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**Re: SOUTH AFRICA Country Practice Review; Intellectual Property Rights and Market Access Practices; Post-Hearing Brief of the International Intellectual Property Alliance, in response to the *Generalized System of Preferences (GSP): Notice Regarding a Hearing for Country Practice Reviews of Azerbaijan, Ecuador, Georgia, Indonesia, Kazakhstan, Thailand, South Africa and Uzbekistan, and for the Country Designation Review of Laos, 84 FR 63955 (November 19, 2019)***

I. Introduction

The International Intellectual Property Alliance (IIPA) submits this post-hearing brief in support of its petition to review South Africa’s intellectual property rights and market access country practices in the 2019 Annual GSP Review process. South Africa’s current copyright protection and enforcement framework is weak, and, if enacted, the Copyright Amendment Bill (CAB) and Performers’ Protection Amendment Bill (PPAB) would cause further harm U.S. rights holders and U.S. exports. In this post-hearing brief, IIPA clarifies certain issues that have been raised by the Government of South Africa as well as other stakeholders in pre-hearing comments and testimony. In particular, IIPA emphasizes that:

- the problems with the CAB and PPAB are extensive, and include many other concerns besides the problematic “hybrid” exceptions, including that provisions addressing technological protection measures (TPMs) fail to meet basic international standards;
- the fair use provision and the other overbroad exceptions and limitations are very different than exceptions in U.S. law and do not meet the requirements of the three-step test;
- South Africa’s remedies for copyright infringement are inadequate, heightening concerns about the proposed unclear and overbroad exceptions;

- the problematic provisions in the bills limiting the term of assignments to 25 years are significantly different than the termination of transfer provision in U.S. law;
- the problems with the bills cannot be fixed through regulations; and
- additional issues raised with IIPA’s petition by “South African Legal Expert” Andrew Rens do not have merit.

## II. The CAB and PPAB Suffer From Fundamental Systemic Failings, Beyond Overbroad Copyright Exceptions

As laid out in IIPA’s petition, pre-hearing brief, and testimony, IIPA’s concerns with the CAB and PPAB are far more extensive than the expanded fair use provision or the other overbroad exceptions and limitations. The attached country report from IIPA’s Special 301 submission, filed February 6, 2020, details our concerns with these bills. IIPA’s additional concerns with the bills include the following:

- severe intrusions into contractual freedom, including limiting the term of assignments, providing sweeping ministerial powers to set contractual terms, mandating the mode of remuneration for audiovisual performers, and prohibiting contractual override;
- protection of performers rights that is inadequate and falls below the standard of protection required by the WIPO Performances and Phonograms Treaty (WPPT) and the Beijing Treaty;<sup>1</sup>
- unclear and ambiguous provisions intended to provide exclusive rights of communication to the public and making available, which are critical rights required by the WIPO Copyright Treaty (WCT) and the WPPT (collectively, the WIPO Internet Treaties) that enable the legitimate digital trade of copyrighted works;<sup>2</sup>
- provisions addressing TPMs, critical technologies for developing the legitimate digital marketplace for copyrighted content, that are inadequate and fail to meet the requirements of the WIPO Internet Treaties;

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<sup>1</sup>Section 5(1)(b) of the Performers’ Protection Amendment Bill (PPAB) downgrades the performers’ WIPO Performances and Phonograms Treaty (WPPT) exclusive rights of distribution and rental to mere remuneration rights. This would be incompatible with WPPT and the Beijing Treaty, which do not permit these rights to be protected at the level of mere remuneration rights.

<sup>2</sup>The wording of proposed Section 9(e) regarding sound recording producers’ exclusive right of communication to the public, omits an express reference to “public performance,” as provided for in the WPPT definition of “communication to the public,” which explicitly “includes making the sounds or representations of sounds fixed in a phonogram audible to the public.” Also, the meaning of Section 9A(aA) and equivalent provisions in the PPAB are not clear. To the extent these provisions could be interpreted as providing a legal license for otherwise unauthorized uses of works, they would be wholly incompatible with the WIPO Internet Treaties and undermine the economic feasibility of South Africa’s creative industries.

- remedies for infringement that are inadequate to deter online piracy, a growing problem in South Africa;
- the establishment of an Intellectual Property Tribunal without requiring adequate resources, providing a definite scope of responsibilities, or establishing benchmarks for determining royalties;
- restrictions on collective management that are unnecessary, inconsistent with industry standards, and contrary to the interest of rights holders;
- a provision on state intervention that could diminish incentives for public-private cooperation in creative developments; and
- failure to bring South Africa’s term of protection in line with evolving global norms to adequately incentivize investment in the creative industries and the dissemination of older works in the latest formats, which would benefit consumers.

In addition to these major concerns, it is important to understand that, from a technical perspective, the bills are fundamentally incoherent, with overlapping and unclear provisions. For example, Section 3B of the PPAB purports to set out the nature of copyright in sound recordings, which would also be enumerated in the Copyright Act, as amended by the CAB. As written, these bills are not capable of being implemented, and risk introducing widespread uncertainty into South African law.

### III. The Proposed Exceptions Are Different From U.S. Law and Do Not Meet the Requirements of the Three-Step Test

#### A. Fair Use

As IIPA emphasized in its testimony, the purported benefits of exporting fair use, which have been vastly overstated by certain stakeholders,<sup>3</sup> are irrelevant to this country review. U.S. trade law and policy demand that this review instead focuses on the extent to which South Africa is providing adequate and effective *protection* of intellectual property rights.<sup>4</sup> As IIPA has demonstrated in its petition and supporting testimony and submissions, South Africa does not

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<sup>3</sup>See Ford, “The Vanishing Benefits of Fair Use: A Review of the Flynn-Palmedo Study on ‘User Rights’ in Copyright Law,” Phoenix Center for Advanced Legal & Economic Public Policy Studies (2017) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3138855](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3138855) (identifying “basic errors in both the design and implementation of the empirical analysis” of the Flynn-Palmedo study that result in “spurious correlations,” and concluding the study is “not relevant for policymaking.”); and Ford, “Fair Use and the Economy: A Review of CCIA’s Estimate,” Phoenix Center for Advanced Legal & Economic Public Policy Studies (2018) available at <https://phoenix-center.org/perspectives/Perspective18-05Final.pdf> (finding that “the core assumption of the [CCIA fair use] study—that entire economic sectors would not exist if not for broad fair use laws—is unsupported” and that countries that have adopted U.S.-style fair use have not seen any increase in economic growth).

<sup>4</sup>See 19 U.S.C. § 2462(c)(4). IIPA’s petition includes an extensive discussion of the intellectual property criteria in the GSP statute. See IIPA Request for Review of the Intellectual Property Rights Practices of South Africa in the 2019 GSP Review, 3-5, April 2019.

provide adequate and effective protection of intellectual property rights, and the pending CAB and PPAB will move South Africa further away from meeting the GSP criteria.

The claim made by certain stakeholders that IIPA is asking the U.S. Government to oppose U.S. fair use is false. As IIPA detailed in its pre-hearing brief and testimony, the problem with South Africa's proposal is that it is much broader than U.S. fair use, which is determined on a case-by-case basis. South Africa lacks the foundation of the long history of fair use jurisprudence in U.S. law and lacks an efficient civil enforcement system, both of which help to appropriately confine the fair use exception in U.S. law. While some stakeholders have suggested that South Africa could look to the case law in the United States, South African judges are not bound by the decisions of U.S. courts, and such decisions carry virtually no legal weight in South Africa.<sup>5</sup> South African courts would need to establish their own precedents. It is very unlikely that South African courts would, or even could, wholesale adopt U.S. precedents, especially considering South Africa's very different and unique legal history (which ironically certain fair use proponents have highlighted to try to explain away the deficiencies in the bills). Moreover, the suggestion of one stakeholder that South Africa's jurisprudence on fair dealing is equivalent to U.S. jurisprudence on fair use is also without merit. The South Africa proposal on fair use is much broader than the current fair dealing provisions (which themselves have been expanded in the bills), and is derived from a very different legal tradition. Whatever case law exists interpreting the existing, narrower fair dealing provisions would have very little relevance.

One reason South African courts would be unlikely to adopt U.S. fair use precedents is because the proposed fair use provision on its face is significantly different and broader than the U.S. fair use statute. The South African proposal includes a number of additional access and use purposes that are absent from the U.S. fair use statute. These include: "personal use, including the use of a lawful copy of the work at a different time or with a different device;" "illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;" "preservation of and access to the collections of libraries, archives and museums;" and "ensuring proper performance of public administration." In addition, unlike the U.S. fair use statute, the South Africa proposal states that the "the purpose and character of the use" should include consideration of whether "such use serves a purpose different from that of the work affected." The South Africa proposal also includes an affirmative requirement to consider "all relevant factors" that is not in the U.S. statute. It is unknown how South African judges would interpret these provisions.

