

UNITED STATES TRADE REPRESENTATIVE

IN THE MATTER OF  
2016 SPECIAL 301 REVIEW:  
IDENTIFICATION OF COUNTRIES UNDER SECTION 182 OF THE TRADE ACT OF 1974  
SUBMISSION AND STATEMENT OF INTENT TO TESTIFY

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## I. INTRODUCTION AND STATEMENT OF INTEREST

The Program on Information Justice and Intellectual Property at American University Washington College of Law (PIJIP) is an academic research program devoted to promoting the public interest in national and international intellectual property policy.

Karisma is an organization of the civil society dedicated to supporting and disseminating the good use of the technology available in digital environments, in social processes and in Colombian Public Policies and of the region, from a perspective of protection and promotion of human rights.

Public Knowledge is a non-governmental organization located in Washington D.C. that promotes freedom of expression, an open Internet, and access to affordable communications tools and creative works.

Michael Birnhack, Peter Jaszi, David Levine, Srividhya Ragavan and Lea Shaver are professors of intellectual property law at leading global universities.

The first part of this submission calls on USTR to adopt two interpretive principles in implementing the Special 301 statute. First, USTR should give proportional consideration to appropriate limitations and exceptions in evaluating foreign intellectual property systems, including by mentioning positive examples of limitations and exceptions in its “best practices” and “positive developments” identifications, and by listing countries on watch lists for egregious cases where a lack of limitations and exceptions stands as a barrier to US trade. Second, the submission urges USTR to expressly abandon any intent to list a World Trade Organization member on Special 301’s priority foreign country list as an action that would violate either the WTO’s dispute settlement understanding or GSP enabling clause.

Sean Flynn, American University Washington College of Law, requests to testify at the Special 301 hearing.

**II. THE 2016 REPORT SHOULD GIVE PROPORTIONAL CONSIDERATION TO ADEQUATE LIMITATIONS AND EXCEPTIONS THAT ENABLE US TRADE**

Section 182 of the Trade Act of 1974 [19 U.S.C. 2242](#)(a) requires:

The United States Trade Representative] shall identify—

(1) those foreign countries that—

(A) deny adequate and effective protection of intellectual property rights, or

(B) deny fair and equitable market access to United States persons that rely upon intellectual property protection, and

(2) those foreign countries identified under paragraph (1) that are determined by the Trade Representative to be priority foreign countries.

The “adequate and effective protection of intellectual property” standard has long guided USTR and the administration more generally in foreign affairs programs. It is, for example, the same standard that guides the development of US trade policy, including that reflected in the recently completed Trans Pacific Partnership Agreement.

19 USC 2242(d)(2) defines the adequate and effective intellectual property standard:

(2) A foreign country denies adequate and effective protection of intellectual property rights if the foreign country denies adequate and effective means under the laws of the foreign country for persons who are not citizens or nationals of such foreign country to secure, exercise, and enforce rights relating to patents, process patents, registered trademarks, copyrights and mask works.

In implementing the Special 301 statute, USTR has – and should continue to – interpret “rights relating to... copyrights” as including the rights copyright laws gives to use copyrighted material without licenses in appropriate circumstances – so-called “user rights.” Likewise, the word “protection” in the Act should continue to be interpreted to refer to the protection of US industries bestowed by limitations and exceptions to copyright.

**A. Past 301 Reports Have Defined Adequate and Effective Intellectual Property to Include Limitations and Exceptions**

The 2015 Special 301 Report acknowledged in several places that the definition of an adequate and effective intellectual property system must include a balance of copyright owner and user protections. See e.g. 2015 Special 301 Report, p. 2 (describing the goal of achieving “well balanced assessments,” and “a broad and balanced assessment of U.S. trading partners’ IPR protection and enforcement”); p. 8 (describing as best practices by trading partners mechanisms that encourage voluntary licensing of pharmaceutical patents); p. 9 (describing the Trans Pacific Partnership Agreement’s IP chapter as “promoting adequate and effective IPR protection and enforcement” through “strong and balanced standards”).

An important limitations and exceptions issue was mentioned in the 2015 Report. The 2015 Report (p. 23) included a specific section on copyright challenges affecting “Information and Communications Technology Sectors.” That section drew attention to laws “enacted in some European countries that involve required remuneration or authorization for certain online activities relating to publishing excerpts from others’ websites.” The sentence relates to so-called “ancillary copyright” legislation in Spain and Germany that impose remuneration requirements on the quotation of snippets of news on internet search platforms – an arguable violation of the Berne Convention.<sup>1</sup>

Although the 2015 Report defined limitations and exceptions issues to be within its scope, the issue received scant attention. Ancillary copyright laws were not used as grounds for listing either Spain or Germany on a Watch List. Nor did any other issue of lack of balance in copyright systems appear in any 2015 listing. The absence of balance issues in the Report is particularly notable in the “Positive Developments” and “Best IPR Practices” sections of the Report. These sections are not required by statute. It is a policy choice as to what issues are mentioned in these sections of the report.

**B. US Trade Policy as Expressed in the Trans Pacific Partnership Agreement Includes Appropriate Limitations and Exceptions as a Necessary Component of an Adequate and Effective Intellectual Property System**

The inclusion of limitations and exceptions as a necessary component to an adequate and effective intellectual property system is consistent with evolving US trade policy.

In terms similar to those found in the Special 301 authorizing legislation, US trade policy is required to promote “adequate and effective” intellectual property protection abroad. Section X of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 states:

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<sup>1</sup> Raquel Xalabarder, The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law, IN3 WORKING PAPER SERIES (Sept. 30, 2014), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2504596](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504596).

(4) The principal negotiating objectives of the United States regarding trade-related intellectual property are—

(A) to further promote adequate and effective protection of intellectual property rights, including through—

... II) ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law;<sup>2</sup>

In the Trans Pacific Partnership negotiation, USTR defined these terms in the Trade Act, including the injunction to promote standards similar to US law, as including the promotion of limitations and exceptions that are similar to US law.

TPP Article 18.66 provides:

Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.

The TPP balance requirement reflects US policy that limitations and exceptions to copyright can be necessary to facilitate US trade interests. In announcing the proposed standard, USTR described copyright limitations and exceptions as necessary to grant “diverse benefits for large and small businesses, consumers, authors, artists, and workers in the information, entertainment, and technology sectors,” and thus as constituting an “important part of the copyright ecosystem” that affects trade between countries. USTR explained:

A robust copyright framework ensures that authors and creators are respected, investments (both intellectual and financial) are promoted, that limitations and exceptions provide an appropriate balance, and that enforcement measures are effective.

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<sup>2</sup> <https://www.law.cornell.edu/uscode/text/19/3802>

In the United States, for example, consumers and businesses rely on a range of exceptions and limitations, such as fair use, in their businesses and daily lives. Further, under the U.S. Digital Millennium Copyright Act (DMCA), the United States provides safe harbors limiting copyright liability, which help to ensure that legitimate providers of cloud computing, user-generated content sites, and a host of other Internet-related services who act responsibly can thrive online.

These same definitions of an adequate intellectual property system as including appropriate limitations and exceptions should guide USTR in the interpretation and implementation of Section 182 of the Trade Act of 1974, 19 U.S.C. 2242(a).

