

Before the
Office of the United States Trade Representative
Washington, DC

In re

2015 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-2014-0025

**COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the request for comments issued by the U.S. Trade Representative (USTR) and published in the Federal Register at 79 Fed. Reg. 78,133 (Dec. 29, 2014), the Computer & Communications Industry Association (CCIA)¹ submits the following comments for consideration as USTR composes its annual Special 301 Report. CCIA’s comments focus on legislation in several European countries that denies market access, denies adequate and effective protection of rights guaranteed under international IP law, and violates commitments that facilitate Internet commerce made in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

I. Introduction

CCIA’s comments address so-called “ancillary copyrights,” which have been the basis of troubling new legislative proposals in Europe — particularly Germany and Spain — that violate long-established rights of Internet services to make use of information online. Countries that grant rights in quotations deviate from international law, where long-recognized copyright rules prohibit nations from restricting the right to quote. These laws not only undermine market access for U.S. companies and distort established copyright law, but also violate EU-wide treaty and WTO commitments.²

¹ CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and

² See Raquel Xalabarder, *The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law*, IN3 WORKING PAPER SERIES (Sept. 30, 2014), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504596.

II. Ancillary Rights Laws Are Inconsistent with International Norms, Including TRIPS

Ancillary rights laws impose a levy on quotations. This contradicts the unambiguous language of Article 10(1) of the Berne Convention, titled “*Free Uses of Works.*” Article 10(1) provides:

*It 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.*³

The fact that “quotations from newspaper articles and periodicals in the form of press summaries” are explicitly cited as an example of what constitutes fair practice leaves little question that the Berne Convention mandates the free use of quotations from new articles.

As CCIA has argued in previous Special 301 proceedings, restrictions on the mandatory quotation right constitute an actionable TRIPS violation.⁴ This is because an ancillary right or any other form of private levy or tax on quotations contradicts Berne article 10, which is incorporated into TRIPS article 9.⁵ WTO Members therefore have a mandatory, affirmative obligation to permit anyone to quote from a work that is already lawfully publicly available.

III. Ancillary Rights Laws Have Been Enacted or Introduced Across Europe

There is a recent and growing trend of legislatures, primarily in Europe, proposing or implementing levies designed to tax online services and cross-subsidize domestic news producers. These levies take a form resembling a copyright-like “neighboring right” that may be invoked against online services reproducing quotations or snippets from news, or linking to the same. Ancillary rights functionally compel search providers, social media platforms, and other online services (many of which are American) to pay for the “privilege” of quoting from news

³ Berne Convention for the Protection of Literary and Artistic Works, art. 10(1), amended Oct. 2, 1979 (emphasis supplied).

⁴ *See, e.g.*, Comments of CCIA, Dkt. No. USTR-2010-003, filed Feb. 16, 2010, at 5, at <http://www.cciagnet.org/wp-content/uploads/library/CCIA-2010-Spec301-cmts.pdf> (stating that if a Berne Contracting Party “were to prohibit the making of quotations from newspaper articles, for example, this would constitute denial of ‘adequate and effective protection’ under § 2242(a)(1), possibly necessitating identification as ‘acts, policies, or practices’ having actual or potential impact on relevant United States products.”); *see also* Comments of CCIA, Dkt. No. USTR-2012-0022, filed Feb. 8, 2013, at [http://www.cciagnet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20\[2013\].pdf](http://www.cciagnet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf), at 11-12 (“By virtue of Berne’s incorporation in TRIPS, Article 10(1) imposes a mandatory, affirmative obligation on WTO Members to permit anyone to quote from a work that is already lawfully publicly available.”).

⁵ TRIPS Agreement, art. 9 (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971).”).

publications. As noted above, a levy on quotations, whether labeled an “ancillary right” or otherwise, violates TRIPS.

The desire to impose such taxes, levies or other restrictions, seemingly aimed at U.S. Internet companies, now permeates multiple governments across Europe. And in Brussels, the European Commissioner for the Digital Economy and Society has called for Europe-wide regulation of Internet services, most recently saying that a levy is necessary to preventing the Internet from “hollow[ing] out” news publishers’ rights.⁶

A. Germany’s *Leistungsschutzrecht*

Following CCIA’s 2013 submission on Germany’s *Leistungsschutzrecht*, the ancillary copyright law took effect.⁷ While the law was specifically aimed at news aggregation,⁸ such enactments threaten digital trade in general and set a problematic precedent.

