January 28, 2021

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Office of the United States Trade Representative
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VIA ONLINE SUBMISSION

Re: Comments of Engine Advocacy in Response to *Request for Comments and Notice of a Public Hearing Regarding the 2021 Special 301 Review*, Docket No. USTR-2020-0041

Dear Mr. Ewerdt,

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues. We appreciate the opportunity to submit these responses as the Office of the United States Trade Representative ("USTR") conducts its Special 301 Review into countries that deny adequate and effective intellectual property ("IP") protections or that deny fair and equitable market access to U.S. companies that rely on IP protection.[1]

I. Startups need certain, consistent, balanced IP frameworks

Balanced, certain, and consistent IP frameworks are critical for innovation and for facilitating startup growth and competition globally. In considering the adequacy and effectiveness of other countries' IP frameworks, USTR should weigh these features of balance and certainty. And the Special 301 Review

[1] Engine has articulated similar positions over the past year. The present comments draw from previous submissions, including, e.g., Comments of Engine Advocacy, *In re* Request for Comments Regarding the 2020 Special 301 Review, Docket No. USTR-2019-0023, at (Feb. 6, 2020), *available at* https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5e41a15789f5bb0179ffba69/1581359448083/Engine_2020+Special+301_Review_Comment.pdf; Comments of Engine Advocacy, *In re* Request for Comments to Compile the National Trade Estimate Report on Foreign Trade Barriers, Docket No. USTR-2020-0034 (Oct. 29, 2020), *available at* https://www.engine.is/s/Engine_Comments_USTR-2021-NTE-Report.pdf; Comments of Engine Advocacy on China's WTO Compliance, Docket No. USTR-2020-0033 (Sept. 16, 2020), *available at* https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5f636cd9731cc06411c97307/1600351450345/2020.09.16_Engine+Comments+re+Docket+No+USTR-2020-0033.pdf.

should acknowledge how imbalanced and uncertain IP laws can erect unfair and unjustified barriers to market access, especially for U.S. startups looking to expand globally.

Well-tailored IP frameworks correctly focus on enforcement of legitimate rights. But a functioning IP system must also have ample protections against abuse; provide certainty that startups that encounter user generated content will not be liable for alleged infringement they have no knowledge of or involvement in; prevent IP from creating unjustified barriers to entry; and avoid overly-rigid applications which stifle creativity, innovation, or free speech.

Domestic startups rely on balance in U.S. law which is reflected in, for example, 17 U.S.C. § 512, the doctrine of fair use, and efficient and affordable means of avoiding or curtailing abusive IP litigation. These features have enabled a healthy innovation ecosystem, and led to the creation of technical, economic, and creative sectors that would not have been possible absent balanced IP frameworks.[2] That said, imbalances and uncertainty remain, even in U.S. law. Startups are regularly subject to abusive patent assertion.[3] Startups and smaller Internet platforms—as well as the users and creators they serve—have to deal with abusive and anticompetitive accusations of copyright infringement.[4] Some entities still wield disproportionate leverage, and can use IP laws to stifle non-infringing content and harm startups or even force them to close up shop.[5]

To protect startups and enable their growth on a global scale, countries must both adopt and implement balanced, certain, and consistent IP laws. For example, the recent U.S.-Mexico-Canada Agreement's ("USMCA") IP provisions embodied some of the balanced and unambiguous IP frameworks that are critical for startups.[6] Indeed, while imbalance, uncertainty, inconsistency, or change in IP law and policy

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[2] *See generally, e.g.*, Engine Comments to the National Trade Estimate Report, *supra* note 1, at 1-2 (identifying value of various components of digital economy); *Is the DMCA's Notice-and-Takedown System Working in the 21st Century?: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 116th Congress, 3-5 (2020) (testimony of Abigail Rives); *available at* https://www.judiciary.senate.gov/imo/media/doc/Rives%20Testimony.pdf (identifying economic growth in global Internet ecosystem and Internet-enabled creative industries enabled by 17 U.S.C. § 512 notice-and-takedown and safe harbor framework); Jason Wiens & Chris Jackson, How Intellectual Property Can Help or Hinder Innovation, Kauffman Foundation (Apr. 6, 2015), https://www.kauffman.org/resources/entrepreneurship-policy-digest/how-intellectual-property-can-help-or-hinder-innovation/ (summarizing how IP "can increase productivity and firm valuations," but also "be inefficient and hinder innovation if they are too weak or too strong," and calling for a "Goldilocks" approach to IP frameworks).

