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April 18, 2019

VIA REGULATIONS.GOV (Docket No. USTR-2019-0001)

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: 2019 Generalized System of Preferences (GSP): Notice of Annual GSP Product and Country Review; Request for Review of the Intellectual Property Rights Practices of South Africa, 84 Fed. Reg. 11150 (March 25, 2019)

Dear Mr. Herfindahl and Members of the GSP Subcommittee:

On March 25, 2019, the Office of the United States Trade Representative (USTR) published in the Federal Register a notice announcing the 2019 Generalized System of Preferences (GSP): Notice of Annual GSP Product and Country Review; Deadline for Filing Petitions. *See* 84 Fed. Reg. 11150 (March 25, 2019). In its March 25, 2019 notice, USTR indicated that interested parties "may submit a petition to review the GSP eligibility of any beneficiary developing country with respect to any of the designation criteria listed in sections 502(b) and 502(c) of the Trade Act (19 U.S.C. 2462(b) and (c))." *See* 84 Fed. Reg. 11151.

The International Intellectual Property Alliance (IIPA) hereby submits its request that the U.S. Government review the eligibility of South Africa as a GSP beneficiary developing country. IIPA believes that South Africa is not meeting the GSP eligibility criteria, in particular to provide "adequate and effective protection" of American copyrighted works and sound recordings, and to provide "equitable and reasonable access" to its markets for American producers and distributors of creative materials. We request that the U.S. Government work with the South African Government, and consider the suspension or withdrawal of South Africa's GSP benefits, in whole or in part, if requisite improvements are not made by South Africa to remedy the deficiencies outlined below (as well as in greater detail in the Appendix to this filing) which have adversely affected U.S. copyright owners and creators. In 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.

Among the criteria the President must take into account in determining whether a country should continue to be designated 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 U.S.C. § 2462(c)(4) and (5).

South Africa does not meet the GSP eligibility criteria primarily due to its weak copyright law and enforcement regime. Unfortunately, the first major revision of the law in decades has resulted in legislation—which has been adopted by the Parliament and is on the verge of entering into force—that is a giant step backwards for the protection and enforcement of copyrighted works in South Africa. If finally enacted, the new laws will deny the GSP-mandated "adequate and effective protection" and enforcement of intellectual property rights, as well as "equitable and reasonable access" to South Africa's markets. This legislation will move South Africa further away from international norms by failing to establish a clear legal framework to provide adequate and effective protection of copyrighted material, especially in the digital environment, and it will severely restrict the ability of rights holders to produce and distribute creative works in South Africa, including through severe contractual limits on licensing and transfers of rights. South Africa presently fails to provide adequate and effective protection and enforcement against piracy in the digital environment, and maintains additional barriers that deny the creative industries equitable and reasonable access to its markets. As support for our assertions in this regard, we append to this filing the "South Africa" country report from IIPA's 2019 Special 301 submission.[1]

I. DESCRIPTION OF PETITIONER AND ITS INTEREST: THE INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

IIPA 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 of America (www.mpaa.org), and Recording Industry Association of America (www.riaa.com).

The U.S. copyright-based industries are one of the fastest-growing and most dynamic sectors of the U.S. economy.[2] Inexpensive and accessible reproduction technologies, however,

[1] IIPA's 2019 Special 301 Report is available to the public via http://www.regulations.gov as well as our website, at https://iipa.org/files/uploads/2019/02/2019SPEC301SOUTHAFRICA.pdf.

[2] See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2018 Report* (December 6, 2018) available at: https://iipa.org/reports/copyright-industries-us-economy/. The "core" copyright industries in the U.S. outpaced the U.S. economy, growing at 5.23% between 2014 and 2017, while the U.S. economy grew by 2.21%. The core copyright industries generated over $1.3 trillion dollars of economic output in 2017, accounting for 6.85% of the

make it easy for copyrighted materials to be pirated in other countries, including in the online environment. IIPA strives for the establishment of modern copyright law and enforcement regimes in foreign countries that deter piracy, because such regimes create a framework for trade in creative products, foster technological and cultural development, and encourage investment and employment in the creative industries.

