

Before the
Office of the United States Trade Representative
Washington, D.C.

In re

Post-Hearing Comments: Annual Review of
Country Eligibility for Benefits Under the
African Growth and Opportunity Act for
Calendar Year 2024

Docket No. USTR-2023-0003
2024 AGOA Eligibility Review: South Africa

**POST-HEARING COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

Pursuant to the notice issued by the U.S. Trade Representative (USTR) and published in the Federal Register at 88 Fed. Reg. 48944 (July 28, 2023), the Computer & Communications Industry Association (CCIA)¹ submits the following post-hearing comments regarding the Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act (AGOA).

CCIA responds to arguments made in the comments filed by the International Intellectual Property Alliance (IIPA) that the Republic of South Africa does not provide adequate and effective intellectual property protection by virtue of including a fair use provision in the pending Copyright Amendment Bill (CAB). These comments largely reiterate comments made by CCIA to USTR in response to previous complaints brought by IIPA against the CAB.²

¹ CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at <https://www.ccianet.org/members>.

² Reply Comments of CCIA, In Re Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act, Docket No. USTR-2020-0020, filed July 24, 2020, <https://ccianet.org/wp-content/uploads/2020/07/2020-07-24-CCIA-Reply-Comments-to-USTR-AGOA-2020.pdf>; Post-Hearing Brief of CCIA, In re Generalized System of Preferences (GSP): Notice Regarding a Hearing for Country Practice Review of South Africa, Docket No. USTR-2019-0020, filed Feb. 28, 2020, <https://www.ccianet.org/wp-content/uploads/2020/02/CCIA-USTR-2019-0020-Post-Hearing-Brief.pdf>; Reply Comments of CCIA, In Re Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act, Docket No. USTR-2018-0022, filed Aug. 30, 2018, <https://www.regulations.gov/document?D=USTR-2018-0022-0011>.

I. IIPA’s Concerns Regarding the South Africa CAB Fair Use Provisions Are Unwarranted.

IIPA’s comments state that South Africa’s CAB “would create an overbroad amalgamation of copyright exceptions that includes an expansive ‘fair use’ rubric (not in line with the U.S. doctrine) appended to a large number of extremely open-ended new exceptions and limitations to copyright protection (on top of the existing ‘fair dealing’ provision), resulting in an unclear thicket of exceptions and limitations.”³

IIPA criticizes the appending of the fair use rubric to the fair dealing provision, and further seems to object to supplementing the fair use/fair dealing exception, Section 12A, with specific exceptions. However, the hybrid structure IIPA finds offensive is precisely the structure of exceptions found in the U.S. Copyright Act. Section 107 of the U.S. Copyright Act is a general exception with a non-exclusive list of factors to consider, supplemented by a longer list of specific exceptions (as outlined in Sections 108-121). To illustrate, Section 12A(a) of the CAB states that copyright is not infringed by “fair use in respect of a work or the performance of that work, for purposes such as” research, criticism, reporting, scholarship, comment, preservation, and public administration. This parallels the first sentence of 17 U.S.C. § 107, which provides that “the fair use of a copyright work, . . . for purposes such as criticism, comment news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright.”

Section 12A(b) of the CAB then provides that “in determining whether an act done in relation to a work constitutes a fair use, all relevant factors shall be taken into account, including but not limited to” the nature of the work, the amount and substantiality of the part used, the purpose of the use, and the effect of the use upon the potential market for the work. Likewise,

³ Comments of IIPA, In Re 2024 AGOA Eligibility Review, filed July 5, 2023, at 15.

the second sentence of 17 U.S.C. § 107 states that “in determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include” the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use upon the potential market for the work. Once again, the wording of the four factors in Section 12A(b) of the CAB is highly consistent with 17 U.S.C. § 107.

