Response to Questions to Knowledge Ecology International from Trade Policy Staff Committee in Docket No. USTR-2022-0016, Special 301

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Q1. Your comment suggests that USTR exclude the “introduction of fair use in national copyright laws” from grounds for inclusion in the Special 301 Report. Please expand on what you mean by “fair use.” In your view, do all “fair use” provisions automatically satisfy international requirements such as the so-called “Berne three-step test?”

What is Fair Use?

In the United States, the exception for fair use is set out in 17 U.S. Code § 107 - Limitations on exclusive rights: Fair use. The Act refers to an illustrative but not closed list of purposes:

> “such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,”

The U.S. statute requires consideration of four factors in determining if the exception applies:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

There is no strict rule regarding the weight given to any of the four factors. The Stanford Libraries provide this summary of U.S. fair use cases: https://fairuse.stanford.edu/overview/fair-use/cases/

For purposes of the Special 301 Report, KEI recommends that any fair use exception that is substantially similar to the U.S. statute be considered an acceptable exception. In addition, national laws on fair dealing should also be considered acceptable.

The Canada fair dealing exception has two tests: the “dealing” must be for a purpose stated in the Copyright Act, such as research, private study, criticism, review, news reporting, education, satire and parody and educational use. The use must also be “fair.”[1]

The WIPO/UNESCO Tunis Model Law on Copyright for Developing Countries has a Section 7 titled “Fair Use,”[2] and the use of the exceptions described in that act, which largely track exceptions from the Berne Convention, should also be considered fair and adequate.

[1] https://cmec.ca/docs/copyright/CMEC_POSTER_FDG_EN.pdf
[2] https://www.keionline.org/wp-content/uploads/tunis_OCR%20model_law_en-web.pdf

The Berne three-step test

The Berne Convention three-step test is found in Article 9(2), the Right of Reproduction, and it reads as follows:

> **Article 9 - Right of Reproduction:**
> 2. Possible exceptions;
> . . .
> (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.
> . . .

The three steps are that an unauthorized reproduction must be (1) a "special case," and (2) "not conflict with a normal exploitation of the work," and (3) "not unreasonably prejudice the legitimate interests of the author."

I will comment on the specific balancing tests in Article 9(2), and also discuss the exceptions in the Berne Convention that are relevant to this test, and the exceptions which are not subject to the three-step test.

Using the three tests

Special cases. The first part of the three-step test is never difficult to satisfy. Every national exception cited by rights holders are those related to **special cases.**

Conflict with a normal exploitation. The second part of the three-step test, regarding "does not conflict with a **normal** exploitation of the work" is subjective, and in practice, including in the United States, is interpreted fairly broadly. In the United States, publishers clearly believe that some of the exceptions for libraries or educators conflict with their notion of what would otherwise be a "normal" exploitation of a work, in the absence of the exception.

It is worth noting that unlike the three-step test for patents in the TRIPS Agreement, there is no qualifier in the Berne Convention for this test. In the WTO TRIPS Agreement, Article 30, the test is: "do not unreasonably conflict with a normal exploitation." The word "unreasonably" is absent in Berne 9(2), and that makes this test more restrictive, if taken seriously. However, in the United States and elsewhere, what is "normal" is determined by public policy to be something considerably different from whatever rights holders want to assert.

Unreasonably prejudice the legitimate interests of the author. The third of the three steps includes words that have a subjective meaning. What is unreasonable, or what constitutes

prejudice, and what are “the legitimate” interests of authors? This is anything but clear, but in practice, it seems to have been interpreted fairly liberally in terms of the flexibility to create exceptions.

The panel report in the WTO Case, DS160, United States — Section 110(5) of US Copyright Act, is 188 pages, and attempts to address these ambiguities. As regards the reference to “normal exploitation” of a work, the report (footnotes omitted) stated:

> 6.166. . . the ordinary meaning of the term "normal" can be defined as "constituting or conforming to a type or standard; regular, usual, typical, ordinary, conventional …".151 In our opinion, these definitions appear to reflect two connotations: the first one appears to be of an empirical nature, i.e., what is regular, usual, typical or ordinary. The other one reflects a somewhat more normative, if not dynamic, approach, i.e., conforming to a type or standard. We do not feel compelled to pass a judgment on which one of these connotations could be more relevant. Based on Article 31 of the Vienna Convention, we will attempt to develop a harmonious interpretation which gives meaning and effect to both connotations of "normal".
>
> 6.167 If "normal" exploitation were equated with full use of all exclusive rights conferred by copyrights, the exception clause of Article 13 would be left devoid of meaning. Therefore, "normal" exploitation clearly means something less than full use of an exclusive right.152

As regards the issue of what is an unreasonable prejudice, the United States position was that “Given that any exception to exclusive rights may technically result in some degree of prejudice to the right holder, the key question is whether that prejudice is unreasonable.” (WTO Case, DS160, Paragraph 6.220)

What does the Berne (or WTO) three-step test apply to?

