

Pre-hearing Brief: Written Comment
South African Country Practice Reviews under the United States Generalized
System of Preferences (GSP)

South African Government Submission
Washington DC, 17 January 2020

Introduction and Overview

1. On 25 October 2019, the United States Trade Representative (USTR) announced it would initiate a country review of South Africa under the terms of the US Generalized System of Preferences (GSP) due to concerns raised about South Africa’s intellectual property (IP) protection and enforcement regime. On 19 November 2019, the US Federal Register published a notice for a public hearing and requested comments for the review, indicating it would focus on whether South Africa is meeting the GSP eligibility criterion requiring adequate and effective protection of intellectual property rights.
2. The Federal Register notice advised that the USTR has accepted a petition filed by the International Intellectual Property Alliance (IIPA) and it notes that “The petition alleges that the Government of South Africa **does not provide** adequate and effective copyright protection for US copyrighted works”. (Emphasis added).
3. In that petition, dated 18 April 2019, the IIPA requests the U.S. Government to initiate the review, as it believes South Africa is not meeting the GSP eligibility criteria. The IIPA petition upon which the current review is premised is entirely focused on two Bills that are currently not a part of South Africa’s legal regime, namely the Copyright Amendment Bill (CAB) and the Performers’ Protection Amendment Bill (PPAB) (hereinafter referred to as “the Bills”). The petition states, *“We request that the U.S. Government work with the South African Government, and consider the suspension or withdrawal of South Africa’s GSP benefits, in whole or in part, if requisite improvements are not made by South Africa to remedy the deficiencies outlined....”*
4. In this Submission, the South African Government sets out why we believe that South Africa should continue to enjoy full access to the GSP, and will
 - a. Explain why the petition is misdirected in that the proposed law that is being objected to has not yet come into effect, is not part of South African law and accordingly no clear and present damage is being suffered by any US firm as a result of legislative changes;
 - b. Recall the existing legal position in relation to protection of intellectual property, applicable in South Africa, including some challenges experienced with the existing framework that led to proposed changes to the law being developed;
 - c. Set out briefly key points in the proposed legislation currently being reviewed by the Presidency in South Africa, including the objections to aspects of the proposed changes raised by the IIPA and why these do not constitute valid grounds for the removal of SA from the GSP benefits; and

- d. Note the significant benefit that accrues to the US economy and the positive impact on US jobs from the economic relationship with South Africa.

Part 1: The petition is misdirected as the proposed law has not come into effect

5. In respect of intellectual property, section 502(a)(2)(D) of the Trade Act of 1974 states that the US President shall not designate any country a beneficiary developing country under GSP if such country:
 - a. has nationalized, expropriated or otherwise seized ownership or control of property, including patents, trademarks or copyrights owned by US citizens or corporations, partnerships or associations;
 - b. has taken steps to repudiate or nullify an existing contract or agreement with a US citizen or corporation, partnership or association, the effect of which is to nationalize, expropriate or otherwise seize ownership or control of property, including patents, trademarks or copyrights, so owned; or
 - c. has imposed or enforced taxes or other exactions, restrictive maintenance or operational conditions, or other measures with respect to property, including patents, trademarks or copyrights, so owned, the effect of which is to nationalize, expropriate or otherwise seize ownership or control of such property.
6. In each case, we contend that no such action has taken place. Neither the law in its current form, or any provision of the Bills violate the terms of Section 502(a)(2)(D).
7. The current legal position in SA is that copyright and related rights are regulated by the Copyright Act, Act No. 98 of 1978 (as amended) and the Performers Protection Act, Act No 11 of 1967 (as amended). In addition, SA is a signatory to the Berne Convention and the WTO TRIPS agreement. South Africa is in the process of ratifying three copyright internet treaties. The South African Parliament approved the ratification of the WIPO Copyright treaty, the WIPO Performances and Phonograms treaty and the Beijing Treaty on Audiovisual Performances.
8. Based on concerns about inadequacies in the current legislation (see details in section 23 to 27 below), the SA Parliament reviewed the law between 2017 and 2019 and approved Bills which would make changes in the current law. While we hold that none of the provisions of the Bills would fall foul of the criteria set out in the section 502(a)(2)(D) of the Trade Act of 1974 of the USA, we also point out that these Bills are not law.
9. Under South Africa's Constitution, before a Bill becomes law, it requires the assent of the President, who is required to assess whether a Bill is consistent with the South African Constitution and our Bill of Rights. The Bill of Rights provides inter alia strong and clear protection for property rights, which covers intellectual property rights.
10. In exercising this discretion, the President is subject to various restrictions. The wording of the South African Constitution makes it clear that the President may only refer a matter back to Parliament if he has reservations about the constitutionality of the Bills. In addition, the South African Constitutional Court has

clarified that the President's discretion does not extend to referring Bills back to Parliament in their entirety; the President's reservations must be specified and itemised when he refers a Bill back to Parliament.

