



November 6, 2019

His Excellency Cyril Ramaphosa
President, Republic of South Africa
Union Buildings
Pretoria
South Africa

Re: Copyright Amendment Bill

Dear Mr. President:

The Library Copyright Alliance, which consists of three major library associations in the United States, writes to respond to some of the complaints made by the International Intellectual Property Alliance (“IIPA”) to the U.S. Trade Representative concerning the Copyright Amendment Bill.

First, IIPA asserted that South Africa’s adoption of a fair use provision based on the U.S. fair use doctrine would be problematic because South Africa “lacks the decades of legal precedent that have served to define, refine, and qualify that doctrine in the United States.” This is a truly ridiculous argument to make in 2019. Via the Internet, South African judges would have easy access to hundreds of fair use decisions in the United States, as well as the opinions by judges in the other jurisdictions that have fair use exceptions. Moreover, South African judges can rely upon online tools such as the U.S. Copyright Office’s Fair Use Index, which contains a searchable database of summaries of hundreds of fair use decisions. The Copyright Office explains that “the goal of the Index is to make the principles and application of fair use more accessible and understandable to the public,” thereby directly addressing IIPA’s concerns. (In the introduction to its Index, the Copyright Office notes that “fair use is a longstanding and vital aspect of American copyright law.”)

Second, the IIPA asserts that adoption of a fair use provision, along with several specific exceptions, would be inconsistent with South Africa’s international obligations because they exceed the degree of exceptions permitted under the “three-step test.” However, in the context of the negotiations on the Trans Pacific Partnership (“TPP”) Agreement, the United States affirmed that such a set of exceptions would be three-step compliant.

In a statement issued on July 3, 2012, USTR observed that

the balance of rights and exceptions and limitations achieved in U.S. law provides diverse benefits for large and small businesses, consumers, authors, artists, and workers in the information, entertainment, and technology sectors.

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.

An important part of the copyright ecosystem is the limitations or exceptions placed on the exercise of exclusive rights in certain circumstances. 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.

After this introduction stressing the importance of copyright exceptions, USTR announced that

[f]or the first time in any U.S. trade agreement, the United States is proposing a new provision, consistent with the internationally-recognized “3-step test,” that will obligate Parties to seek to achieve an appropriate balance in their copyright systems in providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research.

The six listed purposes come directly from fair use provision in the U.S. Copyright Act, 17 U.S.C. § 107. USTR followed this description of its new proposal by asserting that

[t]hese principles are critical aspects of the U.S. copyright system, and appear in both our law and jurisprudence. The balance sought by the U.S. TPP proposal recognizes and promotes respect for the important interests of individuals, businesses, and institutions who rely on appropriate exceptions and limitations in the TPP region.

A provision based on the U.S. proposal was included in the final TPP Agreement. It stated:

18.66: Balance in Copyright and Related Rights Systems

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 [the three-step test], 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.

After assuming office in 2017, President Trump pulled out of the TPP Agreement. In 2018, the eleven remaining TPP countries entered into a successor agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”). Significantly, the CPTPP included the balanced copyright provision quoted above.

In sum, USTR itself has stated that fair use and other copyright exceptions are “critical aspects” of the U.S. copyright system, and USTR sought to reflect them in an international agreement. To be sure, this position was taken under the Obama Administration. But the fact of the centrality of exceptions to U.S. copyright law has not changed.

Moreover, the eleven parties to the CPTPP—Japan, Singapore, Malaysia, Vietnam, Brunei, Australia, New Zealand, Canada, Mexico, Chile, and Peru—have all committed to achieving an appropriate balance in their copyright systems. The South African Copyright Amendment Bill seeks to achieve the same balance for the same purposes as the CPP parties.

Accordingly, we urge Your Excellency to reject the arguments made by IIPA and sign the Copyright Amendment Bill.

Respectfully,

Jonathan Band
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