



Before the Office of the United States Trade Representative

Docket No. USTR-2019-0020

South Africa Country Practice Review

Post-Hearing Brief of the Library Copyright Alliance

The Library Copyright Alliance (“LCA”) consists of three major U.S. library associations: the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries. These associations represent over 100,000 libraries in the United States employing more than 350,000 librarians and other personnel. An estimated 200 million Americans use these libraries over two billion times each year. These libraries spend over \$4 billion annually acquiring books and other copyrighted material.

LCA submits these comments to respond to the arguments made in the petition filed by the International Intellectual Property Alliance (“IIPA”) that the Republic of South Africa does not provide adequate and effective intellectual property protection by virtue of provisions in the Copyright Amendment Bill (“CAB”) and the Performers’ Protection Amendment Bill (“PPAB”).

Before responding to specific concerns raised by IIPA, LCA wishes to make several general points.

First, the CAB is intended to update the Apartheid-era Copyright Act of 1978. The CAB also seeks to address the lingering effects of Apartheid, notably the lack of bargaining power of black artists vis-à-vis white-owned publishers and media companies. Relatedly, South Africa still experiences a very uneven distribution of income, with many impoverished black students. The CAB cannot be evaluated fairly without considering this context.

Second, South Africa and other developing countries confront a frustrating Catch-22 with respect to copyright exceptions. When they seek normative work at the World Intellectual Property Organization concerning exceptions, the rights holders and developed countries, including the United States, insist that exceptions should be addressed only at the national level where country conditions can be considered. But if a country such as South Africa then attempts to adopt exceptions that are mindful of the domestic situation, the rights holders claim that the exceptions are inconsistent with the Berne three-step test and enlist the U.S. government to intimidate the country into abandoning the exercise.

Third, as a matter of policy, the United States should always support other countries’ adoption of provisions based on U.S. copyright law. This is true regardless of whether the provision expands copyright or limits it. To oppose such adoption appears hypocritical and condescending.

Fourth, following from the previous point, the CAB and PPAB amendments that are not based on U.S. law have precedents elsewhere in the world. Contrary to IIPA's suggestions, these amendments do not deviate from global standards.

Fifth, the bills contain many features that significantly benefit large copyright owners, including the establishment of the Intellectual Property Tribunal, the prohibition of circumvention of technical measures, the prohibition on the removal of copyright management information, and the granting of additional rights to performers. IIPA minimizes or finds fault with these provisions so as not to detract from its narrative of the bills' inadequacy. But the bills aren't inadequate. To the contrary, they strike a balance among the interests of individual creators, corporate copyright owners, distributors, and the public at large.

Sixth, 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. Rather, they concern with the allocation of rights—and money—among different rights holders. These provisions should be outside the scope of this review.

Seventh, some of the IIPA's attacks are based on a fundamental misunderstanding of existing South African law. For example, IIPA incorrectly states that injunctive relief is not available in South Africa. Such relief in fact is currently available under section 24(a) of the existing law. Further, the new Intellectual Property Tribunal will have the power to issue injunctions under section 29H(b). Perhaps the IIPA is confused by the law's use of the term "interdicting" rather than "enjoining."

Eighth, as discussed below, many of the concerns raised by the IIPA are highly technical definitional or interpretive matters. USTR should not be reviewing another country's copyright law on such a granular level. When these concerns might be sufficiently important to warrant USTR's intervention, they could easily be addressed by regulations. It must be stressed that regulations—or what is termed in South Africa secondary legislation—plays a much more significant role in South African law than in U.S. law. Thus, Section 39(d) of the existing law, which is not amended by the CAB, authorizes the Minister to promulgate regulations "as to any matter which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved." IIPA overlooks this fundamental difference between South African law and U.S. law; it fails to appreciate the significant role regulations, or secondary legislation, plays in South African law.

Finally, if the South African President sends the CAB and PPAB back to Parliament, there is a good chance that South Africa will not adopt a copyright amendment bill for another five or even ten years. The involvement by IIPA and other foreign rights holders has proven incredibly divisive in South Africa, and there won't be the appetite to return to such a controversial topic. This means that provisions sought by IIPA, such as those relating to technical protection measures, would be delayed indefinitely.