II. ACTION REQUESTED BY PETITIONER

Pursuant to Section 501 *et seq*. of the Trade Act of 1974 [hereinafter "TA 1974"], as amended, 19 U.S.C. § 2461 *et seq*., and 15 C.F.R. pt. 2007, and pursuant specifically to Section 502(c)(4) and (5) of the TA 1974 (19 U.S.C. § 2462(c)(4) and (5)), and 15 C.F.R. § 2007.0(b), IIPA, on behalf of its five trade association members, hereby petitions the President to review the GSP eligibility of South Africa, specifically whether it is providing adequate and effective copyright protection for U.S. copyright owners, and equitable and reasonable access to South African markets. IIPA believes that South Africa is not meeting these standards and requests that the U.S. Government work with the South African Government on means to address these deficiencies, and, if South Africa fails to adequately address these concerns, suspend or withdraw GSP benefits, in whole or in part.

III. LEGAL AUTHORITY FOR THIS PETITION AND DISCUSSION OF THE IPR AND MARKET ACCESS CRITERIA IN THE GSP STATUTE

The GSP program was instituted on January 1, 1976, and authorized under the TA 1974 (19 U.S.C. § 2461 *et seq*.). Title V of the Trade and Tariff Act of 1984 (TTA 1984), known as the GSP Renewal Act of 1984, renewed the GSP Program that was authorized under the TA 1974, and specifically required the President to consider intellectual property protection in determining whether to designate a developing country as eligible for GSP benefits. Provisions tying market access to these trade benefits were introduced in the GSP Renewal Act of 1996, Subtitle J, which revised the GSP criteria to require the President to take into account "the extent to which [a country seeking to obtain or maintain GSP eligibility] has assured the United States that it will provide equitable and reasonable access to the markets … of such country …." There have been many renewals of the GSP Program since 1996, including 1997, 1998, 1999, 2002, 2006, 2008, 2009, 2011, 2015, and 2018. The 2018 renewal reauthorized the GSP program through December 31, 2020. While the GSP Renewal Act of 1996 made a minor change, the intellectual property criteria have remained essentially the same since its introduction in the 1984 Renewal Act. Accordingly, the legislative history of the 1984 Renewal Act is particularly instructive on the important link between GSP eligibility and benefits, and strong IPR protection.

A. The GSP Renewal Act of 1984

In the GSP Renewal Act of 1984, Congress specified conditions that GSP beneficiary countries must meet in order to gain and maintain their preferential trading status. In particular, one of these express conditions (which Congress also delineated as one "purpose" of the GSP program) was to encourage developing countries "to provide effective means under which foreign nationals may secure, exercise, and enforce exclusive intellectual property rights." The

entire economy. Core copyright industries are those whose primary purpose is to create, produce, distribute, or exhibit copyright materials.

legislation required the President to apply mandatory and discretionary criteria with respect to IPR protection as a condition to a country achieving "beneficiary" status under the GSP program. Among other things, the GSP Renewal Act of 1984 added as a discretionary criterion, in determining whether to designate a developing country as eligible to receive GSP duty-free trade treatment, that:

> the President shall take into account . . . the extent to which [each] country is providing adequate and effective means under its laws for foreign nations *to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights*.

Section 503(c)(3) of the GSP Renewal Act of 1984, *codified at* 19 U.S.C. 2462(c)(5) (emphasis added). The Senate Finance Committee Report explained that:

> To determine whether a nation provides "adequate and effective means," the President should consider the extent of statutory protection for intellectual property (including the scope and duration of such protection), the remedies available to aggrieved parties, the willingness and ability of the government to enforce intellectual property rights on behalf of foreign nationals, the ability of foreign nationals effectively to enforce their intellectual property rights on their own behalf and whether the country's system of law imposes formalities or similar requirements that, in practice, are an obstacle to meaningful protection.

S. Rep. No.98-485, 98th Cong., 2d Sess. at 11 (1984). The Senate Report also noted:

> In delegating this discretionary authority to the President, it is the intent of the committee that the President will *vigorously exercise the authority to withdraw, to suspend or to limit GSP eligibility for noncomplying countries* . . . Where valid and reasonable complaints are raised by U.S. firms concerning a beneficiary country's market access policy or protection of intellectual property rights, for example, it *is expected that such interests will be given prominent attention by the President in deciding whether to modify duty-free treatment for that country*.

