

March 17, 2021

The Honorable Katherine Tai
U.S. Trade Representative
600 17th Street NW
Washington, DC 20006

Re: Promoting a Balanced Copyright Policy to Benefit All Americans

Dear Ambassador Tai:

Congratulations on your confirmation as United States Trade Representative. We write to request that the Biden-Harris Administration return to the Obama-Biden Administration policy of protecting and promoting fair use rights in international copyright policy. The Trump Administration abandoned this policy, and took the contrary position of pressuring countries such as South Africa to abandon fair use proposals. The undersigned organizations, representing consumers, librarians, archivists, educators, and creators, urge this Administration to once again prioritize fair use as an engine of equity. In particular, the United States should praise, not punish, other countries that seek to incorporate fair use in their national copyright laws.

In a January 20, 2021 executive order, President Biden announced that it is the policy of the Administration “that the Federal Government should pursue a comprehensive approach to advancing equity for all.”¹ The U.S. copyright system has built-in accommodations for equity in the form of fair use and other exceptions and limitations. The Obama-Biden Administration recognized the importance of advancing the equitable balance reflected in the U.S. copyright law, both domestically internationally. Below, we set forth some of the positions regarding fair use taken by USTR and other executive branch agencies during the Obama-Biden Administration, and urge that they be reincorporated into U.S. policy priorities now.

Balanced Copyright in the Trans-Pacific Partnership Agreement

In the context of the negotiations on the Trans-Pacific Partnership (“TPP”) Agreement, USTR stated that fair use and other copyright exceptions are “critical aspects” of the U.S. copyright system, and USTR sought to reflect them in the TPP. In a statement issued on July 3, 2012, USTR observed that

¹ White House, Executive Order on Advancing Racial Equity and Support for Underserved Communities Throughout the Federal Government (2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

the balance of rights and exceptions and limitations achieved in U.S. law provides diverse benefits for large and small businesses, consumers, authors, artists, and workers in the information, entertainment, and technology sectors.

A robust copyright framework ensures that authors and creators are respected, investments (both intellectual and financial) are promoted, that limitations and exceptions provide an appropriate balance, and that enforcement measures are effective.

An important part of the copyright ecosystem is the limitations or exceptions placed on the exercise of exclusive rights in certain circumstances. In the United States, for example, consumers and businesses rely on a range of exceptions and limitations, such as fair use, in their businesses and daily lives.²

After this introduction stressing the importance of copyright exceptions, USTR announced that

[f]or the first time in any U.S. trade agreement, the United States is proposing a new provision, consistent with the internationally-recognized “3-step test,” that will obligate Parties to seek to achieve an appropriate balance in their copyright systems in providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research.

The six listed purposes come directly from fair use provision in the U.S. Copyright Act, 17 U.S.C. § 107. USTR followed this description of its new proposal by asserting that

[t]hese principles are critical aspects of the U.S. copyright system, and appear in both our law and jurisprudence. The balance sought by the U.S. TPP proposal recognizes and promotes respect for the important interests of individuals, businesses, and institutions who rely on appropriate exceptions and limitations in the TPP region.

A provision based on the U.S. proposal was included in the final TPP Agreement. After assuming office in 2017, President Trump pulled out of TPP. In 2018, the eleven remaining TPP countries entered into a successor agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”). Significantly, the CPTPP included the balanced copyright provision. Language similar to the CPTPP balanced copyright provision was included in the 2020 Regional Comprehensive Economic Partnership (“RCEP”).

² Office of the U.S. Trade Representative, *USTR Introduces New Copyright Exceptions and Limitations 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>.

Marrakesh Treaty

In 2009, the U.S. Delegation to the Standing Committee on Copyright and Related Rights (“SCCR”) at the World Intellectual Property Organization announced support for the adoption of an instrument concerning exceptions for people with print disabilities. This eventually became the Marrakesh Treaty, which the United States signed in 2013. At the December 2009 meeting of the SCCR, Justin Hughes, the head of the U.S. Delegation stated:

We recognize that some in the international copyright community believe that any international consensus on substantive limitations and exceptions to copyright law would weaken international copyright law. The United States does not share that point of view. The United States is committed to both better exceptions in copyright law and better enforcement of copyright law. Indeed, as we work with countries to establish consensus on proper, basic exceptions within copyright law, we will ask countries to work with us to improve the enforcement of copyright. This is part and parcel of a balanced international system of intellectual property.³