Contrary to assertions of certain stakeholders, many of the additional access and use purposes in the South African proposal are broader than exceptions permitted under U.S. law. For example, regarding the "personal use" language, there is no general "personal use" exception in U.S. law and "format shifting" is not always held to be a fair use.<sup>6</sup> In addition, the "preservation

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<sup>5</sup>Some stakeholders have suggested that South Africa could look to precedents outside the United States, but, as previously noted, IIPA is not aware of any significant case law that has been developed under the fair use statutes in any of the handful of countries that have recently enacted fair use provisions. Even if such case law existed, South African courts would not be bound by it.

<sup>6</sup>See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001) (holding that "space-shifting, where users downloads a sound recording through the Napster system that they already own in audio CD format" is not a fair use); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 112 (2d Cir. 1998) (holding the "retransmission of Infinity's copyrighted broadcasts is not a fair use").

of and access to the collections of libraries, archives and museums” is not a fair use in the U.S. Rather, Section 108 of the Copyright Act establishes specific instances and limits pursuant to which libraries and archives may make copies of works for preservation purposes.<sup>7</sup> It is unclear what “ensuring proper performance of public administration” encompasses, but nothing in the Copyright Act or U.S. case law establishes such use to be a fair use.

In addition, requiring South African judges to consider whether “such use serves a purpose different from that of the work affected” would broaden the U.S. judge-made notion of “transformative use.” The Supreme Court has defined “transformative use” as one that “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>8</sup> South Africa’s provision would establish a lower bar for the permissibility of a use than U.S. law because it appears to require that a use merely serve a “different” rather than a “transformative” purpose.<sup>9</sup>

Furthermore, the scope of the fair use provision is even less clear when considered in the context of this “hybrid model,” a term the South African Government has used to describe its proposal, which combines a broadened “fair dealing” system with other exceptions and limitations as well as aspects of fair use, all drawn from various jurisdictions and legal traditions.<sup>10</sup> This overlapping thicket of exceptions will deny rights holders and users any kind of certainty regarding what works and what uses are permissible without a license.

For these reasons, this unprecedented “fair use” exception is not confined within the limits of the internationally-recognized three-step test: “certain 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.”<sup>11</sup> The expansive provisions discussed above, which are broader than U.S. law, and the lack of a body of case law to define the exception ensure that implementation of the proposed exception will not be confined to certain special cases, and will conflict with the normal exploitation of the work and unreasonably prejudice the legitimate interests of the rights holder.

## B. Other Exceptions and Limitations

Sections 12B, 12C and 12D, along with the fair use provision, are part of the overbroad amalgamation of exceptions in the pending bills. These exceptions are significantly broader than exceptions in U.S. law, and do not meet the requirements of the three-step test.

Section 12B(1)(i) permits broad copying for “personal use,” which is not limited to “certain special cases” and does not include any requirement to consider whether such copying would conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests

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<sup>7</sup>See 17 U.S.C. 108.

<sup>8</sup>*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>9</sup>See *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (“difference in purpose is not quite the same thing as transformation, and *Campbell* instructs that transformativeness is the critical inquiry under this factor.”).

<sup>10</sup>See, e.g., South Africa’s Department of Trade and Industry (DTI) “Presentation on Flagged Provisions in the Copyright Amendment Bill” at 12-13, available at [https://www.thedti.gov.za/parliament/2018/FLAGGED\\_CAB.pdf](https://www.thedti.gov.za/parliament/2018/FLAGGED_CAB.pdf) (outlining the intent to create a unique “hybrid model” mixing fair use with fair dealing provisions).

<sup>11</sup>See, e.g., TRIPS Article 13.

of the rights holder. Contrary to the assertion of some stakeholders, such a broad exception is not part of U.S. law.

Section 12B(1)(f) permits translations for purposes of “giving or receiving instruction” including that the work is “communicated to the public for non-commercial purposes.” This exception fails to take into account the need to avoid conflict with a normal exploitation of the work or unreasonably prejudicing the legitimate interests of the rights holder because it would undermine the market for the authors’ and publishers’ translation rights, which South Africa is required to protect under the Berne Convention and the TRIPS Agreement.<sup>12</sup>

The quotation exception in Section 12B(1)(a) is overbroad because it fails to articulate a list of permitted purposes. The exception allows quotation in all instances, which fails to meet the three-step-test limitation to “certain special cases.” The absence of clear limits to the extent and purpose of a quotation would also potentially lead to a conflict with the normal exploitation of the work and unreasonably prejudice the legitimate interest of the rights holder.

Section 12D permits the copying of works, recordings, and broadcasts for educational purposes with very few limitations. Subsection 12D(4)(c) authorizes the copying of entire textbooks, even those that are available for authorized purchase or licensing, if the textbook “cannot be obtained at a price reasonably related to that normally charged . . . for comparable works.” Permitting copying of entire textbooks that are available for authorized purchase or licensing clearly is not confined to certain special cases. Such an unauthorized use would also clearly conflict with publishers’ normal exploitation of the work and unreasonably prejudice their legitimate interest.<sup>13</sup>

Although Sean Flynn, Director of the Program on Information Justice and Intellectual Property, asserted in his brief and his testimony that Subsection 12D(4)(c) draws on language in Article III of the Berne Convention Appendix, this comparison is spurious. First, it is important to understand the context of the Appendix, which was adopted into the Berne Convention only in 1971 to encourage certain qualifying developing countries not yet able to fulfil some of the minimum obligations of Berne to join the agreement.<sup>14</sup> The Appendix is intended to apply to these countries for only a limited period of time.<sup>15</sup> Thus, the rules in the Appendix provide for a lower level of protection than the minimum standards required under the Berne Convention and the TRIPS Agreement. South Africa has never availed itself of the Berne Appendix flexibilities and,

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<sup>12</sup>See Berne Convention Article 8, and TRIPS Article 9, incorporating the Berne Convention Article 8.

<sup>13</sup>See “The expected impact of the ‘fair use’ provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry,” available at <http://www.publishsa.co.za/file/1501662149slp-pwcreportonthecopyrightbill2017.pdf>. The study notes that a 33% weighted average decline in sales would likely occur, with concomitant reductions in GDP, VAT, and corporate tax revenue collections. Some 89% of publishers surveyed noted that the Copyright Amendment Bill (CAB), if adopted in its current form, would negatively impact their operations, likely resulting in retrenchments and possible business closures.

<sup>14</sup>See WIPO, Guide to the Berne Convention, 146 (1978) (noting that the purpose of the Appendix is to provide certain developing countries with “more latitude as regards the rights of translation and of reproduction than is normally permitted by the Convention proper.”), available at [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_615.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_615.pdf).

<sup>15</sup>A developing country that wishes to avail itself of the Berne Appendix must provide notification declaring such, and this declaration is effective for no more than ten years (although it can be renewed).

indeed, it is not clear that South Africa would even qualify as a “developing country” under the Berne Convention in order to do so.

Contrary to Mr. Flynn’s assertions, the proposed exception in Subsection 12D(4)(c) fails to meet even the substandard level of protection of Article III of the Berne Appendix, which is not applicable to South Africa. Article III provides for a system of compulsory licenses to be granted by a “competent authority” under certain limited conditions, including that the work is unavailable in the market for a period of five years. Even if Article III were applicable to South Africa, there is no evidence of a lack of availability of educational materials in South Africa that would permit a competent authority to grant a compulsory license. The proposed exception in Subsection 12D(4)(c) would permit immediate, wholesale, uncompensated copying based on an undefined pricing standard determined not by a competent authority, but apparently by the user. Such a broad, open-ended exception is clearly impermissible under South Africa’s international obligations.

#### IV. Remedies for Online Copyright Infringement Are Inadequate

South Africa’s remedies for online copyright infringement are inadequate, which heightens concerns of the impact of the proposed broad, unclear, open-ended exceptions. Effective and deterrent remedies are necessary to prevent bad actors from taking advantage of the uncertainty created by the exceptions to infringe copyright.

While it is true that South Africa’s current law allows for an “interdict” (or injunction) under certain circumstances, in practice this remedy is limited and extremely difficult to obtain. Lower courts have jurisdiction to grant an interdict, but only if the “value of the relief sought in the matter” does not exceed a limit of ZAR400,000 (~US\$30,000) or if the actual economic harm that the injunction is sought to prevent or restrain can be projected under that limit. It is also often difficult in intellectual property cases to establish the required showings of “urgency” and “irreparable harm resulting if the order is not granted.” Compounding this problem, judges in South Africa have little to no experience in IP infringement cases, further diminishing the utility of this remedy. As a result, in practice, the interdict remedy is not effective for rights holders in South Africa. Moreover, the pending legislation will further diminish the utility of this remedy because the ambiguous and overbroad exceptions could make it more difficult to establish a prima facie case of infringement on which to base an interdict order. South Africa’s current law falls short of global best practices because it does not provide effective injunctive relief to prevent or restrain infringement online, and the legislation not only does not address this deficiency, it could make things worse.

