

South African Country Practice Review under the United States Generalized System of Preferences (GSP)

South African Government Post Hearing Written Submission Pretoria, 28 February 2020

Introduction

1. The South African Government prepared a written submission for the GSP Country Review of South Africa on 17 January 2020. That Submission comprehensively responded to questions and concerns about South Africa's pending Copyright Amendment Bill (CAB) and the Performers' Protection Amendment Bill (PPAB). The written submission is part of the record.
2. On 31 January 2020 senior South African Government officials attended the GSP Hearing in Washington DC, delivering an oral submission and answering questions posed by Members of the GSP Sub-Committee. In advocating that South Africa should continue to retain eligibility for the GSP, the oral submission noted that:
 - The strong mutually beneficial trade and investment relationship between South Africa and the US should be built upon, not undermined;
 - The petition by the International Intellectual Property association (IIPA) that triggered the GSP Review of South Africa is misdirected and mistimed as it expresses concerns about Bills that are not law and because the process to update South Africa's copyright legislation has not been completed;
 - Notwithstanding this, the Parliamentary process to develop the Bills in any event duly considered diverse inputs in a rational manner, fully cognizant of South Africa's international obligations, and it drew on best practice around the world, including from US legislation; and
 - The South Africa Government will continue to work with interested parties in the process of completing the unfinished business of copyright law through Parliament should the President return the bills to Parliament for reworking and, also at the appropriate time, through the required process of developing secondary legislation/regulations to operationalize new copyright legislation.
3. We reiterate that the Parliamentary process to develop the Bills was thorough, and met the South African constitutional requirement for public involvement in law making. The relevant committees received more than 250 written submissions, and all were duly considered, including in the numerous public hearings held over three and a half years. As expected, South African constituencies expressed diverse views on the Bills. The IIPA also made a submission raising concerns about the proposed legislation and some of its views resonated with some domestic constituencies. However, a number of other stakeholders, including US corporations, supported the proposed legislation. Our Parliament took into account these various views in

developing draft legislation that is appropriate to the South African context, drawing on international practice, and fully respecting our international treaty obligations.

4. It is also worth recalling that in terms of the South African Constitution, a Bill only becomes law if the President is satisfied that it is constitutionally sound. If the President has reservations, the Bill will be returned to Parliament for reworking. If constitutional questions persist, the Bill can be referred to the Constitutional Court for a final ruling.
5. When the President deems that the Bills have met constitutional muster, their entry into force is not immediate either. For entry into force, the responsible government department must develop supporting regulations through an open participatory process, and the government department must put in place the requisite capacity to implement the new legislation. More broadly, our democracy ensures that constitutional principles, due process, and checks and balances govern law-making in South Africa and all this is underpinned by a strong, independent judiciary,
6. In this post-hearing written submission, **in Annex 1**, we provide answers to additional questions received from the USTR. With a view to advancing the process, we use this opportunity to make general observations on the Hearing in the next section. **Annex 2** outlines the consultative process undertaken by the South African government and Parliament. In **Annex 3** we set out excerpts from other testimonies delivered at the Hearing that respond directly to the concerns raised in respect to the CAB and PPAB. In **Annex 4** we offer a Table that sets out many of the specific concerns that have been raised alongside specific responses as a tool to understand the main issues at stake.
7. This submission ends by proposing next steps with a view to concluding the Review.

General Observations on the GSP Hearing

8. In the petition that triggered the GSP Country Review of South Africa in April 2019, the IIPA focuses predominately on its concerns with the CAB and the PPAB. The fact that the IIPA has not previously raised concerns about South Africa's 1978 Copyright Law suggests that the affirmative protection provisions for copyright in South African law has not been a matter of concern, notwithstanding concerns about enforcement capacity to address piracy. In this respect, the question of enforcement capacity is distinct from the question of legal remedies.
9. In addition to the South African Government testimony at the Hearing, there were 13 other testimonies and four question and answer periods. Ten testimonies expressed support for the CAB and PPAB. These were delivered by US business reps, US academics as well as copyright experts from Ireland, Portugal and Germany. This followed the pattern of written submissions: Of

the 40 written submissions that were circulated, around 31 were broadly supportive of the new Bills, while nine indicated opposition.

10. Two testimonies robustly opposed the Bills (IIPA and RIAA). The ICLE testimony raised concerns about the Bills but appeared to suggest this was not primarily a GSP matter and was not in favour of removing South Africa from the GSP. The concerns revolved around claims that the CAB and PPAB:
 - Violate South Africa's international obligations, in particular due to overbroad exceptions to exclusive rights;
 - Unduly limit the freedom to contract;
 - Expand the role of Ministerial intervention and regulations;
 - Contain inadequate remedies; and
 - Contain inadequate protection for TPMs.
11. **Annex 3** highlights excerpts drawn from the Hearing testimonies and written submissions that appear relevant in responding to these claims. **Annex 4** provides further responses to the claims set out in the IIPA petition.

Next Steps

12. In considering next steps, we reiterate that the South Africa Government will continue to work with interested parties in the process of completing the unfinished business of copyright law through Parliament if the President returns bills to Parliament for reworking.
13. The South African Government is also committed to working with all interested parties at the appropriate time in the process to develop secondary legislation/ regulations (already foreseen in the Bills) that would operationalize new copyright legislation. Secondary legislation would aim to clarify issues of ambiguity in the general legislation and would address many of the technical and procedural issues that have been raised.
14. We are prepared for further engagements with the USTR and we expect that constructive dialogue and engagement will lead to an early recommendation to terminate the current GSP Country Review for South Africa.

Annex 1

South African Government Responses to the USTR's Additional Questions

USTR Question 1:

The Government of South Africa mentioned in its testimony that it engaged in an “independent assessment” and that it drew on “independent studies” to review the relevant treaties to determine whether a fair use provision is warranted in South Africa. Please answer:

1. Can the Government of South Africa share the alleged independent assessment and the alleged independent studies? If the Government of South African cannot share them, explain the basis for not sharing them and provide a summary of them.
2. Please explain the nature of the assessment and the studies (*i.e.*, legal, economic, etc.).
3. Who performed the assessment and these studies?
4. Are the assessment and studies public? If they are not public, can the Government of South Africa share redacted versions of the assessment and studies?

South African Government Answer

Yes. The studies will be made available and shared with the USTR and they are in the public domain.

Name of Study	Nature of the assessment and study	Year	Who performed the assessment and studies	Description of the studies
1.The Economic Contribution of Copyright-Based Industries in South Africa.	Economic	2011	Commissioned by the World Intellectual Property Organization (WIPO). Authors: Prof. Anastassios Pouris and Mrs Roula Inglesi-Lotz	The research study focused on whether there are any benefits coming from copyright-based industries in South Africa. It recognised the relevance of fair use in the South African context.
2. Assessment of the Regulatory Proposals on the Intellectual Property Policy Framework	Social, economic and regulatory	2014	Genesis Analytics	The report aimed to assess the social and economic impact of the regulatory proposals in the dti's draft IP policy and to identify whether each of the proposals is sufficient, efficient and suitably designed to meet its objectives.

for South Africa				-It also focused on the amendment of local legislation to implement the contents of international treaties on a) copyright (Berne Convention, Marrakesh Treaty, WIPO Copyright Treaty, WIPO Performers and Phonograms Treaty, Beijing Treaty on Audio-visual Performances).
3. Copyright TRIPS Exceptions in South Africa	Social and regulatory	2009	Prof Anastassios Pouris	The study focused on exceptions and limitations and the status of South Africa.
4. Copyright Review Commission	Social and economics regulatory	2011	Farlam Commission chaired by retired judge Ian Farlam Members of the Commission: Mr Oupa Lebogo, Mr Nala Mhlongo, Prof. Tana Pistorius, Dr Jean Swanson-Jacobs, and Prof. Musa Xulu.	The Copyright Review Commission (CRC) conducted a detailed examination of the workings of collecting societies that were established in South Africa to license musical and literary works, sound recordings and published editions to prospective users, and to collect on behalf of the rights owners the royalties payable by the users. It analysed their functioning and the degree to which they complied with the accepted principles of corporate governance
5. Intellectual Property Rights and Economic Development in South Africa	Economic	2009	Authored by: Prof Anastassios Pouris Director Institute for Technological Innovation University of Pretoria South Africa	The objective of this document is to assess whether the intellectual property rights regime assists in the objectives of a developmental state such as South Africa and to develop relevant recommendations.
6. An Introduction to Copyright for Small and	Social Regulatory	2013	WIPO	This is the fourth in a series of guides developed under the World Intellectual

Medium-sized Enterprises (Creative Expressions)				Property Organisation (WIPO) Development Agenda project to assist small and medium sized enterprises (SMEs) to navigate and optimally utilise the South African intellectual property right system.
7. Who Benefits from the South African IPR System	Economic Regulatory	2009	Prof Anastassios Pouris Director Institute for Technological Innovation University of Pretoria South Africa	The success of any intellectual property rights regime is dependent on balancing the exclusive rights awarded to inventors and creators with the rights of consumers and other inventors and researchers who benefit from the disclosure and use of the information contained in the exclusive rights. The study discusses the above balance in South Africa. Emphasis is placed on the patent and copyright systems which constitute the cornerstone of any intellectual property regime.

USTR Question 2:

During the hearing, the United States noted that the South African reversion provision was automatic, whereas the U.S. termination provision is at the election of the right holder. In your post-hearing submission, please answer the following:

1. What happens when parties to these agreements cannot be found at the time of reversion?
2. Do the parties to the contract have any recourse if one or more parties cannot be found?

South African Government Answer

1. Reversion is automatic in South Africa in the CAB, so will happen on the date 25 years later. The CRC Report recommended that 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.” Assignment must always be in writing.

2. Section 22 of the CAB on the 25 year reversion on musical or literary works does not provide a procedure. The procedure on the reversion right will be outlined in the Regulations. The Regulations will stipulate that the locating of the contracting parties be considered at the point of contracting. In addition, there will be others included as contact points for later on such as heirs or other beneficiaries including a collecting society and legal representatives as point of contact from the onset. In addition, a procedure to locate the creator or their heir will be outlined in the Regulations. A procedure will be provided for all parties to locate one another as well as a procedure on efforts required to search the parties to the contract. This is an implementation matter that will be addressed in the Regulations and during public consultations. A similar process envisaged for orphan works searches will be considered for reversionary provision in the Bill. Consultation with various stakeholders, especially industry will ensure the well-drafted, benchmarked, cost effective, robust, sound and clear Regulations are drafted for this provision.
3. The law will ensure certainty by providing a prior formal Notice¹ should be given to the rights holders before the reversion date. For example, 3 years or more before the reversion date, authors or creators will be required to submit the completed template to the rights holders and any relevant collecting society, providing their current postal and physical addresses and contact details. At the same time, they will indicate their intention to accept the reversion rights or alternatively, to enter into a new contract assigning their rights to the rights holders. In this way, the majority of works will not become orphan works, and anyone wanting permission from them, would be able to trace them through the rights holders, heirs or collecting societies who will have their details. It would be in the interests of the authors/creators to notify the said entities, otherwise they may lose out on royalties, etc.
4. In the US, if the original author is no longer living but transferred or licensed away their rights during their lifetime, the law recognizes the right of certain family members to terminate agreements entered into by the author. Those family members who may be eligible to exercise such a “termination right” are: the widow, widower, surviving children, grandchildren, executor in case all the listed people are not alive, administrator, personal representative or trustee shall own the author’s entire termination interest. In the reading of the sections, there is no process to locate the right holder; further contracting is

¹ We are considering that this be done on a set template drafted by the Department of Trade, Industry and Competition that can be found on the Department’s website

provided for as well. The CAB Regulations can also cater for contract renegotiation and re-assignment. The US law outlines a procedure including Notices, timelines and process of termination. South Africa can follow a similar approach as in the US. The US law does not specify remedies when the author is not found but ensures there are sufficient people to whom the rights can be transferred.

5. In Canada, a time-based approach is used, automatically reverting rights 25 years after authors' deaths. It might be of interest to the kids or grandchildren of the author. Since it is automatic, estates do not have to comply with any legalities or pay any fees – the ownership simply transfers to the author's heirs, and they can make new arrangements to exploit the work.
6. South African law differs with other jurisdictions in that subordinate legislation in the form of Regulations form part of the law. Not all practical implementation steps are provided in the principal Act.

USTR Question 3:

In testimony, the Government of South Africa noted that if there are issues with the pending legislation, then it may be possible to address those issues through regulations.

1. Is there an estimate of when the legislation will come into effect?
2. Would you please explain how regulations would address these potential issues?
3. Would you please explain how regulations operate in South African law? For example, are they legally binding?
4. If there is a conflict between a South African law and a regulation, how do South African courts interpret the conflict (*i.e.*, does the law take precedence over the regulation)?

South African Government Answer

1. This is subject to the completion of the constitutional review by the President and timeframes are not known.
2. The Interpretation Act 33 of 1957 defines law to mean any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law. Section 10 of the Act provides that when a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires. The "*power*" here could refer to the power to make regulations or rules – *delegated legislation*. It further says that where a law confers a power to make rules, regulations or bylaws, the power shall, unless the contrary intention appears, be construed as including a power exercisable in like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or bylaws.

3. Section 39 of the Copyright Act of 1978 provides that the Minister may make regulations on any matter required or permitted by the Act to be prescribed by regulation; and generally, on any matter which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved. The Minister is empowered by the Act to develop regulations necessary for the purpose of the Act. If the CAB is passed into law, the regulations will be developed on fair use, 25 year reversion procedure, strengthening of the technological protection measures, rules of the Tribunal and other provisions of the CAB that requires regulations. They will be developed with industry, technical and legal experts and consulted upon in the public to ensure that all implementation consideration are taken into account.
4. Section 239 of the Constitution on the definitions provides that unless the context indicates otherwise “national legislation” includes subordinate legislation made in terms of an Act. Regulations in South African law are ‘subordinate legislation’ and form part of the law and are legally binding. An Act is legislation passed by the Parliament. Section 44 of the Constitution provides that legislative authority vests in Parliament.
5. Regulations are subsidiary legislation and require publishing in the Government Gazette and promulgated to become legal. The Copyright Act is being amended in section 39 to provide that before making any regulations, the Minister must publish the proposed regulations for public comment for a period of not less than 30 days.
6. An Act may require certain actions to be taken by the Department before it can be implemented, for instance subordinate legislation (regulations, determinations, rules etc.) may have to be prepared and promulgated to further regulate aspects in terms of an Act. In such instances, an Act contains a provision that provides that the Act comes into operation on a date determined by the President by proclamation in the Gazette. Once the necessary actions have been finalised, the President is approached and requested to put the Act into operation on a specified date. Where there is a need for subordinate legislation, the commencement of the legislation is put on hold until the required subordinate legislation is in place and all the required personnel, financial and infrastructural requirements have been taken care of.
7. One expert has said the following: “In many cases, possibly in all the Bills, there is a need for detailed processes and procedures to be spelt out in subordinate legislation, rather than cluttering the Bill with such fine detail. The subordinate legislation is also referred to as “secondary legislation” or “delegated legislation”. This category of legislation is usually in the form of rules or regulations. Parliament can and does delegate some of its law-making responsibilities to another functionary or body, usually the Cabinet member responsible for the administration of the legislation in question. This delegation must, however, be spelt out very clearly in the Bill, providing very specifically what can be dealt with by the Minister in rules

or regulations. Failure by the Minister to stick within the limits or boundaries set out in the Bill could lead to the rules or regulations being declared invalid by a court of law” (Adv Lawrence Bassett said, in Justice Today 2012, Issue 1, p08 <https://www.justice.gov.za/docs/articles/2012-drafting-legislation.html>.)

8. The distinction drawn between ‘law’ and ‘regulations’ is not strictly speaking, accurate. This is because regulations, once promulgated, forms part of South African law. One may however, under the umbrella term “legislation” distinguish between primary legislation, such as an Act of Parliament, and subsidiary legislation, such as regulations.
9. When there are conflicts in the South African law between the wording in the legislation passed by Parliament and regulations issued by the Minister, the courts will hold that the former takes precedence.

Additional Information

South Africa intends to accede to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. We will also accede to the Beijing Treaty on Audiovisual Performances. South Africa is preparing to deposit the legal instruments to the WIPO Director General.

For information, there were four public hearings on the CAB in August 2017 at which time 35 stakeholders participated.

Annex 2

CONSULTATIVE PROCESS OF THE CAB

1. The CAB and the PPAB were developed through an intensive and extensive consultative parliamentary process where a diverse set of stakeholders and constituencies were active participants that spanned from 2009 to 2019.
2. In 2009, the Creative Industry Meeting took place with the President at Sandton Convention Centre. Some of the longstanding challenges faced by the industry included broadcasting content, intellectual property rights, industry unity, piracy in the industry, royalties and that artists not properly recognised as workers.
3. The Bill was first published in 2015 by the Department of Trade and Industry.
4. A Conference was held with the copyright-based industries in August 2015. More than 300 people attended.
5. Presentations were made at NEDLAC on the CAB/PPAB on 09 September 2016.
6. The Bill was introduced to Parliament and referred to the Committee on 16 May 2017. A briefing on the Bill took place on 30 May 2017.
7. The Committee called for written submissions on 26 May 2017. The closing date for submissions was 19 June 2017 and the Committee received **73 submissions**.
8. The Committee held 4 public hearings on the Bill on 1, 3, 4 and 15 August 2017. 35 stakeholders made oral presentations to the Portfolio Committee on Trade and Industry.
9. Given the specialised, technical nature of copyright, the Committee appointed two technical consultants, namely Prof Tobias Schonwetter and Prof Caroline Ncube, in 2017 to assist it during its consideration of the Bill. The consultants played a pivotal role with the redraft; however, due to delays in deliberating on the Bill, they were unable to effectively assist the Committee in 2018.
10. From 10 October 2017, there were multiple meetings of the Portfolio Committee during which the Bill was discussed technically and substantively.
11. A Sub Committee was established that comprised of some members of the Portfolio Committee to deliberate on the Bill to advise the main Committee.
12. After its initial deliberations, the Committee made a second call for specific clauses of the Bill on 29 June 2018. These proposed clauses were informed by the Committee's deliberations on public submissions and were substantively "new" matters that warranted further consultation. The closing date was 9 July 2018, which was later extended to 20 July 2018. The Committee received **60 submissions** for this second call.
13. The Committee based on its further deliberations introduced an offence for acting as a collecting society without being accredited. As this was a substantively "new" sub-clause, it made a third call for written submissions on 3 September 2018 with a closing date of 21 September 2018.
14. The Committee resolved to appoint a panel of technical experts to advise it on any technical or drafting issues pertaining to the Committee's amendments to the Copyright Amendment Bill. The panel was tasked to focus on the appropriateness of the terminology used in the Bill; whether the wording of the Bill will achieve the policy objectives as agreed to by the Committee;

- whether the amendments agreed to can pass Constitutional muster; and whether the concepts outlined in the Bill will comply with international copyright law.
15. The third draft of the Amendment Bill was sent to the technical panel of experts on 10 September 2018. The panel was initially given a deadline of 26 September 2018, which was later extended to 1 October 2018. The Committee received **2 submissions**. Only four members of the panel made inputs by the deadline or after, which were considered and reported on by the drafting team.
 16. On Tuesday, 11 September 2018, the National Assembly granted permission to the Portfolio Committee on Trade and Industry to inquire into amending the other provisions of the Act, in terms of Rule 286(4)(c).
 17. The Committee having considered the technical panel's inputs and the two submissions from the third call for submissions, made further amendments to the Bill, which required a further call for submissions. This was advertised on Parliament's social media, through a media statement and communication to identified stakeholders on 12 October 2018. The closing date was 26 October 2018. The specific clauses advertised included the definition of collecting society (Clause 1), empowering collecting societies further (Clause 25 – Section 22C). The Committee received **16 submissions**. On 14 November 2018, the Portfolio Committee adopted the Bill subject to various amendments (B13B-2017).
 18. The Department and Parliament legal advisor also briefed the Committee on an opinion received from Prof T Schonwetter in relation to the questions: Do the proposed exceptions and limitations comply with the Berne three-step test? If not, is it necessary to comply? Would any of the proposed exceptions and limitations constitute deprivation of property? If so, would section 36 of the Constitution be covered?
 19. The Department of Trade and Industry submitted a legal opinion on 13 November 2018. The opinion focused on the legal validity or constitutionality of certain provisions of the Amendment Bill. These clauses included clauses on retrospectivity of royalties, fair use and the 25 year limit on assignment.
 20. In the National Council Of Provinces, the Bill was referred to the Select Committee for Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour. The Select Committee was briefed on 13 February 2019. On 14 February 2019, it called for submissions. It considered those submissions on 6 March 2019. More than **100 written submissions** were received in the Committee.
 21. All stakeholders were given an opportunity to engage and submit comments during the course of the three and a half years and were present at public hearings in Parliament from August 2017 to March 2019. The Bills were informed by research at various intervals and the provisions were informed and not arbitrary. The version of the Bill introduced in Parliament in 2017 was improved significantly by the time the Bills were passed by Parliament.
 22. IIPA made a written submission to the Portfolio Committee on Trade and Industry dated 17 July 2018 wherein a number of issues were raised, covering fair use, broad exceptions and limitations, making available rights extending beyond the scope of reaching industry, rights to contract on the open market and interference in the open market, inadequate criminal and court remedies from infringement including online piracy, inconsistency with international

obligations permitted in TRIPS and WIPO Copyright Treaties and lack of legal precedent on fair use. Parliament considered the comments and made a policy choice to address the plight of creators in South Africa and to address the policy gaps and continued imbalances in the copyright regime.

23. It is noted that the US Government raised a number of technical issues on the Bills and the technical issues were discussed and clarified in interactions with US Government representatives. The Department met twice with the delegation from the US Embassy in Pretoria. Some of the technical issues raised included minimum contract terms of royalties - they had a question on the cooling off period; a provision subsequently removed in the Bill, retrospective application of royalties in terms of how they can undermine bargaining - the policy position was clarified; reciprocity of collecting societies; increased penalties for infringement (in terms of threshold of penalties). On 21 May 2019, the Department of Trade and Industry met with the USTR and other US Government representatives via a teleconference. Clarity was provided on the fair use and limits of 25 years reversion rights. Research studies that informed the amendments were submitted to the USTR following the meeting.
24. The US industry and academic stakeholders participated in the Parliamentary processes of the CAB and made written representations in both Houses of Parliament. Examples include the US Chamber of Commerce, Google SA, academics that include Professor Sean Flynn of the American University, IIPA itself made a written representation. In 2011, the US was benchmarked in the Copyright Review Commission.

Annex 3

Some Excerpts from Testimonies that Respond to Claims and Concerns Raised

The policy, technical and legal concerns that have been raised in the IIPA petition and by others in written and oral testimonies tend to coalesce around five main issue areas. It is claimed that the CAB and PPAB would:

- Violate South Africa's international obligations, notably due to overbroad exceptions to exclusive rights;
- Unduly limit the freedom to contract;
- Expand the role of Ministerial intervention and regulations;
- Contain inadequate remedies; and
- Contain inadequate protection for TPMs.

In this Annex, we highlight excerpts from testimonies that provide direct comment and responses to these claims.

On International Obligations...

Julia Reda, Member of the European Parliament 2014-2019, Fellow, Berkman Klein Center for Internet & Society at Harvard University

"South African Copyright Amendment Bill closely resembles established norms in the U.S. or EU copyright systems..."

"The provisions of the Copyright Amendment Bill comply with South Africa's international obligations under the Berne Convention and the TRIPS agreement in general, and the three-step-test in particular."

Professor Sean Michael Flynn, Director, Program on Information Justice and Intellectual Property, American University

"IIPA makes vague but unsubstantiated claims that these provisions would violate TRIPS Article 13 and Berne Article 9. We find no basis for these claims. Many other nations have copyright laws with similar exceptions as proposed for South Africa, including the United States."

Teresa Nobre, Vice President, Communia International Association

"So, we believe that there are no grounds on which the USTR could conclude that these exceptions, if enacted into law, would be incompatible with international standards. But unfortunately, the petition does not specify which international standards are at stake. But from our analysis, we can conclude that in general, the exceptions in the bill are similar or compatible with those contained in various legal

instruments, namely the Berne Convention, the EU Copyright Directives, and many national laws including from European member states.”

Teresa Hackett, Copyright and Libraries Programme Manager, Electronic Information for Libraries (EIFL)

“... in the petition from the IIPA it says that the bill will move South Africa further away from international norms. But in fact, reviewing the provisions in the bill, it embraces new developments and global best practices, especially relating to the digital environment.”

On Fair Use...

Ali Sternburg, Senior Policy Counsel, Computer & Communications Industry Association

“Under IIPA’s reasoning, no country would ever be able to adopt fair use because it would never have the body of precedent necessary to apply it. Further, South Africa has a ready source of fair use guidance: court decisions on fair use from countries that have already adopted a U.S.-style fair use provision....”

“ ... the hybrid structure of specific exceptions and a general fair use provision.... is precisely the structure found in the U.S. Copyright Act: a preamble with specific exceptions followed by the fair use factors.”

“A fair use provision in South Africa, modeled closely on U.S. law, will protect American innovators and creators that are seeking to export to the South African market, while ensuring that South African copyright law does not diverge from the American legal framework.”

“... many new types of technology require copying and so are really reliant on the fair use right... U.S. companies, including CCIA members more likely to be exporting to the South African market if this is adopted and fair use becomes law in South Africa.”

Mr. Peter Jaszi, Emeritus Professor of Law, American University

“... the same conditions apply in South Africa. A well established, well trained judiciary with a common law background, a high functioning supreme court....”

“Now turning to the CAB, I begin by noting that the language in which it expresses the concept of fair use was designed with some precision to capture the interpretive framework that U.S. law has evolved over decades. Likewise, the four factors recited in new Section 12b are functionally equivalent if not semantically identical, in all respects to those found in Section 107 of the Copyright Act here as it has been interpreted. Only the addition of Section 12c, which imposes a duty of attribution on fair users is a novelty in comparative law terms, and it's actually a novelty that constrains rather than expands the exercise of fair use in South Africa.”

Teresa Hackett, Copyright and Libraries Programme Manager, Electronic Information for Libraries (EIFL)

"... this bill would really assist libraries in unlocking the collections that they have in their libraries and serving users, and students, and academics to increase access to knowledge."

"... Section 39b of the bill safeguards exceptions from override by terms in licenses from digital materials. So in other words, it protects the exception regardless of the format of the material. And, IIPA in their submission characterize this and call it a severe intrusion into contractual freedom. But contract override, the concept of contract override, is already well established in other jurisdictions."

"And, the provisions will help to alleviate the chronic shortage of learning materials, promote the preservation of South Africa's rich cultural heritage that will encourage further creativity and innovation, and support the development of a knowledge based economy...."

On Contracting...

Jonathan Band, Counsel, Library Copyright Alliance and Adjunct Professor, Georgetown University

"... the Copyright Amendment bill is intended to update the Apartheid-era Copyright Act of 1978. The Copyright bill seeks to address the lingering effects of Apartheid, notably the lack of bargaining power of Black artists, vis-a-vis white owned publishers. South Africa still experiences a very uneven distribution of income with many impoverished Black students. The copyright bill cannot be evaluated without considering this context."

Julia Reda, Member of the European Parliament 2014-2019, Fellow, Berkman Klein Center for Internet & Society at Harvard University

"International copyright treaties are silent on how to regulate the contractual relationship between authors and rights holders...."

"... [the] petitioner could not name a specific international norm that would be violated by those contract adjustment mechanisms..."

"... specific provisions limiting the length and scope of transfers of exclusive rights are an established practice in several countries with a high level of copyright protection.... Conditions on and limits to the assignment of rights by authors to third parties are therefore not unique to South Africa's Copyright Amendment Bill, but have a long tradition in continental European copyright law."

"The rights reversion provisions exist in different versions both under U.S. and under EU law.... The automatic rights reversion after 25 years as proposed in the South

African bill is designed to ... effectively ensure that authors are protected from retaliation simply for exercising their rights."

Dr Andrew Rens, Copyright Expert, Attorney, South Africa (Written Testimony)

"... international copyright treaties ... don't take issue with such provisions (time limits for the assignment of copyright), which is why the copyright reversion provisions in the United States copyright law has not been impugned."

"... the [PPAB] will provide that a performer may receive either a royalty or equitable remuneration. The latter term is undefined but since it is an alternative to a royalty it seems that a single payment is contemplated. The bills also stipulate these provisions will be subject of elaboration in delegated rule making...."

"Since, as the petition admits, rights may be licensed and assigned, this section [Section 39B] properly understood permits contracting around the provision of the legislation while preventing contractual ouster."

On the Role of the Minister, and regulation...

Julia Reda, Member of the European Parliament 2014-2019, Fellow, Berkman Klein Center for Internet & Society at Harvard University

"... government intervention ... in such contractual relations ... define appropriate remuneration if the different parties to a dispute cannot do it amongst themselves."

"...[this] does not led to legal uncertainty among the rights holders and authors involved in such disputes, but rather it has contributed to an out of court dispute settlement...."

"... governments intervene by means of passing secondary legislation that sets the exact remuneration for the different parties. As a general rule, this is only the last resort."

"... this possibility for the ministry to intervene highly encourages the parties to find amicable solutions and I think as a general principle, any kind of possibility of future contract renegotiation or a contract termination if a contract is not advantageous to both parties encourages the parties to find fair solutions at the outset."

"... the vast majority of commercially exploited copyrighted works is out of commerce after 25 years. So, only in the cases of particularly successful and commercially viable works would the work still be in commerce after 25 years when the contract termination happens. And it's precisely in those cases where authors have received a disproportionately low remuneration considering how successful the work ended up being, which of course, the parties could not know at the outset."

Jonathan Band, Counsel, Library Copyright Alliance and Adjunct Professor, Georgetown University

"... many of the concerns raised by IIPA, such as those relating to the reversion of rights and royalties, have nothing to do with the adequacy or effectiveness of IP protection."

Dr Andrew Rens, Copyright Expert, Attorney, South Africa (Written Testimony)

"... the power of the Minister of Trade and Industry to prescribe regulations that affect the terms of contracts... are responses to the requirements of South African law."

"International intellectual property law does not prohibit regulation of licensing or contracts... the very first article of the Agreement on Trade-related Aspects of Intellectual Property Rights... provides: Members shall be free to determine the appropriate method of implementing the provisions of this agreement within their own legal system and practice."

Mr. Sean Michael Flynn, Director, Program on Information Justice and Intellectual Property, American University

"So, of course every legislation including our own, has ambiguities. But there is a specific process which South Africa defined to cater for those ambiguities and to define them. And, it will be a public process and there will be notice and comments and the IIPA and USTR may participate that. And, so to the extent that the problems are you seem to have vague and ambiguous requirements, you may continue to work with the South African government to address those ambiguities. So, there's a process for you which you could do that."

On Remedies...

Dr Andrew Rens, Copyright Expert, Attorney, South Africa (Written Testimony)

"Section 24 of the 1978 Copyright Act sets out civil remedies. A copyright holder can recover damages from an infringer; alternatively the right holder may choose to recover a reasonable royalty."

"... Section 24 (3) creates an additional category of damages ... a species of statutory damages...."

"In addition to a claim for damages or a reasonable royalty, and statutory damages, a right holder can obtain injunctions which are referred to as interdicts in South African law, seizing infringing copies, and prohibiting an infringer from making or distributing copies." Tools or other means of producing infringing copies may be seized and forfeited to a rights holder without compensation to the infringer."

“Section 27 of the Copyright Act criminalizes the intentional infringement of copyright.”

“The CAB introduces additional categories of infringing acts giving rise to civil liability. These include tampering with copyright management information and abuse of technical protection measures.”

“In addition to the remedies in copyright legislation, the Counterfeit Goods Act of 1997 provides for a right holder to complain to the authorities, and for the authorities to search and seize suspected counterfeit copies....”

“The Counterfeit Goods Act also created criminal offenses.”

“The Electronic Communications and Transaction Act of 2002 created an offense functionally equivalent to copyright prohibitions on circumvention; section 86 prohibits unauthorized interference with technical protection measures.”

“The CAB introduces additional criminal offenses. These include new offenses for circumventing technical protection measures, supplying the means of circumvention of technical protection measures and tampering with copyright management information.”

“The Bill dramatically increases the penalties for all criminal infringements. The Bill introduces a minimum sentence for corporations of the corporation annual turnover for each infringement....”

“Rights holders can use criminal procedures to effectively enforce their rights.... A rights holder may thus be able to receive compensation for infringement without incurring the costs of pursuing a civil claim.”

“South African law inhibits unfounded defenses through its cost rules.... Thus if a rights holder sues for infringement and the defendant unsuccessfully raises fair use as a defense the rights holder will recover the costs, including the costs of fighting the fair use claim.”

On Technological Protection Measures...

Dr Andrew Rens, Copyright Expert, Attorney, South Africa (Written Testimony)

“The CAB introduces additional categories of infringing acts giving rise to civil liability. These include tampering with copyright management information and abuse of technical protection measures.”

“The Electronic Communications and Transaction Act of 2002 created an offense functionally equivalent to copyright prohibitions on circumvention; section 86 prohibits unauthorized interference with technical protection measures.”

“The CAB introduces additional criminal offenses. These include new offenses for circumventing technical protection measures, supplying the means of circumvention of technical protection measures and tampering with copyright management information.”

Julia Reda, Member of the European Parliament 2014-2019, Fellow, Berkman Klein Center for Internet & Society at Harvard University

“South African Copyright Amendment Bill introduces criminal sanctions for the circumvention of technological restrictions on the copying of copyright-protected material. Any such restrictions must necessarily come with provisions regarding the legal circumvention of these technological restrictions, in order to be proportionate.”

Teresa Hackett, Copyright and Libraries Programme Manager, Electronic Information for Libraries (EIFL)

“When anti-circumventions laws were drafted at the international level, they were expected to protect TPMs insofar as they restricted acts not authorized by the right holders or not permitted by the law. They were never intend to restrict those acts that are permitted by the law, namely under copyright exceptions.”

Annex 4

IIPA GSP Complaints with Responses

IIPA petition	Response
<p>South Africa has not joined WCT or WPPT [p.6]</p>	<p>The CAB will create the basis for South Africa to join the WCT and WPPT. Being a signatory of the WCT and WPPT is not a requirement of international law, AGOA or the US GSP program.</p>
<p>“Severe restrictions on the freedom of rights holders to contract in the open market.”</p> <ul style="list-style-type: none"> ● Limiting the assignment of rights to 25 years ● “Providing ministerial powers to set standard and compulsory contractual terms for contracts covering seemingly an transfer or use of rights” [p7] 	<p>Rights reversions are not regulated by international intellectual property law.</p> <p>Reversions of rights to authors is a common component of the copyright laws of many countries, including the United States. See 17 USC 203, 17 USC 304(c) and 17 USC 304(d); Art 35 of the European Directive; Art. 22, EU Directive 2019/790 (author’s right of revocation for lack of exploitation); Germany §7, §18, and §31a, Gesetz über Urheberrecht und verwandte Schutzrechte (only recognizes the creator as copyright holder; copyright cannot be transferred; usage rights may be revoked);</p> <p>The Bill’s authorization of the regulation of contracts is an optional Ministerial power that would be used only in rare cases. The power is similar to that found in German copyright law which protects an author’s right to appropriate remuneration. §32, Gesetz über Urheberrecht und verwandte Schutzrechte).</p>
<p>“importation of the U.S. “fair use” rubric is appended to a proliferation of extremely broad new exceptions and limitations to copyright protection (on top of ‘fair dealing’ provisions) creating an amalgam of broad and unclear exceptions and limitations.” [p.7]</p>	<p>All countries that have a general fair use or fair dealing exception also have specific exceptions. See e.g. the rights in the U.S. for Libraries (§108), Education (§110), ephemeral fixations (§112).</p> <p>At least 70% of African and Latin American Countries, and half the members of the EU, have broad educational use rights that permit use of excerpts for teaching.</p>
<p>“Overly regulated licensing mechanisms 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.”[p.7]</p>	<p>This is a policy argument not a legal one. There are no international copyright restrictions on the regulation of contracts. There is a documented history of abuse in contracts with creators in South Africa that the legislation seeks to address.</p> <p>The prohibition on revocation of rights by creators in Section 39B of the Bill mirrors UK Copyright Designs and patents Act, as amended, 2014.</p> <p>Provisions preventing contractual override of exceptions are found in four European Directives:</p> <ul style="list-style-type: none"> ● Directive 2019/790 ● Directive 2017/1564 ● Directive 2009/29/EC ● Directive 96/9/EC

	<p>Provisions regulating the contractual relationship between authors and intermediaries such as publishers are included in Directive 2019/790. Some national copyright laws in Europe have a long tradition of contractual protections for authors, such as the German copyright law. German copyright law specifically allows the Ministry of Justice, by means of regulation (secondary legislation), to set the amount of appropriate remuneration to be paid to authors in cases where an out-of-court dispute resolution process between authors' and intermediaries' representatives has failed to come to an agreement (§ 36 (8) Gesetz über Urheberrecht und verwandte Schutzrechte).</p> <p>German law prohibits the transfer of copyright -- only a usage right can be sold to others. y §7, §18, and §31a, Gesetz über Urheberrecht und verwandte Schutzrechte.</p> <p>Australia and Singapore have both signaled their intent to protect exceptions from contractual override</p>
<p>"Inadequate criminal and civil remedies for infringement, including online piracy"</p>	<p>Dr. Rens's submission shows that South Africa has a robust enforcement regime including damages, injunctions, seizure of materials, criminal penalties, and private enforcement of criminal law..</p>
<p>"Inadequate provisions on technological protection measures necessary for the licensing of legitimate content..."</p>	<p>Current South African law contains prohibitions of circumventing TPMs, as set out in the submission by Andrew Rens.</p>
<p>"...and overbroad exceptions to prohibitions on the circumvention of such measures"</p>	<p>The Bill authorizes exceptions only for conduct that is permitted by limitations and exceptions in the Act, in compliance with the WCT and WPPT.</p> <p>Similar limits to technological restrictions are incorporated Article 6.4, Directive 2001/29/EC.</p> <p>In Portugal, legal protection granted to TPMs does not cover situations in which, as a result of an omission of conduct, a TPM prevents or restricts the use of TPM-protected content by a beneficiary of a copyright exception.</p>
<p>"Taken as a whole, these 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). "[p.8]</p>	<p>This assertion is presented with no actual argument. South Africa's exceptions include internal limitations found in international copyright law and are modeled on exceptions prevalent elsewhere.</p>
<p>"Enforcement in South Africa is not, at present, adequate or effective. To facilitate a healthy online ecosystem, South Africa should appoint cybercrime inspectors and develop a cybercrime security hub recognizing</p>	<p>Dr. Rens's submission shows that South Africa has a robust enforcement regime including damages, injunctions, seizure of materials, criminal penalties, and private enforcement of criminal law.</p>

