

## **Statement of the International Center for Law & Economics**

*In support of IIPA Request for Review of the Intellectual Property  
Rights Practices of South Africa in the 2019 GSP Review, 84 Fed.  
Reg. 11150 (March 25, 2019)*

**Authored by:**

**Geoffrey A. Manne, Julian Morris and Kristian Stout**

**ICLE Intellectual Property Research Program**

**January 17, 2020**

## Statement of the International Center for Law & Economics

*In support of IIPA Request for Review of the Intellectual Property Rights Practices of South Africa in the 2019 GSP Review, 84 Fed. Reg. 11150 (March 25, 2019)*

**Geoffrey A. Manne, Julian Morris and Kristian Stout\***

We submit this statement in support of IIPA’s petition to review South Africa’s GSP eligibility in light of South Africa’s failure to provide “adequate and effective protection” to intellectual property as required by the GSP statute and, in particular, profound concerns with draft legislation that will, if enacted, further erode the protection of intellectual property in South Africa for U.S. and South African creators alike.<sup>1</sup>

While we support IIPA’s petition, we note at the outset our reluctance to take such a position: We believe that trade sanctions are harmful to the country imposing them (and on which they are imposed, of course), and, as far as possible, should be avoided. Both the U.S. and South Africa benefit from the GSP that currently affords South African producers unilateral, tariff-free access to U.S. markets for some goods. As such, we caution that the USTR should withdraw South Africa’s GSP designation only as a last resort.

---

\* Geoffrey A. Manne is President and Founder of The International Center for Law & Economics (ICLE); Julian Morris is Executive Director of ICLE; and Kristian Stout is Associate Director of ICLE.

ICLE is a nonprofit, nonpartisan research center based in Portland, OR. ICLE promotes the use of law & economics to inform public policy debates. We believe that intellectually rigorous, data-driven analysis will lead to efficient policy solutions that promote consumer welfare and global economic growth. ICLE has received financial support from numerous companies and individuals, including firms with interests both supportive of and in opposition to the ideas expressed in this and other ICLE-supported works. Unless otherwise noted, all ICLE support is in the form of unrestricted, general support. The ideas expressed here are the author’s own and do not necessarily reflect the views of ICLE’s advisors, affiliates, or supporters. Please contact us with questions or comments at [icle@laweconcenter.org](mailto:icle@laweconcenter.org).

<sup>1</sup> Kevin M. Rosenbaum, *Re: 2019 Generalized System of Preferences (GSP): Notice of Annual GSP Product and Country Review; Request for Review of the Intellectual Property Rights Practices of South Africa*, 84 Fed. Reg. 11150 (March 25, 2019), Washington, D.C.: International Intellectual Property Alliance (Apr. 18, 2019), available at [https://iipa.org/files/uploads/2019/10/2019-04-18\\_IIPA\\_South\\_Africa\\_GSP\\_Petition.pdf](https://iipa.org/files/uploads/2019/10/2019-04-18_IIPA_South_Africa_GSP_Petition.pdf).

But we also believe that both the United States and South Africa share a strong interest in sustaining creators through adequate and effective protection of intellectual property, thereby promoting economic development and the production of culturally diverse materials.<sup>2</sup> And, unfortunately, removal of GSP is one of the few tools available to the U.S. to protect the interests of U.S. creators of intellectual property in global markets. The USTR is legally obliged to faithfully discharge its congressional mandate by taking action to defend U.S. intellectual property in accordance with various trade laws, including by ensuring that GSP beneficiary countries provide adequate and effective protection within the meaning of the statute.<sup>3</sup>

In submitting this statement, we are mindful that South Africa's President has not yet signed into law the Bills that motivated the IIPA's petition. If he does so, South Africa would fail to meet the conditions for GSP eligibility and USTR will be obliged to revoke all or some of its GSP benefits. We note, however, that numerous local actors have voiced concerns regarding the constitutionality of the proposed legislation and the harm that it will do to the community of creators in South Africa.<sup>4</sup> It is possible that President Ramaphosa will heed these concerns, reject the draft legislation and send it back to Parliament for reconsideration, with directions to adapt or remove its numerous provisions that conflict with South Africa's Constitution and the country's international treaty obligations. So doing could result in a text more consistent with South Africa's (and the U.S.'s) cultural and economic interests. Most importantly from the perspective of this submission, by rejecting the draft legislation President Ramaphosa would at the very least defer any action on the part of USTR to revoke South Africa's GSP eligibility.

