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July 17, 2019

Submitted Electronically via EDIS and in Copies to the Commission,
Investigation No. 332–571

Ms. Lisa R. Barton
Secretary to the Commission
United States International Trade Commission
500 E Street, SW
Washington, DC 20436

Re: **Pre-Hearing Statement of the International Intellectual Property Alliance (IIPA) Related to: *U.S. Trade and Investment with Sub-Saharan Africa: Recent Trends and New Developments*; Institution of Investigation and Scheduling of Public Hearing, Investigation No. 332-571, 84 Fed. Reg. 28587, June 19, 2019.**

Dear Ms. Barton:

Attached please find the Pre-Hearing Statement of the International Intellectual Property Alliance (IIPA) related to the following request for comments: *U.S. Trade and Investment with Sub-Saharan Africa: Recent Trends and New Developments*. We understand the public hearing is scheduled for July 24, 2019.

Respectfully submitted,

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Pre-Hearing Statement

of the International Intellectual Property Alliance (IIPA)[1]

before the United States International Trade Commission (USITC)

Related to U.S. Trade and Investment with Sub-Saharan Africa:

Recent Trends and New Developments – July 24, 2019

Introduction

The International Intellectual Property Alliance (IIPA),[2] is a private sector coalition formed in 1984, consisting of trade associations that represent the U.S. copyright-based industries. The following is our Pre-Hearing Statement related to: *U.S. Trade and Investment with Sub-Saharan Africa: Recent Trends and New Developments*.

In particular, IIPA's comments focus on two aspects of the request letter from the United States Trade Representative (USTR) – Items #3 and #5. Item 3 requests the following information: "To the extent information is available, describe the intellectual property

[1]Kevin M. Rosenbaum, Counsel to IIPA will appear at the July 24, 2019 hearing.

[2]IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA include Association of American Publishers (www.publishers.org), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association of America (www.mpaa.org), and Recording Industry Association of America (www.riaa.com). Collectively, IIPA's five member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world. These include entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music recorded in all formats (from digital files to CDs and vinyl), for streaming and download services, or synchronization in audiovisual materials; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.

environment, including national and regional laws, enforcement measures, and infringement issues, in key [Sub-Saharan Africa (SSA)] markets. Through case studies describe the effects of the intellectual property environment on trade and investment in key SSA markets." Item 5 requests the following information: "Provide a broad overview and describe recent developments in the digital economy for key SSA markets. Provide information on the market for digital technologies in those key SSA markets as well as the role of digital products and services from the United States. To the extent that data are available, describe the market for digital products and services, such as internet-connected devices, cloud computing, e-commerce, internet of things, blockchain, and internet search and digital content, as well as how adoption of digital technologies affects other industry sectors such as manufacturing and other services. Describe current and national regulatory and policy measures and market conditions in key countries in SSA that affect digital trade."

The U.S. copyright-based industries are one of the fastest-growing and most dynamic sectors of the U.S. economy.[3] Inexpensive and accessible reproduction technologies, however, make it easy for copyrighted materials to be reproduced and distributed in foreign countries, including via the online environment. IIPA's goals abroad include for foreign countries to adopt modern copyright laws and enforcement regimes that encourage the creation and dissemination of copyright materials, and that deter piracy of unauthorized materials in these countries. Modern and effective copyright laws and enforcement regimes create a framework for trade in

[3]See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2018 Report* (December 6, 2018) available at https://iipa.org/reports/copyright-industries-us-economy/. The "core" copyright industries in the U.S. outpaced the U.S. economy, growing 5.23% between 2014 and 2017, while the U.S. economy grew by 2.21%. The core copyright industries generated over $1.3 trillion dollars of economic output in 2017, accounting for 6.85% of the entire economy. Core copyright industries are those whose primary purpose is to create, produce, distribute, or exhibit copyright materials.

creative products, foster technological and cultural development, and encourage investment and employment in the creative industries.

As SSA economies develop, governments should look to domestic copyright laws and enforcement mechanisms that can incentivize the creation and licensing of their own creative materials, and that will foster economic growth and stability. IIPA appreciates the opportunity to participate in this investigation and to provide information describing the copyright environment, as well as recent developments in the digital economy, in key SSA markets.

Intellectual Property Environment in SSA

Intellectual property regimes, specifically copyright laws and practices, encourage the creation of new creative works, and provide incentives for disseminating these works as broadly as possible. Good copyright laws also help to promote investments needed to renew and preserve the creative process and cultural enterprise, and also promote technological advances used to produce and distribute copyrighted materials. The adequate and effective protection and enforcement of copyright is the foundation on which both U.S. and local creators and investors base their production and distribution activities in SSA markets. Indeed, creators from SSA countries recognize the importance of adequate and effective copyright protection and enforcement to incentivize investment in the production of cultural works, and allow local artists to sustain their livelihoods. There is no shortage of news reports that highlight local artists struggling to make a living in the face of widespread piracy in SSA.[4] In one recent story, a

[4]See, e.g., Peace Hyde, "The Fortune and Fury Behind Nollywood," Jan. 30, 2018, Forbes Africa, https://www.forbesafrica.com/life/2018/01/30/fortune-fury-behind-nollywood/ (quoting Kofi Ansah, an emerging Ghanaian movie producer: "Piracy works with informal networks and to be honest, there is really no fear of punishment because you hardly hear of anybody who has been arrested on the grounds of video piracy. That is where the law needs to act. Instill a fear of imprisonment and people will behave accordingly."); Sharon Kantengwa, "Rwanda: Why Rwanda's Hillywood Dream Is Still Elusive," Mar. 2, 2018, The New Times,

Cameroonian saxophonist, referring to the proliferation of pirated content across Africa, stated simply: "Who is paying the price? Right now it's the artists."[5]

