January 30, 2023

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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 2023 Special 301 Review,* Docket No. USTR-2022-0016

Dear Ms. Gordon,

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 2022 Special 301 Review, Docket No. USTR-2021-0021 (Jan. 31, 2022), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/61f9615b02932176d9cfcb93/1643733339492/USTR+2022.01.31_Engine+Special+301+Comments+re+Docket+No+USTR_2021_0021.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 or assertion. 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.[2] That said, imbalances and uncertainties 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, IP provisions in the U.S.-Mexico-

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[2] *See generally, e.g.,* Comments of Engine Advocacy, *In re* Request for Comments on Significant Foreign Trade Barriers for the 2023 National Trade Estimate Report, Docket No. USTR-2022-0013, at 1-2 (Oct. 28, 2022), https://engine.is/s/Engine-Comments-NTE-2023.pdf (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); 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, http://static1.squarespace.com/static/571681753c44d835a440c8b5/57323e0ad9fd5607a3d9f66b/57323e14d9fd5607a3d9faec/1462910484459/Startup-Patent-Troll-Stories1.d.pdf?format=original (summarizing some startup experiences with abusive patent assertion).

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

[5] *See generally, e.g.,* Engine, *Patent Reform*, *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

[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. 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 profile: Ryan Heafy, Co-Founder and COO, 6AM City*, Engine (May 15, 2020), https://www.engine.is/news/startupseverywhere-greenville-sc (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

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.[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 by EU Member States, will open smaller and startup Internet platforms to substantial new costs and risks.[10] 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 court decisions surrounding Article 17 could force implementation in different directions.[11]

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 encounters user-generated content explained that if the use of filtering technology were mandated by law, "it would put us out of business."[12]

By imposing a "staydown" requirement,[13] the EU directive mandates use of upload filtering technology, because use of such technology is the only way to implement staydown.[14] Such mandatory filtering substantially increases the costs of market entry.[15] YouTube spent over $100

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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, including as the Commission considered 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.

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, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0790&rid=1.

11 *See, e.g.*, Christoph Schmon, *Article 17 Copyright Directive: The Court of Justice's Advocate General Rejects Fundamental Rights Challenge But Defends Users Against Overblocking*, Elec. Frontier Found. (July 15, 2021), https://www.eff.org/deeplinks/2021/07/article-17-copyright-directive-court-justices-advocate-general-rejects-fundamental.

12 *Startups, Content Moderation, & Section 230*, Engine 2 https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/61b26e51cdb21375a31d312f/1639083602320/Startups%2C+Content+Moderation%2C+and+Section+230+2021.pdf (last visited Jan. 30, 2023).

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

14 *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.

15 *See generally* Rives, *DMCA*, *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]

Moreover, in 2022, the Court of Justice of the European Union (CEJU) identified a number of limitations in Article 17 that Member States and startups will have to account for in implementing and abiding by the Directive. That ruling endeavors to provide important safeguards for Internet users, to protect the fundamental rights of EU citizens, but it also could increase confusion, complexity, and cost for startup service providers.[21] Poland had challenged Article 17 on the grounds that it violated the right of free expression. In responding to that challenge, CEJU

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

[17] *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).

[18] *State of the Startup Ecosystem*, Engine 17 (2021), https://engineis.squarespace.com/s/The-State-of-the-Startup-Ecosystem.pdf.

[19] 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.

[20] *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), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5f5a64c6cb585e4abe0cf490/1599759563332/2020.09.10_Engine+Responses+to+Targeted+Consultation+on+Article+17.pdf.

[21] *See, e.g.*, Elva Cullen et al., *Latest Developments in Controversial Article 17 Platform Liability for Infringing Content*, JD Supra (Sept. 22, 2022), https://www.jdsupra.com/legalnews/latest-developments-in-controversial-6833972/; *European Court Renders Judgment in Policy Challenge to Art 17*, Creative Commons (Apr. 25, 2022), https://creativecommons.org/2022/04/25/european-court-renders-judgment-in-polish-challenge-to-art-17/.

acknowledged that Article 17's requirements to filter content impacts free expression for Internet users, and it listed limitations in implementation that are needed to safeguard that expression. For example: platforms can only use filtering systems that can distinguish between lawful and unlawful content—a high bar for automating fact-specific infringement decisions with imperfect technology and incomplete information.

