

SEAN MICHAEL FIIL-FLYNN
DIRECTOR, PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY,
AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW
2021 Special 301 Review
Comment
January 28, 2021

The Biden Administration has called for every agency to identify “[w]hether new policies, regulations, or guidance documents may be necessary to advance equity in agency actions and programs.”¹ USTR could promote the equity directive by adopting the following policy in relation the operation of the Special 301 Program:

(a) In administering sections 301–310 of the Trade Act of 1974, the United States shall not seek, through negotiation or otherwise, the revocation or revision of any intellectual property law or policy of another country if the law or policy of the country:

(1) promotes access to pharmaceuticals, medical technologies, research, education or culture materials, or the holdings of libraries, archives, museums or other institutions of cultural memory; and

(2) provides adequate and effective intellectual property protection consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) referred to in section 101(d)(15) of the Uruguay Round Agreements Act (19 U.S.C. 3511(d)(15)).²

The outcome of the policy would be clear and simple. It would draw the line at international law, and stop using Special 301 to push countries to adopt TRIPS-plus requirements through unilateral trade pressure. Adopting the policy would provide a clear basis on which to reject the entreaties of some, for example, to pressure South Africa to alter the provisions of its Copyright Amendment Bill that expand limitations and exceptions in the public interest. It would also provide a clear policy basis for rejecting calls to unilaterally promote monopoly protections that threaten health outcomes.

¹ Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 5(c) (January 20, 2021).

² The policy is modeled on bipartisan trade policies of the past, including the Executive Order 13155 of May 10, 2000, Access to HIV/AIDS Pharmaceuticals and Medical Technologies, and the Office of the United States Trade Representative, Bipartisan Agreement on Trade Policy: Intellectual Property Provisions, May 11, 2007.

The policy would be the best interpretation of Federal Law. Special 301 and other trade statutes require only that USTR promote “adequate and effective intellectual property.” USTR should interpret that standard as set by international treaties, not the whims of US industries.

The policy is also the best interpretation of the WTO dispute settlement understanding. Article 23 of the Dispute Settlement Understanding prohibits unilateral adjudication of trade disputes.³ As explained by a WTO Panel decision, that provision should be read to prohibit international trade pressure short of adjudication as well:

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.⁴

The policy would promote equity. Developing countries – where more black and brown people reside – commonly harbor extreme inequality. Monopoly power in markets with extreme income inequality leads to excessive pricing to the rich sliver of the population, excluding the large majority of disadvantaged consumers.⁵ The patterns are seen in markets for patented medicines and copyrighted expression alike.⁶

³ Article 27 states:

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:

(a) 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, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding

⁴ United States - Sections 301-310 of the Trade Act of 1974 (WT/DS152/R).

⁵ Sean Flynn et al., *An Economic Justification for Open Access to Essential Medicine Patents in Developing Countries*, 37 J.L. Med. & Ethics 184, 185, 191-95 (2009).

⁶ *See id.* (describing medicine pricing); 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>; *Fair Use in South Africa*, ReCreate (Nov. 10, 2018), https://youtu.be/wsrfkFkS_xM (interviewing students about textbook costs in South Africa); Eve Gray & Laura Czerniewicz, *Access to Learning Resources in Post-Apartheid South Africa*, in *Shadow Libraries*,

Finally, the policy would give effect to express US policy. US policy has long recognized that its trade interests do not reside within a one-way intellectual property ratchet. US policy promotes *balance* in intellectual property systems, including through adequate limitations and exceptions to exclusive rights to promote essential public purposes.⁷ Balance in IP promoted our trade interests, as shown in studies showing higher foreign direct investment by US technology firms in countries with adequate limitations and exceptions to copyright.⁸

107–58 (Joe Karaganis ed., 2018), Sean Flynn & Peter A. Jaszi, *Untold Stories in South Africa: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*, Program on Info. Justice and Intellectual Prop. Pub. Impact Series, 2010-23 (2010) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654025 (reporting anecdotes from interviews with over 30 South African documentary filmmakers).

⁷ See USTR (2012) (observing that in the United States “consumers and businesses rely on a range of exceptions and limitations, such as fair use, in their businesses and daily lives”); U.S. Intellectual Property Enforcement Coordinator, 2013 Joint Strategic Plan (“fair use is a core principle of American copyright law”; “enforcement approaches should not discourage authors from building appropriately upon the works of others”); IPEC 2016 Joint Strategic Plan (instructing that fair use enables “new and innovative uses of media (e.g., remixes and mashups involving music, video and the visual arts)”); U.S. Copyright Office, 2016 Study of Software Enabled Consumer Products (“courts repeatedly have used the fair use doctrine to permit copying necessary to enable the creation of interoperable software and products”).

⁸ See Sean Flynn and Michael Palmedo. *The User Rights Database: Measuring the Impact of Opening Copyright Exceptions*. Fifth Global Congress on IP and the Public Interest. September, 2018. <https://www.wcl.american.edu/impact/initiatives-programs/pijip/impact/global-network-on-copyright-user-rights/research/> (finding that correlations between investment and more open exceptions hold after controlling for other major factors like income level and the size of the economy).