Much is at stake in SSA. Studies undertaken by the World Intellectual Property Organization (WIPO) in the region indicate that the copyright industries – both domestic and foreign – provide significant contributions to SSA local economies.[6] Unfortunately, antiquated copyright laws and enforcement practices have held back the development of the creative industries in SSA. To improve local culture, as well as local economies, SSA countries should update their copyright regimes into the modern digital age. In the absence of modern copyright regimes, investments in the creation, production, and dissemination of creative works will be lacking, denying access to important creative works that advance not just cultural, but also scientific and educational systems. Adequate and effective copyright protection and enforcement is required for investors to take the often enormous financial risks of producing and disseminating a complete creative work, motivated by the prospect for realizing a financial return on the investment (as well as by the desire to enrich the local, national, or global culture and

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https://allafrica.com/stories/201803020040.html (quoting Willy Ndahiro, an actor and founder of Hillywood Actors and Modelling Agency: "Rwandan films are not well protected property rights infringement. Although the law was put in place in 2009, stakeholders have not put into account any implementation and instead movies are increasingly being pirated."); Muhamed Bah, "Gambia: Film Makers, Actors Lament On Challenges Within the Industry," July 6, 2018, FOROYAA Newspaper, https://allafrica.com/stories/201807060745.html (quoting Sheikh Tijan Sonko, a film producer, actor and entertainer: "Government must do all they can to assist them in their fight against piracy on their products; that this is the worst illegal activity that is killing their work; that they will not make any gain either for the nation or themselves, if this illegal activity continues.").

[5]See Aarni Kuoppamäki, "Stolen melodies: Copyright law in Africa," November 6, 2018, DW.com, https://www.dw.com/en/stolen-melodies-copyright-law-in-africa/a-44149899.

[6]The World Intellectual Property Organization (WIPO) has undertaken a series of studies using WIPO-approved guidelines to measure the contribution of the copyright industries to economies around the world. In Sub-Saharan Africa (SSA), WIPO has done such studies in Ethiopia, South Africa, and Tanzania. For Ethiopia, WIPO found that in 2012 the copyright industries contributed 4.73% of Ethiopia's GDP, and 4.2% of employment (see https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_et.pdf); for South Africa, WIPO found that in 2008 the copyright industries contributed 4.11% to GDP, and 4.08% to employment (see https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_za.pdf); and for Tanzania, WIPO found that between 2007 and 2010 the copyright industries generated 3% to 4.6% of GDP, and 4.5% and 5.7% of employment (see https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_tz.pdf).

scientific and educational communities). Only where these legal regimes are in place and functioning well can creators themselves contemplate the prospect of making a living through their creative activities. Moreover, without adequate and effective copyright protection and enforcement, local treasuries are denied revenues derived from legitimate business activity related to the making and distribution of copyrighted materials.

The importance of copyright in promoting the creation and dissemination of music, films, literary works (including educational materials), entertainment software, and other products is perhaps most acutely felt in smaller markets and less developed economies, such as those in SSA. When works originating in the developed world and catering to international markets are copied, disseminated, or otherwise exploited in these smaller or less developed markets without the authorization of the author, the injuries inflicted, while real and substantial, are to some extent ameliorated by the fact that the work might still be successfully exploited by the author in other national markets. Investments in music performed in the Spanish language, for example, or in a film with an English script, may produce a reasonable return from international markets, even if a few of those markets are closed due to widespread and un-remedied infringements. By contrast, for books, music or films in a language such as Igbo or Yoruba, the situation may be quite different. Such creative content may have only a very limited market outside regions of Nigeria. The risks not only to the local economy and to authors' and artists' livelihoods, but also to cultural diversity, if these works are not adequately protected is apparent.

For the building blocks of a modern copyright regime, SSA countries should look to the obligations of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights ("TRIPS Agreement"), which provide global minimum standards of copyright protection and enforcement. In addition, the standards provided under the World Intellectual Property

Organization (WIPO) Internet Treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) – contemplate many of the legal norms for a sustainable and healthy online marketplace. These treaties establish a foundation for essential legal frameworks for the continued growth of legitimate digital trade by providing copyright holders with a full panoply of exclusive rights in the digital networked environment to protect their valuable content. It is critical for SSA countries to meet the requirements of TRIPS and the WIPO Internet Treaties in order to foster local creative industries and attract foreign direct investment. As indicated below, key SSA markets have not yet put in place the necessary laws and enforcement practices that would provide creators, both foreign and domestic, with adequate and effective protections for their creative content.

IIPA highlights below serious concerns with **South Africa's** copyright law amendments, as well as some positive indications of improvements in copyright protection and enforcement in **Nigeria, Burundi, Kenya, Rwanda, Tanzania,** and **Uganda**.

The Government of **Nigeria** has recognized the importance of the growing film industry, now the second largest in the world by production volume, as well as a vibrant and growing music industry.[7] Nigeria's Minister of Information and Culture, Lai Mohammed, recently commented, "When we talk about diversifying the economy it is not just about agriculture or solid minerals alone, it is about the creative industry – about the films, theatre and music."[8] Unfortunately, pervasive piracy remains a significant obstacle for Nigerian authors and artists,

[7]Symbolic of Nigeria's growing music industry, Universal Music recently launched a division in Nigeria. See Richard Smirke, "Universal Music Grows African Presence With Launch Of Nigeria Division," July 17, 2018, Billboard, https://www.billboard.com/articles/business/8465836/universal-music-nigeria-western-africa-ezegozie-eze.