The first version of the Berne Convention for the Protection of Literary and Artistic Work was established in 1886. From 1886 to 1971, the Convention was frequently revised, and in every revision, the exceptions were modified. (See: The Berne Convention revisions for limitations and exceptions to copyright, 2012:1 KEI Research Note, August 2012. Revised June 18, 2017[3]). It was not until 1967 that the three-step test on the right of reproduction appeared.

The following is from the preparatory work for the 1967 revisions which addressed the relationship between the three-step test in Article 9(2), and other provisions on exceptions in the Berne.

> “Account must be taken of the other provisions in the Convention. This implies that the provisions already existing in certain special purposes (Articles 10, 10bis and 11bis, paragraph (3)) must be regarded as rules exercising limits on the questions with which they

[3] https://www.keionline.org/copyright/berne-convention-exceptions-revisions

deal. Thus, the special conditions, whose presence these exceptions imply, must always be respected. . . . Furthermore . . . It follows, therefore, from this reservation that the new provision places no restriction on the right granted to countries of the Union, under Article 13, to institute a compulsory license to the right to record musical works." Records of the Stockholm Conference, 1967, Vol 1, page 112

Exceptions which are part of the Berne Convention that are NOT subject to the three-step test

The Berne Convention today, including the addition of the 1971 Appendix for Developing Countries, includes a number of limitations and exceptions that are not subject to the three-step test. These include:

Works not Fixed. Article 2(2). "It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form."

Official texts. Article 2(4). It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.

Applied art and designs. Article 2(7). Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected.

Mandatory exception for news of the day. Article 2(8). states "The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information."

Political speeches and speeches delivered in the court of legal proceedings. Article 2bis (1). It shall be a matter for legislation . . . to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings.

Lectures and addresses delivered in public. Article 2bis (2). It shall also be a matter for legislation . . . to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11bis(1) of this Convention, *when such use is justified by the informatory purpose.*

Restrictions on protection of authors in countries outside the Union. Article 6(1). A Berne member may restrict protection to authors living in countries outside the union that "fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union,"

Mandatory exception for quotations. Article 10(1). It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that **justified by the purpose**, including quotations from newspaper articles and periodicals in the form of press summaries.

Teaching. Article 10(2). It shall be a matter for legislation . . ., and for special agreements existing or to be concluded between them, to permit the utilization, **to the extent justified by the purpose**, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

Current economic, political or religious topics. Article 10*bis.* (1) It shall be a matter for legislation . . . to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics . . .

Reporting current events. Article 10*bis* (2). It shall also be a matter for legislation . . . to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, **to the extent justified by the informatory purpose**, be reproduced and made available to the public.

Broadcasting and other communication to the public. Article 11*bis* (2). Countries may provide exceptions for broadcasting or other communications to the public of "signs, sounds or images" of works, which are not "prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration."

Musical works. Article 13(1). "Each country . . . may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any;" . . . but not "prejudicial to the rights of these authors to obtain equitable remuneration."

Artist Resale Right (Droit de suite). Article 14*ter.* (2) There is an "inalienable right to an interest" in a resale of a work, but the provision has no legal force in the absence of national legislation implementing the right.

Appendix: Special Provisions Regarding Developing Countries. According to Article 21(2), the Appendix regarding special provisions for developing countries "forms an integral part of this Act." This Appendix deals with additional exceptions to expand access to works, and it is long, with 3,870 words set out in six Articles.

The rights of performers, producers of phonograms or broadcasters are not part of the Berne Convention

The three-step test in the Berne Convention only relates to the rights of authors, and not the rights of performers, producers of phonograms or broadcasters. The 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations has 96 parties, not including the United States. This convention has in Article 15, permitted exceptions, but no three-step test, as well as an article (Article 16) on reservations, also with no three-step test.

Three-step tests in recent WIPO treaties and agreements

In more recent years, WIPO has adopted four treaties covering copyright and related rights, including the WCT, WTTP, the WIPO Beijing Treaty on Audiovisual Performances, and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. Each of these agreements have its own provisions on exceptions. Very relevant to the question asked above is the "Agreed Statements concerning the WIPO Copyright Treaty,"[4] including in particular the statement regarding Article 10 of the WCT.