copyright as one of its priorities” [p.8]	
A proposed regulation on locally produced TV and radio content would discriminate against foreign content, and therefore limits market access [p.9]	This is not a copyright issue. Local content requirements are not prohibited by international law. Similar provisions are in place in Europe under Directive 2018/1808.
An online Value Added Tax is also a trade barrier “because it includes online selling of content such as films, TV series games, and e-books”. [p.9]	Taxes on online sales are prevalent in the United States and other countries.

IIPA ‘19 Special 301 Complaint	Response
<i>Subsection on copyright exceptions (Emphasis added)</i>	
A. Section 12B(1)(i) and 12B(2) allow individuals to make copies for “ personal uses. ” These broad exceptions in effect allow for private copying without any remuneration for rights holders, which is out of step with international norms (and has in fact been challenged successfully, for example, in EU courts in relation to a proposed UK exception). Furthermore, such private copying exceptions are typically accompanied by a remuneration system by which rights holders are compensated for the private copying of their works. The proposed exception also permits copying in an “electronic storage medium,” which risks undermining existing licensing practices with regard to digital content services.	Personal use exceptions are common in intellectual property laws around the world. Recent studies by the WIPO Standing Committee on Copyright and Related Rights show that a majority of WIPO members have personal use rights without remuneration. This includes the USA which has no private copy levy. See Updated Study And Additional Analysis Of Study On Copyright Limitations And Exceptions For Educational Activities https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=390249
B. Section 12B(1)(f) grants an exception for making translations for the purpose of “giving or receiving instruction.” The scope of this proposed exception could be interpreted too broadly,	Translation rights for the purpose of teaching is explicitly permitted by the Berne Appendix and is common in countries around the world. Limiting of the exception to education and non-commercial purposes bolsters its justification. The IIPA expresses concern that the provision “may” be interpreted

<p>particularly as it allows for communication to the public, albeit for non-commercial purposes. Though the bill attempts to limit the scope by defining its purpose, it could undermine the author's translation rights, which is a significant market for authors and their publishers, and one for which just compensation is warranted.</p>	<p>"too broadly." The interpretation of the provision may be influenced by regulation. But the complaint here is too vague to act upon.</p>
<p>C. Section 12C provides an exception for temporary reproduction of a work "to enable a transmission those copies or adaptations is to enable a transmission. Such language could hinder efforts to work with online intermediaries to put a stop to piracy. ...</p>	<p>This provision is similar to US law and to the EU. See 17 U.S. Code § 512.Limitations on liability relating to material online; EU DSM, Article 5, Exceptions and limitations (requiring exception for "Temporary acts of reproduction . . . which are transient or incidental [and] an integral and essential part of a technological process").</p>
<p>D. Section 12B(1)(a) provides a broad and circular exception for quotation, permitting any quotation provided that "the extent thereof shall not exceed the extent reasonably justified by the purpose," but without enumerating the permitted purposes, for example, criticism and review. The result is an exception that appears to permit quotations for any purpose whatsoever, which risks causing substantial harm to rights holders and renders the proposed exception incompatible with the internationally-recognized three-step test for copyright exceptions and limitations.</p>	<p>The quotation right is already currently provided in the South Africa Copyright Act. There is no purpose restriction in the present exception.</p> <p>The same approach is followed in Nordic countries, where the quotation exception is presented as a 'relatively open rule of reason', whose only requirement is that the quotation is made 'in accordance with proper usage', without enumerating the purposes for which it can be made.</p>
<p>E. Section 12D permits the copying of works, recordings, and broadcasts for educational purposes with very few limitations. Subsection 12D7(a) on open access for "scientific or other</p>	<p>Testimony of Palmedo and Isqueiro and Nobre demonstrated that over 70% of countries in Africa and Latin America, and over 50% of EU countries, have rights to use excerpts of works without authorization for teaching. At least 7 other countries authorize the use of whole works for teaching to the extent justified by the purpose.</p>

<p>contributions” is overreaching and will likely undermine the rights of authors and publishers and deny authors academic freedom. Subsection 12D(4)(c) specifically authorizes the copying of entire textbooks under certain conditions, even those that are available for authorized purchase or licensing, if the price is deemed not to be “reasonably related to that normally charged in the Republic for comparable works.” The impact of these provisions on normal exploitation of works for educational markets is likely to far exceed what is permitted under international standards.</p>	
<p>F. Section 19D provides an exception provision for persons with disabilities, as defined to mean essentially disabilities that relate to the ability to read books. This would benefit from tighter drafting. While South Africa is not a signatory to the Marrakesh VIP Treaty, it would be prudent to bring provisions designed to facilitate access for visually impaired persons in line with the Treaty by including the requirement that the exception may apply only to authorized entities.</p>	<p>The Bill’s exception for people with disabilities is fully in accord with the Marrakesh Treaty and the South African constitutional rights of persons with disabilities. It has been cited in WIPO as a model for Marrakesh implementation that promotes the rights of all people with disabilities.</p>