1. Contractual Freedom

IIPA's longest and most detailed discussion concerns the bills' "severe restriction on the freedom of rights holders to contract in the open market." This also is the first issue IIPA raises.

Accordingly, it is likely that this is IIPA's highest priority. Significantly, the alleged restrictions IIPA identifies have nothing to do with the question of adequate and effective protection of intellectual property. Instead, they address the allocation of rights (and thus money) between original creators and media companies. One may agree or disagree with the bills' efforts to strike a more equitable balance between artists and distributors, but this should be outside the scope of this review of South Africa's eligibility for trade preferences.

A. Reversion of Rights

IIPA complains that Sections 22(b)(3) of the CAB and 3A(3)(c) of the PPAB limit assignment of rights in literary and musical works and performances to a maximum of 25 years. That is, 25 years after a creator assigns his copyrights to a publisher or other media company, the rights would revert to the creator. Such reversion rights exist in the United States, 35 years after the transfer. 17 U.S.C. § 203. And as in the CAB and PPAB, this reversion can occur notwithstanding any agreement to the contrary. 17 U.S.C. § 203(a)(5).

In other words, the IIPA is objecting to a feature of the CAB and PPAB analogous to an existing provision in U.S. law. These provisions have the same objective: to protect the creator from exploitation by media companies who have all the bargaining power. It should be noted that IIPA represents large media companies, not individual artists.

In both the U.S. and South Africa, there is a long history of record labels and other media companies exploiting creators, especially artists of color early in their careers. Many performing artists have aged in poverty because they signed away all their rights in their youth and media companies have denied them a fair share of the profits. There is unequal bargaining strength between sophisticated companies with their armies of lawyers and individual artists who focus on their craft. The South African bills correctly try to level the playing field.

It should be noted that the economic value of the vast majority of works is exhausted within five years after publication. Thus, in most cases, the publisher would no longer be exploiting the work 25 years after the assignment. The author, however, might be interested in continued distribution of the work. Even a small volume of sales could be welcome income to the author. Moreover, the author might see a value in making the work available for free.¹

Additionally, the reversion of rights is prospective; it applies only to assignments that occur after the bills take effect. This means that creators and publishers could fashion contracts that would protect their interests in the future. To be sure, a complete waiver of reversion rights likely would be unenforceable under new section 39B. But section 39B renders unenforceable only terms which purports "to renounce a right or protection afforded by this Act." The parties could negotiate terms that would govern their relationship 25 years after the initial assignment that would not constitute a renunciation of the reversion rights. For example, the contract could provide the publisher with the means to continue existing uses, subject to remuneration, on a non-exclusive basis.

¹ See Joshua Yuvaraj and Rebecca Giblin, *Are Contracts Enough? An Empirical Study of Author Rights in Australian Publishing Agreements*, __ U. Sydney L. Rev. __ (forthcoming 2020).

Indeed, under PPAB section 3A(3)(a) and CAB section 39, the Minister could prescribe standard terms for contracts that would not be invalidated by CAB section 39A. In particular, the Minister could prescribe terms for contracts with backup singers that would reduce any undue burdens to record producers. Regulations could clarify that the reversion rights apply only to principal performers of a sound recording, and not every performer in a work. Most copyright systems provide statutory reversion rights to artists,² and they have found mechanisms for addressing the problem of multiple performers in a work.

Finally, copyright ownership typically is determined by the law of the work's country of origin. *Itar-Tass News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 88–92 (2d Cir. 1998). Accordingly, the bills' reversion of rights provisions will have no impact on the ownership of the copyrights in the works created by IIPA members in the United States.

B. Ministerial Powers to Set Contractual Terms

IIPA attacks the CAB and the PPAB for including “sweeping” ministerial powers to set contractual terms related to copyright. This criticism is grossly premature. Simply granting the Minister the power to set “compulsory and standard contractual terms” does not mean that the Minister would exercise this power. Moreover, IIPA has no way of knowing what terms the Minister may eventually set. The South African government has made it clear the intent that the Minister set standard terms for contracts when abuses arise in the marketplace. IIPA members can prevent the Minister from setting unwanted standard terms by treating authors fairly.