> **Concerning Article 10:** It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.
>
> It is also understood that Article 10(2) **neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention**.

Three-step test in the WTO TRIPS Agreement

The WTO TRIPS Agreement has a three-step test for authors in Article 13, however, the rights of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations in Article 14 are not subject to a three-step test (Article 14(6)).

There is some confusion, promoted by publishers, regarding the relationship between the WTO TRIPS Article 13 three-step test, and the specific exceptions in the Berne that have a different

[4] https://www.wipo.int/wipolex/en/text/295456

standard. Plainly stated, the issue is as follows: Can the WTO TRIPS Article 13 be seen as a way of expanding the exceptions in the Berne, for example, by creating new exemptions or exceptions to the requirements of specific exceptions? In some commentary, this concerns the “minor exceptions” doctrine.

The WTO has a single case addressing an exception to copyright regarding a US exception to the Berne obligations for rights in broadcasting: Dispute DS160, United States - Section 110(5) of US Copyright Act.

The WTO case concerned a U.S. exception that was a departure from the approach approved in Berne Article 11bis(2). Of relevance here is that the panel found that in addition to the exceptions that are provided for explicitly in the Berne Convention, there is a “minor exceptions” doctrine that extended, among other things, to public performances of works.

> 6.48 We note that, in addition to the explicit provisions on permissible limitations and exceptions to the exclusive rights embodied in the text of the Berne Convention (1971), the reports of successive revision conferences of that Convention refer to “implied exceptions” allowing member countries to provide limitations and exceptions to certain rights. The so-called “minor reservations” or “minor exceptions” doctrine is being referred to in respect of the right of public performance and certain other exclusive rights.57 Under that doctrine, Berne Union members may provide minor exceptions to the rights provided, inter alia, under Articles 11bis and 11 of the Berne Convention (1971).58
>
> fn57 The other main category of implied exceptions are understood to apply to the use of translations of literary works.
>
> fn 58 The doctrine refers to (i) public performance and (ii) communication thereof to the public in the meaning of Article 11(1)(i-ii) as well as to (i) broadcasting by wireless diffusion, (ii) communication of the broadcast to the public by wire or re-broadcasting, and (iii) public communication by loudspeaker etc. of the broadcast in the meaning of Article 11bis(1). The minor exceptions doctrine also has been referred to in the context of Articles 11ter, 13 and 14 of the Berne Convention. See the Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986, published by the International Bureau of WIPO (1986), published by the International Bureau of WIPO in 1986 (“Berne Convention Centenary”), pp. 203 and 204. See also Ricketson, Sam: The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986, Centre for Commercial Law Studies, Queen Mary College, London (1987), pp. 532-537ff.

The WTO panel added “As regards the coverage of the minor exceptions doctrine in temporal respect, we cannot share the European Communities’ view that the coverage was “frozen” in 1967.” [Para 6.59]

The panel also concluded that the specific exception in 11bis(2) was not subject to the TRIPS three-step test, but also was not directly relevant, because the US legislation did not provide for

remuneration. The TRIPS three-step test would be used to evaluate an exception to the public performance and broadcasting right, a part of the minor exceptions doctrine.

> 6.87 We believe that Article 11bis(2) of the Berne Convention (1971) and Article 13 cover different situations. On the one hand, Article 11bis(2) authorizes Members to determine conditions under which the rights conferred by Article 11bis(1)(i- iii) may be exercised. The imposition of such conditions may completely replace the free exercise of the exclusive right of authorizing the use of the rights embodied in subparagraphs (i- iii) provided that equitable remuneration and the author's moral rights are not prejudiced. However, unlike Article 13 of the TRIPS Agreement, Article 11bis(2) of the Berne Convention (1971) would not in any case justify use free of charge.
>
> 6.88 On the other hand, it is sufficient that a limitation or an exception to the exclusive rights provided under Article 11bis(1) of the Berne Convention (1971) as incorporated into the TRIPS Agreement meets the three conditions contained in its Article 13 to be permissible. If these three conditions are met, a government may choose between different options for limiting the right in question, including use free of charge and without an authorization by the right holder. This is not in conflict with any of the paragraphs of Article 11bis because use free of any charge may be permitted for minor exceptions by virtue of the minor exceptions doctrine which applies, inter alia , also to Article 11bis.

