SOUTH AFRICA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)
2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR place South Africa on the Priority Watch List in 2024.[1] IIPA further recommends that through the ongoing Generalized System of Preferences (GSP) review, the U.S. government continue to indicate that the Copyright Amendment Bill (CAB) and the Performers' Protection Amendment Bill (PPAB), as they currently stand, are fatally flawed and to work with the South African government to remedy the deficiencies in South Africa's legal and enforcement regimes, including by withdrawing and redrafting the bills to address the serious concerns detailed below and in IIPA's previous submissions. If, at the conclusion of the review, South Africa has not made requisite improvements, the U.S. government should suspend or withdraw GSP benefits to South Africa, in whole or in part.

Executive Summary: South Africa's current copyright protection and enforcement framework fails to meet the challenges of the digital age. New technologies are providing South Africa's consumers with increasing access to legitimate creative content and exciting opportunities for the growth of the copyright industries and all creators. Unfortunately, South Africa's inadequate response to persistent piracy enabled by these same technologies threatens to impede increased access to creative content. 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. IIPA is encouraged that South Africa's government has stated its commitment to protecting intellectual property (IP) and its desire to bring its laws into compliance with international treaties and commitments. However, IIPA remains seriously concerned about the pending CAB and PPAB, which remain inconsistent with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties) and, if enacted, would also violate South Africa's obligations under the WTO TRIPS Agreement and the Berne Convention, potentially violate South Africa's Constitution and Bill of Rights, and move South Africa even further away from international treaty obligations and best practices. As South Africa is an important market in Sub-Saharan Africa that other countries in the region may seek to emulate, the stakes are very high. Considering the importance of the task of modernizing South Africa's Copyright Act and Performers' Protection Act and the degree of concern raised by the creative industries with the current bills, IIPA recommends that the U.S. government continue to emphasize that the bills remain fundamentally flawed and that South Africa's Parliament should not rush its reconsideration and make only minor revisions. Instead, consistent with the President's directives, South Africa's Parliament should reassess the bills in their entireties for compliance with South Africa's Constitution, international treaty obligations, and best practices. As it stands, the bills in their present form fail to meet these standards and would have several unintended and harmful consequences, including to threaten and hamper the growth of and investment in the creative economy in South Africa and weaken South Africa's market for creative content, both for U.S. exports and the local creative sector.

PRIORITY ACTIONS REQUESTED IN 2024

Legal Reforms

- Ratify and fully implement the WIPO Internet Treaties.
- Withdraw and redraft the CAB and the PPAB to ensure compliance with South Africa's Bill of Rights and Constitution and with international treaty obligations and best practice, informed by an independent economic

[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://www.iipa.org/files/uploads/2024/01/Appendix-B-2024.pdf.

impact assessment study as required by the government's Socio-Economic Impact Assessment System (SEIAS) guidelines and in consultation with stakeholders and independent IP law experts.
- Increase the term of protection for works and sound recordings from 50 years to at least 70 years, in line with the international standard.

Market Access
- Remove market access restrictions that negatively impact the U.S. creative industries.

Enforcement
- Improve enforcement against online piracy, including by providing effective mechanisms and statutory remedies to address services that infringe domestic and foreign content.

LEGAL REFORMS

- **Ratify and fully implement the WIPO Internet Treaties.**

Significant reforms are needed to South Africa's Copyright Act and Performers' Protection Act to bring the country's laws into compliance with international agreements, including the WTO TRIPS Agreement and the WIPO Internet Treaties.[2] As previously reported, in 2018, the South African Parliament adopted the first major revision of the country's copyright and related laws in decades.[3] While the intent of South Africa's copyright reform process was to bring the country's laws into compliance with international agreements, the bills that ultimately passed fell far short of international norms for the protection of copyrighted works in the digital era. Moreover, the copyright reform process failed to consider whether the proposed changes would be compliant with South Africa's Constitution and international obligations. Further, as part of its required SEIAS process, the government did not publish a SEIAS report to adequately measure the economic impact of the bills on South Africa's creative sector.

- **Withdraw and redraft the CAB and the PPAB to ensure compliance with South Africa's Bill of Rights and Constitution and with international treaty obligations and best practice, informed by an independent economic impact assessment study as required by the government's Socio-Economic Impact Assessment System (SEIAS) guidelines and in consultation with stakeholders and independent IP law experts.**

In June 2020, South Africa's President referred the CAB and the PPAB back to the National Assembly based on reservations regarding the bills' compliance with South Africa's Constitution and its international commitments. The National Assembly's Portfolio Committee on Trade, Industry, and Competition (Portfolio Committee) subsequently made minor revisions to the bills without addressing the major concerns, and the National Assembly adopted the revised bills in September 2022, then sent them to the National Council of Provinces (NCOP) for concurrence. The NCOP, as well as the legislatures of South Africa's nine provinces, staged public hearings on the bills. Unfortunately, the NCOP did not heed the serious reservations raised by the provincial governments during their deliberations on the bills nor fully assess the President's concerns expressed in his 2020 rejection of the bills. Despite the fact that the majority of the provinces (six out of nine) raised serious concerns about the proposed legislation, including the scope of the proposed new and invasive regime of copyright exceptions and limitations, the introduction of an expansive "fair use" exception to copyright protection, and the absence of a proper economic impact assessment study as is required under government's own SEIAS protocols, the Select Committee of the NCOP moved to adopt the bills, subject to some minor revisions. On September 26, 2023, the provinces voted in favor of adopting the revised texts (the so-called "F-versions" of the bills) and returned the bills to the National Assembly for concurrence. It is anticipated that the National Assembly will adopt the F-versions, because the changes proposed by the NCOP are mainly intended to

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[2] South Africa's Cabinet has approved the country's accession to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the "WIPO Internet Treaties"), and the Beijing Treaty.
[3] See IIPA's 2020 Special 301 Report on South Africa, https://www.iipa.org/files/uploads/2020/02/2020SPEC301SOUTHAFRICA.pdf at 76.

correct certain legislative drafting errors and are not controversial. The next step is for the bills to return to the Portfolio Committee, which was scheduled to meet and discuss the bills in December 2023, but that meeting has been delayed.

South Africa's Parliament has not commissioned any independent legal opinion regarding whether the new copyright exceptions and limitations, including the expanded fair use doctrine, and the weak legal protections proposed for technological protection measures (TPMs) are compliant with South Africa's Constitution and Bill of Rights or international agreements, including the Berne Convention and the WTO TRIPS Agreement (to which South Africa is a member) and the WIPO Internet Treaties (accession to which South Africa approved in 2019). The most comprehensive legal analysis of the bills to date, co-authored by practicing copyright lawyers who are members of the Copyright Committee of the South African Institute of Intellectual Property Law (SAIIPL), concluded that the bills require significant amendments before they would pass constitutional muster and meet the requirements of international treaties.[4]