EU Member States were supposed to implement Article 17 by June 2021, but given the controversy and court challenges, it is unsurprising that several countries failed to fully (or even partially) transpose the directive into law on time.[22] 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.[23] And still others (like the Czech Republic) have taken unique approaches. The country attempts to account for the CJEU ruling and safeguard free expression by authorizing a ban on service providers if they repeatedly remove or block lawful content.[24] While the goal of protecting user expression is noble, banning entire services would be an extreme remedy that puts entire companies and services in the crosshairs and would restrict lots of other expression.[25] This outcome is problematic and misplaced; policymakers should instead grapple with the underlying problem that Article 17 mandates reliance on flawed technologies.

The 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."[26]

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[22] *See, e.g.*, *Filter Future? Updates on the Copyright Directive and Platform Liability*, JD Supra (Oct. 11, 2021), https://www.jdsupra.com/legalnews/filter-future-updates-on-the-copyright-8196873/; *DSM Directive Implementation Tracker*, https://www.notion.so/DSM-Directive-Implementation-Tracker-361cfae48e814440b353b32692bba879 (last visited Jan. 30, 2023).

[23] *E.g.*, Christina Angelopoulos, *Comparative Report on the National Implementations of Articles 15 & 17 of the Directive on Copyright in the Digital Single Market – Part 2*, Kluwer Copyright Blog (Dec. 1, 2022), https://copyrightblog.kluweriplaw.com/2022/12/01/comparative-report-on-the-national-implementations-of-articles-15-17-of-the-directive-on-copyright-in-the-digital-single-market-part-2/.

[24] Zákon [Copyright Act] č. 429/2022 §51a Sb. (Czech), https://www.zakonyprolidi.cz/cs/2022-429#cast1; *see also, e.g.*, Paul Keller, *Reflecting the Conclusions of the CJEU? The Evolving Czech Implementation of Article 17*, Communia (Oct. 21, 2022), https://communia-association.org/2022/10/21/reflecting-the-conclusions-of-the-cjeu-the-evolving-czech-implementation-of-article-17/ (discussing motivation, flaws, and proposed solution to Czech implementation).

[25] Keller, *supra* note 24.

[26] Pamela Samuelson, *Pushing Back on Stricter Copyright ISP Liability Rules*, 27 Mich. Tech. L. Rev. 299, 325 (2021).

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.[27] While Australian law does provide for a certain level of safe harbor protections, it is narrower than required by AUSFTA.[28]

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.[29] Redbubble was found liable for copyright infringement in Australia when a user uploaded derivative images of a Pokémon character.[30] And this happened even though Redbubble undertakes a number of initiatives to prevent potentially infringing content being uploaded to and remaining on its site.[31]

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.[32] As such, Australian law continues to lack the full coverage contemplated under AUSFTA. This harms startups and disincentivizes expansion into the Australian market.[33]

India. Historically, India 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), as set out by their Information Technology Act, 2000.[34] In 2021, India amended that

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

[28] 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/.

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

[30] Isobel Taylor & 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, https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca1541.

[31] *Pokémon v. Redbubble*, *supra* note 30 (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").

[32] 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/.

[33] *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."

[34] *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), https://web.archive.org/web/20211217095736/https://internetassociation.org/files/ia_2020-special-301-review-

law and 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, *inter alia*, prevent previously-removed material from being uploaded.[35] In response, many firms already operating in the country—those that could afford it—did adopt proactive monitoring technologies.[36] In 2022, India amended these rules to strengthen this expectation that companies use filtering technologies.[37] And in 2023, India has put forward additional proposed amendments, signaling that this continues to be an important issue relevant to U.S. trade interests.[38]

The 2021 intermediary liability rule changes were primarily aimed at issues that do not address intellectual property directly (more attention went to, e.g., encryption, sexually-explicit content, deep fakes, and identifying users), but the 2022 amendments put IP-related content issues more squarely at issue. Both versions of the rules address the due diligence of Internet services operating in the country with respect to content that "infringes any patent, trademark, copyright or other proprietary rights."[39] The 2021 rules merely required companies to inform users not to upload such content in, e.g., their terms of use. The 2022 amendments now require companies to "make reasonable efforts to cause" their users to not upload such content.[40] The change can be read to require the use of proactive monitoring technologies and will further impact how companies that encounter user-generated content operate (or not) in the region.[41] 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.[42]

comments_feb-2020_trade/; Namrata Maheshwari & Emma Llansó, *Part 1: New Intermediary Rules in India Imperil Free Expression, Privacy and Security*, Center for Democracy & Tech. (May 25, 2021), https://cdt.org/insights/part-1-new-intermediary-rules-in-india-imperil-free-expression-privacy-and-security/.

