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South Africa and Indonesia Country Practice Reviews
Pre-Hearing Brief
January 17, 2020

Docket Number: USTR-2018-0007 & USTR-2019-0020

Public Citizen submits the following comments for the Office of the United States Trade Representative’s hearing on the Generalized System of Preferences (GSP) country practice reviews of South Africa and Indonesia.

Public Citizen is a nonprofit consumer advocacy organization with 500,000 members and supporters. Public Citizen works with partners across the United States and around the world to promote access to knowledge, privacy and free expression and make medicines affordable and available for all through tools in policy and law. The submission draws on our experience providing technical assistance to public agencies, particularly in developing countries, on patent, copyright and other intellectual property rules.

South Africa

Inequality plagues South Africa¹, due in large part to the legacy of apartheid. According to South African human rights organization Section 27, “prior to 1994, the education system was central to entrenching segregation and inequality.”² South Africa’s inherited inequalities constitute major challenges for education and social development.

Further, stringent copyright rules limit access to key books and enable dominant global publishing houses to crowd out South African publishers³. Even Nelson Mandela’s *Long Walk to Freedom*, a foundational book for South African education and consciousness today, is sold at higher prices than in most wealthy countries.⁴ This itself is a scandal. U.S. engagement with South Africa should support reforms that improve access, not seek to pressure South Africa into greater financial burdens for its people. South Africa’s copyright amendments include such reforms, among them a U.S.-style “fair use” doctrine that could help provide educational access to essential books.

The South African Constitution considered a model around the world⁵, has been one instrument to address pervasive inequality. Section 29 of the Constitution provides that

¹ The World Bank in South Africa, <https://www.worldbank.org/en/country/southafrica/overview>

² Funding basic education, Fact Sheet, <http://section27.org.za/wp-content/uploads/2019/06/S27-IEJ-FUNDING-BASIC-EDUCATION-FACT-SHEET-FINAL.pdf>

³Mr President, stand up to Trump and Big Hollywood, Dailymaverick, <https://www.dailymaverick.co.za/article/2019-11-10-mr-president-stand-up-to-trump-and-big-hollywood/>

⁴ *Id.*

⁵ Why does Ruth Bader Ginsburg like the South African constitution so much? Foreign Policy, <https://foreignpolicy.com/2012/02/06/why-does-ruth-bader-ginsburg-like-the-south-african-constitution-so-much/>

‘Everyone has the right –
(a) to a basic education, including adult basic education; and
(b) to further education, which the state, through reasonable
measures, must make progressively available and accessible.’⁶

In one landmark case, the Supreme Court of Appeal held that that every student is entitled to a textbook in every subject at the beginning of the academic year.⁷ In other words, the government has a *duty* to provide books—but this responsibility may be prohibitively expensive at a time of austerity budgets in South Africa.⁸

Viewed in this context, South Africa is attempting to use the copyright reform to fulfill its constitutional imperatives. Copyright reform would help serve development needs, like increasing access to knowledge and education, and to address bargaining power inequality between large distributors (publishers and labels) and local creators. It would help make books—and education—more affordable. Access to knowledge can help play a role in breaking the enduring chains of inequality based on race in South Africa.

The international trade regime and regional intellectual property institutions have established policies harmful to access to knowledge. But South Africa’s copyright reform is promising.

The World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) sets the minimum rules for member states. However, as a report by Dean Baker, Arjun Jayadev and Nobel Laureate Joseph Stiglitz notes,

Ever since the adoption of TRIPS, it has become increasingly clear that the intellectual property provisions of the WTO are not well-aligned with the needs of developing countries and that they serve corporate interests in developed countries disproportionately. These conflicts become more pronounced over time. (...) Many countries lack such protections for educational and other public interest uses. This is in part because the TRIPS-plus requirements that have been exported through bilateral and multilateral FTAs generally are not accompanied by corresponding flexibilities. (...) Education is a foundation for economic growth and human dignity. Affordable access to high quality educational materials is critical to delivering on the international community’s development objectives and obligations, including within the SDG framework. Copyright must be calibrated so as to remove unjust barriers to access, and to ensure that the most vulnerable among us can access the vast opportunities that a high-quality education provides. At the current juncture,

⁶ Chris McConnachie, Ann Skelton & Cameron McConnachie The Constitution and Right to Basic Education, <http://section27.org.za/wp-content/uploads/2017/02/Chapter-1.pdf>

⁷ Minister of Basic Education v Basic Education for All (20793/2014) [2015] ZASCA 198; [2016] 1 All SA 369 (SCA); 2016 (4) SA 63 (SCA) (2 December 2015), <http://www.saflii.org/za/cases/ZASCA/2015/198.html> & <https://www.tandfonline.com/doi/abs/10.1080/02587203.2016.1210920?journalCode=rjhr20>

⁸ <http://section27.org.za/wp-content/uploads/2019/06/S27-IEJ-FUNDING-BASIC-EDUCATION-FACT-SHEET-FINAL.pdf>
Funding basic education, Fact Sheet, <http://section27.org.za/wp-content/uploads/2019/06/S27-IEJ-FUNDING-BASIC-EDUCATION-FACT-SHEET-FINAL.pdf>

multiple cross cutting intellectual property restrictions, especially on copyright, limit the full ability to access educational material globally.⁹

Excessive copyright protection harms access to knowledge

High textbook costs present a barrier to learning for students in the South Africa. A recent study found that textbook costs approach one-fifth of the income of millions of black households.¹⁰ High prices may force poor South African families to make decisions that compromise their kids' education.¹¹ When a family must spend a substantial portion of their household income just on textbooks, it also can discourage them from sending their kids to school.