---

<sup>2</sup> See, e.g., George R. Barker, *Diminished Creative Industry Growth in Australia in the Digital Age* (2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2915246](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2915246) (analyzing the negative effect widespread digitization and weakly enforced copyright laws had on cultural production and economic growth).

<sup>3</sup> See Office of the United States Trade Representative, *U.S. Generalized System of Preferences Guidebook* (Dec. 2019), available at [https://ustr.gov/sites/default/files/IssueAreas/gsp/GSP\\_Guidebook-December\\_2019.pdf](https://ustr.gov/sites/default/files/IssueAreas/gsp/GSP_Guidebook-December_2019.pdf) (“[T]he [GSP] statute includes a number of factors that the President takes into account when designating a country as eligible for GSP. These factors include ... the extent to which a country is providing adequate and effective protection of intellectual property rights.”).

<sup>4</sup> See *infra* Section I and, e.g., PEN Afrikaans, *Press Release: Authors Unite Against Copyright Amendment Bill*, (Dec. 3, 2018), available at <https://www.litnet.co.za/press-release-authors-unite-against-copyright-amendment-bill/>.

In short, we argue that:

- 1) Protection of intellectual property both in the U.S. and in South Africa is mutually beneficial;
- 2) Duty-free imports from South Africa to the U.S. benefit the citizens of both countries, and those citizens will suffer as a result of the partial or full withdrawal of GSP benefits from South Africa;
- 3) GSP withdrawal is nonetheless required if South Africa does not adequately and effectively protect U.S. intellectual property;
- 4) South Africa's copyright laws currently do not effectively protect the rights of artists; and
- 5) Two Bills recently passed by South Africa's Parliament, and championed by U.S.-based evangelists of "fair use," would further weaken the effectiveness of copyright protection.

## **I. South Africa's copyright law reforms**

In 2011, a group of musicians and performers petitioned South Africa's government to reform the country's copyright laws.<sup>5</sup> Their concern was that South Africa's copyright laws were outdated and causing economic harm to its artists and other creators.

A primary concern is the weak protection of online content. As recently as 2017, a survey of over 1,000 IT professionals and "tech savvy" individuals in South Africa found that nearly three-quarters self-identified as online "pirates" or had pirated media, games or software in the preceding twelve months.<sup>6</sup>

Proponents of reform requested that South Africa's laws be updated for the digital age in order better to sustain the local creative community and enable artists to earn a living by telling stories reflecting local cultural traditions.<sup>7</sup> Indeed, a stated objective of South Africa's copyright law reform project was to modernize and cure these defects.<sup>8</sup> The bills introduced under the rubric of these reforms failed to achieve that

---

<sup>5</sup> Staff reporter, *Artists Petition Government for Copyright Reform*, MAIL AND GUARDIAN (Jun. 6, 2011), available at <https://mg.co.za/article/2011-06-06-artists-petition-government-for-copyright-reform>.

<sup>6</sup> Staff Writer, *Top Piracy Sites Among South Africans*, MYBROADBAND (Sept. 4, 2017), available at <https://mybroadband.co.za/news/internet/226397-top-piracy-sites-among-south-africans.html>.

<sup>7</sup> *Supra* note 4.

<sup>8</sup> Denise Rosemary Nicholson, *South Africa's Copyright Amendment Bill: Its Genesis and Passage Through Parliament*, INFOJUSTICE (Jun. 7, 2019), available at <http://infojustice.org/archives/41167>.

stated purpose, however. Instead, they introduced a whole new series of problems, as we discuss below.

### **A. There can be no access without content**

Some proponents of the copyright amendments have advanced a narrative that exceptions to copyright are necessary in order for creative industries to thrive – thus privileging access to content over the creation of content.<sup>9</sup> This is a false narrative. Indeed, the opposite is more nearly the case: There can be no “access” without content; and the production of content is motivated in no small part by the potential to reap rewards from the sale or licensing of that content, which is made feasible by copyright. As Neil Turkewitz, then at the Recording Industry Association of America, wrote in a 2014 submission to the UN Special Rapporteur in the Field of Cultural Rights:

A “right of access” presupposes the existence of something worth accessing and is, therefore, derivative. The first objective of societies must be to support the establishment and maintenance of an environment conducive to fostering creativity and innovation through the effective protection of the rights of creators. An effective copyright regime is an essential element for encouraging investment in cultural production, and investment will be lacking in societies where such protections do not exist. Simply put, when a society fails to reward its own creators, such creators will cease to exist, and “access” will be limited to foreign cultural materials.

Cultural hegemony flows not from the protection of intellectual property, but from its absence. An effective and functional copyright environment is not a panacea; it does not on its own create global parity in the marketplace of ideas. But it does give individual creators a fighting chance, and an opportunity to compete. The ability to generate revenue from one’s creativity – to earn a living as a creator – is central to a society’s ability to foster cultural production. In its absence, dreams and creative lives perish. While copyright may be inadequate on its own in

---

<sup>9</sup> See, e.g., Denise Rosemary Nicholson, *Why ‘Fair Use’ is so Important for South African Copyright Law*, THE CONVERSATION (Nov. 25, 2018), available at <https://theconversation.com/why-fair-use-is-so-important-for-south-african-copyright-law-107098>.

creating fair market conditions, it remains by far the most powerful tool for fostering creativity and democratizing culture itself.<sup>10</sup>

A similar point was made by Bankole Sodipo, a founding member of the Africa IP Group and professor of law at Babcock University in Nigeria. Speaking at a regional workshop held in Dar es Salaam, he said:

Today, more than ever, Africans, whether living on Africa soil or in the Diaspora need to network to nurture our intellectual property. We need to share experiences, to evaluate and consider how we can promote our culture, our creative industries, our innovation and our investments and ensure that intellectual property becomes a tool for African economic emancipation.<sup>11</sup>

Meanwhile, the breadth of opposition to the proposed legislation from South Africa's creative community, was nicely captured by Benjamin Trisk, Chairman of Trustees: Nal'ibali literacy organization:

In its present form the Copyright Amendment Bill endangers authors and their output at a critical and formative time in the emergence of a new literary voice in South Africa. That voice has become more strident and more important as countless South Africans of colour begin to weave their personal narratives into fiction and memoir. Equally importantly are the many works of non-fiction that are emerging from a three-century old racist past to shed light on a history of South Africa that, until recently, was recounted only by the victors.<sup>12</sup>

## **B. History of the bills and their defects**

In 2015, South Africa's Department of Trade & Industry (DTI) introduced the Copyright Amendment Bill and, shortly after, the Performers' Protection Amendment Bill.<sup>13</sup> Unfortunately, these bills did not adequately address the defects.

---

<sup>10</sup> Neil Turkewitz, RIAA Submission to the UN Special Rapporteur in the Field of Cultural Rights (2014), *available at* <https://www.ohchr.org/Documents/Issues/CulturalRights/ConsultationIntellectualproperty/UN%20Special%20Rapporteur%20August%202014.docx>.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Supra* note 4.

<sup>13</sup> *Supra* note 1, at 67.

Following blistering criticism from South African academics and stakeholders,<sup>14</sup> as well as from international observers, the DTI revised the 2015 bills numerous times.<sup>15</sup> These revisions continued until 2018 when the DTI introduced a revised Copyright Amendment Bill and Performers' Protection Amendment Bill (Revised 2018 Bills).<sup>16</sup> The Parliament adopted both of the revised bills in March of 2019 and the bills now await Presidential assent.<sup>17</sup>

While these revised bills addressed some of the defects of the original bills, a majority of the problematic provisions remained unchanged and new problematic provisions have been introduced.<sup>18</sup> As IIPA observes, at a high level, many of the provisions in the Revised 2018 Bills, "lack clarity, risk major negative disruption of the creative industries, pose significant harm to the creators they purport to protect, and fall far short of the needed reforms."<sup>19</sup> The Revised 2018 Bills appear mistakenly to assume that the government's role is to regulate relationships in the creative community, rather than incentivize the production of new innovative works.<sup>20</sup> This misguided approach will result in South Africa weakening copyright incentives and harming the economic and cultural interests of South African and U.S. creators alike.

Among the problems imposed by the Revised 2018 Bills, multiple provisions in the bills impede the rights of individuals to enter into private contractual relationships.<sup>21</sup> For example, the Revised 2018 Bills "limit the term of assignments for literary and musical works and performers' rights in sound recordings... to a maximum term of

---

<sup>14</sup> See e.g. Sadulla Karjiker, *Let's Pray for Mediocrity: Another Case of Legislative Diarrhoea*, The Anton Mostert Chair of Intellectual Property (Aug. 3, 2015) available at <https://blogs.sun.ac.za/iplaw/2015/08/03/lets-pray-for-mediocrity-another-case-of-legislative-diarrhoea/>; Owen Dean, *DTI Dishes Up A Hopeless Curate's Egg*, The Anton Mostert Chair of Intellectual Property (Aug. 5, 2015), available at <http://blogs.sun.ac.za/iplaw/2015/08/05/dti-dishes-up-a-hopeless-curates-egg/>; Cobus Jooste, *A Diamond in the Rough – Technology and the Copyright Amendment Act* (Aug. 19, 2015), available at <https://blogs.sun.ac.za/iplaw/2015/08/19/a-diamond-in-the-rough-technology-and-the-copyright-amendment-act/>.

<sup>15</sup> *Supra* note 1, at 67.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 68.

<sup>21</sup> *Id.*

25 years from the date of agreement.”<sup>22</sup> These provisions would likely render many works effectively unusable after 25 years and prevent anyone from receiving revenues from them.<sup>23</sup> They would also reduce the amount that artists would be paid upfront, thereby discouraging the creation of content.

Furthermore, the Revised 2018 Bills regulate the mode of remuneration for audio-visual performers.<sup>24</sup> Typically, featured performers are remunerated on a royalty basis and non-featured performers are remunerated through a lump-sum payment.<sup>25</sup> However, the Revised 2018 Bills require non-featured performers to be paid on a royalty basis.<sup>26</sup> This significantly hinders the contractual rights of non-featured performers to the detriment of both those performers and the copyright owner.<sup>27</sup> To top it all off, the risks these provisions impose are further compounded by the fact that the Revised 2018 Bills prohibit the inclusion of “any contractual terms that deviate from the provisions of” the Revised 2018 Bills, thereby rendering the bills’ contract terms mandatory, preventing individuals from voluntarily remedying harmful provisions, and limiting individual rights to contract.<sup>28</sup>

### C. Dangerous exceptions

Perhaps most troublesome is the inclusion in the Revised 2018 Bills of provisions designed to reflect the American fair use doctrine, but which fail to properly contextualize and limit their application to ensure compliance with the Berne Convention and with the TRIPS Agreement.

To be clear, we are not opposed to fair use and similar exceptions *per se*.<sup>29</sup> But U.S. style fair use does not exist in a vacuum and is not easily transposed onto other legal

---

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 69.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 70.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> As we have noted elsewhere:

[T]ransaction costs may... inhibit the creation of some socially beneficial uses of copyrighted material ... For example, there will be some instances in which copyright owners



regimes, especially those that lack the U.S.'s robust underlying copyright protections, as is the case in South Africa, where creators' precarity is a core feature of the landscape. As we have written elsewhere:

The wholesale importation of "fair use" into other jurisdictions without appropriate restraints may not result in a simple extension of the restrained and clearly elaborated fair use principles that exist in the U.S., but, rather, something completely different, possibly even a system untethered from economics and established legal precedents. In some jurisdictions, it might have the effect of fundamentally undermining incentives to create and trade content, ultimately harming not only producers of such works but also users—surely the very opposite of the intended effect. In many instances the "user" is also a "creator" and as such may wish to benefit from the sale of work that, while derived from previous content, may nevertheless itself be protected by copyright. The introduction of very broad "fair use" provisions might act to actually discourage the creation of many derivative works that the provisions are ostensibly intended to enable.<sup>30</sup>

Moreover, as André Myburgh notes, there are numerous substantive differences between fair use as defined in US law and that of the proposed legislation:

[T]he provision often referred to... as a "fair use clause" in the Bill, is not a provision that follows the examples of the United States and the other countries referenced by its proponents, but a far more wide-ranging

---

would in principle be willing to license their works to users (including producers of derivative works) but in which the costs of creating, monitoring and enforcing such licenses precludes their creation. Under such circumstances, it makes sense to allow limited licenses by law to otherwise copyrighted content at a zero price. In addition, there may be situations where copyright owners would not license their works at any price because of the nature of the intended derivative use—even though that derivative use results in substantial net benefits to society when the use is permitted. An example is parody. In such cases, a presumptive rule is adopted permitting the use.

Geoffrey A. Manne and Julian Morris, *Dangerous Exception: The Detrimental Effects Of Including "Fair Use" Copyright Exceptions In Free Trade Agreements*, ICLE Intellectual Property Research Program White Paper 2015-1 at 10, available at [http://laweconcenter.org/images/articles/dangerous\\_exception\\_final.pdf](http://laweconcenter.org/images/articles/dangerous_exception_final.pdf)

<sup>30</sup> *Id.* at 15.

provision without the balancing mechanisms that exist in the United States and elsewhere.<sup>31</sup>

Myburgh also notes that the push to include such so-called “fair use” provisions came largely from U.S. experts interested in exporting their personal preferences, such as U.S. law professor and attorney of record for the advocacy group, User Rights Network,<sup>32</sup> Sean Flynn.<sup>33</sup>

A recent article by Collen Dlamini captured the reality perfectly:

The core issue with the Copyright Amendment Bill is that it will amount to the expropriation of intellectual property (IP) without compensation. This will deal a hammer blow to the production of local content in our book stores, on our television screens and in our educational institutions.

Although the bill was originally intended to benefit South African creatives, it will instead cut off their income streams. The losers will be local artists, writers and musicians. The winners will be the large, global tech companies who will gain free access to South African content thanks to the bill’s extensive exceptions to copyright, especially under an expansive set of principles allowing free use of copyright materials called “fair use.”<sup>34</sup>

Even some proponents of fair use oppose the current version of the Copyright Amendment Bill, raising concerns that it would be counterproductive. Tana Pistorius and Odirachukwu S. Mwim note:

---

<sup>31</sup> André Myburgh, *Rights for Creators or Dismantling Copyright?*, POLITY (Mar. 27, 2019), available at <https://www.polity.org.za/article/rights-for-creators-or-dismantling-copyright-2019-03-27>.

<sup>32</sup> See Sean Flynn, *Submission of Global Expert Network on Copyright User Rights Communia*, Centrum Cyfrowe, Creative Commons to Parliament of the Republic of South Africa Portfolio Committee on Trade and Industry Regarding the Copyright Amendment Bill (B13-2017) (Jul. 3, 2017), available at [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170801Sean\\_Flynn.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170801Sean_Flynn.pdf). The User Rights Network lobbied for the inclusion of broad fair use provisions in the 2018 Revised Bills. *Id.*

<sup>33</sup> *Supra* note 31. For an example of such advocacy, see, e.g., Sean Flynn, *South Africa Takes Steps to Adjust Copyright Law to the Digital Age*, THE CONVERSATION (Aug. 6, 2017), available at <https://theconversation.com/south-africa-takes-steps-to-adjust-copyright-law-to-the-digital-age-81490>.

<sup>34</sup> Collen Dlamini, *The Copyright Bill is Fundamentally Flawed and Strips Creatives of Their Rights*, THE DAILY MAVERICK (Sept. 30, 2019), available at <https://www.dailymaverick.co.za/article/2019-09-30-the-copyright-bill-is-fundamentally-flawed-and-strips-creatives-of-their-rights/>.

The current wording of the Copyright Amendment Bill is out of step with South Africa's international obligations in terms of the WCT and the WPPT. Secondly, it could lead to abuses. For example, a user may download or copy an electronic textbook published in Europe where the textbook is not available for sale in South Africa through the application of a TPM circumvention device. This could lead to the geoblocking of electronic resources. Geoblocking will adversely impact on access to knowledge and learning. Thirdly, the proposed copyright reform will deter knowledge generation. South African academics will publish less as the market that currently exists for academic works will no longer exist if the Copyright Bill is enacted. Academic authors will also increasingly publish in overseas journals. This will lead to knowledge degeneration and will have a direct and negative impact on access to knowledge and learning.<sup>35</sup>

Those advocating for final approval of the bill have come up with a term that inadvertently highlights the extent to which the proposed legislation is unique and out of step with international conventions, by which we mean both norms and treaties. Since the proposal neither tracks the provisions of US fair use, nor the parameters of fair dealing within a context of delineated exceptions and limitations, the bill's defenders refer to "hybrid fair use."<sup>36</sup> But the "hybrid" nature of the exceptions underscores their very indefensibility. The exceptions are not only over-broad, but duplicative and vague. They are both intended to operate, and will operate, to excuse conduct not confined to "certain special cases" as required by Berne and TRIPS.<sup>37</sup> And it is worth noting that they are largely the result of interventions by U.S. fair use

---

<sup>35</sup> Tana Pistorius and Odirachukwu S. Mwim, 2019, *The Impact of Digital Copyright Law and Policy on Access to Knowledge and Learning*, READING & WRITING 10(1), a196, available at <https://files.eric.ed.gov/fulltext/EJ1221248.pdf>.

<sup>36</sup> *Recreate South Africa Comments on the Copyright Amendment Bill [B13-2017]*, INFOJUSTICE.ORG (Mar 11, 2019), available at <http://infojustice.org/archives/40930>.

<sup>37</sup> See, e.g., Article 9, Berne Convention for the Protection of Literary and Artistic Works (as amended on Sept. 28, 1979), available at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283693](http://www.wipo.int/treaties/en/text.jsp?file_id=283693) ("It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.") See also Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), available at [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm3\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm); WIPO Copyright Treaty (adopted in Geneva on Dec. 20, 1996), available at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=295157](http://www.wipo.int/treaties/en/text.jsp?file_id=295157); WIPO Performances and Phonograph Treaty (adopted in Geneva on Dec. 20, 1996), available at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=295578](http://www.wipo.int/treaties/en/text.jsp?file_id=295578).

evangelists and have nothing to do with the particular conditions of South African life and society.<sup>38</sup> These advocates saw potentially fertile ground to plant the seeds of their global agenda, and they seized that opportunity.

## **II. GSP eligibility and the mutual interest of creators and the wider public in South Africa's protection of intellectual property**

Rather than strengthening the position of creators as originally intended, the bills adopted by Parliament would further erode the conditions for copyright protection. Of particular concern are amendments that are rooted in the false premise that South Africa's interests are best served by expansive limitations and exceptions rather than by fueling the creative genius of South Africa's cultural community.<sup>39</sup> In so doing, South Africa would chart a course that puts it at odds with its trading partners and global norms. The Revised 2018 Bills seek to regulate relationships in the creation of materials rather than ensuring that creators can effectively prevent the misappropriation of their works and then determine for themselves how to allocate risk and reward.<sup>40</sup> It engages in the politics of division rather than focusing on how to expand the universe of creative works through the development of a sustainable ecosystem.