### **C. Inadequate Limitations and Exceptions Affect US Trade Interests**

USTR's assessment of copyright limitations and exceptions as being an aspect of copyright law that impacts US trade interests is well supported. While it is true that substantial elements of the US economy are reliant on copyright owner rights, a roughly equal portion of the US economy is dependent on limitations and exceptions to rights.<sup>3</sup>

The positive economic impact of flexibility has been demonstrated in a series of recent studies and empirical investigations. The most recent, performed by economists at American University and included as an appendix to this submission, found:

[A]doption of fair use clauses modeled on U.S. law is associated with positive outcomes for the firms in our dataset, both those that may be more dependent on copyright exceptions, and those that may be more dependent on copyright protection. In other words, this is not an “internet technology” vs. “big content” debate — both internet firms and content providers can benefit in fair use systems.<sup>4</sup>

Other work has demonstrated trade- and economic growth-related benefits from adequate limitations and exceptions systems. For example:

- Exceptions that permit “non-transformative, personal-use copying . . . draws investment to technologies that are complementary goods to copyrighted works.”<sup>5</sup>

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<sup>3</sup> See CCIA, Fair Use in the US Economy, <https://docs.google.com/viewer?url=http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000526/CCIA-FairUseintheUSEconomy-2011.pdf&pli=1>; <http://www.ccianet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf>

<sup>4</sup> Mike Palmedo, Firm Performance in Countries With & Without Open Copyright Exceptions, Infojustice.org (May 18, 2015), available at <http://infojustice.org/archives/34386>

<sup>5</sup> Fred Von Lohman, Fair Use as Innovation Policy (September, 24 2008). Berkley Technology Law Journal, Vol. 23, No. 2, 2008. Available at SSRN: <http://ssrn.com/abstract=1273385>

- In the US, “fair use permits a range of activities that are critical to many high technology businesses, including search portals and web hosting... The creation of new businesses (e.g., Google and Amazon) and business activities has in turn fueled demand from other sectors of the U.S. economy (e.g., fiber optics, routers and consumer electronics) and transformed a host of business processes (e.g., communications and procurement).”<sup>6</sup>
- Fair use and other limitations and exceptions promote innovation. One way this occurs is by creating a stock of social capital that is the sum of a massive number of tiny knowledge spillovers from individual unauthorized uses that are uncaptured by either the copyright owner or user. This stock of social capital is an input to further innovations.<sup>7</sup>
- Depoorter and Parisi explained that fair use aids efficient market outcomes even in digital markets with extremely low transactions costs. “Fair use doctrines retain a valid efficiency justification even in a zero transaction cost environment. Fair use defenses are justifiable, and in fact instrumental, in minimizing the welfare losses prompted by the strategic behavior of the copyright holders.”<sup>8</sup>
- By one estimate, expanding the flexibility of limitations and exceptions through a fair use type provision in UK law would increase annual GDP growth by 0.3 to 0.6 percent.<sup>9</sup>
- Economic modeling has shown that an introduction of flexible copyright exceptions and better ‘safe harbors’ in Australia would raise economic activity in that country.<sup>10</sup>
- Roya Ghafele and Benjamin Gibert compare the output of industries before and after Singapore implemented fair use in its copyright law, finding that “fair use policy is

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<sup>6</sup> Andrew Szamoszgegi & Thomas Rogers, CCA, “Fair Use in the U.S. Economy,” (2010) at [http://www.wired.com/images\\_blogs/threatlevel/2010/04/fairuseeconomy.pdf](http://www.wired.com/images_blogs/threatlevel/2010/04/fairuseeconomy.pdf)

<sup>7</sup> Mark Lemley & Brett Frischmann, “Spillovers.” 2006, Columbia Law Review, Vol. 107. [http://www.columbialawreview.org/wp-content/uploads/2012/07/111-8\\_Kelly.pdf](http://www.columbialawreview.org/wp-content/uploads/2012/07/111-8_Kelly.pdf)

<sup>8</sup> Ben Depoorter & Francesco Parisi, “Fair Use and Copyright Protection: A Price Theory Explanation,” International Review of Law and Economics, Vol. 21, No. 4, pp. 453-473, May 2002.

<sup>9</sup> Ian Hargreaves, “Digital Opportunity: A Review of Intellectual Property and Growth,” (2011) available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32563/ipreview-finalreport.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf)

<sup>10</sup> Australian Digital Alliance, Copyright and the Digital Economy, (2012) available at <http://digital.org.au/sites/digital.org.au/files/documents/FINAL%20ADA%20ALCC%20CopyRevSub.pdf>



correlated with higher growth rates” relative to a control group of other industries.<sup>11</sup>

- Josh Lerner examined venture capital investment before and after a court case that provided legal clarification to firms relying on copyright flexibilities to provide cloud services, finding that investment increased after the decision relative to investment in the U.S. before the decision and to the experience in EU markets where there was no such clarification.<sup>12</sup>
- Gibert finds that “countries that employ a broadly ‘flexible’ regime of exceptions in copyright” have higher rates of growth of their overall economy, information technology & service sectors, and even traditional media sectors. Workers in these economies also fared better, enjoying higher wages overall, in the communications sector, and technology sector. He notes other positive aspects of more open systems of copyright limitations and exceptions, such as “the promotion of education, independent research, free speech, user-generated content and text and data mining.” He argues that exceptions to copyright should not be viewed as being in conflict with stronger intellectual property protection. Rather, “the evidence suggests that broad and flexible exceptions to copyright embedded within a strong intellectual property framework may be the best way to achieve both simultaneously.”<sup>13</sup>

#### **D. The Best Practices Section of the Report Should Include Best Practices in Limitations and Exceptions**

One place in the 2016 Report where USTR can and should comment on limitations and exceptions issues within foreign country laws is in the Best Practices section of the report. Past reports have included access to medicines concerns in this section. But limitations and exceptions to copyright has never been mentioned among the best practices highlighted. This should change.

##### *1. Flexible Limitations and Exceptions*

The most important contribution toward a properly balanced copyright act from the perspective of creators, innovators and consumers is the inclusion of a flexible exception, similar to the US fair use clause, that can permit the evolution and use of new technologies. USTR should describe the adoption of such exceptions as a best practice of its trading

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<sup>11</sup> Roya Ghafele & Benjamin Gibert, *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*, (2012) at <http://mpr.aub.uni-muenchen.de/41664/>

<sup>12</sup> Josh Lerner, CCA, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computer Companies*, (2014) at [http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Lerner\\_Fall2011\\_Copyright\\_Policy\\_VC\\_Investments.pdf](http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Lerner_Fall2011_Copyright_Policy_VC_Investments.pdf)

<sup>13</sup> Benjamin Gibert, *The Lisbon Council, The 2015 Intellectual Property and Economic Growth Index* (2015), available at [http://www.lisboncouncil.net//index.php?option=com\\_downloads&id=1162](http://www.lisboncouncil.net//index.php?option=com_downloads&id=1162)

partners. In particular, it should describe as a best practice the provision of exceptions that meet the following two requirements:

(1) they can be applied to any use not specifically enabled by enumerated limitations and exceptions, for example through a phrase like “such as” or “including” before an enumerated list, and

(2) they are applied through a flexible proportionality test that balances factors such as nature and importance of the new use, the interests of the author or copyright holder, and the impacts on third parties and society at large.

