

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

In re

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

Docket No. USTR-2019-0020

South Africa Country Practice Review: Intellectual Property Rights

Comments of Google Inc.

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), Google submits the following comments in relation to the GSP country practice review of South Africa.

South Africa has made strong progress in crafting a fair use system that is closely modeled on the U.S. legal framework, including a four-factor test drawn from 17 U.S.C. § 107 that strikes an appropriate balance between the interests of authors, creators, and users. The adoption of fair use in South Africa would clearly benefit U.S. exporters, particularly when the alternative is a legal system that is less consistent with U.S. law.

The United States has a strong and innovation-oriented copyright system that protects the legitimate rights of creators, enables new innovation, and generates massive consumer benefits. In addition to other aspects of the U.S. copyright system, the U.S. fair use framework has been critical to the growth of the U.S. digital economy and U.S. digital exporters. One economic study found that American industries that benefit from fair use generate \$368 billion in U.S. exports each year.¹

Sustaining the growth of American exports increasingly requires promoting the adoption of fair use-style measures in key foreign markets, such as South Africa. Many of the core technologies that drive American exports of goods and services depend upon fair use or similar rules to function, and exporters of these technologies will be disadvantaged if South Africa does not develop a compatible legal system:

- **Search engines and social media services** help American small businesses get discovered by new foreign customers. These services depend upon fair use to create an index of content on the web and to enable people to post and share content.

¹ <https://www.ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>

- **Streaming platforms** enable American creators and businesses to monetize their works in other markets and increase the global visibility of their brands—on some platforms, more than 60% of views of content produced by American creators now comes from outside of the U.S.² These platforms depend upon fair use to allow creators to incorporate small parts of their surrounding culture into new works, just as classical music composers and Renaissance painters have done in prior generations.
- **Cloud technologies** help American businesses instantly build a secure global footprint and engage in low-latency transactions with foreign customers without building their own international IT infrastructure. Cloud technologies depend upon fair use to allow for the storage, movement, and retrieval of content online.
- **Translation software** breaks down barriers between American sellers and foreign buyers—72% of foreign consumers are more likely to buy a product online if its listing has information in their own language,³ and improvements in machine translation resulted in a 17.5% increase in export volumes for small businesses selling abroad on eBay.⁴ Online translation tools depend upon fair use to gather and analyze content that has been translated into multiple languages.
- **Artificial intelligence technologies** enable American businesses to increase productivity, find new customers abroad, and create new products in fields ranging from retail to farming, while helping to tackle pressing global challenges. Fair use enables AI firms to find patterns and train algorithms on large and diverse datasets.

All of these technologies have been found to be legal in the United States, thanks in part to the strong U.S. fair use framework. However, in countries that lack copyright and fair use measures that are compatible with the U.S. law, American innovators in these areas face increased legal uncertainty and potential loss of market access.

To take one example, U.S. artificial intelligence firms face increased legal risks in countries that lack fair use. To compile a large dataset and train an AI system on that dataset, a company or researcher must typically make a number of incidental copies of the underlying data, often altering or ‘cleaning up’ the data so that it can be analyzed by a machine, and creating backup copies to protect against loss of data in the event of system failure. Each step in this process involves making some type of temporary or private copy of a work. As a result, firms face some level of increased legal risk at each stage of training and implementing an AI system in countries that lack fair use or comparable rules. The absence of fair use may lead U.S. firms to avoid the risk of exporting to certain markets, while the presence of fair use provides firms with strong legal certainty to engage in AI-relevant activities.

Fortunately for American exporters, other countries are increasingly adopting fair use or other text and data mining protections. Across the world, a number of countries have made changes in favor of more flexibility in their copyright laws. Countries that have adopted fair use provisions

² https://www.uschamber.com/sites/default/files/ctec_googlereport_v7-digital-opt.pdf

³ <https://hbr.org/2012/08/speak-to-global-customers-in-t>

⁴ <https://www.nber.org/papers/w24917>

include Singapore (2004), Israel (2007), South Korea (2012), and Malaysia (2012). Other countries including Hong Kong, Australia, and New Zealand have considered similar changes to their laws, while Japan and the European Union have introduced exceptions for text and data mining that serve a similar purpose.

There is no evidence of a detrimental effect on traditional creators from the adoption of fair use or similar rules in these countries. In a Deloitte study, interviews with copyright creators in Israel suggested that the change did not disrupt their daily operations.⁵ In Singapore, studies on fair use concluded that “it seems likely that overall the Singapore indigenous approach has been very successful.”⁶ A report on the economic value of fair use in Singapore concluded that the rise in private copying technology industries, driven in part by Singapore’s fair use exception, has not been problematic for copyright industries.⁷

It is critical for USTR and the U.S. government to support South Africa in its own efforts to craft a fair use framework, and to provide capacity building assistance where necessary to ensure that these new rules are implemented effectively and consistently with U.S. law. As part of providing support for these efforts, USTR should reject the elements of the GSP petition that complain about South Africa’s efforts to develop a fair use system modeled on U.S. law.

5

<https://www2.deloitte.com/content/dam/Deloitte/nz/Documents/Economics/dae-nz-copyright-fair-use-final.pdf>

⁶ Susy Frankel, Test Tubes for Global Intellectual Property Issues, 2015.

⁷ Ghafele, Roya and Gilbert, Benjamin (2012), The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy on Private Copying Technology and Copyright Markets in Singapore, Oxfirst, UK