Enactment of the bills in their current form would place South Africa out of compliance with international norms, the obligations of the WTO TRIPS Agreement, the WIPO Internet Treaties, and the Berne Convention, as well as the eligibility criteria of both the GSP and the African Growth and Opportunity Act (AGOA) regarding IP.[5] It is critical that South Africa's Parliament does not rush this process nor make only cosmetic revisions; instead, consistent with the President's directives, South Africa's Parliament should reassess the bills in their entirety for compliance with South Africa's Constitution and its international obligations. Provisions that are not compliant should be redrafted or deleted from the bills, and any redrafting effort should be based on a meaningful economic impact study, as required under the government's SEIAS protocols (which to date has not been produced by South Africa's Department of Trade Industry and Competition), and the advice of independent and qualified copyright and constitutional law experts and practitioners. At a time when South Africa's economy must rebound from the economic impacts of the global pandemic, the stakes are extremely high for the Parliament to redraft these bills to avoid destabilizing the creative industries and to support a thriving copyright sector, which contributes so significantly to economic and job growth in the country, and which has potential for substantial growth under the proper conditions.[6]

The bills contain many provisions that lack clarity, risk major negative disruption of the creative industries, and pose significant harm to the creators they purport to protect. Major issues of immediate and primary concern to the copyright industries, which are maintained in the current versions of the bills, despite numerous submissions from local stakeholders, are the following:

- The bills would severely restrict the contractual freedom of authors, performers, and other rights holders, 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 freely license and otherwise derive value from their copyrighted works, performances, and sound recordings. For example, as explained below, both the CAB and the PPAB limit certain assignments of rights to a maximum of 25 years, and both bills provide ministerial powers to set standard and compulsory contractual terms for contracts covering seemingly any transfer or use of rights.

- The bills would create an overbroad amalgamation of copyright exceptions that includes an expansive "fair use" rubric (not in line with the U.S. doctrine) appended to a large number of extremely open-ended new exceptions and limitations to copyright protection (on top of the existing "fair dealing" provision), resulting in an unclear thicket of exceptions and limitations.

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[4] See Myburgh et al, *Copyright Reform or Reframe?*, available at https://juta.co.za/uploads/Copyright_Reform_or_Reframe/.

[5] See IIPA's comments and post-hearing brief on South Africa's Generalized System of Preferences (GSP) eligibility in the 2019 annual GSP review, available at http://www.iipa.org/files/uploads/2020/01/2020-01-17-IIPA-South-Africa-GSP-Review-Written-Comments-and-Notice-of-Intent-to-Testify.pdf and https://www.iipa.org/files/uploads/2020/03/SOUTH-AFRICA-IIPA-GSP-Post-Hearing-Brief.pdf; and IIPA's comments on the 2024 African Growth and Opportunity Act (AGOA) Eligibility Review, available at https://www.iipa.org/files/uploads/2023/07/2023.07.05-FINAL-IIPA-Comments-on-2024-AGOA-Eligibility-Review.pdf.

[6] According to a study commissioned by the Department of Trade and Industry (the DTI) in 2010 using data from 2008, the South African copyright-based industries contributed 4.11% to gross domestic product (GDP) and 4.08% to employment. See WIPO, Economic Contributions of Copyright Based Industries in South Africa, available at https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_za.pdf.

- The bills would unjustly interfere with and over-regulate the relationship between creative parties, including by introducing statutory royalty and remuneration entitlements and onerous reporting obligations coupled with disproportionate penalties for non-compliance, all of which would undermine producers' ability to finance content and introduce legal risks for the legitimate use of audiovisual works and sound recordings by rights holders and their licensees. Instead, the bills should provide a flexible and robust legal framework for the protection of creative content and investment in production, enabling private parties to freely negotiate the terms of their relationships and the exploitation of copyrighted works and sound recordings.

- The bills would not provide adequate legal remedies for rights holders to take effective action to enforce their rights against infringers and to combat piracy, especially in the online environment, thus thwarting the development of legitimate markets for copyrighted works and sound recordings.

- The bills' provisions on TPMs are inadequate, falling short of the requirements of the WIPO Internet Treaties, and the overly broad exceptions to prohibitions on the circumvention of such measures would further impinge on the ability of legitimate markets for copyrighted materials to further develop.

These provisions are inconsistent with South Africa's international obligations, for example, by far exceeding the scope of exceptions and limitations permitted under the WTO TRIPS Agreement (Article 13) and the Berne Convention (Article 9). Moreover, aspects of both bills are incompatible with the WIPO Internet Treaties. The provisions are also inconsistent with other established international legal norms and commercial practices, posing a significant risk to investments in South Africa.

Beyond their individual failings, the two bills suffer from fundamental systemic failings that are not amenable to discrete fixes, nor correction through implementing regulations.[7] Without a fundamental course correction of its copyright reform process, South Africa will be taking a step backward in its effort to strengthen copyright incentives and align its laws with international standards and practices. South Africa would be better served by providing clear and unencumbered rights (subject only to targeted and clearly delineated exceptions and limitations that are justified by a clear evidentiary basis and comply with the three-step test), without unreasonable restrictions on contractual freedoms, to allow the creative communities to increase investment in the South African economy to meet the growing demand for creative works of all kinds, in all formats, at all price points. This is particularly important in light of the President's clear objective to improve levels of domestic and 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 CAB and PPAB are extremely broad-reaching legislation. 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 would be already enumerated in the Copyright Act, as amended by the CAB. Also, Section 8A of the CAB would introduce new rights and entitlements for performers, which should exclusively be dealt with under the Performers' Protection Act. Thus, in addition to the very significant flaws in the bills described below, from a technical perspective, the bills are inadequate and risk introducing widespread uncertainty into South African law.

1. Unjustified Interference into Contractual Freedom

[7] Regulations cannot cure fundamental problems with the bills because a basic legal principle adhered to in South Africa is that regulations must be confined to the limits of the law itself and cannot fundamentally alter primary legislation. See *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) (holding by the South Africa Constitutional Court that while "detailed provisions" are necessary to implement laws, "[t]here is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body. . ."). Furthermore, the number of provisions in the bills that require future regulation are very limited and do not relate to the vast majority of the problematic issues raised by IIPA in this and previous submissions.

Several provisions in the CAB and the PPAB constitute unjustified interference into private contractual relations. As such, these provisions restrict how private parties can collaborate to facilitate the public's access to copyrighted works, threatening well-established market practices that underpin domestic and foreign investment in artists and creative content, including books, films, sound recordings, musical works, music videos, and video games.

A. Limitation on term of assignments: Section 22(3) of the CAB and Section 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 assignment, 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 by proposing to limit the term of contracts between performers and copyright owners to a maximum term of 25 years, which would detrimentally disrupt the well-established practices of the recording industry in South Africa for the creation and use of sound recordings. These provisions also would risk serious harm to the recording industry, performers, and other creators in South Africa, because a major incentive for investment would be removed as the term of assignment of recordings effectively would be halved from 50 years to 25 years. These provisions have their origin in an incorrect application of a recommendation made by the Copyright Review Commission that South Africa's Copyright Act should be amended to include a reversion right for composers of musical works that is modelled on the relevant provisions of the U.S. Copyright Act.[8]

In effect, these provisions would make it impossible to clear rights in many works (including audiovisual) and sound recordings after 25 years, rendering this content unusable, with no one able to receive any revenues from such works and sound recordings. For example, sound recordings typically involve performances from a large number of performers. The copyright owner of a sound recording (i.e., the record company) will often have a long-term relationship with the featured artist but is far less likely to have such a relationship with, for example, a performer who entered into a one-off agreement to provide the backing vocals or other musical performances in the sound recording. Under the PPAB, each such performer would have rights that, according to 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. Yet Section 3A provides that the record company would cease to have those rights after 25 years, meaning that the record company would need to seek out thousands of performers (with whom, in the case of session or "backing" musicians, the company often has no long-term relationships) 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 render the sound recording unusable, ending the revenues that come to record companies, performers, authors, or publishers from the exploitation of that recording. That cannot be the intent of this legislation.