Applying a flexible exception to all uses and purposes is necessary to ensure that today’s copyright law is adaptable to tomorrow’s technologies and practices. This aspect of flexibility is often described as the reason that technology and creative industries thrive under systems with an exception that is flexible in this way, without harming traditional content industries. Very few if any copyright laws in the world today contain express exceptions that clearly authorize the copying of the internet to enable search technologies. Such technologies exist because of the possibility to interpret the flexibilities in law to permit such services. Such interpretation is much easier in countries with flexible exceptions. USTR should promote such flexible exceptions not only to enable the provision of currently existing trade – such as trade in internet services not specifically enabled by enumerated exceptions – but also to enable trade in future goods and services that we cannot today define with specificity.

A clear statement of proportionality factors produces an internal balance between the interests of copyright owners and those of innovators who build on existing knowledge and add new value to it. Such factors can also guide interpreters and users, contextualizing the law within a corpus of comparative jurisprudence to aid predictability. The factors also tailor the law to ensure compliance with international norms, such as the “three-step test.”<sup>14</sup>

Countries that may be referred to as having adopting this best practice include Korea, Israel, Philippines, Singapore and Malaysia. As noted below, countries that are currently considering such reform should be mentioned in the “Positive Developments” section of the report, including Hong Kong, South Africa, and Nigeria.

## 2. *Limitations and Exceptions in the Digital Environment*

USTR should commend countries that have taken action to update their copyright laws in ways that promote trade in internet goods and services.

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<sup>14</sup> See Christophe Geiger, Daniel J. Gervais, & Martin Senftleben, *The Three-Step-Test Revisited: How to Use the Test’s Flexibility in National Copyright Law*, 29 *Am. U. Int’l L. Rev.* 3 (2014), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1816&context=auilr>

Canada should be mentioned for its work promoting modern exceptions to technical protection measures,<sup>15</sup> promoting free expression and digital platforms through exceptions for non-commercial user-generated content,<sup>16</sup> promoting digital trade through exceptions to copyright for temporary reproductions for technological purposes,<sup>17</sup> and for ensuring that criminal penalties do not deter legitimate activity by limiting criminal remedies to infringing conduct that is willful, for profit and on a commercial scale.<sup>18</sup>

The Best Practices section of the Report should include Administration policy that “any enforcement of copyright on the internet must be narrowly targeted to cover activity clearly prohibited under existing laws, provide strong due process and be focused on criminal activity,” “any provision covering Internet intermediaries such as online advertising networks, payment processors, or search engines must be transparent and designed to prevent overly broad private rights of action that could encourage unjustified litigation that could discourage startup businesses and innovative firms from growing,” and that laws “not tamper with the technical architecture of the Internet through manipulation of the Domain Name System (DNS), a foundation of Internet security.”<sup>19</sup>

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<sup>15</sup> E.g. E.g. Canada [C-11 sec. 41.21\(a\)](#) permits the government to prescribe “additional circumstances in which” TPM paragraph 41.1(1)(a) does not apply.

<sup>16</sup> E.g. Canada Bill [C-11 §22 creating 29.21](#), providing that it is “not an infringement of copyright for an individual to use an existing work . . . in the creation of a new work . . . or to authorize an intermediary to disseminate it, if . . . the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes” and other factors, such as attribution, are met.

<sup>17</sup> E.g. Canada [Bill C-11 § 32](#), creating a new § 30.71, providing that it “is not an infringement of copyright to make a reproduction of a work or other subject-matter if (a) the reproduction forms an essential part of a technological process; (b) the reproduction’s only purpose is to facilitate a use that is not an infringement of copyright; and (c) the reproduction exists only for the duration of the technological process.”

<sup>18</sup> E.g. Canada [Bill C-11 § 46\(1\)](#), introducing a new § 38.1(1)), limiting statutory damages to “a sum of not less than \$100 and not more than \$5,000 that the court considers just, with respect to all infringements involved in the proceedings for all works or other subject-matter, if the infringements are for non-commercial purposes.”

<sup>19</sup> See e.g. [White House statement](#), Victoria Espinel, Aneesh Chopra, and Howard Schmidt, Combating Online Piracy while Protecting an Open and Innovative Internet, WE THE PEOPLE (Jan. 14, 2012) (calling for “any enforcement of copyright on the internet must be narrowly targeted to cover activity clearly prohibited under existing laws, provide strong due process and be focused on criminal activity,” “any provision covering Internet intermediaries such as online advertising networks, payment processors, or search engines must be transparent and designed to prevent overly broad private rights of action that could encourage unjustified litigation that could discourage startup businesses and innovative firms from growing,” laws to “not tamper with the technical architecture of the Internet through manipulation of the Domain Name System (DNS), a foundation of Internet security.”).

### 3. *Access to Government Funded Innovation*

The Best Practices section of the Report should include promoting public benefits from publicly funded research, including by promoting accessibility, availability, affordability and access to data and information from government funded research.<sup>20</sup>

### 4. *Innovations in the Protection of Test Data*

USTR has always paid ample attention in Special 301 to the protection of pharmaceutical test data through exclusivity. But USTR should also reflect as a best practice the use of innovative mechanisms to protect the interests of those that produce test data, such as the cost sharing mechanisms acknowledged in the KORUS free trade agreement,<sup>21</sup> as well as implementation of exemptions from data exclusivity requirements that can promote competition and access to medicine.<sup>22</sup>

## **E. The Positive Developments Section of the Report Should Include Positive Developments in Limitations and Exceptions Reform**

The Positive Developments section of the Report is a key place where USTR can and should comment positively on the ongoing efforts of countries to reform their laws to add flexibility to their limitations and exceptions regimes and to implement the Marrakesh Treaty.

### 1. *Expanding Flexibility*

A number of countries have implemented or are considering reform of their copyright laws that would expand flexibility in their limitations and exceptions in ways that will promote the interests of trade in technology, education and other markets where US businesses are active participants. Examples of such reforms are listed in the Country Considerations below, and include South Africa, Nigeria, Hong Kong, Australia, New Zealand and Ireland. USTR should mention such issues in the Positive Developments part of the report. In particular, it should praise countries that have adopted or are considering adopting fair use exceptions as the legal change that can most advantage trade in internet services and other digital technologies.

### 2. *Marrakesh Treaty Implementation*

A number of countries in the last year have ratified the Marrakesh Treaty, including recently Brazil and Peru. The US should show its support for such countries, and encourage

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<sup>20</sup> See <http://www.federalregister.gov/articles/2010/09/20/2010-23395/request-for-comments-on-incentivizing-humanitarian-technologies-and-licensing-through-the>; March-in requirements of the Bayh-Dole legislation (for a failure to make the product “available to the public on reasonable terms,” 35 U.S.C. § 201(f) (defining “practical application”) or to “alleviate health or safety needs.” 35 U.S.C. § 203(a)(2)).

