



SPECIAL 404 REPORT

WHAT YOU WON'T FIND IN THE US SPECIAL 301 REPORT

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A publication of the Electronic Frontier Foundation

April 30, 2015

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Executive Summary: Missing Stories From the 301 Blacklist

Every year, the United States publishes a report on countries that, in the opinion of the U.S. Trade Representative (USTR), fail to give “adequate and effective” protection to U.S. holders of intellectual property rights. This Special 301 Report names and shames nations that do not meet a vague and impossibly high standard of IP enforcement, and implies that the U.S. and its trade partners should punish them for failing to enact more draconian copyright, patent, and trademark restrictions. The Special 301 Report is the result of an opaque process that directly manifests the desires of private industry, like Hollywood studios. It is used as a bullying tactic to push countries into adopting stronger IP laws, regardless of whether such laws are in the best interests of the citizens of that country.

But the Special 301 Report fails to tell the whole story about copyright across the modern online world. It doesn’t talk about the damage that restrictive copyright can do to artists and researchers in the digital era. It ignores how innovators have benefited from a more balanced enforcement system and generous exceptions—most famously in the United States itself.

On the Web, the error code 404 shows browsers that something is missing. EFF believes that in the Internet era, the Special 301 Report is missing real stories from the countries that the Special 301 condemns. Our intention for this report is to show what’s missing from Special 301 and give some balance to the USTR’s biased review of global intellectual property laws by highlighting the arguments for balanced copyright, patent, and trademark law worldwide.

EFF’s Special 404 Report includes a selection of case studies from across the globe showing how overly broad intellectual property laws stifle access to cultural artifacts, artistry, and innovation. Our report also showcases examples in which flexible fair use interpretations have benefited the community, culture, and economy of a country. This report is not an exhaustive analysis of each country listed in the Special 301 Report. Rather, our report is designed to provide insightful case studies that will inform a larger conversation about how the USTR’s report is fundamentally defective.

Our report concludes by outlining some of the flaws of the Special 301 Report, including issues around transparency, balance, and legality.

Many people look to the USTR's Special 301 Report when analyzing business relationships in a new country or when analyzing the intellectual property laws of a country for other purposes. Our report is designed as a counterpoint—ensuring that the one-sided narrative of the USTR is challenged with examples that prioritize access to culture and new forms of innovation over the financial interests of a handful of U.S. corporate rights holders.

For more details on what the Special 301 Report gets wrong, see our detailed dissection of the flaws in the 301 Report process.¹

¹Electronic Frontier Foundation. "Comments of EFF to the USTR 2015 Special 301 Review, docket number USTR-2014-0025." *Eff.org*. <https://www.eff.org/document/comments-eff-ustr-2015-special-301-review>. 6 February 2015.

Select Case Studies From Countries Listed in the USTR's Special 301 Report

CANADA

What the Special 301 Report says: The USTR has listed Canada as one of its rogue nations for decades, and continues to claim that the country has not “fully address[ed] the challenges of piracy over the Internet.”



In 2010, Connie Fournier and her husband were sued for three alleged copyright violations on their discussion forum, Free Dominion. The first was for uploading a speech that had been an exhibit in several court and tribunal hearings. The second was for displaying a photo from the plaintiff's own server which had been embedded into a user's post on a forum using an inline link. The third was for an article that had appeared in the National Post and was posted as an excerpt with a link back to the original source.

After four years, the court dismissed the case² and ruled in their favor stating that the use of the inline link to embed the image was not publication, the posting of the speech was time-barred, and the newspaper excerpt was fair dealing (a public interest exception to copyright).