[8]See Franck Kuwonu, "Nigeria's 'new oil' export is beating the charts," May 28, 2018, Business Report, https://www.iol.co.za/business-report/opinion/opinion-nigerias-new-oil-export-is-beating-the-charts-15194513.

who, as a result, struggle to receive any compensation for their works.[9] Illustrating the problem, a Nigerian actor commenting on the decline of that country's Hausa language film industry (known as "Kannywood") said, "We are all not happy and surely, piracy was what destroyed us."[10] Furthermore, in a 2019 Muso and GumGum Sports study, Nigeria (along with Kenya) were among the top five countries in the world illegally streaming English Premier League (EPL) soccer games.[11] Stronger copyright protection and enforcement are needed to support the country's burgeoning creative sector, which, according to one study, is expected to grow from $4.8 billion in 2015 to more than $8 billion in 2019.[12] For the past four years, the Government of Nigeria has slowly worked to update its 1978 Copyright Act, including by ratifying the WIPO Internet Treaties in 2017. A draft bill was completed by the Nigerian Copyright Commission (NCC) in 2018. IIPA encourages the Government of Nigeria to fully implement the treaties, which will support the growth of that country's vibrant and growing creative industries. In addition, capacity building is needed in Nigeria to increase awareness not only of intellectual property crimes, but also of the legal tools that aid in enforcement against all forms of cybercrime.[13]

The East African Community (the regional intergovernmental organization of **Burundi, Kenya, Rwanda, Tanzania,** and **Uganda**) adopted the EAC Creative and Cultural Industries Bill of 2015, which would establish a Creative and Cultural Industries Council, whose purposes

[9]See, e.g., Dionne Searcey, "Nigeria's Afrobeats Music Scene is Booming, but Profits Go to Pirates," June 3, 2017, NY Times, https://www.nytimes.com/2017/06/03/world/africa/nigeria-lagos-afrobeats-music-piracy-seyi-shay.html.
[10]See, Mohammed Lere, "Nigeria: Kannywood is on the Brink of Collapse – Actor," June 24, 2019, Premium Times, https://allafrica.com/stories/201906240774.html.
[11] See James Kariuki, "Kenyans Leads in Illegal Streaming of EPL Matches," July 11, 2019, Daily Nation, https://allafrica.com/stories/201907120142.html.
[12]See Kuwonu, https://www.iol.co.za/business-report/opinion/opinion-nigerias-new-oil-export-is-beating-the-charts-15194513. See also Joseph Onyekwere, "Nigeria: Outdated Laws, Bane of Nigeria's Creative Industry, Says Idigbe," May 15, 2018, The Guardian, https://allafrica.com/stories/201805150315.html.
[13]See Adeyemi Adepetun, "25% of cybercrime cases unresolved," Sep. 2, 2015, The Guardian, http://www.ngrguardiannews.com/2015/09/25-of-cybercrime-cases-unresolved/.

include "to enhance awareness of intellectual property rights, and consequently strengthen the foundation for successful creative and cultural industries."[14] Unfortunately, Tanzania has withheld its assent for this initiative, putting its future in jeopardy.[15] IIPA encourages Tanzania and the rest of the East African Community to follow through with this important commitment to incentivize its creative and cultural industries, with dedicated resources and the assistance of international capacity building wherever available.

In Kenya, the government introduced a Copyright Amendment Bill in 2017 to modernize its copyright law. While the Bill would provide rights holders with some important protections needed for the digital age, there are concerns regarding the scope of those protections, including whether they are consistent with international standards and best practices. Furthermore, while Kenya has announced its intention to accede to the Internet Treaties, there has been no stated timeframe for accession. IIPA encourages Kenya to accede to and implement these treaties as soon as possible. The Attorney General of Kenya, Paul Kihara, recently affirmed that the government "is considering ratification of the WIPO Internet Treaties," and that the Copyright Amendment Bill has been forward to Parliament. Encouragingly, the Attorney General highlighted the creative industries' contribution to Kenya's economy, estimated to be 5.3% of GDP, stating, "The protection of the copyrights will essentially put money into the pockets of authors, producers and all creators."[16]

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[14]See Section 6 of the Creative and Cultural Industries Bill; see also Anthony Weseka: "New Regional Law to Protect Artistes," Daily Monitor, Aug. 27, 2015, http://www.monitor.co.ug/News/National/New-regional-law-to-protect-local-artistes/-/688334/2847294/-/15f4mkrz/-/index.html.
[15]See Zephania Ubwani, "East Africa: EALA Bills Hang in the Balance After Rejection By Tanzania," April 24, 2017, The Citizen, https://allafrica.com/stories/201704240739.html.
[16]See Anyango Otieno, "AG: Kenya to ratify copyright protection, information laws", June 11, 2019, The Standard, https://www.standardmedia.co.ke/article/2001329381/how-copyright-creative-works-can-boost-gdp.

South Africa's 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. If enacted, the two new laws would violate South Africa's international obligations (including the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") and the TRIPS Agreement) and would result in a clear lack of adequate and effective intellectual property rights protection. The bills are also inconsistent with obligations of the WIPO Internet Treaties. South Africa's Cabinet recently approved the country's accession to these treaties, but at present, South Africa remains just a signatory to the treaties, and not yet a member of either the WCT or WPPT. The South Africa country report from the IIPA 2019 Special 301 submission (February 7, 2019) to USTR is appended to this filing and includes a full description of the deficiencies in these two bills, as well as other deficiencies in South Africa's legal and enforcement regimes.

Significant reforms are needed to South Africa's Copyright Law and Performers' Protection Act in order to bring the country's laws into compliance with international treaties and agreements, including TRIPS, and the WIPO Internet Treaties. In 2015, a Copyright Amendment Bill was introduced (2015 Bill), followed by a Performers' Protection Amendment Bill (PPAB), intended to effect this purpose. However, as IIPA detailed in extensive comments to the South African Government, these bills fell far short of international norms for the protection of copyrighted works in the digital era. Following criticism from many rights holder groups, including IIPA, the bills stalled pending further review and consultation with domestic and international stakeholders. In December 2016 and May 2017, two new Copyright Amendment bills—amounting to, in essence, a revised version of the 2015 Bill—were

introduced, and then further amended in 2018 (2018 Bill). A revised PPAB was also introduced in 2018.

