

January 17, 2020

VIA REGULATIONS.GOV, DOCKET NO. USTR-2019-0020

Mr. Erland Herfindahl
Deputy Assistant U.S. Trade Representative
for the Generalized System of Preferences
Office of the United States Trade Representative
600 17th Street, NW
Washington, D.C. 20508

Re: SOUTH AFRICA Country Practice Review; Intellectual Property Rights and Market Access Practices; Notice of Intent to Testify and Written Comments 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)*

Dear Mr. Herfindahl and Members of the GSP Subcommittee:

The International Intellectual Property Alliance (IIPA) submits these written comments in response to USTR's "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." As you know, IIPA was the original petitioner of the GSP review of South Africa's intellectual property rights and market access country practices petition in the 2019 Annual GSP Review process. IIPA counsel intends to testify at the January 30, 2020 hearing. Testifying will be:

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Sincerely,

/Kevin M. Rosenbaum/

Kevin M. Rosenbaum, Counsel
International Intellectual Property Alliance

Written Comments
of the International Intellectual Property Alliance in the
2019 GSP Annual Review
of the Intellectual Property Rights and Market Access Practices of
SOUTH AFRICA

Submitted to the GSP Subcommittee
Docket No. USTR-2019-0020, South Africa

January 17, 2020

I. Introduction

In April 2019, the International Intellectual Property Alliance (IIPA)¹ submitted a petition requesting that the U.S. government review the GSP status of South Africa with respect to eligibility criteria listed in subsections 502(b) or 502(c) of the 1974 Act (19 U.S.C. § 2462(b) and (c)). For the IIPA, the relevant criteria the President must take into account in determining whether to continue to designate a country as a GSP beneficiary country are “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.” 19 USC § 2462(c)(4) and (5).

South Africa is a current GSP beneficiary.² IIPA believes that, despite the benefits South Africa receives, South Africa is not meeting the GSP eligibility criteria in two key respects. First, South Africa is not currently providing “adequate and effective protection” of American copyrighted works and sound recordings because of its very weak copyright law and enforcement regimes, which would be further weakened by two pending fatally flawed bills. Second, South Africa is not providing “equitable and reasonable access” to its markets for American producers and distributors of creative materials.

¹IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. IIPA’s five member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world. These include entertainment software, including interactive games for video game consoles, handheld devices, personal computers and the Internet; educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Members of the IIPA include: Association of American Publishers (www.publishers.org), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association (www.motionpictures.org), and Recording Industry Association of America (www.riaa.com).

²In 2018, South Africa exported goods valued at \$878,525,117 to the U.S. that received preferential duty-free treatment under the GSP program. This represented approximately 16% of its total exports to the U.S., according to U.S. Government statistics.

In late 2018, the South African Parliament adopted the first major revision of the copyright and related laws in decades. This legislation has not entered into force, but could be signed into law by the President of South Africa at any time. Unfortunately, if enacted the legislation would be a giant step backwards for the protection and enforcement of copyrighted works in South Africa, as well as for creators and producers of creative content. If enacted, the legislation would move South Africa further out of compliance with GSP eligibility criteria. Moreover, by introducing unclear and sweeping exceptions to copyright protection, restrictions on normal business transactions and contracts, and other significant copyright protection and enforcement deficiencies into South Africa’s law, enactment of the legislation would move South Africa further away from international norms designed to protect creators and producers. The end result would be to severely restrict the ability of rights holders to produce and distribute creative works in South Africa.

Through this review, IIPA requests that 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 serious concerns detailed below and in IIPA’s previous submissions.³ If, at the conclusion of the review, the Government of South Africa has not made requisite improvements, IIPA requests that the Committee suspend or withdraw South Africa’s GSP benefits, in whole or in part.

II. South Africa Fails to Provide “Adequate and Effective Protection” of United States Copyrights

South Africa does not meet the GSP eligibility criteria primarily because its current legal regime fails to provide adequate and effective protection of copyrighted materials, and two pending bills that are on the verge of final enactment would further weaken that legal regime. If enacted, the two proposed laws would violate South Africa’s international obligations (including under the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”)), and would move South Africa even further away from adequate and effective intellectual property rights protection and international best practices. Enactment would also undermine South Africa’s ability to accede to the World Intellectual Property Organization (WIPO) Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)—which South Africa has signed, and indicated an intention to join. The South Africa country report from the IIPA 2019 Special 301 submission (February 7, 2019) includes a full description of the deficiencies in these two bills, as well as other deficiencies in South Africa’s legal and enforcement regimes. IIPA flagged many of these deficiencies for the Government of South Africa in extensive comments provided in several filings over the past five years.

³IIPA provided extensive information regarding South Africa’s inadequate and ineffective protection for copyrights, including the recently-passed copyright reform legislation, and the lack of equitable and reasonable access to South Africa’s market in IIPA’s 2019 Special 301 submission. See IIPA’s 2019 Special 301 Report, available to the public via <http://www.regulations.gov> as well as our website, at <https://iipa.org/files/uploads/2019/02/2019SPEC301SOUTHAFRICA.pdf>.