11. The proposed changes to the law in the form of the Bills are currently undergoing such constitutional scrutiny by the President. Accordingly, the President has not assented to the Bills and they therefore do not constitute law. Until these processes are completed, South Africa's current law will continue to be based upon the existing Copyright Act, Act No. 98 of 1978 (as amended) and the Performers Protection Act, Act No 11 of 1967 (as amended)).
12. The petition offers no proof or argument that South Africa's current copyright law violates the GSP criterion. Indeed, South Africa's current copyright law has been in force since 1978, and while it has been amended from time to time (notably in 1992 to make computer programs a distinct class of protected work, and in 1997 to bring it into line with the TRIPS Agreement), the current law has not previously raised any concerns, including from the IIPA.
13. From the above it is clear that the IIPA petition upon which the current review is premised is entirely focused on two Bills that are currently not a part of South Africa's legal regime.
14. As advised, the Bills are the subject of ongoing review and consideration by the President of South Africa. Property rights are entrenched in the South African Constitution, and hence core to the President's consideration. Section 25(1) of the Constitution states that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."
15. There are several possible outcomes of such a consideration, and some of these involve further processes, which will be set out briefly below:
 - a. The President must either assent to and sign the Bill or, if the President has reservations about the constitutionality of the Bill, he must refer it back to Parliament for reconsideration.
 - b. Following a decision of the President, if he
 - i. Assents to the Bill, it becomes law subject to the processes that may flow as set out below; or
 - ii. Refers the Bill back to Parliament, Parliament must then consider the reservations of the President that are the subject of the aforementioned referral.
 - c. Parliament, after considering the President's reservations, may either
 - i. concur with all or some of the President's concerns, and undertake a process of amending the Bills. The relevant Parliamentary Committee is entitled to call public hearings at which interested parties may make representations; or
 - ii. Parliament may disagree with the President's reservations and decline to amend the text of the Bill.
 - d. When the Bill is sent back, the President is required to consider the Bill and if it

- i. fully accommodates the President’s reservations, the President must assent to and sign the Bill and it becomes law subject to the processes that may flow as set out below; or
 - ii. does not address the President’s reservations fully, the President must either assent to and sign the Bill or refer it to the Constitutional Court for a decision on its constitutionality.
 - e. If the Constitutional Court determines that:
 - i. the Bill in all respects complies with the Constitution it may be brought into effect in accordance with the process set out below.
 - ii. the Bill is not in compliance with the Constitution, it must be referred back to Parliament, subject to such direction as the Constitutional Court may make.
 - f. If the President, or where appropriate the Constitutional Court, considers that the Bills are constitutionally sound and assents, the entry into force of the new legislation would only follow once the responsible government department ensured that it has the necessary capacity and is ready to implement the new law.
 - g. Once this process has been completed, the Bill is promulgated and comes into operation on a date determined by the President.
 - h. Where legislation provides for regulations, the implementation of the relevant sections may be delayed until the regulations have been drafted, which would involve a public consultation process and thereafter published in the Government Gazette (similar to the Federal Register).
 - i. At any stage after the Bill has been promulgated and has come into operation, affected parties may institute legal proceedings to challenge the legislation on the basis that either the legislation or regulations or other administrative decisions made in terms of it are not compliant with the Constitution.
16. Against this background, our key representation in this Submission is that there is no basis under the terms of the GSP to review South Africa’s eligibility. South Africa’s current legislation is not under challenge in the IIPA petition. As noted above, the Bills that are the subject of the IIPA petition and concerns are not yet in force as law and may still be referred back to Parliament or the Constitutional Court for scrutiny as part of the law-making process envisaged by the Constitution. Accordingly, the law-making process on copyright in South Africa is an unfinished business. It appears that this review of South Africa’s copyright regime is premature and based on speculation as to the outcome of the current legislative process that is as yet incomplete.
17. We respectfully propose therefore that this review of South Africa’s GSP eligibility be brought to an end on these grounds alone.
18. We have taken note of the case of a completed country review of eligibility for GSP on the grounds of intellectual property, being that of Uzbekistan, which was opened in 1999. The USTR closed the review in October 2019, “following Uzbekistan’s accession to the Geneva Phonograms Convention, the World Intellectual Property Organization (WIPO) Copyright Treaty, and the WIPO Performances and Phonograms Treaty.” As indicated in this Submission, the South African Parliament has adopted the WIPO Copyright and WIPO Performances and Phonograms Treaty

and the Beijing Treaty on Audiovisual Performances. These treaties will be deposited to WIPO and will be expected to come into effect within the 3 months following that process. The copyright internet treaties informed the drafting of the Bills.

19. We reiterate that the South African Government is committed to work with all interested parties in an appropriate and constructive manner on updating South Africa's copyright legislation.

Part 2: South Africa's Current Intellectual Property Regime Protecting Copyrights

20. South Africa has an existing legal regime to protect copyrights under a broader regime that provides protection for all of intellectual property rights. The Copyright Act of 1978 has existing protections and provides exclusive rights and a sound legal framework on copyright works. The civil remedies are already in the principal Act in the form of interdicts/claim for damages and enable rights holders to initiate these themselves. The law provides certainty and sound measures on copyright regime as it ensures works are protected, clarifies the type of works the Act addresses, determines what constitutes infringement and duration of copyright and many other important provisions such as on assignment and moral rights that renders it effective to date.
21. The Bill of Rights in the South African Constitution contains a property clause that only permits deprivation of property in terms of a law of general application and prohibits any law from permitting arbitrary deprivation of property. In other words, any statute permitting or authorising arbitrary deprivation of property will be unconstitutional.
22. The South African authorities have acted against piracy through a range of actions, including the confiscation and destruction of pirated films, the arrest of individuals trading in counterfeit CDs and DVDs, and raids on facilities suspected of housing operations for counterfeit products, including branded clothing covered by patents and trademarks. Last year the South African Revenue Services (which plays a role, inter alia, similar to US Customs and Border Protection) reported confiscation of counterfeit clothing, footwear and other goods to the value of R2.7 billion (±\$187 million) for the year. This follows confiscations of counterfeit goods valued at R1.8 billion (±\$125 million) in the prior year. The last published data, for 2013, reports the destruction of counterfeit CDs and DVDs at South Africa's ports of entry equal to R671 million (±\$50 million) for that year
23. The existing regulatory regime has some challenges, including that (i) it has not fully taken into account changes that occurred at the multilateral level and the content of treaties; (ii) it has not kept abreast of global trends and developments to advance IP regimes; (iii) was falling behind on technological advances in the digital era; and (vi) it lacked clear and appropriate mechanisms to provide for dissemination of information in support of innovation and the broader public interest. Creators of intellectual property were not adequately compensated through payment of royalties and many of them died as paupers. There was a weak regulatory framework to govern the misconduct and abuses identified with the

collecting societies, who abuse creators and do not adhere to corporate governance requirements, including failure to distribute royalties to members