Analysis

Not every accusation of “piracy” is really a case of infringement. Copyright law can be used to chill legitimate speech too. If Canada had had a U.S.-style notice and takedown system as promoted by the USTR, this legitimate speech may have been silenced long before the court had an opportunity

²Geist, Michael. “Cdn Fed Court Says No Copyright Infringement For Linking, Posting Several Paragraphs from Article.” *Michael Geist*. <http://www.michaelgeist.ca/2012/06/warman-v-fournier-copyright/> 25 June 2012. Accessed 23 April 2015.

to rule on its legality. The USTR's story that greater enforcement is the solution to the Internet's challenges ignores how national courts need the freedom to allow exceptions for the Internet to fulfill its potential.

CHILE

What the Special 301 Report says: The U.S. has repeatedly listed Chile on its Priority Watch List. The USTR urges Chile to amend its ISP liability regime and implement additional policies against "unlawful circumvention of technological protection measures."



Chilean record labels are increasingly giving away albums for free, in order to avoid the restrictions of copyright and maximize their exposure to fans. That is according to Diego Sepúlveda Porzio, owner and founder of Sudamerican Records,³ an independent record label based in Santiago. The record label recently decided to give an album away for one of the bands they manage. Porzio contacted the National Institute of Youth (INJUV) and gave them 5,000 cards with a code for a free download of the album to distribute in their offices. The label also collaborated with the organization to enable young fans to download the album directly through the INJUV app—which has 150,000 active users across the country. This resulted in a national campaign where this government agency worked with record labels to provide free, legal music downloads to thousands.

Analysis

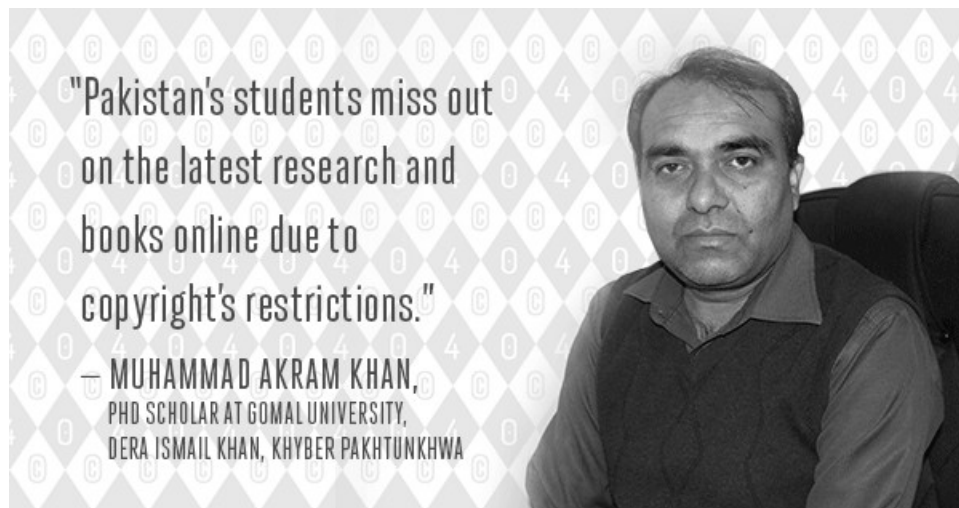
Mainstream distribution models can hinder independent or lesser-known artists from reaching their existing and potential audiences because the main barrier to success for many musicians is obscurity. The problem with major streaming services or other popular methods of music consumption is that they can prevent fans from accessing or remixing those works, due to DRM technologies and the anti-circumvention rules that support them. These restrictions are actively

³Sudamerican Records. [ca. 2013] In Facebook [Business page]. Retrieved 24 April 2015 from <https://www.facebook.com/sudamericanrecords>

promoted by the USTR in the Special 301 Report. For younger generations in particular, sharing and remixing content is a natural part of experiencing culture online, and many artists want to let their fans do just that.

PAKISTAN

What the Special 301 Report says: Pakistan remains on the report's Priority Watch List. The USTR urges Pakistan to enable enforcement officials to act on infringement activities without the need for a formal complaint by a rights holder, and should provide for "deterrent-level penalties" for criminal IP infringement.