The GSP eligibility criterion of “adequate and effective” protection of intellectual property rights (also used in other laws) is a minimum standard of protection, intended to be technology neutral to change with the ways in which copyrighted works and sound recordings are produced and distributed. These technological changes also mean that enforcement and anti-piracy actions need to adapt over time. The obligations of the TRIPS Agreement, which provide global minimum standards of copyright protection and enforcement, are a key benchmark for determining whether protection is “adequate and effective.” Along with the TRIPS Agreement, in the digital era of copyright production and dissemination, the WIPO Internet Treaties contain many of the legal norms and standards of protection and enforcement for a sustainable and healthy online marketplace. These treaties establish a foundation for essential legal frameworks for the continued growth of legitimate digital trade by providing copyright holders with a full panoply of exclusive rights and remedies in the digital networked environment to protect their valuable content. South Africa’s Cabinet recently approved the country’s accession to the WIPO Internet Treaties, but at present, South Africa remains merely a signatory to these treaties.

Significant reforms are needed to South Africa’s Copyright Law and Performers’ Protection Act in order to bring the country’s legal framework into compliance with international agreements, including the TRIPS Agreement, and the WIPO Internet Treaties. For example, South Africa lacks basic protections required to enable trade in copyrighted materials for the digital environment. This includes the right of copyright owners to control the distribution of copies of their works and sound recordings, and to control the manner in which their works and sound recordings are communicated to the public. South Africa also lacks adequate protections for technological protection measures (TPMs), which foster many of the innovative products and services available online by allowing creators to control and manage access to copyrighted works (for example, via streaming services), and to diversify products and services. At the same time, TPMs enable consumers to enjoy desired content on a variety of platforms, in many different formats, and at a time of their choosing. In addition, South Africa’s legal regime does not provide adequate civil remedies or criminal penalties to allow rights holders to recover their losses from infringement or to deter piracy. Without an adequate means to remedy infringement or deter piracy, the path for legitimate services to operate is difficult.

In 2017, a Copyright Amendment Bill (CAB) was introduced, which was preceded by a Performers’ Protection Amendment Bill (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.

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.

The list of rights holders' concerns with these bills is long. Many provisions lack clarity and will undermine the creation, licensing and dissemination of copyrighted materials in South Africa. Adoption of this legislation risks major negative disruption of the creative industries, and will ultimately harm the creators and producers of copyrighted materials that the legislation is purported to protect (which is why there have been demonstrations in South Africa by local rights holders against the bills). In sum, the legislation falls far short of needed legal reforms to improve the South African marketplace for copyright creators and producers, and ultimately may harm consumers as well if rights holders are unable to continue in the marketplace. If these bills enter into force, South Africa's copyright framework would move even further away from providing adequate and effective protection of intellectual property rights.

Some of the immediate and primary issues of concern with the two bills include:

- 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, which will 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 can freely negotiate the terms of their relationships. For example, the bills include mandates for the mode of remuneration for audiovisual performers, to the detriment of both performers and producers.
- 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 TRIPS Agreement (Article 13) and the Berne Convention (Article 9). Moreover, aspects of both bills are incompatible with the WIPO Internet Treaties. The incompatibility of these provisions with a healthy, sustainable and fair digital marketplace for creators, both domestic and foreign, run afoul of the GSP eligibility criteria to provide "adequate and effective protection" of intellectual property rights.

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,⁴ 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 and 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).⁵ 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."⁶
- 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.

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

⁵Although 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.

⁶See 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.

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.

- 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.⁷ 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), 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

⁷See “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.

to join, and would further erode the already inadequate level of copyright protection in the country.

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 enable 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.

Furthermore, this legislative process is occurring against a backdrop of increasing online piracy in South Africa. Growth in bandwidth speeds, coupled with lax controls over corporate and university bandwidth abuse, drive this piracy. In addition, piracy devices (i.e., set-top boxes equipped with apps for accessing pirated content) and memory sticks pre-loaded with infringing content or apps continue to grow in popularity in South Africa. Enforcement in South Africa is not, at present, adequate or effective. 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.

III. South Africa Fails to Assure the United States “That It Will Provide Equitable and Reasonable Access to [Its] Markets”

South Africa does not meet the GSP eligibility criteria because it fails to assure the United States that it will provide equitable and reasonable access to its markets for American-produced creative materials. As noted, the enactment of two bills (the CAB and the PPAB) would further deny the creative industries with equitable and reasonable access to the South African market for copyrighted works and sound recordings. If enacted, the new laws would severely restrict the freedom of rights holders to contract in the open market, and will impose licensing and regulatory mechanisms to overly regulate the relationships between and among creative parties and licensees and users.

In addition, there exist other barriers to equitable and reasonable access to the South African market:

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 (VAT) on all online transactions conducted in, from, or through South Africa. Currently levied at 15%, this onerous tax is a trade barrier because it includes online selling of content such as films, TV series, games, and e-books. Income on business-to-business services provided to South African businesses by foreign providers is also subject to the VAT as of April 2019.

IV. Conclusion

For the reasons stated in this submission, 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 outlined above as well as 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.

Respectfully submitted,

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