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January 17, 2020

**South Africa Country Practice Review**  
**Subject matter: Copyright Amendments Bill**  
**Notice of Intent to Testify**

I request to testify at the upcoming USTR hearing on January 30, 2020, concerning the review of South Africa GSP benefits.

I intend to testify on the following points and will submit additional comments as warranted in the post-hearing process.

I. MY INTEREST AND BACKGROUND

I direct the Program on Information Justice and Intellectual Property (PIJIP) – the internationally recognized intellectual property and information law research and academic program of American University Washington College of Law (AUWCL). PIJIP implements AUWCL's motto – Champion What Matters – through a large array of research and public impact projects that focus on promoting the public interest in intellectual property and information law.

One of PIJIP's projects is coordination of the Global Expert Network on Copyright User Rights – a coalition of over 100 copyright academics from around the world who give pro bono advice and technical assistance to stakeholders and governments on the legal and policy issues with respect to copyright reform. As part of that project, we have submitted comments and held numerous events and workshops in relation to South Africa's reform of its copyright law.

I also have a more personal experience and interest in South Africa. I lived and worked in South Africa from 1998 to 2001, including a year as a clerk to Chief Justice Arthur Chaskalson, President of the South African Constitutional Court. I have been involved in various public interest law projects in South Africa every year since then, and have visited South Africa on these projects about 50 times over the

last 20 years. I have passing knowledge of many aspects of South African law, but am not a South Africa barred lawyer.

## II. THE STANDARD OF REVIEW – COMPLIANCE WITH INTERNATIONAL INTELLECTUAL PROPERTY LAW

I would like to start with the standard of review in this matter.

As noted in the Federal Register Notice, and as included in the relevant statutes, the statutory standard is “adequate and effective intellectual property” (or, in the case of AGOA, simply ensuring “the protection of intellectual property.” The plain language of the statutes would suggest that this is a minimum standard. South Africa has a full panoply of intellectual property rights statutes that meet the requirements of all relevant international treaties. The inquiry should end there.

The applicable US and international law requires an inquiry limited to whether South Africa possesses intellectual property laws that comply with the relevant treaties. The Supreme Court admonished over 200 years ago, statutes be interpreted to not conflict with United States international treaty commitments.<sup>1</sup> GSP programs are governed by the GSP enabling clause which requires that program criteria be “non-reciprocal” (Para 2) and “designed . . . to respond positively to the development, financial and trade needs of developing countries.” (Para 3). A WTO appellate panel report gave further definition to these concepts – holding that in order for a criteria to be development oriented and non-reciprocal, it cannot be “based merely on an assertion to that effect by, for instance, a preference-granting country.” GSP criteria must be based on an “objective” and “[b]road-based recognition of a particular need,” such as those “set out in the WTO Agreement or in multilateral instruments adopted by international organizations.”<sup>2</sup>

## III. THE CONTEXT -- SOUTH AFRICA IS A DEVELOPING COUNTRY WITH THE MOST EXTREME INCOME INEQUALITY IN THE WORLD

IIPA’s primary complaint sounding in international law is that the South Africa Copyright Amendment Bill, if enacted, would violate the Berne (and TRIPS) three-step test.<sup>3</sup> This arguments fails on even the most cursory examination.

The international three step test – originating in the Berne Convention and included in various forms in the TRIPS agreement and in other Copyright Treaties – is extremely sensitive to context. It does not require that all limitations and exceptions around the world be the same. It incorporates important protections for copyright owners, but grants a large amount of freedom to legislate within that limit

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<sup>1</sup> *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (U.S. 1804) (act of Congress ought never to be construed to violate the law of nations if any other possible construction remains).

<sup>2</sup> EC – Preferential Tariffs.

