

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

In re:

2017 Special 301 Review:
Identification of Countries Under
Section 182 of the Trade Act of 1974:
Request for Public Comment and
Announcement of Public Hearing

Docket No. USTR-2016-0026

**COMMENTS OF
THE INTERNET ASSOCIATION**

I. Statement of Interest

The Internet Association¹ represents over 40 internet companies and supports policies that promote and enable internet innovation – ensuring that information flows freely across national borders, uninhibited by restrictions that are fundamentally inconsistent with the transnational, free, and decentralized nature of the internet. 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 Internet Association members, and by the hundreds of thousands of U.S. businesses that use internet platforms to reach global customers, comes 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 red tape for internet companies and deny market access to U.S. platforms

¹Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Match Group, Microsoft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Snap Inc., Spotify, SurveyMonkey, Ten-X, TransferWise, TripAdvisor, Turo, Twitter, Uber Technologies, Inc., Upwork, Yahoo!, Yelp, Zenefits, and Zynga.

and small businesses.

Balanced and equitable 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, with internet industries representing an estimated 6 percent of U.S. GDP in 2014, totaling nearly \$967 billion, and accounting for nearly 3 million American jobs.² Hundreds of thousands of U.S. small businesses now use the internet to reach customers around the world, in ways impossible a generation ago. At the same time, all U.S. industries – from flat-rolled steel to financial services to farming – are increasingly relying on the internet, and see internet-enabled tools as critical to their future global competitiveness. In addition, the internet has helped the United States unlock a massive \$159 billion trade surplus in digitally-deliverable services in 2014.³

In the United States, 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 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.

Accordingly, pursuant to the request for comments issued by USTR and published in the Federal Register at 81 FR 95724 (December 28, 2016), the Internet Association respectfully submits the following comments regarding the 2017 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 2017 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 having an adverse impact on U.S. businesses.

² Stephen Siwek, *Measuring the U.S. Internet Sector*, Economists Incorporated (Dec. 2015) at 4-5.

³ <http://esa.doc.gov/economic-briefings/digitally-deliverable-services-remain-important-component-us-trade>

In order to adequately advance U.S. interests in intellectual property, USTR should not only highlight 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, we explain how USTR can address these issues in the 2017 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.

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.⁴ 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

⁴ *How Internet Search Engines Work*, How Stuff Works, <http://computer.howstuffworks.com/internet/basics/search-engine1.htm> (last visited Oct. 26, 2016).

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 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.⁵ 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

⁵ 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."

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. That is, it is difficult if not impossible for a third party to know in most instances 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 on 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.

European Union

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

"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 justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.”⁶ 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.⁷

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.

As discussed below, 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.⁸ The European Union’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.⁹

⁶ 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”).

⁷ The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, art. 9.

⁸ *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).

⁹ Eur. Comm’n, Directive of the European Parliament and of the Council on Copyright in

The threat posed by ancillary copyright laws to U.S. stakeholders is genuine and timely, and we strongly urge USTR to address such concerns in the 2017 Special 301 Report 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.

B. The European Union’s copyright proposal will deny market access to U.S. stakeholders.

The European Commission’s Copyright Directive includes several elements likely to restrict a wide range of internet services in European markets.¹⁰ The proposed changes would represent a significant departure by the EU from its shared approach with the United States on the foundational principles of the free and open internet, and would restrict exports of U.S. online services to the EU. Particular problems with the Directive include broad and unclear monitoring and filtering obligations for service providers (Article 13), as well as potentially intrusive multi-stakeholder processes regarding the design and operation of content recognition technologies (Article 13).

If implemented, Article 13 of the proposed directive – read in conjunction with Recital 38 – would narrow the existing EU copyright safe harbor for hosting providers in unpredictable ways across different member states, subjecting online services to incalculable liability risks and requiring the costly deployment of content filtering technologies to “prevent the availability” of certain types of content.

This proposed requirement deviates from shared U.S. and EU norms that have been critical to the growth of the commercial internet. The internet is a vibrant and economically valuable platform in large part because of balanced intermediary liability laws, which permit users and small businesses to post material – such as videos, reviews, and pictures – online without being unduly exposed to liability for the content of that

the Digital Single Market (Article 11), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0596&from=EN>.