Id. at 12-13 (emphasis added). The House Ways and Means Committee stated that "countries wishing to reap the benefits of preferential duty-free access to the U.S. market must fulfill international responsibilities" in the intellectual property area. House Rep. No. 98-1090, 98TH Cong., 2d Sess. at 12 (1984).

The IPR criteria are a condition, not only for obtaining GSP benefits in the first place, but also for retaining them. The 1984 Renewal Act authorized the President to "withdraw, suspend, or limit the application of the duty-free treatment accorded under Section 501 of this title with respect to any article or *any country*" and requires the President, when taking any such action, to "consider the factors set forth in Sections 501 and 502(c)," which include the intellectual property criteria. *See* TTA 1984 Section 505(a)(1); TA 1974 Section 504(a)(1), as amended (originally codified as 19 U.S.C. 2464(a)(1)) (emphasis added). The 1984 Renewal Act also created a system of "general reviews" to ensure that these statutory criteria are met. *See* TTA 1984 Section 505(b); TA 1974 Section 504(c)(2)(A), as amended (originally codified as 19 U.S.C. 2464(c)(2)(A)); *see also* 15 C.F.R. 2007.3.

B. The GSP Renewal Act of 1996

When the GSP Program was reauthorized in August 1996,[3] the language of the IPR discretionary criterion for GSP eligibility in Section 502(c)(5) of the TA 1974, as amended, was simplified slightly to require the President to take into account "the extent to which such country is providing adequate and effective protection of intellectual property rights." The prior expired law from the 1984 Act specified (as discussed above) that each beneficiary country provide "adequate and effective means under its laws for foreign nationals to secure, to exercise and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights." Otherwise, the GSP Renewal Act of 1996 contained identical IPR provisions, including "mandatory" criteria denying GSP status to countries that directly or indirectly expropriate U.S. property (including intellectual property), and authorization for the President to withdraw, suspend or limit GSP privileges based on failure to meet the IPR criteria. In addition, the GSP Renewal Act of 1996 amended Section 502(c)(4) of the TA 1974 to provide in relevant part that the President must also take into account "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 …." In the renewals of the GSP Program since 1996, the criteria language has not changed.

Thus, we ask the GSP Subcommittee to follow the explicit intent of Congress, and advise the President to "vigorously exercise" his authority to review, and if necessary, withdraw, suspend or limit South Africa's GSP eligibility for its non-compliance with the statutory criteria on intellectual property rights under the GSP Program.

Over the years, retaining GSP benefits has figured prominently in the decisions of a number of countries to improve their IPR protection. In the 1980s, GSP benefits were used as leverage to encourage Singapore, Indonesia and Malaysia to adopt new copyright legislation. IIPA has filed petitions against several countries for their failure to provide adequate and effective copyright protection. IIPA petitions that have been accepted by USTR over the past twenty-nine years (1989-2018) include: Cyprus, Egypt, El Salvador, Indonesia, Lebanon, Poland, Russia, Thailand, Turkey, Ukraine, and Uzbekistan. IIPA has participated in GSP IPR reviews involving the Dominican Republic, Guatemala, Honduras, Panama, and Paraguay (all of which were initiated by other petitioners or by USTR). Presently, GSP petitions commenced by IIPA have been accepted by the U.S. Government and remain open against Indonesia, Ukraine, and Uzbekistan.

IV. 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 impending laws that are on the verge of final enactment would further weaken that legal regime.

[3]GSP Renewal Act of 1996, Subtitle J, P.L. 104-188, August 20, 1996, at 110 Stat. 1917 *et seq*.

If enacted, the two new laws would violate South Africa's international obligations (including 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 result in a clear lack of adequate and effective intellectual property rights protection. The South Africa country report from the IIPA 2019 Special 301 submission (February 7, 2019) appended to this filing includes a full description of the deficiencies in these two bills, as well as other deficiencies in South Africa's legal and enforcement regimes.

The GSP eligibility standard 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 recordings are produced and distributed. These technological changes also mean that enforcement and anti-piracy actions need to also adapt over time. The obligations of the TRIPS Agreement, which provide global minimum standards of copyright protection and enforcement, are a key measuring stick for these determinations, even though the TRIPS Agreement is a mid-1990s agreement. Along with the TRIPS Agreement, in the digital era of copyright production and dissemination, the World Intellectual Property Organization (WIPO) Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)—contemplate 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 these treaties, but at present, South Africa remains a signatory to the treaties, and not yet a member of either the WCT or WPPT.