Additionally, the IIPA overlooks the possibility that this power could be used in a manner beneficial to IIPA members. As noted in the previous section, the Minister might prescribe terms that address concerns about reversion.

Finally, at the hearing, witnesses from Ireland, Portugal, and Germany testified that provisions allowing the government to set aside contractual terms are common in the European Union. South Africa's grant of this power to the Minister provides no basis for finding that IP protection in South Africa is not adequate or effective.

C. Remuneration of Performers

Section 8A of the CAB requires royalty payments to audiovisual performers. As with the provision on reversion, Section 8A is intended to redress the exploitation of performers. However, it should be noted that this provision does not take effect until the Minister promulgates regulations for its implementation, CAB Section 38, which must then be approved by the National Assembly. *See* CAB Section 8A(5)(b)(iii). In other words, the royalty provisions won't take effect until mechanisms for distributing these royalties are approved by both the Minister and the National Assembly. IIPA and USTR will have ample opportunity to provide their views to the Minister and to the National Assembly on the regulations if they are not sufficiently equitable and practicable. Because Section 8A is severable from the rest of the CAB

² Paul J. Heald, *Copyright Reversion to Authors (and the Rosetta Effect): An Empirical Study of Reappearing Books*, 66 J. Copyright Soc'y 59 (2019).

and takes effect only at some undetermined date in the future, the President need not delay signing the bill because of concerns relating to Section 8A.

Additionally, as noted above, copyright ownership typically is determined by the law of the work's country of origin. *Itar-Tass News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 88–92 (2d Cir. 1998). Thus, for an American film, the copyright interest of performers (and thus the right to royalties) would be determined based on U.S. law, not South African law. Under U.S. law, a performer's contribution to a motion picture is a work-made-for-hire. This means that Section 8A would not apply to films made in the United States.

D. Contractual Override.

IIPA's final "freedom of contract" point is that CAB Section 39B(1) "prohibits any contractual terms that deviate from the provisions of the bill." This is a mischaracterization of Section 39B(1). Rather, Section 39B(1) provides that any term that purports to "renounce" a right or protection afforded by the Act is unenforceable. "Renounce," of course, contemplates a complete waiver of a right. Nothing in Section 39B(1) would prevent a more limited restriction of a right agreed to for adequate consideration after a fair negotiation.

Moreover, it should be noted that several EU Directives prohibit the contractual override of exceptions, including the Digital Single Market Directive, the Marrakesh Directive, the Database Directive, and the Software Directive. All the EU member states have adopted these contractual override provisions. Furthermore, the UK, Germany, Ireland, Portugal, Montenegro, and Belgium have enacted contractual override provisions that go far beyond those required by the EU Directives.³ South Africa should not be punished for doing what these other countries have done.

2. Fair Use

IIPA opposes the inclusion of a fair use provision based on 17 U.S.C. § 107. Many other entities are responding to this complaint, so we will not discuss it in detail. We just reiterate our general point above that United States should never oppose another country's adoption of provisions based on U.S. copyright law.

Additionally, we note that IIPA appears to imply that a fair use provision might be inconsistent with the three-step test in the Berne Convention and the TRIPS Agreement. This is a dangerous argument for IIPA to make, because if Section 12A of the CAB violates the three-step test, so does 17 U.S.C. § 107.

Finally, IIPA repeatedly refers to the uncertainty of fair use. However, over the last decade, several empirical studies of U.S. fair use case law have highlighted significant alignment among courts on both analysis of the specific fair use factors as well as overall outcomes of clusters of

³ See International Federation of Library Associations and Institutions, *Protecting Exceptions Against Contractual Override*, https://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/contract_override_article.pdf.