In addition, statutory and punitive damages are unavailable to rights holders in South Africa. In many cases of infringement, especially online, the fact of harm—even massive harm—is certain, but the amount of harm is difficult to quantify. Because it is very difficult and sometimes even impossible to establish the infringer’s profits or the rights holder’s losses, statutory damages are essential for adequate and effective civil enforcement. Punitive damages are also important to provide an effective deterrent against blatant infringement. Introduction of statutory and punitive damages would improve access to the courts, because lawyers would be able to accept cases knowing that there is a prospect of recovering legal fees, even if the litigation became protracted. The proposed Copyright Tribunal would not help in this regard, because the costs of litigation for

rights holders, which is primarily for legal representation, would remain the same, and the potential to recover damages would remain inadequate.

Although certain submissions indicated Section 24(3), which states that courts may “award such additional damages as the court may deem fit,” may provide statutory and/or punitive damages, that is not the case. As noted, statutory damages allow plaintiffs to recover damages without showing proof of harm to the rights holder or gain to the infringer. In contrast, the “additional damages” provision of 24(3) permits a judge to take into account the flagrancy of the infringement and the benefit to the infringer, but rights holders must still prove the harm and the gain to the infringer. Thus, Section 24(3) is not a “species of statutory damages,” as at least one stakeholder claimed. In addition, this provision does not provide punitive damages. IIPA is not aware of a case in which these “additional damages” have been actually quantified and awarded, and there is nothing in South Africa’s law or practice to suggest that the purpose of the “additional damages” provision is to punish or deter infringement.

Contrary to the suggestions of some stakeholders, criminal damages in South Africa are ineffective for deterring infringement. Due to scarce resources, criminal prosecutions are selective, and focused on major piracy operations. Thus, rights holders cannot primarily rely on criminal enforcement to enforce their rights. Furthermore, the same burden for establishing damages due to infringement applies in both the criminal and civil context. Moreover, the burden of proof in criminal cases is higher, requiring prosecutors to prove knowledge of guilt. The vague and open-ended exceptions in the proposed legislation would make proving knowledge of guilt even more difficult because defendants could point to the lack of clarity regarding the scope of the protection.

Contrary to the assertion of at least one stakeholder, Section 300 of the Criminal Procedure Act is not a form of punitive damages, nor is it effective. Because the damages permitted under Section 300 are intended to reimburse a rights holder for the loss or damages suffered, courts will only issue such an order under limited circumstances, including that the accused has the means to pay the compensation. Moreover, damages issued under section 300 have the effect of a civil judgement, which means that rights holders must take further actions in order to enforce payment of the damages.

V. Problematic Provisions Limiting the Term of Assignments to 25 Years Are Significantly Different Than U.S. Law on Termination of Transfers

The Government of South Africa compares the provisions in the bills limiting the term of assignment to 25 years to the U.S. law on termination of transfers, but there are key differences. First, the South African provision broadly applies to all literary and musical works and sound recordings, and is automatic. Under U.S. law, by contrast, termination rights do not apply to works made for hire; as a result, many works, including most audiovisual works (with potentially dozens or hundreds of contributing “authors”), or similar multiple-contributor works (sound recordings, video games etc.) cannot be terminated. This gives certainty to the producers of those works of their ability to exploit the works without clearances from the numerous contributors. Second, termination under U.S. law is subject to notice (up to ten years prior to termination) and exceptions

allowing derivative works to continue to be exploited.<sup>16</sup> The South African bill has neither of these provisions. Third, the U.S. termination right applies only where the grant was made by the original author, not by successors or assignees. The South African proposal includes no such limitation; it is broadly applicable to all literary and musical works and sound recordings.

South Africa's proposed provision, an automatic reversion of rights after 25 years, will cut off all ability to exploit works after that period of time absent re-negotiation, in essence shortening the exploitation for works with multiple contributors such as films, TV programs, video games, musical recordings and other works. IIPA is not aware of any provisions that would enable the continued exploitation of works for authors or co-authors who cannot be located (especially for successors of those who are deceased). This will effectively shorten all distribution or other assignments of rights in South Africa to 25 years. For example, in the highly likely event that a producer of a sound recording is unable to locate one or more performers in order to clear the rights in a recording after the 25-year assignment period, that recording would be rendered unusable. Considering the number of performers often contributing to a single track, there is a high likelihood that most sound recordings will become unusable. This would cause serious harm to the recording industry, performers, and other creators in South Africa because a major incentive for investment would be removed through the effective halving of the term of assignment of recordings from 50 years to 25 years.

#### VI. Problems With the Bills Cannot Be Fixed By Regulations

While the Government of South Africa and certain stakeholders have indicated that the extensive problems with the bills outlined by IIPA could be fixed through regulations, this is not the case. Regulations in South Africa cannot cure fundamental problems with the bills because regulations must be confined to the limits of the law itself, and cannot fundamentally alter primary legislation.<sup>17</sup> The number of provisions in the bills that require future regulation are very limited, and do not relate to the vast majority of the problematic issues raised by IIPA in this and previous submissions. The only solution here is for the Government of South Africa to reset its copyright reform process and redraft the bills, this time taking into account a broader range of stakeholder input, including from local artists and creators.

#### VII. Additional Issues Raised By "South African Legal Expert" Andrew Rens

A submission by Andrew Rens, who describes himself as a "South African Legal Expert," raises a number of issues with the petition. Some of these issues are addressed above and in IIPA's

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<sup>16</sup>For a grant of rights that took place on or after January 1, 1978, the termination right may only be exercised within five years beginning at the end of 35 years from the date of the copyright grant. The notice must be properly served within the time period of ten years before the five-year termination period begins until two years before the period ends. See 17 USC § 203.

<sup>17</sup>See *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC)* in which the South Africa Constitutional Court held that while "detailed provisions" are necessary to implement laws, "[t]here is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body. . ."

prior submissions and testimony, including the proposed exceptions and remedies for copyright infringement.

In addition, Rens suggests that Section 8A of the CAB, which regulates the remuneration terms of private contractual agreements between performers and copyright owners, may allow some flexibility for remuneration, including lump sum payments. But Section 8A on its face states that performers have a right to royalties, apparently removing the possibility of lump-sum payments. Rens' suggestion is based on his speculation that a certain provision in the Performers Protection Act, as amended by the PPAB, may supersede the language in Section 8A, and further speculation regarding how the undefined phrase "equitable remuneration" could be interpreted. These assumptions find no support in the text of the bill.

Contributing to the uncertainty surrounding this provision, Section 8A was never published for consultation, even though it proposes significant interference into private contractual relationships. Rather than effectively rebutting IIPA's criticism of this provision, Rens's speculation underscores that this fundamentally flawed legislation is riddled with inconsistencies and ambiguities and should not be passed into law.

Ignoring the obvious inconsistencies and ambiguities with the bills, Rens dismisses concerns with the contractual override provision in Section 39B, stating it merely "prohibits contractual terms that seek to vitiate copyright legislation." But this provision is a significant problem because it prohibits parties from determining contractual arrangements to mitigate the harm caused by the ambiguities and uncertainties in the bills. The provision also presents a significant risk of compelling contractual parties to follow rigid standardized contractual terms, thereby inhibiting a competitive and innovative marketplace, and requiring terms that may be overly onerous and disadvantageous to the contractual parties in light of the specific circumstances.

Rens also dismisses IIPA's concerns with the proposed sweeping ministerial powers to set contractual terms as an "appropriate method of implementing the provisions of TRIPS." Yet such a far-reaching intrusion into contractual relations cannot be justified, and would be a significant trade barrier for the U.S. copyright industries in South Africa. Moreover, these broad restrictions on contractual arrangements are effectively limitations on the exercise of exclusive rights that are not limited to "certain 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." As such, these provisions are incompatible with the TRIPS Agreement.

Regarding TPMs, Rens wrongly asserts that the WCT requires only prohibitions against acts of circumvention, and that prohibitions against trafficking in devices or circumvention technologies is a "supplementary measure" not required by the Treaty. Both the WCT and WPPT require "adequate legal protection and effective legal remedies against the circumvention of effective technological measures."<sup>18</sup> Any such adequate protection and effective legal remedies against circumvention must include not only prohibitions against acts of circumvention but also prohibitions against trafficking in circumvention devices and technologies, as is found in U.S.

