

Before the Office of the United States Trade Representative

Docket No. USTR-2019-0020

South Africa Country Practice Review

Post-Hearing Brief of Engine Advocacy

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship. To that end, Engine welcomes the opportunity to submit this post-hearing brief to respond to the complaint of the International Intellectual Property Alliance (IIPA) alleging that the Republic of South Africa fails to adequately protect intellectual property rights in part, by adopting U.S.-style fair use doctrine in its Copyright Amendment Bill (CAB). This brief seeks to acknowledge the strong role fair use plays in intellectual property law, the benefits it provides to creators, and its importance to startups and small businesses.

The growth of the Internet has had a huge, positive impact on both the U.S. and global economies, thanks in part to balanced legal frameworks. While the growth of digital trade has provided innumerable benefits to global economies, the disjointed patchwork of country-specific laws poses difficulties for businesses—particularly for startups—to expand their ventures internationally due to the costs of compliance, when those laws differ significantly from legal frameworks in the United States. Discouraging the international adoption of practiced and accepted American-style copyright laws, like fair use, is not only detrimental to domestically-based startups—which often lack the resources to navigate complex foreign legal systems—but also sets a dangerous precedent for U.S. involvement in international trade, where tested U.S. legal frameworks may be viewed as no longer widely accepted when applied to the global stage.

I. Startups Rely on Consistent IP Law to Grow

In the context of IP law generally, including on the global stage, U.S. startups need legal frameworks that are certain, consistent, and balanced. Startups already operate on lean budgets and thin margins, and cannot accommodate the risk, cost, and uncertainty around whether they and their users may be liable for IP infringement and, if so, under what circumstances. Instead, startups benefit when there is a clear path to compliance with the law, and when laws foster innovation—not impose unmanageable burdens on early stage companies. The adoption of U.S.-style copyright law abroad only serves to foster the growth of American startups outside the United States. The ease of compliance limits the burden of potentially costly litigation for infringement and provides the certainty startups rely on without the threat to their bottom line. Encouraging, rather than discouraging, countries to adopt laws that mirror U.S. fair use doctrine serves to promote expression and encourages innovation so that startups—particularly those in fair use dependent industries—can thrive.

II. Fair Use Is An Essential Component of Balanced Copyright Law and Should Not be Discouraged in Other Countries

Engine recently noted in our comments to USTR regarding the 2020 Special 301 Review, that fair use is a crucial component of balanced IP law, as it provides an essential safety valve against improper and overly-broad enforcement of copyright protection in ways that stifle free

speech and innovation.¹ As Engine highlighted in the past: “fair use is one of the few doctrines in copyright law that permits people to reuse someone’s copyrighted work without permission. Think, for instance, of a book review, for which one might want to use an excerpt of the reviewed book. Or a parody, criticism, or other forms of speech protected by the First Amendment. Each of these requires use of the underlying work and doesn’t harm the market for that work by creating some kind of substitute for the original content.”² The fair use framework in the U.S. copyright system represents a significant outlet for individuals to use copyrighted work in a limited number of circumstances, without permission of the creator.³ It also provides significant benefits to the U.S. economy. According to one report, as of 2014, fair use industries added \$2.8 trillion in value to the U.S. economy, with roughly one in eight American workers benefiting from fair use.⁴ Moreover, many technology-centric industries rely on fair use to innovate, including software development, Internet search providers, and artificial intelligence—industries in which the U.S. is often considered a leading player.⁵

Fair use as a doctrine facilitates innovation in a number of ways and is largely responsible for the technological advancements of startups and Internet platforms.⁶ Startups and tech companies alike rely on flexible copyright doctrines like fair use that promote creativity and expression, while still protecting original works. Merely by way of example, fair use currently provides the only legal basis for startups to reimplement application program interfaces (APIs). Startups depend on APIs, but since APIs were recently found to be copyrightable, fair use is the only safety valve permitting their continued use. Likewise, for startups that need to use data to train and tune artificial intelligence (AI) systems, they need fair use because it is what allows transformative uses of content in that training capacity. Some startup platforms host user-generated, creative content and provide a forum for creators to reach new audiences and monetize their work; for them, fair use is an essential stop-gap against abusive takedown notices filed by those who want to leverage copyright law for censorship and anti-competitive purposes. For these and other reasons, fair use is simply integral to the startup world. Without it, technological advancement could crumble.⁷ USTR should not take part in discouraging the adoption of fair use in other countries, as startups rely on this integral framework to launch their ventures and keep America one of the most technologically advanced countries in the world.