[3] *See generally, e.g.*, *Startups Need Comprehensive Patent Reform Now*, Engine, *available at* http://static1.squarespace.com/static/571681753c44d835a440c8b5/57323e0ad9fd5607a3d9f66b/57323e14d9fd5607a3d9faec/1462910484459/Startup-Patent-Troll-Stories1.d.pdf?format=original (summarizing selected startup experiences with abusive patent assertion).

[4] *See generally, e.g.*, Rives *supra* note 2, at 11-17 (discussing examples of abusive or anticompetitive copyright takedown notices).

[5] *See generally, e.g.*, Engine, *supra* note 3; *see also, e.g.*, Emily Chasan, *Web Video Service Veoh to Liquidate, Founder Says*, Reuters (Feb. 12, 2010), https://www.reuters.com/article/veoh-bankruptcy-idCNN1216366120100212 (quoting founder saying "[t]he distraction of the legal [copyright] battles, and the challenges of the broader macro-economic climate have led to our Chapter 7 bankruptcy"). Veoh launched in 2005, and was sued by Universal Music Group in 2007, based on alleged copyright infringement by Veoh's customers. That case was not resolved until 2013. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013). UMG eventually lost the suit, with the Ninth Circuit affirming that Veoh was operating within the protection of 17 U.S.C. § 512 safe harbors. But while the suit was pending, Veoh filed for bankruptcy.

[6] *Engine Applauds Signing of USMCA*, Engine (Jan. 29, 2020), https://www.engine.is/news/engine-applauds-signing-of-usmca; *see also, e.g.*, Jennifer Weinhart, *Startups Need Balanced Copyright Provisions in the U.S.-U.K.*

may not have a significant impact on large companies that can afford to accommodate it, startups are disproportionately and negatively affected.[7] Startups operating on tight budgets and thin margins are ill-suited to afford the costs and risks of defending IP infringement allegations—especially when some legal frameworks make it easy to raise weak or ambiguous infringement claims, the path to compliance with the law is unclear, or the damages for infringement are out of proportion with any alleged harms caused.

There are concerning trends in many countries—several of which are discussed herein—where IP frameworks are (or are becoming) less balanced. And the success of many (current and potential) startups could be jeopardized by a patchwork of such imbalanced laws. At the same time, certain countries are considering positive changes to their IP frameworks, which would improve the backdrop for global innovation and startup growth—and we have highlighted a few of those positive developments in these comments as well, in hopes that USTR will encourage the good while also identifying the bad.

II. Startups that encounter user-generated content need certainty that they will not face crippling copyright litigation or liability

Certainty in the law is essential to all businesses, but especially startups. Startups that encounter user-generated content need to know whether and when they can be sued for copyright infringement—especially when the alleged infringement involves user-generated content the company has no knowledge of or direct involvement in. Otherwise, the risks and costs of copyright litigation would be so high that few companies could succeed.[8] However, some countries have adopted (or are expected to adopt) laws that impose near-impossible burdens on companies that encounter user-generated content and create undue uncertainty concerning a company's liability for its users' purported infringement.

<u>European Union.</u> The EU adopted a copyright directive rife with problems for startups seeking to host any user-generated content and operate in the region.[9] Article 17 of the Directive on Copyright in the Digital Single Market has teed up an impossible constellation of requirements and, as it is implemented

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Trade Agreement, Engine (Sept. 22, 2020); https://www.engine.is/news/startups-need-balanced-copyright-provisions-in-the-us-uk-trade-agreement; Kate Tummarello, Opinion, *Exporting U.S. Internet Law Will Help Startups Thrive*, The Hill (Oct. 16, 2019), https://thehill.com/opinion/technology/465984-exporting-us-internet-laws-will-help-startups-thrive.

[7] *Cf.* Evan Engstrom, Opinion, *Ending Digital Copyright Act Would Fundamentally Change Internet*, The Hill (Mar. 28, 2017), https://thehill.com/blogs/pundits-blog/technology/326043-ending-digital-copyright-act-would-fundamentally-change ("The cost of mandatory filtering would poke a giant hole in the business plan of startups, which have historically driven the growth of the internet sector, making it harder for new startups to attract investors or compete with incumbents."); Björn Greif, *Study: Google Is the Biggest Beneficiary of the GDPR*, Cliqz (Oct. 10, 2018) https://cliqz.com/en/magazine/study-google-is-the-biggest-beneficiary-of-the-gdpr; *#StartupsEverywhere: Greenville, SC*, Engine (May 15, 2020), https://www.engine.is/news/startupseverywhere-greenville-sc (Profile of Ryan Heafy, Co-Founder and COO, 6AM City) (referring to established U.S. copyright law governing allegations of online infringement and platform liability, and explaining how "[a] large shift in policy might not have a significant impact on large companies that can accommodate change, but it could unintentionally result in negative impact on entrepreneurs and the small business community").