Muhammad Akram Khan is frustrated by how his country has been locked out of academic research, even though the Internet should be making universal access to knowledge easier and cheaper. “No research can be accomplished without going through the existing knowledge on a particular topic,” he says. But online access to research materials is often charged at rates that are impossible for the average Pakistani student to pay, or they are blocked from the country entirely due to regional licensing agreements. Pakistan has a [National Digital Library](#)⁴ with negotiated access to thousands of journals. In 2011, the future of that digital library [came under threat](#)⁵, and students worried that their access to this vital academic resource would be completely halted. This shut down threatened historical archives as well as documents the students had already used. In countries with more restrictive copyright laws, students might be prevented from making copies of licensed but locked-down content, but Pakistan’s fair dealing provisions allow copies to be made for private study. Additionally, Pakistan does not have the equivalent of the United State’s DMCA anti-circumvention provisions, so it is not a criminal act to break DRM when exercising those rights.

⁴HEC National Digital Library (DL). Accessed 24 April 2015. <http://www.digitallibrary.edu.pk/>.

⁵Lodhi, Adnan. “HEC’s devolution to scrap National Digital Library?” Pakistan Today. 9 April 2011.

<http://www.pakistantoday.com.pk/2011/04/09/city/lahore/hecs-devolution-to-scrap-national-digital-library/>.

Analysis

The Special 301 Report condemns Pakistan for its book piracy, and calls for criminal enforcement of infringement. But rather than increasing enforcement, a statutory license that supplements Pakistan's existing fair dealing exception by allowing for copying for educational use at affordable rates might work better, while providing better access for Pakistan's academic community. The USTR has used its Special 301 Report to criticize such licenses in the past, but Pakistan's students might be less likely to pursue unlawful sources of research material if they had more affordable access to legal works.

ROMANIA

What the Special 301 Report says: The USTR calls on Romania to conduct greater enforcement efforts to address online piracy and counterfeiting. It urges the country to prioritize intellectual property protection and enforcement, and instructs them to enact deterrent-level sentencing.



In 2014, Copy-me⁶ founder and video editor Alex Lungu created and uploaded a [video parody](#)⁷ to YouTube featuring a scene from “The Matrix” overdubbed with lines from an old Romanian film called “Brigada Diverse intră în acțiune.” YouTube’s algorithm detected that “The Matrix” scene belonged to Warner Bros., which meant that even though this parodic video was created by Lungu, the revenue garnered through video views went directly to Warner Bros.

Lungu filed a counterclaim asserting ownership of the video under fair use; however, Warner Bros. claimed it back within 48 hours. A month later, he went through the tedious process of filing another counterclaim in which Warner Bros. had one month to respond. Ultimately, the company did not, so the claim was released. Now, instead of Warner Bros. profiting from Lungu’s original work, this independent artist rightfully receives compensation for his creation.

⁶Copy-me. Accessed 24 April 2015. <http://copy-me.org/>

⁷“Brigada MATRIX intră în acțiune.” YouTube video, 3:57. Posted by “Platoaș,” December 22, 2014. <https://www.youtube.com/watch?v=B8iZl5BARys>

Analysis

Alex Lungu is fortunate to have understood and upheld his rights under fair use to defend the profits from the video. Unfortunately, there remains an innumerable amount of parody or remix content online that is fair use, but is targeted by major content producers to take them down or make easy money from these derivative works. The USTR's Special 301 Report frequently targets countries such as Romania to adopt a carbon-copy of the notice and takedown provisions in U.S. law that streamline the removal of content from the Internet, and Alex's case illustrates why this is a bad idea.

COLOMBIA

What the Special 301 Report says: Colombia remains on the Watch List for not establishing copyright enforcement provisions as outlined in its trade agreement with the United States.



