

ACADEMICS SUBMISSION

IN THE UNITED STATES TRADE REPRESENTATIVE

REGARDING SOUTH AFRICA COUNTRY PRACTICE REVIEW IN THE UNITED STATES TRADE
REPRESENTATIVE

REGARDING SOUTH AFRICA COUNTRY PRACTICE REVIEW

<https://www.regulations.gov/document/USTR-2023-0003-0051>

August 2023

This submission is made by Sean Fiil-Flynn, Director of the Program on Information Justice and Intellectual Property, American University Washington College of Law and Professor Klaus Beiter, Professor of Law, North-West University in Potchefstroom, South Africa. We are members of the Global Expert Network on Copyright User Rights – a coalition of over 100 copyright academics from around the world. As part of that project, we have submitted comments and participated in numerous events and workshops in relation to South Africa’s reform of its copyright law.

We respond to the repeated submission by the IIPA alleging that South Africa is out of compliance with broad based international copyright treaties because of its consideration of adopting a U.S. style fair use exception, fair remuneration rights, and other reforms to its copyright act. The USTR has rejected these requests each year since they were first filed in 2018.¹

As described below, the complained of Bill has not been enacted. Even if the reforms enacted, they would not violate international law. Contrary to the IIPA submission, the USTR should positively consider the reforms being considered, which will add provisions on digital copyright protection needed for South Africa to join the WIPO Copyright Treaty and WIPO Performers and Phonograms Treaty.

¹ The IIPA complaint about South Africa is a word for word recycle of a complaint it originally drafted in 2018 and has repeated, and rejected by USTR, verbatim in Special 301 and AGOA proceedings since then. IIPA Agoa Comments 2023 <https://www.regulations.gov/comment/USTR-2023-0003-0010> For extensive comments opposing the 2018 IIPA complaint see <https://www.wcl.american.edu/impact/initiatives-programs/pijip/impact/global-network-on-copyright-user-rights/policy-interventions/south-africa-gsp-review/>

USTE should make an affirmative statement rejecting this complaint, in part to clarify misinformation spreading in South African press.²

I. USTR CANNOT FIND THAT THE COPYRIGHT AMENDMENT BILL VIOLATES INTERNATIONAL INTELLECTUAL PROPERTY LAW

The World Trade Organization appellate panel has held that in order for GSP programs to comply with the World Trade Organization's "GSP enabling clause," program criteria cannot be "based merely on an assertion to that effect by, for instance, a preference-granting country," but rather 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."³ IIPA complains that the proposed Copyright Amendment Bill's exceptions violate the Berne Convention and TRIPs Agreement.

South Africa cannot violate international intellectual property law through the provisions of a Bill not yet enacted. Even when 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 language in the Bill.

If the bill passes and the US then believes that the law puts South Africa out of compliance with international intellectual property law, then the WTO requires that dispute to be adjudicated in the WTO, not unilaterally.⁴ Only if the WTO finds that the law is out of compliance with its accords may the US deny GSP program benefits based on that non-compliance. The IIPA complaint should be dismissed on this basis and ordered to halt resubmitting its complaint to the USTR and the press on this basis.

II. THE COPYRIGHT AMENDMENT BILL WILL NOT VIOLATE INTERNATIONAL COPYRIGHT LAW IF PASSED

The IIPA's primary complaints are that South Africa's proposed copyright law will not follow the precise contours of US law or IIPA's desires about what US law should be (e.g. it opposes the U.S. fair use doctrine). In particular, it criticizes South Africa's proposed copyright law for having broader limitations than US law. But these differences with US law are proposed in South Africa to respond to its unique

² See [SA's new copyright bills could sink Agoa](#), Sunday Times (July 30, 2023).

Contentious laws could 'substantially lower' protections

³ DS246: European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries.

⁴ WTO Dispute Resolution Understanding Article 23, "Strengthening of the Multilateral System" ("Members shall: (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding"). See Flynn, [COULD SANCTIONING SOUTH AFRICA FOR COPYRIGHT REFORM VIOLATE THE WORLD TRADE ORGANIZATION?](#), infojustice.org (Dec 2, 2019)

context of extreme income inequality which creates particular harms from unrestrained monopolies.