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 treaties, including TRIPS, and the WIPO Internet Treaties. In 2015, a Copyright Amendment Bill was introduced (2015 Bill), followed by a Performers' Protection Amendment Bill (PPAB), intended to effect this purpose. However, as IIPA detailed in extensive comments to the South African Government, these bills fell far short of international norms for the protection of copyrighted works in the digital era. Following criticism from many rights holder groups, including IIPA, the bills stalled pending further review and consultation with domestic and international stakeholders. In December 2016 and May 2017, two new Copyright Amendment bills—amounting to, in essence, a revised version of the 2015 Bill—were introduced, and then further amended in 2018 (2018 Bill). A revised PPAB was also introduced in 2018.

Unfortunately, the 2018 Bill and the revised PPAB bill did not make significant improvements, but instead addressed only a few of the identified problems in the 2015 Bill. Moreover, many of the most problematic provisions for rights holders carried over to the new bills, and, additional provisions that are even more problematic were introduced in the new versions, all without public consultation in many instances. These two 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 are awaiting Presidential assent (which we understand may occur prior to the May 8 national election).

The list of rights holders' concerns about 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 will harm consumers as well because rights holders will inevitably pull out of the marketplace. If these bills enter into force, South Africa's copyright framework would clearly not provide adequate and effective protection and enforcement of intellectual property.

Here is a summary of some of the major issues of immediate and primary concern to the copyright industries with this legislation:

- The inclusion of severe restrictions on 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 property interest in their copyrighted works and sound recordings. For example, both the 2018 Bill and the PPAB limit 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.

- An ill-considered importation of the U.S. "fair use" rubric is appended to a proliferation of extremely broad new exceptions and limitations to copyright protection (on top of "fair dealing" provisions) creating an amalgam of broad and unclear exceptions and limitations. The effects of this array of provisions will imperil legitimate markets for educational materials, locally-distributed works, and online works in general. 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.

- The overly regulated licensing mechanisms will undermine the digital marketplace and severely limit the ability of rights holders to exercise exclusive rights in their copyrighted works and sound recordings by regulating the relationship between creative parties, 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.

- Inadequate criminal and civil remedies for infringement, including online piracy, will deny the ability to effectively enforce rights against infringers, thus thwarting the ability for legitimate markets to develop for copyrighted works and sound recordings.

- Inadequate provisions on technological protection measures necessary for the licensing of legitimate content (for example, video-on-demand, or music streaming services), 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.

Taken as a whole, 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" and enforcement of intellectual property.

Many of the proposals in the 2018 Bill 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, rather than to incentivize new creative output. This premise is incorrect, however, and will instead result in a stagnation of South Africa's cultural community. Without important revisions to these provisions, 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, in South Africa. 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 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.

V. 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 new laws (the 2018 Bill and the PPAB) will further deny the creative industries with equitable and reasonable access to the South African market for copyrighted works and sound recordings. Once enacted, the new laws will 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 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%, the tax is a trade barrier because it includes online selling of content such as films, TV series, games, and e-books.

VI. CONCLUSION

For the reasons stated in this submission (and the attached Appendix), IIPA requests that the Trade Policy Staff Committee initiate a review of the country eligibility of South Africa for its failure to provide adequate and effective copyright protection for U.S. copyright creators and owners, and for its failure to assure the United States that it will provide equitable and reasonable access to the markets of South Africa. If requisite improvements are not made in South Africa to remedy these deficiencies, IIPA requests that the U.S. suspend South Africa's eligibility or withdraw the GSP benefits of South Africa, in whole or in part.