¹⁰ Eur. Comm’n, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (Sept. 14, 2016), <https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market>; World Intellectual Property Organization (WIPO), Berne Convention for the Protection of Literary and Artistic Works (as amended on Sept. 28, 1979), Eur. Comm’n, Directive of the European Parliament and of the Council on copyright in the Digital Single Market (2016 draft), http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283698.

material. Both the United States (under Section 512 of the Digital Millennium Copyright Act) and the EU (under Articles 12-15 of the E-Commerce Directive) create a “safe harbor” that protects online services from being liable for what their users do, as long as the service acts responsibly, such as by taking down content after being given notice that it infringes copyright.

However, the recent proposal by the Commission would deviate from this common transatlantic approach to intermediary liability by requiring service providers to “take measures . . . to prevent the availability on their services of works or other subject-matter identified by rightholders.” This language would create new, broad, and unclear filtering obligations that could be implemented in different and inconsistent ways across member states. Service providers would be subject to a moving target in the European Union for years to come. Larger providers would face critical liability risks, while smaller startups and entrepreneurs would be deterred from entering the market, given the difficulty of raising funds from venture capitalists that have consistently characterized such rules as strong impediments to investment.¹¹ Moreover, such filtering technology will be expensive for large and small services to develop and maintain.

In these ways, this new copyright proposal is quite similar to the “duty of care” that USTR correctly flagged in the 2016 National Trade Estimate as generating numerous market access problems for U.S.-based services, including significant “logistical difficulties,” “implications for free expression,” and a “regulatory regime to more tightly control platforms’ behaviors.” We encourage USTR to raise strong concerns about this new proposal, recognizing that it will serve as a damaging market access barrier for U.S.-based services if it is implemented.

C. Other intermediary liability problems in the European Union.

U.S. stakeholders have concerns about the Court of Justice of the European Union’s (CJEU’s) recent 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.¹² This case is already 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.

¹¹ Fifth Era, *The Impact of Internet Regulation on Early Stage Investment* (Nov. 2014), <http://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/5487f0d2e4b08e455df8388d/1418195154376/Fifth+Era+report+lr.pdf>

¹² *C--GS Media BV v Sanoma Media Netherlands BV et al.*, [ECLI:EU:C:2016:644](https://eur-lex.europa.eu/eli/cj/oj/2016/644), European Court of Justice (8 September 2016).

In addition, in the *Delfi* opinion, the European Court of Human Rights held an Estonian news site responsible for numerous user comments on articles, even though the company was acting as an intermediary, not a content provider, when hosting these third-party comments. In response to that decision, the Delfi.ee news site shut down its user comment system on certain types of stories, and the chief of one newspaper association stated: “This ruling means we either have to start closing comments sections or hire an armada of people to conduct fact checking and see that there are no insulting opinions.” Without clarification following this opinion, numerous internet services are likely to face increased liability risks and market access barriers in Estonia.

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 indexing” to users.¹³ Another U.S.-based platform was found liable because it engaged in indexing or other organization of user content.¹⁴ 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.’¹⁵ 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, we urge USTR to highlight the importance of maintaining strong liability protections under the E-Commerce Directive to enable open internet platforms.

France

Under France’s newly enacted “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, set to go into effect on January 8, 2017, will require online services to seek a license for any indexation of an image published in France.¹⁶ These requirements will present significant market access

¹³ RTI v. Kewego (2016).

¹⁴ Delta TV v. YouTube (2014).

¹⁵ RTI v. TMFT (2016).

¹⁶ 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>.

barriers for the large number of online services in the U.S. and elsewhere that work with images. By its very existence the law also deprives U.S. image banks, such as Getty, from their right to control how they are indexed and from the possibility to negotiate indexation fees. We urge 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.

Germany

Ancillary copyright laws in Germany and Spain have proven detrimental for U.S. companies, EU 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.¹⁷ 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.”¹⁸ 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.

