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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 2022 Special 301 Review, Docket No. USTR-2021-0021

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

¹ Engine has articulated similar positions in the past. The present comments draw from previous submissions, including, e.g., 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 (Jan. 28, 2021), https://static1.squarespace.com/static/571681753c44d835a440e8b5/t/6013357d1b344f0ee4fa5480/1611871613654/2021.01.28_Engine+Comments+re+Docket+No+USTR-2020-0041.pdf.
Review 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 balanced U.S. laws which are 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 without balanced IP frameworks. That said, imbalances and uncertainties remain, even in U.S. law. Startups are regularly subject to abusive patent assertion. 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. 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.

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, IP provisions in the U.S.-Mexico-

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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., Wiens & Jackson, 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-bankruptcyidCNN1216366120100212 (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.
Canada Agreement (USMCA) 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 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

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8 In the U.S., 17 U.S.C. § 512 provides the safe harbor and notice-and-takedown framework for resolving claims of
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.

**European Union.** The EU adopted a copyright directive rife with problems for startups seeking to host any user-generated content and operate in the region. 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 by EU Member States, will open smaller and startup Internet platforms to substantial new costs and risks. It is currently still being implemented by member states, though efforts so far indicate that diverging approaches across the EU will further complicate the situation for startups looking to operate in multiple EU countries. And an ongoing court challenge to Article 17 could force implementation in different directions.

For example, Article 17 imposes a de facto filtering mandate, requiring platforms that host user generated content to review every post for potential infringement. Under the more balanced approach of U.S. law, startups already report spending up to $10,000 annually integrating human content moderation into their work. And in a recent Engine study, the founder of one startup that encountered user-generated content explained that if the use of filtering technology were mandated by law, “it would put us out of business.”

By imposing a “staydown” requirement, the EU directive mandates use of upload filtering technology, because use of such technology is the only way to implement staydown. Such mandatory filtering substantially increases the costs of market entry. YouTube spent over $100 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 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.


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


15 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).
million to develop ContentID, but that is orders of magnitude more than what the typical startup can afford.¹⁶ 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.¹⁷ By contrast, the average investor-backed seed-stage startup raises $1.2 million, a sum that is expected to cover its costs for nearly two years. And most startups do not even have close to that much money.¹⁸

Moreover, not only are filtering tools very expensive, but for many purposes they are inadequate and/or non-existent.¹⁹ And when those 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 the 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. Overall, large companies have the financial wherewithal to survive the increased risks and costs associated with hosting user-generated content in the EU. Startups, who are operating on already-thin margins, do not.²⁰

EU Member States were supposed to implement Article 17 by June 2021, but only a subset of countries have fully (or even partially) transposed the directive into law.²¹ And so far, individual countries are taking divergent approaches to implementation—with some (like Germany) searching for more balanced implementation that takes Internet users into account and others (like France) favoring certain traditional rightsholders.²²

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²² *Id.*
This divergence in member state implementation signals an impending patchwork of copyright laws across the EU which will be difficult for startups to maneuver and will increase the costs of compliance. The patchwork of laws will multiply the costs of human review, imperfect technology, litigation reserves, and license negotiations that need to be tailored to each member state, and carry higher legal costs to figure out what each law requires—all putting startups at a further disadvantage. Indeed, as one scholar recently noted: “The ‘best efforts’ licensing burden of Article 17 will [] put small and medium-sized firms at a significant disadvantage, especially if they have to negotiate with numerous collecting societies on a member-state-by-member-state basis.”

**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. While Australian law does provide for a certain level of safe harbor protections, it is narrower than required by AUSFTA.

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, and have them printed on everyday products like apparel, housewares, and wall art. Redbubble was found liable for copyright infringement in Australia when a user uploaded derivative images of a Pokémon character. And this happened even though Redbubble undertakes a number of initiatives to prevent potentially infringing content being uploaded to and remaining on its site.

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. As such,

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28 *Pokémon v. Redbubble*, supra note 27 (Redbubble “requir[ed] 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”).
Australian law continues to lack the full coverage contemplated under AUSFTA. This harms startups and disincentivizes expansion into the Australian market.\textsuperscript{30}

**India.** Last year, India adopted new intermediary liability rules that impose near-impossible content takedown requirements, such as tight timelines for removal of certain content and an expectation that qualifying social media platforms will use automatic filters to, \textit{inter alia}, prevent previously-removed material from being uploaded.\textsuperscript{31} This is a change from India’s Information Technology Act, 2000, which addressed intermediary liability for copyright claims with a notice-and-takedown and safe harbor framework (though the exact boundaries of that safe harbor were not clearly defined).\textsuperscript{32}