[8] In the U.S., 17 U.S.C. § 512 provides the safe harbor and notice-and-takedown framework for resolving claims of online infringement. Especially since U.S. law also allows copyright owners to seek extremely high statutory damages, 17 U.S.C. § 504, section 512's clear and balanced framework for online service providers to address alleged infringement can spare nascent companies substantial legal exposure over even just a few user posts.

[9] Engine raised concerns to the EU throughout the process of its development and implementation of this copyright directive, most recently last year as the Commission considers Member State implementation of the Directive. *See, e.g.*, Abby Rives, *Engine Submits Comments to EU on Implementing Copyright Policy Directive*, Engine (Sept. 11, 2020), https://www.engine.is/news/engine-submits-comments-to-eu-on-implementing-copyright-policy-directive.

by EU Member States, will open smaller and startup Internet platforms to substantial new costs and risks.[10]

For example, Article 17 imposes a de facto filtering mandate, requiring platforms that host user generated content to review every post for potential infringement. By imposing a "staydown" requirement,[11] the directive mandates use of upload filtering technology, because use of such technology is the only way to implement staydown.[12] Such mandatory filtering substantially increases the costs of market entry.[13] YouTube spent over $100 million to develop ContentID, but that is orders of magnitude more than what the typical startup can afford.[14] Off-the-shelf tools like Audible Magic are equally impractical for startups, as licenses can easily cost over $10,000 per month, and adopting those technologies requires companies to spend even more to implement and maintain the software.[15] By contrast, early-stage companies raise an average of $78,500 during their first year.[16]

Moreover, not only are filtering tools very expensive, but they are inadequate and/or non-existent.[17] When the filtering tools fail (which they do, and will), Internet platforms will also face the massive liability that comes along with failure to implement staydown.

Likewise, Article 17 inherently favors larger organizations and certain traditional rightsholder organizations, and disadvantages smaller service providers and the Internet-enabled creators they serve. Many, if not most, larger and established Internet platforms have already developed technology needed to comply with Article 17. And those larger companies have already, or are well-equipped to, negotiate licenses with rightsholder organizations (which inherently have, and have historically wielded, disproportionate leverage in such negotiations). Those are negotiations in which startups and smaller Internet platforms are at a distinct and substantial disadvantage. Further, large companies have the financial wherewithal to survive the increased risks associated with hosting user-generated content in the EU. Startups, operating on already-thin margins, do not.[18]

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[10] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0790&rid=1.

[11] Article 17(4)(c) (requiring platforms to implement measures to prevent further uploads of allegedly infringing works).

[12] *E.g.*, Chris Sprigman & Mark Lemley, Opinion, *Why Notice-and-Takedown is a Bit of Copyright Law Worth Saving*, L.A. Times (June 21, 2016), https://www.latimes.com/opinion/op-ed/la-oe-sprigman-lemley-notice-and-takedown-dmca-20160621-snap-story.html.

[13] *See generally* Rives, *supra* note 2, at 18-23 (addressing how changes in U.S. law which mandate filtering or increase obligations on platforms to review all user content would disproportionately impact startups, including addressing the costs and risks of upload filters).

[14] Paul Sawers, *YouTube: We've Invested $100 Million in Content ID and Paid Over $3 Billion to Rightsholders*, VentureBeat (Nov. 7, 2018), https://venturebeat.com/2018/11/07/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders/.

[15] *See, e.g.*, Jennifer M. Urban et al., *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, 64 J. Copyright Soc'y U.S.A. 371, 400 (2017).

[16] *Startup Funding Infographic*, Fundable, https://www.fundable.com/learn/resources/infographics/startup-funding-infographic (last visited Jan. 21, 2021).

[17] Evan Engstrom & Nick Feamster, *The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools* (Mar. 2017), https://www.engine.is/the-limits-of-filtering.

[18] *See* Letter of Engine Advocacy re: Targeted Consultation Addressed to Participants to the Stakeholder Dialogue on Article 17 of the Directive on Copyright in the Digital Single Market 7 (Sept. 10, 2020), *available at* https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5f5a64c6cb585e4abe0cf490/1599759563332/2020.09.10_Engine+Responses+to+Targeted+Consultation+on+Article+17.pdf.