<sup>21</sup> E.g. Agreement Between the EFTA States and the Republic of Korea, Annex XIII (Article 3), E.F.T.A.- S. Kor., Dec. 15, 2005 (“Any Party may instead allow in their national legislation applicants to rely on such data if the first applicant is adequately compensated.”)

<sup>22</sup> [Peru-EU FTA](#), Chapter 3 §6 Art 231 (parties may adopt exceptions for reasons of public interest)

others to follow, by listing Marrakesh ratifications in the Positive Developments section of the 2016 301 Report.

### **III. TO COMPLY WITH WTO MANDATES, NO COUNTRY SHOULD BE LISTED AS A PRIORITY FOREIGN COUNTRY**

In recent Special 301 processes, and likely in this one, there have been calls for listing some countries (often including China, India and Ukraine) as priority foreign countries. In 2013, Ukraine was listed as a PFC, representing the first known time that a WTO member was listed as a PFC under Special 301. Ukraine's listing was later rescinded.<sup>23</sup>

No country may lawfully be listed as a PFC under Special 301 absent a WTO finding that their intellectual property policies violate the TRIPS agreement. Accordingly, no country should be listed as a PFC in this or any future report. The "WTO Dispute Resolution" section of the Report should include reference to the Statement of Administrative Action making clear that 301 will not be used to bypass the WTO. The statement should be further clarified to explain that use of Special 301 and GSP benefit determinations will strictly adhere to WTO requirements that ban the consideration of issues not reflected in broad based international agreements such as TRIPS.

#### **A. The US Cannot Unilaterally Sanction or Threaten Countries for TRIPS-covered Issues**

The U.S. cannot unilaterally sanction, or threaten to sanction, any WTO member for an intellectual property policy covered by the WTO's Agreement on Trade Related Aspects of Intellectual Property (TRIPS).

The WTO Dispute Settlement Understanding, Art. 23.2 states:

Members shall not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this understanding.

Special 301 is an offshoot of the more general pre-WTO "Section 301" program which authorizes the USTR to unilaterally impose trade barriers on any country for "unreasonable" conduct that burdens U.S. commerce. Special 301 creates a "watch list" of countries being threatened for possible sanctions for "unreasonable" intellectual properties that harm U.S. commerce. Being named a "Priority Foreign Country" is the most direct

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<sup>23</sup> Notice of Determination in Section 301 Investigation of Ukraine, <https://www.federalregister.gov/articles/2014/03/13/2014-05536/notice-of-determination-in-section-301-investigation-of-ukraine>

threat – requiring USTR to launch a Section 301 investigation and determine what sanctions should follow.

When the U.S. Congress failed to repeal Section 301 in its WTO implementation legislation it was sued in the WTO by the EU. The Panel Report in United States – Sections 301-310 of the Trade Act of 1974 upheld the continuation of Section 301 after the WTO only if used after, and as a means to implement, DSU findings. It also clearly signaled that threats of sanctions through programs like Special 301 cannot survive WTO scrutiny. The panel said:(¶ 7.89)

Members faced with a threat of unilateral action, especially when it emanates from an economically powerful Member, may in effect be forced to give in to the demands imposed by the Member exerting the threat... To put it differently, merely carrying a big stick is, in many cases, as effective a means to having one's way as actually using the stick. The **threat alone** of conduct prohibited by the WTO would enable the Member concerned to exert undue leverage on other Members. It would disrupt the very stability and equilibrium which multilateral dispute resolution was meant to foster and consequently establish, namely equal protection of both large and small, powerful and less powerful Members through the consistent application of a set of rules and procedures.<sup>24</sup>

Recent Special 301 Reports have included a section on Implementation of the WTO TRIPS Agreement with a subsection on WTO Dispute Settlement. See 2015 Special 301 Report at 29. The 2016 Report should include language in this section clarifying that Special 301 will not be used in a manner that deviates from the WTO or the Statement of Administrative Action governing Section 301. Specifically, the Report should quote the Statement that the Trade Representative will:

- invoke DSU dispute settlement procedures, as required under current law;
- base any section 301 determination that there has been a violation or denial of U.S. rights under the relevant agreement on the panel or Appellate Body findings adopted by the DSB;
- following adoption of a favourable panel or Appellate Body report, allow the defending party a reasonable period of time to implement the report's recommendations; and

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<sup>24</sup> Panel Report, United States—Sections 301–310 of the Trade Act of 1974, WT/DS152/R (December 22, 1999).

- if the matter cannot be resolved during that period, seek authority from the DSB to retaliate.

USTR should further clarify that only after all these steps have been taken would the USTR list any country as a PFC in Special 301 and initiate any Section 301 process to implement the DSU finding.

#### **B. The US Cannot Withhold GSP Benefits of Threaten Countries for “TRIPS-Plus” Issues**

It would also violate the WTO to sanction any WTO member for so-called “TRIPS-plus” standards not directly covered by the WTO.

GSP benefits are authorized by the WTO only as an exception to the general Most Favoured Nation (MFN) clause. MFN requires that tariff treatment provided to one member of the WTO be provided to all. An exemption to MFN exists for GSP programs only if the programs are based on criteria that are “generalized, non-reciprocal and non discriminatory” and “addressed to a particular development, financial or trade need” of developing countries.<sup>25</sup> The statutory language authorizing Special 301 for “TRIPS-plus” investigations<sup>26</sup> must be implemented in light of these binding international rules.

The WTO Appellate Body ruled in the *EC Tariffs* case on the permissible bounds of GSP programs, and struck down an EU program that, like Special 301, was justified by domestic economic interests rather than the “non-reciprocal” development interests of other countries. In that case, the Appellate Body stressed that GSP criteria must to be tailored to the needs of *developing countries*, and held that such needs may not be “based merely on an assertion to that effect by . . . a preference-granting country.” Rather, the basis for GSP criteria must be an “objective . . . [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.”<sup>27</sup>

This holding puts ANY use of the 301 program to sanction a country absent a DSU finding in a legal Catch 22. USTR can’t unilaterally adjudicate TRIPS consistent with the Dispute Settlement Understanding. But under the GSP enabling clause it also can’t unilaterally withhold GSP benefits for IP standards not contained in TRIPS or some equivalent multilateral instrument.

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<sup>25</sup> General Agreement on Tariffs and Trade, October 30, 1947, art. 1, T.I.A.S. 1700, 55 U.N.T.S. 194 and associated appendices; WTO, Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, L/4903 (28 November 1979).

<sup>26</sup> 19 U.S.C. § 2242(d)(4).

<sup>27</sup> Appellate Body Report, European Communities--Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, ¶ 163 (Apr. 20, 2004)

USTR should make clear in the section of the Report on WTO Dispute Resolution that it will abide by the GSP enabling clause and not threaten to revoke GSP benefits, including through a PFC listing, for any IP issue not covered by the TRIPS agreement.

#### **IV. COUNTRY CONSIDERATIONS**

Below is a list of deficiencies in the limitations and exceptions in the copyright laws of selected nations. Many examples are drawn from Consumers International's country surveys used to create the IP Watchlist Report 2012, updated with research by fellows of American University's Program on Information Justice and Intellectual Property.

