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Promoting human rights and democracy through the media since 1993

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

**COPYRIGHT AMENDMENT BILL [B13B-2017]:
SUBMISSION BY MEDIA MONITORING AFRICA TO THE NATIONAL COUNCIL OF PROVINCES**

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INTRODUCTION

1. Media Monitoring Africa (MMA) provides this submission to the members of the Generalized System of Preferences (GSP) Sub-Committee, in response to the submission made by the International Intellectual Property Alliance (IIPA) regarding the Copyright Amendment Bill B13B-2017 (CAB) in South Africa.
2. MMA has previously engaged in the public participation process relating to the CAB before both houses of Parliament in South Africa – namely, the National Assembly and the National Council of Provinces – and has largely been in support of the CAB.
3. MMA is deeply concerned by the approach taken by the IIPA in respect of the CAB, and therefore welcomes this opportunity to make submissions to the members of the GSP Sub-Committee to provide relevant context and further information regarding the CAB. Importantly, MMA notes at the outset that the Copyright Act 98 of 1978 is in urgent need of updating and revision, and the CAB makes important strides in this regard.
4. This submission is structured as follows:
 - 4.1. **First**, we provide an overview of MMA.
 - 4.2. **Second**, we deal with the parliamentary processes that have been followed in South Africa.
 - 4.3. **Third**, we set out our reasons for supporting the fair use provisions of the CAB as they currently read.
 - 4.4. **Fourth**, we discuss the role of the Cybercrimes Bill in addressing some of IIPA's concerns.
 - 4.5. **Fifth**, we highlight our concerns that IIPA's approach is currently premature.
5. This is dealt with in turn below.

OVERVIEW OF MMA

6. Media Monitoring Africa (MMA) is a not-for-profit entity that has been monitoring the media since 1993. We aim to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are, media ethics, media quality and media freedom.

7. In the last 27 years, we have conducted over 200 different media monitoring projects – all of which relate to key human rights issues, and at the same time to issues of media quality. MMA continues to challenge media on a range of issues, always with the overt objective of promoting human rights and democracy through the media. In this time, MMA has consistently sought to deepen democracy and hold media accountable through engagement in policy and law-making processes.
8. MMA has made submissions relating to copyright, public broadcasting, online content regulation, cybercrimes, data protection and various other matters relevant to the exercise of freedom of expression and other information rights, both on- and offline. In this regard, MMA has presented on a number of occasions to the National Assembly and the National Council of Provinces. In addition, MMA has made submissions to broadcasters, the Press Council, the South African Human Rights Commission and the Independent Communications Authority of South Africa. MMA also actively seeks to encourage ordinary citizens to engage in the process of holding media accountable through the various means available.
9. For more about MMA and our work, please visit: www.mediamonitoringafrica.org.

PARLIAMENTARY PROCESSES FOLLOWED IN SOUTH AFRICA

10. The CAB has had a long and extensive series of public engagements, following its first introduction in the National Assembly in 2017. We submit that, in significant part, these parliamentary processes have been lawful, constitutionally-mandated and participatory. In this regard, the IIPA has had every opportunity to participate in the parliamentary processes and present their submissions.
11. In our view, it appears that the IIPA now seeks to circumvent the parliamentary processes by approaching the members of the GSP Sub-Committee, to apply pressure to the Government of South Africa not to sign the CAB into law. However, the IIPA has itself noted that the Copyright Act is in urgent need of update and reform, which is precisely what the CAB seeks to do.
12. While Parliament may not have ultimately taken on board all of the IIPA's submissions on the CAB, this is in line with Parliament's prerogative. The Constitutional Court of South Africa has made clear that the views expressed by the public through the process of public participation does not bind the legislature if they are in conflict with the views

of the government.¹ Indeed, what the constitutionally-required public participation process does require is that “a genuine and objectively satisfactory effort must be made” to obtain the views of industry or sector role-players and the public, and to enable a policy-maker to appreciate what those being consulted think or make of the major and incidental aspects of the issue or policy under consideration.² We submit that this threshold has been met in respect of the CAB.

13. As the Constitutional Court has stated, “[i]nterested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions”.³ The requirement of public participation comprises both procedural and substantive elements, and as further stated by the Constitutional Court, “[t]he facilitation or genuineness of any public participation process is of course subject to judicial scrutiny”.⁴
14. If the IIPA had been dissatisfied with the parliamentary processes that were followed, it was at all relevant times available to the IIPA to challenge such processes through the available domestic remedies in South Africa. In our view, it is now highly inappropriate for the IIPA to evade the domestic processes, and instead seek to apply pressure to the Government of South Africa through a foreign government entity.

THE FAIR USE PROVISIONS IN THE CAB

15. The primary cause of complaint from the IIPA is that the current copyright framework in South Africa does not provide adequate and effective protection of copyrighted materials, and that the CAB will serve to weaken the existing regime. To the contrary, MMA submits that the CAB will strengthen the current framework, as it will revise the copyright framework in line with the digital era. Furthermore, MMA submits that the CAB has the potential to promote the right to freedom of expression, as the Government of South Africa is required to do in terms of section 16 of the Constitution of the Republic of South Africa, 1996, as well as in terms of its international obligations.

¹ *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC) at para 50.

² *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) at para 38.

³ *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) at para 171.

⁴ *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) at para 66.