Germany’s *Leistungsschutzrecht* resulted from political pressure by Germany’s powerful news publishers, who began advocating for some form of tax in 2009 through the association BDZV.⁹ As a result, Germany’s Federal Ministry of Justice (“*Bundesministerium der Justiz*”) issued a draft proposal in July 2012 for legislation that would establish a new exclusive right for press publishers.¹⁰ The enactment of the *Leistungsschutzrecht* in August 2013 upset the status quo under which search and social media platforms had the right to quote short excerpts from

⁶ *EU’s Oettinger mulls levy on Google - Handelsblatt*, REUTERS (Oct. 28, 2014), at <http://www.reuters.com/article/2014/10/28/eu-commission-oettinger-idUSL5N0SN34020141028>; *Oettinger Floats Proposal for EU-wide ‘Google-tax’*, EURACTIV (Oct. 29, 2014), at <http://www.euractiv.com/sections/innovation-enterprise/oettinger-floats-proposal-eu-wide-google-tax-309568>; *EU plant Urheberrechtsabgabe im Internet*, Handelsblatt, Oct. 28, 2014, at <http://www.handelsblatt.com/politik/international/schutz-geistigen-eigentums-bis-2016-eu-plant-urheberrechtsabgabe-im-internet/10900130.html> (“... Wenn Google intellektuelle Werte aus der EU bezieht und damit arbeitet, dann kann die EU diese Werte schützen und von Google eine Abgabe dafür verlangen”). See also Frances Robinson & Tom Fairless, *EU Considers Taxing Google, Other U.S. Internet Firms*, WALL ST. J., Jan. 19, 2015, at <http://www.wsj.com/articles/eu-considers-taxing-google-other-u-s-internet-firms-1421699055>. In a January 28 speech, Mr. Oettinger said a “Google ‘levy’ is an option” so that Internet platforms do not “hollow out” copyright. Video at <https://www.youtube.com/watch?v=jta92bxjMDw> (original German, with English subtitles).

⁷ Matt Schruers, *Germany Looks to Prop Up News Publishers With Snippet Subsidy, But Is a Quotation Tax Legal?*, DISRUPTIVE COMPETITION PROJECT (Nov. 14, 2012), at <http://www.project-disco.org/intellectual-property/111412-germany-looks-to-prop-up-news-publishers-with-snippet-subsidy-but-is-a-quotation-tax-legal>.

⁸ Jakob Kucharczyk, *Ancillary Copyright in Germany: From Opt-out to Opt-in on Google News*, DISRUPTIVE COMPETITION PROJECT (July 1, 2013), at <http://www.project-disco.org/intellectual-property/070113-ancillary-copyright-in-germany-from-opt-out-to-opt-in-on-google-news>.

⁹ Bundesverband Deutscher Zeitungsverleger e.V. (trade association of German newspapers).

¹⁰ Bundesministerium der Justiz, *Entwurf eines Siebenten Gesetzes zur Änderung des Urheberrechtsgesetzes* (July 7, 2012), at art. 87f-g.

web content (as is the case with offline content), including content from newspapers, periodicals, and other press publishers.¹¹

The *Leistungsschutzrecht* expressly holds search engines liable for making available to the public parts of “press products” in search results, thereby creating direct liability for the automated indexing processes by which search results are generated. In a last minute change, however, the German legislature decided to exclude “smallest text excerpts” from the scope of the law. This created some legal uncertainty, as that term was given no definition.

The law states that providing access to press publications remains permissible as long as the access provider is not a commercial search service or similar entity.¹² The draft legislation’s official background explanation clarified that this new restriction would not apply to “bloggers, other commercial businesses, associations, law firms or private and unpaid users.”¹³ Thus, a German law firm, for example, might be permitted to compile links to news coverage on a particular topic, with accompanying snippets, without obtaining permission, but a search engine or social media provider would not. (If the hypothetical law firm were to use a social media provider to advertise its compilation, it remains unclear whether a remuneration obligation would accrue, and to whom.) CCIA and others have argued that this statute is inconsistent with Germany’s international obligations.¹⁴ In addition to representing a trade barrier, the statute has also been the subject of a challenge under German constitutional law.¹⁵

B. *Spain’s ley de propiedad intelectual*

Spain’s legislature introduced a similar snippet levy in July 2014 in an omnibus reform of its *ley de propiedad intelectual*.¹⁶ Included within a broader reform known as the “canon

¹¹ German Copyright Act (1965, as last amended in 2013), at art. 87f(1), at http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0572 (“The producer of a press product (press publisher) shall have the exclusive right to make the press product or parts thereof available to the public for commercial purposes, unless this pertains to individual words or the smallest of text excerpts. If the press product was produced within an enterprise, the owner of the enterprise shall be deemed to be the producer.”).

¹² See *supra* note 11, at art. 87g(4) (discussing “commercial providers of search engines or commercial providers of services which process the content accordingly”).

¹³ See *supra* note 10 (translated).

¹⁴ See generally Comments of CCIA, Dkt. No. USTR-2012-0022, *supra* note 4 (pointing out inconsistency of ancillary right proposal with international trade obligations in USTR’s Special 301 proceeding).

¹⁵ Loek Essers, *German copyright law is unconstitutional, Yahoo says in complaint*, PCWORLD (Aug. 1, 2014), at <http://www.pcworld.com/article/2460720/german-copyright-law-is-unconstitutional-yahoo-says-in-complaint.html> (explaining Yahoo’s claim that the law conflicts with the German constitutional protections to freedom of information and from government action restricting access to information).