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<sup>18</sup>See WCT Article 11 and WPPT Article 18.

law.<sup>19</sup> In addition, Rens apparently does not understand that adequate protections against circumvention of TPMs, as required by the WIPO Internet Treaties, must be independent of protections for the underlying copyrighted work. Permitting exceptions to the protections against circumvention of TPMs for any use that can be shown to be possibly non-infringing (as South Africa's proposed legislation would do) would effectively eliminate the need for TPMs protections altogether. Accordingly, any exception to TPMs protections must be considered separately to ensure it is appropriately narrow.

#### VIII. Conclusion

For the reasons stated in IIPA's petition, testimony, and supporting submissions, IIPA requests that through the GSP review, the U.S. Government continue to send a clear message that the proposed bills are fatally flawed and work with the South African Government to remedy the deficiencies in South Africa's legal and enforcement regimes, including by redrafting the bills to address the deficiencies IIPA has outlined in this and previous submissions. If, at the conclusion of this review, requisite improvements are not made by the Government of South Africa, IIPA requests that the U.S. Government suspend or withdraw GSP benefits to South Africa, in whole or in part.

Respectfully submitted,

*/Kevin M. Rosenbaum/*

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<sup>19</sup>To implement the WIPO Internet Treaties, the United States enacted provisions prohibiting both acts of circumvention and trafficking in circumvention devices and technologies. See 17 U.S.C. 1201.

**ATTACHMENT: SOUTH AFRICA**  
**International Intellectual Property Alliance (IIPA)**  
**2020 Special 301 Report on Copyright Protection and Enforcement**

**Special 301 Recommendation:** IIPA recommends that USTR place South Africa on the Priority Watch List in 2020.<sup>1</sup> IIPA further recommends that through the Generalized System of Preferences (GSP) review, the U.S. Government continue to send a clear message that the Copyright Amendment Bill (CAB) and the Performers' Protection Amendment Bill (PPAB) are fatally flawed, and work with the South African Government to remedy the deficiencies in South Africa's legal and enforcement regimes, including by redrafting the bills to address the serious concerns detailed below and in IIPA's previous submissions. If, at the conclusion of the review, South Africa has not made requisite improvements, the U.S. Government should suspend or withdraw GSP benefits to South Africa, in whole or in part.

**Executive Summary:** South Africa's current copyright protection and enforcement framework is not up to the challenges of the digital age. New technologies are providing South Africa's consumers with increasing access to legitimate creative content and exciting opportunities for the growth of the copyright industries and all creators. Unfortunately South Africa's inadequate response to growing piracy enabled by these same technologies threatens to undermine this progress. An important emerging market and a dominant economy in sub-Saharan Africa, South Africa is uniquely positioned to demonstrate how a modern copyright regime can contribute to the growth of creative industries in an era of rapid digital and mobile expansion throughout the country and the region. It is now more important than ever to maintain and expand proper incentives for investment in the creation of original material—motion pictures, music, video games, books and journals in all formats—by ensuring that rights holders enjoy, in law and practice, exclusive rights that enable them to securely disseminate their content and develop new legitimate services. IIPA is encouraged that South Africa's government has stated its commitment to protecting intellectual property and its desire to bring its laws into compliance with international treaties and commitments.

IIPA is seriously concerned, however, about two bills that are sitting on the President's desk, which are not only inconsistent with the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)), but, if enacted, would also violate South Africa's obligations under the TRIPS Agreement, potentially violate South Africa's Constitution, and move South Africa even further away from international norms. Since 2015, South Africa has embarked on a project to update and amend its Copyright Act and Performers' Protection Act, which, after numerous revisions, resulted in two fundamentally problematic bills—the CAB and the PPAB. These bills raise many concerns, including that they undermine the potential of the modern marketplace because they fail to establish a clear legal framework—particularly in the digital arena where the potential for growth is most evident. Many of these defects stem from an approach that focuses on government interference in negotiations and the distribution of revenue from licensing, rather than on laying a foundation for a vibrant free market in creative materials. A number of troubling issues in the bills have clear potential to drive a formal

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<sup>1</sup>For more details on South Africa's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of South Africa's Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.

challenge in the Constitutional Court. Among these, the bills' inadequate protections for trade of copyrighted works and sound recordings in the digital environment would render South Africa's law incompatible with the very standards the government has stated an intention to implement.

Considerable work remains to make the bills acceptable and frankly, implementable in practice, and the full extent of the clarifications needed to establish a robust system of copyright incentives through amendments to the Copyright Act go beyond those raised in this report. The bills require redrafting, not only to address their deficiencies as outlined by multiple stakeholders, but also to reduce ambiguity and thereby establish greater certainty in the law for rights holders and users alike. As currently drafted, the bills would put South African creators and artists at a serious disadvantage relative to their counterparts in other countries. Considering the importance of the task of modernizing South Africa's Copyright Act, and the degree of concern raised by the creative industries with the current bills, IIPA recommends that the U.S. Government continue to send a clear message that the proposed bills are fundamentally flawed and should be returned to Parliament due to fundamental reservations regarding their constitutionality (as has been raised by local creators and copyright owners) for redrafting to address the concerns of *all* stakeholders and ensure the provisions comply with international agreements.

### **PRIORITY ACTIONS REQUESTED IN 2020**

- Redraft the CAB and the PPAB to make them implementable, ensure compatibility with international agreements and commitments, and avoid undermining the existing commercial practices of the creative industries.
- Engage in effective enforcement against online piracy, including by appointing cybercrime investigators and developing a cybercrime security hub recognizing copyright as a priority.
- Ratify and fully implement the WIPO Internet Treaties.
- Monitor implementation of 4G and 5G networks to ensure it does not lead to a higher level of piracy, and improve education and increase enforcement commensurate to the increased threat.

### **COPYRIGHT LAW IN SOUTH AFRICA**

Significant reforms are needed to South Africa's Copyright Law and Performers' Protection Act in order to bring the country's laws into compliance with international agreements, including TRIPS, and the WIPO Internet Treaties.<sup>2</sup>

In 2017, a CAB was introduced, which was preceded by a PPAB, intended to bring South Africa's laws into compliance with international agreements. However, as IIPA detailed in extensive comments to the Portfolio Committee of the National Assembly of the South African Parliament, these bills fell far short of international norms for the protection of copyrighted works in the digital era. Following criticism from many local and foreign rights holder groups, including IIPA, the Portfolio Committee undertook a revision of the bills, culminating at the end of 2018 in revised versions of the CAB and the PPAB.

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<sup>2</sup>South Africa's Cabinet recently approved the country's accession to the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the "WIPO Internet Treaties"), and the Beijing Treaty.

Unfortunately, the revisions of the CAB and the PPAB addressed only a few discrete problems; many of the most problematic provisions for rights holders carried over to the new versions. Moreover, even more troubling provisions were introduced in the new versions. This process transpired without adequate consultation with the public. Where opportunity for public consultations was provided, comments submitted by rights holders apparently were disregarded entirely. These two highly problematic bills were adopted by the National Assembly in December 2018, and by the National Council of the Provinces in March 2019. At the time of this filing, the bills continue to await Presidential assent.

While there seems to be some consideration of the bills in process at the Presidential level, the bills contain many provisions that lack clarity, risk major negative disruption of the creative industries, pose significant harm to the creators they purport to protect, and fall far short of needed reforms. Major issues of immediate and primary concern to the copyright industries are the following:

- The bills would severely restrict the freedom of rights holders to contract in the open market, which is a key factor for the healthy growth of the entire creative sector. These restrictions would fundamentally impair the value of copyrighted materials by depriving rights holders of the ability to license and otherwise derive value from their copyrighted works and sound recordings. For example, both the CAB and the PPAB limit certain assignments of rights to a maximum of 25 years, and both bills provide ministerial powers to set standard and compulsory contractual terms for contracts covering seemingly any transfer or use of rights.
- The bills would create an overbroad amalgamation of copyright exceptions that includes a more expansive version of the U.S. “fair use” rubric appended to a proliferation of extremely open-ended new exceptions and limitations to copyright protection (on top of “fair dealing” provisions), resulting in a vast and unclear thicket of exceptions and limitations.
- The bills would overly regulate the relationship between creative parties, including mandating the mode of remuneration for audiovisual performers, which would undermine the digital marketplace and severely limit the ability of rights holders to exercise exclusive rights in their copyrighted works and sound recordings, rather than providing a robust legal framework for the protection of creative works within which private parties could freely negotiate the terms of their relationships.
- The bills would not provide adequate criminal and civil remedies for infringement, including online piracy, and would deny rights holders the ability to effectively enforce their rights against infringers, thus thwarting the development of legitimate markets for copyrighted works and sound recordings.
- The bills’ provisions on technological protection measures are inadequate, and overbroad exceptions to prohibitions on the circumvention of such measures will further impinge on the ability of legitimate markets for copyrighted materials to launch and develop.

