



January 17, 2020

Erland Herfindahl
Deputy Assistant U.S. Trade Representative
for the Generalized System of Preferences
Office of the United States Trade Representative
600 17th Street, NW
Washington, D.C. 20508

CreativeFuture
South Africa Country Practice Review
Intellectual Property Rights Practices
Written Comments
2019 Generalized System of Preferences
84 Fed. Reg. 63957; Document Number USTR-2019-24947; November 19, 2019

Dear Mr. Herfindahl,

CreativeFuture is a coalition of Americans who create – over 560 organizations and companies and over 275,000 individuals. We make our living creating in film, television, music, book publishing, and photography.

On November 19, 2019, the Office of the United States Trade Representative (USTR) published a Federal Register notice regarding a public hearing and request for comments on a Generalized System of Preferences (GSP) country practice review of South Africa with respect to whether South Africa is meeting the GSP eligibility criteria requiring adequate and effective protection of intellectual property rights.

CreativeFuture fully supports USTR’s decision to initiate this review. We believe that the government of South Africa does not provide adequate and effective copyright protections to ensure a fair and equitable marketplace for creativity to thrive. Under the GSP program, South Africa is required to have an adequate and effective copyright system in order to be an eligible beneficiary country. For this reason, a review is certainly a reasonable step toward addressing this issue.

Our concerns regarding copyright protections and enforcement in South Africa are twofold. First, South Africa’s existing copyright regime does not adequately protect creative content. More importantly, recently-proposed amendments to its copyright laws do not address and in fact exacerbate these shortcomings. These amendments miss a critical opportunity to make much-needed improvements and would significantly undermine copyright protection and the creative ecosystem in South Africa. We simply cannot stand by and watch their copyright system get worse.

To remedy these concerns, CreativeFuture asks the U.S. government to engage intensively with the government of South Africa to ensure that the needed improvements are made to South African copyright law and practice, and to prevent any changes to that law and practice, including addressing the defects contained in the draft laws mentioned above, which would result in further deterioration of copyright protection and enforcement in South Africa. If South Africa does not address these concerns, we request that the U.S. government take appropriate measures under the rules of the GSP program.

South Africa's Current Copyright System

South Africa's existing copyright system does not provide adequate and effective protection of U.S. copyright works and sound recordings, and therefore falls short of GSP eligibility criteria, for several reasons. First, South Africa has neither ratified nor adequately implemented international copyright treaties, i.e., the WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT).

In certain key respects, these treaties set the baseline for minimum copyright protections. South Africa's absence as a signatory to treaties that have very broad membership (WCT and WPPT each with 103 parties) reflects an outlier status with respect to fundamental copyright norms. Second, South Africa has not joined the emerging global consensus with respect to the term of protection for copyright and related rights. For example, sound recordings only receive 50 years of protection from the year in which the recording was first published. U.S. law provides 95 years of protection.

The Copyright Amendment Bill and Performers' Protection Amendment Bill represent an attack on the already weak South African copyright system and should not become law. These Bills are highly problematic and would wreak havoc on the livelihoods of creative people around the world, and, in particular, in South Africa.

These Bills include overbroad copyright exceptions, which deprive creatives of compensation for their work. These exceptions would allow extensive use of copyrighted content for free and without a license – meaning no creative would be paid for these uses. These Bills combine aspects of fair use and fair dealing exceptions in an unprecedented and untested way that would introduce profound uncertainty and litigation into the South African market.

While some have argued that the Bills merely borrow the fair use concept from the U.S., this is misleading at best. What is being proposed in South Africa is fundamentally different from U.S. law and the U.S. experience. If the Bills were enacted, South Africa would have an utterly new and untested copyright exception that is missing any well-established judicial parameters, while overlapping in unpredictable ways with fair dealing.

These changes would render the scope of copyright ambiguous at best and likely meaningless in practice. They would no doubt cause lengthy and perpetual court battles, requiring creatives to spend significant resources to try to vindicate their basic rights. Only the largest technology companies would have the resources to pursue until resolution, and they would be fighting on the side to weaken the copyright system.

The exceptions provisions of the Bills threaten to expand the scope of copyright exceptions in a manner that raises serious questions with respect to the Bills' being consistent with the three-step test found in the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and other WIPO copyright treaties.

If this was not dire enough, the Bills also include problematic language on technological protection measures, which is precisely how we protect our copyrighted content in the digital world. As drafted, this would fundamentally threaten the digital market for streaming creative content in South Africa. The Bills also include a change to performers rights from strong exclusive rights to weaker remuneration rights, which again raise questions regarding consistency with the WIPO Internet Treaties.

Going even further, these Bills provide for alarming levels of intervention into the core contractual freedoms currently enjoyed by artists. This change would deprive copyright of the essential value that is conveyed by licensing. For example, these amendments intrude into commercial agreements that cover audiovisual content, which would certainly reduce the income of a large number of creatives around the world, including those in our American creative community.

The Bills also grant overreaching powers to the South African government to define and limit contractual terms, essentially regulating from abroad the framework in which American creative industries have operated for decades. Of course, these changes are not only detrimental to American interests, but will harm local South African creatives who contribute significantly both as independent producers and co-producing partners.

Any one of these changes would be alarming and cause for review of South Africa's GSP access. Taken together, they represent a fundamental attack on the way creative people make a living. Adequate and effective copyright is a fundamental prerequisite for a healthy creative community. No one can make a living as a creative person without a robust copyright system that protects and nurtures a legitimate marketplace.

South Africa is a vibrant creative society, and CreativeFuture fights to maintain creativity around the world. The South African creative community is deep and diverse, and its laws should reflect and protect that. As it stands today, South Africa's copyright system does not provide the critical copyright protections that are needed to ensure that creatives prosper and thrive. The Copyright Amendment Bill and Performers' Protection Amendment Bill would make an already weak system even worse. This should not be acceptable.

It is for all of these reasons that CreativeFuture requests that the U.S. government engage intensively with the government of South Africa through this GSP process. As a beacon of opportunity to creative people around the world, the United States and its government must set the gold standard for copyright protections at home and abroad, working with our allies to ensure consistent protections in international markets.

Respectfully,



Ruth Vitale