

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

In re

Annual Review of Country Eligibility for
Benefits Under the African Growth and
Opportunity Act

Docket No. USTR-2020-0020

2020 AGOA ELIGIBILITY REVIEW
SOUTH AFRICA

REPLY COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

Pursuant to the notice issued by the U.S. Trade Representative (USTR) and published in the Federal Register at 85 Fed. Reg. 28,695 (May 13, 2020), the Computer & Communications Industry Association (CCIA) submits the following reply comments regarding the Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act (AGOA).

CCIA responds to arguments made in the comments filed by the International Intellectual Property Alliance (IIPA) 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 pending Copyright Amendment Bill (CAB). These comments largely reiterate comments made by CCIA in USTR’s Generalized System of Preferences (GSP) Country Practice Review of South Africa.¹

I. IIPA’s Concerns Regarding the South Africa CAB Fair Use Provisions Are Unwarranted.

IIPA’s petition states that South Africa’s CAB “would create an overbroad amalgamation of copyright exceptions and limitations that includes a more expansive version of the U.S. ‘fair use’ rubric appended to a proliferation of extremely open-ended new exceptions and limitations to copyright protection (on top of ‘fair dealing’ provisions), resulting in a vast and unclear

¹ Post-Hearing Brief of CCIA, *In re* Generalized System of Preferences (GSP): Notice Regarding a Hearing for Country Practice Review of South Africa, filed Feb. 28, 2020, *available at* <https://www.cciagnet.org/wp-content/uploads/2020/02/CCIA-USTR-2019-0020-Post-Hearing-Brief.pdf>. *See also* Reply Comments of CCIA *In Re* Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act, filed Aug. 30, 2018, *available at* <https://www.regulations.gov/document?D=USTR-2018-0022-0011>.

thicket of exceptions and limitations.”²

IIPA criticizes the appending of the fair use rubric to the fair dealing provision, and further seems to object to supplementing the fair use/fair dealing exception, Section 12A, with specific exceptions. However, the hybrid structure IIPA finds offensive is precisely the structure of exceptions found in the U.S. Copyright Act. Section 107 of the U.S. Copyright Act is a general exception with a non-exclusive list of factors to consider, supplemented by a longer list of specific exceptions (as outlined in Sections 108-121). To illustrate, Section 12A(a) of the CAB states that copyright is not infringed by “fair use in respect of a work or the performance of that work, for purposes such as” research, criticism, reporting, scholarship, comment, preservation, and public administration. This parallels the first sentence of 17 U.S.C. § 107, which provides that “the fair use of a copyright work, . . . for purposes such as criticism, comment news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright.”

Section 12A(b) of the CAB then provides that “in determining whether an act done in relation to a work constitutes a fair use, all relevant factors shall be taken into account, including but not limited to” the nature of the work, the amount and substantiality of the part used, the purpose of the use, and the effect of the use upon the potential market for the work. Likewise, the second sentence of 17 U.S.C. § 107 states that “in determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include” the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use upon the potential market for the work. Once again, the wording of the four factors in Section 12A(b) of the CAB is highly consistent with 17 U.S.C. § 107.

Also inexplicable is IIPA’s hostility to the CAB establishing specific exceptions in addition to the general fair use provision. Virtually all countries that have a fair use or fair dealing provision also provide specific exceptions. The United States, for example, has exceptions for libraries and archives (§ 108, § 109(b)(2)(A)), rental car companies (§ 109(b)(1)(B)(i)), museums and galleries (§ 109(c)), videogame arcade operators (§ 109(e)),

² Comments of IIPA, In Re 2020 AGOA Eligibility Review, filed June 23, 2020, *available at* <https://www.iipa.org/files/uploads/2020/06/IIPA-Written-Comments-on-2020-AGO-Eligibility-Review.pdf> [hereinafter “IIPA AGOA Comments”] at 9.

educational institutions (§ 110(1) and (2)), religious institutions (§ 110(3)), small restaurants (§ 110(5)), agricultural or horticultural organizations (§ 110(6)), record stores (§ 110(7)), organizations that provide services to people with disabilities (§ 110(8), § 110(9), § 121, and § 121A), veterans' and fraternal organizations (§ 110(10)), hotel and apartment house owners (§ 111(a)), broadcasters (§ 112(a)), owners of computer programs (§ 117(a)), and computer maintenance or repair organizations (§ 117(c)). The mere presence of additional exceptions does not vitiate the meaning of the underlying fair use provision.