<sup>3</sup> Berne Convention Article 9; TRIPS Article 13.

to promote local social and economic concerns.<sup>4</sup>

Given the three-step test's allowance of context-specific adaptation of limitations and exceptions, it is incredibly important to take note of South Africa's unique context that it inherited from hundreds of years of legalized segregation and discrimination. South Africa has the highest inequality in the world, according to the World Bank.<sup>5</sup> It has a rich – mostly white – minority that makes up about 10% of the population, a small wage-earning working class that makes less than 25% of the median income of the top tier, and a massive impoverished majority that struggles to afford basic needs.

This unique social fabric gives rise to a very particular problem. Economic analysis shows that a monopoly in a market with very high income inequality will rationally profit maximize by pricing to the rich sliver of the population and excluding the large majority of consumers.<sup>6</sup> We know this from medicine markets in South Africa in the 1990s, when the price for a year of AIDS medicines was over three times the median GDP per capita. US trade pressure to bolster medicine patent monopolies markets then led to the adoption of the Clinton executive order banning TRIPS plus trade pressure on South Africa and other sub-Saharan African countries,<sup>7</sup> followed by the Doha Declaration on TRIPS and Public Health.

We can see similar exclusionary pricing behavior in some copyright markets. Some imported textbooks in South Africa cost three times the government provided bursary for a year's supply of books.<sup>8</sup> Rates for licensing a clip of footage from a Hollywood movie can eat an entire documentary film budget.<sup>9</sup>

South Africa is not prohibited by international law from reacting to these real problems with the effects of monopoly power in information markets through

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<sup>4</sup> See generally, Christopher Geiger et al, *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, Program on Information Justice and Intellectual Property Research Paper Series Research Paper Series, 2013-04 (2013), <https://digitalcommons.wcl.american.edu/research/39/>

<sup>5</sup> See Katy Scott. *South Africa is the world's most unequal country. 25 years of freedom have failed to bridge the divide*. CNN. (May 10, 2019); <https://www.cnn.com/2019/05/07/africa/south-africa-elections-inequality-intl/index.html>

<sup>6</sup> Sean Flynn et al., *An Economic Justification for Open Access to Essential Medicine Patents in Developing Countries*, 37 J.L. Med. & Ethics 184, 185, 191-95 (2009).

<sup>7</sup> Exec. Order No. 13155, 3 C.F.R. 268 (2000).

<sup>8</sup> See Linda Daniels, *Copyright Bill Will Make the Cost of Studying Cheaper*, GroundUp, (Aug. 30, 2019), <https://www.groundup.org.za/article/copyright-bill-will-make-cost-studying-cheaper>; *Fair Use in South Africa*, ReCreate (Nov. 10, 2018), [https://youtu.be/wsrFkS\\_xM](https://youtu.be/wsrFkS_xM) (interviewing students about textbook costs in South Africa); Eve Gray & Laura Czerniewicz, *Access to Learning Resources in Post-Apartheid South Africa*, in *Shadow Libraries*, 107-58 (Joe Karaganis ed., 2018), <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/56942/IDL-56942.pdf?sequence=2&isAllowed=y>.

<sup>9</sup> See Sean Flynn & Peter A. Jaszi, *Untold Stories in South Africa: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*, Program on Info. Justice and Intellectual Prop. Pub. Impact Series, 2010-23 (2010) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1654025](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654025) (reporting anecdotes from interviews with over 30 South African documentary filmmakers).

tailoring its copyright limitations and exceptions.

#### IV. SOUTH AFRICA'S PROPOSED EXCEPTIONS ARE CONSTITUTIONAL AND CONSISTENT WITH THOSE IN MANY OTHER COUNTRIES

There are no ground on which USTR could conclude that the Copyright Amendment Bill, if enacted into law, violates the international three-step test.