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

[36] *See, e.g.*, *Response to Questions by Engine Advocacy on the 2022 Special 301 Review*, Docket No. USTR-2021-0021 (Mar. 8, 2022) https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/62279842644e5f0a7e093004/1646762051072/2022.03.08_Response+to+Questions_Engine_USTR+Special+301.pdf; Achint Das, *Trade Engagement Can Improve India's Friendliness Towards U.S. Startups*, Engine (Apr. 14, 2022), https://engineadvocacyfoundation.medium.com/trade-engagement-can-improve-indias-friendliness-towards-u-s-startups-6d6ab0ba42ac.

[37] Ministry of Electronics and Information Technology, G.S.R. 794(E) (Notified Oct. 28, 2022), https://www.meity.gov.in/content/notification-dated-28th-october-2022-gsr-794e-information-technology-intermediary-guidelines.

[38] IT Rules, 2021 with proposed amended texts in colour (for Public Consultation), Ministry of Electronics and Information Technology (Jan. 2, 2023), https://www.meity.gov.in/writereaddata/files/Revised-IT-Rules-2021-proposed-amended.pdf.

[39] MeitY, *supra* note 37, at §3(a)(i)(b)(iv); *see also* Ministry of Electronics and Information Technology, G.S.R. 139(E) § 3(1)(b)(iv) (Notified Feb. 28, 2021), https://www.meity.gov.in/content/notification-dated-25th-february-2021-gsr-139e-information-technology-intermediary.

[40] MeitY, *supra* note 37, at §3(a)(i)(b).

[41] *E.g.*, Tiwari, *supra* note 35.

[42] *See, e.g.*, Maheshwari, *supra* note 34.

As noted above, the costs and risks of mandatory upload filtering are steep, and beyond what many U.S. startups can afford.[43] 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 companies must use upload filters.[44] 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.[45] 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.[46]

III. 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.[47] 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.[48]

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43 *Supra*.

44 *See generally* Rives, *DMCA*, *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).

45 Raghav Mendiratta, *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021*, Wilmap (Mar. 26, 2021), https://wilmap.stanford.edu/entries/information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021 (discussing grievance and compliance officers). With extremely short timelines to respond to requests about content, it would also be impossible or impracticable for intermediaries to handle those requests in a third country, thereby creating a barrier in effect. *Cf. Internet Way of Networking Use Case: Intermediary Liability*, Internet Society (Sept. 9, 2020), https://www.internetsociety.org/resources/doc/2020/internet-impact-assessment-toolkit/use-case-intermediary-liability/ (discussing how intermediary liability laws can implicate where companies store and how they transmit data).

46 Mendiratta, *supra* note 45.

47 *E.g.*, *Understanding "Ancillary Copyright" in the Global Intellectual Property Environment*, CCIA, https://www.ccianet.org/wp-content/uploads/2015/02/CCIA-Understanding-Ancillary-Copyright.pdf (last visited Jan. 30, 2023).

48 Engine has articulated and elaborated on these concerns in the past. *See, e.g.*, Comments of Engine Advocacy Regarding Publishers' Protections Study: Notice and Request for Public Comment (Jan. 5, 2022), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/61d74d3504279d2a450f0d88/1641499958319/2022.01.05_Engine+Comments+re+Publishers+Protections+Study_Docket+No+2021-5.pdf; Abby Rives, *Copyright Law & Startup Innovation: Policies That Matter and Where They May be Headed*, Engine (Jan. 19, 2022), https://engineadvocacyfoundation.medium.com/copyright-law-startup-innovation-policies-that-matter-and-where-they-may-be-headed-dea034904e25.

For example, Australia's Media Bargaining Code requires "aggregators" and "press publishers" to negotiate over charges to link content. While this may have 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 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.[49] Unfortunately these problematic proposals that contemplate or imply ancillary copyrights continue to propagate, including most recently in Canada.[50]

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]

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 legal basis for startups to reimplement application program interfaces (APIs). Startups depend on APIs for vital interoperability and compatibility between computer programs, and the

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49 Engine, *Publishers' Study Comments*, *supra* note 48, at 11-12 (citations omitted).
50 Bill C-18, *An Act respecting online communications platforms that make news content available to persons in Canada*, 44th Parl., 2022, https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c18_1.html.
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), 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).
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").