The 25-year limitation is described in the CAB's memorandum of objects as a "right of reversion," but a reversion right is substantially different from a fixed time limit on all assignments of copyright in literary and musical works. Section 22(3) of the CAB is therefore fundamentally flawed. While the Copyright Review Commission in 2011 proposed a right of reversion to be considered in certain special cases in the music industry, highly sophisticated legal mechanisms are required to address bespoke situations where such reversions may be needed to address highly specific market failures. Without any economic impact assessment, legal study, or other assessment of the perceived industry problem that Section 22(3) seeks to address in the first place, the enactment of a general limitation of all assignment terms would certainly result in a series of negative, unintended, and completely avoidable consequences. For example, in the film and television industries, the 25-year limitation on assignments of literary works (which would include film and television scripts) and musical works (which would include musical scores for films and television

[8] See Copyright Review Commission Report (2011), ¶15.1.9, p. 102, available at https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf. While there is a provision in U.S. law on termination of transfers, that provision contains key differences that mitigate the harms that would be introduced by the South Africa proposal. First, the South African provision broadly applies to all literary and musical works and sound recordings and is automatic. Under U.S. law, by contrast, termination rights do not apply to works made for hire; as a result, many works, including most audiovisual works (with potentially dozens or hundreds of contributing "authors"), or similar multiple-contributor works (sound recordings, video games, etc.) cannot be terminated. This gives certainty to the producers of those works of their ability to exploit the works without clearances from the numerous contributors. Second, termination under U.S. law is subject to notice (up to ten years prior to termination) and exceptions, allowing derivative works to continue to be exploited. The South African bill has neither of these provisions. Third, the U.S. termination right applies only where the grant was made by the original author, not by successors or assignees. The South African proposal includes no such limitation; it is broadly applicable to all literary and musical works and sound recordings.

shows) would render it practically impossible for producers to consolidate all rights for the life of copyright at the onset of new productions. This would harm the ability of producers to secure financing for new productions, as well as the commercial value of any content produced in South Africa, because undisturbed commercialization could be guaranteed only for a limited period of 25 years—just half the period of time for commercialization guaranteed under South Africa's current law and only a third of the period of time for commercialization guaranteed in the United States.

Section 3A would have a broader negative effect on performers. Introducing new artists to the market and promoting their careers require large upfront investment from record companies, with no certainty of 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 revenues available to invest in new talent. The provision should be removed to avoid the serious harm that it risks causing to all participants in the South African music industry. Audiovisual works may inadvertently fall within the ambit of Section 3A of the PPAB, which states that any performer whose performance is fixed in a sound recording will benefit from the reversion of performers' rights. Accordingly, performers who "make an audible sound" in an audiovisual work or contribute to a voice-over in an animated work may be able to claim that they should also benefit from the reversion of rights under Section 3A of the PPAB. This provision would increase legal uncertainty and introduce a disincentive against film companies' acquiring literary and musical properties for adaptation into film and TV shows. As such, Section 3A would ultimately inhibit financing of film projects and would jeopardize film production in South Africa.

B. Sweeping ministerial powers to set contractual terms: Section 39 of the CAB and Section 3A(3)(a) of the PPAB create ministerial powers to prescribe "standard elements," including setting royalty rates regarding "uses" of copyrighted works and across any form of agreement covering authors' and performers' rights. Furthermore, the proposals would impose unwarranted contractual formalities on all contractual partners. These provisions are not only unjustified but are seemingly premised on a lack of understanding of the myriad 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. It would also introduce the unnecessary legal risk of impermissibly delegating executive legislative authority to the Minister by permitting the Minister to unilaterally determine the manner in which trade and investment in South Africa's creative sectors can occur, without the required Parliamentary oversight if future legislative amendments are deemed necessary to address any properly assessed and clearly determined market failure.

For example, these provisions would unfortunately restrict the flexibility in transfer agreements between sound recording performers and producers. That flexibility is needed to address the varying relationships between performers and copyright owners. 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 inevitably fail to meet the differing needs of performers depending on their respective roles in a sound recording. There is simply no evidence of a market failure that would justify this extensive interference into contractual relations.

While the F-versions slightly modified these sweeping Ministerial powers, the concerns identified above remain. The proposal restricting the Minster's power to set royalty rates to only the "re-sale royalty right" is welcomed. However, the proposal replacing "compulsory and standard contract terms" with "standard elements for agreements" does not resolve concerns regarding the broad Ministerial power to limit contractual freedoms of private parties to prescribe the terms that copyright industry contracts should contain.

C. Mandating the mode of remuneration for audiovisual performers: The CAB includes a proposal (Section 8A) to regulate the remuneration terms of private contractual agreements between performers and copyright owners. Even though it proposes a significant interference into private contractual arrangements, to the particular detriment of certain performers, the substantive provisions of Section 8A were never published and fully opened for public consultation, which may have constitutional implications.[9] Section 8A(5) has since been found to bring about arbitrary deprivations of property rights, and the National Assembly's Portfolio Committee resolved to remove it. The result is a proposal that would substantially undermine the economics and commercial practices concerning the production of audiovisual works. While Section 8A may be intended to provide appropriate remuneration to performers, in practice, the proposal would undermine the feasibility of productions and cause substantial harm to performers.

Section 8A, combined with the contract override provision in Section 39B(1) discussed below, prescribes a compulsory statutory royalty remuneration mode that practically removes the possibility of lump-sum payments.[10] Rather than benefitting performers, this provision would in fact result in many performers, who otherwise would receive remuneration from performing in an audiovisual work, receiving little or nothing from the exploitations of the work. This is because many creative projects are loss-making for the producer. Under proposed Section 8A, performers 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 happen only if the work in question actually succeeded in generating revenues. The current commercial practices avoid that outcome by paying performers on a lump-sum basis, irrespective of whether the works in which they perform succeed. Audiovisual works are comprised of performances by lead/featured performers and extra/non-featured performers. Lead/featured artists are remunerated in accordance with the terms they have negotiated with the producer, and these terms almost invariably are on a lump-sum basis. Extra/non-featured performers, in particular, are remunerated by way of lump-sum payments given their minor roles. Section 8A 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. Furthermore, for certain modes of distribution, such as subscription video-on-demand (VOD), where revenue is received in return for access to an entire catalogue of works, it is not possible to allocate specific revenue to specific works. Therefore, the possibility of paying a share of any such revenue to any stakeholders in individual works (performers or otherwise) is not feasible.

The F-versions include a welcome proposal to introduce contractual flexibility into Section 8A by allowing for an election between "royalties or equitable remuneration." Also welcome is the proposal to exclude "extras" from the statutory royalty entitlement under Section 8A; however, the manner in which the proposal excludes extras is flawed. The amendment excludes all "extras, ancillary participants or incidental participants" from the definition of "performer" in the PPAB. This would result in excluding these performers not only from the application of the CAB's Section 8A, but also from the protections they may currently enjoy under the Performers' Protection Act, which cannot be the intent of the proposal. This flawed proposal illustrates the problem of legislating for performers' rights under the CAB, instead of exclusively dealing with this aspect in the PPAB.