24. In 2010, the Copyright Review Commission (CRC) was established to consider deficiencies in the legal regime and proposals to address these. The CRC made a number of recommendations for changes to the legal regime to better address and balance the rights and interests of different parties.
25. In light of concerns raised in the current GSP Country Practice Review of South Africa, we note for the information of the USTR, the following recommendations from the CRC Report:

“The Copyright Act must be amended to include a section modelled on that in the US Copyright Act providing for the reversion of assigned rights 25 years after the copyright came into existence.”

And in a further section, it recommended:

“To provide the artists or their heirs with the opportunities to reduce the level of losses that arise as a result of the disparate circumstances referred to above, the CRC recommends an amendment to the legislation to allow for automatic reversions of assigned rights after 25 years (from the date of assignment). The recommendation is based upon the relevant provision in the US Copyright Act. But the period proposed is 25 years and not 35 years, in view of the fact that the period of copyright protection in the US is much longer than in South Africa.”
26. In 2013, the South African Department of Trade and Industry (DTI) published a draft National Policy on changes to the country’s Intellectual Property Framework, setting out proposed changes to address concerns and gaps in the existing legislative provisions. This included a recommendation for the introduction of a ‘fair use’ provision in South African law, for the copying and use of material in reasonable numbers for educational and research purposes and using reasonable excerpts in commentary and criticism.
27. An independent Assessment Study of the Regulatory Proposals on the Intellectual Property Framework for South Africa, commissioned by the South African Government, to review the draft Policy was also conducted. The independent Assessment looked at the content of relevant Treaties and international experience and concluded that the introduction of a ‘fair use’ provision was warranted.
28. Based on the work done as set out above, a number of recommendations were drafted as proposed changes to the law and debated in Parliament. Not all of the recommendations made their way into the final Bill approved by Parliament.
29. The parliamentary process initiated to develop the Bills took these and other inputs into account and all were subjected to further policy and legal assessments. It also included engagement with the public and interested parties, as detailed in this Submission.
30. The Bills were the product of a thorough policy development process that took account of, inter alia, contemporary challenges, international best practice and expert advice and assessment.

Part 3: The Bills and concerns expressed by stakeholders during and after the Parliamentary hearings

31. The focus in this Submission will mainly be on the Copyright Amendment Bill (CAB) as more concerns were expressed about this Bill. It is acknowledged that the two Bills are linked: for example, matters related to the 25-year reversion limit and contractual terms are similar in both Bills.
32. The CAB seeks to protect the economic interests of authors and copyright owners of copyright works against infringement and to promote innovation and creative activities. It regulates matters relating inter alia to royalties, fair-use of copyrighted works; exceptions and limitations for libraries, archives and museums, education, and people living with disabilities; reversion of rights to the original creators after 25 years, the increase in the penalties applicable on conviction for unauthorised use of copyrighted materials or technological protection measures and the strengthening of the Copyright Tribunal.
33. The CAB and the PPAB together seek to modernize and update copyright protection in South Africa to bring it into the digital era, ensure consistency with South Africa's international obligations, and to address shortcomings in the current legislative framework. The CAB seeks a balance that ensures reasonable access to copyright protected works for educational purposes; to ensure access to information and resources for persons with disabilities; and to ensure that artists obtain a fair compensation for their creative endeavors. It seeks to do so by providing reasonable limitations and exceptions to exclusive rights and to address imbalances in bargaining strengths.
34. The proposed provisions in the Bill are aligned to South Africa's international obligations under the TRIPS Agreement and the Berne Convention. Alignment was also sought with other relevant World Intellectual Property Organization (WIPO) digital treaties including the Copyright Treaty (WCT), the Performance and Phonograms Treaty (WPPT), and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.
35. IIPA raised a number of concerns regarding the Copyright Amendment Bill (CAB). It should be noted that there are a diversity of views and interests within the US business community (as indeed is the case in South Africa itself), and certain US corporations have supported the South African draft legislation. Examples are set out in Annex 1 to this Submission.
36. Some of the concerns raised by the IIPA are on matters that may fall within the ambit of the review of certain provisions of the Bills being undertaken by the President of South Africa, and we are not in a position to anticipate which clauses may be considered by the President to fail to pass constitutional muster. Accordingly, this Submission seeks simply to point to the considerations applied by Parliament during its consideration, without anticipating the outcome of the Presidential review. We do not offer a comprehensive response as this Submission makes the principal argument that the petition is misdirected as the Bills are not yet

part of South African law; the examples cited below serve to illustrate that the processes of Parliament were rational and not incompatible with protection of intellectual property and to highlight the diverse views and opinions that have been expressed in the process of developing the Bills and on their content.