Australia. The Australia-U.S. Free Trade Agreement ("AUSFTA") required Australia to implement limitations on copyright liability for service providers, similar to U.S. law.[19] While Australian law does provide for a certain level of safe harbor protections, it is narrower than required by AUSFTA.[20]

The failure of Australia's efforts to implement the copyright safe harbors called for in AUSFTA can be seen in practical experience. For example, Redbubble owns and operates leading global marketplaces powered by independent artists. Independent artists share and sell their creative works to a worldwide audience, printed on everyday products like apparel, housewares, and wall art.[21] Redbubble was recently found liable for copyright infringement in Australia when a Redbubble user uploaded derivative images of a Pokémon character.[22] This result was reached even though Redbubble had undertaken a number of initiatives to prevent potentially infringing content from being uploaded to and remaining on its site.[23]

In 2018, Australia expanded its safe harbor only to, e.g., organizations that provide legal protections to those with a disability and to public libraries, educational, and cultural institutions.[24] As such, Australian law continues to lack the full coverage contemplated under AUSFTA. This harms startups and disincentivizes expansion into the Australian market.[25]

India. India's Information Technology Act, 2000 addresses intermediary liability for copyright claims, with a notice-and-takedown and safe harbor framework for platforms that encounter user-generated content. However, the exact boundaries of this safe harbor are not clearly defined.[26]

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[19] Chapter 17 of the Australia-U.S. Free Trade Agreement, *available at* https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file469_5141.pdf (Article 17.11, Section 29).

[20] Jonathan Band, *Australian Copyright Law Thumbs Nose at U.S. Trade Commitments*, Project Disco (July 6, 2018), https://www.project-disco.org/intellectual-property/070518-australian-copyright-law-thumbs-nose-at-u-s-trade-commitments/.

[21] Emma Clark, *Redbubble Group*, Redbubble Investor Presentations (Nov. 2019), https://shareholders.redbubble.com/site/PDF/1994_1/investorpresentationnovember2019.

[22] Isobel Taylor and Georgina Hey, *Australia: No Safe Harbour: Online Platforms Face Choppy Waters When it Comes to Copyright Infringement*, Mondaq (May 8, 2019), http://www.mondaq.com/australia/x/803964/Copyright/No+safe+harbour+Online+platforms+face+choppy+waters+when+it+comes+to+copyright+infringement; *Pokémon Co. Int'l, Inc. v. Redbubble Ltd* [2017] FCA 1541, *available at* https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca1541.

[23] *Pokémon v. Redbubble*, *supra* note 22 (Redbubble "require[d] that the users agree that they owned (or had permission to use) the copyright in any works uploaded to the site, systems allow[ed] copyright owners to notify Redbubble of infringing content then promptly remov[ed] such content, a content team monitor[ed] the accounts of users who had been flagged in the past, and block[ed] certain keywords as search terms").

[24] Corinne Reichert, *Copyright Safe Harbour Expansion Bill Passes Parliament*, ZD Net (June 27, 2018), https://www.zdnet.com/article/copyright-safe-harbour-expansion-bill-passes-parliament/.

[25] *See, e.g.*, Jessica Coates, *Australian Digital Alliance: Extension of Safe Harbour Welcomed as an Incremental Step*, Info Justice (June 27, 2018), http://infojustice.org/archives/40114 ("Australia technology companies are still exposed to greater risk than their international counterparts. Australian companies are being sued right now, spending hundreds of thousands of dollars in court even when they have been acting as model corporate citizens.").

[26] *E.g.*, Comments of Internet Association, *In re* Request for Comments and Notice of a Public Hearing Regarding the 2020 Special 301 Review, Docket No. USTR-2019-0023, at (Feb. 10, 2020), *available at* https://internetassociation.org/files/ia_2020-special-301-review-comments_feb-2020_trade/.

Moreover, in recent years the Indian government has proposed detrimental changes to the country's intermediary liability laws through a process that has not been particularly transparent.[27] Some of the changes which have been floated include a sweeping definition of "intermediary" that could mean that many new and different types of companies would be impacted.[28] Importantly, one proposal from the Ministry of Electronics and Information Technology would require companies to actively monitor and pre-screen content to proactively remove problematic content (e.g., in this context, infringing content).[29] As noted above, the costs and risks of mandatory upload filtering are steep, and beyond what many U.S. startups can afford.[30] India's government has also proposed a restrictive legal local incorporation requirement, which could readily become a hurdle to U.S. startups seeking to expand to India and serve Indian users, because those companies may lack the resources to quickly incorporate there, and set up a permanent physical presence with sufficient staff.[31] Finally, as some smaller and mid-sized Internet companies have noted, there is a concern that proposed amendments could "promote automated censorship, tilt the playing field in favour of large players, substantially increase surveillance, and prompt a fragmentation of the Internet in India . . . ."[32] Indeed, over-removal of legitimate, non-infringing content is assured if all companies must use upload filters.[33]

USTR should continue to track any proposed amendments to intermediary liability laws in India. If the suggestions noted go into effect, startups and small platforms risk being boxed out of India as a result of the requirement that they adopt costly and overzealous filtering tools.

