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WASHINGTON COLLEGE OF LAW
PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY

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RE: SOUTH AFRICA GSP

IN THE UNITED STATES TRADE REPRESENTATIVE

JANUARY 31, 2020

If I were state the single largest flaw in the IIPA compliant it would be this:

A failure to state a rule upon which relief can be granted.

As a law professor, I teach my students that legal analysis requires the explanation of all the rules and sub-rules – the guides to interpretation – that support the conclusion. Papers that merely quote the statute and then state the facts and conclusion are given low marks.

Where you are suggesting a new rule of interpretation that is necessary for your outcome – you must explain and justify that rule.

Here, you are presented with quite a conundrum.

The IIPA accepts that the US complies with international law with a fair use clause in addition to many specific exceptions, but argues that these same factors render the South Africa bill a violation of international law.

It would receive a low mark in my class because it fails to state a rule of interpretation that can lead you that result and be applied even handedly to other cases.

I. APPLICABLE LAW

A. Text

We start with the law as written.

The statutory standard here is "adequate and effective intellectual property" or, in the case of AGOA, simply ensuring "the protection of intellectual property."

The plain language of the statutes would suggest that this is a minimum standard.

It does not say that this is an evolving standard that requires the adoption of ever-higher TRIPS-plus rules over time. Indeed, the relevant rules of interpretation form international law say the opposite.

B. International Law

US statutes must be interpreted to comply with international treaty commitments. *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (U.S. 1804)

The US treaty commitment to the WTO includes the GSP enabling clause. This rule requires that GSP program criteria be

- "non-reciprocal" - It is not enough that some US industries or the USTR itself does not like the rule or thinks that US parties will not be advantaged by it. This is not a quid pro quo program.
- "generalized" - It must be capable of being applied even handedly to all countries.
- "designed . . . to respond positively to the development, financial and trade needs of developing countries." The WTO appellate body has stated that this means that criteria must be objective and reflected in broadly endorsed international treaties – not in the subjective opinions of IIPA or USTR.

So how do these apply to the criteria that IIPA suggests.

II. FAILURE OF IIPA STANDARDS

A. Lack of Case Law

IIPA and others point out that South Africa lacks 200 years of common law precedent. But so does Korea, Malaysia, Philippines, Liberia, Uganda, and other countries that have incorporated fair use into their law over the last several decades and have not been judged to violate the 3-step test.

It cannot be the rule that only countries that already have had fair use for 200 years can adopt it.

Indeed, even if that were the rule, South Africa may indeed comply with it. It has had a fair dealing standard for perhaps as long as the US has had fair use.

The leading decisions on that right use the US fair use factors.

B. Lack of Remedies

The IIPA argues that South Africa lacks sufficient deterrent remedies.

While I don't see how they get from remedies to three-step test, it is important to note that they misread South Africa law. As the Rens opinion points out, South Africa has statutory damages, criminal penalties and injunctions.

And their law has an extra penalty that our lacks – it follows the English rule where the loser generally has to pay the legal fees of the winner.

C. Hybrid Exceptions

The IIPA argues that South Africa has implemented a "hybrid" of fair use and fair dealing.

All fair use countries have specific as well as a general exception.

Their specific characterization is untrue. The words "fair dealing" no longer appear in the Bill at all.

D. Broad exceptions

The complaints note the breadth of some of the exceptions, often looking specifically at the education exception.

We have contributed a study in this record indicating that over 70% of African and Latin American countries have educational exceptions similar to South Africa's bill that permit educational uses of excerpts without compensation.

E. Ambiguities

It is true that there are elements of the South African law that are vague and undefined. But that is true with every law, including our own. And, as the note from Professor Klaaren explains, the South African government is required to produce clarifying regulations before the law goes into effect.

At bottom, one cannot, on this record, state a generalized, non-reciprocal and development oriented rule that would authorize the withholding of GSP benefits in this case.

III. BENEFITS TO US

Although benefits to the US are not supposed to arise in GSP criteria – given that they are required to be "non-reciprocal" – there is concrete evidence that US interests are served by copyright reform that broaden exceptions to enable a broader range of technological uses.

Our research, cited in my submitted testimony, shows that US technology firm investments increase in counties that reform their laws to include fair use or other broader exceptions. Our data also show that these increases are without negative effect on traditional US entertainment industry investments.

IV. THE WAY FORWARD

The IIPA and USTR may have legitimate interests to pursue with regard to South Africa's implementation of the copyright bills. There will be a process for that input to be received going forward.

It would be incredibly unwise, and indeed illegal, to use threats of withdraw of GSP benefits as the means to press your opinions.