Respectfully submitted,

Kevin M. Rosenbaum
Counsel
International Intellectual Property Alliance

APPENDIX

IIPA 2019 SPECIAL 301 REPORT ON SOUTH AFRICA

SUBMITTED FEBRUARY 7, 2019

TO THE

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

SOUTH AFRICA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)
2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR place South Africa on the Priority Watch List in 2019.[1]

Executive Summary: As 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. New technologies for distribution of cultural materials provide exciting opportunities for growth of the copyright industries and all creators. To capture this opportunity, it is essential that rights holders enjoy, in law and practice, exclusive rights that enable them to securely disseminate their goods and develop new legitimate services. 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. South Africa's Cabinet also recently approved the country's accession to the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT), and the Beijing Treaty (the "WIPO Internet Treaties"). IIPA applauds this development, but is seriously concerned about two draft laws recently accepted at the National Assembly, and pending approval by the National Council of Provinces, which are in violation of these treaties and, potentially, South Africa's Constitution.

Since 2015, South Africa has embarked on a project to update and amend its Copyright Act and Performers' Protection Act, which resulted in two fundamentally problematic bills—a Copyright Amendment Bill and a Performers' Protection Amendment Bill, both of which have been subject to numerous revisions to bring them into their present forms, but which have failed to address their fundamental deficiencies. These bills raise many concerns for the content industries and move South Africa further away from international norms, rather than into compliance with the WIPO Internet Treaties. Moreover, the bills 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 ensuring the vibrancy of a free market in creative materials. Also very troubling are a number of issues that have clear potential to drive a formal challenge in the Constitutional Court.

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 would benefit from revision, 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. 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 send a clear message that the proposed bills are flawed and additional review is necessary to address the concerns of *all* stakeholders and ensure the provisions comply with international treaties.

[1]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/2019/02/2019SPEC301HISTORICALCHART.pdf.

PRIORITY ACTIONS REQUESTED IN 2019

- Revise the Copyright Amendment Bill and the Performers' Protection Amendment Bill to make them implementable and ensure compatibility with international treaties and commitments, and further to 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 WCT and WPPT.

COPYRIGHT LAW IN SOUTH AFRICA

Amendment of South Africa's Copyright Law and Performers' Protection Act are needed to bring the country's laws into compliance with international treaties. In 2015, a Copyright Amendment Bill was introduced (2015 Bill), followed by a Performers' Protection Amendment Bill (PPAB), intended to effect this purpose. However, these bills were highly unsatisfactory. Following criticism from many rights holders groups, including IIPA, the progress of the bills was postponed pending further review and discussion with stakeholders. In December 2016 and May 2017, two further Copyright Amendment bills, amounting to a revised version of the troubling 2015 Bill, were introduced, and further amended in 2018 (2018 Bill). A revised PPAB was also produced in 2018. These revised bills address only a few of the problems in the 2015 Bill. Moreover, many of the most problematic provisions carried over to the new bills, and new problematic provisions have been introduced without any public consultation in some cases. These bills were passed by the National Assembly in December 2018 and are now pending before the National Council of the Provinces. At the time of writing, it is understood that they may be presented for Presidential assent prior to the 2019 South African elections, which may take place in May.

As drafted, many provisions of the bills 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 inclusion of severe restrictions on 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. For example, both the 2018 Bill and the PPAB limit 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.
- An ill-considered importation of the U.S. "fair use" rubric is appended to a proliferation of extremely broad new exceptions and limitations to copyright protection, whose effects would imperil the legitimate markets for educational materials, locally-distributed works, and online works in general. Neither the "fair use" nor the "fair dealing" aspects of the proposed bill are ideal, but, more importantly, the proposed "hybrid" model is of utmost concern in terms of its drafting and the challenges posed to any entity that may try to actually use it.
- The licensing and regulatory mechanisms are likely to undermine the digital marketplace by regulating the relationship between creative parties, 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.
- Inadequate criminal and civil remedies for infringement, including online piracy.
- Inadequate provisions on technical protection measures, and overbroad exceptions to prohibitions on the circumvention of such measures.

Taken as a whole, 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). Moreover, aspects of both bills are incompatible with the WIPO Performances and Phonograms Treaty and WIPO Copyright Treaty.

2018 COPYRIGHT AMENDMENT BILL (2018 BILL) AND PERFORMERS' PROTECTION AMENDMENT BILL (PPAB)

Many of the proposals in the 2018 Bill and the PPAB suggest a mistaken assumption 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, rather than to incentivize new creative output. This misguided approach will instead result in a stagnation of South Africa's cultural community. Without important revisions to these provisions, 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 that would allow the creative communities to increase investment to meet the growing demand for creative works of all kinds, in all formats. 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 2018 Bill 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 are already enumerated in the Copyright Act, as amended by the 2018 Bill. Notwithstanding the very significant flaws in the bills, described below, from a technical perspective, the drafts are inadequate and require urgent attention to avoid introducing widespread uncertainty into South African law.