Unfortunately, the 2018 Bill and the revised PPAB did not make significant improvements, but instead addressed only a few of the identified problems in the 2015 Bill. Moreover, many of the most problematic provisions for rights holders carried over to the new bills, and, additional provisions that are even more problematic were introduced in the new versions, all without public consultation in many instances. These two bills were adopted by the National Assembly in December 2018, and by the National Council of the Provinces in March 2019. At the time of this filing, the bills are awaiting Presidential assent.

The list of rights holders' concerns about these bills is long. Many provisions lack clarity and will undermine the creation, licensing and dissemination of copyrighted materials in South Africa. Adoption of this legislation risks major negative disruption of the creative industries, and will ultimately harm the creators and producers of copyrighted materials that the legislation is purported to protect (which is why there have been demonstrations in South Africa by local rights holders against the bills). In sum, the legislation falls far short of needed legal reforms to improve the South African marketplace for copyright creators and producers, and ultimately will harm consumers as well because rights holders will inevitably pull out of the marketplace. If these bills enter into force, South Africa's copyright framework would clearly not provide adequate and effective protection and enforcement of intellectual property.

Here is a summary of some of the major issues of immediate and primary concern to the copyright industries with this legislation:

- The inclusion of severe restrictions on the freedom of rights holders to contract in the open market, which is a key factor for the healthy growth of the entire creative sector. These restrictions would fundamentally impair the value of copyrighted materials by depriving rights holders of the ability to license and otherwise derive value from their property interest in their copyrighted works and sound recordings. For example, both the 2018 Bill and the PPAB limit assignments of rights to a maximum of 25 years, and both bills provide ministerial powers to set standard and compulsory contractual terms for contracts covering seemingly any transfer or use of rights.

- An ill-considered 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. The effects of this array of provisions will imperil legitimate markets for educational materials, locally-distributed works, and online works in general. Taken alone, the "fair use" and the "fair dealing" aspects of the proposed bill are each too broad. Taken together, the proposed "hybrid" model creates an unprecedented mash-up of exceptions and limitations that will deny rights holders fundamental protections that enable licensing of their copyrighted works and sound recordings, and, because the provision is drafted so unclearly, will also deny users certainty regarding what works and what uses are permissible without a license.

- The 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.

- Inadequate criminal and civil remedies for infringement, including online piracy, will deny the ability to effectively enforce rights against infringers, thus thwarting the ability for legitimate markets to develop for copyrighted works and sound recordings.

- Inadequate provisions on technological protection measures (TPMs) necessary for the licensing of legitimate content (for example, video-on-demand, or music streaming services), and overbroad exceptions to prohibitions on the circumvention of such measures, will further impinge on the ability of legitimate markets for copyrighted materials to launch and develop.

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). Moreover, aspects of both bills are incompatible with the WIPO Internet Treaties. The provisions are incompatible with a healthy, sustainable and fair digital marketplace for creators, both domestic and foreign.

Many of the proposals in the 2018 Bill and the PPAB are based on a false premise, i.e., that there is a fixed market for works and that the government's role is to regulate the internal relationships of the creative community, and their authorized distributors, rather than to incentivize new creative output. This premise is incorrect, however, and will instead result in a stagnation of South Africa's cultural and educational community. Without important revisions to these provisions, South Africa will be taking a step backward in its effort to strengthen copyright incentives. South Africa would be better served by providing clear and unencumbered

rights, and minimal restrictions on contractual freedoms, to allow the creative communities to increase investment to meet the growing demand for creative works of all kinds, in all formats, at all price points, in South Africa. This is important particularly in the context of the President's clear objective to improve levels of foreign direct investment, as well as the imperative to improve the lives and legacies of South Africa's own artists and creators.

Furthermore, this legislative process is occurring against a backdrop of increasing online piracy in South Africa. Growth in bandwidth speeds, coupled with lax controls over corporate and university bandwidth abuse, drive this piracy. In addition, piracy devices (i.e., set-top boxes equipped with apps for accessing pirated content) and sticks pre-loaded with infringing content or apps, continue to grow in popularity in South Africa. 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 copyright as one of its priorities.

The Digital Economy in Key SSA Markets

As evidenced by the growth of revenues, the copyright industries have embraced all means of digital technologies to produce and distribute their works and recordings, including launching new businesses, services, and apps to meet consumer demand. More legitimate copyrighted material is now available to consumers, and in more diversified ways and with more flexible pricing than at any time in history.[17] This consumer appetite for copyrighted materials

[17]For example, there are now over 45 million licensed tracks on major music streaming services (see e.g., https://www.apple.com/music; https://music.amazon.com/home) and hundreds of digital music services. For more information on the proliferation of services, see, e.g., https://www.mpaa.org/watch-it-legally/ (movies and TV content); http://www.whymusicmatters.com and http://www.pro-music.org/ (music); and https://www.theesa.com/wp-content/uploads/2019/05/ESA_Essential_facts_2019_final.pdf (video games).

does not stop at our borders. To meet worldwide demand, the copyright sector, more than any other in the U.S. economy, has moved aggressively to digitally deliver its products and services across borders, inextricably linking "digital trade" with trade in copyright-protected material.[18]

Thanks to ever-increasing adoption of mobile Internet and greater investment in digital distribution models, more and more Africans are able to access and consume film and television content through legitimate online services. According to data from Digital TV Research, the customer base for subscription video on-demand (SVOD) products in SSA will grow to 9.99 million people by 2023 – a 534.6% increase from 2017.[19] Revenues from Over-the-Top (OTT) online video streaming subscriptions in Africa and the Middle East are also on the rise, from $1.57 million in 2013 to $216.98 million in 2018, according to market research firm IHS.[20] The U.S. film and television industry engages in this region through both the licensing of content and by directly offering content to consumers over platforms, with Netflix and Amazon Prime, in particular, available in nearly all key SSA markets. The landscape of competitors, however, is diverse – encompassing local and foreign telecommunication services, Pay-TV providers, and VOD platforms.[21] Online video game services are also available in SSA. For example, Xbox software and services (comprising Xbox Live transactions and subscriptions) are available in

[18]A January 2018 Department of Commerce study, using the latest available year (2016) data, found that charges for the use of intellectual property, which includes copyrighted content, accounted for $124.5 billion of a total of $403.5 billion of potentially ICT (information and communications technology)-enabled services exports, or 31%. It also found that charges for the use of intellectual property accounted for $80 billion out of a total trade surplus of $159.5 billion of potentially ICT-enabled services, or over 50%. See, Department of Commerce "Digital Trade in North America" at 4, available at: https://www.commerce.gov/sites/default/files/media/files/2018/digital-trade-in-north-america.pdf.