Additionally, IIPA identifies concerns with specific exceptions contained in the CAB, and CCIA takes no position on these provisions.³ However, USTR should assess these specific exceptions separately from the fair use provision in Section 12A.

IIPA argues that the language of the CAB's fair use provision is broader than the U.S. fair use provision. As an example, IIPA has argued that the CAB requires that "all relevant factors shall be taken into account, including but not limited to" the four factors imported from the U.S. Copyright Act.⁴ IIPA suggests that this is far broader than the parallel language in 17 U.S.C. § 107. In fact, Section 107 provides that "in determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include" the four fair use factors. U.S. courts have made clear that the four factors are not exclusive, and indeed many courts have recognized a fifth factor, the good faith of the user. In short, IIPA is pointing to a distinction without a difference.

IIPA also observes that South Africa "lacks statutory and punitive damages, which rights holders in the U.S. rely on to deter and remedy infringement."⁵ 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. Most countries do not allow them, including most of the countries that already have fair use or fair dealing. In any case, IIPA is wrong as a factual matter. Both the Copyright Act of 1978 and the Counterfeit Goods Act in South Africa allow the imposition of significant punitive fines for

³ The one exception is Section 12C, which permits the creation of temporary copies. This provision is based on Article 5(1) of the European Union's Information Society Directive. IIPA objects to the CAB's clarification that this exception for transient or incidental copies includes reformatting for the purpose of adapting the work for use on a different device. IIPA ignores that Section 12C, like Article 5(1), applies only "as long as there is no independent economic significance to these acts." Accordingly, Section 12C would cause no harm to copyright owners.

⁴ *IIPA AGOA Comments*, *supra* note 2 at Annex 81.

⁵ *Id.*

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.

Additionally, South Africa follows the “English Rule” for the award of attorney’s fees. Under the English Rule, the prevailing party automatically recovers attorney’s fees. The English Rule not only deters unlawful behavior, it also strongly discourages a defendant from pursuing a defense unless it has a high degree of confidence it would prevail. This would ensure that defendants would assert fair use only in the strongest of cases. By contrast, the U.S. Copyright Act does not automatically shift fees. Rather, it grants courts the discretion to award fees to the prevailing party. 17 U.S.C. § 505. The Supreme Court clarified that in exercising its discretion, courts should give “substantial weight to the objective reasonableness of the losing party’s position.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1079 (2016). In other words, the objective reasonableness of a losing defendant’s fair use argument would weigh substantially against the shifting of fees. This means that a U.S. court would be far more lenient and forgiving about fee-shifting than a South African court in a case involving the unsuccessful assertion of fair use. Thus, South African defendants are more unlikely to attempt to abuse fair use than U.S. defendants.

II. The U.S. Should Not Penalize Countries that Seek to Implement Fair Use in Domestic Copyright Laws.

IIPA requests that the “Administration continue to assess the progress of AGOA-eligible governments in legislative measures and enforcement of copyright protections, and to identify those countries that could benefit from U.S. assistance in capacity building to meet the requirement to provide “adequate and effective” protection of intellectual property rights (IPR).”⁶

CCIA requests that U.S. assistance should reflect not only guidance on enforcement of intellectual property rights but also guidance on how limitations and exceptions work within IP regimes. Both aspects are critical to the effectiveness of copyright regimes for rights holders and users, as reflected in U.S. law. The U.S. government has long acknowledged the economic and social importance of fair use. Below is a non-exhaustive list of statements by U.S. officials regarding the benefits of fair use.

