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South Africa Country Practice Review (GSP)
Subject Matter: Copyright Amendments Bill
Post Hearing Brief

This statement provides additional information in regard to the complaint by IIPA against South Africa in the GSP docket.

As discussed in the pre-hearing statements, U.S. statutes must be interpreted to comply with international treaty commitments. *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (U.S. 1804). At issue in this process is the meaning of the term "adequate and effective intellectual property," which occurs in the Special 301 and GSP statutes. USTR is required to implement the U.S. GSP and AGOA statues in line with the WTO GSP Enabling Clause, which requires that GSP criteria be "general," "non-reciprocal" (Para 2) and "designed . . . to respond positively to the development, financial and trade needs of developing countries." (Para 3).[1] The WTO TRIPS agreement provides the applicable "adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights." (Preamble).

As explained by the many participants in the public hearing, all of the issues complained about in the CAB have analogues in U.S. law or in the law of other countries that have not been challenged by the U.S. (including in the Special 301 process or in any WTO or other trade forum). Accordingly, sanctioning South Africa for these rules would lack a "general" basis and could also be considered arbitrary and capricious under the Administrative Procedures Act.

Within a post-colonial international order characterized by respect for national sovereignty, large trading nations like the U.S. should insist on a significant evidentiary showing before demanding that democratically arrived-at legislation

[1] See *EC – Preferential Tariffs*, WTO Appellate Body (explaining that GSP criteria must be based on an "objective" and "[b]road-based recognition of a particular need," such as those "set out in the WTO Agreement or in multilateral instruments adopted by international organizations").

developing countries be rewritten primarily to suit the self-interest of their own nationals. This is particularly true where, as in the case of South Africa's Copyright Amendment Bill the legislation itself has not been implemented, and its claimed potential adverse impacts are both hypothetical and (to the extent that they prove real) readily capable of mitigation.

Moreover, it is significant that although the filings and testimony of representatives of U.S. copyright industries assert that their interests are at risk, the record as we are aware of it contains no factual demonstrations whatsoever to support even those narrowly based assertions.

This post-hearing statement provides additional examples and information in these regards.

I. The Public Policy Context

South Africa has one tenth the GDP per capita of the U.S., and it is among the most unequal countries in the world.[2] This income distribution feeds abusive practices by monopolies. South African government and civil society reports demonstrated cases of excessive pricing of educational books as well as inadequate compensation of South African creators.[3] South African civil society and government

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[2] See Katy Scott, *South Africa is the World's Most Unequal Country. 25 years of Freedom Have Failed to Bridge the Divide*, CNN (May 10, 2019, 11:38 AM)(citing World Bank data on income inequality), https://www.cnn.com/2019/05/07/africa/south-africa-elections-inequality-intl/index.html.

[3] See Genesis Analytics, *Intellectual Property Policy Impact Study,* https://libguides.wits.ac.za/ld.php?content_id=50111158 (describing publishing prices); Republic of South Africa Dep't Trade and Industry, *Copyright Review Commission Report* (2011) (discussing low payouts to South African creators); Republic of South Africa, Dep't Trade and Industry, *Draft National Policy on Intellectual Property,* No. 36816, at 32 (2013), https://www.publishsa.co.za/file/1446644308eub-draftnationalpolicyonintellectualproperty2013-invitationforthepublic.pdf ("To enhance access to copyrighted materials and achieve developmental goals for education and knowledge transfer, South Africa must adopt pro-competitive measures under copyright legislation"); Republic of South Africa, *South Africa's National Research and Development Strategy* (Aug. 2002), https://www.cepal.org/iyd/noticias/pais/0/31490/Sudafrica_Doc_1.pdf (finding a net cost to SA in copyright sales and royalties of 200 m R800 m per anum); Denise Nicholson & Leti Kleyn, *The Cost of Accessing Academic Research is Way Too High. This Must Change*, Oct. 26, 2018, The Conversation, https://theconversation.com/the-cost-of-accessing-academic-research-is-way-too-high-this-must-change-105583 (describing South Africa pricing to libraries); Eve Gray & Laura Czerniewicz, *Access to Learning Resources in Post-Apartheid South Africa*, in Shadow Libraries 107–58 (Joe Karaganis ed., 2018), https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/56942/IDL-56942.pdf?sequence=2&isAllowed=y. (describing excessive prices to students); Linda Daniels, *Copyright Bill Will Make the Cost of Studying Cheaper, GroundUp*, Aug. 30, 2019, https://www.groundup.org.za/article/copright-bill-will-make-cost-studying-cheaper/ (describing prices to students); Fair Use in South Africa, Recreate (Nov. 10, 2018), https://youtu.be/wsrfkFkS_xM (interviewing students about textbook costs in South Africa). *Cf* Vincent Lariviere et al., The Oligopoly of Academic Publishers in the Digital Era, PLOS ONE, June 10, 2015, at 1, https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0127502 (describing

have identified improving access to education as a development goal of overarching importance. Access to study materials is an essential component of any strategy to achieve that goal.