[19]See, Rebecca Hawkes, "SVOD Set to Soar in Sub Saharan Africa." June 26, 2018, Rapid TV News, https://www.rapidtvnews.com/2018062552633/svod-set-to-soar-in-sub-saharan-africa.html#axzz5tUpiOK1G.

[20]IHS Markit "Broadband Media Intelligence Trax" database.

[21]Major players and brands include StarTimes, Airtel, Econet, Showmax, DStv, iFlix, NuVu, Kwesé, TracePlay and iRoko. Major markets include: Ghana, Kenya, Rwanda, Nigeria, Mozambique, D.R. Congo, South Africa, Tanzania, Uganda, Namibia, Cameroon, Zimbabwe, and Zambia.

South Africa.[22] As streaming has become an increasingly large segment of the digital music market worldwide, many streaming services have entered the African market to unleash Africa's potential as a legitimate market for music consumption. While Internet penetration has grown in Africa, these services must overcome challenges posed by widespread piracy and poor Internet infrastructure.[23]

This explosion of digital content and platforms through which to access it is predicated on contracts underpinned by copyright. Copyright incentivizes the creation of high-quality content by securing to creators the exclusive rights to control the dissemination of their creations. This helps inspire that necessary leap of faith to invest in the high-risk proposition of producing and distributing commercial content. Copyright protections, including rules against the circumvention of TPMs, also incentivize creators and distributors to experiment with diverse, innovative new business models, resulting in the multitude of online platforms globally.

As a result, the U.S. copyright industries, as much as any industry, depend on strong rules and practices for digital trade. For the copyright industries to flourish in SSA markets, SSA countries need to: (i) have copyright laws that meet high standards of protection; (ii) provide efficient copyright enforcement and sound legal structures to enable healthy licensing of works and recordings; and (iii) eliminate market access barriers and unfair competitive practices. Markets with these features also will help SSA countries to develop, nurture, and enjoy the fruits of their own cultural and creative output. These principles are echoed by two WIPO studies conducted in 2013 and 2014 concerning the creative industries in Kenya, Burkina Faso, and Senegal. Among the recommendations from the two studies were the following: Greater respect

[22]In 2018, globally Xbox Live had 57 million monthly active users and brought in $10 billion in revenue.
[23]See Titilola Oludimu, "Boomplay's dominance and the music streaming market in Africa," May 1, 2019, Techpoint.africa, https://techpoint.africa/2019/05/01/boomplay-african-music-streaming-market/.

for contracts, as "contracts are in many cases non-existent [in Kenya], which as such is a hurdle for the audiovisual industry to become more professional;" ratification and implementation of the WIPO Internet Treaties, which should be "urgently considered as Internet legal and illegal distribution is rapidly changing the market;" and "a concerted effort against audiovisual piracy in both East-Africa and West-Africa," which "would have a positive effect on the market."[24]

Unfortunately, in SSA rights holders and copyright-dependent services generally confront deficient local laws, weak enforcement, and market access barriers (or other discriminatory or unfair competitive practices). These shortcomings enable parties to engage in piracy, some on a commercial scale, because it is a high-profit, low risk enterprise, unencumbered by the considerable costs associated with either producing and licensing works, or protecting them against theft.[25]

Internet use in Africa has skyrocketed. According to Internet World Stats, in March 2019 there were 492.8 million users in Africa, up 10,815% since 2000.[26] Nigeria was estimated to have 111.6 million users, South Africa was estimated to have 31.2 million users, and Kenya was estimated to have 43.3 million users.[27] This impressive technological growth, unfortunately, is accompanied by illegitimate activities that will hamper legitimate economic growth if left unchecked. To effectively ensure a safe, healthy, and sustainable digital marketplace, SSA

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[24]See Tarja Koskinen-Olsson, "STUDY ON COLLECTIVE NEGOTIATION OF RIGHTS AND COLLECTIVE MANAGEMENT OF RIGHTS IN THE AUDIOVISUAL SECTOR", WIPO Committee on Development and Intellectual Property, August 12, 2014. https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_14/cdip_14_inf_2.pdf; and Bertrand Moullier, Benoit Muller, "SCOPING STUDY ON STRENGTHENING AND DEVELOPMENT OF THE AUDIOVISUAL SECTOR IN BURKINA FASO AND CERTAIN AFRICAN COUNTRIES", WIPO Committee on Development and Intellectual Property, September 25, 2013, https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_12/cdip_12_inf_3.pdf.

[25]See, e.g., USTR, 2019 National Trade Estimate Report on Foreign Trade Barriers (March 2019), for the leading U.S. Government report on many market access and other trade barriers in key SSA markets. The report is available at https://ustr.gov/sites/default/files/2019_National_Trade_Estimate_Report.pdf.

[26]See "Internet Penetration in Africa," March 31, 2019, https://www.internetworldstats.com/stats1.htm.

[27]Id.

countries should assess whether their legal regimes are capable of responding to today's challenges, including rampant online piracy.