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 to promote local social and economic concerns.⁵

South Africa is among the most unequal countries in the world. 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.⁶ 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.⁷ 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.⁸ Rates for licensing a clip of footage from a Hollywood movie that could eat an entire documentary film budget.⁹ South Africa is not prohibited by international law from reacting to these real problems with the effects of monopoly power in highly unequal information markets through tailoring its copyright limitations and exceptions – including by adopting the same or broader exceptions than exist in the U.S.

The application of copyright in the digital economy is an area of great concern around the world. The current Hollywood strikes are in part about issues of remuneration in the digital environment which are a core of the South African Copyright Amendment Bill proposals. At bottom, the Copyright Amendment Bill proposes three sets of reforms: (1) an expansion of rights of original authors to own their own works, including through reversion rights and changing defaults on who

⁵ See Generally, C. Geiger et al, *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, (2013) <https://digitalcommons.wcl.american.edu/research/39/>

⁶ See World Bank, *Inequality in Southern Africa : An Assessment of the Southern African Customs Union* (2022) (finding South Africa to have the most unequal income distribution in the world).

⁷ 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),

⁸ 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 (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>.

⁹ See Untold Stories in South Africa: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers (2010) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654025 (reporting anecdotes from interviews with over 30 South African documentary filmmakers).

owns copyright in commissioned works; (2) the expansion of rights of original authors and performers to earn from their rights, including through “equitable remuneration” (previously “fair royalty”) requirements, regulation of contractual terms, and regulation of collective management organizations, and (3) an expansion and further specification of limitations and exceptions, including an open fair use exception and revised exceptions for educational and other public interest uses.

The various exceptions that the South Africa Bill adopts are framed in terms that commonly appear elsewhere.¹⁰ For example, the Bill’s exception for educational uses of excerpts in course packs can be found in roughly 70% of developing countries in Latin America and Africa.¹¹ 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.¹² 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.¹³

IIPA’s complaints about the proposed law is word for word what it submitted first in 2018. It fails to note the numerous hearings and considerations of amendments of the bill showing that the bill has had ample public process. A June 26, 2023, report on that progress describes some of the numerous amendments that were considered in the most recent process, some of which respond to IIPA policy concerns.¹⁴

¹⁰ The Bill’s exceptions appear particularly informed by the EIFL DRAFT LAW ON COPYRIGHT INCLUDING MODEL EXCEPTIONS AND LIMITATIONS FOR LIBRARIES AND THEIR USERS (2016), which itself was informed by laws around the world. See <https://www.eifl.net/resources/eifl-draft-law-copyright-including-model-exceptions-and-limitations-libraries-and-their>

¹¹ See Michael Palmedo and Andrés Izquierdo, *Submission to U.S. Trade Representative for the 2020 G.S.P. Review of South Africa* Docket ID: USTR-2019-0020 (January 17, 2020).

¹² 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”).

¹³ See Jonathan Band, THE FAIR USE/FAIR DEALING HANDBOOK (2015), <http://infojustice.org/archives/29136> (compiling a full list of fair use and fair dealing countries, all of which also have specific exceptions).

¹⁴ Sanya Samtani, SOUTH AFRICA’S COPYRIGHT AMENDMENT BILL: MAKING PROGRESS AT THE PROVINCES, <http://infojustice.org/archives/45332> June 26, 2023.

III. SOUTH AFRICA’S EXCEPTIONS SERVE US TRADE INTERESTS IN BALANCED COPYRIGHT

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

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.¹⁶

South Africa’s current law scores fairly low on our index of copyright flexibility.¹⁷ 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.¹⁸

Importantly, when the Copyright Amendment Bill passes, South Africa intends to use their provisions on TPM circumvention and other digital copyright protections to allow it to join the WCT and WPPT – two objectives of long standing US policy.

¹⁵ 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”).

¹⁶ 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).

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

¹⁸ 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/>