These provisions are inconsistent with South Africa’s international obligations, far exceeding the scope of exceptions and limitations permitted under the World Trade Organization Trade-Related Aspects of Intellectual Property Rights Agreement (the “WTO TRIPS Agreement”) (Article 13) and the Berne Convention (Article 9). Moreover, aspects of both bills are incompatible with the WIPO Internet Treaties.

## **2018 COPYRIGHT AMENDMENT BILL (CAB) AND PERFORMERS’ PROTECTION AMENDMENT BILL (PPAB)**

Beyond their individual failings, the two bills suffer from fundamental systemic failings that are not amenable to discrete fixes. Rather than incentivize new creative output, many of the proposals in the CAB and the PPAB are based on a false premise, i.e., that there is a fixed market for works and that the government’s role is to regulate the internal relationships of the creative community, and their authorized distributors. This premise is incorrect, and will instead result in a stagnation of South Africa’s cultural community. Without a fundamental reset of its copyright reform process, South Africa will be taking a step backward in its effort to strengthen copyright incentives. South Africa would be better served by providing clear and unencumbered rights, and minimal restrictions on contractual freedoms, to allow the creative communities to increase investment to meet the growing demand for creative works of all kinds, in all formats, at all price points. This is important particularly in the context of the President’s clear objective to improve levels of foreign direct investment, as well as the imperative to improve the lives and legacies of South Africa’s own artists and creators.

It is important to note that the CAB and PPAB are extremely broad-reaching documents. IIPA’s comments in this filing are not comprehensive, but instead highlight some of the major concerns for the U.S. copyright industries. It should also be noted that the bills, when read together, are incoherent. For example, Section 3B of the PPAB purports to set out the nature of copyright in sound recordings, which is already enumerated in the Copyright Act, as amended by the CAB. Thus, in addition to the very significant flaws in the bills described below, from a technical perspective, the bills are inadequate and risk introducing widespread uncertainty into South African law.

### ***1. Severe Intrusions into Contractual Freedom***

Several provisions in the CAB and the PPAB constitute severe intrusions into private contractual relations. As such, these provisions restrict how private parties can collaborate to facilitate the public’s access to copyrighted works, threatening the market value of books, films, sound recordings, musical works, music videos, video games, and other works created by South African creators.

**A. Limitation on term of assignments:** Sections 22(b)(3) of the CAB and 3A(3)(c) of the PPAB limit the term of assignments for literary and musical works and performers’ rights in sound recordings, respectively, to a maximum term of 25 years from the date of agreement, and in the case of performers’ rights in sound recordings, provide for automatic reversion of rights to the performer after that period. These provisions raise serious concerns, including that Section 3A of the PPAB, by proposing to limit the term of contracts between performers and copyright owners to a maximum term of 25 years, would detrimentally disrupt the well-established practices of the

recording industry in South Africa for the creation and use of sound recordings. This would risk serious harm to the recording industry, performers, and other creators in South Africa because a major incentive for investment would be removed through the effective halving of the term of assignment of recordings from 50 years to 25 years.

In effect, these provisions would make it impossible to clear rights in many works after 25 years, rendering these works unusable, with no one able to receive any revenues from them. Sound recordings typically involve performances from a large number of performers. The copyright owner of a sound recording (i.e., the record company) will often have a long-term relationship with the featured artist, but is far less likely to have such a relationship with, for example, a performer who entered into a one-off agreement to provide the backing vocals or other musical performances in the sound recording. Under the PPAB, each such performer would have rights that, according to Section 3A, would be transferred to the copyright owner (the record company in most cases) to enable the copyright owner to license the use of the sound recording by third parties. Yet Section 3A provides that the record company would cease to have those rights after 25 years, meaning that the record company would need to seek out thousands of performers (with whom, in the case of session or “backing” musicians, the company often has no long-term relationship) to obtain their mutual consent to an extension of the 25-year term. The inability to locate just one session musician involved in a sound recording would render the sound recording unusable, ending the revenues that come to record companies, performers, authors, or publishers from the exploitation of that recording. That cannot be the intent of this legislation.

Section 3A would have a broader negative effect on performers. Introducing new artists to the market and promoting their careers require large upfront investment from record companies, with no certainty to when, if ever, the investment will be recouped. Limiting the term of agreements between record companies and artists would increase the economic risk even further and would likely reduce the number of investments by record companies in new talent. The provision requires urgent reconsideration to avoid the serious harm that it risks causing to all participants in the South African music industry. Moreover, although audiovisual works are now excluded from this provision, its enactment would nevertheless increase legal uncertainty and introduce a disincentive to the acquisition of literary properties by film companies for adaptation into film and TV. This would ultimately inhibit financing of film projects and would jeopardize film production in South Africa.

**B. Sweeping ministerial powers to set contractual terms:** Section 39 of the CAB and Section 3A(3)(a) of the PPAB create ministerial powers to prescribe “compulsory and standard contractual terms,” including setting royalty rates regarding “uses” of copyrighted works and across any form of agreement covering performers’ rights. These provisions are not only unjustified, but are seemingly premised on a lack of understanding of the myriad of contractual relationships that underpin the creation of copyright content, which often comprises many different rights from various parties, and which are licensed for use by third parties in a variety of ways. Empowering ministers to impose contractual terms risks imposing a degree of rigidity into the South African creative economy that will stifle investment and innovation.

These provisions would unfortunately restrict the flexibility in transfer agreements between sound recording performers and producers. That flexibility is needed to address the varying relationships between performers and copyright owners. For example, the relationship and

contractual agreement between the featured artist and the copyright owner will differ substantially from that between a performer appearing as a one-off session musician and the copyright owner. Neither performers nor copyright owners would benefit from prescribed contracts, which would inevitably fail to meet the differing needs of performers depending on their role in a sound recording. There is simply no evidence of a market failure that would justify this extensive interference into contractual relations. Furthermore, the proposals would impose unwarranted contractual formalities on all contractual partners.

**C. Mandating the mode of remuneration for audiovisual performers:** The CAB includes a proposal (Section 8A) to regulate the remuneration terms of private contractual agreements between performers and copyright owners. Even though it proposes a significant interference into private contractual arrangements, to the particular detriment of certain performers, Section 8A was never published for consultation (except for Section 8A(6)). The result is a proposal that would substantially undermine the economics and commercial practices concerning the production of audiovisual works. While Section 8A may be intended to provide appropriate remuneration to performers, in practice, the proposal would cause substantial harm to a large category of the performers who perform background roles.

Audiovisual works are comprised of performances by lead/featured performers and extra/non-featured performers. Lead or featured artists are remunerated in accordance with the terms they have negotiated with the producer, and these terms almost invariably are on a royalty basis (in addition to lump-sum advances). Extra/non-featured performers, on the other hand, are remunerated by way of lump-sum payments, typically by way of one-off contracts, rather than by way of longer-term partnerships with producers.

Unfortunately, Section 8A appears to propose removing the possibility of lump-sum payments and replacing them with royalty payments. Rather than benefitting performers, this provision would in fact result in many performers, who otherwise would receive remuneration from performing in an audiovisual work, receiving little or nothing from the exploitations of the work. This is because many creative projects are loss-making for the producer. As a consequence of proposed Section 8A, extra/non-featured performers would no longer enjoy being paid a lump sum immediately in return for their one-off performances and would instead have to wait to be remunerated on a royalty basis, which would only happen if the work in question actually succeeded in generating revenues. The current commercial practices avoid that outcome by paying extra/non-featured performers on a lump sum basis, irrespective of whether the works in which they perform succeed or not. This provision also risks a direct negative impact on investments in South African productions and a reduction in the number of South African “background” performers engaged to perform in audiovisual works.

**D. Prohibition on contractual override:** The risks posed by the CAB are further compounded by the prohibition on contractual override in Section 39B(1), which prohibits any contractual terms that deviate from the provisions of the bill, thereby removing the possibility for parties to determine their own contractual arrangements in a manner that avoids the harm caused by certain provisions of the bill.

## **2. *Inadequate Protection of Performers' Rights***

South Africa's intention to ratify the WIPO Internet Treaties is welcome and would represent a significant step towards establishing an appropriate legal framework. Regrettably, a number of provisions in the bills, including the level of protection afforded to certain performers' rights, are incompatible with the treaties.

Section 5 of the PPAB sets out the rights granted to performers. In the PPAB, performers' rights are also enumerated under Section 3. The amendments to Section 5 are therefore, in part, duplicative of Section 3. More importantly, though, Section 5(1)(b) downgrades the performers' exclusive rights of distribution and rental to mere remuneration rights, a proposal that would be incompatible with WPPT (and the WIPO Beijing Treaty), which do not permit these rights to be diminished to the level of mere remuneration rights. Furthermore, providing mere remuneration rights with respect to distribution and rental, subject to rate-setting by the Tribunal (Section 5(3)(b)), would prejudicially devalue these performers' rights. Experience in South Africa, and internationally, shows that Tribunal-set remuneration falls well below the commercial value of the rights licensed.