One particularly odd complaint is that South Africa has adopted a mix of specific exceptions and a general fair use clause. Every country that has a fair use or fair dealing general exception also has a list of specific exceptions.<sup>10</sup>

The various exceptions that the South Africa Bill adopts are framed in terms that commonly appear elsewhere.<sup>11</sup> For example, the Bill's exception for educational uses of excerpts for teaching can be found in roughly 70% of developing countries in Latin America and Africa.<sup>12</sup> Some of those countries also have educational use exceptions that generally apply to the use of whole works. Perhaps the most unique and controversial exception in South Africa's Bill – the exception for the use of whole textbooks when they are not available in South Africa at non-excessive prices – is itself modeled on the Berne Convention.<sup>13</sup>

The exceptions in the law have also been subject to Constitutional analysis, including by Parliament's legislative counsel and by a group of esteemed South African attorneys.<sup>14</sup>

#### V. SOUTH AFRICA'S EXCEPTIONS SERVE US TRADE INTERESTS

US policy has long recognized that its trade interests do not reside within a one-way intellectual property ratchet toward constantly greater rights for movie and music producers. Rights are important to US trade interests. But so are exceptions.

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<sup>10</sup> See Jonathan Band & Jonathan Gerafi, *The Fair Use/Fair Dealing Handbook*, InfoJustice (Mar. 10, 2015), <http://infojustice.org/archives/29136> (compiling a full list of fair use and fair dealing countries, all of which also have specific exceptions).

<sup>11</sup> The Bill's exceptions appear particularly informed by the EIFL Draft Law on Copyright Including Model Exceptions And Limitations For Libraries And Their Users, which itself was informed by laws around the world. See *EIFL Draft Law on Copyright*, EIFL (2016), <https://www.eifl.net/resources/eifl-draft-law-copyright-including-model-exceptions-and-limitations-libraries-and-their>.

<sup>12</sup> See accompanying submission of PIJIP researchers Mike Palmedo and Andres Izquierdo.

<sup>13</sup> Compare Copyright Amendment Bill Sec. 12D(4) ((4) The right to make copies contemplated in subsection (1) extends to the reproduction of a whole textbook— (a) where the textbook is out of print; (b) where the owner of the right cannot be found; or (c) where authorized copies of the same edition of the textbook are not for sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works.”), with Berne Appendix (II(6) authorizing copies of books until such time as “a translation of a work is published by the owner of the right of translation or with his authorization at a price reasonably related to that normally charged in the country for comparable works”).

<sup>14</sup> See Susannah Cowen et al., *Legal Opinion of Advocate Cowan* (2019), <https://www.re-createza.org/legal-opinion-on-the-bill>.

And thus US policy has long endorsed the promotion of *balance* in intellectual property systems, including through fair use rights.<sup>15</sup>

PIJIP's research shows that greater openness and generality in copyright exceptions can be a factor in increasing foreign direct investment by US technology firms.<sup>16</sup>

South Africa's current law scores fairly low on our index of copyright openness.<sup>17</sup> Adopting a general fair use right and applying its exceptions to a broader range of works, purposes and users may better enable it to promote the kind of non-expressive technical uses that are driving machine learning and other innovative projects in the US, to the interest of both it and US trading partners.<sup>18</sup>

## VI. ANY AMBIGUITIES OR IMPLEMENTATION ISSUES MAY BE ADDRESSED IN REGULATION

As a threshold question, the USTR cannot find any violation of international intellectual property law by the Copyright Amendment Bill because that bill has not been signed and therefore is not law. Even when it the bill is signed, the law only goes into effect after the Minister promulgates any necessary regulations.

As in the US, regulations may be used to interpret ambiguous language in the Bill. Given that many of the IIPA's complaints are about the ambiguity of various provisions of the bill – it should be encouraged to take those up with the Minister in

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<sup>15</sup> See USTR (2012) (observing that in the United States “consumers and businesses rely on a range of exceptions and limitations, such as fair use, in their businesses and daily lives”); U.S. Intellectual Property Enforcement Coordinator, 2013 Joint Strategic Plan (“fair use is a core principle of American copyright law”; “enforcement approaches should not discourage authors from building appropriately upon the works of others”); IPEC 2016 Joint Strategic Plan (instructing that fair use enables “new and innovative uses of media (e.g., remixes and mashups involving music, video and the visual arts)”); U.S. Copyright Office, 2016 Study of Software Enabled Consumer Products (“courts repeatedly have used the fair use doctrine to permit copying necessary to enable the creation of interoperable software and products”).