Supreme Court has held that reimplementing APIs is a fair use under U.S. copyright law.[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; 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 have 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.[60] Reports indicate that the U.S. and EU pressured South Africa to abandon, or at least pause adoption, of fair use laws.[61] And regrettably, South Africa's president previously returned South Africa's draft law to the parliament striking the fair use provisions.[62] In 2021, the government reopened consideration with a call for further comment on proposed fair use provisions,[63] and last year the proposal continued to advance through parliament.[64]

USTR has a direct role to play here. Were the U.S. to put its trading relationship with South Africa in jeopardy because South Africa is considering passing and potentially adopting a law that is consistent with the U.S. legal framework, that would be unwise. Doing so could discourage other

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[57] *See, e.g., Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021) (assuming copyrightability and holding that API reimplementation is 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-care-fair-use/.

[60] *See, e.g.*, Niva Elkin-Koren & Neil Weinstock Netanel, *Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition*, 72 Hastings L.J. 1121 (2021) (discussing, and rebutting claims from, the history of U.S.-based opposition to adoption of U.S.-style fair use abroad).

[61] 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/.

[62] Kayali, *supra* note 61.

[63] *See, e.g.*, Sean Flynn, *South Africa Parliament Calls For Comments On Fair Use*, InfoJustice (June 7, 2021), http://infojustice.org/archives/43201.

[64] *E.g.* Mwangi Githahu, *Creatives, Parties Divided Over Passage of Copyright Amendment Bill*, IOL (Sept. 6, 2022), https://www.iol.co.za/capeargus/news/creatives-parties-divided-over-passage-of-copyright-amendment-bill-97075440-a367-433f-a216-0f665da8d750; Denise Rosemary Nicholson, Opinion, *New Copyright Bill will take South Africa into the 21st Century At Last*, GroundUp (Sept. 15, 2022), https://www.groundup.org.za/article/new-bill-will-remedy-many-evils-of-current-copyright-regime/.

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.[65] Broader applications of fair use across the globe will only encourage this growth, enable innovative startups, and ultimately further bolster the U.S. economy.

V. Promoting balance in standard essential patent licensing

Startups depend on fair and balanced licensing of standard essential patents (SEPs), and that is especially true for emerging tech companies that want to create connected devices or build technology and apps to run on them. To support development of these innovative technologies, the U.S. government should take steps to ensure that certain SEP holders are not able to demand inflated licensing rates or threaten startups with injunctions. Otherwise, those sorts of imbalances in law and policy will make it harder for startups to innovate, develop apps and Internet of Things (IoT) products and services, and reach consumers.[66]

As we noted to the Department of Justice (DOJ), U.S. Patent and Trademark Office (USPTO), and National Institute of Standards and Technology (NIST) last year:[67]

> Startups understand the important role standards and patents can play in the innovation ecosystem, but they experience the significant negative consequences that result from imbalances in SEP licensing. Ensuring that SEPs are subject to clear, enforceable commitments to license on fair, reasonable, and non-discriminatory (F/RAND) terms is critical for startups—it allows them to innovate and develop standard-compliant technologies and enables consumers to access their contributions.

Of note, threatened injunctive relief in the context of F/RAND commitments harms innovation. And the threat of injunctive relief—in the SEP context and the context of patent litigation more

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

66 *E.g.*, ACT | The App Association et al., *Standards, Licensing, and Innovation:, A Response to DOJ AAG's Comments on Antitrust Law and Standard-Setting* (May 30, 2018), https://www.saveourstandards.com/wp-content/uploads/2021/03/Multi-Assn-DOJ-White-Paper-053018.pdf; Carl Shapiro & Mark A. Lemley, *The Role Of Antitrust In Preventing Patent Holdup*, 168 U. Penn. L. Rev. 2019 (2020).