III. Imbalanced IP enforcement regimes create uncertainty and opportunities for abuse

It is essential for countries to pursue IP enforcement policies with an eye toward avoiding abuse of the system. Without balanced IP enforcement, those who can obtain low-quality patents or raise weak IP claims can easily use them as a threat, to coerce startups into settling frivolous assertions, or to hinder or halt startup growth. For example, when the remedies for accused infringement are unjustifiably high and disconnected from the value of the purported patent or copyright, even the lowest-quality (invalid) patents and weakest infringement claims become an effective bludgeon against innovative startups.

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[27] *See, e.g.*, Raghav Mendiratta & Joan Barata, *Draft Information Technology [Intermediaries Guidelines (Amendments) Rules] 2018*, WILMAP (Dec. 24, 2018), https://wilmap.law.stanford.edu/entries/draft-information-technology-intermediaries-guidelines-amendment-rules-2018; Tanya Sadana et al., *India: Impact of Proposed Amendments to Intermediary Guidelines*, Mondaq (May 12, 2020), https://www.mondaq.com/india/it-and-internet/932340/impact-of-proposed-amendments-to-intermediary-guidelines.

[28] *See* Manish Singh, *GitHub, Mozilla and Cloudflare Appeal to India to be Transparent About Changes in its Intermediary Liability Rules*, TechCrunch (Jan. 7, 2020), *available at* https://techcrunch.com/2020/01/07/github-mozilla-and-cloudflare-appeal-india-to-be-transparent-about-changes-in-its-intermediary-liability-rules/ (broad definition "would likely lead to many unintended parties being impacted").

[29] *Id.*

[30] *Supra*.

[31] Mendiratta, *supra* note 27.

[32] Manish Singh, *GitHub, Mozilla and Cloudflare Appeal to India to be Transparent About Changes in its Intermediary Liability Rules*, TechCrunch (Jan. 7, 2020), *available at* https://techcrunch.com/2020/01/07/github-mozilla-and-cloudflare-appeal-india-to-be-transparent-about-changes-in-its-intermediary-liability-rules/.

[33] *See generally* Rives, *supra* note 2, at 11, 18-19 (identifying incentive to "over-takedown" non-infringing content, and how changes to U.S. law that mandate filtering would increase the problem).

China. Last year China amended its patent laws.[34] Of note, two areas of the amended law cause concern: administrative adjudication of infringement and disproportionate relief.

Administrative adjudication of infringement: China recently expanded the power of the China National IP Administration ("CNIPA") to adjudicate infringement, where the same agency that examines and issues patents would be authorized to evaluate infringement and award damages.[35] Instead of opening up such administrative adjudication, it is better to have courts adjudicate infringement. While the administrative agencies that issue patents are well suited to tasks of patent examination, including adjudication of post-issuance validity disputes, there are a number of reasons why they should not adjudicate infringement and damages.

First, patent infringement disputes are the type of complex cases between private parties which should be decided by courts. Courts have well-established procedures to govern such disputes, and international agreements spell out fundamental procedures common in the judicial system which provide fairness to the parties in infringement disputes.[36]

Second, if an administrative agency has the authority to both examine and issue patents, enforce them, and award damages, this calls into question the independence and fairness of both the patent examination and enforcement systems housed within the administration.[37]

Third, the specific approach China has proposed for allowing dual administrative and judicial adjudication is unclear. There are no articulated standards for when a dispute could or would be taken to the administrative agency versus the court.[38] Dividing enforcement authority in this way will increase uncertainty for startups and open doors to abuse.

Punitive damages & injunctive relief: Recent changes in China will also over-amplify the damages and relief available in patent cases, creating a fertile foundation for abuse. In fact, one commenter has noted that a main objective of China's amendment process was "to increase the penalties for infringement and

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[34] *See, e.g.*, Zhen Feng et al., *China's New Amended Patent Law and Draft Implementation Rules – All That Was Expected and More to Come*, JD Supra (Dec 4, 2020), https://www.jdsupra.com/legalnews/china-s-new-amended-patent-law-and-13108/; Haifeng Huang et al., *White Paper: China Promulgates Fourth Amendment to Patent Law*, Jones Day (Nov. 2020), *available at* https://www.jonesday.com/en/insights/2020/11/china-promulgates-fourth-amendment-to-patent-law.