##### **A. ARGENTINA**

The United States should be concerned that general user rights in Argentina do not include a flexible exception that can apply to future technologies not specifically identified in the Act, such as a fair use or flexible fair dealing exception. Quotation is only allowed for educational or scientific purposes. No exemption is provided for temporary or transient copies incidental to lawful use, or for parody or satire. Argentina law permits criminal prosecution for engaging in reproducing, representing and performing copyrighted works in a way not covered by the limited framework of exceptions, even when the use of a work is not made for profit. The United States should further be aware that the Argentine Congress is discussing a bill (2157-D-2015) that is likely to shrink the public domain by increasing retroactively the copyright term of protection for photographs from 20 years after publication to life of the author plus 70 years. The United States should encourage the Argentine Congress to approve bill 5792-D-2015 which provides for exceptions and limitations for libraries, archives and museums, and exempts libraries, archives and museums from criminal liability. Argentina should be applauded for adopting an open-access mandate to publicly-funded institutions that are part of the National Science and Technology System. Argentina should also be applauded for ratifying the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities.

##### **B. ARMENIA**

The United States should be concerned that there is no flexible exception that can apply to future technologies not specifically identified in the Act, such as a fair use or flexible fair dealing exception. The United States should be concerned that Armenian law allows for quotations only for a narrow set of purposes, and those purposes do not appear to embrace the full range of digital technology that the U.S. exports. The obligation to attribute a work to the original author is embedded in Armenia's "Free Use of a Work" provision. Armenia should be applauded for its adoption of the "Freedom of Panorama" which makes permissible the incidental inclusion of works displayed in public.



### **C. AUSTRALIA**

The United States should be concerned that Australia's general user right based on a set of balancing criteria applies only to educational and library uses and for those with disabilities. The United States should be concerned that Australia does not provide a flexible exception that can apply to future technologies not specifically identified in the Act, such as a fair use or a flexible fair dealing exception. Incidental inclusion of artistic works is permitted only for film and television broadcasts. Australia should be applauded for its serious consideration of adopting a flexible user right similar to the U.S. fair use exception in its ongoing copyright reform process. USTR should encourage Australia to adopt a fair use provision. Late in December 2015, Australia released for public comment the "Copyright Amendment (Disability Access and Other Measures) Bill 2016." The Bill seeks to extend the safe harbor provisions in several categories of online activities. Proposed changes to the definition of "carrier service provider" are intended to bring the language more in line with that under TRIPS. A revision of the definition would extend the safe harbor to include organizations such as universities and purely online service providers. The Bill also includes a simplification of fair dealing provisions for those with disabilities such that the law comes into compliance with the Marrakesh Treaty, which Australia signed in 2014. Other proposed amendments include changes to the statutory licensing scheme for educational institutions and libraries. The United States should continue to urge Australia to adopt a flexible fair use exception for general users.

### **D. BELARUS**

The United States should be concerned that there is no flexible exception that can apply to future technologies not specifically identified in the Act, such as a fair use or flexible fair dealing exception. The United States should be concerned that Belarus does not provide copyright exceptions for transient copies. Belarus only allows for quotations as illustrations in publications, radio and television broadcasts, audio and video recordings of educational nature. These narrow limitations threaten electronic commerce business from the U.S.

### **E. BELGIUM**

The United States should be concerned that a Belgian court has found the practice of providing short quotes in web searches infringes upon Belgian copyright law.<sup>28</sup>

### **F. BOLIVIA**

The United States should be concerned that there is no flexible exception that can apply to future technologies not specifically identified in the Act, such as a fair use or flexible fair dealing exception. No copyright exemption is provided for parody or satire, or for persons with print disability.

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<sup>28</sup> <http://www.cciinet.org/wp-content/uploads/library/Internet-Protectionism.pdf>

## **G. BRAZIL**

The United States should be concerned that Brazilian law does not allow a whole copy, even for purposes that would be permitted under US fair use law. No exceptions are provided permitting temporary or transient copies. Brazilian law does not provide any exception for libraries and archives. The United States should also be concerned that the discussion on a copyright reform proposal which includes a flexible fair-use like limitation and exception is stalled in the Brazilian Congress. Brazil should be applauded for ratifying the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities. Brazil should also be commended for considering amendments to its copyright law that would implement a fair use-like flexible exception.

## **H. CAMEROON**

The United States should be concerned that general user rights in the Cameroon do not include a set of balancing criteria, such as a “fair use” right. Cameroon does not allow computer software to be reproduced or transformed for the purpose of reverse engineering interoperable software.

## **I. CANADA**

The United States should be concerned that Canada’s exception for the incidental inclusion of a work in other work does not protect deliberate incidental inclusion. Canada should be applauded for its recent court decisions that have made the interpretation of their fair dealing clause much more flexible and also for its new and innovative copyright reform that has expanded users rights and protections.

## **J. CHILE**

The United States should be concerned that Chilean copyright law lacks any general user right that is based on a set of balancing criteria. As a TPP member subject to the balance requirement of the agreement, Chile should be encouraged to adopt a flexible limitation and exception similar to fair use.

## **K. CHINA**

The United States should be concerned that there is no flexible exception that can apply to future technologies not specifically identified in the Act, such as a fair use or flexible fair dealing exception. China should be applauded for its current consideration of a flexible exception (based on Berne Convention 3 step test) in its current copyright reform proposals. It should also be noted that a recent draft of proposed amendments to China’s Copyright Law removes the language “fixed on a certain medium” from the definition of audiovisual works. Users’ rights regarding the incidental inclusion of a work in other material is limited to specific circumstances.

**L. COLOMBIA**

The United States should be concerned that Colombia lacks any general user right based on a set of balancing criteria. USTR should encourage Colombia to include a provision of this kind in the implementation bills of the free trade agreement with the United States. Colombian copyright law does not provide exemptions for parody or satire. Libraries are not exempted from liability for public lending their collections. Furthermore, the United States should be concerned that Colombian criminal law punishes copyright infringement without requiring the intent to profit, and that the punishments are disproportionately severe in comparison to other crimes. Colombia should be applauded for introducing an exception and limitation for blind and low vision persons, but it should also be encouraged to ratify the Marrakesh Treaty.

**M. COSTA RICA**

The United States should be concerned that Costa Rica lacks any general user right that is based on a set of balancing criteria. The law does not explicitly allow the incidental inclusion of a copyrighted work in the creation of other materials. Costa Rica also does not have a copyright exception for parody or satire, any explicit exception for libraries and archives, or for persons with disability.

**N. DOMINICAN REPUBLIC**

The United States should be concerned that the Dominican Republic lacks any general user right that is based on a set of balancing criteria. No copyright exemption is provided for parody or satire.

**O. ECUADOR**

Ecuador should be applauded for its current consideration and participatory discussion on a copyright reform proposal seeking to achieve balance between rights holders, users, competitors, and citizens, and to democratize the benefits and opportunities derived from knowledge. The bill provides for several exceptions and limitations for libraries and archives, parody, satire, pastiche, and text data mining. USTR should actively support Ecuador's consideration of a fair-use like provision in the bill. The United States should applaud Ecuador for discussing an amendment to the criminal code which excludes from liability for unauthorized reproductions of a work made without commercial purpose.

