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**2019 Generalized System of Preferences Annual Review**  
**South Africa Country Practice Review**  
**Intellectual Property Rights and Market Access Practices**  
**Written Comments by the**

**Alliance for Recorded Music, American Association of Independent Music,  
Association of American Publishers, Authors Guild, Entertainment Small Business Alliance,  
Independent Film & Television Alliance, Motion Picture Association,  
National Music Publishers Association, News Media Alliance,  
Recording Industry Association of America, Songwriters Guild of America**

**Docket Number USTR-2019-0020**  
**November 19, 2019**

**Introduction**

We are a group of trade associations that represent individual creators, independent producers, small-and-medium-size enterprises and large businesses that represent a broad and diverse group of American copyright-intensive industries, including movies, music, television, authors, publishers, and news media. Creativity is an engine for economic growth in both the United States and in South Africa, and copyright protection is its fuel, particularly in the digital age. We share strong concerns regarding South Africa's current legal regime for all creators as well as with troubling proposed amendments to that legal regime that would be profoundly detrimental to the creative community in South Africa, and that would render this already difficult market considerably more problematic.

The following written comments are submitted in response to the notice published in the Federal Register with respect to the Generalized System of Preferences (GSP) country practice review of South Africa. As set out below, South Africa is not meeting the GSP eligibility criteria requiring

adequate and effective protection of intellectual property rights, nor is it meeting the GSP eligibility criteria to provide equitable and reasonable access to the South African market for American creative works and sound recordings.

South Africa lacks adequate and effective protection of intellectual property rights, specifically of U.S. copyright works and sound recordings. The potential of South Africa for creators has long gone unrealized as the result of its existing copyright system that fails to provide basic and internationally recognized minimum standards of protection and enforcement for creators. Making matters worse, two pending bills amending South African copyright and contract laws threaten to further undermine protections for creators in that market. These amendments are already having a negative impact in terms of generating both significant legal uncertainty regarding existing creative ventures and a considerable chilling effect on future investments to the detriment of all creators in South Africa. Moreover, American creators face market access barriers in South Africa that compound the challenges copyright-intensive industries face with that country's flawed legal regime.

We therefore share the concerns articulated in the country eligibility petition submitted by interested stakeholders regarding copyright protection and market access in South Africa, and welcome the recommendation of the Trade Policy Staff Committee to undertake this country practice review of South Africa. As part of this GSP review, we strongly support the U.S. government working intensively with South Africa to resolve these concerns. It is critical that the two pending bills are returned for redrafting to resolve the numerous flaws outlined in these comments. Simply amending or suspending certain provisions of the pending bills will be not be sufficient. If South Africa does not resolve these concerns, the United States should suspend or withdraw GSP benefits to South Africa, in whole or in part.

## **Lack of Adequate and Effective Copyright Protection in South Africa**

### ***The Existing South African Copyright Landscape for Creators***

The current South Africa copyright law fails to ensure adequate and effective protection of U.S. copyright works and sound recordings. Consequently, South Africa is not fulfilling this GSP eligibility criteria. This is the case for several reasons. First, certain fundamental rights for creators are either absent or unclear. For example, protections for technological protection measures (TPMs) are absent in South Africa's legal regime. TPMs give creators the ability to control access to their copyright works and sound recordings and to prevent unauthorized access. Without such legal protections, creators are left with no recourse against those that circumvent such protections to gain unauthorized access to protected works, thereby fundamentally jeopardizing legitimate content streaming services and other authorized digital platforms.

Second, the term of copyright protection in South African remains out of step with global norms. For example, in South Africa the copyright term for creative works extends for the life of the author plus 50 years. Likewise, sound recordings receive 50 years of protection from the year in which the recording was first published. This is in stark contrast to life plus 70 for copyright works or 70 years

from publication for sound recordings, which is the emerging global consensus. Finally, South Africa has yet to join key international copyright agreements that reflect global norms of minimum standard protections for creators. For instance, South Africa has neither ratified nor fully implemented the WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT), i.e., the WIPO Internet Treaties. Indicative of the internationally-recognized standards these treaties represent, 103 countries are parties to the WCT and to the WPPT. That South Africa has not acceded to or ratified the WIPO Internet Treaties further illustrates the extent to which the country falls short with respect to core copyright protections.

### ***Pending Copyright and Contract Amendments to South African Law***

In addition to concerning aspects of South Africa's existing legal framework, the Copyright Amendment bill and Performers' Protection Amendment bill are profoundly troubling. If enacted, these two bills would further render the South African copyright system inadequate and ineffective for U.S. copyright works and sound recordings. Moreover, given the systemic and pervasive problems with these pending bills, those problems are not able to be resolved with minor revisions. These problems fall into two baskets, i.e., copyright and contract.

