SOUTH AFRICA COUNTRY PRACTICE REVIEW

IFPI written comments in response to the "*Generalized System of Preferences (GSP): Notice Regarding a Hearing for Country Practice Reviews of Azerbaijan, Ecuador, Georgia, Indonesia, Kazakhstan, Thailand, South Africa and Uzbekistan, and for the Country Designation Review of Laos*", 84 FR 63955 (November 19, 2019)

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INTRODUCTION

IFPI, representing the recording industry worldwide, has some 1,300 record company members in some 60 countries and affiliated industry associations in some 57 countries. IFPI's objective is to develop fair and balanced market conditions for our members to operate in, to enable the recording industry to continue to invest in artists, create jobs, and contribute to economic growth. IFPI submits these written comments in response to the USTR's *Generalized System of Preferences (GSP): Notice Regarding a Hearing for Country Practice Reviews of Azerbaijan, Ecuador, Georgia, Indonesia, Kazakhstan, Thailand, South Africa and Uzbekistan, and for the Country Designation Review of Laos*, 84 FR 63955 (November 19, 2019), with particular reference to South Africa.

South African law currently fails to ensure adequate protection of copyright works, including sound recordings. It should be a priority for South Africa to update its framework to provide adequate protection and so as to comply with international good practice and law, including the WIPO "Internet Treaties" which South Africa has stated it intends ratify. However, the proposals to update the legal framework, in the form of the Copyright Amendment Bill ("CAB") and Performers' Protection Amendment Bill ("PPAB"), would not achieve these aims but would instead be a significant step backwards. The adoption of these bills would harm the creative industries in South Africa and the ability for the creative industries in the U.S. and elsewhere to operate and invest in South Africa, not least the recording industry, represented by IFPI worldwide and by the RIAA in the U.S.

It is clear from this that South Africa's current and proposed laws do not meet the GSP eligibility criteria requiring adequate and effective protection of intellectual property rights, nor the GSP eligibility criteria to provide equitable and reasonable access to the South African market for American creative works and sound recordings. Accordingly, IFPI supports IIPA's

requests that: (i) the U.S. Government work with the South African Government to remedy the deficiencies in the South African legal framework, as detailed below; and (ii) if, at the conclusion of the review, the Government of South Africa has not made requisite improvements, that the U.S. Government suspends or withdraws South Africa's GSP benefits, in whole or in part.

EXECUTIVE SUMMARY

South Africa's existing copyright protection and enforcement framework is inadequate and significant reforms are needed. By way of illustration, the term of copyright protection in South Africa remains out of step with global norms. In South Africa, sound recordings receive 50 years of protection from the year in which the recording was first published. This is in stark contrast to 70 years from publication for sound recordings, which is the emerging international consensus. Meanwhile, the rights framework needs to be clarified, and crucial protections such as those for technological protection measures ("TPMs") need to be implemented.

The CAB and PPAB are complex bills which have received inadequate stakeholder input and which suffer from serious flaws. They do not provide for the adequate or effective protection of intellectual property rights, they are not compatible with international treaties including the WIPO Performances and Phonograms Treaty, and they provide for a highly problematic degree of government interference into private contractual relationships that would limit the ability of creators to license freely their creative content in South Africa. Were these bills adopted, they would create serious obstacles precluding equitable and reasonable access to the South African market for American creative industries.

PRINCIPLE FLAWS IN THE BILLS

1. Government interference into private contractual relationships that would limit the ability of creators to license freely their creative content in South Africa

The CAB and PPAB provide for sweeping government interference into private contractual relationships that would limit the ability of creators to license freely their creative content in South Africa. If enacted, the bills would introduce:

1.1 Undue regulation of the remuneration terms of private contractual agreements between audiovisual performers and audiovisual copyright owners, including performers in and copyright owners of music videos. Very significantly, the proposed legislation purports to be capable of applying the above provisions to contracts entered into force before the date that the law comes into force. This would have the effect of undoing contracts previously agreed between performers and producers, based on the legitimate expectations of the parties at the time of entering into such contracts. Such a provision would set a very dangerous precedent for South Africa, eroding privity of contract and sending a message that the State can at any time undo contracts that were entered into

by the parties lawfully. There would also be a significant economic impact, again reducing investments. Finally, we have concerns about the constitutionality of such a provision.

1.2 Extremely broad Ministerial powers to set "standard and compulsory" terms for seemingly any private contractual arrangement covering the licensing or transfer of rights, including prescribing royalty rates. It would appear that the Minister could even, for example, prescribe the terms on which a record company licenses a digital music service, including setting the royalties payable under the licence.