- USTR has observed that in the United States, “consumers and businesses rely on a range

⁶ *IIPA AGOA Comments*, *supra* note 2 at 10.

of exceptions and limitations, such as fair use, in their businesses and daily lives.”⁷

- The U.S. Intellectual Property Enforcement Coordinator (IPEC) stated that “fair use is a core principle of American copyright law.”⁸ The IPEC added that “the Supreme Court has repeatedly underscored fair use provisions in the Copyright Act as a key means of protecting free speech,”⁹ and that “enforcement approaches should not discourage authors from building appropriately upon the works of others.”¹⁰ In the most recent Joint Strategic Plan, the IPEC discussed how fair use enabled “new and innovative uses of media (e.g., remixes and mashups involving music, video and the visual arts).”¹¹ The IPEC concluded that “it is the combination of strong copyright rights with a balance between the protection of rights and exceptions and limitations that encourages creativity, promotes innovation, and ensures our freedom of speech and creative expression are respected.”¹²
- The U.S. Copyright Office notes that “fair use is a longstanding and vital aspect of American copyright law.”¹³ In a study on software-enabled consumer products, the Copyright Office found that “courts repeatedly have used the fair use doctrine to permit copying necessary to enable the creation of interoperable software and products.”¹⁴
- The Solicitor General of the United States filed a brief in the U.S. Supreme Court in September 2019 asserting that fair use “permits courts to consider whether ‘rigid application of the copyright statute’ in a particular case ‘would stifle the very creativity which that law is designed to foster.’”
- Members of Congress have also shared these views. As Senator Ron Wyden and Congressman Jerry McNerney told USTR on January 28 in the context of this review: “In the United States, our fair use policy has spurred the creation of transformative works and technological innovations that create new markets and drive economic activity.” They concluded by explaining how South Africa adopting fair use would benefit both the U.S. and South Africa: “The balanced copyright system adopted by the United States has helped make us a leader in innovation and the creative economy, and we should commend—rather than penalize—trading partners that adopt balanced copyright regimes

⁷ OFFICE OF THE U.S. TRADE REP., USTR Introduces New Copyright Exceptions and Limitations Provision at San Diego TPP Talks (July 2012), <https://ustr.gov/about-us/policy-offices/press-office/blog/2012/july/ustr-introduces-new-copyrightexceptions-limitations-provision/>.

⁸ U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR, 2013 Joint Strategic Plan on Intellectual Property Enforcement (June 2013), <https://obamawhitehouse.archives.gov/sites/default/files/omb/IPEC/2013-us-ipecc-jointstrategic-plan.pdf>, at 18.

⁹ *Id.*

¹⁰ *Id.*

¹¹ U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR, U.S. Joint Strategic Plan on Intellectual Property Enforcement FY 2017-2019 (Dec. 2016), <https://obamawhitehouse.archives.gov/sites/default/files/omb/IPEC/2016jointstrategicplan.pdf>, at 10.

¹² *Id.*

¹³ U.S. COPYRIGHT OFFICE, U.S. Copyright Office Fair Use Index, <https://www.copyright.gov/fair-use/>.

¹⁴ U.S. COPYRIGHT OFFICE, Software-Enabled Consumer Products (Dec. 2016), <https://www.copyright.gov/policy/software/software-full-report.pdf>, at 54.

that both protect U.S. interests and boost developing economies.”¹⁵

In short, various experts in the U.S. government have repeatedly affirmed the centrality of fair use to the U.S. copyright system, and its importance in promoting creativity and innovation. It is important that these views are reflected in consultations with foreign governments regarding adequate and effective intellectual property rights protection.

III. Conclusion

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. It is inappropriate then for USTR to consider the CAB fair use provisions in this AGOA review. Without relevant fair use provisions in a copyright regime, both technology and content industries will face uncertain liabilities upon entering new markets, chilling innovation and creativity.

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¹⁵ Letter from Ron Wyden, U.S. Senator, and Jerry McNerney, U.S. Congressman, to Ambassador Robert Lighthizer, U.S. Trade Rep. (Jan. 28, 2020).