



17 January 2020

Dear Office of the US Trade Representative:

I am writing in regards to your Office's upcoming GSP country practice review for South Africa on the issue of whether South Africa is meeting the GSP eligibility criterion requiring adequate and effective protection of intellectual property rights.

I am a South African legal academic, with law degrees from both South Africa and the United States and have served as the Dean of the School of Law at the University of the Witwatersrand, where I currently work as a Professor of Law.

I am writing with specific reference to the capacity of regulations in terms of South African constitutional and public law to respond to legitimate and genuine problems in the Copyright Amendment Bill, B-13B of 2017. My view is that options in regulatory drafting do and will exist to respond to such problems. These options are available both in the current period of consideration of the Bill in terms of s 79 of the South African Constitution and, assuming the Bill is enacted in its current form, in the period between enactment and its being brought into force.

The Copyright Amendment Bill should it be enacted in current form must be accompanied by subordinate legislation (including here regulations) in order to be brought into force and to be successfully implemented. Once signed, the amendment Act will need regulations to be drafted so as to be brought into force. This necessity emerged dramatically in a case the Constitutional Court decided in 2000, *Pharmaceutical Manufacturers*. The necessity of subordinate legislation for the implementation of Parliamentary Acts has been a constant feature of the South African polity since the first decades of the 20th century. The necessity of such delegated public power was affirmed first in the post-apartheid era in the case of *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995).

As most legal practitioners and scholars realize, regulations implement principal legislation and often become just as if not more significant to persons, firms, and industries working with the primary legislation. Regulations can structure further levels of implementation including guidance documents. One example might be a "Guide to Best Practices in Fair Use" for certain sectors of the creative industries. Such guidance documents may be drafted on private or government initiative. *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* (CCT51/05) [2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC) (28 July 2006) (regulations drafted by a private body considered as PAJA administrative action).

Given the above understanding, we can formulate, as a working framework, five legal doctrines that both empower and constrain drafting regulations for the amended Copyright Act.

First, regulations must be intra vires their empowering legislation or other empowering legal instrument. *UCT v Minister of Education; Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others* (April 8, 2017) (Constitutional Court) see esp. paras 89-92.

Second, regulations, like other laws, must be written in a clear and accessible manner; *Affordable Medicines Trust* para 108. According to the Constitutional Court, "[t]he doctrine of vagueness is founded on the rule of law, which ... is a foundational value of our constitutional democracy. It



requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives. And should not be used unduly to impede or prevent the furtherance of such objectives.”

Third, regulations must not be based on errors of law. *Security Industry Alliance* (2014, SCA).

Fourth, regulations must be rational. The controlling test in this area of SA administrative law may be stated as: “is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at”; *Trinity Broadcasting (Ciskei) v ICASA*, SCA, 2004.

Fifth, regulations must be proportionate and reasonable. *SA Shore Angling Assoc* (2002).

I request to testify at the public hearing and request to participate in the hearing remotely if that opportunity is available. On 30 January 2020, I expect to be available from 11 am Eastern time.

I believe my testimony will be useful in understanding the capacity and parameters of South African public law within which regulations and their drafting may address genuine and legitimate problems that may arise in the process of interpreting and implementing the Copyright Amendment Bill in its current form.

Regards,

Prof Jonathan Klaaren