



Songwriters Guild of America, Inc.
210 Jamestown Park Road Suite 100
Brentwood, Tennessee 37027-750
615-742-9945

January 17, 2020

Dkt No. USTR-2019-0020

**Comments of the Songwriters Guild of America, Inc.
In Advance of the January 30, 2020 United States Trade Representative (USTR) Hearing
Concerning, inter alia, the Continued Application of US Trade Preferences in Light of
Contemplated Changes by the Government of South Africa to its Copyright Laws**

Joined by The Society of Composers & Lyricists (SCL); Music Creators North America (MCNA), and; the International Council of Music Creators (CIAM) (including the Pan-African Composers' and Songwriters' Alliance (PACSA)).

I. Introduction and Statement of Interest

These Comments are respectfully submitted by the [Songwriters Guild of America, Inc.](#) ("SGA"), the longest established and largest music creator advocacy and copyright administrative organization in the United States run solely by and for songwriters, composers, and their heirs. Its positions are reasoned and formulated solely in the interests of music creators, without financial influence or other undue interference from parties whose interests vary from or are in conflict with those of songwriters, composers, and other authors of creative works. Established in 1931, SGA has for 88 years successfully operated with a two-word mission statement: "Protect Songwriters," and continues to do so throughout the United States and the world.

SGA's organizational membership stands at approximately 4500 members, and through its affiliations with the US-based [Society of Composers and Lyricists](#) (SCL), [Music Creators North America, Inc.](#) (MCNA) (of which SGA and SCL are founding members), and the [International Council of Music Creators](#) (CIAM) (in which MCNA and the [Pan-African Composers' and Songwriters' Alliance \(PACSA\)](#) are key Continental representatives), SGA is part of a US and global coalition of music creators and heirs numbering in the millions. Of particular relevance to these comments, SGA is also a founding member of the international organization [Fair Trade Music](#), which is the leading US and international advocacy group for the principles of transparency, equitable treatment, and financial sustainability for all songwriters and composers. SCL, MCNA, and CIAM all join SGA in submitting these Comments.

On November 19, 2019, the USTR published in the Federal Register notice of a hearing to be held on January 30, 2020 to consider, among other issues, whether South Africa “is meeting” and/or will continue to meet “the GSP eligibility criterion requiring adequate and effective protection of intellectual property rights.”¹ This is a crucially important inquiry in light of South Africa’s planned amendment of its copyright laws.

By USTR’s analysis, its own responsibilities in this regard are as follows:

Section 182 of the Trade Act of 1974 (Trade Act) (19 U.S.C. 2242) requires the United States Trade Representative to identify countries that deny adequate and effective protection of intellectual property rights (IPR) or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. The provisions of Section 182 are commonly referred to as the “Special 301” provisions of the Trade Act. The Trade Act requires the Trade Representative to determine which, if any, of these countries to identify as Priority Foreign Countries. Acts, policies, or practices that are the basis of a country's identification as a Priority Foreign Country can be subject to the procedures set out in sections 301-305 of the Trade Act.

In addition, the Office of the United States Trade Representative has created a “Priority Watch List” and “Watch List” to assist the Administration in pursuing the goals of the Special 301 provisions. Placement of a trading partner on the Priority Watch List or Watch List indicates that particular problems exist in that country with respect to IPR protection, enforcement, or market access for persons that rely on intellectual property protection. Trading partners placed on the Priority Watch List are the focus of increased bilateral attention concerning the problem areas.²

These Comments seek to address the issues of whether current legislative amendments being contemplated in South Africa in the copyright area, if enacted, would likely necessitate the placement of South Africa on the US Special 301 Watch List or the Priority Watch List in anticipation of further remedial action, and what action by USTR can potentially be taken in cooperation with the Government of South Africa in order to enhance the chances of avoiding that negative result.

II. The Unfair Nature of the Legislative Process in South Africa regarding Copyright Reform

¹ Federal Register Notice by the Trade Representative, Office of the United States, *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* (November 19, 2019), available at <https://www.federalregister.gov/documents/2019/11/19/2019-24947/generalized-system-of-preferences-gsp-notice-regarding-a-hearing-for-country-practice-reviews-of>.

² See Notice by the Trade Representative, Office of the United States, *Special Review of Countries that Do Not Provide Adequate Protection of Intellectual Property Rights*, (January 3, 2014), available at https://www.regulations.gov/document?D=USTR_FRDOC_0001-0287

On April 9, 2019, music creators and performers of South Africa led a large, peaceful protest in Cape Town under the banner of their trade group, TUMSA. The demonstration was designed to bring to the attention of the Government of South Africa the opposition of songwriters, composers, musicians and recording artists to the current results of a decade-long process to “modernize” local copyright laws, which have not gone well for creators.³

According to TUMSA leaders, including spokesperson and popular local South African recording artist Vicky Sampson, the legislative process regarding copyright reform in South Africa has repeatedly included the broad, invited participation of longstanding copyright opponents from the global Big Data and Big Tech/Digital Distribution sectors. Conversely, almost no representatives of the South African or international creator communities, whose members rely on copyright protection to preserve their abilities to earn their livings and to advance South African and global musical heritage and artistic culture, were included in such discussions or activities.