1.3 The limitation of the term of contracts between performers and copyright owners of sound recordings to a maximum term of 25 years. Not only would this provision harmfully disrupt the well-established practices of the recording industry in South Africa and internationally, it will have the unintended consequence of the majority of South African recordings ceasing to be available to the public, and therefore ceasing to generate any revenues for performers, producers, authors or publishers, after 25 years. This is not a hypothetical risk. When considering the thousands of tracks produced by a record company in partnership with many thousands more performers, the impossibility of securing renewed assignments of rights after the reversion is clear. While the record company may have an ongoing relationship with the featured artist on a track or album, locating every session musician who has performed on a track or album would be impossible in many cases. The effect of the proposed 25 year reversion would therefore be that a vast catalogue of recorded music will fall out of circulation because it simply cannot be used without infringing one or more parties' rights. In effect, the period that a sound recording can generate revenues for producers and performers will be halved from the current (already too short) 50 year term of protection to a maximum of 25 years.

1.4 The harmful potential of the above provisions is exacerbated by a prohibition on contracting parties from agreeing to deviate from, for example, "standard and compulsory" terms set by the Minister, thereby creating a rigid and highly regulated commercial environment.

A thriving South African cultural sector would be best supported by robust copyright protection, not by undue regulation of private contractual agreements. Such provisions risk disincentivising investments in South Africa, since the ability to determine the terms on which copyright is licensed or assigned is a key part of establishing thriving content markets. This is particularly true of digital markets, where the flexibility of freedom of contract enables right holders to respond rapidly and innovatively to market developments. The recording industry is highly competitive and record companies need to be able to respond to the varying needs of artists in order to compete to work with them. These provisions would therefore impose contractual formalities that benefit no party.

2. Overly broad exceptions, which would be incompatible with the three-step test enshrined in international law, creating long-term legal and commercial uncertainty

If adopted, the bills would introduce a so-called "hybrid" fair use exception, which essentially means a version of fair use is introduced in addition to all the existing and newly proposed

"fair dealing" and other enumerated exceptions. The relationship between this amalgamation of different legal traditions is wholly unclear and creates significant harmful uncertainty.

The scope and the application of fair use in the US have been developed in some 150 years of fair use jurisprudence. Not only does South African law not have this case law history, but the fair use criteria proposed to be introduced in South Africa include vague concepts which, as far as we are aware, have no precedent globally. It is expected that the introduction of this newly-styled fair use / fair dealing hybrid in South Africa would dramatically increase unlicensed uses of copyright content, handing a significant advantage to large-scale users of copyright works who can afford lengthy and complex litigation.

In addition, other new enumerated exceptions are highly problematic, including an over-broad quotation exception, which could undermine the existing market for sampling of sound recordings, and a broad private copying exception which is not accompanied by a remuneration system (contrary to international practice) and extends to digital storage, risking undermining existing licensing practices.

This panoply of inadequately scoped exceptions would create a significant and harmful imbalance in the South African copyright system. Moreover, the unclear "fair use" exception and others of the proposed exceptions would not pass the three-step test, putting South Africa in breach of its international obligations.

3. Incompatibility with international law

South Africa's existing law falls short of internationally agreed standards in a number of respects. Rather than bringing the law into line with international standards, the bills are not only inconsistent with the WIPO Internet Treaties (WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty), but, if enacted, would also violate South Africa's obligations under the TRIPS Agreement, violate South Africa's Constitution, and move South Africa even further away from international norms.

In addition to the problematic exceptions outlined above, other areas that fall below international standards include a failure to guarantee certain exclusive rights of performers, and risking creating a piracy safe haven through a flawed approach to TPMs. In respect of TPMs, which are of paramount importance when considering the central role of digital distribution to the current and future economics of the music industry, the bills fall far short of what is required. At the outset, the definition of TPMs is inadequate. Worse, the exceptions to TPM protections create significant loopholes in the protection framework, opening the provisions to abuse and leaving rightsholders inadequately protected.

CONCLUSION

If enacted, the CAB and PPAB would further render the South African copyright system inadequate and ineffective for both South African and U.S. copyright works, including sound recordings. Given this, we respectfully request that: (i) the U.S. Government work with the South African Government to remedy the deficiencies in the legal framework in South Africa, as detailed below; and (ii) if, at the conclusion of the review, the Government of South Africa

has not made requisite improvements, that the U.S. Government suspends or withdraws South Africa's GSP benefits, in whole or in part.

We thank you for the opportunity to make this submission.

IFPI