

Before the
Office of the United States Trade Representative
Washington, D.C.

In re

Generalized System of Preferences (GSP):
Notice Regarding a Hearing for Country
Practice Review of South Africa

Docket No. USTR-2019-0020

South Africa Country Practice Review: Intellectual Property Rights

**Notice of Intent to Testify and Proposed Hearing Statement of
Computer & Communications Industry Association (CCIA)**

Pursuant to the notice issued by the U.S. Trade Representative (USTR) and published in the Federal Register at 84 Fed. Reg. 63,955 (Nov. 19, 2019), the Computer & Communications Industry Association (CCIA) submits the following notice of intent to testify and proposed hearing statement in relation to the GSP country practice review of South Africa.

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

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Proposed Oral Statement of Ali Sternburg, CCIA

My name is Ali Sternburg and I am Senior Policy Counsel at the Computer & Communications Industry Association. CCIA represents over twenty companies of all sizes providing high technology products and services, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services—companies that collectively generate more than \$540 billion in annual revenues.¹

CCIA wishes to respond to some of the arguments made in IIPA’s petition filed that the Republic of South Africa does not provide adequate and effective intellectual property protection by virtue of including a fair use provision in the Copyright Amendment Bill (CAB).

It is both appropriate and in the economic interest of the United States for other countries to adopt a fair use exception modeled on the provision in Section 107 of the U.S. Copyright Act. I’d like to make a few high-level points concerning fair use, then will address IIPA’s specific objections to fair use in the CAB.

The U.S. Government has expressed strong support for fair use in a number of contexts. USTR has previously observed that in the United States, “consumers and businesses rely on a range of exceptions and limitations, such as fair use, in their businesses and daily lives.” The U.S. Intellectual Property Enforcement Coordinator (IPEC) has stated that “fair use is a core principle of American copyright law.” Similarly, the U.S. Copyright Office notes that “fair use is a longstanding and vital aspect of American copyright law,” and the former U.S. Register of Copyrights has explained that “fair use is an essential pillar of copyright law.”

Balanced copyright rules such as fair use have been critical to the growth of the U.S. digital economy. A 2017 study illustrated how U.S. firms operating abroad in regimes with balanced copyright law reported higher incomes and increased total sales, encouraging foreign investment. A CCIA study demonstrated that fair use industries account for 16% of the U.S. economy, employ 1 in 8 workers, and contribute \$2.8 trillion to GDP. Driven by increases in service-sector exports, U.S. exports of goods and services related to fair use increased by 21% over four years to \$368 billion. These U.S. economic benefits are threatened when a foreign country fails to include U.S.-style fair use protections in their own copyright laws, impeding market access for U.S. companies looking to export to that market.

Turning to the specific objections to fair use: IIPA appears to have three main objections: one, South Africa lacks decades of legal precedent upon which to base application of fair use; two, the bill establishes a hybrid model which “creates an unprecedented mash-up” of fair dealing, fair use, and specific exceptions; and three, South Africa lacks statutory and punitive damages. These objections have no merit.

First, with respect to the lack of precedent, South Africa fortunately has a ready source of fair use guidance: court decisions on fair use from countries that have already adopted a U.S.-style

¹ A list of CCIA members is available at <https://www.ccianet.org/members>.

fair use provision, including the United States and Israel. These countries' decisions are available online, and South African courts can rely upon them until they develop their own body of case law. Additionally, numerous fair use-related resources are available online, in particular the U.S. Copyright Office's index of fair use cases.

Second, with respect to the hybrid structure of specific exceptions and a general fair use provision, this is precisely the structure found in the U.S. Copyright Act: many specific exceptions supplemented by fair use. Further, it is hard to understand why IIPA objects to providing standards by which a court is to assess whether a particular use is fair. The absence of standards for assessing fairness is at times cited as one of the deficiencies of the traditional fair dealing test, and one respect in which U.S.-style fair use is superior to traditional fair dealing.

Third, IIPA observes that South Africa "lacks statutory and punitive damages that infringers face in the United States," but does not explain how this is relevant to the appropriateness of a fair use exception. It should be noted that there is no connection between the three-step test and remedies; these issues are treated separately in the Berne Convention and TRIPS. Moreover, neither Berne nor TRIPS require statutory damages.

In any case, IIPA is wrong as a factual matter. Both the Copyright Act of 1978 and the Counterfeit Goods Act in South Africa do allow the imposition of significant punitive fines for copyright infringement. And under section 24(3) of the Copyright Act of 1978, a court may impose additional damages, "as the court may deem fit," in cases of flagrant infringement.

In conclusion, there is nothing inappropriate about the bill's inclusion of a fair use provision. A fair use provision in South Africa, modeled closely on U.S. law, will protect American innovators and creators that are seeking to export to the South African market, while ensuring that South African copyright law does not diverge from the American legal framework.