As a result, the copyright bills currently under consideration in South Africa are geared almost exclusively toward relaxing rules prohibiting the unauthorized use of copyrighted works, in favor of expansive, fair use exceptions and contract-override provisions that will benefit primarily the interests of copyright users (especially the giant, multi-national data-mining and technology conglomerates) over the rights of popular individual creators—many of them Americans. The requests by members of the South African and international creative communities to gain a voice in this legislative process have so far gone principally unanswered.

In considering these developments in South Africa, it is of critical significance to take note that legislative trends in Europe, North America and elsewhere have recently re-embraced the longstanding principle that the protection of creators’ rights must be the centerpiece of legislative reform in the copyright area if such laws are to effectively spur overall economic growth. The recent, well-publicized adoption in the European Union of legal initiatives designed to alleviate the “value gap” between the enormous earnings of multinational digital distributors of music and other creative products as compared to the miniscule remunerations that finds their way to the actual creators of such works is just one example of that trend. The recent passage and enactment of the Music Modernization Act in the United States is another.

As creators have consistently pointed out in the United States and around the world, the failure to recognize the longstanding principles of authors’ and artists’ intellectual property rights led in the early years of the digital age to the near-collapse of the carefully calibrated, rights-balancing systems that had for well over a century been of enormous benefit to creators, copyright users and consumers alike. Protecting creators’ economic and creative rights in general, in important part by sustaining the creation of new works through fair compensation for their use, has proven again and again to generate long-term, across-the-

³ Mthuthuzeli Ntseku, *WATCH: Acclaimed Cape Musicians Protest Copyright Amendment Bill*, IOL, (April 9, 2019) available at <https://www.iol.co.za/capeargus/news/watch-acclaimed-cape-musicians-protest-copyright-amendment-bill-20845972>

board gains for everyone involved in the global music chain, including distributors and consumers.

Legal frameworks granting overbroad “safe harbors” and other unfair benefits to copyright users and distributors, while diminishing or ignoring altogether the rights of creators, have on the other hand had exactly the opposite effect. Since the 1990s and the advent of the digital age, laws experimentally expanding the alleged “access rights” of copyright users have permitted the growth of a value gap (as noted above) whereby the huge data and technology corporations that lobbied for such changes have been enabled to benefit thousands of times more from the use of copyrighted works than the meager earnings passed down to the creators of such works themselves. These inequitable compensation and rights systems are economic barriers that depress both creation and economic growth, stunting financial gains throughout the entire, global copyright and artistic sphere. That is the key message that South Africa’s music creators are seeking to deliver to their Government, to the benefit of all (including American composers, authors, songwriters, and their affiliated US business entities).

We do, however, also importantly take note of certain narrow provisions included in the pending South African copyright bills that may in the long run provide some, new benefits to creators (such as (i) proposed limitations on the duration of copyright assignments that seem to adopt the progressive approach underlying the granting of termination rights to creators under the US Copyright Act; and, (ii) provisions that appear to seek protections for the bargaining positions of creators and performers against powerful business entities exercising unfair commercial advantage). These few exceptions, however, are simply not enough to overcome the overall shortcomings of the proposals. That is especially true in regard to the proposed expansion of the fair use doctrine under South African law.

III. The Specific Problems in the South African Legislative Drafts That Need to be Addressed Prior to Enactment

In a letter dated March 4, 2019 to the US Chargé d’Affaires Jessye Lapenn at the American Embassy in Pretoria, South Africa, members of the US creative community and copyright industries --including SGA-- described some of the specific shortcomings of the copyright legislation currently under consideration by the South African Government, and the inevitably negative effects on US intellectual property interests that would flow from their enactment. As was stated in that portion of the letter most specifically endorsed by SGA:

The two draft bills are...highly problematic with respect to expansive exceptions to copyright, which is the critical intellectual property right used by creative industries to protect their works against piracy and to ensure fair remuneration for creators. These troubling exceptions include broad “fair use” carveouts to copyright protections that would deprive such rights of any commercial value and would imperil the market for legitimate creative works, including online....The negative impact of these amendments would be felt not only in South Africa, but globally for our industries in terms of the

concerning precedent they would set, as well as the fundamental question they raise regarding their compliance with international copyright rules. Nor would the United States be immune from the resulting effects on our industries' contributions to U.S. economic growth, job creation and trade competitiveness. U.S. copyright-intensive industries contributed \$1.3 trillion to the U.S. economy, and supplied 5.7 million jobs, in 2017. The compensation paid in the copyright intensive industries far exceeds that of U.S. workers overall amounting to a compensation premium of 39 percent over the average U.S. annual wage, in 2017.

IV. The Potential Role of USTR in Ensuring the Protection of US and International Music Creator and Copyright Owner Rights in South Africa

Under the circumstances, it would appear that the Government of South Africa might indeed be placing in jeopardy its trade status with the United States under the Special 301 rules and principles should it enact the above-referenced, particularly anti-creator/copyright owner amendments into its copyright legal framework. We therefore respectfully suggest that USTR make clear to the Government of South Africa that it would be beneficial to all concerned if it were to immediately commence discussions with US Government representatives, assisted by members of the creator community, concerning potential improvements in the drafts prior to moving forward with its plans for copyright law modernization.

We thank USTR for the opportunity to submit these Comments, and look forward to working together with USTR in the future on this issue in any ways that may be helpful.

Sincerely,



Rick Carnes
President, SGA

Encl.

cc: Charles J. Sanders, Esq.
The SGA Board of Directors
Ashley Irwin, President, SCL
Eddie Schwartz, President, MCNA/CIAM