The penalty clauses introduced by Sections 8A(6) and 9A(4) of the CAB may also have constitutional implications due to the disproportionate nature of the penalties prescribed for the failure of rights holders and licensed users of audiovisual works and sound recordings to submit timely reports to all performers featured in such works and sound recordings regarding each commercial activity relating to the use of such works. Criminal liability and fines of a minimum of 10% of a company's annual turn-over are prescribed for a failure to comply with the new reporting obligations. Such fines are wildly inconsistent with the fines (which are not specified) that individuals who infringe on these provisions may incur. By unnecessarily raising the legal risk of doing business in South Africa, these penalties could discourage investment in new content production projects. The manner of reporting to all performers is not prescribed in the CAB, and no impact assessment was performed to determine whether this proposal would be even practically feasible or capable of being operationalized without undue risk of liability arising for parties who make legitimate and licensed commercial uses of audiovisual works and sound recordings in South Africa.

[9] Section 8A was not included in the text of the first draft of the CAB that was the subject of the August 2017 public hearings. Instead, it was written into the text of the bill after the public hearings by the Portfolio Committee under the previous Parliament, without being subjected to an economic impact assessment or full public consultation, which has constitutional implications. This fundamental procedural irregularity was raised by numerous stakeholders during the August 2021 public hearings.

[10] Section 8A, on its face, states that performers have a statutory right to royalties. Combined with the contractual override provision of Section 39B(1), this statutory right to royalties is not waivable, even in instances in which the performers concerned might prefer an alternative remuneration model.

D. Prohibition on contractual override: The risks posed by the CAB are further compounded by the prohibition on contractual override in Section 39B(1), which prohibits any contractual terms that deviate from the provisions of the bill or waive any rights provided by 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. The provision also presents a significant risk of compelling contractual parties to follow rigid standardized contractual terms, thereby inhibiting a competitive and innovative marketplace, and requiring terms that may be overly onerous and disadvantageous to the contractual parties in light of the specific circumstances. IIPA is not aware of any substantive contract override provision that has blanket application across all copyright contracts and rights of copyright in the copyright laws of any country in the world. Not only does the contractual override provision apply to all rights of copyright, but it would also apply to all copyright exceptions and limitations, which would entrench the effect of deprivation of rights of the overly broad new exceptions in the CAB and present serious challenges for the negotiation of settlement agreements in infringement cases in which one of the parties relies on a copyright exception.

2. Inadequate Protection of Performers' Rights

South Africa's intention to ratify the WIPO Internet Treaties is welcome, and full implementation would represent a significant step towards establishing an appropriate legal framework. Regrettably, several 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 diminished to 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, because one set of rights would be subject to private negotiation (the producers' rights), and the performers' rights would ultimately be subject 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 CAB drastically expands the exceptions and limitations to copyright protection in South Africa's law. The broad exceptions, which are extended to have application in the PPAB (without any impact assessment on how this would impact the rights of performers), 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, the proposed exceptions 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 Internet Treaties).

While the proposed "fair use" provision may resemble certain aspects of the fair use statute in U.S. law, it is inaccurate to contend, as some have suggested, that South Africa is proposing to adopt the U.S. fair use doctrine. South Africa's proposed broader fair use provision, along with the other proposed exceptions and limitations to copyright protection, are blatantly inconsistent with the three-step test, which is the internationally recognized standard that confines the scope of copyright exceptions and limitations.[11] The fair use provision, which is supported and

[11] See, e.g., Article 13 of the TRIPS Agreement and Article 9 of the Berne Convention.

entrenched further by the contract override provision (Section 39B(1)), is inconsistent with the three-step test for the following reasons:

- First, South Africa lacks the rich body of case law that, in the United States, helps to mitigate the inherent uncertainty of the scope or applicability of the fair use exception. Without the foundation of a well-developed body of case law, South Africa's untested, broad fair use provision would result only in uncertainty for both rights holders and users on the parameters of permissible uses (since U.S. fair use is determined on a fact-intensive, case-by-case basis, informed by legal precedents developed in jurisprudence stretching back for more than a century).[12] Compounding this shortcoming is that high legal fees and protracted timeframes for cases in South Africa will deter and undermine efforts by rights holders to access the courts in hopes of more clearly establishing the parameters of this broad exception. The International Center for Law & Economics, analyzing whether the United States should require trading partners to adopt U.S.-style fair use, concluded that "the wholesale importation of 'fair use' into other jurisdictions without appropriate restraints may not result in a simple extension of the restrained and clearly elaborated fair use principles that exist in the U.S., but rather, something completely different, possibly even a system untethered from economics and established legal precedents."[13]

- Second, the South African proposal includes language broader than the U.S. fair use statute, which further heightens the uncertainty discussed above, and the risk that an unacceptably wide range of uses in South Africa will be considered "fair" and non-infringing. For example, the proposal includes several additional access and use purposes that are absent from the U.S. fair use statute. These include: "personal use, including the use of a lawful copy of the work at a different time or with a different device"; "education"; "comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche"; "preservation of and access to the collections of libraries, archives and museums"; and "ensuring proper performance of public administration." Extending fair use to such undefined access and use purposes that are not included in the U.S. statute adds to the uncertainty of how South Africa's judges will apply fair use, and the risk that they will apply the fair use doctrine well beyond the scope of its application in the United States.[14] In addition, unlike the U.S. fair use statute, the South Africa proposal states that the "the purpose and character of the use" should include consideration of whether "such use serves a purpose different from that of the work affected."[15] The South Africa proposal also includes an affirmative requirement to consider "all relevant factors," which is not in the U.S. statute. Further, the CAB calls on judges to narrowly consider the "substitution effect" rather than the overall "effect" of the use on the potential market for the copyright protected work, as called for under the U.S. fair use statute. Even if a particular use of a copyrighted work would not amount to a direct "substitution" of the work in its current market, such use could still have a detrimental impact on the potential markets for a rights holder. Moreover, this departure from the language in U.S. law was not subjected to any

[12] While some have suggested that South Africa could look to case law in the United States, or elsewhere, South African judges are not bound by the decisions of U.S. courts, and such decisions carry virtually no legal weight in South Africa. It is very unlikely that South African courts would, or even could, wholesale adopt U.S. precedents, especially considering South Africa's very different and unique legal history. In addition, while a handful of countries have recently enacted fair use provisions, IIPA is not aware of any significant case law that has been developed under the fair use statutes in any of these countries. South Africa's existing jurisprudence on fair dealing will also not be helpful because the fair use proposal is much broader than the fair dealing provisions in the current law and, therefore, whatever case law exists interpreting the existing, narrower fair dealing provisions would have very little relevance.

[13] See Geoffrey A. Manne and Julian Morris, International Center for Law & Economics, *Dangerous Exception: The Detrimental Effects of Including 'Fair Use' Copyright Exceptions in Free Trade Agreements*, (2015), p. 15, available at http://laweconcenter.org/images/articles/dangerous_exception_final.pdf.

