January 17, 2020

Comments of the Wikimedia Foundation

RE: Generalized System of Preferences (GSP): Notice Regarding a Hearing for Country Practice Review of South Africa

A. Introduction and Background

The Wikimedia Foundation welcomes the opportunity to comment on the Office of the United States Trade Representative's Country Practice Review of South Africa. The Wikimedia Foundation is the non-profit organization that hosts and supports a number of free, online, collectively-produced resources, including Wikipedia. The Foundation's objective is to help create a world where every human being can share freely in the sum of all knowledge.

Our work is further supported by groups of volunteers across the world recognized officially as "chapters." These Wikimedia chapters comprise of volunteers dedicated to furthering our mission in their countries by hosting editing events, adding local history and photographs, and advocating for policies that promote access to knowledge. In South Africa, the Wikimedia South Africa chapter has long been a proponent of reasonable exceptions and limitations which would allow South African citizens to better share their knowledge with the world. Now, those volunteers and the larger community risk seeing their work undone to protect the profits of rightsholders overseas.

Together with these chapters, our shared mission depends greatly on our users' ability to share existing information online quickly and with confidence, which is why the Wikimedia Foundation advocates for balanced copyright law across the world. In furtherance of our mission, almost all of the content used on Wikipedia is licensed under a free license, meaning it is available for anyone to copy, share, and build upon. Where freely licensed content is not available, that information is supplemented by information in the public domain and certain fair uses of copyrighted works. Meanwhile, most of the copyright enforcement on Wikipedia is done by volunteer editors, who are able to detect and remove most copyright violations before they are even brought to the attention of the Wikimedia Foundation. Wikipedia's success in these areas is enabled by copyright laws which encourage beneficial uses and protect the public domain. Where volunteers are instead confused or frightened by overly restrictive national copyright laws, it serves to hinder the sharing of knowledge worldwide, creating an imbalance in the types of perspectives heard on a global scale.

B. The ubiquity and influence of fair use in the United States is so great that its introduction into the law of a foreign country cannot be regarded as a failure to protect copyright.

One of the highlighted concerns in the IIPA's petition to reconsider GSP status for South Africa is the inclusion of US-style fair use in recent copyright amendments. The amendments codify the four part test used by courts to determine if a use is fair in the United States.[1] Although the concept of fair use long predates the 20th century,[2] this test was first codified in the United States in the Copyright Act of 1976 and has served as the standard for fair use since.[3] Hundreds of cases in the United States have validated fair use as an essential part of United States copyright law, and fair use has allowed for both creators and consumers in the United States to better access and share knowledge. In fact, fair use in the United States has brought our country some of its most important news coverage,[4] its most evocative artwork,[5] and innovations that most Americans use every day.[6]

The IIPA also points to consumer confusion over how to adequately utilize their right to fair use of copyrighted works as a drawback in this bill. They argue that fair use in the United States adequately protects copyright, whereas those same provisions codified in South African copyright law will prove confusing because South Africa does not have the same long judicial history defining fair use that the United States has. South Africa has accounted for this difference -- not only codifying the fair use "test" employed in countless judicial decisions from the United States, but also enumerating a number of categories which qualify as fair use, essentially substituting legislation for that long judicial history.[7]

South Africa's codification of the United States-style fair use includes a list of exceptions which represent, in part, the significant advancements that the United States has made in fair use jurisprudence over the 20th century. These include exceptions for: research,[8] criticism,[9] reporting,[10] comment,[11] preservation,[12] education,[13] and time-shifting for personal use.[14] While these categories are not without

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[1] Copyright Amendment Bill, 13B-2017, of 2018 (pending signature), *available at* http://pmg-assets.s3-website-eu-west-1.amazonaws.com/B13B-2017_Copyright.pdf.
[2] Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841).
[3] 17 U.S.C. § 107.
[4] *See Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 742 F.3d 17 (2d Cir. 2014); *Righthaven, L.L.C. v. Jama*, No. 2:10-CV-1322 JCM (LRL) (D. Nev. Apr. 22, 2011).
[5] *See Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith,* 17-cv-2532 (JGK), 2019 U.S. Dist. LEXIS 110086 (S.D.N.Y. July 1, 2019)
[6] *See Perfect 10, Inc. v. Amazon.com,Inc. And A9.com Inc. and Google Inc.,* 508 F.3d 1146 (9th Cir. 2007).
[7] Copyright Amendment Bill, 13B-2017, §§ 12A-B.
[8] *See Katz v. Google, Inc.,* No. 14-14525 (11th Cir. Sept. 17, 2015); *Authors Guild, Inc. v. Google Inc.,* No. 13-4829-cv (2d Cir. Oct. 16, 2015); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067 (2d Cir. 1992); *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991).
[9] *See Matt Hosseinzadeh v. Ethan Klein and Hila Klein*, No. 16-CV-3081 (S.D.N.Y. Aug. 23, 2017); *New Era Publ'ns Int'l, ApS v. Carol Publ'g Grp.*, 904 F.2d 152 (2d Cir. 1990).
[10] *See Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000); *L.A. News Serv. v. CBS Broad., Inc.,* 305 F.3d 924 (9th Cir. 2002); *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 742 F.3d 17 (2d Cir. 2014).
[11] *See Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569 (1994); *Clark v. Transportation Alternatives, Inc.,* 18 Civ. 9985 (VM) (S.D.N.Y. Mar. 18, 2019);
[12] *See Authors Guild, Inc. v. Google Inc.,* No. 13-4829-cv (2d Cir. Oct. 16, 2015);*A.V. ex rel. Vanderhye v. iParadigms, L.L.C.*, 562 F.3d 630 (4th Cir. 2009).
[13] *See Duffy v. Penguin Books USA, Inc.,* 4 F. Supp. 2d 268 (S.D.N.Y. 1998); *Eisenschiml v. Fawcett Publ'n, Inc.*, 246 F.2d 598 (7th Cir. 1957).

controversy in the United States, that does not change the law as it is now, and does not justify holding another country to a higher standard for copyright protection.

