Before the Office of the United States Trade Representative

Docket No. USTR-2019-0020

South Africa Country Practice Review

Library Copyright Alliance Notice of Intent to Testify

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My name is Jonathan Band. I represent the Library Copyright Alliance ("LCA"). LCA consists of three major U.S. library associations: the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries. These associations represent over 100,000 libraries in the United States employing more than 350,000 librarians and other personnel. An estimated 200 million Americans use these libraries over two billion times each year. These libraries spend over $4 billion annually acquiring books and other copyrighted material.

In a post-hearing brief, LCA will provide detailed responses to the arguments made in the petition filed by the International Intellectual Property Alliance ("IIPA") that the Republic of South Africa does not provide adequate and effective intellectual property protection by virtue of provisions in the Copyright Amendment Bill ("CAB") and the Performers' Protection Amendment Bill ("PPAB").

In this notice, I will just make several general points.

First, the CAB is intended to update the Apartheid-era Copyright Act of 1978. The CAB also seeks to address the lingering effects of Apartheid, notably the lack of bargaining power of black artists vis-à-vis white-owned publishers and media companies. Relatedly, South Africa still experiences a very uneven distribution of income, with many impoverished black students. The CAB cannot be evaluated fairly without considering this context.

Second, South Africa and other developing countries confront a frustrating Catch-22 with respect to copyright exceptions. When they seek normative work at the World Intellectual Property Organization concerning exceptions, the rights holders and developed countries, including the United States, insist that exceptions should be addressed only at the national level where country conditions can be considered. But if a country such as South Africa then attempts to adopt exceptions that are mindful of the domestic situation, the rights holders claim that the exceptions

are inconsistent with the Berne three-step test and enlist the U.S. government to intimidate the country into abandoning the exercise.

Third, as a matter of policy, the United States should always support other countries' adoption of provisions based on U.S. copyright law. This is true regardless of whether the provision expands copyright or limits it. To oppose such adoption appears hypocritical and condescending.

Fourth, following from the previous point, the CAB and PPAB amendments that are not based on U.S. law have precedents elsewhere in the world. Contrary to IIPA's suggestions, these amendments do not deviate from global standards.

Fifth, the bills contain many features that significantly benefit large copyright owners, including the establishment of the Intellectual Property Tribunal, the prohibition of circumvention of technological protection measures, the prohibition on the removal of copyright management information, and the granting of additional rights to performers. IIPA minimizes or finds fault with these provisions so as not to detract from its narrative of the bills' inadequacy. But the bills aren't inadequate. To the contrary, they strike a balance among the interests of individual creators, corporate copyright owners, distributors, and the public at large.

Sixth, if the South African President sends the CAB and PPAB back to Parliament, there is a good chance that South Africa will not adopt a copyright amendment bill for another five or even ten years. The involvement by IIPA and other foreign rights holders has proven incredibly divisive in South Africa, and there won't be the appetite to return to such a controversial topic. This means that provisions sought by IIPA, such as those relating to technological protection measures, will be delayed indefinitely.

Seventh, many of the concerns raised by IIPA, such as those relating to the reversion of rights and royalties, have nothing to do with the adequacy or effectiveness of IP protection. Rather, they concern with the allocation of rights—and money—among different rights holders. These provisions should be outside the scope of this review.

Eighth, some of the IIPA's attacks are based on a fundamental misunderstanding of existing South African law. For example, IIPA incorrectly states that injunctive relief is not available in South Africa. Such relief in fact is currently available under section 24(a) of the existing law. Further, the new Intellectual Property Tribunal will have the power to issue injunctions under section 29H(b). Perhaps the IIPA is confused by the law's use of the term "interdicting" rather than "enjoining."

Finally, many of the concerns raised by the IIPA are highly technical definitional or interpretive matters. USTR should not be reviewing another country's copyright law on such a granular level. When these concerns might be sufficiently important to warrant USTR's attention, they could easily be addressed by regulations. In these situations, USTR should urge that the South African government craft appropriate regulations, rather than pressure the President to send the bills back to Parliament.