Poland

In its recent judgment of January 25, 2017 in the case of *OTK v. SFP*,¹⁹ 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 rightsholder 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

¹⁷ 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.

¹⁸ Id.

¹⁹ C-367/15 Stowarzyszenie ‘Oławska Telewizja Kablowa’ v. Stowarzyszenie Filmowców Polskich, ECLI:EU:C:2017:36, European Court of Justice (January 25, 2017).

concerned to be used. In addition, in such a situation, the court clarified that there is no need for the rightsholder 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.

Spain

In Spain, reforms of the *ley de propiedad intelectual* 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.”²⁰ 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 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.²¹ An economic study prepared by the Spanish Association of Publishers of Periodical Publications found that the result of *ley de propiedad intelectual*, 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.²²

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 we strongly urge USTR to address these laws in the 2017 Special 301 Report.

²⁰ 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 Propiedad 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.

²¹ *An Update on Google News in Spain*, GOOGLE EUROPE BLOG (Dec. 11, 2014) <http://googlepolicyeuropa.blogspot.com/2014/12/an-update-on-google-news-in-spain.html>.

²² *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>.

Sweden

A recent Supreme Court ruling²³ 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.²⁴ These problems have not been effectively addressed in the past year.²⁵ A law proposed in late 2016 contained 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 would require intermediaries to monitor and filter user content.²⁶ These and other provisions are in direct conflict with Section 512 of the Digital Millennium Copyright Act, and would harm the ability of U.S. companies to access the Ukraine market.

United Kingdom

The U.K. has so far failed to implement 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 2015.²⁷ 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.

²³ April 4, 2016, case Ö 849-15, Bildupphovsrätt i Sverige ek. för v. Wikimedia Sverige.

²⁴ <https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf>.

²⁵ 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/>

²⁶ Law of Ukraine “On State Support of Cinematography in Ukraine”

²⁷ 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>.

Africa

Kenya

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. We urge 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. We encourage 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. stakeholders.

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. We respectfully urge 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, Australia is obligated to provide safe harbors for a range of functions by online services providers. Australia has failed to comply with this commitment. The Copyright Act of 1968's safe harbor provisions do not unambiguously cover all internet service providers, including the full range of internet services. Current Australian provisions cover only a narrower subset of "carriage service providers," 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. We urge 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 the Australia-U.S. FTA requirements. Similarly, Australia should consider extending its existing fair dealings regime onto a broader principle based fair use exception. 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 foreign providers of digital services. The government should adopt these recommendations and implement "a broad, principles-based fair use exception."²⁸

China

We urge USTR to engage with China on numerous problematic laws and regulations that are putting U.S. cloud service providers at a significant disadvantage vis-à-vis Chinese cloud service providers in China. China has been developing new regulations, including a "Draft Notice on Regulating Business Operation in Cloud Services Market" and a "Draft Notice on Cleaning up Regulations in the Internet Access Service Market" that, if fully implemented, would require U.S. cloud service suppliers to transfer high-value intellectual property related to specialized cloud services software and hardware (*e.g.*, racks, servers, routers, and switches) to Chinese companies as a condition of operating in-country. Current regulations prevent U.S. cloud service suppliers from using only their own trademarks and brands to market their services; all cloud services have to be marketed jointly with a Chinese company's trademarks and/or brands. Current regulations also prohibit U.S. cloud service providers from operating their own cloud services, signing contracts with end customers in China, offering customer support, and providing technical services.

²⁸ Australian Productivity Commission, April 2016 report.

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 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 reengaged 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,²⁹ 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 2016 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. Such strict rules encourage over-compliance with takedown notices, causing intermediaries to remove content that may not be illegal. Foreign companies providing internet services in India are forced to choose between needlessly censoring their customers and subjecting themselves to the possibility of legal action.³⁰

We urge 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.

²⁹ 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 . . .").

³⁰ <https://ustr.gov/sites/default/files/2016-NTE-Report-FINAL.pdf>

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 engines³¹ and some data mining activities,³² Japanese law today does not clearly provide for the full range of limitations and exceptions necessary for the digital environment,³³ creating 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

Currently, 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 the 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

³¹ 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).