Gomez is a Masters student who has been researching biodiversity and working on the conservation of reptiles and amphibians for several years in the South American region. Throughout his career, the biggest obstacle he has faced has been accessing academic resources on global research databases. One day a couple of years ago, he came across a paper that was especially useful to his fieldwork. He later shared the research online on the website Scribd. The author of the paper then pressed charges against Gomez for the "violation of [his] economic and related rights." Now the Colombian government is criminally prosecuting Gomez, and he could be sentenced to prison for up to eight years and face crippling monetary fines. Gomez is currently awaiting trial.

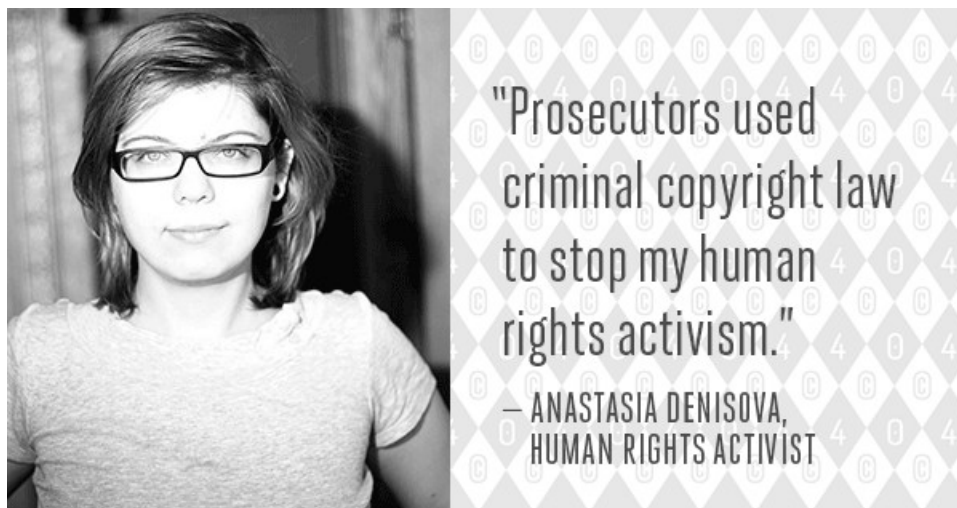
Analysis

There are two primary causes of these egregious penalties. The demands of the copyright industries in the Colombia-U.S. free trade agreement led to extreme enforcement language in the deal, which then led Colombia to enact new, harsher criminal sanctions over "unauthorized" sharing and uses of

copyrighted works. Additionally, Colombia does not have a flexible fair use system like the United States. It has a closed list of exceptions and limitations to the rights of authors (*derecho de autor*). This list was issued more than 20 years ago and is narrowly tailored to some specific situations that are not at all applicable to the digital age. While the Special 301 Report pressures Colombia to toughen its copyright regime, the current system is already inflexible and has a detrimental effect on researchers like Gomez.

RUSSIA

What the Special 301 Report says: Russia has been on the report's Priority Watch List for years. The U.S. repeatedly calls for stronger enforcement, including tougher laws to combat software piracy and more prosecutions.



Anastasia Denisova is no stranger to harassment from the Russian authorities. The head of the Youth Group for Tolerance (“ETHnICS”), an organization that fights for immigrant and minority rights in South West Russia, she has been repeatedly detained at the Russian border for questioning. Her organization was targeted for an unexplained tax audit that took three years to overturn in the courts.

In January 2010, the police raided Denisova’s apartment on suspicion of copyright infringement, and seized all of her computers. Denisova was charged with the “illegal use of copyright objects or neighbouring rights” as well as “appropriation, storage, transportation of pirated copies of material for sale purposes on a large scale.” Under Russian law, she faced up to 500,000 rubles in fines (around \$15,000 at the time), and up to six years in prison.

Analysis

The harsh penalties for copyright infringement have been repeatedly used in the former Soviet states to intimidate activists and independent media. The law allows law enforcement to remove, examine, and hold vital computing equipment while threatening large fines and prison sentences. It was cases like Denisova's that led Microsoft to grant free, unilateral software licenses to non-governmental organizations and media organizations, thus preventing Microsoft's local representatives from being co-opted to justify such politically-motivated raids. Microsoft's license covers twelve countries where such practices are widespread, including Russia. Half the countries on Microsoft's list were simultaneously on the Special 301's Watch Lists for having insufficiently strong criminal copyright laws and lackluster enforcement.