[14] Many of these additional access and use purposes in the South African proposal are in fact broader than exceptions permitted under U.S. law. For example, regarding the "personal use" language, there is no general "personal use" exception in U.S. law and "format shifting" is not always held to be a fair use. In addition, the "preservation of and access to the collections of libraries, archives and museums" is not a fair use in the United States. Rather, Section 108 of the Copyright Act establishes specific instances and limits pursuant to which libraries and archives may make copies of works for preservation purposes. It is unclear what "ensuring proper performance of public administration" encompasses, but nothing in the Copyright Act or U.S. case law establishes such use to be a fair use.

[15] Requiring South African judges to consider whether "such use serves a purpose different from that of the work affected" would broaden the U.S. judge-made notion of "transformative use." The Supreme Court has defined "transformative use" as one that "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). South Africa's provision would establish a lower bar for the permissibility of a use than U.S. law because it appears to require that a use merely serve a "different" rather than a "transformative" purpose. See *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U. S. ____, 28 (2023) (clarifying that "*Campbell* cannot be read to mean that §107(1) weighs in favor of any use that adds some new expression, meaning, or message. Otherwise, 'transformative use' would swallow the copyright owner's exclusive right to prepare derivative works.")

impact or legal assessment. It is unknown how South African judges would interpret these provisions, which heightens the risk that a broader range of uses in South Africa will be considered "fair" than those permitted under U.S. law. Therefore, rather than proposing to adopt a U.S.-style "fair use," South Africa has proposed a new copyright exception, borrowing certain statutory language from the United States, while adding new and broader language, and without the corpus of U.S. jurisprudence that is integral to defining the scope of U.S. fair use and its interpretation.

- Third, in addition to the new expansive "fair use" exception, the legislation also retains South Africa's existing "fair dealing" system, while expanding the impact of fair dealing exceptions by effectively removing the limiting standard of "fair practice." It also introduces several extremely broad new exceptions and limitations to copyright protection, all of which have the potential to adversely impact the legitimate market for educational texts, sound recordings, locally distributed works, and online works in general. A 2017 study by PricewaterhouseCoopers looked at the impact of these broad exceptions on the South African publishing industry and predicted "significant negative consequences" would result from the adoption of the proposed fair use provision and the other broad exceptions.[16] 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 copyright owners the exclusive rights and 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 which uses of a work are permissible without a license.

As detailed above, the proposed fair use provision is overly broad (significantly broader than the U.S. fair use doctrine), and its scope and application are uncertain due to the lack of supporting case law, new and broader language, and the "hybrid" combination with the existing fair dealing system. As a result, the proposed provision is not limited to "certain special cases," and there is a substantial risk that it would be applied in a manner that conflicts with the normal exploitation of a work or unreasonably prejudices the legitimate interests of the rights holder. Thus, the provision clearly falls outside the limits of the three-step test. If the proposed legislation is enacted, South Africa's legal framework for exceptions and limitations to copyright protection would violate South Africa's international obligations, would be inconsistent with international treaties it has stated an intent to join, and would further erode the already inadequate level of copyright protection in the country.

In addition, the uncertainty that will be caused by the proposed hybrid model is particularly problematic in South Africa, because its legal system lacks statutory and punitive damages, which rights holders in the United States rely on to deter and remedy infringement, and enforcement in South Africa has been historically inadequate.[17] In South Africa, civil damages may be claimed for copyright infringement only after a rights holder meets a statutory requirement to first prove that an infringer had "guilty knowledge" of infringement. As a result, in most instances damages would be claimable for infringing acts committed by a defendant only after a court has determined that the defendant cannot rely on the fair use defense. As a result, bad actors in South Africa would be undeterred from taking advantage of the uncertainty created by these exceptions to infringe copyrights. A copyright system that consists of open-ended and

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[16] See PricewaterhouseCoopers, *The expected impact of the 'fair use' provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry*, July 2017, available at https://publishsa.co.za/pwc-report-the-expected-impact-of-the-fair-use-provisions-and-exceptions-for-education-in-the-copyright-amendment-bill-on-the-south-african-publishing-industry/. The study notes that a 33% weighted average decline in sales would likely occur, with concomitant reductions in GDP and VAT and corporate tax revenue collections. Some 89% of publishers surveyed noted that the CAB, if adopted in its current form, would negatively impact their operations, likely resulting in retrenchments and possible business closures.

[17] Section 24(3) of South Africa's Copyright Law, which states that courts may "award such additional damages as the court may deem fit," does not provide for statutory or punitive damages. Statutory damages allow plaintiffs to recover damages without showing proof of harm to the rights holder or gain to the infringer. In contrast, the "additional damages" provision of 24(3) permits a judge to take into account the flagrancy of the infringement and the benefit to the infringer, but rights holders must still prove the harm and the gain to the infringer. Regarding punitive damages, IIPA is not aware of a case in which these "additional damages" have been actually quantified and awarded, and there is nothing in South Africa's law or practice to suggest that the purpose of the "additional damages" provision is to punish or deter infringement. In addition, criminal damages in South Africa are ineffective for deterring infringement due to limited criminal prosecutions, the high burden of proving and collecting damages, and the higher burden of proof in criminal cases (which would be exacerbated by the new vague and open-ended exceptions in the copyright reform proposal).

unclear exceptions, weak affirmative rights, and non-deterrent enforcement is the archetype for inadequate and ineffective protection of IP rights.

Finally, the risks posed by the fair use provision, and the other unclear and very broad exceptions discussed below, are further compounded by the prohibition on contractual override in Section 39B(1) (discussed above), which renders unenforceable any contractual term that prevents or restricts a use of a work or sound recording that would not infringe copyright under the Copyright Act (as amended by the CAB).

4. Exceptions and Limitations

In addition to the proposed introduction of "fair use" into South African law, the following new or expanded statutory exceptions contained in the CAB are likewise of concern, and many clearly exceed the bounds of the longstanding international standard confining exceptions and limitations to copyright, the three-step test:

A. Sections 12B(1)(h) 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 (a similar proposal was challenged successfully in the United Kingdom where the High Court quashed a private copying exception that did not compensate rights holders for the harm the exception would cause). Such private copying exceptions are typically accompanied by a remuneration (or "levy") system by which rights holders are compensated for the private copying of their works. Section 12B(2)(c) also permits copying in an "electronic storage medium," which is highly unusual and risks undermining existing licensing practices for digital content services. This exception violates the three-step test, because it is not limited to "certain special cases" and does not include any requirement to consider whether such copying would conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the rights holder.

B. Section 12B(1)(e) 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 would undermine the author's translation rights, which warrant just compensation and which South Africa is required to protect under the Berne Convention and the WTO TRIPS Agreement.[18] Enactment of this exception would therefore disrupt the significant market for authors' and publishers' translation rights. As a result, this exception falls outside the bounds of the three-step test, because it fails to account for the need to avoid conflict with a normal exploitation of the work or unreasonably prejudicing the legitimate interests of the rights holder.

C. Section 12C provides an exception for temporary reproduction of a work "to enable the transmission of the 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 commercial significance to these acts." This provision also allows copying for reformatting, where such copies are an integral and essential part of a technical process if the purpose of those copies or adaptations is to enable a transmission. Such language could hinder efforts to work with online intermediaries to stop 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 use of any quotation provided that "the extent thereof shall not exceed the extent reasonably justified by the purpose," but without enumerating the permitted purposes such as, for example, criticism and review, and without limiting the use to avoid conflict with the normal exploitation of the work or unreasonable prejudice to the legitimate interest of the rights holder.

[18] See Berne Convention Article 8, and WTO TRIPS Agreement Article 9, incorporating the Berne Convention, Article 8.

The result is an exception that appears to permit quotations in virtually all instances, 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. Without clear limits to the extent and purpose of a quotation, the exception fails to meet the three-step test limitation of "certain special cases" and would potentially lead to a conflict with the normal exploitation of the work and unreasonably prejudice the legitimate interest of the rights holder.

E. Section 12D permits the copying of works, recordings, and broadcasts for educational purposes with very few limitations. Section 12D(7)(a) on open access for "scientific or other contribution[s]" is overreaching and will likely undermine the rights of authors and publishers and deny authors academic freedom. Section 12D(4)(c) specifically authorizes the copying of entire textbooks under certain conditions, even textbooks 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 likely impact of these provisions on normal exploitation of works for educational markets would far exceed what is permitted under international standards. Permitting copying of entire textbooks that are available for authorized purchase or licensing clearly is not confined to certain special cases. Such unauthorized uses would also clearly conflict with publishers' normal exploitation of the work and unreasonably prejudice their legitimate interest.

F. Section 12B(1)(b) introduces an unreasonably broad so-called "ephemeral exception" for the reproduction of sound recordings by a broadcaster. To ensure that this exception is properly confined by the three-step test, reasonable limits should be introduced including: (i) the time limit must be such that it limits the copies made to truly "ephemeral" copies (e.g., copies may not be kept for longer than thirty (30) days); (ii) copies must not be used for transmission more than three (3) times; and (iii) the exception should not allow broadcasters to use it to create permanent databases of copyright works for use in their broadcast activities.

G. Section 19D provides an exception for persons with disabilities, which is defined as, essentially, disabilities that relate to the ability to read books. This provision 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 "Making Available"

The CAB would add Section 9(f) to the Copyright Act, confirming that sound recording producers have the exclusive making available right set out in WPPT, Article 14. This provision is a positive clarification, as this right underpins the digital music industry. However, the wording of proposed Section 9(e) regarding 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," which explicitly "includes making the sounds or representations of sounds fixed in a phonogram audible to the public." To avoid ambiguity in the legal framework, IIPA submits 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 proposed 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. Technological Protection Measures (TPMs)

TPMs 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 sectors opened up by current and emerging technologies. It is welcome that the CAB introduces provisions (and the PPAB incorporates them by reference) on TPMs. Unfortunately, these provisions are completely inadequate, and therefore fall short of the requirement of Article 18 of WPPT and Article 11 of the WCT that contracting parties provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures."

This issue is of paramount importance when considering the central role of digital distribution to the current and future economics of the creative industries. 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. Moreover, many film and television producers are seeking to respond to consumer demand by establishing online platforms to provide content to consumers or licensing film and television programming to online services. TPMs are essential to the functionality of these platforms and to the licensing of this high-value content. Furthermore, video game publishers, device makers, and online platforms rely on TPMs to safeguard the content played on platforms from illegal copying and distribution. Protecting the integrity of the video game ecosystem from infringing activities is necessary to ensure that consumers can enjoy rich and immersive video game experiences. Anti-circumvention provisions are instrumental in safeguarding the highly creative works produced by the video game industry across all platforms.

First, the definition of "technological protection measure" in Section 1(j) is problematic because it refers to technologies that prevent or restrict infringement, as opposed to technologies that are designed to have that effect or that 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. The provision should be clarified to ensure that a protected TPM is one that effectively protects a right of a copyright owner in a work, or effectively controls access to 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. As it stands, paragraph (b) of the definition would be open to abuse and would provide a charter for hacking TPMs. In this respect, see also IIPA's comments below with respect to Section 28P(1)(a).

Second, IIPA also recommends that the definition of "technological protection measure circumvention device or service" be amended to include devices or services that (a) are manufactured, promoted, advertised, marketed, or sold 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 encompasses a broader range of harmful TPM circumvention devices and services, consistent with best international practices.

Finally, the exceptions in Section 28P regarding prohibited conduct with respect to TPMs (in Section 28O) are inadequately defined, therefore rendering them incompatible with international norms 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 or service by a user was not to perform an act permitted by an exception.[19] Additionally, a provider of an unlawful circumvention technology (e.g., device or service) could rely on Section 28P(1)(b) to claim it is 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.

[19] In this regard, see the discussion above regarding the proposed "fair use" and other unclear and overly broad exceptions proposed in the bills, which would compound this problem.

The F-versions include proposed changes to the TPMs provisions, including a revision of Section 28P(2), which do not resolve the concerns identified above. Section 28P(2), as revised, would be subject to abuse by enabling a user to engage the services of a third party for assistance to overcome or circumvent TPMs when the user holds the subjective view that the user is acting lawfully under an exception, even if that is not the case.

7. Penalties for Infringement

The revised CAB amends section 27 to include (5A), (5B), and 5(C) to provide liability for online infringement and violations of protections for TPMs and copyright management information. This is in keeping with Article 18 and Article 19 of the WPPT, which require adequate legal protection and effective legal remedies against the circumvention of effective technological measures and infringement of electronic rights management information. However, (5B)(a)(i) should be amended to clarify that the offering and other dealing with circumvention devices or services are already illegal, without the need to show that the illegal device is subsequently used to infringe copyright. The current wording, "knows that the device or service will, or is likely to be used" to infringe copyright in a work protected by an effective TPM, sets the bar for liability so high such that it would render the entire provision ineffective. Moreover, given the scope and scale of the problem of online piracy, which remains a persistent and growing threat to the creative industries, there is a serious need for more mechanisms to combat infringement and further remedies for rights holders. Under current law, it is practically impossible for rights holders in South Africa to enforce their rights against non-domestic infringers and content pirates who locate infringing services in other countries while targeting South African audiences and consumers. Unfortunately, the CAB does not address this need in any meaningful way. As discussed below, South Africa should provide in its legal system mechanisms that ensure Internet service providers (ISPs) can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities.

IIPA also reiterates its recommendations to introduce additional enforcement provisions that are effective in the digital 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 copyrighted 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 29A through 29H in the CAB 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 is required by the bill, nor do the proposed provisions sufficiently delineate the Tribunal's scope. Indeed, the CAB 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 a broadcast, or to reproduce and publish out of print editions 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. Further, it should be clarified that rights holders may elect to bring claims to the Tribunal *or to the Courts*, and that the Tribunal shall hear and determine matters referred to it expeditiously.

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 economic 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 the price that would be agreed in a free-market transaction based on a willing buyer and a willing seller standard. 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 in the CAB, 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 interpretation would be inconsistent with industry standards and contrary to the interests of those rights holders, the users (licensees), and the public at large. 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, and as referred to in section 8 above, 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 (i.e., the "willing buyer willing seller" standard applied by the U.S. Copyright Royalty Board), which seeks to ensure that rights holders are renumerated adequately for the high value of recorded music.

10. State Intervention in Private Investments and the Public Domain

The CAB contains concerning provisions that revert rights to the government in situations that could discourage investment, while unnecessarily diminishing the public domain. Section 5 empowers the Minister to designate "local organizations" to be vested with all rights of copyright in works made under the direction or control of such organizations. This could result in designated local organizations, that may include state-owned enterprises, being vested with full rights of copyright in works of South African authors without agreement between the parties to this effect. The CAB further proposes to amend Section 22(1) to provide that "copyright owned by, vested in or under the custody of the state may not be assigned." This departure of the standard rules of engagement as established for copyright transfers in the Copyright Act may have constitutional implications and result in arbitrary and unjustifiable deprivations of property rights and unwarranted restrictions on the freedom to trade.

11. Certain Definitions Incompatible with International Treaties

The definitions of "producer" and "reproduction" in Section 1 of the PPAB are inconsistent with corresponding definitions in the international treaties including the WPPT.

- The definition of "producer" should be clarified to ensure that it covers both natural and legal persons as provided for in Article 2(d) of the WPPT.

- The definition of "reproduction" should be clarified to confirm that it means the copying of the whole or a part of an audiovisual fixation or sound recording, consistent with Article 11 of the WPPT.

While the definition of "broadcast" was removed in the F-version of the PPAB, it is important that any definition in South African law does not extend beyond wireless transmissions to include transmissions "by wire," which is incompatible with the definition of "broadcast" in international treaties including the WPPT (as well as the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations). "Broadcast" is defined in the WPPT as limited to "transmission by wireless means."

- **Increase the term of protection for works and sound recordings from 50 years to at least 70 years, in line with the international standard.**

At present, sound recordings receive a term of protection of only 50 years from the year in which the recording was first published, and for literary, musical, and artistic works, the term of protection is 50 years from the author's death or 50 years from publication if first published after the author's death. The CAB should be revised to extend the term of protection for copyrighted works and sound recordings to at least 70 years, in line with the international standard. This will provide greater incentives for the production of copyrighted works and 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 works and recordings to local consumers in updated and restored formats as those formats are developed.

MARKET ACCESS

- **Remove market access restrictions that negatively impact the U.S. creative industries.**

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" and published local program quotas for licensed broadcasters of television content in March 2016. In May 2020, ICASA published a new regulation, fully exempting "television broadcasting service licensees" from compliance with the local television content quotas during the National State of Disaster (NSD) and allowing a three-month grace period from the end of the NSD. Non-domestic media service providers licensing content to local broadcasters are exempt from the program quotas and, in 2018, ICASA clarified that this exemption also applies to non-domestic, over-the-top (OTT) services. IIPA recommends removing these quotas to ensure that businesses have the freedom to determine content programming according to their business models and relevant consumer demands.

"Must Provide" Requirements: In April 2019, ICASA published its draft findings on the "Inquiry into Subscription Television Broadcasting Services" and proposed a new licensing regime that would severely impact the contractual freedoms of rights holders to license their content in South Africa, thereby undermining their exclusive rights. Unfortunately, the report's methodology, and therefore its conclusions, are flawed because ICASA failed to consider the impact of OTT media services on the market, nor did it consult with rights holders on who the proposed measures would affect. IIPA encourages the U.S. government to engage with the South African government to ensure that any regulatory interventions into the pay-TV market are informed by international best practices and current market realities and preserve the contractual freedoms of all parties concerned, while developing a legislative and regulatory framework that promotes investment and growth.

Video-on-Demand (VOD) Quotas: For several years, the Department of Communications and Digital Technologies (DCDT) has considered how to adapt South Africa's content regulatory framework to the online marketplace. The DCDT has issued a couple of Draft White Papers (DWP), the most recent in July 2023, that, among other things, recommends the imposition of local content quotas (up to 30% of the catalogue). The DCDT also envisions expanding the regulatory powers of ICASA to regulate On-Demand Content Services (OCS) and OTT services within the same regulatory framework as traditional broadcasters, to level the playing field. This creates the threat of competing regulatory oversight between the Films and Publication Board, which was also recently tasked to regulate OCS and ICASA. The DWP also recommends imposing a 2% turnover tax on digital platforms that would be payable into a fund dedicated to producing more local and original South African content production projects. The DWP also recommends a streamlined process for removal of infringing content and site blocking.

Online Value-Added Tax (VAT): South Africa currently levies a 15% VAT on the online selling of content, including films and television programming. As of April 2019, income on B2B services provided to South African businesses by foreign providers is also subject to VAT.

Digital Services Tax (DST): In July 2023 South Africa published a Draft White Paper on Audio and Audiovisual Media Services and Online Content Safety that proposed a unilateral DST. The measure would impose a 2% turnover tax on digital platforms operating in the audiovisual sector or a levy to fund the production of South African audiovisual content. Such a unilateral DST conflicts with the Organization for Economic Cooperation and Development (OECD) multilateral tax convention.

ENFORCEMENT

- **Improve enforcement against online piracy, including by providing effective mechanisms and statutory remedies to address services that infringe domestic and foreign content.**

Creative sectors in South Africa are growing but face the challenge of illegal services competition. Improved infrastructure and accessibility to broadband Internet has changed the landscape of copyright piracy in South Africa over the last decade. Physical piracy (e.g., sale of pirated CDs and DVDs) is not as prevalent as it used to be. The dominant concern in South Africa is increasing piracy in the digital environment.

Although South African consumers have increasing options available to stream legitimate creative content, 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. Statistics recently released by software security and media technology company Irdeto show that Internet users in five major African territories (South Africa, Kenya, Nigeria, Ghana, and Tanzania) made a total of approximately 17.4 million visits to the top ten identified piracy sites on the Internet.[20] Of the African countries that were tracked during this survey, South African Internet users made the second-most visits to the top ten tracked pirated sites (around 5 million, almost double that of Nigeria and Ghana, and only trailing Kenya where seven million users accessed these sites).[21] An Association of American Publishers (AAP) member publishing house reported that 2,348,973 books have been downloaded via P2P file-sharing platforms by South African Internet users since May 2021.

South Africa also has one of the highest rates of music piracy worldwide. According to a 2022 music consumer study, nearly two-thirds (65.4%) of all Internet users in South Africa between 16-64 admitted downloading pirated music, a piracy rate below only Nigeria, India, China, and Indonesia.[22] Stream ripping was the major music piracy issue in the country, with 61% of all users and 74% of 16- to 24-year-olds saying they had downloaded illegally via stream ripping. Twenty-one percent of users stated they had downloaded pirated music from BitTorrent in the prior month from sites such as *ThePirateBay* and *1337x*, and 32% had downloaded from cyberlockers using sites such as *Mega* and *Zippyshare*. Local piracy sites were also popular. MP3 download sites such as *Fakaza.com* (used by 26.5% of all Internet users) and *Zamusic* (used by 10.0% of users) deliver pirated copies of South African and wider African music to many visitors from South Africa.