³² 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).

³³ 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 snipping 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.

existing exceptions. To eliminate this barrier and comply with 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 United States.

In addition, New Zealand's Copyright Act 1994 limits safe harbor caching to "temporary storage," while U.S. law includes no such limitation.³⁴ 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.

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.³⁵

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 well as numerous other market access barriers highlighted below.³⁶

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 2016 National Trade Estimate, a similar intermediary liability provision in India has forced U.S. services "to choose between needlessly censoring their customers and subjecting themselves to the possibility of legal action." We urge USTR to take similar action on this Vietnamese decree and to highlight that this decree would serve as a market access barrier. In addition, we encourage 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

³⁴ DMCA § 512.

³⁵ Law on Intellectual Property (as amended, 2009), Art. 25, 26.

³⁶ Draft Decree Amending Decree 72/2013-ND-CP on the Management, Provision and Use of Internet Services and Information Content Online.

230 of the CDA and Section 512 of the DMCA.³⁷ 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.

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. We urge USTR to support these reform efforts.

Latin America

Brazil

We urge USTR to monitor potential changes to the ‘Marco Civil’ law,³⁸ which historically has been instrumental in offering legal certainty for domestic and foreign online services, and in creating conditions for the growth of the digital economy in Brazil.³⁹ In particular, there are 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.⁴⁰

³⁷ 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.

³⁸ Brazilian Civil Rights Framework for the Internet, Law No. 12.965 (2014).

³⁹ Angelica Mari, *Brazil Passes Groundbreaking Internet Governance Bill*, ZDNET (Mar. 26, 2014), <http://www.zdnet.com/brazil-passes-groundbreaking-internet-governance-bill-7000027740/>.

⁴⁰ Andrew McLaughlin, *Brazil’s Internet is Under Legislative Attack*, MEDIUM (Apr. 4, 2016), <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>.

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 rules⁴¹ that does not clearly provide for open limitations and exceptions that are necessary for the digital environment – for 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

While a bill to implement the U.S.-Colombia FTA copyright chapter is pending, this bill lacks both fair use limitations and exceptions and intermediary liability safe harbor provisions that are required under the FTA.⁴² 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 clearly address the full scope of digital activities engaged in by U.S. businesses.⁴³ Ecuadorian law also does not include a copyright safe harbor system, meaning that intermediaries remain liable for 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

⁴¹ Law No. 17.336 on Intellectual Property (as amended 2014), Art. 71.

⁴² USTR, *Intellectual Property Rights In in the US-Colombia Trade Promotion Agreement*, US-U.S.-Colombia Trade Agreement, <https://ustr.gov/uscolombiatpa/ipr> (last visited Oct. 25, 2016).

⁴³ 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”).

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 does not have a comprehensive framework of copyright limitations and exceptions for the digital economy. Today, digital creators and innovators in Mexico must rely on a general provision that allows the use of works where there is no economic profit,⁴⁴ in conflict with the principle under U.S. law that commercial uses are not a bar to invoking copyright limitations. In addition, Mexico does not have a comprehensive ISP safe harbor framework covering the full range of service providers and functions, with prohibitions on 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 environment⁴⁵ – 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.⁴⁶

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.”⁴⁷ U.S. internet companies and the businesses that use these services to reach global customers rely on copyright

⁴⁴ Mexico Federal Law on Copyright (as amended, 2016), Art. 148-151.

⁴⁵ Legislative Decree No. 822 of April 23, 1996, Title IV Chapter 1.

⁴⁶ Legislative Decree No. 822 of April 23, 1996, Title IV Chapter 1, Art. 50.

⁴⁷ 2015 Special 301 Report, at 6

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. To ensure a comprehensive understanding of the IPR interests at stake in evaluating global enforcement policies, the Internet Association urges USTR to include substantive discussion in the 2017 Special 301 Report of the role of necessary limitations, exceptions, and intermediary liability protections in developing and advancing companies dependent on U.S. copyright law.