Section 5(1)(b) would also substantially and detrimentally disrupt the sale and rental of sound recordings and audiovisual works because one set of rights would be subject to private negotiation (the producers' rights), and the performers' rights would ultimately be subject to Tribunal rate-setting. The consequence would be a transfer of value from those who create and invest in recorded performances to the licensees of those performances, the latter likely ending up paying less, resulting in reduced revenues for producers to invest in South African performers.

## **3. *Fair Use***

The CAB drastically expands the exceptions and limitations to copyright in South Africa's law for, among other things, educational and academic uses and uses by libraries, galleries and museums. It also allows for perpetual and unassignable claims to royalties by authors, composers, artists and filmmakers (with retrospective effect); unlimited parallel importation; and the override of contracts. The broad exceptions, which are duplicated in the PPAB, will create a disproportionate imbalance against creators and producers of copyright-protected works and undermine the predictability needed to support a robust marketplace for copyrighted works. Additionally, they appear to far exceed the scope of exceptions and limitations permitted under South Africa's international obligations, namely under Article 13 of the WTO TRIPS Agreement (and Article 9 of the Berne Convention and the corresponding provisions in the WIPO Internet Treaties). The government should be guided by a 2016 High Court decision that firmly rejected an expansive reading of South Africa's provisions on exceptions and limitations, rejecting arguments that copyright stifled freedom of expression, and holding that copyright is a constitutionally protected property interest. The case rejected any interpretation of the "public interest" that would serve to constrain copyright protection.<sup>3</sup>

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<sup>3</sup>See *South African Broadcasting Corporation v. Via Vollenhoven & Appollis Independent, et al.*, Case No. 13/23293, The High Court of South Africa, Gauteng Local Division, Johannesburg (Sept. 2, 2016) <http://www.saflii.org/za/za/cases/ZAGPJHC/2016/228.pdf>.

While it is true the proposed “fair use” provision resembles certain aspects of the fair use statute in U.S. law, it is inaccurate to contend, as some have suggested, that South Africa is proposing to adopt U.S. fair use. South Africa’s proposed broader fair use provision, along with the other proposed exceptions and limitations to copyright protection, are blatantly inconsistent with the three-step test, which is the internationally-recognized standard that confines the scope of copyright exceptions and limitations,<sup>4</sup> for the following reasons:

- First, South Africa lacks a deep and rich body of case law that, in the United States, helps to mitigate the inherent uncertainty of the scope or applicability of the fair use exception. Without the foundation of a well-developed body of case law, South Africa’s untested broad fair use doctrine would only result in uncertainty for both rights holders and users on the parameters of permissible uses (since U.S. fair use is determined on a fact-intensive case-by-case basis).<sup>5</sup> Compounding this shortcoming is that high legal fees and protracted timeframes for cases in South Africa will deter and undermine efforts by rights holders to access the courts in hopes of confining this broad exception. The International Center for Law & Economics, analyzing whether the U.S. should require trading partners to adopt U.S.-style fair use, concluded that “the wholesale importation of ‘fair use’ into other jurisdictions without appropriate restraints may not result in a simple extension of the restrained and clearly elaborated fair use principles that exist in the U.S., but, rather, something completely different, possibly even a system untethered from economics and established legal precedents.”<sup>6</sup>
- Second, the South Africa proposal includes language even broader than the U.S. fair use statute, which further heightens the uncertainty discussed above, and the risk that an unacceptably wide range of uses in South Africa will be considered “fair” and non-infringing. For example, the proposal includes “ensuring proper performance of public administration” as among the purposes to which fair use is applicable. Extending fair use to such undefined access and use purposes that are not included in the U.S. statute adds to the uncertainty of how South Africa’s judges will apply fair use, and the risk that they will apply the fair use doctrine well beyond the scope of its application in the United States. In addition, the South Africa proposal requires that “all relevant factors shall be taken into account, including but not limited to” the four factors imported from U.S. law. This dictate to consider “all relevant factors,” which is not affirmatively stated in U.S. law, could similarly result in a broader range of uses in South Africa considered “fair” than those permitted under U.S. law. Therefore, rather than proposing to adopt U.S. fair use, South Africa has proposed a new copyright exception, borrowing certain statutory language from the United States, while adding new and broader language, and without incorporating the corpus of U.S. jurisprudence that is integral to defining the scope of U.S. fair use and its interpretation.

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<sup>4</sup>See, e.g., Article 13 of the TRIPS Agreement and Article 9 of the Berne Convention.

<sup>5</sup>Although a handful of countries have recently enacted fair use provisions, IIPA is not aware of any significant case law that has been developed under the fair use statutes in any of these countries.

<sup>6</sup>See International Center for Law & Economics *Dangerous Exception: The Detrimental Effects of Including ‘Fair Use’ Copyright Exceptions in Free Trade Agreements*, 15 (2015), [http://laweconcenter.org/images/articles/dangerous\\_exception\\_final.pdf](http://laweconcenter.org/images/articles/dangerous_exception_final.pdf).

- Third, the proposal retains South Africa’s existing “fair dealing” system, while expanding the impact of fair dealing exceptions by effectively removing the limiting standard of “fair practice.” It also introduces a number of extremely broad, new exceptions and limitations to copyright protection, all of which have the potential to adversely impact the legitimate market for educational texts, locally distributed works, and online works in general. A 2017 study by PricewaterhouseCoopers looked at the impact of these broad exceptions on the South African publishing industry, and predicted “significant negative consequences” would result from the adoption of the proposed fair use provision and the other broad exceptions.<sup>7</sup> Taken alone, the “fair use” and the “fair dealing” aspects of the proposed bill are each too broad. Taken together, the proposed “hybrid” model creates an unprecedented mash-up of exceptions and limitations that will deny rights holders fundamental protections that enable licensing of their copyrighted works and sound recordings, and, because the provision is drafted so unclearly, will also deny users certainty regarding what works and what uses are permissible without a license.
- Fourth, the uncertainty that will be caused by the proposed hybrid model is particularly problematic in South Africa because its legal system lacks statutory and punitive damages, which rights holders in the U.S. rely on to deter and remedy infringement, and enforcement in South Africa has been historically inadequate. As a result, bad actors in South Africa would be undeterred from taking advantage of the uncertainty created by these exceptions to infringe copyrights. A copyright system that consists of open-ended and unclear exceptions, weak affirmative rights, and non-deterrent enforcement is the archetype for inadequate and ineffective protection of intellectual property rights.
- Fifth, the risks posed by the fair use provision, and the other unclear and very broad exceptions discussed above, are further compounded by the prohibition on contractual override in Section 39B(1) (discussed below), which renders unenforceable any contractual term that prevents or restricts a use of a work or sound recording that would not infringe copyright under the Copyright Act (as amended by the CAB).

For these reasons, if the proposed legislation is enacted, South Africa’s legal framework for exceptions and limitations to copyright protection would clearly violate South Africa’s international obligations, would be inconsistent with international treaties it has stated an intent to join, and would further erode the already inadequate level of copyright protection in the country.

#### **4. *Exceptions and Limitations***

In addition to the introduction of “fair use” into South African law, the following new or expanded statutory exceptions contained in the CAB are likewise of concern:

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<sup>7</sup>See *The expected impact of the ‘fair use’ provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry*, available at <http://www.publishsa.co.za/file/1501662149slp-pwcreportonthecopyrightbill2017.pdf>. The study notes that a 33% weighted average decline in sales would likely occur, with concomitant reductions in GDP, VAT, and corporate tax revenue collections. Some 89% of publishers surveyed noted that the CAB, if adopted in its current form, would negatively impact their operations, likely resulting in retrenchments and possible business closures.

**A.** Section 12B(1)(i) and 12B(2) allow individuals to make copies for “personal uses.” These broad exceptions in effect allow for private copying without any remuneration for rights holders, which is out of step with international norms (and has in fact been challenged successfully, for example, in EU courts in relation to a proposed UK exception). Furthermore, such private copying exceptions are typically accompanied by a remuneration system by which rights holders are compensated for the private copying of their works. The proposed exception also permits copying in an “electronic storage medium,” which risks undermining existing licensing practices with regard to digital content services.

**B.** Section 12B(1)(f) grants an exception for making translations for the purpose of “giving or receiving instruction.” The scope of this proposed exception could be interpreted too broadly, particularly as it allows for communication to the public, albeit for non-commercial purposes. Though the bill attempts to limit the scope by defining its purpose, it could undermine the author’s translation rights, which is a significant market for authors and their publishers, and one for which just compensation is warranted.