Also inexplicable is IIPA’s hostility to the CAB establishing specific exceptions in addition to the general fair use provision. Virtually all countries that have a fair use or fair dealing provision also provide specific exceptions. The United States, for example, has exceptions for libraries and archives (§ 108, § 109(b)(2)(A)), rental car companies (§ 109(b)(1)(B)(i)), museums and galleries (§ 109(c)), videogame arcade operators (§ 109(e)), educational institutions (§ 110(1) and (2)), religious institutions (§ 110(3)), small restaurants (§ 110(5)), agricultural or horticultural organizations (§ 110(6)), record stores (§ 110(7)), organizations that provide services to people with disabilities (§ 110(8), § 110(9), § 121, and § 121A), veterans’ and fraternal organizations (§ 110(10)), hotel and apartment house owners (§ 111(a)), broadcasters (§ 112(a)), owners of computer programs (§ 117(a)), and computer maintenance or repair organizations (§ 117(c)). The mere presence of additional exceptions does not vitiate the meaning of the underlying fair use provision.

IIPA argues that the language of the CAB’s fair use provision is “not in line with the U.S. doctrine,” but then fails to explain in what way it is “not in line” with Section 107. To the contrary, the four fair use factors in the CAB are clearly modeled on the four factors in Section 107 as interpreted and applied by U.S. courts.

It is unlikely that South African defendants would abuse the fair use provision. South Africa follows the “English Rule” for the award of attorney’s fees. Under the English Rule, the prevailing party automatically recovers attorney’s fees. The English Rule not only deters unlawful behavior, it also strongly discourages a defendant from pursuing a defense unless it has a high degree of confidence it would prevail. This would ensure that defendants would assert fair use only in the strongest of cases. By contrast, the U.S. Copyright Act does not automatically shift fees. Rather, it grants courts the discretion to award fees to the prevailing party. 17 U.S.C. § 505. The Supreme Court clarified that in exercising its discretion, courts should give “substantial weight to the objective reasonableness of the losing party’s position.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1079 (2016). In other words, the objective reasonableness of a losing defendant’s fair use argument would weigh substantially against the shifting of fees. This means that a U.S. court would be far more lenient and forgiving about fee-shifting than a South African court in a case involving the unsuccessful assertion of fair use. Thus, South African defendants are more unlikely to attempt to abuse fair use than U.S. defendants.

II. The U.S. Should Not Penalize Countries That Seek to Implement Fair Use in Domestic Copyright Laws.

IIPA requests that the “Administration continue to assess the progress of AGOA-eligible governments in legislative measures and enforcement of copyright protections, and to identify those countries that could benefit from U.S. assistance in capacity building to meet the requirement to provide ‘adequate and effective’ protection of IP rights.”

CCIA requests that U.S. assistance should reflect not only guidance on enforcement of intellectual property rights but also guidance on how limitations and exceptions work within IP regimes. Both aspects are critical to the effectiveness of copyright regimes for rights holders and

users, as reflected in U.S. law. The U.S. government has long acknowledged the economic and social importance of fair use. Below is a non-exhaustive list of statements by U.S. officials regarding the benefits of fair use.

- USTR has observed 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.”⁴
- The U.S. Intellectual Property Enforcement Coordinator (IPEC) has stated that “fair use is a core principle of American copyright law.”⁵ The IPEC added that “the Supreme Court has repeatedly underscored fair use provisions in the Copyright Act as a key means of protecting free speech,”⁶ and that “enforcement approaches should not discourage authors from building appropriately upon the works of others.”⁷ The IPEC has also discussed how fair use enabled “new and innovative uses of media (e.g., remixes and mashups involving music, video and the visual arts),”⁸ and concluded that “it is the combination of strong copyright rights with a balance between the protection of rights and exceptions and limitations that encourages creativity, promotes innovation, and ensures our freedom of speech and creative expression are respected.”⁹
- The U.S. Copyright Office notes that “fair use is a longstanding and vital aspect of American copyright law.”¹⁰ In a study on software-enabled consumer products, the Office found that “courts repeatedly have used the fair use doctrine to permit copying necessary to enable the creation of interoperable software and products.”¹¹
- The U.S. Department of Commerce Internet Policy Task Force, led by the United States Patent & Trademark Office and National Telecommunications & Information Administration, has noted that fair use “is a fundamental linchpin of the U.S. copyright system.”¹²

⁴ USTR, *USTR Introduces New Copyright Exceptions and Limitations Provision at San Diego TPP Talks* (July 2012), <https://ustr.gov/about-us/policy-offices/press-office/blog/2012/july/ustr-introduces-new-copyright-exceptions-limitations-provision/>.

