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RE: SOUTH AFRICA SPECIAL 301

IN THE UNITED STATES TRADE REPRESENTATIVE

FEBRUARY 26, 2020

I think perhaps the most interesting and telling page of the IIPA submission this year is the very last one in the several hundreds of pages submitted. I found it somewhat amusing to find it labeled “page 3.”

That page has a chart contrasting the IIPA requests for watch listing various countries with the actual USTR listing of each dating back to 1998. You will find in the first column that IIPA has asked you to list South Africa on the second highest designation – on the Priority Watch List.

Follow that row and you will find that USTR has not listed South Africa – or any Sub-Saharan African country -- on any 301 list dating back to 1999.

This should raise two key questions for you.

What changed after 1999?

What has happened since that would justify USTR altering its judgment?

I. WHAT CHANGED AFTER 1999

What changed after 1999 was an Executive Order that banned USTR from applying trade pressure on Sub Saharan countries to pressure them to adopt TRIPS+ policies that reduce access to needed AIDS medications.¹

At the time, South Africa was being watch-listed for having passed a law allowing the parallel importation of medicines. That trade pressure,

¹ 43 Exec. Order No. 13,155, 65 Fed. Reg. 30,521 (May 10, 2000)

in the face of overwhelming evidence that patents were driving exclusionary pricing of AIDS drugs, led to a massive public outcry, with marches and protests from Seattle to Cape Town.²

The above-mentioned Executive Order halted the use of Special 301 on sub Saharan African countries on medicine issues. USTR has not listed an African country in Special 301 since – for any issue. There appears to be an implicit rule here that IIPA is seeking to change. That implicit rule is that Sub Saharan African countries should be given full leeway to use TRIPS flexibilities across the IP spectrum to meet the particular development challenges they face.

II. WHAT HAS HAPPENED TO TRIGGER THE IIPA COMPLAINT?

You are now presented with an invitation to warn or sanction South Africa for passing a law that implements the WIPO Internet Treaties, the Marrakesh Treaty and the Beijing Treaty. The reason IIPA gives you to sanction South Africa for this effort is that it includes fair use and exceptions for libraries, archives, museums, education and research along with the expansions of exclusive rights. The bill also includes provisions meant to give local creators protection from multinational distributors in contractual relations.

As described more fully in the extensive GSP hearing record from last month, South Africa's policy choices are modeled on provisions in other countries. Most of the countries that South Africa seeks follow – including the US, UK and Germany – do not appear on the 301 watch lists.

South Africa's bill responds to specific problems. South Africa has a tenth of the GDP per capita of the US and is among the two or three most unequal countries in the world. This income distribution feeds abusive practices by monopolies.

South African government and non-governmental reports have shown that the prices of some books with monopoly pricing power are over ten times the competitive price and can consume an entire family's household budget. Some books by South African authors – including Nelson Mandela's famous memoir – cost more in South Africa than in

² See Ellen T'Hoen, TRIPS, Pharmaceutical Patents and Access to Essential Medicines: Seattle, Doha and Beyond, <https://www.who.int/intellectualproperty/topics/ip/tHoen.pdf>

the UK or US, with ten times the income per person.³ This is a clear signal that markets are beset by harmful monopoly power.

The reports also found that South African artists are not being paid adequately for their work, including by requiring assignment of copyright for small up-front payments and no ongoing royalty rights.⁴

The South Africa copyright reform bill seeks to address these real social and economic problems with TRIPS-compliant copyright provisions that exist in other countries.

³ See Genesis Analytics, Intellectual Property Policy Impact Study, https://libguides.wits.ac.za/ld.php?content_id=50111158 (describing publishing prices); 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/copyright-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 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 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).