similar cases. See Matthew Sag, *Predicting Fair Use*, 73 Ohio St. L.J. 47, 47 (2012) (“[T]he fair use doctrine is more rational and consistent than is commonly assumed.”); Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L. Rev. 2537, 2541 (2009) (“This Article argues that fair use law is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns”); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. Penn. L Rev. 549, 621 (2008) (“In practice, judges appear to apply section 107 in the form of a cognitively more familiar two-sided balancing test in which they weigh the strength of the defendant’s justification for its use, as that justification has been developed in the first three factors, against the impact of that use on the incentives of the plaintiff.”); Neil Netanel, *Making Sense of Fair Use*, 15 Lewis & Clark L. Rev. 715, 719 (2011) (“Looking at fair use’s recent historical development, on top of Beebe’s and Sag’s statistical analyses and Samuelson’s taxonomy of uses, reveals greater consistency and determinacy in fair use doctrine than many previously believed was the case.”); Clark Asay, *Is Transformative Use Eating the World?*, 61 Boston Col. L. Rev. ___, 24 (forthcoming 2020) (“[O]ver time there has been a steady progression of both appellate and district courts adopting the transformative use paradigm, with modern courts relying on it nearly ninety percent of the time.”). In sum, fair use is not uncertain in the United States; there is no reason it should be more uncertain in South Africa.

3. Other Exceptions and Limitations

IIPA states that the CAB “drastically” expands the limitations for libraries, galleries, and museums, but then does not provide any specific criticisms of Section 19C. We will respond to the specific criticisms IIPA makes of other exceptions.

A. Personal Uses

IIPA claims that the exceptions for personal uses without remuneration in CAB Sections 12B(1) and (2) are “out of step with international norms.” While it is true that personal uses are subject to remuneration in the EU, they are not in most other countries. They certainly are not in the United States, where personal uses fall within the scope of fair use. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

B. Translations for Educational Uses

IIPA worries that the exception in Section 12B(1)(f) for making translations for educational purposes “could be interpreted too broadly.” The solution to this perceived problem is regulations that provide the proper interpretation. The IIPA should act constructively by proposing the interpretative language that would address its concerns.

C. Temporary Reproductions

IIPA asserts that the exception in Section 12C for temporary reproductions to enable transmissions “could hinder efforts to work with online intermediaries to put a stop to piracy.” The language of section 12C first appeared in Article 5(2) of the EU Information Society Directive, and has been adopted broadly by jurisdictions around the world. IIPA seeks to expose service providers in South Africa to significantly greater liability than service providers elsewhere.

D. Quotations

IIPA criticizes the “broad and circular” exception for quotations in Section 12B(1)(a). The language in Section 12B(1)(a) is virtually identical to the language in Article 10(1) of the Berne Convention; any breadth and circularity is the fault of Berne Convention. Further, IIPA suggests that the exception’s lack of specificity renders the exception “incompatible” with the three-step test. However, the quotation right in Article 10(1) of the Berne Convention is not subject to the three-step test. Moreover, this exception is no broader than the quotation exception in many other countries.

E. Educational Uses

IIPA attacks subsection 12D7(a) as a threat to “academic freedom” because it gives the author of a scientific article that is the result of a research activity primarily funded by the government the right to make the article available on an open access basis. This is a truly Orwellian argument. How does preserving a scientist’s right to make her research publicly available undermine her academic freedom? The statute doesn’t obligate her to provide open access, although the Government certainly has the power to do so as a condition of its providing the research funding. Indeed, the United States government conditions its research grants on making the resulting articles available on an open access basis. So do the EU and many other research funders around the world.

IIPA also objects to Section 12D(4)(c), which permits the making of a copy of an entire textbook when a copy cannot be obtained “at a price reasonably related to that normally charged in the Republic for comparable works.” The median household income in the United States is over \$70,000. The median household income in South Africa is around \$13,000, and \$9,000 for black families. The higher education textbook market in South Africa is dominated by the UK publisher Pearson. For certain titles, Pearson charges the same prices in South Africa as it does in the UK or the United States, notwithstanding the enormous disparity in income. When a textbook publisher charges prices most students cannot possibly afford, the publisher cannot reasonably expect to make many sales. Accordingly, in such a special case, the copying of the textbook does not unreasonably prejudice the legitimate interests of the rights holder.