As noted above, in **South Africa** the enactment of two new laws (the 2018 Bill and the PPAB) will create significant impediments to the digital marketplace in South Africa for copyrighted works and sound recordings. Once enacted, the new laws will severely restrict the freedom of rights holders to contract in the open market, and will impose licensing and regulatory mechanisms to overly regulate the relationships between and among creative parties and licensees and users. Inadequate protections for works and sound recordings and for the TPMs that protect access to those works and sound recordings in the digital environment will further undermine the creative industries' access to the digital marketplace in South Africa.

In addition, in May 2014, South Africa published regulations relating to registration and payment of value-added tax on all online transactions conducted in, from, or through South Africa. Currently levied at 15%, the tax is a digital trade barrier because it includes online selling of content such as films, TV series, games, and e-books.

Widespread online copyright piracy remains a very serious problem among all African countries. As a result, many copyright-based sectors and companies may still be reluctant to invest in these smaller markets where piracy is, in effect, out of control. As SSA countries consider reforms to their copyright systems, they should be encouraged to work with stakeholders and the U.S. Government to help ensure they are meeting international standards and best practices to facilitate legitimate digital trade in copyrighted works. Several countries have either enacted legislation or are considering the implementation of the WIPO Internet Treaties, which, as noted above, provide many of the legal norms for a sustainable and healthy

online marketplace. So far, eleven countries in sub-Saharan Africa have deposited their instruments to join the WCT and the WPPT: **Benin, Botswana, Burkina Faso, Gabon, Ghana, Guinea, Madagascar, Mali, Senegal, Togo,** and **Nigeria**. While **Kenya, Namibia**, and **South Africa** signed the WCT and WPPT between 1996 and 1997, these three important markets have yet to ratify or implement either of the treaties.

Conclusion

IIPA appreciates the opportunity to provide the Commission with the perspectives of the U.S. creative industries on the issues presented in these investigations. We hope the results of the investigation will lead to targeted and effective dialogue and improvements in copyright protection and enforcement, and in the digital economy for legitimate content in the SSA region for the benefit of the SSA local economies and for the American copyright industries.

APPENDIX

SOUTH AFRICA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)
2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR place South Africa on the Priority Watch List in 2019.[1]

Executive Summary: As an important emerging market and a dominant economy in sub-Saharan Africa, South Africa is uniquely positioned to demonstrate how a modern copyright regime can contribute to the growth of creative industries in an era of rapid digital and mobile expansion throughout the country and the region. It is now more important than ever to maintain and expand proper incentives for investment in the creation of original material—motion pictures, music, video games, books and journals in all formats. New technologies for distribution of cultural materials provide exciting opportunities for growth of the copyright industries and all creators. To capture this opportunity, it is essential that rights holders enjoy, in law and practice, exclusive rights that enable them to securely disseminate their goods and develop new legitimate services. South Africa's government has stated its commitment to protecting intellectual property and its desire to bring its laws into compliance with international treaties and commitments. South Africa's Cabinet also recently approved the country's accension to the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT), and the Beijing Treaty (the "WIPO Internet Treaties"). IIPA applauds this development, but is seriously concerned about two draft laws recently accepted at the National Assembly, and pending approval by the National Council of Provinces, which are in violation of these treaties and, potentially, South Africa's Constitution.

Since 2015, South Africa has embarked on a project to update and amend its Copyright Act and Performers' Protection Act, which resulted in two fundamentally problematic bills—a Copyright Amendment Bill and a Performers' Protection Amendment Bill, both of which have been subject to numerous revisions to bring them into their present forms, but which have failed to address their fundamental deficiencies. These bills raise many concerns for the content industries and move South Africa further away from international norms, rather than into compliance with the WIPO Internet Treaties. Moreover, the bills undermine the potential of the modern marketplace because they fail to establish a clear legal framework—particularly in the digital arena where the potential for growth is most evident. Many of these defects stem from an approach that focuses on government interference in negotiations and the distribution of revenue from licensing, rather than on ensuring the vibrancy of a free market in creative materials. Also very troubling are a number of issues that have clear potential to drive a formal challenge in the Constitutional Court.

Considerable work remains to make the bills acceptable and frankly, implementable in practice, and the full extent of the clarifications needed to establish a robust system of copyright incentives through amendments to the Copyright Act go beyond those raised in this report. The bills would benefit from revision, not only to address their deficiencies as outlined by multiple stakeholders, but also to reduce ambiguity and thereby establish greater certainty in the law for rights holders and users alike. Considering the importance of the task of modernizing South Africa's Copyright Act, and the degree of concern raised by the creative industries with the current bills, IIPA recommends that the U.S. Government send a clear message that the proposed bills are flawed and additional review is necessary to address the concerns of *all* stakeholders and ensure the provisions comply with international treaties.

[1]For more details on South Africa's Special 301 history, see previous years' reports at https://iipa.org/reports/reports-by-country/. For the history of South Africa's Special 301 placement, see https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf.

PRIORITY ACTIONS REQUESTED IN 2019

- Revise the Copyright Amendment Bill and the Performers' Protection Amendment Bill to make them implementable and ensure compatibility with international treaties and commitments, and further to avoid undermining the existing commercial practices of the creative industries.
- Engage in effective enforcement against online piracy, including by appointing cybercrime investigators and developing a cybercrime security hub recognizing copyright as a priority.
- Ratify and fully implement the WCT and WPPT.

COPYRIGHT LAW IN SOUTH AFRICA

Amendment of South Africa's Copyright Law and Performers' Protection Act are needed to bring the country's laws into compliance with international treaties. In 2015, a Copyright Amendment Bill was introduced (2015 Bill), followed by a Performers' Protection Amendment Bill (PPAB), intended to effect this purpose. However, these bills were highly unsatisfactory. Following criticism from many rights holders groups, including IIPA, the progress of the bills was postponed pending further review and discussion with stakeholders. In December 2016 and May 2017, two further Copyright Amendment bills, amounting to a revised version of the troubling 2015 Bill, were introduced, and further amended in 2018 (2018 Bill). A revised PPAB was also produced in 2018. These revised bills address only a few of the problems in the 2015 Bill. Moreover, many of the most problematic provisions carried over to the new bills, and new problematic provisions have been introduced without any public consultation in some cases. These bills were passed by the National Assembly in December 2018 and are now pending before the National Council of the Provinces. At the time of writing, it is understood that they may be presented for Presidential assent prior to the 2019 South African elections, which may take place in May.