67 Comments of Engine Advocacy on Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Feb. 4, 2022), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/62029f90241be57ad8149c66/1644339088824/Engine+DOJ+SEP+Comment+-+AS+FILED.pdf. In 2021, these agencies released a draft policy statement which would have marked a critical improvement in bringing balance to SEP policy. Press Release, Public Comments Welcome on Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to F/RAND Commitments (Dec. 6, 2021), https://www.justice.gov/opa/pr/public-comments-welcome-draft-policy-statement-licensing-negotiations-and-remedies-standards. Engine filed comments with the DOJ, USPTO, and NIST in response to that 2021 draft, encouraging adoption of a policy statement embodying the draft's positive approach.

broadly—disproportionately impacts startups.[68] Monetary damages are most often the appropriate remedy for infringement of a valid SEP that the holder has willingly agreed to license on F/RAND terms.[69] And the availability of injunctive relief would grant the SEP holder the ability to threaten the production of an entire standard-compliant product, regardless of the number of SEPs covering the standard, regardless of whether the SEP covers only a small portion of the standard (which is typical), and regardless of whether the standard is only a small portion of the product.[70] The threat of an injunction gives SEP holders unwarranted and outsized leverage in license negotiations, and the problem of increased holdup is further exacerbated because SEPs are often actually non-essential or invalid.[71]

Injunctions can pose a particular, unjustified, yet existential threat to startups. Given their resource constraints, startups are more vulnerable in the face of patent assertion in general. But startups are also more likely to offer a smaller product line than larger companies, and young startups may only have a single product. This means that an injunction could put the company out of business entirely. As such, the threat of injunctive relief provides an unscrupulous SEP holder with massive leverage in licensing negotiations and infringement suits, even when the startup is willing to pay a F/RAND licensing fee.[72]

SEP-related policies continue to unfold globally and USTR should emphasize and promote the need for balance in this area of the law. Some countries, for example Germany, still have laws authorizing injunctions in SEP litigation.[73] And the European Commission is set to consider a package on SEPs this April.[74] Engaging with trading partners to promote balance should be a priority to ensure that U.S. startups encounter a more level playing field on the global stage.

VI. Increasing transparency around who owns patents and controls lawsuits

[68] Engine has articulated similar positions in the past. Engine, *SEP Comments*, *supra* note 67.
[69] *See, e.g.*, *Apple, Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1332 (Fed. Cir. 2014) (F/RAND commitment "strongly suggest[s] that money damages are adequate to fully compensate [the patent holder] for any infringement"); *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 885 (9th Cir. 2012) (finding that "injunctive relief against infringement is arguably a remedy inconsistent with the [F/RAND] licensing commitment").
[70] *See, e.g.*, Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 Tex. L. Rev. 1991, 2008 (2007).
[71] *See* RPX Corp., *Standard Essential Patents: How do they Fare?* 9 (2014), https://www.rpxcorp.com/wp-content/uploads/2014/01/Standard-Essential-Patents-How-Do-They-Fare.pdf (finding that a significant majority of SEPs alleged in district court proceedings were found to be not infringed or invalid).
[72] *Cf.* Tim Molino, Opinion, *If Your Startup Really Is Disruptive, Expect to be Sued By a Patent Troll*, Entrepreneur (Aug. 4, 2017), https://www.entrepreneur.com/article/296625 ("The threat of an injunction and the high costs of litigation often forced defendants to settle for large amounts of money, even if they believed the patent was invalid or worth very little.").
[73] *See, e.g.*, Gerd Jaekel & Christian Paul, *Still Alive: The German "Automatic Injunction" in Patent Infringement Cases Under the New Patent Act*, JD Supra (May 6, 2022), https://www.jdsupra.com/legalnews/still-alive-the-german-automatic-5297840/ (noting SEP disputes and F/RAND defenses are excluded from a recent German law that proportionality and the interest of all parties is considered before granting an injunction).
[74] *E.g.*, Luca Bertuzzi & Molly Killeen, *Tech Brief: Meta's Advertising Business, Next Six Month's Agenda*, Euractiv (Jan. 6, 2023), https://www.euractiv.com/section/digital/news/tech-brief-metas-advertising-business-next-six-months-agenda/.

Transparency around who owns what patent rights and about who is paying for or controlling patent litigation can reduce waste, mitigate vexatious litigation, and promote the integrity of the patent system. That sort of transparency also equips startups and small businesses with valuable information and helps protect them from abuse.[75] Secrecy in the patent system, on the other hand, can facilitate abusive practices, as entities looking to game the system often try to conceal which patents they own or try to hide behind shell companies in court.