Further, the reasonable price standard appears in the U.S. Copyright Act. See 17 U.S.C. § 108(h)(2). See also 17 U.S.C. § 108(c)(1) and (e) (“cannot be obtained at a fair price”).

In any event, regulations could provide additional certainty concerning the application of the reasonable price stand.

F. People with Disabilities

IIPA argues that the section 19D exception for the making of accessible format copies should apply only to authorized entities, as provided in the Marrakesh Treaty. However, the Marrakesh Treaty is not restricted only to authorized entities. Article 4(1)(a) of the Treaty simply provides that Contracting Parties *shall* provide for an exception to the right of reproduction and distribution “to facilitate the availability of works in accessible formats.” Article 4(2) then states that one way to meet the obligations under Article 4(1) is to permit an authorized entity to make and distribute accessible format copies. But even Article 4(2) isn’t limited to authorized entities.

It also permits a person with a print disability, or someone acting on her behalf, to make an accessible copy. Many of the jurisdictions that have implemented the Treaty, including the European Union, have followed the Article 4(2) approach (*i.e.*, extending the exception to authorized entities, people with disabilities, and others acting on their behalf). Some countries, like Chile or the Cook Islands, have taken an even broader approach.

4. Communication to the Public and Making Available

IIPA identifies what it claims are ambiguities concerning the rights of communication to the public and making available. Any such ambiguities can be addressed by regulation.

5. Technological Protection Measures

IIPA identifies three problems with the new provision prohibiting the circumvention of technological protection measures (“TPMs”) that it claims are so severe that the new provision does not meet the requirements of the WIPO Performances and Phonograms Treaty (“WPPT”). As an initial matter, IIPA provides no support for its interpretation of WPPT’s obligations concerning technological measures. The language of Article 18 of the WPPT is very general. The benchmark the IIPA seems to be using—17 U.S.C. § 1201—is not the standard required under the WPPT.

Further, IIPA overstates the severity of the drafting issues in this provision. First, IIPA states that the definition of TPM refers only to technologies that prevent infringement, as opposed to technologies *designed* to have that effect. However, the WPPT requires that the contracting parties “provide adequate legal protection and effective legal measures against the circumvention of *effective* technological measures.” Thus, the CAB’s definition of technological protection measure satisfies the WPPT. If this definition requires further clarification, that can be accomplished via regulation.

IIPA’s second criticism is equally trivial. It believes that the CAB’s definition of a TPM circumvention device is insufficient because it applies only to devices “primarily designed, produced, or adapted for purposes of enabling or facilitating the circumvention” of a TPM. Thus, even the inclusion of “designed” is insufficient for IIPA. Here, IIPA is also demanding reference to advertising and marketing. Clearly, there is no satisfying the IIPA.

IIPA’s third criticism is that the exceptions regarding TPMs “are inadequately defined, therefore rendering them incompatible with the three-step test.” The obligations in the WPPT and the WIPO Copyright Treaty (“WCT”) have nothing to do with the three-step test. The three-step test concerns exceptions to copyright law, not exceptions to the additional layer of protection provided by the prohibition on TPM circumvention, which copyright scholars consider to be “paracopyright.” Peter Jaszi, *Intellectual Property Legislative Update: Copyright, Paracopyright, and Pseudo-Copyright*, May 1998.

IIPA also appears to complain that liability would be imposed only if there is a nexus between circumvention and infringement. However, courts in the Sixth and Federal Circuit’s require precisely such a nexus before imposing liability under the DMCA.⁴

6. Penalties for Infringement

IIPA asserts that the CAB lacks appropriate remedies for infringement. It first observes that criminal fines will not assist copyright owners in recovering losses from infringement because the money does not go to them. This is true with respect to criminal fines in the United States as well. IIPA also complains that the CAB does not provide copyright owners with additional remedies in cases of online infringement. In support of this argument, it provides statistics concerning global online piracy. Further, the remedies it seeks such as “ensuring online platforms do not make or allow unauthorized use of copyrighted works on their platforms,” do not exist in U.S. law. It appears that IIPA is requesting USTR to impose the EU Digital Single Market’s filtering obligations on South Africa. Additionally, IIPA overlooks the CAB features relating to TPMs and copyright management information that target the digital environment. Finally, when complaining that statutory or punitive damages are not available in South Africa, IIPA ignores section 24(3) of the Copyright Act of 1978, which allows a court to award additional damages in cases of flagrant infringement.

