[50] 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.

significant liability risks and market access barriers for 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 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 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.

New Zealand's Copyright Act of 1994 limits safe harbor caching to "temporary storage" while U.S. law and other similar provisions in U.S. FTAs include no such limitation. The definition of caching in Section 92E of the Copyright Act should be amended to remove the requirement of the storage being "temporary." This amendment would allow for greater technological flexibility and remove uncertainty surrounding the definition of "temporary." In addition, the government should clarify that under this caching exception, there is no underlying liability for the provision of referring, linking, or indexing services.

Singapore

In 2016, Singapore opened a public consultation on a comprehensive and forward-looking review of the national copyright regime in particular introducing a new exception for copying of works for the purposes of 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.

Vietnam

Vietnam does not have a comprehensive framework of copyright exceptions and limitations for the digital economy. Vietnamese law provides a short list of exceptions that do not clearly cover such core digital economy activities as text and data mining, machine learning, and indexing of content.[51]

Vietnam also fails to provide adequate and effective ISP safe harbors. Vietnam's Ministry of Information and Communications recently introduced a decree on the use of internet services and online information that includes an excessively short 24-hour window for compliance with content takedown requests, as

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

well as numerous other market access barriers highlighted below.[52]

Unfortunately, the requirements in this decree deviate from international standards on intermediary liability frameworks, and would present significant barriers to companies seeking to do business in Vietnam. Online services often require more than 24 hours to process, evaluate, and address takedown requests, particularly in situations where there are translation difficulties, different potential interpretations of content, or ambiguities in the governing legal framework.

As USTR identified in the 2017 National Trade Estimate with respect to a similar intermediary liability provision in India, "[t]he absence of a safe harbor framework discourages investment to internet services that depend on user generated content."[53] IA urges USTR to take similar action on this Vietnamese decree and highlight that this decree would serve as a market access barrier. In addition, IA encourages USTR to work with Vietnam and other countries to develop intermediary liability protections that are consistent with U.S. law and relevant provisions in trade agreements, including Section 230 of the CDA and Section 512 of the DMCA.[54] This draft decree also includes long and inflexible data retention requirements, a requirement for all companies to maintain local servers in Vietnam, local presence requirements for foreign game service providers, requirements to interconnect with local payment support service providers, and other market access barriers that will harm both U.S. and Vietnamese firms.

LATIN AMERICA

Brazil

IA urges USTR to monitor potential changes to the 'Marco Civil' law.[55] Historically, the 'Marco Civil' law has offered legal certainty for domestic and foreign online services and has created conditions for the growth of the digital economy in Brazil.[56] Recently, there have been attempts to revisit or change key provisions of this legal framework, including by compelling online companies to assume liability for all user communications and publications.[57]

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.

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[58] that does not clearly provide for open limitations and exceptions that are necessary for the digital environment – for

[52] Draft Decree Amending Decree 72/2013-ND-CP on the Management, Provision and Use of Internet Services and Information Content Online.
[53] 2017 National Trade Estimate Report on Foreign Trade Barriers, at 217.
[54] Vietnam must at a minimum include express and unambiguous limitations on liability covering ISP transmitting, caching, storing, and linking functions; revise Article 5(1) of Joint Circular No. 07/2012 to provide a safe harbor for storage rather than just "temporary" storage; and clarify that its safe harbor framework does not include any requirements to monitor content and communications.
[55] Brazilian Civil Rights Framework for the Internet, Law No. 12.965 (2014).
[56] Angelica Mari, *Brazil Passes Groundbreaking Internet Governance Bill*, ZDNET, http://www.zdnet.com/brazil-passes-groundbreaking-internet-governance-bill-7000027740/.
[57] Andrew McLaughlin, *Brazil's Internet is Under Legislative Attack*, MEDIUM https://medium.com/@mcandrew/brazil-s-internet-is-under-legislative-attack-1416d94db3cb#.dy4aak1yk.
[58] Law No. 17.336 on Intellectual Property (as amended 2014), Art. 71.

instance, 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. Chile must implement a general flexible exception, such as 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, but while this bill contains a number of new copyright enforcement provisions, it lacks both fair use limitations and exceptions and intermediary liability safe harbor provisions that are required under the Colombia FTA.[59] Without a full safe harbor, intermediaries remain liable for civil liability. Action should be taken by the Colombian government to provide a full safe harbor as required by the Colombia FTA.

Ecuador

Ecuador's recently enacted "Ingenios Law" provides for unclear copyright limitations and exceptions that do not clearly address the full scope of digital activities engaged in by U.S. businesses.[60] 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.

In addition, 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) 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

Mexico currently does not have a comprehensive framework of copyright exceptions and limitations for the digital economy. Without the USMCA, digital creators and innovators in Mexico must rely on a general provision that allows the use of works where there is no economic profit,[61] which increases legal risk and costs for U.S. internet and technology companies seeking to offer commercial services in Mexico.

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[59] USTR, Intellectual Property Rights In in the US-Colombia Trade Promotion Agreement, US-U.S.-Colombia Trade Agreement, https://ustr.gov/uscolombiatpa/ipr visited Oct. 25, 2016).

[60] 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").

[61] Mexico Federal Law on Copyright (as amended, 2016), Art. 148-151.

Without the USMCA, Mexico does not have a comprehensive safe harbor framework covering the full range of service providers and functions and prohibiting the imposition of monitoring duties. The absence of clear safe harbor measures for online services is a market barrier for U.S. companies, and could halt the growth of new online services critical to Mexico's growing economy.

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 clearly provide for open limitations and exceptions that are necessary for the digital environment[62] – for instance, 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 new innovations and new uses of works in the digital environment.[63]

In addition, 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.[64] 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 correctly identifies that an "important mission of USTR is to support and implement the Administration's commitment to vigorously protect the interests of American holders of IPR while preserving incentives that ensure access to, and wide dissemination of, the fruits of innovation and creativity."[65] 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 USMCA. Increasingly, however, jurisdictions have chipped away at the principles 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 2019 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.

[62] Legislative Decree No. 822 of April 23, 1996, Title IV Chapter 1.
[63] Legislative Decree No. 822 of April 23, 1996, Title IV Chapter 1, Art. 50.
[64] https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file437_9548.pdf
[65] 2015 Special 301 Report, at 6, available at https://ustr.gov/sites/default/files/2015-Special-301-Report-FINAL.pdf.