Importantly, gaps in knowledge around patent ownership and litigation finance open doors to abuses that disproportionately harm startups and small businesses. Likewise:[76]

> [T]here is a growing need for better information about who is paying for, controlling, and reaping financial benefits from patent litigation. This helps parties and courts, for example, to understand conflicts of interest, investigate standing, and approach settlement.[77] Importantly, too, when wealthy entities can provide financial backing for patent assertion without revealing their identity, it fuels some problematic practices in the patent system.[78]

For example, patent assertion entities (PAEs) wielding low-quality patents in frivolous cases can immunize themselves by hiding behind shell companies.[79] PAEs can fund someone else (and advise them) to file a meritless patent suit, and if no one (including the court) knows who is really behind it, then the PAE pulling the strings can avoid the consequences of those meritless cases.[80] Those consequences are supposed to deter abusive litigation, and without them PAEs can unfortunately keep safely filing cases and trying to coerce startups into settling frivolous claims.[81]

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[75] Engine has made similar points in the past. *See, e.g.*, Abby Rives, *Improving the Patent System Through Greater Transparency*, Engine (Dec. 12, 2022), https://engineadvocacyfoundation.medium.com/improving-the-patent-system-through-greater-transparency-1d258e91d46f.

[76] *Pride in Patent Ownership: The Value of Knowing Who Owns a Patent: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 117th Congress, 6 (2021)(response to Question for the Record (QFR) No. 1(b) from Senator Patrick Leahy to Abigail Rives), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/63d7edd8200dbb2c1d059e79/1675095512741/2022.09.07_A+Rives+responses+to+Sen+Leahy+QFR.pdf.

[77] *E.g.*, Kevin M. Lewis, Cong. Res. Serv., LSB10145, *Following the Money: Should Federal Law Require Litigants to Disclose Litigation Funding Agreements?* (2018) (discussing history and perspectives on litigation finance and associated disclosures); Marla Decker, *Litigation Funding Disclosure in Delaware: An Emerging Standard?*, Above the Law (May 25, 2022), https://abovethelaw.com/2022/05/litigation-funding-disclosure-in-delaware-emerging-standard/ (similar).

[78] *Pride in Patent Ownership: The Value of Knowing Who Owns a Patent: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 117th Congress, 4-5 (2021) (testimony of Abigail Rives); https://www.judiciary.senate.gov/imo/media/doc/2021.10.19_A.%20Rives%20Written%20Testimony_u1.pdf.

[79] *E.g.*, Joe Mullin, *This Judge's Investigation Of Patent Trolls Must Be Allowed to Move Forward*, Elec. Frontier Found. (Dec. 2, 2022), https://www.eff.org/deeplinks/2022/12/judges-investigation-patent-trolls-must-be-allowed-move-forward.

[80] Generally, if a patent owner files a meritless, frivolous suit that stands out from the norm, they can be ordered to reimburse the other side's legal fees, 35 U.S.C. § 285, or they might be violating a state law, *see, e.g.*, Abby Rives, *State Policy Update: Anti-patent Troll Laws and What they Mean for Startups*, Engine (Nov. 14, 2022), https://engineadvocacyfoundation.medium.com/state-policy-update-anti-patent-troll-laws-and-what-they-mean-for-startups-ed445184c4b8 (citing various state laws).

[81] Rives, *Transparency*, *supra* note 75.

Overall, secrecy allows those misusing the patent system to do more damage to innovators and entrepreneurs. If startups could access better information, it would give them valuable tools to protect themselves and/or hold PAEs liable if they are unreasonable, vexatious, or act in bad faith. And better, more public information about these practices would curb abuse, overall, protecting startups against the problem more broadly.[82]

European Union. In September, the European Parliament adopted a report on third party litigation funding which addresses the need for more transparency and notes several safeguards the Commission could adopt.[83] This is a promising and welcome development. While the process is still ongoing as the Commission evaluates potential legislation in the area, USTR should support these and similar efforts worldwide where they would bring greater transparency to patent systems and patent litigation.

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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 high-tech startup community and ensure that its efforts support startup growth and success on the global stage.

[82] *E.g.*, Rives, *Pride in Patent Ownership*, *supra* note 78, at 6-7.
[83] *See, e.g.*, *European Parliament Advances Landmark Third Party Litigation Funding Reforms*, Inst. for Legal Reform (Sept. 13, 2022), https://instituteforlegalreform.com/blog/european-parliament-passes-landmark-third-party-litigation-funding-reforms/ (discussing report and mentioning several safeguards it endorsed).