<sup>16</sup> See Sean Flynn and Michael Palmedo. *The User Rights Database: Measuring the Impact of Opening Copyright Exceptions*. Fifth Global Congress on IP and the Public Interest. September, 2018. <https://www.wcl.american.edu/impact/initiatives-programs/pijip/impact/global-network-on-copyright-user-rights/research/> (finding that correlations between investment and more open exceptions hold after controlling for other major factors like income level and the size of the economy).

<sup>17</sup> See Sean Flynn, *New User Rights Data: Ranking Openness in 21 Countries*, InfoJustice (July 10, 2019), <https://www.wcl.american.edu/impact/initiatives-programs/pijip/impact/global-network-on-copyright-user-rights/research/> (presented at the 18th Congress of the Society for the Economic Research of Copyright Issues. Montpellier, France).

<sup>18</sup> This has been a strong theme in South African commentary. See Andrew Rens & Achal Prabhala, *No Reason for President to Delay Urgently Needed Copyright Law*, *BusinessDay* (Dec. 5, 2019, 2:24 PM), <https://www.businesslive.co.za/bd/opinion/2019-12-05-no-reason-for-president-to-delay-urgently-needed-copyright-law/>; Andrew Rens, *Copyright Flexibility Opens the Door to Decision AI Advantages*, *BusinessDay* (Oct. 15, 2019, 7:52 AM), <https://www.businesslive.co.za/bd/opinion/2019-10-15-copyright-flexibility-opens-the-door-to-decisive-ai-advantages/>.

the regulatory process. The USTR may also participate in that process if it has concerns of interpretation or application in the Bill.

## VII. THE DRAFTING OF THE BILL WAS SUBJECT TO AN OPEN PROCESS

One of the IIPA complaints is that the Copyright Amendment Bill was not subject to an open enough process. I can say from my own experience that this is very untrue.

The consultation process on the South African Bill goes back decades.<sup>19</sup> It was informed by numerous reports and commissions.<sup>20</sup> The DTI published several versions of the bill, which I know were open to comments for foreign parties because I was part of several submissions myself. The Bill was subject to an impact assessment at an early stage.<sup>21</sup> The parliamentary process included several open hearings in which all who applied could testify, and several others where the public was welcome to observe the mark up of the bill. If this is not an open process, then US lawmaking is similarly closed.

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<sup>19</sup> See Denise Nicholson, *South Africa's Copyright Amendment Bill: Its Genesis and Passage Through Parliament*, InfoJustice (June 7, 2019), <http://infojustice.org/archives/41167>.

<sup>20</sup> See Republic of S. Afr. Dep't Trade and Industry, *Copyright Review Commission Report 67*, (2011); The Gov't of the Republic of S. Afr., *South Africa's National Research and Development Strategy 67* (2002) [https://www.cepal.org/iyd/noticias/pais/0/31490/Sudafrica\\_Doc\\_1.pdf](https://www.cepal.org/iyd/noticias/pais/0/31490/Sudafrica_Doc_1.pdf); Republic of S. Afr., Dep't Trade and Industry, *Draft National Policy on Intellectual Property, No. 36816 32* (2013), <https://www.publishsa.co.za/file/1446644308eub-draftnationalpolicyonintellectualproperty2013-invitationforthepublic.pdf>.

<sup>21</sup> Tana Pistorius et al., *Assessment of the Regulatory Proposals on the Intellectual Property Policy Framework for South Africa*, in Final Report for Dep't of Trade and Industry 77 (prepared by Genesis Analysis, 2014) [https://libguides.wits.ac.za/ld.php?content\\_id=50111158](https://libguides.wits.ac.za/ld.php?content_id=50111158).