The United States and copyright holders have long been advocating for the adoption of stronger copyright protections and standards going beyond TRIPS in South Africa. In a similar vein, international capacity building efforts in sub-Saharan Africa tend to focus on protection of copyright, but not so much on flexibilities or copyright limitations and exceptions, which are fundamental for access to knowledge and thus for human and social development.

A study¹² conducted by the African Copyright and Access to Knowledge (ACA2K) project in eight African countries¹³, including South Africa, on how copyright impacts access to knowledge revealed that all the African countries comply with international copyright standards and in many cases provide greater protection than is required by the international norms. Yet these laws failed to generate the anticipated result of economic development or inflow of foreign investment. The empirical evidence in the ACA2K study suggests that there is a disconnect between the copyright law and its application, directly impacting access to knowledge and education in Africa. The study recommends that what Africa needs is a balanced copyright system that reflects local realities. A less restrictive but more realistic copyright system would not only provide more effective protection and increase access to knowledge but also would enable compliance with entire segments of the population operating outside the copyright system.¹⁴

South Africa's Copyright Amendment Bill

The Copyright Amendment Bill, which would implement fair use in South African law, aims to promote access to knowledge by allowing use of copyrighted material for a wider range of purposes that do not conflict with author rights. This could help schools and families ensure everyone has access to essential texts.

⁹ Dean Baker, Arjun Jayadev and Joseph Stiglitz, *Innovation, Intellectual Property and Development* (2017), <http://cepr.net/images/stories/reports/baker-jayadev-stiglitz-innovation-ip-development-2017-07.pdf>.

¹⁰ The new draft copyright Bill could help unlock the doors of learning and culture, Mail & Guardian <https://mg.co.za/article/2019-08-19-00-the-new-draft-copyright-bill-could-help-unlock-the-doors-of-learning-and-culture/>

¹¹ Students hurt by pricey textbooks, Mail & Guardian, <https://mg.co.za/article/2014-10-03-students-hurt-by-pricey-textbooks/>

¹² African Copyright and Access to Knowledge Network (ACA2K) <https://www.idrc.ca/en/project/african-copyright-and-access-knowledge-network-aca2k>

¹³ Egypt, Ghana, Kenya, Mozambique, Senegal, South Africa and Uganda

¹⁴ Schonwetter, Tobias and de Beer, Jeremy and Kawooya, Dick and Prabhala, Achal, *Copyright and Education: Lessons on African Copyright and Access to Knowledge* (2009). J. de Beer, T. Schonwetter, D. Kawooya & A. Prabhala, "Copyright and Education: Lessons on African Copyright and Access to Knowledge" (2009-2010) 10 *The African Journal of Information and Communications* 37-52. Available at SSRN: <https://ssrn.com/abstract=2333864>

Fair use has long been a key priority for the library, education, freedom of expression, disability and other public interest organizations in South Africa. The bill has been praised for its clearly defined exceptions, including a pro-user fair use section that balances rights owners' interests and the interests of the users, third parties and the general public, tailored to local needs. Still, the bill was flagged in the International Intellectual Property Alliance's (IIPA) submissions to the 2019 GSP notice as containing provisions "inconsistent with South Africa's international obligations, far exceeding the scope of exceptions and limitations permitted under the TRIPS Agreement (Article 13) and the Berne Convention (Article 9)" but also "incompatible with the WIPO Internet Treaties,"¹⁵ which South Africa has signed but not ratified.

Copyright law aims to strike a balance between creating adequate, not maximal, incentives for the creation and distribution of expressive works, while also ensuring widespread public access to, and enjoyment of, such works.¹⁶ This is the path South Africa is taking.

The three-step test incorporated in Article 13 of the TRIPS Agreement should not block adoption of fair use in South Africa any more than it has in the United States.¹⁷ The U.S. fair use doctrine has often been criticized for not adhering to the three-step test. Back in 1996, the European Community, Australia, and New Zealand each questioned the United States on the legitimacy of the fair use doctrine under the three-step test.¹⁸ The United States argued that it embodied "essentially the same goals as Article 13 of TRIPS" and is "applied and interpreted in a way entirely congruent with the standards set forth in that Article."¹⁹ Fair use was never challenged at the tribunal. Recent academic literature convincingly demonstrates that fair use complies with the three-step test.²⁰

The wording of the South African provision mimics the wording of its U.S. equivalent. The arguments that support the validity of the U.S. provision apply to the South African provision as well. According to Tobias Schonwetter of the University of Cape Town, "In particular, the factors for assessing fairness are strikingly similar. If anything, the South African provision is more detailed and there should thus be less tension between s12A and the three-step test (especially the test's first step)."