37. Fair use:

- a. The IIPA raises concerns at what they consider to be an ill-considered importation of the U.S. “fair use” concept and the lack of an adequate jurisprudence to ensure appropriate protection of intellectual property.
- b. Parliament took account of the provisions of expert Reports that considered the US legislation and legal provisions in other jurisdictions and treaties, submissions from the public and businesses (See Annex 1) and adapted these to South African circumstances. There are different views within the business community on the merits of the fair-use principle in the draft South African law, and as noted earlier, there are US businesses and advocacy organisations that support the SA formulations and have argued it would have significant economic benefit. In addition, it should be noted that SA has a long and widely-respected tradition of judicial competence and independence in matters of intellectual property and commercial law. The SA judiciary will be able to access the thinking and decisions of jurists across the world and build on its own judicial traditions to ensure a workable jurisprudence that will not have a chilling effect on innovation nor destroy the basic foundations of intellectual property protections.

38. Freedom to contract:

- a. The IIPA raises concerns on restrictions on the freedom of rights holders to contract in the open market, particularly the limit of assignments of rights to a maximum of 25 years and Ministerial powers to set standard and compulsory contractual terms for contracts covering seemingly any transfer or use of rights.
- b. The essential right to contract is not removed in the legislation; instead it is regulated to address the concerns that were raised in the expert reports and the public submissions to Parliament, referred to elsewhere in this Submission. The principle of assigning rights for a fixed period is contained in many jurisdictions; the US sets a period of 35 years. The SA Parliament applied its mind to determining an appropriate period and it is submitted that 25 years is not an unduly short period and reflects differences in the period of copyright protection currently in the South African law compared to that of the United States. In respect of concerns about Ministerial power, South African law provides that Ministers, when exercising a public power that adversely affects rights of parties, may not act in an arbitrary, capricious or irrational manner; and any action must be proportional to the problem it seeks to address. In the South African legal system, there are a number of examples of Ministerial powers, though these are bounded by due process and the rule-of-law requirements in our constitutional order.

39. Over-regulated licensing regime:

- a. The IIPA raises concerns at what they believe to be an overly regulated licensing mechanisms that will undermine the digital marketplace and severely limit the ability of rights holders to exercise exclusive rights in their

copyrighted works and sound recordings by regulating the relationship between creative parties, rather than providing a robust legal framework for the protection of creative works within which private parties can freely negotiate the terms of their relationships.

- b. Parliament sought to ensure that an existing imbalance in bargaining power between legitimate private sector agents are addressed through an appropriate regulatory framework, as applies in other areas of law (for example labour legislation). In this regard, it is pointed out that to the extent that standard and/or compulsory contractual terms may be provided to protect vulnerable parties this would be consistent with internationally accepted limits on the absolute freedom to contract. In the event that such conditions are introduced, any such decision would be subject to constitutional scrutiny.

40. Inadequate remedies:

- a. The IIPA raises concerns at inadequate criminal and civil remedies for infringement, including online piracy which will deny the ability to effectively enforce rights against infringers.
- b. The CAB has remedies for online infringements. It criminalises the circumvention of technological protection measures and prohibits certain conducts in copyright management information. In addition, the CAB provides for greater penalties for natural persons, and extends penalties to firms which may also be found guilty of infringements.

41. Inadequate technological protection measures

- a. The IIPA raises concerns at inadequate provisions on technological protection measures (TPM) necessary for the licensing of legitimate content.
- b. The CAB has provided new safeguards to protect copyrighted content through the introduction of TPMs that is absent in the current legislation. The Bill defines TPMs, provides for specified prohibited conduct in respect of TPMs, and extends the penalty regime to infringement of TPMs.

42. Inconsistency with international treaties

- a. The IIPA raises concerns that the provisions are inconsistent with South Africa's international obligations, far exceeding the scope of exceptions and limitations permitted under the TRIPS Agreement (Article 13) and the Berne Convention (Article 9). Moreover, it contends that aspects of both the Bills are incompatible with the WIPO Internet Treaties.
- b. The proposed provisions in the Bill are aligned to South Africa's international obligations under the TRIPS Agreement and the Berne Convention. Alignment was also sought with other relevant World Intellectual Property Organization (WIPO) digital treaties including the Copyright Treaty (WCT), the Performance and Phonograms Treaty (WPPT), and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The TRIPS Agreement has provided effective enforcement of the rights and obligations undertaken by all WTO Member States, including on copyright protection. Any alleged breach of those obligations would be subjected to the WTO's Dispute Settlement Understanding processes and procedures. If a panel or the Appellate Body found that a Member has breached its

obligations, that Members would be required to bring its measure into conformity and, failing that would entitle the complainant to impose retaliatory measures equivalent to the costs incurred by the breach.

43. Access to education exceptions
 - a. Access to education exceptions was also raised as a concern by IIPA.
 - b. South Africa is a developing economy and public policy aims to transform the creative industry and bring access to knowledge and information to all South Africans. The CAB balances various interests including the public interest concerns of access to knowledge and education. The aim is to enhance access to and use of copyright works in a clearly regulated manner and enhance access to information for the advancement of education and ultimately democracy.

44. The US Government raised a number of technical issues on the CAB during and after its consideration by Parliament and these were discussed and clarified in interactions with US Government representatives. The DTI met twice with a delegation from the US Embassy in Pretoria. Some of the technical issues raised by the US Government included minimum contract terms of royalties, the impact of retrospective application of royalties on the bargaining arrangements between contracting parties; the clarity on reciprocity of collecting societies on payment of royalties and how this would be implemented and the implications for national treatment; and increased penalties for infringement. The proposed inclusion of a so-called “cooling off period” was also discussed; however the proposal was removed from the final Bill following discussion with the US Government and other stakeholders. On 21 May 2019, the Department of Trade and Industry met with the USTR on a teleconference. The meeting involved other government representatives in the US. The USTR requested South Africa to clarify the fair use doctrine and limits of 25 years reversion rights in the CAB. The clarity was provided by the DTI. The responsiveness of the Department was acknowledged by the US Government in the engagement.