Recent changes to India’s intermediary liability rules were adopted through a process that has not been particularly transparent.\textsuperscript{33} While many of the new rules do not directly address intellectual property (more attention went to, e.g., encryption, sexually-explicit content, deep fakes, and identifying users), the rules have some direct impacts in the IP space and will have a substantial impact on how companies that encounter user-generated content operate (or not) in the region.\textsuperscript{34} And while the rules have a threshold where certain requirements only apply to “significant social media intermediaries,” that definition is set pretty low, including companies with five million users, and the government can deem companies significant on an ad hoc basis.\textsuperscript{35}

As noted above, the costs and risks of mandatory upload filtering are steep, and beyond what many U.S. startups can afford.\textsuperscript{36} So India’s call for some form of automated filtering to implement a notice-and-staydown type regime will put startups at a notable disadvantage. It could also promote automated censorship since over-removal of legitimate, non-infringing content is assured if all

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\textsuperscript{30} See, e.g., Jessica Coates, \textit{Australian Digital Alliance: Extension of Safe Harbour Welcomed as an Incremental Step}, Info Justice (June 27, 2018), \url{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.”).

\textsuperscript{31} See, e.g., Udbhav Tiwari, \textit{India's New Intermediary Liability and Digital Media Regulations Will Harm the Open Internet}, Mozilla (Mar. 2, 2021), \url{https://blog.mozilla.org/netpolicy/2021/03/02/indias-new-intermediary-liability-and-digital-media-regulations-will-harm-the-open-internet/}.


\textsuperscript{34} E.g., Tiwari, supra note 31.

\textsuperscript{35} See, e.g., Maheshwari, supra note 32.

\textsuperscript{36} Supra.
companies must use upload filters. The new rules also impose de facto data localization requirements and requirements to hire employees in India—another area where startups are at a disadvantage. These expectations for U.S. companies to have that level of physical presence in India could quickly become a hurdle to U.S. startups seeking to expand to serve Indian users because they may lack the resources to set up a permanent physical presence with sufficient staff.

II. Ancillary copyright threatens to create barriers to innovation online

Countries around the world are adopting or considering copyright-like laws that require websites to pay licensing fees or face lawsuits when they, or users, link to or quote news articles or headlines—a trend that promises substantial unintended consequences for innovation, public engagement, and the exchange of ideas online. USTR should discourage frameworks that would restrict progress or curtail vital free speech rights.

Linking to news articles is something many startups and innovators—from media to edtech—rely on. Barring that linking would make some of the exciting work of U.S. startups impossible and put future innovation at risk. Moreover, engaging with information and current events, which is central to public discourse and free speech, requires being able to link to and quote the news. And as the experience with so-called “ancillary copyright” or “link taxes” reveals, these approaches are a poor fit for the intended purpose of helping local media, and instead play out in ways that benefit and entrench the largest companies in media and digital markets.

For example, Australia’s Media Bargaining Code requires “aggregators” and “press publishers” to negotiate over charges to link content. While this has worked out well for News Corp., one of the largest publishers in Australia, smaller entities face barriers under the Code. For example, there are high administrative costs for Internet companies to reach deals with publishers under the Code, and

37 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).
39 Mendiratta, supra note 33.
the lack of clarity in the law makes it difficult to navigate who has to pay to link to what. A similar experience played out in Spain, where a link tax was enacted and then revoked after traffic to smaller Spanish publishers dropped.\footnote{Engine Publisher's Study Comments, supra note 41, at 11-12 (citations omitted).}

**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.\footnote{Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1110 (1990).} 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.”\footnote{Evans 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.} While certain applications of copyright law could “stifle the very creativity which that law is designed to foster,”\footnote{Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (citation omitted).} “[t]he role of fair use, like the copyright system as a whole, is [] to encourage the new and different.”\footnote{Bill Patry, Fair Use Is Good for Creativity and Innovation, PIJIP Research Paper Series, Paper No. 2017-01, at 4 (2017), https://digitalcommons.wcl.american.edu/research/46/.} Moreover, in the U.S., “capacious copyright is tolerated on the premise that doctrines, like fair use, are available to protect users’ rights.”\footnote{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.\footnote{See, e.g., Patry, supra note 46, 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”).} Merely by way of example, fair use currently provides the legal basis for startups to reimplement application program interfaces (APIs). Startups depend on APIs for vital interoperability and compatibility between computer programs, and the Supreme Court recently held that reimplementing APIs is a fair use under U.S. copyright law.\footnote{See, e.g., Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021) (assuming copyrightability and holding that API reimplementations are fair use).} 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.\footnote{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).} 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.”

USTR should ardently support fair use, as a critical aspect of any adequate and effective IP regime; 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 the U.S. and EU pressured South Africa to abandon, or at least pause adoption, of fair use laws. And regrettably, South Africa’s president previously returned South Africa’s draft law to the parliament striking the fair use provisions. Last year, the government reopened consideration with a call for further comment on proposed fair use provisions.

USTR has a direct role to play here. 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. 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. 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. 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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53 Kayali, supra note 52.
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.