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

In re	
2016 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing	Docket No. USTR-2015-0022

NOTICE OF INTENT TO TESITFY
AND PROPOSED HEARING STATEMENT OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Pursuant to the notice issued by the U.S. Trade Representative (USTR) and published in the Federal Register at 81 Fed. Reg. 1,277 (Jan. 11, 2016), the Computer & Communications Industry Association (CCIA) submits the following notice of intent to testify and proposed hearing statement in relation to the March 1, 2016 hearing on the annual Special 301 Report.

The name, identifying information, and contact information of CCIA's proposed witness follows. A proposed hearing statement is appended.

Matthew Schruers
Vice President, Law & Policy
Computer & Communications Industry Association
900 Seventeenth Street NW, 11th Floor
Washington, D.C. 20006
Telephone: (202) 783-0070
Facsimile: (202) 783-0534
mschruers@ccianet.org

Proposed Oral Statement of Matthew Schruers, CCIA

"On behalf of the Computer & Communications Industry Association (CCIA), thank you for the opportunity to discuss the 2016 Special 301 report. I am Matt Schruers; VP for Law & Policy at CCIA, a trade association of Internet and technology firms that has promoted openness, competition, and free trade for over 40 years. My comments focus on a problematic trend of so-called "ancillary copyright," in which countries deny market access and adequate and effective protection of rights guaranteed under international IP law, contrary to commitments under TRIPS. Separately, I will discuss the importance of insisting on comprehensive implementation of intermediary liability protections abroad, particularly where required by our free trade agreements.

First, I address policies referred to as "ancillary copyright." These laws, while branded as extensions of existing intellectual property law, are inconsistent with international IP norms and are better referred to as "quotation levies," or, more colorfully, a "snippet tax." CCIA has raised this problem in previous Special 301 filings. In fact, in 2010 CCIA specifically warned that at some future date another nation might violate their international commitment to free quotation, and that the Special 301 process should respond to such an eventuality. That date has now arrived.

Article 10(1) of the Berne Convention ("*Free* Uses of Works"), which is incorporated by reference into TRIPS, states that "It *shall be* permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries."

Sui generis snippet taxes, however, compel search providers and other online services to pay for the "privilege" of quoting from publicly available news publications, notwithstanding long-standing international law and WTO market access commitments to the contrary.

Germany's 2013 *Leistungsschutzrecht*, which targeted news aggregation at the behest of German news publishers, is one such example. Under this law, automated search indexing can lead to liability, with only an exception for the "smallest text excerpts" – which government officials have recommended interpreting to mean less than seven words.

Spain's 2015 reform of its *ley de propriedad intelectual* created a similar quotation levy, vesting an *unwaivable* right in publishers of online news content, such that "electronic content aggregation service providers" are taxed for using even "non-significant fragments of aggregated content which are disclosed in periodic publications or on websites." As a result of this law, several U.S. and Spanish news aggregators exited the market, including news.google.es. Spain has recently been the subject of an out-of-cycle review for its IP compliance; there is no principled reason that this problem should not be considered along with other aspects of Spain's non-compliance. USTR has previously watchlisted countries for TRIPS violations; European states should not get a pass.

Separately, I would like to address non-compliance with international norms on online intermediary liability protection. These protections are found in laws of developed countries around the world. U.S. law established the gold standard of intermediary liability protection at the dawn of the Internet, and other countries are following suit. Similar protections are found in articles 12-15 of the EU E-Commerce Directive, article 18.82 of TPP, and every U.S. free trade agreement reached in this century. Some countries have yet to adopt these norms, however. This shortcoming has two effects: it hobbles their own domestic Internet industries, which cannot attract capital in a high liability-risk environment, and it inhibits the ability of U.S. service providers to export to those countries.

The U.S. Government should support harmonization to U.S. law on this crucial subject. At the least, when U.S. trading partners enter into explicit commitments on intermediary liability, we should insist that those commitments be honored. As discussed more fully in CCIA's written comments, Australia entered into a commitment on intermediary liability protections in its 2003 FTA with the United States, but over a decade later it has yet to provide the promised protections to all service providers. Australian authorities documented this implementation flaw years ago, but no legislation has been enacted to remedy it. We understand there is an ongoing legislative consultation in Australia in which this has been raised, but compliance on this provision is long overdue.

More generally, it is time to place greater emphasis upon provisions ensuring balanced copyright in our international trade policy. From the quotation right to intermediary liability protections, these provisions ensure that crucial business activities can take place, but numerous

countries have yet to adopt them, or are out of compliance with international obligations to implement them.

Just as the 2015 Special 301 Report urged countries to bolster existing IP protections against piracy, future Reports should similarly urge countries to enhance protection for industries that benefit from rights related to IP limitations and exceptions, which are essential to the success of significant U.S. exporting industries."