45. The two Bills were developed through an open and transparent consultative parliamentary process, stretching over two years, where a diverse set of stakeholders and constituencies were active participants. Technical specialists were appointed by Parliament to support its drafting, and a number of public hearings were held in both houses of Parliament where both written and oral comment was sought on the objectives and the efficacy of the Bills. More than 250 written submissions were received by the relevant parliamentary committees. The IIPA was indeed one of many interested parties who made representation to Parliament, and their interests were considered in the context of the many other views heard by Parliament, including those by local and international commentators, including other US businesses (see Annex 1).

PART 4: The benefits to the US of the economic relationship with SA

46. According to the USTR website, the GSP is the largest and oldest U.S. trade preference program. Established by the Trade Act of 1974, GSP promotes economic development by eliminating duties on thousands of products when imported from one of 119 designated beneficiary countries and territories. The USTR notes that

GSP “aims to promote sustainable development in beneficiary countries by helping these countries to increase and diversify their trade with the United States. Moving GSP imports from the docks to U.S. consumers, farmers, and manufacturers supports tens of thousands of jobs in the United States. GSP also boosts American competitiveness by reducing costs of imported inputs used by U.S. companies to manufacture goods in the United States. GSP is especially important to U.S. small businesses, many of which rely on the programs’ duty savings to stay competitive. In addition to promoting economic opportunity in developing countries, the GSP program also supports progress by beneficiary countries in affording worker rights to their people, in enforcing intellectual property rights, and in supporting the rule of law”.¹

47. The economic benefit to the United States of its relationship with South Africa is substantial. Economic flows from exports of goods and services and income receipts to the United States from South Africa amounted to \$12.2 billion in 2018 (2017: \$11.3 billion), according to data reported by the US Bureau of Economic Analysis. This represented 23.5% of total such economic flows from the African continent to the United States for the same period. The sum of \$12.2 billion was made up of \$5.6 billion from the export of goods to South Africa, \$2.9 billion from export of services to South Africa, \$3.6 billion from primary income receipts from South Africa (including income to US investors from investment in South Africa) and \$106 million from secondary income receipts from South Africa (including remittances from private individuals).
48. Top exports of goods (2-digit HS) to South Africa from the United States in 2018 included machinery (\$1.2 billion), vehicles (\$692 million), mineral fuels (\$459 million), electrical machinery (\$365 million), and aircraft (\$334 million). The US generally has a trade surplus in its favour in export of manufactured goods and services; agriculture exports are evenly balanced between the two countries and South Africa has a surplus in its favour in minerals and commodities.
49. According to the Office of the United States Trade Representative, direct investment by US investors in South Africa is led by manufacturing, professional, scientific, and technical services, and wholesale trade. A number of US businesses have been present in South Africa for a considerable period of time. General Electric, for example, has been operating in South Africa since 1898. According to the US Chamber of Commerce, there are more than 600 US companies invested in SA, which employ many thousands of South Africans. (See Annex 2 for selection of US business in operation in South Africa.) For example, the Ford Motor Company has an established manufacturing base in South Africa, from where it supplies the South African domestic market and exports to Europe and other African countries. These investments result in a dividend flow back to the United States, to the benefit of the US economy.
50. Trade with South Africa also supports a number of jobs in the United States. According to the Department of Commerce, U.S. exports of goods and services to South Africa alone, supported an estimated 46,000 direct jobs in 2015 (latest data

¹ <https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp>. Accessed Jan. 17, 2020

available), made up of 26,000 jobs supported by goods exports and 20,000 jobs supported by services exports.²

51. The US Trade Act of 1974 identifies as a criterion for eligibility of a country for GSP status, the extent to which a country provides reasonable access to the markets and basic commodity resources of such country (See s 502(c)(4)). South Africa provides critical mineral inputs to a number of US industries and corporations for their production-facilities in the United States, including for example palladium, platinum, rhodium, titanium, iridium, ferromanganese, vanadium and chromium. In a number of these, South Africa provides more than half of the mineral-type imported by the United States. These mineral-inputs support many thousands of US jobs in manufacturing.
52. South African outward investment in the United States contributes further to US jobs – one South African company’s investment alone resulted in the creation or sustaining of 8 700 construction or operations jobs in the United States.
53. South Africa also benefits from its economic relationship with the United States. The Generalised System of Preferences, and access to benefits under the Africa Growth and Opportunities Act (AGOA), contributes to increased exports to the United States. Economic flows from exports of goods and services and income receipts to South Africa from the United States also amounted to \$12.2 billion in 2018. As such the benefit to both countries was equally balanced during the year. Over the ten-year period from 2009 to 2018, the cumulative balance of payments from trade in goods and services as well as payments and receipts of income was net in favour of United States to an amount of \$5.8 billion. (See Annex 3.)
54. We are acutely aware that a consequence of being removed from the list of US GSP beneficiary countries would be loss of eligibility to and preferences of the AGOA. This would have seriously negative implications for South African exports but also for the broader SA-US trade relations as well as some US exports to South Africa where specific legal arrangements are predicated on continuation of AGOA and GSP.