[35] *E.g.*, Huang, *supra* note 34, at 2-3; Xiaoling Duan, *Everything You Need to Know About China's New Patent Law*, IAM (Jan 13, 2021), https://www.iam-media.com/everything-you-need-know-about-chinas-new-patent-law; Mark Cohen, *Translation of Draft Patent Law Available*, China IPR (July 4, 2020), https://chinaipr.com/2020/07/04/translation-of-draft-patent-law-available/ (linking to unofficial translation of patent law amendments, first and second reading, proposed Articles 69 and 70 provide for administrative adjudication).

[36] *E.g.* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197, art. 42-49 *available at* https://www.wto.org/english/docs_e/legal_e/31bis_trips_01_e.htm [hereinafter "TRIPS"].

[37] *See, e.g.*, Mark Cohen, *Why the Proposed Amendments to the Patent Law Really Matter . . . and Maybe Not Just For Patents*, China IPR (Sept. 6, 2012), https://chinaipr.com/2012/09/06/why-the-proposed-amendments-to-the-patent-law-really-matter-and-maybe-not-just-for-patents/ (further explaining that a 2012 draft law to allow administrative enforcement would "return[] China to its state of IP affairs before WTO accession, when local IP offices . . . had the authority to award damages in administrative cases").

[38] *See, e.g.*, Huang, *supra* note 34, at 2-3 (describing the new legal standard for which cases can be decided within CNIPA, and noting it remains to be seen how that standard will be defined in regulation and practice).

the amount of compensatory damages."[39] For example, China raised the cap for statutory damages fivefold.[40] It has allowed greater punitive damages in patent cases, multiplying the damages award up to five times. And, here again, there is uncertainty regarding how and when punitive damages may be awarded.[41] China has also lowered the burden of proof for a patentee seeking damages.[42] And other portions of Chinese law purport to favor injunctions as the standard approach to sanctions in IP cases.[43] To embody fairness and equity, and provide safeguards against abuse, the relief available for patent infringement should be more measured and connected to the value of the purported invention and the facts of each case.[44]

Disproportionate remedies, untethered from the facts of a case, play into the hands of abusive litigants. Such remedies give patent owners—including patent assertion entities ("PAEs") and owners of low-quality patents—the power to shut down startups or credibly threaten to shut them down. The possibility of unduly high damages or the ready availability of injunctions creates significant leverage to settle even frivolous lawsuits.[45]

Automatically increasing the amount or severity of remedies in patent cases arbitrarily inflates the value of all patents (including low-quality patents or those that cover trivial features of complicated products or services), and strips courts of their proper role in weighing relevant facts and context when fashioning equitable and monetary relief. And without the ability for courts to scrutinize the facts of a case and award the appropriate relief, the significant leverage of high damages or an injunction would exist equally for low-quality (e.g., invalid) patents that are not infringed.

By contrast, in the U.S., injunctive relief in patent cases is premised on long-standing and traditional concepts of equity, where patent owners are only entitled to injunctive relief when the facts of the case indicate it is appropriate.[46] This levels the playing field in patent assertion, freeing accused infringers to proceed with invalidity and non-infringement defenses without the risk of suffering existential loss (e.g., damages they cannot afford or having their products pulled from the market).[47] This is particularly

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[39] Andrew Liu, *Patent Litigation in China: Overview*, Thomas Reuters Practical Law (May 1, 2020), https://uk.practicallaw.thomsonreuters.com/8-620-4407?__lrTS=20191025142758892&transitionType=Default&contextData=(sc.Default)&firstPage=true (response to question 38).

[40] *E.g.*, Aaron Wininger, *Top Five Changes in China's Newly Amended Patent Law*, Nat. L. Rev. (Oct. 19, 2020), https://www.natlawreview.com/article/top-5-changes-china-s-newly-amended-patent-law ("Article 71 also increases statutory damages from 1 million RMB to 5 million RMB").

[41] *E.g.*, Feng, *supra* note 34.

[42] *E.g.*, *id.*; Cohen, *supra* note 37 (proposed Article 71 addresses increased damages and the burden of proof); *see also* Hui Zhang *et al.*, *The 4th Amendment of PRC Patent Law is Coming*, Kluwer Patent Blog (June 14, 2019), http://patentblog.kluweriplaw.com/2019/06/14/the-4th-amendment-of-prc-patent-law-is-coming/.

[43] Aaron Wininger, *China's Supreme People's Court Draft Opinions on Increasing Sanctions for Intellectual Property Infringement*, National Law Rev. (July 30, 2020), https://www.natlawreview.com/article/china-s-supreme-people-s-court-draft-opinions-increasing-sanctions-intellectual.

