

USTR-2018-0022: Annual Review of Country Eligibility for Benefits Under African Growth and Opportunity Act

RESPONSE TO COMMENTS BY IIPA REGARDING SOUTH AFRICA'S COPYRIGHT AMENDMENTS BILL

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The American University Washington College of Law's Program on Information Justice and Intellectual Property (PIJIP) is an academic research program that promotes the public interest in intellectual property policy. We coordinate the Global Expert Network on Copyright User Rights, a group of leading copyright academics from around the world that publishes research and provides technical assistance to explain how adopting more open, flexible and general user rights can promote social and economic interests.

We write in reference to the August 1, 2018, filing of the IIPA, in respect of South Africa's proposed copyright amendments. IIPA claims that adoption of the South Africa copyright amendment bill "would place South Africa out of compliance with the AGOA eligibility criteria regarding intellectual property." We find this claim wholly unsupported.

AGOA is a general system of preferences (GSP) program. GSP programs are regulated under the World Trade Organization's GSP "Enabling Clause." The WTO permits GSP programs as exceptions to the most favored nation obligation only in so far as GSP criteria are "generalized, non-reciprocal and non discriminatory," and that they "be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries." See DS246: European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries (explaining that needs of developing countries must be assessed according to an "objective," "[b]road-based recognition of a particular need," such as those "set out in the WTO Agreement or in multilateral instruments adopted by international organizations").

The IIPA's submission vaguely criticizes South Africa's proposed copyright amendments as containing "extremely broad and new exceptions and limitations," and an "ill-considered importation of the U.S. 'fair use' rubric" which it concludes without explanation would violate the so-called three-step test in TRIPS Article 13 and Berne Article 9. We take exception to this cursory analysis.

South Africa's proposed copyright amendment bill contains an innovative, forward-thinking and South Africa-specific set of modernized limitations and exceptions that will contribute to its support of both innovation and access that will serve its public.

The bill's proposed new article 12 (considering A and B together) is a hybrid general exception that combines a set of modern specific exceptions for various purposes (Section 12B) and an open general "fair use" exception that can be used to assess any use for a purpose not specifically covered elsewhere. In this sense, it is akin to US law, which also contains a host of specific exceptions and a general fair use general exception.

The IIPA criticizes the specific exceptions in 12B as being "broad." The breadth of South Africa's new specific exceptions is a virtue, not a flaw. Its current law applies exceptions narrowly to specific types of works, users and uses, to the effect that many modern lawful uses of works permitted under US fair use law are excluded from their scope. For example, the incidental use right in current South Africa law applies to artistic, but not audiovisual, works – with the result that documentary film makers lack a right to capture a radio or television broadcast in the background of a shot. The new law broadens most of its current exceptions to apply to all works (e.g., extending to audiovisual, etc.), uses (including, e.g., display, performance, etc.), and users (e.g., to both individuals and institutions). This breadth will make South Africa's law function more similarly to US and other laws around the world that are more accommodating of modern technology.

The breadth of South Africa's exceptions is a feature that contributes to its development, financial and trade needs. Recent empirical research has shown, for example, that providing exceptions that are open to purposes, uses, works and users is correlated with both information technology industry growth and to increased production of works of knowledge creation. See Sean Flynn and Mike Palmedo, *The User Rights Database: Measuring the Impact of Copyright Balance*. PIJIP Working Paper 2017-03., <http://infojustice.org/flexible-use/research>; Deloitte, *Copyright in the digital age: An economic assessment of fair use in New Zealand*, <https://www2.deloitte.com/content/dam/Deloitte/nz/Documents/Economics/dae-nz-copyright-fair-use.pdf>;

The fair use provision in Article 12A is similarly forward thinking. The main features of the clause draws from the US fair use right, and thus must be unassailable as a matter of US trade policy. The provision contains several innovations in its phrasing that will make the provision more clear in its application and consistent with modern trends in the interpretation of fair use and fair dealing rights.