Part 5: Summary of the South African Government Submission and Concluding Comments.

55. South Africa is a democracy underpinned by free and fair elections, a Constitution with an entrenched Bill of Rights setting out fundamental human rights, a strong and robust legal system with rule of law, a free press and strong property rights protections. The country gripped the imagination of the world 25 years ago when it chose peaceful means to address the legacy of centuries of political and economic exclusion, building a democratic society and choosing reconciliation and rule-of-law based transformation and economic inclusion, over retribution

² <https://ustr.gov/countries-regions/africa/southern-africa/south-africa>. Accessed Jan. 17, 2020

56. The country faces enormous challenges: economic growth below the growth level of a young and rapidly urbanizing population, high levels of unemployment and poverty in both urban and rural areas and one of the world's highest levels of inequality. The country is finding ways to address these challenges and the legacies of apartheid, whilst building an inclusive market economy.
57. At the same time, there are considerable opportunities: it is Africa's most developed economy with a growing skills and technology base, significant deposits of natural resources, functioning capital markets and modern infrastructure and it is part of a continent that is growing, with enormous untapped potential.
58. The US GSP remains important to South Africa's trade with the US and makes a vital contribution to establishing mutually beneficial economic relations between South Africa and the US. In 2018, \$882 million of imports from South Africa entered the United States under GSP. The GSP provides economic opportunities that are utilised by South Africans that in turn foster an economic development trajectory based on trade, not aid. In making this positive contribution to the South African economy, the GSP offers active support to our democratic project and to our national security. Given South Africa's pivotal role in Africa, particularly in Southern Africa, South Africa's access to the GSP indirectly promotes democracy, prosperity and development across the region.
59. Section 502(c)(2) of the Trade Act of 1974 provides that, in determining whether to designate any country as a beneficiary developing country, the President shall take into account, among other factors, the level of economic development of such country, including its per capita gross national product, the living standards of its inhabitants, and any other economic factors that the President deems appropriate. While the South African economy has made enormous strides since the end of Apartheid, the country continues to face considerable developmental challenges in the form of high levels of unemployment, inequality and poverty; as well as slow rates of economic growth.
- a. The South African national statistics agency, Stats SA, estimates narrow unemployment (equivalent to U-3 Unemployment) at 29.1%, one of the highest levels for any country today. This is also substantial when one considers that US unemployment peaked at 24.9% during the Great Depression³. Youth unemployment is a particular challenge for South Africa, with 58.2% of people under the age of 25 characterised as unemployed.
 - b. South Africa also faces some of the highest levels of inequality in the world, with a World Bank estimated gini-coefficient of 0.63 to 0.65. The country's GDP per capita significantly understates the levels of development and poverty, as a result of the levels of income inequality, which the SA Government is committed to tackle. A 2015 Stats SA "Living Conditions Survey" estimated that while mean annual income was 39,047 South African rands (\pm US\$2,700), median income, which is more representative of what

³ Bureau of Labor Statistics. "Labor Force, Employment, and Unemployment, 1929-39: Estimating Methods." <https://www.bls.gov/opub/mlr/1948/article/pdf/labor-force-employment-and-unemployment-1929-39-estimating-methods.pdf> Page 2, Table 1. Accessed Jan. 17, 2020.

ordinary South Africans earn, was less than half that at 15,097 South African rands (\pm US\$1,050) per annum.

- c. South Africa still continues to face high levels of poverty. The World Bank estimates the number of South Africans living under \$5.50 per day (2011 Dollars, Purchasing Power Parity) at 57.1%, compared with 2% for the United States.
60. Section 502 (c)(7) of the Trade Act of 1974 provides that in determining whether to designate any country as a beneficiary developing country, the President shall take into account, among other factors, whether or not such country has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognised worker rights. The South African Constitution guarantees fundamental worker rights including the right to fair labour practices, the right of association and the right to organise and bargain collectively. South African labour laws provide for prohibition of forced or compulsory labour, a minimum age for the employment of children and a prohibition of the worst forms of child labour; and minimum wages, hours of work and occupational safety and health.
 61. We underscore the mutually beneficial economic relationship that has existed between South Africa and the US over many years, and the importance of ensuring that this important relationship is not disrupted or diminished in any way. Rather, our common objective should be to make greater efforts to further enhance mutually beneficial economic relationship through greater two-way flows of trade and investment where this is possible, and indeed, increase the level of benefit that South Africa can obtain from the economic relationship, in light of the representations set out earlier.
 62. We have pointed out that the concerns raised in the IIPA petition are at best speculative and certainly premature, as the Bills that have been the source of concern are not in operation. Those Bills are undergoing a Presidential review that is still in progress. We noted that the President could well send the Bills back to Parliament for reworking, if questions of their constitutionality are raised, and that this would mean any change to the current copyright protection regime in South Africa is far from being imminent. Even in the event that the Bills were assented to, further regulatory and processes to operationalise them would be necessary. This would provide further scope to seek to address legitimate concerns raised.
 63. We have observed that in jurisdictions across the world that have robust and functioning IP regimes, including in South Africa, there is a range of views on what constitutes appropriate legislative measures. While views may differ, it is important to point out that South Africa's property protection provisions in the Constitution and Bill of Rights do not permit any action or measure that would constitute an arbitrary deprivation of property rights, including intellectual property. US owners of intellectual property should be assured of this constitutional requirement, and that this consideration is indeed part of the President's remit in reviewing any Bill brought forward for assent.

