

UNITED STATES TRADE REPRESENTATIVE

IN THE MATTER OF
2016 SPECIAL 301 REVIEW:
IDENTIFICATION OF COUNTRIES UNDER SECTION 182 OF THE TRADE ACT OF 1974

Reply Comments

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February 2016

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This reply comment responds to key questions that we were asked of us and others at the Special 301 hearing.

I. FLEXIBLE EXCEPTIONS WORK IN DEVELOPING COUNTRIES

I was asked in the hearing to comment on the proposition that flexible exceptions like fair use are only appropriate for the U.S. or other countries with highly developed adjudication systems. As I noted in the hearing, this idea is based on some key fallacies.

There are three core elements that define fair use:

- (1) **Openness:** the exception can be applied to uses not specifically enabled by enumerated limitations and exceptions (as distinguished from a closed list);
- (2) **Flexibility:** the exception is 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;
- (3) **Generality:** the exception applies to all uses, purposes and uses, including those covered by specific limitations and exceptions.

I focused my comments before the committee on the first two factors. Openness is necessary to ensure that today’s copyright law is adaptable to tomorrow’s technologies and practices. A flexible factor-based inquiry restrains the test from impeding on the legitimate interests of authors and aids predictability by grounding the test within an international tradition.

All countries would benefit by adopting exceptions that meet all three criteria. However, the criticism that “courts in other countries can’t handle it” is largely based on the first two – the openness and flexibility criteria – since they invite interpretation. These attributes are not confined to the U.S. Copyright Act, nor are they found only in wealthy or common law countries.

[South Africa](#), for example, has a quotation clause that is far more open and flexible than many others around the world. The exception in Section 12 of the Act reads:

- (3) The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or

periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.¹

Although this exception is not general – it does not apply to every use of a work; it is open and flexible. One may quote from any work for any purpose confined only by the flexible balancing test: “compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose.”² These attributes serve a similar function to fair use in that they welcome innovators to experiment with new products that use transformative quotation.

[Kenya](#) has an open and flexible exception for copying computer programs. It reads:

(4) . . . a person who is in lawful possession of a computer program may do any of the following acts without the authorization of the right holder whereby copies are necessary for the use of the computer program in accordance with its intended purpose . . . (d) for any purpose that is not prohibited under any license or agreement whereby the person is permitted to use the program.³

Like South Africa’s quotation exception, this exception is open and flexible, and therefore is more inviting to innovative uses.

Philippines and Malaysia – two developing countries – have adopted open and flexible exceptions which are like fair use in that they are general as well (i.e. they apply to all purposes and uses, whether or not also covered by specific exceptions).

In none of these countries do we hear complaints that courts cannot handle the interpretive issues at stake, that their adoption has disrupted copyright owner markets, or that they have otherwise caused harm to their social fabric. Indeed, the opposite is true. The economic data we presented to the committee shows that both content owning and technological distribution companies do better in systems that meet all three criteria. We also expect that they do better when the openness and flexibility criteria are met – but that is subject to work we are still undertaking.

Some decry open and flexible norms for their lack of certainty. This misses the point. First – no exception can be applied to an individual case with certainty. Every law – including the civil law – must be applied to facts, and in that process there is room for interpretive choice. It is not certainty but predictability that we want in a copyright system – especially including the ability of new technology entrants to predict that their entry into a market

¹ Copyright Act 98 of 1978 § 12(3) (amended in 2002) (S. Afr.).

² *Id.*

³ The Copyright Act (2009) Cap. 130 § 26(4)(d) (Kenya).

will be defensible. The most certain answer they can face is no – an answer that is trade distorting and should be resisted by US trade policy. The U.S. should be promoting the openness and flexibility needed for US companies to access markets abroad in all copyright systems around the world.

II. PHARMACEUTICAL PRICING IS NOT SUBJECT TO LISTING UNDER SPECIAL 301

Another speaker received the question of whether ancillary issues that affect pharmaceutical market access – like pricing and reimbursement programs – can be considered in listing criteria under the Special 301 statute. The answer to this question is no, unless the pricing programs themselves discriminate against foreign products.

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

[T]he 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.⁴

19 U.S.C. § 2242(d) defines the “market access” criteria for listing in the Special 301 program:

(3) A foreign country denies fair and equitable market access if the foreign country effectively denies access to a market for a product protected by a copyright or related right, patent, trademark, mask work, trade secret, or plant breeder's right, through the use of laws, procedures, practices, or regulations which—

(A) violate provisions of international law or international agreements to which both the United States and the foreign country are parties, or

(B) constitute discriminatory nontariff trade barriers.⁵

⁴ Trade Act of 1974 § 182, 19 U.S.C. § 2242(a)(1)-(2) (2014).

⁵ 19 U.S.C. § 2242(d)(3)(A)-(B) (2014).

On the whole, pharmaceutical companies do not allege practices that would constitute a market access issue under these terms. They also do not allege that the pricing programs they criticize violate any trade agreement. Infrequently, they allege that the programs are discriminatory. Where a pricing program has the mere effect of reducing the rate of return of a patented product in a non-discriminatory way and violates no international agreement in doing so, then it is an inappropriate subject for listing under the Special 301 program. Past 301 programs have largely respected this interpretation of the Act and only included references to reimbursement programs where there is an allegation of facially discriminatory treatment. The 2016 program should continue this trend.

III. LIMITATIONS AND EXCEPTIONS ARE PART OF AN ADEQUATE AND EFFECTIVE IP SYSTEM

The allegations of technology companies regarding ancillary copyright are categorically different from those of pharmaceutical companies alleging reimbursement rate issues. There is no right of drug companies to be free from price controls on patented pharmaceuticals. But there is a right – under Berne and TRIPS – to be free from remuneration requirements on the quotation of news of the day. Thus the complaints about ancillary copyright norms fall into [19 U.S.C. 2242\(a\)\(1\)\(A\)](#) – the denial of “adequate and effective protection of intellectual property rights.”⁶

19 U.S.C. § 2242(d)(2) defines the relevant terms:

(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.⁷

When a firm is taxed on a free quotation right, it denies the ability to “exercise . . . rights relating to . . . copyrights,” and therefore falls with the scope of § 2242(a)(1)(A) and (d)(2).⁸

The definition of an adequate and effective intellectual property system for Special 301 should be the same definition as used by USTR in implementation of the same terms in regard to trade negotiations - “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.”⁹

⁶ 19 U.S.C. § 2242(a)(1)(A) (2014).

⁷ 19 U.S.C. § 2242(d)(2) (2014).

⁸ *Id.*

⁹ *USTR Introduces New Copyright Exceptions and Limitations Provision at San Diego TPP Talks*, Tradewinds (March 3, 2016), <https://ustr.gov/about-us/policy-offices/press-office/blog/2012/july/ustr-introduces-new-copyright-exceptions-limitations-provision>.