⁵ U.S. Intellectual Property Enforcement Coordinator, *2013 Joint Strategic Plan on Intellectual Property Enforcement* (June 2013), <https://obamawhitehouse.archives.gov/sites/default/files/omb/IPEC/2013-us-ipeec-joint-strategic-plan.pdf>, at 18.

⁶ *Id.*

⁷ *Id.*

⁸ U.S. Intellectual Property Enforcement Coordinator, *U.S. Joint Strategic Plan on Intellectual Property Enforcement FY 2017-2019* (Dec. 2016), <https://obamawhitehouse.archives.gov/sites/default/files/omb/IPEC/2016jointstrategicplan.pdf>, at 10.

⁹ *Id.*

¹⁰ U.S. Copyright Office, *U.S. Copyright Office Fair Use Index*, <https://www.copyright.gov/fair-use/> (last visited Aug. 8, 2023).

¹¹ U.S. Copyright Office, *Software-Enabled Consumer Products* (Dec. 2016), <https://www.copyright.gov/policy/software/software-full-report.pdf>, at 54.

¹² The Department of Commerce Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy* (July 2013), <https://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf>, at 21.

- The Solicitor General of the United States filed a brief in the U.S. Supreme Court in August 2022, asserting that “fair-use principles provide an important safety valve in various circumstances, including when a categorical ban on copying would unduly impede further creativity.”¹³
- Members of Congress have also shared these views. As Senator Ron Wyden and Congressman Jerry McNerney told USTR on January 28, 2020 in the context of a previous review: “In the United States, our fair use policy has spurred the creation of transformative works and technological innovations that create new markets and drive economic activity.” They concluded by explaining how South Africa adopting fair use would benefit both the U.S. and South Africa: “The balanced copyright system adopted by the United States has helped make us a leader in innovation and the creative economy, and we should commend—rather than penalize—trading partners that adopt balanced copyright regimes that both protect U.S. interests and boost developing economies.”¹⁴

In short, various experts in the U.S. government have repeatedly affirmed the centrality of fair use to the U.S. copyright system, and its importance in promoting creativity and innovation. It is important that these views are reflected in consultations with foreign governments regarding adequate and effective intellectual property rights protection.

III. Conclusion

A fair use provision in South Africa, modeled closely on U.S. law, will protect American innovators and creators that are seeking to export to the South African market, while ensuring that South African copyright law does not diverge from the American legal framework. It is inappropriate then for USTR to consider the CAB fair use provisions in this AGOA review. Without relevant fair use provisions in a copyright regime, both technology and content industries will face uncertain liabilities upon entering new markets, chilling innovation and creativity.

¹³ Brief for the United States as Amicus Curiae Supporting Respondents, Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith et al., 143 S. Ct. 1258 (2023) (No. 21-869). The U.S. Supreme Court has also repeatedly recognized the importance of fair use. *See, e.g., Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023); *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1163 (2021); *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).

¹⁴ Letter from Ron Wyden, U.S. Senator, and Jerry McNerney, U.S. Congressman, to Ambassador Robert Lighthizer, U.S. Trade Rep. (Jan. 28, 2020).

Respectfully submitted,

Ali Sternburg

Vice President, Information Policy

Rachael Stelly

Senior Policy Counsel

Computer & Communications Industry Association (CCIA)

25 Massachusetts Avenue NW, Suite 300C

Washington, D.C. 20001

asternburg@ccianet.org

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