64. Further , in our view, the IIPA petition does not establish that the content of the Bills, in its entirety, constitutes a violation of any part of Section 502(a)(2)(D) of the Trade Act of 1974.
65. Finally, we reiterate that the South African Government is committed to work with all interested parties on the unfinished matter of updating South Africa's copyright legislation. We are also taking steps to enhance the South African-US bilateral economic relationship through deepening engagements with the US-South Africa Business Council, renewed dialogue with USTR and with US Government representatives and partnerships with US Corporations that are based in South Africa.

ANNEX 1: Business submissions to the South African authorities – examples

Excerpt from Google South Africa’s Submission to Parliament on the Copyright Amendment Bill (B13-2017), dated 16 July 2018

We thank the Government for the draft it has introduced. While there is some room for refinement, it offers a genuine balance of protection for and encouragement of creativity.

In particular, we commend the government for its thoughtful outline of a fair use doctrine. By judging uses of content against a set of principles, rather than an exhaustive list of allowed exceptions, a fair use approach enables greater flexibility and ingenuity. There is no doubt that a fair use regime will promote socially beneficial, pro-competitive, and innovative uses.

Copyright laws, like all laws, must be fit for their purpose. What is the purpose of copyright laws? There is no one purpose, but many, and therefore a fit for purpose copyright law must be flexible enough to effectively regulate a myriad objectives. Flexible copyright laws have these benefits:

- Fair use would spur creativity by enabling South African artists to legally use small amounts of copyrighted content when creating new and transformative artistic works in ways that are consistent with the nature of local creativity: Artistic genres such as remix and mashups are flourishing in South Africa and on the African continent as a whole.
- Fair use would allow South African consumers to use lawfully acquired content in technology neutral ways.
- For industry, fair use would provide much needed confidence for the providers of new technological services such as cloud computing
- For higher education, fair use would allow teachers to use a wider range of digital technologies in classrooms and would assist South African universities in taking advantage of innovative teaching technologies such as Massive Open Online Courses (MOOCs) thereby helping to increase access to education for all segments of society. Students would have greater scope to include extracts from third party material in works that they may show publicly.
- For research and innovation, fair use would enable South African researchers to use cutting edge digital technologies such as text and data mining. Technologists, including software developers and startups, would have greater latitude to develop new services that can interact with existing programmes and interfaces.
- For cultural institutions, fair use would enable South African libraries, archives, museums and galleries to open up their collections and digitise historical works where copyright owners cannot be found. The importance of such an ability is heightened by the overly restrictive nature of the orphan works provisions.

Creative expression, whose promotion is the overarching goal of copyright, is an inherently cumulative and cooperative process, in which creators bring their own skill and effort to bear while drawing on a public domain nourished by the work of their predecessors and contemporaries. As for the claim that fair use would weaken the incentives to innovate, it is based on a misunderstanding of fair use’s purpose and

functioning. The objective of fair use is not to alter the balance in the copyright system between the interests of rights holders and those of consumers; rather, it aims to promote creative effort by ensuring exclusive rights are not abused to prevent the continued growth of creative output. In considering whether that goal will be met in a particular fact-situation, it pays careful attention to any adverse impact the use at issue could have on the legitimate commercial interests of the rights holder.

Opponents of flexible copyright laws have asserted, contrary to over 300 years of Anglo-American experience, that fair use harms creators, leads to litigation, and is uncertain.⁴

Letter from the Computer and Communications Industry Association, representing some of the largest US corporations in the digital economy, based in Washington DC, to the South African Government

I write to you on behalf of the Computer & Communications Industry Association (CCIA) in support of the inclusion in South Africa’s Copyright Amendment Bill of a fair use doctrine, consistent with U.S. copyright law.

We are aware that a handful of U.S. businesses have convinced the U.S. Trade Representative (USTR) to review South Africa’s eligibility for certain trade preferences. These companies’ complaints center on the inclusion in the Amendment Bill of a fair use provision based on a similar provision in the U.S. Copyright Act. We regret but will not focus on the inconsistency of U.S. companies opposing another country’s adoption of a U.S. legal provision on which they routinely rely. Instead, we draw your attention to the U.S. Government’s consistent strong expressions of support for fair use.

In a statement issued 2012, USTR observed that in the United States, “consumers and businesses rely on a range of exceptions and limitations, such as fair use, in their businesses and daily lives.” The U.S. Intellectual Property Enforcement Coordinator (IPEC), in its 2013 Joint Strategic Plan, stated that “fair use is a core principle of American copyright law.” The IPEC added that “the Supreme Court has repeatedly underscored fair use provisions in the Copyright Act as a key means of protecting free speech,” and explained that fair use promotes creativity: “enforcement approaches should not discourage authors from building appropriately upon the works of others.”

The IPEC’s 2016 Joint Strategic Plan also underscored the importance of fair use to creativity and innovation. The IPEC celebrated how fair use enables “new and innovative uses of media (e.g., remixes and mashups involving music, video and the visual arts).” The IPEC acknowledged fair use and other exceptions as “not only part of our body of laws, but as an important part of our culture,” concluding that “it is the combination of strong copyright rights with a balance between the protection of rights and exceptions and limitations that encourages creativity, promotes innovation, and ensures our freedom of speech and creative expression are respected.”

⁴ A full copy of the submission is available <https://pmg.org.za/bill/705/>

Other government experts have referred to how fair use is critical to business uses such as software development. In September, the Solicitor General of the United States filed a brief in the U.S. Supreme Court reaffirming the long-established principle that fair use “permits courts to consider whether rigid application of the copyright statute in a particular case would stifle the very creativity which that law is designed to foster.” In a 2016 study on software-enabled consumer products, the Copyright Office found that “courts repeatedly have used the fair use doctrine to permit copying necessary to enable the creation of interoperable software and products.”