Another relevant WTO document is a submission from South Africa to the TRIPS Council on January 29, 2020, titled: Intellectual Property And The Public Interest: The WTO TRIPS Agreement And The Copyright Three-Step Test Communication From South Africa, Council for Trade-Related Aspects of Intellectual Property Rights, IP/C/W/663, 29 January 2020.[5]

Limits on remedies to infringement are not subject to the three-step test

The three-step test in the Berne, TRIPS and other copyright and related treaties concerns the limitations and exception to rights. The three-step test does not regulate the limitations and exceptions to the remedies to enforce those rights.

A number of important exceptions in U.S. law relate to the limitations and exceptions to the enforcement of rights, including for example 28 USC § 1498(b), state sovereign immunity and several provisions of 17 USC Chapter 5, as well as proposed legislation to expand access to orphaned copyrighted works.

[5] https://www.keionline.org/wp-content/uploads/W663.pdf

Exceptions to rights and remedies to enforce rights are important for the U.S. public and U.S. industry.

While hardly as well organized as the publisher lobby, educators, libraries and the public have an enormous stake in having robust exceptions to the exclusive rights and enforcement of those rights for copyright and related rights. This is also true for many U.S. businesses, and the companies that depend upon exceptions to operate generate more wealth in the United States than do the publishers. Alphabet has a market cap of $1.2 trillion. Meta has a market cap of $483 billion. In contrast, Disney has a market cap of $185 billion. Paramount has $15 billion. Most of the large book publishers in the U.S. are foreign-owned. John Wiley & Sons has a market cap of $2.5 billion. Scholastic Corp has a market cap of $1.6 billion.

Artificial intelligence services require access to massive databases including works that have copyright protection. Restrictive approaches to copyright exceptions are a threat to these businesses.

Q2. Your submission quotes Berne Convention Articles 10(1) and 2(8), and asserts that “several members of the European Union . . . are seeking in a variety of measures and proposals to impose fees and restrictions on some uses of quotations or news of the day.” Please clarify and specify what measures and proposals in the European Union are a concern, and why. Please also clarify whether these measures do or do not fall within the full provision of Article 10(1)’s remit, which also requires that “the[] making [of quotations] is compatible with fair practice, and their extent does not exceed that justified by the purpose . . . .” Please clarify whether Article 2(8)’s reference to “news of the day” applies in relation to “journalistic works” that are also literary works; whether the selection or arrangement of the news of the day would be separately protected; and how such distinctions apply to each of the measures and proposals alluded to in your submission.

KEI’s primary concern are proposals to impose fees on services that link to news stories on the originator’s web page, and provide concise information including sometimes very short excerpts or summaries.

Evolution of Berne exceptions for news of the day

Since the 19th Century, the Berne Convention has had several different approaches to exceptions for news.

The original exception in 1986 was Article 7, which read:

> **1886 Article 7**
> Articles from newspapers or periodicals published in any of the countries of the Union may be reproduced in original or in translation in the other countries of the Union, unless the authors or publishers have expressly forbidden it. For periodicals it shall be sufficient if the prohibition is indicated in general terms at the beginning of each number of the periodical. This prohibition cannot in any case apply to articles of political discussion, or to the reproduction of news of the day or miscellaneous information.

A 1908 revision of the Berne Convention continued the practice of a mandatory exclusion of protection for “news of the day,” and of providing that, except for “serial stories and tales . . any newspaper article may be reproduced by another newspaper” unless the reproduction is “expressly forbidden.”

> **1908 Berlin Act, Article 9**
>
> Serial stories, tales, and all other works, whether literary, scientific, or artistic, whatever their object, published in the newspapers or periodicals of one of the countries of the Union may not be reproduced in the other countries without the consent of the authors.
>
> With the exception of serial stories and tales, any newspaper article may be reproduced by another newspaper unless the reproduction thereof is expressly forbidden. Nevertheless, the source must be indicated; the legal consequences of the breach of this obligation shall be determined by the laws of the country where protection is claimed.
>
> The protection of the present Convention shall not apply to news of the day or to miscellaneous information which is simply of the nature of items of news.

The 1928 revision required the indication of the source of articles that were used without express authorization under the exception, and retained the mandatory exclusion of protection for “news of the day or to miscellaneous information which is simply of the nature of items of news.”

> **1928 Article 9**
>
> (1) Serial stories, tales, and all other works, whether literary, scientific, or artistic, whatever their object, published in the newspapers or periodicals of one of the countries of the Union may not be reproduced in the other countries without the consent of the authors.
>
> (2) Articles on current economic, political or religious topics may be reproduced by the press unless the reproduction thereof is expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of the breach of this obligation shall be determined by the laws of the country where protection is claimed.