[44] *See, e.g.*, Mark Cohen, *On Avoiding "Rounding Up the Usual Suspects" In the Patent Law Amendments . . .*, China IPR (Jan. 23, 2020), https://chinaipr.com/2019/01/23/on-avoiding-rounding-up-the-usual-suspects-in-the-patent-law-amendments/ (arguing that adequate, predictable, compensatory civil remedies should be a priority).

[45] *See, e.g.*, Brian T. Yeh, Cong. Research Serv., R42668, *An Overview of the "Patent Trolls" Debate* 12-14, 18 (2013) (describing leverage PAEs can exert when injunctive relief is available).

[46] *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).

[47] *See, e.g.*, eBay *Decision Levels Patent Litigation Playing Field*, Buchanan Ingersoll & Rooney (Apr. 5, 2011), https://www.bipc.com/ebay-decision-levels-patent-litigation-playing-field.

important for startups. Many startups would, understandably, be unwilling to risk an injunction or damages that exceed the value of the company, and instead err on the side of settling cases of questionable merit. Balanced IP laws that limit punitive damages and award injunctions based on equitable considerations give startups more freedom to fight back against frivolous claims.

Germany. By contrast, Germany is in the process of restoring balance in patent remedies. Specifically, Germany is considering a bill that would substantially improve injunctive relief in patent infringement cases by introducing a proportionality criterion.[48] Currently, under German law, injunctions for patent infringement are virtually automatic. As noted above, when such severe remedies in patent cases are automatic or routine, it creates imbalance in the law and gives substantial leverage to those seeking to use (even low-quality patents) to harm nascent tech companies and new market entrants.[49] The proposed amendment would limit injunctions—courts would weigh equitable considerations and consider whether an injunction is warranted on a case-by-case basis. Incorporating proportionality will "mitigate the risk of hold-up by patent holders."[50] This is a welcome development, and USTR should encourage similar efforts across the globe.

IV. Fair use is an essential component of any effective IP regime, to promote and permit innovation, creativity, and free speech

Fair use is widely recognized as "a necessary part of the overall design" of copyright law.[51] It provides an essential safety valve against improper or overly-broad copyright protection stifling creativity, free speech, and innovation. It "permits people to reuse someone's copyrighted work without permission. Think, for instance, of a book review, for which one might want to use an excerpt of the reviewed book. Or a parody, criticism, or other forms of speech protected by the First Amendment. Each of these requires use of the underlying work and doesn't harm the market for that work by creating some kind of substitute for the original content."[52] While certain applications of copyright law could "stifle the very creativity which that law is designed to foster,"[53] "[t]he role of fair use, like the copyright system as a whole, is [] to encourage the new and different."[54] Moreover, in the U.S., "capacious copyright is tolerated on the premise that doctrines, like fair use, are available to protect users' rights."[55]

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[48] *E.g.*, Romina Polley et al., *Germany: Revised Draft Law to Introduce Much Awaited Proportionality Requirement for Patent Injunctions*, Cleary Gottlieb (Sept. 15, 2020), https://www.clearygottlieb.com/-/media/files/alert-memos-2020/germany-revised-draft-law-to-introduce-much-awaited.pdf; Benjamin Beck & Maximilian Kücking, *German Government Passes Bill to Simplify and Modernize Patent Law*, Mayer Brown (Nov. 5, 2020), https://www.allaboutipblog.com/2020/11/german-government-passes-bill-to-simplify-and-modernize-patent-law/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.
[49] *Supra*.
[50] Polley, *supra* note 48, at 1.
[51] Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990).
[52] Evan Engstrom, *Dancing Baby Wins Victory for Copyright Fairness*, Engine (Sept. 17, 2015), https://www.engine.is/news/issues/ip/dancing-baby-wins-victory-for-copyright-fairness/5845.
[53] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (citation omitted).
[54] Bill Patry, *Fair Use Is Good for Creativity and Innovation*, PIJIP Research Paper Series, Paper No. 2017-01, at 4 (2017), *available at* https://digitalcommons.wcl.american.edu/research/46/.
[55] Amanda Reid, *Considering Fair Use: DMCA's Take Down & Repeat Infringer Policies*, 24 Comm. L. & Pol'y 101, 126 (2019).