In short, various agencies of the U.S. Government have repeatedly affirmed the centrality of fair use to the U.S. copyright system, and its importance in promoting creativity and innovation. This is supported by economic research. A study commissioned by CCIA in 2017 found that fair use industries accounted for 16% of the U.S. economy; generated \$5.6 trillion in annual revenue; increased annual productivity by 3.2%; increased U.S. exports by 21% over four years; and employed an additional 1 million workers over a four-year period. Recognizing the benefits of fair use to creators and users in the United States, numerous other jurisdictions have adopted fair use provisions, including Singapore, Malaysia, Korea, Taiwan, Hong Kong, the Philippines, and Israel. The Canadian Supreme Court has applied its fair dealing provision in a manner consistent with U.S. fair use case law. Fair use already exists on the African continent, in Liberia.

Contrary to the suggestions of the U.S. companies opposing fair use in South Africa, there is nothing inappropriate about the Copyright Amendment Bill’s inclusion of fair use. South African users and creators should be allowed to benefit from fair use, just as American users and creators are able to, along with the millions of citizens of the other jurisdictions that have adopted fair use.⁵

⁵ <http://infojustice.org/archives/41763>. Last accessed Jan. 17, 2020

ANNEX 2: Selected list of US businesses operating in South Africa

Industry	US Companies in SA
AEROSPACE	Boeing Corporation
AGRIBUSINESS	Monsanto S.A. (Pty) Ltd.
APPAREL & TEXTILE	Nike South Africa (Pty) Ltd.
APPAREL & TEXTILE	Reebok South Africa (Pty) Ltd.
APPAREL & TEXTILE	Levi Strauss S.A. (Pty) Ltd.
AUTOMOTIVE	Tyco Truck Manufacturers (Pty) Ltd.
AUTOMOTIVE	Avis Rent-a-Car
AUTOMOTIVE	Hertz Rent-a-Car
AUTOMOTIVE	Ford Motor Company of SA (Pty) Ltd
AUTOMOTIVE	Budget Rent-A-Car
AUTOMOTIVE	Exxon Mobil South Africa (Pty) Ltd.
CHEMICAL	Air Products South Africa (Pty) Ltd.
CHEMICAL	Pfizer Laboratories
CONSTRUCTION & MINING	Baker Hughes S.A. (Pty) Ltd.
CONSTRUCTION & MINING	Masonite (Africa) Ltd.
EDUCATION	American International School of Johannesburg
ELECTRONICS & TELECOMMUNICATIONS	Medtronic Africa (Pty) Ltd.
ELECTRONICS & TELECOMMUNICATIONS	Franklin Electric S.A. (Pty) Ltd.
ELECTRONICS & TELECOMMUNICATIONS	Motorola Southern Africa
ELECTRONICS & TELECOMMUNICATIONS	Duracell Eveready South Africa
FINANCIAL	Citibank
FINANCIAL	Merrill Lynch Smith Borkum Hare (Pty) Ltd.
FINANCIAL	Goldman Sachs Int.
FINANCIAL	Grant Thornton Kessel Feinstein
FINANCIAL	American Express South Africa
FINANCIAL	Deloitte & Touche
FINANCIAL	General Electric Capital Services
FINANCIAL	J P Morgan Chase Manhattan
FOOD & BEVERAGE	Herbalife International South Africa
FOOD & BEVERAGE	Coca-Cola SA
FOOD & BEVERAGE	Heinz South Africa (Pty) Ltd.
FOOD & BEVERAGE	Kellogg Co. of South Africa (Pty) Ltd.
FOOD & BEVERAGE	McDonald's South Africa (Pty) Ltd.
FOOD & BEVERAGE	Cargill S.A. (Pty) Ltd.
HOUSEHOLD & CONSUMER GOODS	3M South Africa (Pty) Ltd.
HOUSEHOLD & CONSUMER GOODS	Tupperware Southern Africa (Pty) Ltd.
IT & COMPUTER	Honeywell Southern Africa (Pty) Ltd.
IT & COMPUTER	Oracle S.A. (Pty) Ltd.
IT & COMPUTER	Dell Computer (Pty) Ltd.
IT & COMPUTER	Microsoft S.A. (Pty) Ltd.
IT & COMPUTER	Nortel Networks
IT & COMPUTER	Novell Africa
IT & COMPUTER	Hewlett-Packard S.A. (Pty) Ltd.
MANAGEMENT CONSULTING	Accenture

PERSONAL HYGIENE	Procter & Gamble SA (Pty) Ltd.
PERSONAL HYGIENE	Estee Lauder Companies (Pty) Ltd
PETROLEUM	American Power Conversion
PHARMACEUTICALS	Abbott Laboratories
PHARMACEUTICALS	Eli Lilly (SA) (Pty) Ltd
PHARMACEUTICALS	Johnson & Johnson (Pty) Ltd.
SERVICE	Hilton Sandton
SERVICE	AIG South Africa Limited
SERVICE	Black & Veatch Africa
TRANSPORTATION	DHL International (Pty) Ltd.
TRANSPORTATION	Federal Express (Pty) Ltd. (Fedex)
TRANSPORTATION	United Airlines
TRANSPORTATION	Delta AirLines
TRANSPORTATION	American Airlines

ANNEX 3: Cumulative Net benefit to US of trade and income flows with South Africa (2009 – 2018)