First, we commend the drafters on the opening phrase -- "In addition to uses specifically authorized." This provision makes clear that the fair use clause intends to cover issues unaddressed in its specific exceptions, as is the case with US fair use. This is particularly important to obtain the benefit of fair use as enabling adaptation to technology and culture

change. It also signals to the interpreter that there exist a full set of specific exceptions (in 12B et seq.), which we commend for adding to the predictability of the law.

We commend as well the unique and clear phrasing of the opening clause -- “for purposes such as the following.” The inclusion of the illustrative purposes in an itemized list, preceded by the opening clause, makes it very clear that the listed purposes are illustrative, not exhaustive.

We commend the drafters on the list of illustrative purposes that are included. The list of illustrative purposes is innovative in including both traditional fair dealing purposes (e.g., criticism or review of that work or of another work), as well as more modern purposes that have been recognized by statutes and in case law in other countries (e.g., “comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche”).

The inclusion of the interests of “libraries, archives and museums” ensures that such institutions will be able to utilize fair use in addition to the specific rights they are provided later in the Act.

The provision will add to the predictability of its interpretation by reflecting the traditional approach that in interpreting whether a use is fair “all relevant factors shall be taken into account, including but not limited to” the listed four factors. This is also consistent with US law.

The proposal includes a well-considered four-factor test that reflects the global trend, but clarifies its application.

The four fair use factors in the Bill add to the predictability of the law. South Africa’s current fair dealing provision contains no standards for how to consider when a dealing is fair. The Bill proposes to ground the law in a growing international trend toward defining fairness, in both fair use and fair dealing statutes, through a variation of the US four factor test for defining fair use. See Jonathan Band, *The Fair Use/ Fair Dealing Handbook*, <http://infojustice.org/wp-content/uploads/2013/04/Band-and-Gerafi-04032013.pdf> (reporting that over a dozen fair use and fair dealing jurisdictions have adopted a similar four factor test).

The four factors in the South African bill contain helpful clarifications that reflect global trends in interpretation.

In evaluating the purpose and character of the use, the provision helpfully instructs consideration of the core of the transformative use test - whether “such use serves a purpose different from that of the work affected.” The “transformative use” test has added greatly to the predictability of fair use in the US. Judge Leval’s opinion in *Authors Guild v. Google*, 804 F.3d 202 (2d Cir. 2015)(“*Google Books*”) makes the convergence of reasoning within US courts especially clear — he cites authorities from various circuits in reaching his conclusion. The Supreme Court denied certiorari review of the decision, leaving it to stand as the latest and most authoritative interpretation of the transformative use doctrine to date.

The fourth factor in the South African bill is clarified to focus on “the substitution effect of the act upon the potential market for the work in question.” The focus on “substitution effect” is important because copyright law is designed to protect consumer markets for protected works rather than licensing revenue in general. The concept is reflected in US interpretations of fair use. For example, the Second Circuit explained in *Google Books*, 804 F.3d at 214:

The more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright's goal of enriching public knowledge and the less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives.

Substitutionality is a common-sense concept, based on notions of intended audience. It does not open the floodgates for non-licensed use of derivative works. Art consumers substitute reproductions for originals — that's why there's a reproduction market, and why no one argues that merchandise based on reproductions of copyrighted art works is fair use. An example of a non-substitutional use would be the reproduction of some bars of music in a scholarly article, or a brief sample from one musical work incorporated into another.

IIPA makes vague but unsubstantiated claims that these provisions would violate TRIPS Article 13 and Berne Article 9. We find no basis for these claims. Many other nations have copyright laws with similar exceptions as proposed for South Africa, including the United States.¹ The three-step test in the Berne Convention and in TRIPS is adequately flexible to accommodate the full range of such exceptions. See Christoph Geiger, et al., *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1041&context=research>

At bottom, the limitations and exceptions in South Africa's proposed legislation are well crafted and completely within their rights under international law. They should not be considered as any basis for sanctioning the country under AGOA.

¹ See Program on Information Justice and Intellectual Property, Masterlist: Excerpts of Representative Copyright Limitations and Exceptions 35-37 (Am. Univ. Wash. Coll. of Law Working Paper), <http://infojustice.org/wp-content/uploads/2017/07/Master-List-Version-06192017.pdf>.