Foreign lobbying for increased enforcement and criminal penalties for copyright violations can have damaging domestic consequences, especially in countries without impartial courts and prosecutors. The Special 301 Report claims to be representing U.S. companies when it calls for more frequent and drastic prosecutions in other jurisdictions, without acknowledging that in many countries the very U.S. companies it claims to represent have been dragged into local political battles, precisely because of already draconian IP provisions.

301's Flaws

The Special 301 Report is frequently based on uncited, unverifiable, and factually dubious claims. Here are the primary deficiencies of the process:

1. Legality

There are serious questions over the legality of the Special 301 process. The World Trade Organization (WTO) provides that member states cannot unilaterally determine that another country has violated its trade obligations. The U.S. Trade Act appears to conflict with this in that it authorizes the U.S. to apply sanctions against another country if it fails to fulfill its trade obligations. Although the USTR has undertaken not to levy such sanctions outside of the WTO rules, the mere listing of countries on Special 301 Reports has been enough to compel listed countries to enact policies that are detrimental to their people. In practice, the Report has enabled de facto sanctions against the people of those other nations.

2. Lack of Balance

The USTR overlooks copyright limitations and flexibilities when assessing other countries' copyright laws—or worse, treats them as trade barriers. It ignores legitimate uses of DRM anti-circumvention tools or exceptions that enable uses for non-infringing purposes. The USTR should instead encourage the creation of flexible exceptions and limitations in national copyright regimes. The inclusion of copyright limitations and flexibilities in domestic intellectual property laws and policies creates considerable trade benefits, as well as serving many legitimate domestic public interests.

3. Lack of Differentiation

The Report does not differentiate between copyright policies that suit highly industrialized countries from those that suit developing countries. The appropriate level of copyright protection varies depending on a country's level of development—less industrialized countries can experience exacerbated harms from restrictive copyright rules, especially when they impede innovation, creativity, and access to knowledge.

4. Arbitrariness

The methodology behind analyzing countries' copyright policies is arbitrary. There is no defined set of criteria that can be referenced to determine whether a country is included on the list. The USTR only relies on vague language in the Trade Act to discredit a country's policies for any reasons it

chooses. A country could make significant new reforms to its copyright laws while still remaining on the Watch List. Countries' inclusion or non-inclusion seems to be determined more by the entertainment industries' tactical considerations than countries' actual laws and policies.

5. Deficiencies of the Consultation Process

The Report is unduly influenced by a small number of powerful industry associations. Other stakeholders, such as public interest groups, have an extremely short time to submit comments and are not given an opportunity to respond to the final findings of the report. There is no neutral party to assess the merits behind the factual claims made in submissions, and no formal means of challenging the USTR's acceptance of those claims. Public interest groups can only retroactively respond during the following year's Special 301 comment period.

Conclusions

The USTR's Special 301 Report is based on arbitrary methodology and heavily influenced by U.S. industry agendas. The result is a report that doesn't tell the whole story about the role of intellectual property law worldwide. By analyzing case studies from countries listed in the Special 301 Report, we find a far more nuanced story. We can see clear examples where culture and innovation thrive while artists are supported with the current intellectual property laws in place. We also find examples where overbroad copyright laws are shutting down researchers and stifling speech—and strengthening IP systems in these places would only exacerbate existing problems.

We hope these stories will help provide context to all who would look to the USTR's report when trying to understand international intellectual property law.

Above all, we urge countries worldwide to use skepticism when considering the recommendations of the Special 301 Report, and instead prioritize access to culture, economic stimulation, the opportunities brought by Internet distribution of content, and fairness when adopting and enforcing intellectual property law.