Likewise, fair use has proven integral to advancing technology and the work of innovative startups, Internet service providers, and digital platforms.[56] Merely by way of example, fair use currently provides the only legal basis for startups to reimplement application program interfaces (APIs). Startups depend on APIs, but since APIs were recently found to be copyrightable, fair use is the only safety valve permitting their continued use.[57] Likewise, for startups that need to use data to train and tune artificial intelligence (AI) systems, fair use permits transformative uses of content in that training capacity.[58] And numerous startups encounter user-generated content and provide a forum for creators to reach new audiences and monetize their work; an ever growing number of those users and creators rely on fair use. And as startups and smaller online service providers that serve those communities know, these individuals are an important "constituency whose expression deserves to be protected."[59]

USTR should ardently support fair use, as a critical aspect of any adequate and effective IP regime; indeed, the absence of such provisions in copyright law deny fair and equitable market access to innovators, restrict free speech, and cabin creativity.

South Africa. Some countries, like South Africa, had been moving towards adopting U.S.-style fair use laws. USTR should welcome this development and encourage broader adoption of fair use laws modeled after the U.S. framework. But unfortunately, some industries in the U.S. and Europe have thrown up roadblocks to those efforts. Reports indicate that U.S. and EU actors have pressured South Africa to abandon or at least pause adoption of fair use laws.[60] And regrettably, last year South Africa's president returned South Africa's draft law to the parliament striking the fair use provisions.[61]

USTR has a direct role to play here. Indeed, by conducting review of other countries based on their potential adoption of U.S.-style IP laws, the review itself may constitute a trade barrier.[62] Putting the trading relationship between the U.S. and South Africa in jeopardy because South Africa is considering passing and potentially adopting a law that is consistent with the U.S. legal framework is unwise. Doing so could discourage other nations from streamlining their IP frameworks to be more consistent with U.S.

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[56] *See, e.g.*, Patry, *supra* note 54, at 30 ("creativity and innovation are dynamic[,] [f]or our copyright laws to be effective they too must be dynamic"); Maira Sutton, *The Murky Waters of International Copyright*, Elec. Frontier Found. (Feb. 25, 2016) https://www.eff.org/deeplinks/2016/02/murky-waters-international-copyright-law (U.S. "is particularly well known for having a strong, court-tested fair use regime, enabling all kinds of uses and innovation to thrive on the Internet").

[57] *See, e.g.*, *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339 (Fed. Cir. 2014) (holding APIs eligible for copyright and remanding for consideration of fair use); *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179 (Fed. Cir. 2018), *cert. granted*, 140 S.Ct. 520 (Nov. 15, 2019) (No. 18-956) (granting cert to consider whether use of APIs constitutes fair use).

[58] *See, e.g.*, *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003) (addressing transformative use of content in analogous context); *Authors Guild v. Google, Inc.*, 804 F.3d 202, 216-17 (2d Cir. 2015) (similar); *A.V.* ex rel. *Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009) (similar).

[59] Paul Sieminski, Opinion, *Corporations Abusing Copyright Laws Are Ruining the Web for Everyone*, Wired (Jan. 17, 2014), https://www.wired.com/2014/01/internet-companies-fair-use/.

[60] Laura Kayali, *How the US and EU Pressured South Africa to Delay Copyright Reform*, Politico (June 24, 2020), https://www.politico.eu/article/how-washington-and-brussels-pressured-south-africa-to-delay-copyright-reform/; Glyn Moody, *EU Joins In The Bullying of South Africa For Daring to Adopt US-Style Fair Use Principles*, Above the Law (May 1, 2020), https://abovethelaw.com/2020/05/eu-joins-in-the-bullying-of-south-africa-for-daring-to-adopt-us-style-fair-use-principles/.

[61] Kayali, *supra* note 60.

[62] *See, e.g.*, Engine Comments Regarding 2020 Special 301 Review, *supra* note 1, at 11-12 (addressing USTR's review of South Africa's fair use proposal).

law. This, in turn, limits the ability of U.S. startups to expand internationally. Discouraging the adoption of fair use in other countries is counterintuitive economically as well. It is estimated that fair use industries represent 16 percent of the U.S. economy, accounting for $5.6 trillion in annual revenue.[63] Broader applications of fair use across the globe will only encourage this growth, enable innovative startups, and ultimately further bolster the U.S. economy.

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Thank you again for the opportunity to provide these comments. We appreciate USTR's interest in and efforts to promote technology and innovation and maintain U.S. competitiveness in the global economy. Startups are an essential component of our innovation economy, developing some of the most exciting new technologies and making outsized contributions to economic and job growth. We encourage USTR to continue to weigh the interests of the startup community and ensure that its efforts support startup growth and success on the global stage.

[63] *Fair Use in the U.S. Economy*, Computer and Communications Industry Association 4 (2017), *available at* https://www.ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf.