Testimony of Professor Peter Jaszi

I hereby request the opportunity to testify at the USTR public hearing on the GSP country practice review of South Africa

I am an attorney and Emeritus Professor of Law at the Washington College of Law, American University, Washington, D.C. I have served as a Trustee of the Copyright Society of the U.S.A., and currently sit on the Editorial Board of its Journal; in 1994, I served as an appointed member of the Librarian of Congress' Advisory Committee on Copyright Notice and Deposit. With Patricia Aufderheide, I was as a drafter of the *Documentary Filmmakers' Statement of Best Practices on Fair Use,* released in 2005. Since then, I've assisted in the creation of such documents by various practices communities -- including teachers, artists, poets, librarians, and archivists. My publications entitled "Copyright, Fair Use and Motion Pictures," that appeared in the 2007 volume of the *Utah Law Review*, and "Fair Use and Education: The Way Forward," in Volume 24 of *Law and Literature* (2012), and in 2018, the University of Chicago Press published the second edition of *Reclaiming Fair Use,* which I co-wrote with Prof. Aufderheide. I have been following the copyright law reform process in South Africa closely, and I offer the following opinion in my personal capacity. These remarks are limited to addressing actual and potential objections to the Copyright Amendment Bill (CAB) based on its treatment of exceptions of general applicability, and (in particular) its introduction (in Section 13) of fair use into South African law.

It seems anomalous that the creative industries in a country where fair use is a venerable part of the law would object to another nation's decision to adopt it as part of an effort to promote domestic innovation. Giving those objections as much credence as possible, they seem to be based on the proposition that "without the foundation of a well-developed body of case law, South Africa's importation of the U.S. fair use doctrine can only result in uncertainty… ." A subsidiary, objection is based on the dubious assertion that in the U.S., the existence of statutory damages somehow constrains the exercise of fair use in a manner that would not be true in South Africa.

In the U.S., fair use dates back at least to the mid-nineteenth century, and was codified in the 1976 Copyright Act as a limitation on all the exclusive rights specifically conferred in Secs. 106 and 106A, including reproduction, distribution, public performance and display, and the "right to prepare derivative works." Sec. 107 describes fair use in general language that demands judicial construction, and the doctrine has been well served over its history by the fact that our federal judiciary is broadly competent in interpretive jurisprudence, with respect to both statutes and common law doctrine. Happily, the same is true of the courts of South Africa. In the U.S., courts have made it clear that fair use is one of the mechanisms by which copyright recognizes the principle of freedom of expression enshrined in our First Amendment. *See Eldred v. Ashcroft*, 537 U.S. 186 (2003). Again, protections for speech rights are an essential feature of the post-Apartheid constitution of the new South Africa, as well, in Chapter 2, Article 16.

As a result of judicial interventions over the past 25 years, the U.S. fair use doctrine is more robust and – especially – more predictable than at any time in my career. Notably, the contemporary approach to applying the fair use is highly consistent through all the judicial circuits is highly consistent (with the possible, partial exception of the Seventh, where some

judges appear to believe that U.S. Supreme Court precedents on the topic are optional rather than binding). In particular, the courts agree that a critical consideration in evaluating most (if not all) of the statutory "fair use factors" is whether the use under consideration is "transformative" – that is, whether it "adds something new, with a further purpose or different character… ." *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). Another core proposition is that only market effects that are relevant in fair use analysis are those that result from consumer substitution; thus, in an authoritative recent decision, *Authors Guild v. Google*, 804 F.3d 202, 214 (2015), the Second Circuit opined that:

> The more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright's goal of enriching public knowledge and the less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives… .

There is a further consensus that for a use to be considered transformative, it need not modify the copyrighted material; recontextualization can serve the same end. The case law also demonstrates that if a use is deemed transformative and non-substitutional, it also is important to ask whether the amount of material employed is appropriate (and not, as is sometimes suggested, "necessary") to the purpose of the use.

Turning now to the concerns expressed by IIPA's petition, I would begin by noting that the language in which the South African CAB expresses the concept of fair use is designed with some precision to capture not only the basic conceptual framework of U.S. law, but also the clarifying interpretations of Sec. 107 that have emerged over the last quarter-century of U.S. jurisprudence. The exemplary list of eligible use categories in proposed new Sec. 12A(a) encompasses many of the major areas in which U.S. courts have upheld the fair use right, and the four factors recited in Sec. 12(b) are functionally equivalent in all respects to the those recited in Sec. 107 of the Copyright Act, as interpreted. Only the addition of Sec. 12(c), which imposes a duty of attribution on fair users, is a novelty by comparison – and it is one that constrains rather than expands the exercise of fair use.

Under the strict logic of the IIPA's argument about the potential for "uncertainty" in the implementation of fair use in South Africa, no country could ever introduce the doctrine into its domestic law – an absurd result! In fact, any such risk is mitigated in the CAB through the legislative choice to invoke the concept of transformative purpose in proposed Sec. 12(b)(iii)(aa) and to specify the relevance of substitution effects to market harm in Sec. 12(b)(iv). This, in itself, will give South African courts a significant head start in interpreting the doctrine in a balanced and predictable fashion. Also to the point, South African courts would have available to them, as analogous authority, the same "nearly two centuries of [U.S.] case law" which the IIPA petition commends. It may give be giving the South African judiciary too little credit to assume that, if in doubt about an application of fair use, its members would fail to consider U.S. decisional law as a source of guidance. Indeed, this is precisely the practice that judges have employed in other countries that recently have adopted U.S.-style fair use, such as Israel.

In addition, Sec. 39(d) of the 1978 South African Copyright Act specifically authorizes the Minister of Trade and Industry to issue regulations "generally, as to any matter which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved" -- a mechanism that could be invoked, if required, to inform application of the new

fair use provision. Community-based "best practices," such as those that have enjoyed success in the U.S., are yet another tool that could contribute to promote consistency predictability in how fair use doctrine is applied.

I conclude by pointing out that where U.S. law is concerned, the linkage between the operation of fair use and punitive or statutory damages – posited by the IIPA -- is fictive rather than real. In fact, punitive damages are such are unknown in the U.S. copyright, nor are there any examples of which I am aware in which a defendant's decision to invoke fair use has an affirmative consideration in a judge's decision to award statutory damages. That said, the petition also overlooks the fact that since 1978, Sec. 24(3) of the South African Copyright Act has provided for non-compensatory "additional damages," taking into account, among other things, "the flagrancy of the infringement." In the hypothetical case where a sanction against the bad faith invocation of fair use might be required, South Africa would be better equipped to provide it than the U.S.