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 effective injunctive relief for rights holders, especially against foreign defendants who do not own assets in South Africa against which judgements can be executed and South African courts' jurisdiction can be confirmed to hear infringement matters, consumer access to these infringing sites continues unabated.[23] To combat online piracy, South Africa needs a legal framework that enables rights holders

[20] See Benjamen Emuk, ChimpReports, *Piracy Hits African Creative Industries as Millions Find Illegal Content Online*, https://chimpreports.com/piracy-hits-african-creative-industries-as-millions-find-illegal-content-online/.
[21] Id.
[22] International Federation of the Phonographic Industry (IFPI), *Engaging with Music 2022*, available at https://www.ifpi.org/wp-content/uploads/2022/11/Engaging-with-Music-2022_full-report-1.pdf.
[23] While South Africa's current law allows for an "interdict" (or injunction) under certain circumstances, in practice, this remedy is limited and extremely difficult to obtain. Lower courts have jurisdiction to grant an interdict, but only if the "value of the relief sought in the matter" does not exceed a limit of ZAR400,000 (~US$30,000) or if the actual economic harm that the injunction is sought to prevent or restrain can be projected under that limit. It is also often difficult in IP cases to establish the required showings of "urgency" and "irreparable harm resulting if the order is not granted." Compounding this problem, judges in South Africa have

to address unauthorized use in all ways, and, as discussed below, the Government of South Africa should increase consumer education and awareness programs and improve enforcement.

Online Enforcement: South Africa's enforcement framework is not up to the challenge of its counterfeiting and piracy problems. Border enforcement is inadequate because of a lack of manpower and lack of *ex officio* authority, which places a burden on the rights holder to file a complaint and institute costly proceedings to ensure that goods are seized and ultimately destroyed. Civil enforcement is not a practical option, because a High Court application or action currently takes two to three years to be heard, costs are high, and damages are low because, as noted above, South Africa lacks statutory damages or punitive damages and proving actual damages and the amount of economic harm is notoriously difficult in copyright cases. In addition, criminal enforcement suffers from a lack of specialized prosecutors and judges equipped to handle IP cases.

A particular problem for South Africa is infringing services that are impossible to locate or are hosted outside of the country, which undermine the legitimate online marketplace. South Africa should provide in its legal system mechanisms that ensure Internet service providers (ISPs) can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities. Government agencies and courts in over 42 countries—including Australia, Belgium, Brazil, Denmark, France, India, Ireland, Italy, Peru, Portugal, Singapore, South Korea, Spain, Sweden, the United Kingdom, and the United States—employ or have made legally available injunctive relief or administrative orders to compel ISPs to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities. The European Union (EU) has addressed this problem through Article 8.3 of the EU Copyright Directive, which is the basis for injunctive relief against intermediaries to remove access to infringing content. Rights holders welcome DCDT's ongoing, collaborative, and constructive engagement with stakeholders on the Draft White Paper on Audio and Audiovisual Media Services and Online Content Safety: A New Vision for South Africa (July 2023).[24] The DCDT expressly recognized in the Second Draft White Paper the need for effective legal protections to combat the scourge of online piracy, and in particular made the explicit recommendation for "the inclusion of the provisions for a streamlined and fast track process for removal and site blocking by ISPs upon notification by verified rights holders" that includes "search engine operators in the scope of site blocking."[25]

South Africa has a specialized unit tasked with financial crimes and counterfeiting (known as the "HAWKS" unit), but it does not appear to be adequately resourced or have a suitable remit to take effective action against digital piracy. There is also a need for ongoing training and education for South Africa's police and customs officials to improve the process for detention and seizure of counterfeit and pirated goods. In particular, law enforcement officials should better understand the arduous procedures and timelines in the Counterfeit Goods Act (which prohibits rights holders from getting involved in many of the required actions), including that non-compliance will result in the release of counterfeit and pirated goods back to the suspected infringer. The Electronic Communications and Transactions Act (ECTA), read with the Copyright Act, is the law that rights holders rely upon for title, site, and link takedowns. The lack of cybercrime inspectors continues to limit the full potential of this law. 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.

The enactment of the Films and Publications Amendment Act, No. 11 of 2019, which extends application of the Films and Publications Act to online distributors of publications, films, and video games, could be a positive step for enforcement, because it establishes an Enforcement Committee for investigating and adjudicating cases of non-

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little to no experience in IP infringement cases, further diminishing the utility of this remedy. As a result, in practice, the interdict remedy is not effective for rights holders in South Africa. Moreover, the proposed copyright reform legislation will further diminish the utility of this remedy because the ambiguous and overbroad exceptions could make it more difficult to establish a prima facie case of infringement on which to base an interdict order.

[24] See Draft White Paper on Audio and Audiovisual Media Services and Online Content Safety: A New Vision for South Africa (July 2023) available at https://www.gov.za/sites/default/files/gcis_document/202307/49052gen1934.pdf.

[25] See id at 23.

compliance with any provision of the Act. South Africa's government should fully implement and operationalize the Act to improve enforcement against online piracy.

IIPA is hopeful that the implementation of the Cybercrimes Act (CBA) No. 19 of 2020 will increase awareness and stricter enforcement of piracy issues, although it has not yet yielded enforcement improvements. The CBA focuses on cyber-related crimes, including copyright infringement through peer-to-peer networks. Justice and Constitutional Development Minister, Robert Lamola, whose office is responsible for implementation of the Cybercrimes Act, pronounced in March 2022 that the government is intent on increasing collaborations with the private sector to assist the fight against content piracy.[26] While there appears to be an interest within the Department to combat content piracy, no concrete actions have been taken yet.

Piracy Devices (PDs) and Apps: Set-top boxes and memory 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. Some companies develop devices pre-loaded with infringing music content for use in various stores, pubs, and taverns. Many examples of enforcement and consumer education programs that are effective in other markets could be replicated in South Africa. It is critical for South Africa to gain more understanding of these approaches and to work proactively with experts 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. The lack of protection against parallel imports raises concerns and interferes with rights holders' ability to license and protect their IP rights.

Capacity Building: The Interpol Intellectual Property Crime Conference held in 2019 in Cape Town provided local law enforcement with information on best practices and resources for combatting IP theft, including access to the Interpol Intellectual Property Investigators Crime College (IPIC). Law enforcement should take advantage of these initiatives, including the IPIC training courses to assist with local and regional training of new and existing units. In April 2022, a creative industry stakeholder collaboration resulted in the launch of the "Partners Against Piracy" (PAP) initiative with a focus on combating the scourge of online content piracy and the objective of fostering improved private and public sector cooperation on this issue.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

In November 2019, USTR opened an investigation, including holding a public hearing in January 2020, to review country practices in South Africa regarding IP rights and market access issues, and to determine whether South Africa still qualifies for beneficiary status under the GSP. Under the statute, the President of the United States must consider, in making GSP beneficiary determinations, "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." IIPA requests that through the ongoing GSP review, the U.S. government continue to send a clear message that the proposed CAB and PPAB as they currently stand are fatally flawed, and work with the South African government to remedy the deficiencies in South Africa's legal and enforcement regimes, including by redrafting the bills to address the serious concerns detailed above and in IIPA's previous submissions. If, at the conclusion of the review, the Government of South Africa has not made the requisite improvements, IIPA requests that the U.S. government suspend or withdraw GSP benefits to South Africa, in whole or in part.

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[26] See BusinessTech, *Government to clamp down on pirated movies and shows in South Africa*, available at https://businesstech.co.za/news/media/571472/government-to-clamp-down-on-pirated-movies-and-shows-in-south-africa/.