As drafted, many provisions of the 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 needed reforms. Major issues of immediate and primary concern to the copyright industries are the following:

- The inclusion of severe restrictions on the freedom of rights holders to contract in the open market, which is a key factor for the healthy growth of the entire creative sector. For example, both the 2018 Bill and the PPAB limit assignments of rights to a maximum of 25 years, and both bills provide ministerial powers to set standard and compulsory contractual terms for contracts covering seemingly any transfer or use of rights.
- An ill-considered importation of the U.S. "fair use" rubric is appended to a proliferation of extremely broad new exceptions and limitations to copyright protection, whose effects would imperil the legitimate markets for educational materials, locally-distributed works, and online works in general. Neither the "fair use" nor the "fair dealing" aspects of the proposed bill are ideal, but, more importantly, the proposed "hybrid" model is of utmost concern in terms of its drafting and the challenges posed to any entity that may try to actually use it.
- The licensing and regulatory mechanisms are likely to undermine the digital marketplace 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.
- Inadequate criminal and civil remedies for infringement, including online piracy.
- Inadequate provisions on technical protection measures, and overbroad exceptions to prohibitions on the circumvention of such measures.

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 World Trade Organization Trade-Related Aspects of Intellectual Property Rights Agreement (the "WTO TRIPS Agreement") (Article 13). Moreover, aspects of both bills are incompatible with the WIPO Performances and Phonograms Treaty and WIPO Copyright Treaty.

2018 COPYRIGHT AMENDMENT BILL (2018 BILL) AND PERFORMERS' PROTECTION AMENDMENT BILL (PPAB)

Many of the proposals in the 2018 Bill and the PPAB suggest a mistaken assumption that there is a fixed market for works and that the government's role is to regulate the internal relationships of the creative community, and their authorized distributors, rather than to incentivize new creative output. This misguided approach will instead result in a stagnation of South Africa's cultural community. Without important revisions to these provisions, South Africa will be taking a step backward in its effort to strengthen copyright incentives. South Africa would be better served by providing clear and unencumbered rights that would allow the creative communities to increase investment to meet the growing demand for creative works of all kinds, in all formats. This is important particularly in the context of the President's clear objective to improve levels of foreign direct investment, as well as the imperative to improve the lives and legacies of South Africa's own artists and creators.

It is important to note that the 2018 Bill and PPAB are extremely broad-reaching documents. IIPA's comments in this filing are not comprehensive, but instead highlight some of the major concerns for the U.S. copyright industries. It should also be noted that the bills, when read together, are incoherent. For example, Section 3B of the PPAB purports to set out the nature of copyright in sound recordings, which are already enumerated in the Copyright Act, as amended by the 2018 Bill. Notwithstanding the very significant flaws in the bills, described below, from a technical perspective, the drafts are inadequate and require urgent attention to avoid introducing widespread uncertainty into South African law.

1. Severe Intrusions into Contractual Freedom

Several provisions in the 2018 Bill and the PPAB constitute severe intrusions into private contractual relations. As such, these provisions restrict how private parties can collaborate to facilitate the public's access to copyrighted works, threatening the market value of books, films, sound recordings, musical works, music videos, video games, and other works created by South African creators.

A. Limitation on term of assignments: Sections 22(b)(3) of the 2018 Bill and 3A(3)(c) of the PPAB limit the term of assignments for literary and musical works and performers' rights in sound recordings, respectively, to a maximum term of 25 years from the date of agreement, and in the case of performers' rights in sound recordings, provide for automatic reversion of rights to the performer after that period. These provisions raise serious concerns, including that Section 3A of the PPAB, in proposing to limit the term of contracts between performers and copyright owners to a maximum term of 25 years, would detrimentally disrupt the well-established practices of the recording industry in South Africa when it comes to the creation and use of sound recordings. It would risk serious harm to the South African recording industry, performers, and other creators because a major incentive for investment in South Africa would be removed through the effective halving of the term of assignment of recordings from 50 years to 25 years.

The effect of these provisions would be that it would be impossible to clear rights in many works after 25 years, meaning they would simply be unusable as a result of this provision, and no one would receive any revenues from them. Sound recordings will typically include performances from a large number of performers. While the copyright owner of the sound recording (the record company) will often have a long-term relationship with the featured artist, it is far less likely to have such a relationship with, for example, a performer who has entered into a one-off agreement to provide backing vocals or other musical performances in a sound recording. Each such performer would have rights according to the PPAB, which under draft Section 3A would be transferred to the copyright owner (the record company in most cases) to enable the copyright owner to license the use of the sound recording by third parties. Draft Section 3A provides that the record company would cease to have those rights after 25 years. That would mean that the record company would have to seek out thousands of performers (with whom the company has no long-term relationship) to obtain their mutual consent to an extension of the 25-year term. The inability to locate just one session musician involved in a sound recording would mean the sound recording could

longer be used, ending the revenues that come to record companies, performers, authors, or publishers from the exploitation of that recording. That cannot be the intention of this legislation.

The provision would have a broader negative effect on performers. Introducing new artists to the market and promoting their careers requires large upfront investment from record companies, with no certainty to when, if ever, the investment will be recouped. Limiting the term of agreements between record companies and artists would increase the economic risk even further and would likely reduce the number of investments in new talent that can be undertaken by record companies. These provisions require urgent reconsideration to avoid the serious harm that they risk causing to all participants in the South African music industry. Moreover, although audiovisual works are now excluded from this provision, the proposed clause would increase legal uncertainty and introduce a disincentive to the acquisition of literary properties by film companies for adaptation into film and TV. This would ultimately inhibit financing of film projects and would jeopardize the market for making films in South Africa.

