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Written Follow-up to Questions Posed during February 19, 2025, Testimony

Public Hearing Regarding the 2025 Special 301 Review (Docket Number USTR-2024-0023)

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Thank you for the opportunity to testify before the Office of the United States Trade Representative (USTR) on February 19, 2025. ACT | The App Association is pleased to contribute further views as the USTR on its Special 301 review to identify countries that deny adequate and effective protection of intellectual property rights (IPR) or deny fair and equitable market access to U.S. persons who rely on intellectual property protection.

The App Association is a global policy trade association for the small business technology developer community. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. App developers like our members also play a critical role in developing entertainment products such as streaming video platforms, video games, and other content portals that rely on intellectual property protections. The value of the ecosystem the App Association represents—which we call the app economy—is approximately $1.8 trillion and is responsible for 6.1 million American jobs, while serving as a key driver of the $8 trillion internet of things (IoT) revolution. [1]

In response to various questions posed to me during my testimony:

Indonesia: During my testimony, I was asked if there were any recent amendments to Indonesia's 2016 patent law localization rules. While Indonesia has since updated their patent law to align more closely with international agreements and strong IP systems, localization laws remain unchanged. As noted in our comments, this is a significant threat to the IP of American companies that sell products within Indonesia or seek to enter its market. We therefore recommend that Indonesia remain on USTR's Priority Watch List.

India: During my testimony, I was asked to elaborate on India's lack of compliance with the WIPO Internet Treaties. While India acceded to the WIPO Internet Treaties in 2018, the country has yet to adapt its key provisions to the Copyright Act of 1957, amended in 2012 (the "Act"), and the Copyright Rules (2013). The Act still does not provide for a legal mechanism for internet service providers (ISPs) to approach and remove infringing works from their platforms. The Act should devise a mechanism similar to successful jurisdictional approaches, such as those outlined in the United States Digital Millenium Copyright Act (DMCA) and European Union Copyright Directive (EUCD). In parallel with this requirement, Section 52(1)(c) should require ISPs to act expeditiously to remove or disable access to the copyright infringing work or

[1] ACT | The App Association, State of the App Economy (2022), https://actonline.org/wp- content/uploads/APP-Economy-Report-FINAL.pdf.

performance in the event that (i) the copyright holder notice of alleged infringement and requests that the ISP removes or disables such infringement; (ii) the work or performance has been previously removed or access was disabled from the ISP's site; and (iii) the copyright holder, in a complaint to a court, provides that the infringing work or performance has been previously removed or access was disabled from the ISP's site. For ISPs to better comply with these requirements, Copyright Rule 75(3), (Chapter XIV) should modify the 36-hour period for intermediaries to take down infringing content to align with more practical procedures outlined in the DMCA.

The Act does not fully comply with Article 11 of the WIPO Copyright Treaty (WCT) (and parallel language in Article 18 of the WIPO Performances and Phonograms Treaty (WPPT) requiring "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law." Section 1201 of the DMCA provides an effective mechanism to prevent the circumvention of technological measures used to shield unauthorized uses of a copyrighted work. The Act should consider Section 1201 as a model for implementing these requirements under the WIPO Internet Treaties. The Act should ensure that critical phrases are narrowly defined, including "effective technological measure," which should cover commonly-implemented digital rights management (DRMs) and technological protection measures (TPMs) and other access and copy controls. Similarly, the provision should provide prohibitions for the manufacturing, importing, trafficking, and dealing in circumvention devices and software, or making and offering devices for such circumvention. Acts of circumvention under this provision should be subject to civil and criminal penalties.

The Act provides for broad exceptions to prohibiting the circumvention of effective technological measures that would render the provision ineffective. The DMCA permanent exemptions to Section 1201 provide a sounder approach that balances copyright protection with public needs. The DMCA exempts security testing, encryption research, and reverse engineering activities from the prohibition on circumvention within certain parameters. These activities are important and necessary parts of developing software products and services that meet the needs of and entertain consumers. For example, there is a considerable record of published results from security testing on automotive security, medical devices, voting systems, and consumer devices. Likewise, reverse engineering allows developers to create new interoperable and competing products and services. And encryption research is critical to improving technology to protect most internet traffic—everything from commercial transactions to social interactions. Our members like to say, "Just tell us the rules so we can build our businesses." The exemptions in the DMCA provide clear guidelines for app developers as they create and bring their products to market. This is why the DMCA intentionally sets a high bar for further exemptions to Section 1201 prohibitions that allow access to copyrighted works. The rulemaking process is specifically designed to give the law flexibility to address actual harms to the lawful uses of copyrighted works based on evidence presented by users. In addition to following the DMCA's model, the Act should narrow or remove any language that it ambiguous in nature, including in Section 65(2)(a), which states that such prohibition does not apply when "doing anything referred to therein for a purpose not expressly prohibited by this Act."

The Act, as a whole, should review multiple areas where overbroad language could conflict with international treaties, including the WIPO Internet Treaties. Such areas also include where the Act provides considerations for "exceptions and limitations" to copyright based on a "fair dealings" regime under Section 52(1)(a).

Switzerland: During my testimony, I was asked to elaborate on whether the inadequacy of Switzerland's IP enforcement laws have worsened or improved since they were removed from the Watch List in 2020. We note that Switzerland's attempt to revise their Copyright Act in 2020 to address copyright protection and enforcement has not prevented the ongoing piracy that occurs at and within its borders. Switzerland has not met the standard for strengthening and protecting the use of digital rights management (DRM) tools that are set by international treaty obligations. For example, the Copyright Act in Switzerland should align ISP liability and associated safe harbors with that of the WIPO Copyright Treaty. We urge the government of Switzerland to look to strong copyright systems like those of the United States for guidance on effectively implementing these obligations. Our members are also deeply concerned with the Switzerland Copyright Act's private use exception that permits copyrighted works to be used for personal, non-commercial purposes.

It is not easy to determine whether a copyrighted work has been accessed lawfully or unlawfully, and the law does not address whether unlawful access of these works for personal use would result in infringement. Our members develop and build on both proprietary and open-source software. Once proprietary software has been modified and integrated into new software and then subsequently used commercially, it is difficult to determine whether the proprietary software has been used. This deters our members from operating in the Swiss economy. Similarly, open-source software is unique in that the software itself is free to modify, use, and study, but the attached license provides requirements, that when not complied with, constitutes infringement. In these cases, the exception of personal use increases the chances of copyrighted works being manipulated and regurgitated into new commercial works. As public-facing generative artificial intelligence (GAI) continues to be scrutinized for text and data mining practices and its implications on copyrighted works, these loopholes in Switzerland's laws will grow the rate of piracy occurring within and across its borders.

I appreciate the opportunity to submit further comments to USTR and welcome the opportunity to assist the Administration further.

Thank you.

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