II. The Errors in the IIPA Complaint and Testimony

A. Case Law

The record fails to support the highly dubious assertion that South Africa's internationally admired legal institutions would be unable to apply fair use in a consistent and predictable manner. By contrast, we have pointed out the availability of a number of mechanisms (judicial reliance on U.S. decision law for guidance, judicial education, Ministerial regulations, "best practices" documents, etc.) that tend to demonstrate that this claim is groundless. Indeed, South African judges have already been applying the four factor U.S. fair use test in their fair dealing jurisprudence.[4]

In any case, countries can and do adopt fair use clauses into various legal systems without problem – such as in Israel, Korea, Malaysia, Singapore, Philippines, Liberia, and other countries. None have been judged to violate the 3-step test. None of these countries appear on the Special 301 list for having fair use or lacking sufficient case law.

B. Remedies

The IIPA argues that South Africa lacks sufficient deterrent remedies to have fair use. This claim is both logically and legally suspect. There is no evidence (as distinct from assertions) (1) that fair use is subject to significant abuse elsewhere or likely to be abused in South Africa; or (2) that special penalties for infringement do or would function to deter such abuse. Undisputed accounts of the history and function of fair use in the U.S., on the other hand, support contrary conclusions.

There is, of course, no requirement in international law to have heavier penalties for infringement when you adopt fair use. And as the Rens opinion in the GSP docket points out, South Africa has criminal penalties, seizures, injunctions, fee shifting – and it even allows private enforcement of criminal law. Most significantly of all – and unlike the U.S. -- it provides explicitly for "additional" (i.e. punitive) damages in civil copyright litigation, and this provision would come into play in any abuse scenario.

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monopolization of the global publishing industry). See generally, ACCESS TO KNOWLEDGE IN AFRICA THE ROLE OF COPYRIGHT (describing copyright barriers to learning outcomes in a sample of African countries, including South Africa).

[4] See High Court of South Africa, Gauteng Local Division, Johannesburg, *In the Matter Between: Moneyweb (PTY) Limited and Media 24 Limited, Fadia Salie,* IP Unit (2016), http://ip-unit.org/wp-content/uploads/2016/05/Moneyweb-Pty-Limited-v-Media-24-Limited-and-Another.pdf; See generally *Landmark Copyright Decision on Fair Dealing and Other Aspects of SA Copyright Law*, IP Unit, https://ip-unit.org/2016/landmark-copyright-decision-on-fair-dealing-and-other-aspects-of-sa-copyright-law/.

C. Hybrid Fair Use and Fair Dealing

The IIPA argues that South Africa has implemented a "hybrid" of fair use and fair dealing. This is false. A very early version of the bill had both fair use and fair dealing provisions. The version passed through parliament eliminated the fair dealing standards. The current bill has a mix of a general fair use clause and a number of specific exceptions. Of course, every country with fair use or fair dealing general exceptions also has specific exceptions. This is the case under current South African law as it would be under the new law.

Likewise, IIPA has asserted that South African fair use law would not be equivalent to the doctrine in the U.S. because the two statutory provisions do not employ identical language. Our submissions and testimony, however, have demonstrated the two statutes are (by design) functionally identical, and that the South African version may actually have certain advantages in terms of clarity.

D. Broad exceptions

The complaints note the breadth of some of the exceptions, often looking specifically at the education exception. This breadth is not novel.

International law permits countries to define broad categories of educational exceptions "to the extent justified by the purpose.[5]" We have contributed a study in the GSP record indicating that over 70% of African and Latin American countries have broad educational exceptions similar to South Africa's bill that permit educational uses of portions of works without compensation.[6]

The clause in CAB 12D(4) permitting uses of whole textbooks for education that are not available in the market on reasonable terms and conditions is novel. But this exception is very narrowly drawn. It only applies to the use of works not lawfully available in the market.[7] It incorporates by reference the restrictions in paragraph 1 to uses "to the extent justified by the purpose," to non-commercial uses, and to the exercise of the reproduction right -- not extending to distribution or other forms of making available .