1. Severe Intrusions into Contractual Freedom

Several provisions in the 2018 Bill 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 2018 Bill 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, in 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 when it comes to the creation and use of sound recordings. It would risk serious harm to the South African recording industry, performers, and other creators because a major incentive for investment in South Africa would be removed through the effective halving of the term of assignment of recordings from 50 years to 25 years.

The effect of these provisions would be that it would be impossible to clear rights in many works after 25 years, meaning they would simply be unusable as a result of this provision, and no one would receive any revenues from them. Sound recordings will typically include performances from a large number of performers. While the copyright owner of the sound recording (the record company) will often have a long-term relationship with the featured artist, it is far less likely to have such a relationship with, for example, a performer who has entered into a one-off agreement to provide backing vocals or other musical performances in a sound recording. Each such performer would have rights according to the PPAB, which under draft 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. Draft Section 3A provides that the record company would cease to have those rights after 25 years. That would mean that the record company would have to seek out thousands of performers (with whom the company 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 mean the sound recording could longer be used, ending the revenues that come to record companies, performers, authors, or publishers from the exploitation of that recording. That cannot be the intention of this legislation.

The provision would have a broader negative effect on performers. Introducing new artists to the market and promoting their careers requires 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 in new talent that can be undertaken by record companies. These provisions require urgent reconsideration to avoid the serious harm that they risk causing to all participants in the South African music industry. Moreover, although audiovisual works are now excluded from this provision, the proposed clause would 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 the market for making films in South Africa.

B. Sweeping ministerial powers to set contractual terms: Section 39 of the 2018 Bill and Section 3A(3)(a) of the PPAB create ministerial powers to prescribe "compulsory and standard contractual terms", including setting royalty rates across any form of agreement covering copyright or 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.

Insofar as agreements between sound recording performers and producers are concerned, these provisions would restrict the flexibility in transfer agreements, which 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 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: Section 8A of the 2018 Bill includes a new proposal to regulate the remuneration terms of private contractual agreements between performers and copyright owners. Despite proposing a significant interference into private contractual arrangements, to the particular detriment of certain performers, Section 8A was not 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 (including music videos). While it may be assumed that the intention of Section 8A is to ensure that performers are remunerated appropriately, in practice the proposal would cause substantial harm to a large category of the performers who perform background roles in music videos.

Music videos are comprised of performances from featured performers (the artist or artists with whom the record company has partnered) and non-featured or backing performers (the performers who typically are contributing to a music video on a one-off basis, such as dancers performing in the background of the video). Featured artists are remunerated in accordance with the terms they have negotiated with the record company, and these terms almost invariably are on a royalty basis (in addition to lump-sum advances). 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 a longer-term partnership with a record company. Section 8A would appear to propose removing the possibility of lump-sum payments and replacing them with royalty payments.

The effect of Section 8A, rather than benefitting performers, would in fact result in many performers having no guarantee of receiving any remuneration from exploitations of the music video in which they have performed. This is because many creative projects are loss-making for the producer. As a consequence of proposed Section 8A, non-featured performers performing in music videos 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 video in question actually succeeded in generating revenues. The current commercial practices avoid that outcome by paying non-featured performers on a lump sum basis, irrespective of whether the music videos in which they perform succeed or do 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 2018 Bill are further compounded by the prohibition on contractual override in Section 39B(1), which prohibits any contractual terms that deviate from the provisons 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 protracted at 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 as a result of one set of rights being subject to private negotiation (the producers' rights), and the performers' rights being subject ultimately 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 2018 Bill drastically expands the exceptions and limitations to copyright in South Africa's law for, amongst others, 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 digital 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.[2]

[2]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.