¹⁶ See *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*

AEDE,¹⁷ the snippet levy provision was enacted late in 2014, notwithstanding domestic criticism and substantive legal concerns. As enacted, Article 32.2 provides that:

The making available to the public by electronic content aggregation service providers of non-significant fragments of aggregated content which are disclosed in periodic publications or on websites which are regularly updated, for the purposes of informing, shaping public opinion or entertaining, shall not require authorization, without prejudice to the publisher's right, or if appropriate, other right holders to receive equitable compensation. This right shall be unwaivable and will be given effect by means of intellectual property rights management entities . . .¹⁸

Depending upon whether quoted fragments are “significant” or “non-significant,” regulated service providers appear to be obligated to obtain the publishers’ permission to reproduce content, and provide “equitable compensation.”¹⁹ If quoted fragments are “non-significant,” regulated service providers need not obtain authorization to quote, but must still provide “equitable compensation.”

Spain’s national competition enforcement authority (“CNMC”) stated that a new exclusive right would form a barrier to market entry.²⁰ The CNMC further noted that the collecting society contemplated by the law might itself restrict competition, and recommended against creating a new collecting society and also against creating an “unwaivable” right. Unlike the equivalent German legislation, the Spanish ancillary copyright provision creates a right which is unwaivable, or inalienable. That is, news publishers cannot waive it and are prohibited from negotiating over the right to be remunerated; money must be paid for links whether it is desired by the content originator or not. This appears to include even cases where the author desires the content to be available under a more permissible basis, such as a Creative Commons

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), at http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-81-3.PDF.

¹⁷ This informal label for the legislation is a reference to the Spanish news publishers’ trade organization, the Association of Spanish Editors and Newspapers (AEDE).

¹⁸ See *supra* note 16. The revised Article 32.2 also curtails the right to reproduce images and photographic works that are disclosed in periodic publications or websites that are regularly updated. This provision is also problematic but is not addressed in these comments.

¹⁹ While not explicitly stated in the legislation, this is implied by the provision’s recognition of the “publisher’s right, or if appropriate, other right holders to receive equitable compensation.” The text indicates that the publisher’s/right holder’s right to equitable compensation applies at least in the case of non-significant fragments. Accordingly, it likely also applies in the case of significant fragments. It is unclear from the legislation whether there is an independent provision conferring this right directly.

²⁰ See Comisión Nacional de Los Mercados y La Competencia, *Proposal Relating to the Modification of Article 32.2 of the Draft Act Modifying the Redrafted Text of the Intellectual Property Act* (May 16, 2014), at http://cnmcblog.es/wp-content/uploads/2014/05/140516-PRO_CNMC_0002_14-art-322PL.pdf.

license or open publishing. Like its German counterpart, the Spanish snippet levy purports to exclude non-commercial actors. Unlike Germany's law, however, the Spanish ancillary copyright could arguably be interpreted to cover just about any content online, not only news. This is because its scope includes content for "purposes of informing, shaping public opinion or entertaining" – a very broad definition of subject matter covered by the law.

The Spanish legislation went into effect on January 1, 2015, and contemplates creation of a collecting society or rights management organization, but as of the time of this submission, no such entity yet exists. As a result of the law, Google exited the market for Spanish news aggregation, closing down its news.google.es website on December 16, 2014, and delisting links to Spanish news publications in Google search results.²¹

C. Proposals in Other Jurisdictions

In addition to the German and Spanish laws, similar efforts are under consideration in Austria, Italy, Sweden, and France with respect to images.²² Absent a clear statement that these openly protectionist proposals violate international trade norms, similar initiatives are likely to be undertaken in more jurisdictions keen to restrict the growth of successful Internet services.

IV. Conclusion

Ancillary rights laws upend how the Internet and copyright law ordinarily operate. In the United States and nearly all other jurisdictions, showing of a snippet is considered to be permissible either under an exception to copyright law – *e.g.*, because it is considered a fair practice, fair use, or fair dealing of the copyrighted work – or because the copyright owner is considered to have granted implied consent to third-party reproduction of such snippets (because it has made its work available on the Internet and is not blocking its work from being indexed by search engines).

For purposes of USTR's Special 301 inquiry, ancillary rights laws (1) deny market access to U.S. online services and service providers, including search providers and other social media, as well as other exporters of goods and services that rely on these platforms; (2) violate TRIPS; and (3) deny adequate and effective protection of rights secured by international IP treaties. For

²¹ Google Support, *Google Noticias en España*, at <https://support.google.com/news/answer/6140047#English>.

²² Brad Spitz, *Thumbnails: French proposal for payment of royalties by search engines*, KLUWER COPYRIGHT BLOG, Apr. 28, 2014, at <http://kluwercopyrightblog.com/2014/04/28/thumbnails-france/>.

the foregoing reasons, CCIA urges USTR to, at a minimum, place Germany and Spain on the Watch List in this year's Special 301 Report.

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