It is unclear what more could be done to incorporate the concept of fair use into a law that would approximate the years of jurisprudence IIPA is asking for. If there is indeed no match for that development, that would mean that no country could conceivably introduce fair use in their copyright law. This is simply not a tenable solution when the goal is to remove barriers to trade resulting from inconsistencies in copyright protection between countries. In some cases, it may result in the exact opposite issue. For example, Wikipedia allows for fair use images and text to be included in articles on the projects. However, because the projects are organized by language rather than country, Wikipedia volunteers in other English-speaking countries, like South Africa, are hesitant to add content which may violate copyright in their countries. Ultimately, this only serves to center Western content on Wikipedia, and ensure that critical voices from all over the globe are missing.

C. The proposed exceptions are already firmly rooted in copyright law both in the United States and abroad.

Beyond the inclusion of fair use, the IIPA expresses concern at the introduction of "severe restrictions on the freedom of rights holders to contract in the open market." These "severe restrictions" are in actuality a reasonable protection against the improper exploitation of artists' works, and abusive contractual terms created due to disparities in bargaining power. This particular provision allows for authors of a musical or literary works to reclaim or renegotiate the terms of their work 25 years after assignment. While the IIPA intimates that this will make it impossible for rightsholders to operate in the South African market, again there are substantial similarities between this provision and United States copyright law.

This limitation is parallel to the Copyright Act's provisions for termination of transfer of rights, which allows for authors of certain works to reclaim their rights at least 35 years after that assignment.[15] The objective in US law is exactly the same as it is in the South Africal bill: to ensure fairness for authors who have assigned the rights in their work, often to large rightsholder organizations like record distributors or publishing companies. After 25 years, it is likely that a work assigned to a large rightsholder will either be entirely out of production, or produced only in limited runs *or* will have reached a level of success that the author should be afforded control over the future exploitation of that content through contractual renegotiation.[16] Limits on assignments are not a barrier to trade, but instead an important protection for creators to realize the value of their work.

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[14] *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Authors Guild, Inc. v. Google Inc.,* No. 13-4829-cv (2d Cir. Oct. 16, 2015).

[15] 17 U.S.C. §§ 203, 304(c), and 304(d).

[16] *See* Rebecca Giblin, Reclaiming Lost Culture and Getting Authors Paid, 41 COLUM. J.L. & ARTS 369, 375 (2018), *available at* https://journals.cdrs.columbia.edu/wp-content/uploads/sites/14/2018/10/02.-Giblin-41_3_new.pdf; Jule L. Sigall, Re: Response to Notice of Inquiry about Orphan Works, Federal Register (January 26, 2005), Vol. 70, No. 16: 3739-3743*,* letter, (2005), a*vailable at* https://www.copyright.gov/orphan/comments/OW0537-CarnegieMellon.pdf.

D. South Africa remains in compliance with its international obligations under both the Berne Convention and TRIPS Agreement, even with the addition of fair use to South African copyright law.

The primary justification for revoking GSP status based on a "failure to provide adequate and effective protection of" copyright is a country's failure to comply with its international agreements regarding copyright. In its petition, the IIPA suggests that the new amendments to South Africa's copyright law would violate the country's international obligations under the Berne Convention and the TRIPS agreement. This interpretation imputes such strict standards on what is considered "adequate" as to call into question even the United States's compliance with such international standards.

Both Article 9(2) of the Berne Convention and Article 13 of TRIPS employ a three-step test for determining if an exception or limitation to copyright is proper. This test states that exceptions will be allowed in "special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."[17] It is clear from both simple statutory interpretation and historical evidence that fair use does indeed meed these criteria. Fair use, as outlined in United States law and the South African amendments, applies in only special cases,[18] and the test used to determine fair use includes consideration for both the normal exploitation of a wok and the legitimate interests of the rightsholder.[19] In fact, when the United States joined the Berne Convention in 1986, the Subcommittee on Patents, Copyrights & Trademarks of the Committee on the Judiciary determined that the United States fair use was in compliance with that treaty.[20] Further, there have been no objections from any expert or member state about the conformity between the fair use provision in U.S. copyright law and either the Berne Convention or the TRIPS agreement. To ignore this precedent is to apply significantly stricter standards on South Africa than the United States has even held itself to.

E. Conclusion

Wikipedia, like the internet, has no borders. This means that legal coherence across jurisdictions is important to ensure consistency on our collaboratively-edited projects. While we respect the need to ensure that copyrighted works are properly protected abroad, the reasonable exceptions and limitations included in the draft amendments to South African copyright law are not going to erode that protection any more than the century-long tradition of fair use has in the United States, and it makes little sense to prevent South African citizens from the freedoms that have long been held by citizens in our own country.

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[17] Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, revised at Paris July 24, Art. (9)(1), 1971, 25 U.S.T. 1341; 1161 U.N.T.S. 3 [hereinafter Berne Convention]; TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Article 13, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

[18] See some of the categories outlined in Section B.

[19] 17 U.S.C. §§ 107 (2) - (4); Copyright Amendment Bill, 13B-2017, §§ 12A(b).

[20] Subcommittee on Patents, Copyrights and Trademarks of the Committee of the Judiciary, *U.S. adherence to the Berne Convention : hearings before the Subcommittee on Patents, Copyrights, and Trademarks of the Committee on the Judiciary, United States Senate, Ninety-ninth Congress, first and second sessions, May 16, 1985 and April 15, 1986.* 99th Congr. 1st & 2nd sess. Washington: GPO, 1986.