**P. EGYPT**

The United States should be concerned that there is no flexible exception that can apply to future technologies not specifically identified in the Act, such as a fair use or flexible fair dealing exception. The United States should be concerned that Egypt does not exclude or limit the liability of intermediaries such as ISPs for copyright infringements carried out on their network. Egyptian law does not provide explicit provision for the purpose of reverse-engineering interoperable software (a single copy is allowed only for archiving purposes or

to replace a lost, destroyed or invalid original copy). Incidental inclusion of a work in other materials is not permitted. Egyptian law also restricts quotations for the purpose of criticism, discussion or information. On Nov. 15, Egypt passed the “Movable Security Law” (law no. 115/2015) regulating secured transactions in the country. Though the scope of the law extends to intellectual property rights held by financing institutions and corporations, it is uncertain what the practical effects will be on IPRs.

**Q. FRANCE**

The United States should be concerned that there is no flexible exception that can apply to future technologies not specifically identified in the Act, such as a fair use or flexible fair dealing exception. The United States should be concerned that France does not exempt from copyright temporary or transient copies that are incidental to a lawful use, and does not permit the incidental inclusion of a work in other material. Furthermore, there are limits on the quotation right assigned to the press. The United States should be concerned that France is considering a law that would give copyright owners an exclusive right to prevent quotation of their works on search or news aggregating services. This law would be a direct contravention of the Berne Convention quotation right. The US should express its concern that a French court has recently used French trademark law to find eBay liable for the actions of all counterfeiters who use its service, and held E-bay liable for uses of trademarks that would be a fair use in the U.S.

**R. GERMANY**

The United States should be concerned that there is no flexible exception that can apply to future technologies not specifically identified in the Act, such as a fair use or flexible fair dealing exception. The United States should be concerned that Germany passed in 2013 an ancillary right for press publishers. At the moment there's a domestic discussion in Germany to abolish it. Press lobbyists are trying to get an ancillary copyright law introduced on the EU level, via German EU commissioner Oettinger. USTR should express concern about the German ancillary copyright law and its introduction in Europe.

**S. GUATEMALA**

The United States should be concerned that general user rights in Guatemala do not include a set of balancing criteria, such as a “fair use” right. Guatemalan law allows for quotation only for teaching or research purposes.

**T. HONG KONG (CHINA)**

The US should commend Hong Kong for its current copyright reform proposal that includes adopting a parody right. The US should be gravely concerned that some in the country are opposing the adoption of a flexible fair use style right with arguments that such a right would violate the Berne 3-step test. USTR should actively promote the adoption of fair use

in Hong Kong and strongly argue for the 3-step compliance of the US fair use right, and by extension its adoption in similar terms in Hong Kong.

#### **U. INDIA**

The United States should be concerned that there is no flexible exception that can apply to future technologies not specifically identified in the Act, such as a fair use or flexible fair dealing exception. The United States should be concerned that India's fair dealing provisions do not cover sound recordings or cinematographic films. The law does not clearly exclude or limit the liability of intermediaries such as ISPs for copyright infringements carried out on their network. The US should be concerned that the Indian Performance Rights Society (IPRS) has unclear jurisdiction, rights and limitations, resulting in overreach over materials in public domain.

#### **V. INDONESIA**

The United States should be concerned that there is no flexible exception that can apply to future technologies not specifically identified in the Act, such as a fair use or flexible fair dealing exception. The United States should be concerned that Indonesia has no copyright exception for parody or satire.

#### **W. ISRAEL**

Israel should be applauded for adopting a U.S. style fair use clause which will greatly benefit many U.S. businesses seeking access to their market.

#### **X. JAPAN**

The United States should be concerned that there is no flexible exception that can apply to future technologies not specifically identified in the Act, such as a fair use or flexible fair dealing exception. The United States should be concerned that Japanese law does not allow for reverse-engineering of software for compatibility, but consideration is being given to amend the current law. Japan does not provide a copyright exception to parody or satire.

#### **Y. JORDAN**

The United States should be concerned that there is no flexible exception that can apply to future technologies not specifically identified in the Act, such as a fair use or flexible fair dealing exception. The United States should be concerned the Jordan's Copyright Law does not allow making temporary copies in RAM. The author is given the right to control all reproduction of his work whether temporary or permanent. It also does not contain any provisions that allow the "interoperability of software." The Copyright Law does not permit incidental inclusion of a work in other materials, and does not provide an exception for parody or satire.

## **Z. LEBANON**

The United States should be concerned that there is no flexible exception that can apply to future technologies not specifically identified in the Act, such as a fair use or flexible fair dealing exception. The United States should be concerned that Lebanese law does not except temporary or transient copies, incidental to a lawful use, from copyright. Furthermore, computer software may not be legally reproduced or transformed for the purpose of reverse-engineering interoperable software.

### **AA. MALAWI**

The United States should be concerned that there is no flexible exception that can apply to future technologies not specifically identified in the Act, such as a fair use or flexible fair dealing exception. The United States should be concerned that copyright law in Malawi does not exclude or limit the liability of intermediaries such as ISPs for copyright infringements carried out on their network. Computer software may not be reproduced or transformed for the purpose of reverse-engineering interoperable software. The incidental inclusion of a work in other material is not permitted.

### **BB. MALAYSIA**

Malaysia should be commended for its past adoption of a flexible exception in its copyright by adding the word “including” before a previously closed list of permissible fair dealing purposes. The United States should be concerned that Malaysia does not exclude or limit the liability of intermediaries such as ISPs for copyright infringements carried out on their network. Nor does Malaysian law allow computer software be reproduced or transformed for the purpose of reverse-engineering interoperable software.

### **CC. MEXICO**

The United States should be concerned that Mexico do not include a set of balancing criteria, such as a “fair use” right. Mexico should be encouraged to adopt such a right in its implementation of the TPP. Internet service providers are not shielded from liability for third-party content. Mexico should be applauded for recently incorporating in its legislation an exception and limitation for persons with disabilities, and for ratifying the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities.

### **DD. NEW ZEALAND**

The United States should be concerned that there is no flexible exception that can apply to future technologies not specifically identified in the Act, such as a fair use or flexible fair dealing exception. New Zealand should be encouraged to adopt a flexible exception in its implementation of the TPP. The United States should be concerned that nothing in New Zealand’s law limits the right of the copyright owner to injunctive relief in relation to a

user's infringement or any infringement by the Internet service provider. Additionally, there is no copyright exception for parody or satire, though the Green Party has introduced legislation with such an exception.

#### **EE. NIGERIA**

Nigeria should be commended for recent consideration of legislation to expand limitations and exceptions for libraries and other purposes. USTR should encourage Nigeria to adopt a flexible exception in this process, e.g. by including the words "such as" before the currently closed list of fair dealing exceptions.

#### **FF. PANAMA**

Even though Panama recently updated its copyright law including exceptions and limitations for libraries, persons with disabilities, and for software interoperability, the United States should be concerned that Panama does not include any flexible exception such as a fair use. Panama lacks a copyright exception for parody or satire. The United States should also be concerned that the General Copyright Directorate (Dirección General de Derecho de Autor in Spanish) has the power to impose fines on infringers without prejudice of other criminal or civil actions that apply, violating general principles of law such as "non bis in idem".