The fair use provisions proposed in the 2018 Bill derive from the fair use statute in U.S. law. However, the doctrine will likely be difficult to apply in South Africa, as the country lacks the decades of legal precedent that have served to define, refine, and qualify the fair use doctrine in the United States. The relative confidence with which copyright owners and users can function within the fair use environment in the U.S. is a result of nearly two centuries of case law that has developed and (after codification) elaborated on the four factors to be considered; how they are to be balanced and weighed in particular cases; what presumptions ought to apply; and so forth. Without the foundation of a well-developed body of case law, South Africa's importation of the U.S. fair use doctrine can only result in uncertainty for rights holders and users on the parameters of permissible uses. Furthermore, South Africa's legal system lacks statutory and punitive damages that infringers face in the United States. The reality is local and other rights holders will not have the protections afforded by the U.S. precedent, which means that they will face far more uncertainty in the South Africa market, as well as legal fees and protracted timeframes for cases that will likely deter most and leave even the most courageous determined never to try again.

At the same time, the draft retains South Africa's existing "fair dealing" system, but 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. These exceptions virtually guarantee an intolerable level of confusion and uncertainty about which uses of copyright works require licenses and which may not. A robust legitimate marketplace for works cannot develop in such an unpredictable environment and may well jeopardize the existing licensing system in the country. A 2017 study by PricewaterhouseCoopers predicted "significant negative consequences" for the South African publishing industry should the proposed fair use provision and the broad exceptions be adopted.[3] 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 2018 Bill, if adopted in its current form, would negatively impact their operations, likely resulting in retrenchments and possible business closures.

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 2018 Bill are likewise of concern:

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 for *reformatting* an integral and essential part of a technical process, if the purpose of

[3]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.

those copies or adaptations is to enable a transmission. Such language could hinder efforts to work with online intermediaries to put a stop to 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, 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 12D7(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 provision for persons with disabilities, as defined to mean essentially disabilities that relate to the ability to read books. This 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 the 'Making Available'

The proposed Section 9(f) confirms 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 draft Section 9(e), which enumerates 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": communication to the public "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 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. Technical Protection Measures

Technological protection measures 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. The provisions regarding technological protection measures (TPMs) introduced in the 2018 Bill (and incorporated by reference into the PPAB), while welcome, are inadequate. Article 18 of WPPT requires that contracting parties provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures.” At present, the proposed provisions in the bills are not compatible with that requirement.

This issue is of paramount importance when considering the central role of digital distribution to the current and future economics of the creative industries, including the music industry. 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.

First, the definition of “technological protection measure” in Section 1(h) 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. This would defeat the purpose of the provisions prohibiting the circumvention of TPMs. It needs to clarify that a protected TPM is one that in the normal course of its operation is designed to prevent or restrict infringement of copyright in 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. Rather, the provision of Section 28P(2)(a) would apply to enable the user to seek assistance from the rights holder in gaining access to the work in question. 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 also 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 is adequately scoped to encompass all TPM circumvention devices, which would also be consistent with Article 6(2) of the EU Copyright Directive.

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 to benefit from an exception. Additionally, a provider of an unlawful circumvention technology could rely on Section 28P(1)(b) to claim they are 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 28(2)(b).

*7. **Penalties for Infringement***

The 2018 Bill 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 worldwide streaming piracy, in 2016 there were an estimated 21.4 billion total visits to streaming piracy sites across both desktops and mobile devices.[4] 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.

[4] Alliance for Creativity. https://alliance4creativity.com/mission/the-threat-of-online-piracy/.

IIPA reiterates its recommendations to introduce enforcement provisions that are effective in the Internet 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 2018 Bill 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 SAMPRA CMO, which administers needletime rights on behalf of both recording artists and record labels. This would go against the interests of those rights holders, the users (licensees), the public at large, and industry standards. Joint sound recording producer and performer organizations operate in some 40 territories. By working 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 2018 Bill 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. The 2018 Bill should be revised to include a proposal to extend the term of protection for sound recordings to 70 years. This will provide greater incentives for the production of 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 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 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%, the 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. One group of South African artists lamented that they came together as youths to try and make a living out of music, but that street vendors are killing their business by illegally selling pirated CDs and DVDs that they would have released.

Internet Piracy: 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. 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. It is important to have 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 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 should be replicated in South Africa. It is critical for South Africa to gain more understanding of these approaches and to work proactively with the people 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: The Electronic Communications and Transactions Act (ECTA), read with the Copyright Act, is the legislation 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 legislation. 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.