**C.** Section 12C provides an exception for temporary reproduction of a work “to enable a transmission of a work in a network between third parties by an intermediary or any other lawful use of work; or . . . to adapt the work to allow use on different technological devices . . . as long as there is no independent, economic significance.” This provision also allows copying for *reformatting*, where such copies are an integral and essential part of a technical process, if the purpose of those copies or adaptations is to enable a transmission. Such language could hinder efforts to work with online intermediaries to stop piracy. If any such exception is to be included, IIPA recommends that the word “lawful” be replaced by “authorized,” so that this provision meets its principal objective (ensuring that incidental copies made in the course of a licensed use does not give rise to separate liability) without frustrating enforcement efforts where the “incidental” reproduction within the jurisdiction of South Africa is the only justiciable act in a claim against an unauthorized transmission.

**D.** Section 12B(1)(a) provides a broad and circular exception for quotation, permitting any quotation provided that “the extent thereof shall not exceed the extent reasonably justified by the purpose,” but without enumerating the permitted purposes such as, for example, criticism and review. The result is an exception that appears to permit quotations for any purpose whatsoever, which risks causing substantial harm to rights holders and renders the proposed exception incompatible with the internationally-recognized three-step test for copyright exceptions and limitations.

**E.** Section 12D permits the copying of works, recordings, and broadcasts for educational purposes with very few limitations. Subsection 12D(7)(a) on open access for “scientific or other contributions” is overreaching and will likely undermine the rights of authors and publishers and deny authors academic freedom. Subsection 12D(4)(c) specifically authorizes the copying of entire textbooks under certain conditions, even those that are available for authorized purchase or licensing, if the price is deemed not to be “reasonably related to that normally charged in the Republic for comparable works.” The impact of these provisions on normal exploitation of works for educational markets is likely to far exceed what is permitted under international standards.

F. Section 19D provides an exception for persons with disabilities, which is defined as, essentially, disabilities that relate to the ability to read books. This provision would benefit from tighter drafting. While South Africa is not a signatory to the Marrakesh VIP Treaty, it would be prudent to bring provisions designed to facilitate access for visually impaired persons in line with the Treaty by including the requirement that the exception may apply only to authorized entities.

## 5. *Exclusive Rights of ‘Communication to the Public’ and ‘Making Available’*

The CAB would add Section 9(f) to the Copyright Act, confirming that sound recording producers have the exclusive making available right set out in WPPT Article 14. This is a positive clarification, as this right underpins the digital music industry. However, the wording of proposed Section 9(e) regarding sound recording producers’ exclusive right of communication to the public, omits an express reference to “public performance,” as provided for in the WPPT definition of “communication to the public,” which explicitly “includes making the sounds or representations of sounds fixed in a phonogram audible to the public.” To avoid ambiguity in the legal framework, we submit that the new Section 9(e) should expressly refer to public performance. (Existing Section 9(e) in the Copyright Act provides sound recording producers with an exclusive right of communication to the public.)

Furthermore, the meaning of proposed Section 9A(aA) (and equivalent provisions in relation to exploitation of other categories of works, and in the PPAB with respect to performers’ rights) is not clear. While it is understood that these provisions are intended to ensure accurate reporting of authorized uses of works, to the extent they could be interpreted as providing a legal license for such uses, they would be wholly incompatible with the WIPO Internet Treaties, while undermining the economic feasibility of South African creative industries. These provisions should therefore be clarified to avoid any such confusion.

## 6. *Technological Protection Measures*

Technological protection measures (TPMs) are vital tools for the copyright-based sectors in the digital era, enabling creators and rights holders to offer consumers their desired content, at the time and in the manner of their choosing, while also empowering rights holders to explore new markets opened up by current and emerging technologies. It is welcome that the CAB introduces provisions (and the PPAB incorporates them by reference) on TPMs. Unfortunately these provisions are completely inadequate, and therefore fall short of the requirement of Article 18 of WPPT and Article 11 of the WCT that contracting parties provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures.”

This issue is of paramount importance when considering the central role of digital distribution to the current and future economics of the creative industries. While the recorded music industry in South Africa is now predominantly a digital industry, piracy remains a serious obstacle to continued growth in this area. The introduction of adequate provisions on TPMs is therefore essential to protect against piracy and enable the development of new business models. Moreover, many film and television producers are seeking to respond to consumer demand by establishing online platforms to provide content to consumers or licensing film and television

programming to online services. TPMs are essential to the functionality of these platforms and to the licensing of this high-value content.

First, the definition of “technological protection measure” in Section 1(i) is problematic because it refers to technologies that prevent or restrict infringement, as opposed to technologies designed to have that effect or control access to copies of works. The plain reading of this definition would be that a TPM that is circumvented is therefore not one that prevents or restricts infringement (because it has not achieved that aim), and therefore the circumvention of it is not an infringement. The provision should be clarified to ensure that a protected TPM is one that effectively protects a right of a copyright owner in a work, or effectively controls access to a work. Furthermore, paragraph (b) of the definition should be removed; that a TPM may prevent access to a work for non-infringing purposes should not have the effect of removing its status as a TPM. This provision is furthermore inconsistent with the proposed exception of Section 28P(2)(a), which is intended to enable the user to seek assistance from the rights holder in gaining access to the work for a permitted use. As it stands, paragraph (b) of the definition is open to abuse and would provide a charter for hacking TPMs. In this respect, see also our comments below with respect to Section 28P(1)(a).

Second, we also recommend that the definition of “technological protection measure circumvention device” be amended to include devices that (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent TPMs. This would ensure that the definition encompasses a broader range of harmful TPM circumvention devices, consistent with best international practices.

Finally, the exceptions in Section 28P regarding prohibited conduct with respect to TPMs (in Section 28O) are inadequately defined, therefore rendering them incompatible with the three-step test and substantially reducing the effectiveness of the protections afforded by Section 28O. Under Section 28P(1)(a) it would be extremely burdensome, if not impossible, for rights holders to establish that the use of a TPM circumvention device by a user was not to perform an act permitted by an exception.<sup>8</sup> Additionally, a provider of an unlawful circumvention technology could rely on Section 28P(1)(b) to claim it is acting lawfully merely by showing that the technology can be used to access a work to perform a permitted act. There is a substantial risk that this provision would be abused by those providing circumvention technologies for unlawful purposes. The same is true of Section 28P(2)(b), which permits assisting a user to circumvent TPMs after a “reasonable time.”

## **7. *Penalties for Infringement***

The CAB lacks appropriate remedies for infringement. The criminal fines provided will not assist copyright owners in recovering their losses from infringement, as the money does not go to them. Additionally, the bill does not provide copyright owners any additional civil remedies in cases of online infringement. Online piracy remains a persistent and growing threat to the creative industries. In 2016, nearly one billion films and TV shows were pirated. With regard to

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<sup>8</sup>In this regard, see the discussion above regarding the proposed “fair use” and other unclear and overly broad exceptions proposed in the bills, which would compound this problem.

worldwide streaming piracy, in 2018 there were an estimated 32.5 billion total visits to streaming piracy sites across both desktops and mobile devices.<sup>9</sup> Given the scope and scale of online piracy, there is a serious need for more mechanisms to combat infringement and further remedies for rights holders.

IIPA reiterates its recommendations to introduce enforcement provisions that are effective in the digital age and protect the online marketplace, such as: (1) ensuring online platforms do not make or allow unauthorized use of copyrighted works on their platforms; (2) preventing the unauthorized distribution of electronic formats of copyright works; (3) alleviating the burden of proof on claimants with respect to technical allegations in claims that are not in dispute; and (4) providing for appropriate and adequate damages for online infringement.

## **8. *Intellectual Property Tribunal***

Proposed amended Sections 29 through 29H would establish an Intellectual Property Tribunal to replace the existing Copyright Tribunal. The Tribunal's purpose would purportedly be to assist the public in the transition to the new copyright regime by resolving disputes and settling the law, particularly in relation to the proposed "fair use" and other exceptions. This assumes that the Tribunal will be staffed with qualified professionals, adequately resourced, and accessible to the parties it is intended to serve, though none of these things are required by the bill, nor do the proposed provisions sufficiently delineate the Tribunal's scope. Indeed, the CAB adds a Schedule 2 to Section 22(3), which would allow any person to apply to the Tribunal for a license to make a translation of a work, including broadcasts, or to reproduce and publish out of print additions for "instructional activities," with few limitations. To the extent that a revitalized Tribunal is to be considered, it would best serve the South African market with a much more limited mission, confined to copyright matters related to collective licensing.