Department of Commerce Internet Policy Task Force

In 2013, the Department of Commerce Internet Policy Task Force issued a *Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy*. The *Green Paper* stated:

[t]he fair use doctrine, developed by the courts and codified in the 1976 Copyright Act, is a fundamental linchpin of the U.S. copyright system. Along with the idea/expression dichotomy, the fair use doctrine is a critical means of balancing “the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand.” It is also a vital “built-in First Amendment accommodation[.]” in copyright law. [...] [An] advantage of fair use is its flexibility; the doctrine is highly adaptable to new technologies and has already played an important role in the online environment.⁴

Intellectual Property Enforcement Coordinator

In her 2013 Joint Strategic Plan, Victoria Espinel, the Intellectual Property Enforcement Coordinator (“IPEC”), stated:

³ Statement of U.S. Delegation Regarding Copyright Exceptions, World Intellectual Property Organization, Standing Committee on Copyright and Related Rights (SCCR), 19th Sess., (Dec. 14-18, 2009) at http://www.wired.com/images_blogs/threatlevel/2009/12/hughes.pdf; see also David Kravets, *Obama Sides With Blind in Copyright-Treaty Debate*, Dec. 15, 2009, <http://www.wired.com/threatlevel/2009/12/obama-blind-treaty/>.

⁴ Department of Commerce Internet Policy Task Force, *Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy* 21 (2013), <https://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf>.

Effective enforcement is critical to providing meaningful protection of intellectual property rights, but enforcement approaches should not discourage authors from building appropriately upon the works of others. [...] Fair use is a core principle of American copyright law. The Supreme Court has repeatedly underscored fair use provisions in the Copyright Act as a key means of protecting free speech, and many courts across the land have upheld the application of fair use as an affirmative defense to infringement, in a wide variety of circumstances.⁵

In her 2016 Joint Strategic Plan, the IPEC observed:

Nothing in the Joint Strategic Plan should be interpreted as limiting the scope of exceptions and limitations, such as fair use, under U.S. copyright law. To the contrary, the basic principles that have permitted the Internet to thrive must be safeguarded, and the Strategic Plan expressly recognizes and celebrates advancements in technology. The way people use and access content – which has led to new and innovative uses of media (e.g., remixes and mashups involving music, video and the visual arts), and fair use, for example – will undoubtedly continue to evolve. We must work to foster creativity, understanding the role of exceptions and limitations as not only part of our body of laws, but as an important part of our culture. Indeed, 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.⁶

Promoting and Protecting Fair Use Today

We look forward to working with USTR to encourage the spread of fair use around the world, to the benefit of consumers, creators, businesses, and cultural heritage and research institutions both in the United States and overseas. As a first step toward this partnership, we request that USTR make a statement along the following lines and implement it into the policy of the United States, including in defining the concept of “adequate and effective intellectual property” in trade policy programs such as Special 301 and generalized systems of preference:

*The United States promotes an appropriate balance in all copyright systems, including by providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research. The United States shall not seek, through negotiation or otherwise, the revocation or revision of any copyright limitation or exception for the fair use of copyrighted works for purposes such as criticism, comment, news reporting, teaching, scholarship, and research, to the extent they comply with the country’s treaty obligations with the United States.*⁷

⁵ Intellectual Property Enforcement Coordinator, *2013 Joint Strategic Plan* 18 (2013).

⁶ Intellectual Property Enforcement Coordinator, *2016 Joint Strategic Plan* 10 (2016).

⁷ For an example of a similar policy in the context of public interest patent policy, see U.S. Executive Order 13155 of May 10, 2000, Access to HIV/AIDS Pharmaceuticals and Medical Technologies (commanding that the United States “shall not seek, through negotiation or

Again, congratulations on your confirmation.

Sincerely,

American Library Association
Association of College and Research Libraries
Association for Recorded Sound Collections
Association of Research Libraries
Authors Alliance
Center for Democracy & Technology
Electronic Frontier Foundation
HathiTrust Digital Library
Internet Archive
Medical Library Association
Music Library Association
National Federation of the Blind
Organization for Transformative Works
Program on Information Justice and Intellectual Property
Public Knowledge
R Street Institute
Re:Create Coalition
Society of American Archivists
Software Preservation Network
Telecommunications for the Deaf and Hard of Hearing, Inc.

otherwise, the revocation or revision of any intellectual property law or policy of a beneficiary sub-Saharan African country . . . [that] promotes access to HIV/AIDS pharmaceuticals”).