> (3) The protection of the present Convention shall not apply to news of the day or to miscellaneous information which is simply of the nature of items of news.

In the 1967 revision, there was extensive debate about the exceptions for news reporting, focusing on the exception for republishing news reports in Article 9, and exclusion of facts and "news of the day" from protection, and the types of exceptions that are necessary to report the news. An excerpt from a 1965 report of the Study Group made this observation about the 1948 revision exception for republishing news stories:

> Paragraph 2, in its present wording, provides, in favour of the press, a right freely to reproduce articles on current economic, political or religious topics, unless their reproduction is expressly reserved.
>
> In its 1963 report, the Study group proposed deleting this Article for the following reasons:
>
> The International Federation of Journalists has, in the course of recent years, adopted several resolutions expressing the desire for the abolition of this provision.
>
> The Study Group supports this desire. It is possible that, in the more remote past, there was a certain need to reproduce entire articles of this kind, without permission of the author, this need being experienced particularly by small newspapers. On the other hand, at the present time; it is hardly compatible with the moral principles recognised by the press to reproduce an article published in another newspaper without having first obtained permission of the author. It is true that in the interest of the discussion that takes place in the press on public affairs and other questions, there is a need to report such articles freely, and to a fairly general extent. . . In cases where there is a genuine need for literal reproduction, means for so doing should be provided, but within the framework of the right of quotation.

The Study Group proposed moving the exception that precludes protection for "news of the day or miscellaneous information, provided such articles have the character of simple press information" to a new last paragraph of Article 2 of the Convention, where the Berne defines the works to be protected.

As regards utilizing protected works in the reporting of current events, the Study Group wanted several other changes, including expanding its application in terms of technologies and purposes, and eliminating reference to "short extracts" in favor of "the extent justified by the informatory purpose."

The Study Group recommendations were implemented in a new paragraph Article 2(8), and in an expanded and revised Article 10*bis*.

One additional consequence of the changes was to make the exclusion of "news of the day" and "miscellaneous facts having the character of mere items of press information" mandatory.

1967 Article 2(8)

(8) The protection of this Convention shall not apply to news of the day nor to miscellaneous facts having the character of mere items of press information.

The remaining elements of the exception were permissive, and extended to accommodate the role of radio, television and magazines with photographs in providing communications about “current economic, political or religious topics” and “current events.”

1967 Article 10*bis*

(1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

Note that unlike the exceptions for quotations and teaching in Article 10, the news reporting exceptions in Articles 2(8) and 10bis were not based upon a fair practice standard, and only paragraph 10*bis* (2) was limited “to the extent justified by the informatory purpose.”

Q3. Please elaborate further regarding aspects of the 2022 Special 301 Report that would you recommend that we reevaluate this year, including with respect to innovation and access to medicines, taking into consideration the requirements set out in the Trade Act of 1974 as amended.

The U.S. Trade Representative has considerable discretion in determining which intellectual property laws and practices are adequate or fair.

The Special 301 Report could state plainly that if a country follows the TRIPS rules on the grant of a compulsory license or a limitation on the remedies, including the payment of adequate remuneration

(31.h) or compensation (44.2) to rights holders, on a biomedical invention, that is considered adequate and fair. And if USTR can't express this for every country, they should state that this applies to countries that have a per capita gross national income (GNI, Atlas method) and total GNI that are less than 30 percent of the U.S., and that the country will not face trade pressures, regardless of the grounds or disease.

USTR also needs to address the problems that arise, such as in the recent case in the Dominican Republic, when exclusive rights in test data prevent a country from relying upon original test data on safety and efficacy of a product, for a generic or biosimilar product, when there is a compulsory license on the patents or there are grounds to grant a compulsory license on patent, if one existed.

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19 USC §2411. Actions by United States Trade Representative
(d) Definitions and special rules

(3)

(A) An act, policy, or practice is unreasonable if the act, policy, or practice, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable.

(B) Acts, policies, and practices that are unreasonable include, but are not limited to, any act, policy, or practice, or any combination of acts, policies, or practices, which-

(i) denies fair and equitable-

. . .

(II) provision of adequate and effective protection of intellectual property rights notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights referred to in section 3511(d)(15) of this title,

(III) nondiscriminatory market access opportunities for United States persons that rely upon intellectual property protection, or