South Africa has passed both the Copyright Amendment Bill and the Performers Protection Amendment Bill and is moving towards adopting a U.S.-style fair use framework

¹ See Engine’s comments to USTR on the 2020 Special 301 Review, available at:

https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5e41a15789f5bb0179ffba69/1581359448083/Engine_2020+Special+301_Review_Comment.pdf

² Evan Engstrom, Engine, *Dancing Baby Wins Victory for Copyright Fairness* (Sept. 17, 2015), available at: <https://www.engine.is/news/issues/ip/dancing-baby-wins-victory-for-copyright-fairness/5845>

³ 17 U.S.C. § 107.

⁴ Computer and Communications Industry Association, *Fair Use in the U.S. Economy* (2017), available at: <https://www.cciainet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>

⁵ Id.

⁶ Maira Sutton, Electronic Frontier Foundation, *The Murky Waters of International Copyright* (Feb. 25, 2016), available at: <https://www.eff.org/deeplinks/2016/02/murky-waters-international-copyright-law>

⁷ Kate Tumarello, *Primer: Copyrights*, Engine (Jan. 31, 2019), available at: <https://www.engine.is/news/primer/copyright>

through Section 12A of the CAB. Unfortunately, IIPA's efforts to encourage USTR to review GSP eligibility for countries like South Africa that have moved toward U.S.-style fair use could stifle innovation on the Internet and could jeopardize the trading relationship between the two countries.

In its complaint, IIPA alleges that the CAB does not provide adequate and effective protection to U.S. copyrights, though this allegation appears disingenuous as South Africa is seeking to adopt U.S.-style fair use framework that has served to do just that for decades.⁸ Critics of fair use in non-U.S. countries often claim that adopting fair use outside the U.S. is unwise because fair use relies on extensive established case law—something South Africa may not have. IIPA alleged in their Special 301 Report on Copyright Protection and Enforcement that South Africa lacks the requisite case law to support U.S. style fair use, though many countries that have similarly adopted provisions simply look to the extensive resources—in some cases looking to U.S. case law as persuasive authority—to define the contours of fair use.⁹

Recently, USTR solicited comments for its annual 301 Review and asked specifically for the identification of countries that represent trade barriers to American companies due to intellectual property laws. USTR should be mindful that efforts to review South Africa's attempts to adopt a copyright framework analogous to U.S. law constitutes a trade barrier that disproportionately impacts startups. Putting the trading relationship between the U.S. and South Africa in jeopardy because South Africa passed and is potentially adopting a law that is consistent with U.S. legal framework is unwise. Doing so could discourage other developing nations from streamlining their IP frameworks to be more consistent with U.S. law for fear of similarly losing their preferential trade status and would limit the ability of U.S. startups and technology companies to expand to those countries. Discouraging the adoption of fair use in other countries is counterintuitive economically as well. As the Computer and Communications Industry Association has noted, "startups in the core fair use space have generated new jobs while sometimes disrupting established industries and underperforming firms."¹⁰ Doing so would discourage the creation and expansion of globally-minded startups that benefit from fair use, while broader applications of fair use across the globe will encourage the growth of startups and will in turn further bolster the U.S. economy.

III. Conclusion

Contrary to IIPA's argument, South Africa's potential adoption of a fair use framework under the CAB is a step in the right direction and largely aligns with what is accepted in the United States. Having a U.S.-style fair use doctrine is essential for startups and their ability to innovate, and broadening the doctrine to apply globally, will only further the ability of U.S. startups to expand their reach. Engine appreciates the opportunity to provide post-hearing

⁸ See the International Intellectual Property Alliance complaint to USTR, available at:

<http://infojustice.org/wp-content/uploads/2019/11/IIPA-South-Africa-GSP-Review-Petition-2019.pdf>

⁹ See the International Intellectual Property Alliance 2019 *Special 301 Report on Copyright Protection and Enforcement*, available at: <https://iipa.org/files/uploads/2019/02/2019SPEC301REPORT.pdf>

¹⁰ Computer and Communications Industry Association, *Fair Use in the U.S. Economy* (2017), available at: <https://www.cciainet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>

feedback on this important issue and to provide insight into the potential effects on America's startups.

Respectfully Submitted,

Engine Advocacy
700 Pennsylvania Ave SE
Washington, D.C. 20003

February 28, 2020