E. Limitation on term of assignments

The IIPA offers interpretations of the limitations on the terms of assignments that we don't find compelled by the statutory language and which may be subject to regulatory clarification. For example, we do not find it necessary to interpret the limitations on the terms of assignments to mean that entertainment companies have to search out and re-sign hundreds of performers on every product, as IIPA claims.

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[5] See Berne Art. 10(2) (stating "It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.").

[6] Mike Palmedo & Andres Izquierdo, Comment to USTR for the 2019 GSP Review of South Africa, InfoJustice (Jan. 21, 2020), http://infojustice.org/archives/41951.

[7] South African competition law prohibits dominant firms from charging an "excessive price," including where the dominance is created by IP rights; See The Competition Act, 1998, Sec. 8 (S. Afr.), *accessed in* https://www.comptrib.co.za/legislation-and-forms/competition-act.

In its face, the statute does not appear to us to forbid a contract from including a renewal clause on terms agreed by all parties. [8]

Rights reversions are not regulated by international intellectual property law. Many countries have them, including the U.S.[9] We are not aware of USTR having ever complained about such provisions in this or other forums.

F. Regulation of contracts

The regulation of contractual terms is a common governmental responsibility. Minimum wage laws occur in the U.S. and nearly every country and always apply retroactively to re-write terms of contracts in place when such minimums are set.

The Bill's authorization of the regulation of contracts is similar to German law, which protects an author's right to appropriate remuneration. §32, Gesetz über Urheberrecht und verwandte Schutzrechte. German law specifically allows the Ministry of Justice to set the amount of appropriate remuneration to be paid to authors in cases where an out-of-court dispute resolution process fails to come to agreement § 36 (8) Gesetz über Urheberrecht und verwandte Schutzrechte.

There are many provisions in other laws that regulate the revocation of rights by contract.[10]

G. Technical Protection Measures

IIPA complains about "Inadequate provisions on technological protection measures." First – the bill they oppose would put in place TPM circumvention laws. Second, South Africa already has some such prohibitions. IIPA's complaint shows a lack of understanding of South African law, which contains prohibitions of circumventing TPMs in the Electronic Communications Act, as described in the submission by Andrew Rens.

H. Private copies

IIPA strangely complains about rights to make private copies without remuneration. The US does not generally require remuneration for private copies; it is non-controversial that the permitted scope of private reprography is governed by fair use.

Since the hearing, we reviewed the recent reports on this issue in the WIPO Standing Committee on Copyright and Related Rights by Professor Daniel Seng. According to those reports, there are 230 provisions in the laws of over 130

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[8] See International Intellectual Property Alliance, IIPA 2020 Special 301 Report on Copyright Protection and Enforcement (2020), https://iipa.org/files/uploads/2020/02/2020SPEC301REPORT.pdf.

[9] See 17 USC 203, 17 USC 304(c) and 17 USC 304(d); Art. 35 of the European Directive; Art. 22, EU Directive 2019/790 (for lack of exploitation); Germany §7, §18, and §31a, Gesetz über Urheberrecht und verwandte Schutzrechte (copyright cannot be transferred).

[10] See e.g., Copyright, Designs, and Patents Act, as amended, 2014, Section 39B (U.K.), *accessed in* http://www.legislation.gov.uk/ukpga/1988/48/section/39; EU Directive 2019/790; EU Directive 2017/1564; EU Directive 2009/29/EC; EU Directive 96/9/EC *accessed in* https://eur-lex.europa.eu/homepage.html.

countries that allow personal copies without remuneration.[11]

I. Quotation

IIPA complains about South Africa's broad quotation right, which permits a quotation for any purpose to the extent justified by that purpose. This right is in existing South African law, which has never been subject to complaint by the US. Indeed, a quotation right or its functional equivalent is made mandatory under Art. 10 of the Berne convention: "It shall be permissible to make quotations ... provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose." According to the recent WIPO SCCR study by Professor Seng, there are at least 105 provisions in national law that allow quotations "to the extent justified by the purpose," with many having no additional restrictions on purposes.[12] Effectively, this is the same standard applied in U.S. fair use cases involving unauthorized quotation.

III. Conclusion

In sum, the demonstration made by IIPA does not even begin to meet the significant standard that must be satisfied before the U.S. engages in the unprecedented step of intervening in the legislative process of a sovereign state seeking in good faith to implement important development and fairness objectives through copyright reform legislation passed in regular order after years -- if not decades -- of serious deliberation.

[11] See generally Daniel Seng, *Updated Study And Additional Analysis Of Study On Copyright Limitations And Exceptions For Educational Activities, World Intellectual Property Organization,* World Intellectual Property Organization (2017), https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=390249.

[12] Id.