#### Copyright Concerns with the Draft Laws

The pending bills would fundamentally undermine copyright protection in South Africa in several critical ways. This includes numerous, vast and overlapping copyright exceptions, which deprive creators of the economic value of their work by permitting extensive use of copyright-protected creative content without authorization or remuneration. The bills propose to introduce a new and unclear copyright exception to the exclusive rights that would create a conglomeration of aspects of fair use and fair dealing as well as other exceptions. This approach to copyright exceptions is untested. It would create a first-of-its-kind exception of unequalled breadth and uncertainty, and would be the source of copious and expensive lawsuits in South Africa for creative industries. The nature and parameters of copyright protection for creators would be in constant question and shrouded in ambiguity. Those creators unfortunate enough to sustain frequent and costly litigation would find themselves up against wealthy companies with more than enough resources to see any lawsuit through to the end.

While the United States has fair use along with 150 years of U.S. jurisprudence defining the nature and scope of the exception, it does not have fair dealing at the same time. What is being proposed in South Africa is fundamentally different from U.S. law and the U.S. experience. Even the fair use part of the larger copyright exceptions package is broader than U.S. law, with the introduction of additional unspecified factors into the analysis of when fair use exceptions are appropriate. For example, in assessing when fair use is a permissible exception to copyright protection, "*all factors*" must be taken into account, "*including but not limited to*" the four factors explicitly enumerated in the draft proposal. This unlimited-factors analysis is without precedent, including in the United States. Additionally, the proposed fair use provision requires that the exception must "ensur[e] proper performance of public administration" which leaves open considerable scope for interpretation while

further introducing profound legal uncertainty regarding the application of this open-ended “public administration” criteria.

If the bills were enacted, South Africa would have an utterly new and foreign copyright exception in its jurisdiction that is missing any well-established judicial parameters, while overlapping in unpredictable ways with fair dealing. The breadth and ambiguity of these exceptions give rise to serious concerns regarding South Africa’s compliance with the three-step test, which is not only contained its own international treaty obligations, such as the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Berne Convention, as well as other international treaty norms, such as those contained in the WIPO Internet Treaties.

In addition to its troubling provisions on exceptions, the two draft laws include problematic proposals on technological protection measures. These provisions jeopardize the integrity of the legal protections for TPMs, thereby negatively impacting the future of the South African online marketplace for creators. The two draft laws also fundamentally alter the nature of critical copyright protections, including to downgrade important exclusive rights for performers to rights of remuneration. Such changes again give rise to serious concerns regarding compliance with norms contained in the WIPO Internet Treaties; in some cases the proposals would plainly not comply with these treaties.

#### Contract Concerns with the Draft Laws

The pending bills provide for a striking degree of government interference into contracting freedoms to set the terms by which exclusive rights are to be exploited and would erect numerous obstacles that would further limit the ability of all creators to license their creative content in South Africa. The proposals provide for severe intrusion into the commercial arrangements governing the exploitation of audiovisual content, which risk reducing the income of a large number of performers, reducing the number of performers who will be engaged to perform in such content, and reducing the revenues available to U.S. creative industries.

In addition, the draft laws provide the South African government with the ability to set the terms of important contractual provisions, and unfairly regulate private agreements governing creative ventures. Other proposed amendments include highly-problematic restrictions on the transfer of rights by performers, including an automatic reversion of assigned rights after a maximum of 25 years, and Ministerial obligations to regulate the terms of contractual agreements between performer and producers, thereby reducing revenues for performers and producers alike.

#### **Lack of Equitable and Reasonable Market Access in South Africa**

South Africa’s existing system also imposes key barriers for American creators to access the market. For instance, South Africa imposes a value-added tax on all online transactions, whether conducted in South Africa, or from or through the country. This tax, which is currently set at a rate of 15 percent, includes the online sales of films, TV series, e-books and video games. South Africa has also proposed a local-content quota on TV and radio broadcasts. Although this have not yet been adopted,

they introduced considerable commercial and legal uncertainty into the market, and if implemented could further hinder access into the South African market by U.S. creative content.

## **Conclusion**

These written comments reflect our commitment to promoting good conditions for all creators and rights holders in South Africa, including those from that country and from the United States. As enumerated above, there is a wealth of evidence demonstrating that South Africa is not providing adequate and effective protection of intellectual property rights and that it is not ensuring equitable and reasonable access for creators and rights holders to the South African market. As a result, South Africa is not fulfilling these critical GSP eligibility criteria currently under review.

We therefore ask the U.S. government intensify its engagement with the South African government to ensure that the needed improvements are made to South African law and practice, and to prevent any changes to that law and practice that would result in further deterioration of copyright protection and market access in South Africa. It is critical that the two pending bills are redrafted to resolve the numerous flaws outlined in these comments. Simply amending or suspending certain provisions will be not be sufficient. If South Africa does not adequately address these concerns, we request that the U.S. government suspend or withdraw GSP benefits, in whole or in part.