16. As noted by the IIPA, the CAB contains an amalgamation of the fair use and fair dealing provisions from other jurisdictions. In drafting this provision, Parliament has drawn significantly on the work and experiences from the United States of America (US). The final provision, while novel, is expressly intended to safeguard the right to freedom of expression and, in particular, media freedom.
17. MMA has therefore welcomed the new, fair and practical limitations and exceptions contained in the CAB, which we submit are in line with international good practice. Notably, it is important to protect the right of the media to report unhindered on newsworthy events. In particular, MMA has welcomed the acknowledgement that fair use is the lifeblood of the news media.
18. In contrast to the views expressed by the IIPA, we submit that the implementation of the fair use principle in news and current affairs reporting supports and promotes the creative industries. In making this submission, we have also had regard to the Principles in Fair Use for Journalism prepared by the US Center for Media and Social Impact. In our interpretation of the CAB, we submit that these principles are mostly captured in the intent and text:
 - 18.1. Use of copyrighted material as proof or substantiation in news reporting or analysis.
 - 18.2. Use of copyrighted material in cultural reporting and criticism, for instance on entertainment reporting.
 - 18.3. Use of copyrighted material as illustration in news reporting or analysis.
 - 18.4. When copyrighted material is used as historical reference in news reporting or analysis.
 - 18.5. Using copyrighted material for the specific purpose of starting or expanding a public discussion of news.
 - 18.6. Quoting from copyrighted material to add value and knowledge to evolving news.
 - 18.7. Incorporation of copyrighted material captured incidentally and fortuitously in the process of recording and disseminating news.

19. Further in this regard, we note that the intellectual property protection measures at major events of public interest often threaten legitimate news-gathering and news-distribution practices. International sport bodies, entertainment promoters and event sponsors often put restrictions on the coverage of newsworthy events under the guise of copyright protection. This is enforced, for example, with accreditation conditions, which make it difficult for non-rights holders to provide fair and balanced coverage. Mechanisms are therefore required to protect fair use rights.
20. While the CAB is not a perfect law, we submit that it is an important development to update the current copyright framework in South Africa, and to ensure that this framework is aligned with South Africa's domestic and international law obligations on freedom of expression. As such, we submit that the concerns raised by the IIPA regarding the exceptions and limitations in the CAB are misplaced, and that they will not necessarily lead to the dire outcomes that the IIPA envisages.

THE ROLE OF THE CYBERCRIMES BILL IN ADDRESSING PIRACY

21. A further concern raised by the IIPA is that the CAB does not address the issue of piracy. However, the IIPA does not raise the fact that there is a further piece of legislation – the Cybercrimes Bill⁵ – which is currently pending before Parliament, and will provide remedies to affected copyright holders in this regard.
22. For instance, relevant provisions in the Cybercrimes Bill include the following:
 - 22.1. Section 2(1) of the Cybercrimes Bill, which provides that any person who unlawfully and intentionally accesses data, a computer program, a computer data storage medium or a computer system is guilty of an offence.
 - 22.2. Section 4(1) of the Cybercrimes Bill, which provides that any person who unlawfully and intentionally uses or possesses any software or hardware tool for purposes of contravening the Cybercrimes Bill is guilty of an offence.
 - 22.3. Section 5(1) of the Cybercrimes Bill, which provides that any person who unlawfully or intentionally interferes with data or a computer program is guilty of an offence.
 - 22.4. Section 6(1) of the Cybercrimes Bill, which provides that any person who unlawfully and intentionally interferes with a computer data storage medium or a computer system is guilty of an offence.

⁵ Accessible at <https://pmg.org.za/bill/684/>.

- 22.5. Section 7(1) of the Cybercrimes Bill, which provides that any person who unlawfully and intentionally acquires, possesses, provides to another person or uses a password, access code or similar data or device for purposes of contravening the Cybercrimes Bill is guilty of an offence.
 - 22.6. Section 12 of the Cybercrimes Bill, which provides that the common law offence of theft must be interpreted so as not to exclude the theft of incorporeal property.
23. The Cybercrimes Bill has already been considered by both the National Assembly and the National Council of Provinces, and is expected to be transmitted to the President of South Africa for assent. Once in force, we submit that the Cybercrimes Bill will have a significant role to play in addressing the IIPA's concerns regarding piracy.

THE PREMATURE NATURE OF THE IIPA'S CONCERNS

- 24. MMA submits that the concerns raised by the IIPA, at this stage, are premature. The CAB has yet to be signed into law, and as such, there is no evidentiary basis to assume the negative outcomes that the IIPA predict. For instance, the IIPA states in its submission that "rights holders will inevitably pull out of the marketplace", without substantiating this statement.
- 25. MMA emphasises that, once the CAB is effected in law and is implemented, the IIPA will be free to challenge specific concerns that they may have, rather than hypothesising in the abstract about what the impact of the CAB may be. Further, shortcomings in the CAB may subsequently be remedied through regulations or further amendments, following the correct parliamentary processes, in order to address these concerns as may be appropriate in the circumstances.
- 26. Accordingly, we would urge the members of the GSP Sub-Committee not to take any action at this premature stage, and rather wait for this much-needed amendment to be implemented before determining whether South Africa is indeed in violation of any of its international obligations.

CONCLUDING REMARKS

27. MMA thanks the members of the GSP Sub-Committee for the opportunity to make this submission, and remains available to provide any further information, including participating in the oral hearings via video-link. Please do not hesitate to contact us if we can be of any assistance.

**MEDIA MONITORING AFRICA
Johannesburg, 17 January 2020**