7. Intellectual Property Tribunal

The IIPA’s objections to the new Intellectual Property Tribunal are truly bizarre and contradictory to its other criticisms of the CAB. IIPA argues that South African judges lack the capacity to consider matters such as fair use, but then opposes granting a specialized tribunal with the jurisdiction to handle matters such as fair use. It complains about the “legal fees and protracted timeframes” of litigation in South African courts, but then rejects a tribunal intended to provide quick and low-cost resolution of copyright disputes. It should be noted that U.S. copyright owners currently are lobbying for the creation of a small claims tribunal in the U.S. Copyright Office—exactly what the CAB provides copyright owners in South Africa. Again, it appears that there is no satisfying the IIPA.

The one point IIPA makes that may have some merit is that the CAB does not establish detailed benchmarks for determining royalties. These benchmarks (*e.g.*, a willing buyer/willing seller standard) can be set forth in regulations.

8. Collective Management of Rights

IIPA opposes a provision which appears to preclude a collective management organization (“CMO”) from representing both recording artists and record labels. CMOs in South Africa, as is

⁴ See *Chamberlain, Inc. v. Skylink*, 311 F.3d 1178 (Fed. Cir. 2004); *Static Control Components v. Lexmark International, Inc.*, 387 F.3d 522 (2005).

other countries, have a long history of corruption and mismanagement.⁵ The South African government could reasonably determine that including record labels and recording artists in the CMO would lead to serious conflicts of interest, with the record labels dominating the CMOs to the recording artists' detriment.

9. State Intervention in Private Investments

The concern IIPA raises with section 5(2) of the CAB appears to be based on a misunderstanding of the provision. The proposed amendment simply extends the existing "crown copyright" provision to local governments, in the same way that state and local governments in the United States can own copyright. We disagree with the policy behind crown copyright, but the existence of crown copyright cannot be construed as denying adequate and effective protection for intellectual property.

10. Term of Protection

IIPA complains that the PPAB does not extend the term of protection in sound recordings from 50 years to 70 years. However, the term of protection for sound recordings set forth in the TRIPS Agreement and the WPPT is 50 years. South Africa should not be penalized for complying with, but not exceeding, these international standards.

11. Other Issues

IIPA briefly discusses other issues relating to copyright piracy and enforcement. IIPA incorrectly states that injunctive relief is not available in South Africa. Such relief in fact is currently available under section 24(a) of the existing law. Further, the Intellectual Property Tribunal will have the power to issue injunctions under section 29H(b). Perhaps the IIPA does not understand the meaning of the phrase "interdicting conduct which constitutes an infringement."

IIPA also complains that the South African copyright law does not prevent parallel imports. Neither does the U.S. Copyright Act. *Kirtsaeng v. Wiley*, 568 U.S. 519 (2013). Once again, IIPA is attacking South Africa for a feature similar to U.S. law.

Conclusion

The CAB and the PPAB are not perfect. No legislation is. Legislation reflects compromises among diverse stakeholders, meaning that it contains ambiguities and certain policy choices any given stakeholder might oppose. Many of the policy choices made in the bills are completely consistent with U.S. law. Others attempt to redress structural imbalances arising out of Apartheid. Uncertainties in the bills can be eliminated through regulation. But one thing is certain now: the bills significantly increase the overall level of copyright protection in South

⁵ See Jonathan Band and Brandon Butler, *Cautionary Tales About Collective Rights Organizations*, 21 Michigan St. Int'l L. Rev. 687 (2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149036; Jonathan Band and Brandon Butler, *Cautionary Tales About Collective Rights Organizations, Part 2*, <http://infojustice.org/archives/39886>.

Africa, and thus their enactment provides no plausible basis for South Africa losing its eligibility for trade preferences on account of not providing adequate and effective protection for intellectual property.

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