Another significant concern with these provisions is the lack of benchmarks for how the Intellectual Property Tribunal should determine royalties in the event of a dispute between a collective licensing body and a user. It is imperative that the legislation set out that rates should be determined with reference to the value to the user of the rights in trade and the economic value of the service provided by the collective licensing body. Licensing rates should reflect market forces based on a willing buyer and a willing seller, and not by reference to a perceived and vague "public good." If creators are not rewarded at market-related rates, even the best copyright regime in the world will not achieve its objectives.

## **9. *Collective Management of Rights***

IIPA is concerned by proposed Section 22B, which may be understood to preclude a Collective Management Organization (CMO) representing, for example, both copyright owners and performers. Such an interpretation could prohibit the existing collaboration between performers and producers in the SAMPRO CMO, which administers needletime rights on behalf of both recording artists and record labels. This would be inconsistent with industry standards and contrary to the interests of those rights holders, the users (licensees), and the public at large. Joint sound recording producer and performer organizations operate in some 40 territories. By working

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<sup>9</sup>This estimate is based on SimilarWeb data, taking into account streaming sites with at least 10,000 copyright removal requests in the year according to the Google Transparency Report.

together on the licensing of rights, performers and producers save costs, increasing the proportion of revenues returned to them. This also reduces transaction costs to users, who can take a license from one CMO that covers both performers' and producers' rights. The provision should be clarified.

As a general point, it is also vital that any rates set by the Tribunal for performance rights (including "needletime") reflect the economic value of the use of recorded music in trade. This would be consistent with international good practice, which seeks to ensure that rights holders are remunerated adequately for the high value of recorded music.

#### ***10. State Intervention in Private Investments and the Public Domain***

The CAB contains concerning provisions that revert rights to the government in situations that could discourage investment, while unnecessarily diminishing the public domain. The proposed Section 5(2) transfers to the state all rights in works "funded by" or made under the direction or control of the state. This provision could be broadly interpreted to include works developed with a modicum of government involvement and may well diminish incentives for public-private cooperation in creative development.

#### ***11. Term of Protection***

At present, sound recordings only receive a term of protection of 50 years from the year in which the recording was first published, and for literary, musical, and artistic works, the term of protection is 50 years from the author's death or 50 years from publication if first published after the author's death. The CAB should be revised to include a proposal to extend the term of protection for copyrighted works and sound recordings to 70 years. This will provide greater incentives for the production of copyrighted works and sound recordings, and also provide producers with a stronger incentive to invest in the local recording industry, spurring economic growth, as well as tax revenues, and enabling producers to continue offering works and recordings to local consumers in updated and restored formats as those formats are developed.

### **MARKET ACCESS ISSUES IN SOUTH AFRICA**

**Broadcast Quota:** In 2014, the Independent Communications Authority of South Africa (ICASA) began the Review of Regulation on South African Local Content: Television and Radio. While the regulations have yet to be finalized, IIPA recommends that market forces, rather than discriminatory quota regimes, should be used to determine programming allocation.

**Online Value-Added Tax:** In May 2014, South Africa published regulations relating to registration and payment of value-added tax on all online transactions conducted in, from, or through South Africa. Currently levied at 15%, this onerous tax includes online selling of content such as films, TV series, games, and e-books.

### **COPYRIGHT PIRACY AND ENFORCEMENT ISSUES IN SOUTH AFRICA**

Creative sectors in South Africa are growing, but face the challenge of illegal competition. Improved infrastructure and accessibility to broadband internet has changed the landscape of copyright piracy in South Africa over the last decade. Physical piracy (e.g., sale of pirated CDs

and DVDs) is not as prevalent as it used to be, although the sale of USB drives and CDs containing pirated music, especially of local artists and gospel songs that are not available online, remains a concern. The dominant concern in South Africa, however, is increasing piracy in the digital environment.

**Internet Piracy:** Although South African consumers have increasing options available to stream legitimate creative content, online piracy continues to grow in South Africa. Growth in bandwidth speeds, coupled with lax controls over corporate and university bandwidth abuse, drive this piracy. South Africa's government recently agreed to open the spectrum paving the way for implementation of 4G and 5G networks. While this will boost distribution and consumption of legal content, without efforts to increase education and improve enforcement, it also will likely lead to higher levels of piracy. Easy access to pre-released film and television content through international torrent, linking, and cyberlocker sites also fuels online piracy in the country. As South Africa lacks injunctive relief for rights holders, consumer access to these infringing sites continues unabated. South Africa needs a legal framework that facilitates rights holders in addressing unauthorized use in all ways and supports consumer education and awareness programs.

**Piracy Devices and Apps:** Set-top boxes and memory sticks pre-loaded with infringing content or apps continue to grow in popularity in South Africa. Consumers use these devices to bypass subscription services or to consume unauthorized copyrighted content such as music, movies, TV series, or sporting events. These devices are most commonly sold to South African consumers online. There are some companies that develop devices pre-loaded with infringing music content for use in various stores, pubs, and taverns. In January 2018, the Durban Commercial Crime Unit executed a search and seizure warrant for IPTV boxes and Play Station peripherals after it received a filed complaint. Actions like this are helpful, but much more is needed to effectively combat the growing problem. There are a number of examples of enforcement and consumer education programs that are effective in other markets and could be replicated in South Africa. It is critical for South Africa to gain more understanding of these approaches and to work proactively with experts from the applicable creative industry sectors to localize and implement similar programs.

**Parallel Imports:** The Copyright Law does not protect against parallel imports. As a result, the motion picture industry has sought protection under the Film and Publications Act. Industry stakeholders are in the process of developing a MOU with the Film and Publication Board, which will focus on joint cooperation on enforcement against parallel imports.

**Enforcement:** South Africa's enforcement framework is not up to the challenge of its counterfeiting and piracy problems. Border enforcement is inadequate because of a lack of manpower, and lack of *ex officio* authority, which places a burden on the rights holder to file a complaint and institute costly proceedings to ensure that goods are seized and ultimately destroyed. Civil enforcement is not a practical option because a High Court application or action currently takes two to three years to be heard. And criminal enforcement suffers from a lack of specialized prosecutors and judges equipped to handle intellectual property cases. South Africa recently set up a specialized unit tasked with financial crimes and counterfeiting (known as the "HAWKS" unit), but it does not appear to be adequately resourced or have a suitable remit to take effective action against digital piracy. There is also a need for ongoing training and education for South Africa's police and customs officials to improve the process for detention and seizure of counterfeit and

pirated goods. In particular, law enforcement officials should better understand the arduous procedures and timelines in the Counterfeit Goods Act (which prohibits rights holders from getting involved in many of the required actions), including that non-compliance will result in the release of counterfeit and pirated goods back to the suspected infringer. The Electronic Communications and Transactions Act (ECTA), read with the Copyright Act, is the law that rights holders rely upon for title, site, and link take downs. The lack of cybercrime inspectors continues to limit the full potential of this law. To facilitate a healthy online ecosystem, South Africa should appoint cybercrime inspectors and develop a cybercrime security hub recognizing copyright as one of its priorities.

The enactment of the Films and Publications Amendment Act, No. 11 of 2019, which extends application of the Films and Publications Act to online distributors of publications, films, and video games, could be a positive step for enforcement because it establishes an Enforcement Committee for investigating and adjudicating cases of non-compliance with any provision of the Act. Once it enters into force, South Africa's government should implement the Act to improve enforcement against online piracy.

IIPA encourages South Africa to enact the Cybercrimes Bill, which was passed by the National Assembly in November 2018, and focuses on cyber-related crimes, including copyright infringement through peer-to-peer networks. Financial institutions that become aware their computer systems were involved in the commission of an offense are required to report the offense to the Police Service within 72 hours. It is unclear when this bill will be considered by the National Council of Provinces; but enactment of this Bill would provide additional enforcement tools to combat online infringement.

The Interpol Intellectual Property Crime Conference held recently in Cape Town provided local law enforcement with information on best practices and resources for combatting IP theft, including access to the Interpol Intellectual Property Investigators Crime College (IPIC). Law enforcement should take advantage of these initiatives, including the IPIC training courses to assist with local and regional training of new and existing units.

### **GENERALIZED SYSTEM OF PREFERENCES (GSP)**

In November 2019, USTR opened an investigation, including holding a public hearing in January 2020, to review country practices in South Africa regarding intellectual property rights and market access issues, and to determine whether South Africa still qualifies for beneficiary status under the GSP. Under the statute, the President of the United States must consider, in making GSP beneficiary determinations, “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.” IIPA requests that through the GSP review, the U.S. Government continue to send a clear message that the proposed CAB and PPAB are fatally flawed, and work with the South African Government to remedy the deficiencies in South Africa's legal and enforcement regimes, including by redrafting the bills to address the serious concerns detailed above and in IIPA's previous submissions. If, at the conclusion of the review, requisite improvements are not made by the Government of South Africa, IIPA requests that the U.S. Government suspend or withdraw GSP benefits to South Africa, in whole or in part.