#### **GG. PARAGUAY**

The United States should be concerned that general user rights in Paraguay do not include a set of balancing criteria, such as a "fair use" right. Computer software may not be legally reproduced or transformed for the purpose of reverse-engineering interoperable software. No copyright exemption is provided for parody or satire. Internet service providers are not shielded from liability for third-party content. Paraguay should be applauded for ratifying the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities.

#### **HH. PERU**

Even though Peru recently updated its exceptions and limitations framework, the United States should be concerned that Peruvian law does not provide a flexible exception that can apply to future technologies such as a fair use or flexible fair dealing. Internet service providers are not shielded from liability for third-party content.

### **II. PHILIPPINES**

Philippines should be commended for having adopted a US style fair use right. The United States should be concerned that the Philippines does not allow computer software to be reproduced or transformed for the purpose of reverse engineering interoperable software.

There is no specific mention of satire in the limitations on copyright, though its recent fair use provision includes criticism and comment.

**JJ. SLOVENIA**

The United States should be concerned that Slovenian Law allows quotation only if it is necessary for the purpose of illustration, argumentation or referral. Additionally, quotations are allowed to be made only of parts of a disclosed work and of single disclosed photographs, works of fine arts, architecture, applied art, industrial design and cartography.

**KK. SOUTH AFRICA**

South Africa should be commended for considering adding a fair use exception to its local copyright law.

**LL. SOUTH KOREA**

South Korea should be applauded for adopting a U.S. style fair use clause which will greatly benefit many U.S. businesses seeking access to their market. The United States should be concerned that South Korean copyright law has no provisions to exempt the incidental infringement from liability. It also does not exempt satire from copyright infringement and the court is very strict in recognizing an exception for parody.

**MM. SPAIN**

The United States should be concerned that Spain lacks any general user right that is based on a set of balancing criteria. Liability is limited for intermediaries only under certain specific circumstances. There are strict limits to how computer software may be reproduced or transformed for the purpose of reverse-engineering interoperable software. Quotations may be used only for educational and research purposes. A further concern is the adoption of an “ancillary copyright law” which came into effect on January 1, 2015, and which further limits the use of short quotations to provide context for hyperlinks to news sources.

**NN. THAILAND**

The United States should be concerned that Thai law does not exempt temporary or transient copies incidental to a lawful use from copyright infringement. Computer software may be reproduced or transformed for the purpose of reverse engineering interoperable software only if for research or study of the computer program.

**OO. UNITED KINGDOM**

The United States should be concerned that UK copyright law does not provide for fair use. The UK should be commended for its recent adoption of copyright amendments that update its limitations and exceptions for the digital age.



**PP. UKRAINE**

The United States should be concerned that general user rights in the Ukraine do not include a set of balancing criteria, such as a “fair use” right. Temporary, transient copies are covered by definition of reproduction in the Law on Copyright and Related Rights, and therefore they are subject to copyright protection. No exception for copyright infringement is provided for satire or parody. Quotations are limited to information, polemic, scientific and criticism purposes.

This list is not a complete review of every country in the world. Others that deserve to be on the list may have been excluded.

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[1] <http://www.cciagnet.org/CCIA/files/ccLibraryFiles/Filename/000000000202/Internet-Protectionism.pdf>

**QQ. VENEZUELA**

The United States should be concerned that Venezuela lacks any general user right that is based on a set of balancing criteria. No copyright exemption is provided for parody or satire. Internet service providers are not shielded from liability for third-party content.

# Appendix

## Firm Performance in Countries With and Without Open Copyright Exceptions

Mike Palmedo | May 2015  
PIJIP, American University

This piece presents preliminary data showing that firms in industries sensitive to copyright can succeed in countries other than the U.S. when copyright limitations include fair use. It is an early product of an interdisciplinary project at American University, in which legal researchers are working with economics faculty to study how country's copyright exceptions effect economic outcomes. The project has been undertaken as part of American University's larger role coordinating the Global Network on Copyright User Rights. The research supports and expands on other recent research attempting to measure the value of fair use abroad.

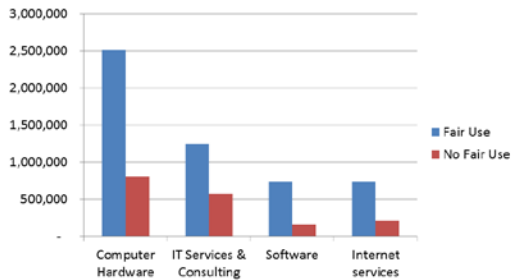
There is a growing consensus in the U.S. that our international trade policy needs to promote more balanced copyright laws around the world — in the sense of promoting limitations and exceptions, not just protections. This growing consensus has been expressed most recently in a U.S. Trade Representative proposal that all countries in the TPP “shall seek to achieve balance” in copyright systems. Similar principles were included in House and Senate report language for the Trade Promotion Authority bill released last week.

National law can address copyright exceptions in different ways. One way to think of the differences is in “closed” versus “open” systems of limitations and exceptions. Closed systems, found in many civil law countries, provide a restricted, itemized list of unauthorized uses of copyrighted content that are acceptable for certain purposes, but lack a catch-all exception that can be applied to uses not specifically mentioned in the closed list. Open systems also contain itemized lists of specific uses permitted by law, but add to that list a general flexible exception (often turning on a balance of interests test) that can be applied to uses not specifically mention in the list. The U.S. fair use clause is such a general exception that makes the U.S. system of limitations and exceptions “open.”

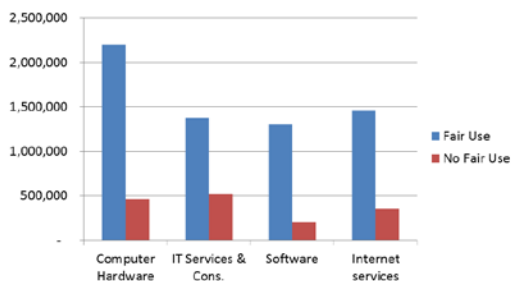
Proponents of open exceptions like fair use argue that they provide greater flexibility to entrepreneurs who develop new communications and ICT-related technologies. They warn that the closed systems favored by civil law countries are unable to quickly adapt to technological change, and therefore are detrimental to innovation in these sectors.