The limitations and exceptions in South Africa's Copyright Bill are well-crafted and completely within their rights under international law. IIPA's claims lack clear reference to either a

¹⁵ IIPA's submission re: 2019 Generalized System of Preferences (GSP): Notice of Annual GSP Product and Country Review; Request for Review of the Intellectual Property Rights Practices of South Africa, 84 Fed. Reg. 11150 (March 25, 2019), <http://infojustice.org/wp-content/uploads/2019/11/IIPA-South-Africa-GSP-Review-Petition-2019.pdf>

¹⁶ Fred von Lohmann, Fair Use as Innovation Policy (September, 24 2008). Berkley Technology Law Journal, Vol. 23, No. 2, 2008. Available at SSRN: <https://ssrn.com/abstract=1273385>

¹⁷ The three-step test requires limitations and exceptions to (1) be confined to certain special cases, (2) not to conflict with a normal exploitation of the work, and (3) not to unreasonably prejudice the legitimate interests of the right holder. Its vagueness has been criticized for failing to adequately reflect the balance between exclusivity and access that is paramount to any copyright system.

¹⁸ See, e.g., Council for Trade-Related Aspects of Intellectual Property Rights, Review of Legislation on Copyright and Related Rights United States, WTO Doc. IP/Q/USA/1 at 2, 4, 18 (Oct. 30, 1996)

¹⁹ *Id.*

²⁰ See P Samuelson Is the U.S. Fair Use Doctrine Compatible with Berne and TRIPS Obligations? (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228052; C Geiger; D Gervais and M Senftleben The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law (2014), available at <https://bit.ly/2pYExLa>

recognized international legal rule, an applicable legal framework, or sufficient citation to relevant facts in support. Access to knowledge is a crucial building block for South Africa's social development and economic growth. U.S. trade policy must respect this.

Indonesia

Indonesia's first patent law went into effect on August 1, 1991. The legislature revised the law in 2001 and 2016. Each iteration has retained the local working requirement. Article 20 of the amended patent law states that patent holders must “make or us[e]” the patented process in Indonesia. The “use” of such patented processes should support technology transfers, increases in domestic investment or employment.

If the invention is not worked (i.e. the patent owner does not make products or use processes in Indonesia covered by the patent) within 36 months after the grant of a patent, a third party can file an application for a compulsory license (Article 82). The patent owner is not expected to regularly notify the patent office that the patent is being implemented. However, he is expected to prove that his invention has been implemented in the event that an application for a compulsory license is filed by a third party. The Ministry of Law will examine each application and decide whether or not to grant the compulsory license based on the facts of each case.

In July 2018, Indonesia introduced implementing regulations to provide more clarity on the working requirement. According to the *Implementing Regulation No. 15 of 2018*, a patent owner who fails to work or use his or her invention can file an application to delay the working requirement for up to five years. Further postponements (i.e., beyond the maximum period of five years) may be granted upon request.

The local working requirement is consistent with TRIPS

This long-standing requirement in Indonesian law has been subjected to fierce criticism from the U.S. government since the early years of TRIPS. This criticism is mostly based on misconceived claims by the U.S. pharmaceutical industry that the local working requirement is not consistent with the TRIPS Agreement and that the WTO Dispute Board ruled out the local working requirement.

The drafting history of the TRIPS Agreement demonstrates that country delegations explicitly excluded limitations on the ability of member states to address local working requirements in their patent laws from the final agreement.

The TRIPS Agreement explicitly incorporates by reference Article 5, Section A (2) of the Paris Convention of 1967, which specifically gives member states the right to legislate against “abuses which ... result from the exercise of the exclusive rights conferred by the patent” subject to the conditions found in Sections A (3) and A (4). The clause specifically cites ‘failure to work’ the patent as an example abuse.

Traditionally, “failure to work” is defined as the failure to industrially produce the product; sales or importation of the patented product do not rise to the level of “working” the patent. But the convention also says that member states may freely define “failure to work” to include the refusal to grant licenses on reasonable terms, insufficient supply of the national market, or excessive prices.

Independent of the convention and consistent with Article 8 and Article 2.1(2) of TRIPS, members may still legislate in the public interest, especially in matters of military security or public health. Further, the Doha Declaration on the TRIPS Agreement and Public Health has reaffirmed that the Agreement should be interpreted in a manner supportive of public health, and member states are free to determine both the grounds on which compulsory licenses are granted and what constitutes a “national emergency or other circumstances of extreme urgency.”

Given the TRIPS negotiating history and the ambiguity of the final TRIPS text, local working requirements are consistent with the flexibilities permitted within the TRIPS Agreement. Indonesia has a right to have local working requirements under international law. Further, TRIPS does not obligate Indonesia to provide postponement of the working requirement, as it does under the new implementing regulation. However, the postponement regime provides an additional safeguard to patent holders.

Indonesia’s local working requirement can support access to otherwise prohibitively expensive medicines. U.S. trade policy should respect the prerogative.