While South Africa's weak copyright laws first and foremost harm local artists, they also adversely affect foreign artists, who are less able to protect their works. Under the terms of the Trade Act of 1974, the U.S. may grant preferential treatment to imports from certain countries under the rubric of the Generalized System of Preferences (GSP).<sup>41</sup> Among other factors that the U.S. Trade Representative (USTR) is required to take into consideration when determining a country's GSP eligibility is, "the extent to which such country is providing adequate and effective protection of intellectual property rights."<sup>42</sup> Thus, if USTR deems that a country is not providing adequate and effective protection of intellectual property rights, it is obligated to revoke that country's GSP eligibility. As the House Ways and Means Committee

---

<sup>38</sup> See, e.g., *supra* note 32.

<sup>39</sup> See *supra* Section I.B.

<sup>40</sup> See *supra* Section I.A.

<sup>41</sup> 19 USC 2461 et seq., available at <https://ustr.gov/sites/default/files/files/gsp/GSP%20statute%20updated%20to%202017.pdf>.

<sup>42</sup> *Id.* at 502.

stated, “countries wishing to reap the benefits of preferential duty-free access to the U.S. market must fulfill international responsibilities” in the intellectual property area.<sup>43</sup>

There are various long-standing legislative and enforcement issues in South Africa that undermine the value of intellectual property.<sup>44</sup> USTR is obliged to remain engaged with its South African counterparts in addressing all of these.<sup>45</sup> But the issue motivating our submission is that the proposed amendments to the copyright law and the Performers’ Protection Act that would place South Africa in conflict with its international treaty obligations and would otherwise result in the lack of adequate and effective protection as contemplated under GSP. As IIPA observes:

South Africa does not meet the GSP eligibility criteria primarily because its current legal regime fails to provide adequate and effective protection of copyrighted materials, and two impending laws that are on the verge of final enactment would further weaken that legal regime.<sup>46</sup>

While this USTR investigation is taking place within the framework of GSP, the U.S. and South Africa share a common interest in establishing robust protection of copyright. Should South Africa determine to proceed with the current amendments, the greatest immediate victim will be the community of South African creators, who have been very vocal in their opposition to the proposed amendments.<sup>47</sup> And ultimately the South African public will suffer, as investment in local cultural production decreases, limiting the production of culturally diverse materials and increasing reliance on foreign cultural materials for which the costs have already been amortized.

---

<sup>43</sup> House Rep. No. 98-1090, 98th Cong., 2d Sess. at 12 (1984).

<sup>44</sup> See, e.g., David Hirschmann & Myron Brilliant, *Researching the Global Intellectual Property Landscape*, 2017 Special 301 Submission (2017) at 103-07, available at <http://www.theglobalipcenter.com/wp-content/uploads/2013/01/USCC-2017-Special-301-Submission-Final.pdf>; David Kaplan, *Intellectual Property Rights and Innovation in South Africa: A Framework*, in *THE ECONOMICS OF INTELLECTUAL PROPERTY IN SOUTH AFRICA* (Jun. 2009).

<sup>45</sup> See Congressional Research Service, *Generalized System of Preferences (GSP): Overview and Issues for Congress Updated November 7, 2019*, Congressional Research Service RL33663, available at <https://fas.org/sgp/crs/misc/RL33663.pdf>.

<sup>46</sup> *Supra* note 1.

<sup>47</sup> *Supra* note 4.

### **III. Conclusion**

South Africa is poised to adopt legislation that would represent a poison pill for its creative community; it would also conflict with its international obligations, including by failing to provide adequate and effective protection as contemplated under GSP.

We hope that President Ramaphosa will pay heed to the chorus of voices from South Africa's creative community—which is calling for a *strengthening* of copyright protection rather than its further weakening—and reject the current bills. Indeed, we fervently hope that President Ramaphosa will direct Parliament to begin the process anew with a commitment to implement in full the provisions of the WIPO Copyright and Performers and Producers of Phonograms Treaties, which South Africa signed in 1997 but has yet to ratify. Unless he does so, however, USTR will be compelled to remove some or all of the benefits South Africa currently receives under the GSP.