## Industry Group 1

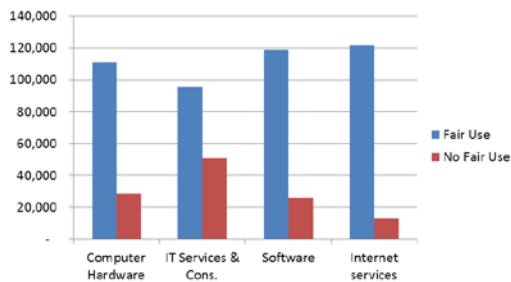
Average Net Sales & Revenue for Firms in Nations With/Without Fair Use (USD)



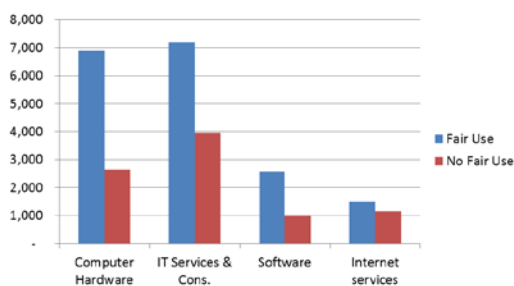
Average Total Assets for Firms in Nations With/Without Fair Use (USD)



Average R&D Spending for Firms in Nations With/Without Fair Use (USD)



Average Employees for Firms in Nations With and Without Fair Use



Others, however, argue that open limitations and exceptions lack the certainty of a closed list of exceptions. If companies and innovators do not know in advance whether new types of uses would be found “fair” in a potential court case, they will not take advantage of flexibilities offered by the letter of the law. At the same time, it is argued that open limitations and exceptions disincentivize creators of new content, because it is unclear they would be able to protect their rights.

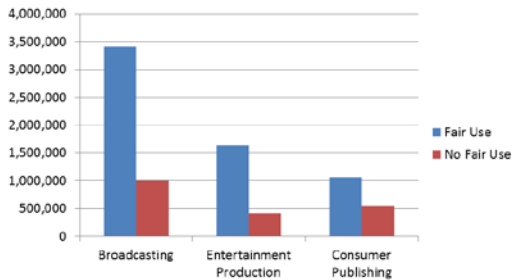
The question of whether countries outside of the U.S. should adopt fair use-style open clauses is regularly debated in international copyright forums, and it has been an issue in recent foreign law reform processes, including in Australia and Colombia. Opponents of fair use argue that its lack of certainty makes it “dangerous” for non-U.S. legal systems, but there is no empirical work supporting this position. In fact, our initial research (which we will build upon throughout the year) indicates just the opposite.

Exceptions to copyright are often thought to have different effects on different firms, depending on which industry they are in. A series of reports by Stephen Siwek identify “copyright-intensive” industries, such as publishers, movie producers and record companies, which rely the most on copyright protection. The Computer and Communications Industry Association (CCIA) has published its own reports which identify “fair use” industries, which depend upon copyright exceptions, including internet services, computer hardware, and software.

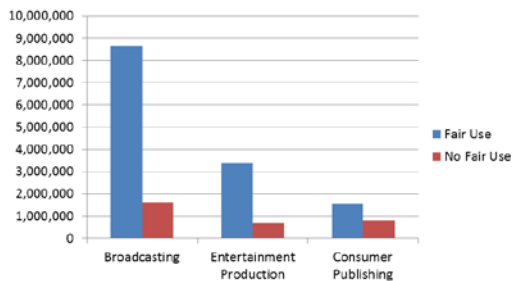
The reports by Siwek and the CCIA each report value added and employment at the industry level to demonstrate the importance of each cluster of industries to the overall U.S. economy. There is overlap between the two clusters, which illustrates how many industries rely on both the strength of copyright protection and the reliability of copyright exceptions.

## Industry Group 2

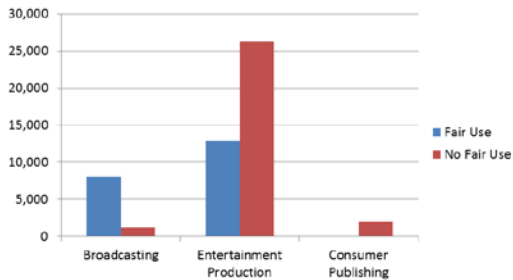
Average Net Sales & Revenue for Firms in Nations With/Without Fair Use (USD)



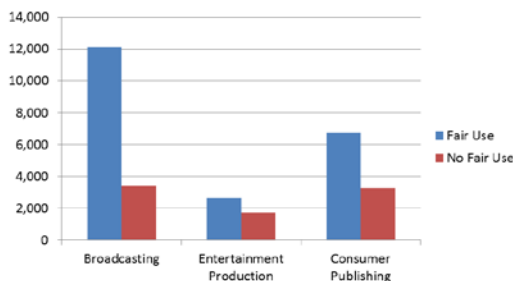
Average Total Assets for Firms in Nations With/Without Fair Use (USD)



Average R&D Spending for Firms in Nations With/Without Fair Use (USD)



Average Employees for Firms in Nations With and Without Fair Use



This piece compares the experiences of firms, categorized by industry, in countries with and without open, “fair use-type” copyright exceptions in their laws. (Later releases will examine the impact other methods of creating open exceptions that do not have all the attributes of fair use). American University has constructed a dataset of data from firms from the industries that the Siwek and CCIA reports identify as sensitive to copyright and its exceptions. The dataset has 166,920 observations spread over 30 years from 5,564 firms. It represents firms from 91 countries, mostly high-income and middle-income ones.

The dataset includes data from firms in each of the seven countries in the world with fair use in their copyright law – the U.S., the Philippines, Singapore, Israel, Taiwan, Malaysia, and Korea. To determine whether a firm-level observation is from a country “with fair use,” both the country and year are considered. For instance, Singapore amended its copyright law to include fair use in 2006, so observations from Singaporean firms up-to-and-including 2006 are considered without fair use, and observations from 2007 forward are considered with it.

We have found that adoption of fair use clauses modeled on U.S. law is associated with positive outcomes for the firms in our dataset, both those that may be more dependent on copyright exceptions, and those that may be more dependent on copyright protection. In other words, this is not an “internet technology” vs. “big content” debate — both internet firms and content providers can benefit in fair use systems.

The data for Industry Group 1 shows that firms in industries identified by the CCIA as being dependent upon copyright exceptions can thrive in countries with fair use. These are firms in our sample operating primarily in the computer hardware, IT services, software, and internet service industries.

They tend – on average – to earn more money, accumulate more assets, create more jobs, and spend more on research and development, relative to countries with more closed copyright exceptions. All differences are statistically significant, with the sole exception of employment in the internet services firms.

The data for Industry Group 2 shows that firms in copyright intensive firms identified by Siwek are also able to do well in countries with fair use. Firms in the consumer publishing, entertainment production, and broadcasting industries report significantly higher net sales & revenues, assets, and employees than firm in countries with closed exceptions. However, consumer publishing and entertainment firms in countries with fair use spend less on average on R&D.

This is not to say that the presence of fair use in a nation’s copyright law will lead to these outcomes in all cases. However, it does seem that firms in industries affected by copyright in different ways are able to do well in countries with open exceptions.

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As American University’s project progresses, we will gather more data in order better examine the effects of copyright exceptions on consumers and firms. We are drafting a survey of copyright experts, which will gather information on the changes to copyright law in up to 50 countries. It will include questions about the text of laws, their application by the courts, and how they are used in practice.

We aim to gather information from 1990 to the present, and to use it to construct an index of the robustness of copyright user rights. Since it will cover many countries and years, it will be useful for further empirical research on copyright. In the meantime, readers may be interested in the 2015 Intellectual Property and Economic Growth Index: Measuring the Impact of Exceptions and Limitations in Copyright on Growth, Jobs and Prosperity. This work by Benjamin Gibert “examines the relationship between economic growth and intellectual property regimes in some of the world’s most innovative economies.”