B. Sweeping ministerial powers to set contractual terms: Section 39 of the 2018 Bill and Section 3A(3)(a) of the PPAB create ministerial powers to prescribe "compulsory and standard contractual terms", including setting royalty rates across any form of agreement covering copyright or performers' rights. These provisions are not only unjustified, but are seemingly premised on a lack of understanding of the myriad of contractual relationships that underpin the creation of copyright content, which often comprises many different rights from various parties, and which are licensed for use by third parties in a variety of ways. Empowering ministers to impose contractual terms risks imposing a degree of rigidity into the South African creative economy that will stifle investment and innovation.

Insofar as agreements between sound recording performers and producers are concerned, these provisions would restrict the flexibility in transfer agreements, which is needed to address the varying relationships between performers and copyright owners. For example, the relationship and contractual agreement between the featured artist and the copyright owner will differ substantially from that between a performer appearing as a one-off session musician and the copyright owner. Neither performers nor copyright owners would benefit from prescribed contracts which would fail to meet the differing needs of performers depending on their role in a sound recording. There is simply no evidence of a market failure that would justify this extensive interference into contractual relations. Furthermore, the proposals would impose unwarranted contractual formalities on all contractual partners.

C. Mandating the mode of remuneration for audiovisual performers: Section 8A of the 2018 Bill includes a new proposal to regulate the remuneration terms of private contractual agreements between performers and copyright owners. Despite proposing a significant interference into private contractual arrangements, to the particular detriment of certain performers, Section 8A was not published for consultation (except for Section 8A(6)). The result is a proposal that would substantially undermine the economics and commercial practices concerning the production of audiovisual works (including music videos). While it may be assumed that the intention of Section 8A is to ensure that performers are remunerated appropriately, in practice the proposal would cause substantial harm to a large category of the performers who perform background roles in music videos.

Music videos are comprised of performances from featured performers (the artist or artists with whom the record company has partnered) and non-featured or backing performers (the performers who typically are contributing to a music video on a one-off basis, such as dancers performing in the background of the video). Featured artists are remunerated in accordance with the terms they have negotiated with the record company, and these terms almost invariably are on a royalty basis (in addition to lump-sum advances). Non-featured performers, on the other hand, are remunerated by way of lump-sum payments, typically by way of one-off contracts, rather than by way of a longer-term partnership with a record company. Section 8A would appear to propose removing the possibility of lump-sum payments and replacing them with royalty payments.

The effect of Section 8A, rather than benefitting performers, would in fact result in many performers having no guarantee of receiving any remuneration from exploitations of the music video in which they have performed. This is because many creative projects are loss-making for the producer. As a consequence of proposed Section 8A, non-

featured performers performing in music videos would no longer enjoy being paid a lump sum immediately in return for their one-off performances and would instead have to wait to be remunerated on a royalty basis, which would only happen if the video in question actually succeeded in generating revenues. The current commercial practices avoid that outcome by paying non-featured performers on a lump sum basis, irrespective of whether the music videos in which they perform succeed or do not. This provision also risks a direct negative impact on investments in South African productions and a reduction in the number of South African "background" performers engaged to perform in audiovisual works.

D. Prohibition on contractual override: The risks posed by the 2018 Bill are further compounded by the prohibition on contractual override in Section 39B(1), which prohibits any contractual terms that deviate from the provisons of the bill, thereby removing the possibility for parties to determine their own contractual arrangements in a manner that avoids the harm caused by certain provisions of the bill.

2. Inadequate Protection of Performers' Rights

South Africa's intention to ratify the WIPO Internet Treaties is welcome and would represent a significant step towards establishing an appropriate legal framework. Regrettably, a number of provisions in the bills, including the level of protection afforded to certain performers' rights, are incompatible with the treaties.

Section 5 of the PPAB sets out the rights granted to performers. In the PPAB, performers' rights are also enumerated under Section 3. The amendments to Section 5 are therefore, in part, duplicative of Section 3. More importantly, though, Section 5(1)(b) downgrades the performers' exclusive rights of distribution and rental to mere remuneration rights, a proposal that would be incompatible with WPPT (and the WIPO Beijing Treaty), which do not permit these rights to be protracted at the level of mere remuneration rights. Furthermore, providing mere remuneration rights with respect to distribution and rental, subject to rate-setting by the Tribunal (Section 5(3)(b)), would prejudicially devalue these performers' rights; experience in South Africa, and internationally, shows that Tribunal-set remuneration falls well below the commercial value of the rights licensed.

Section 5(1)(b) would also substantially and detrimentally disrupt the sale and rental of sound recordings and audiovisual works as a result of one set of rights being subject to private negotiation (the producers' rights), and the performers' rights being subject ultimately to Tribunal rate-setting. The consequence would be a transfer of value from those who create and invest in recorded performances to the licensees of those performances, the latter likely ending up paying less, resulting in reduced revenues for producers to invest in South African performers.

3. Fair Use

The 2018 Bill drastically expands the exceptions and limitations to copyright in South Africa's law for, amongst others, educational and academic uses and uses by libraries, galleries and museums. It also allows for perpetual and unassignable claims to royalties by authors, composers, artists and filmmakers (with retrospective effect); unlimited parallel importation; and the override of contracts. The broad exceptions, which are duplicated in the PPAB, will create a disproportionate imbalance against creators and producers of copyright-protected works and undermine the predictability needed to support a robust marketplace for copyrighted works. Additionally, they appear to far exceed the scope of exceptions and limitations permitted under South Africa's international obligations, namely under Article 13 of the WTO TRIPS Agreement (and Article 9 of the Berne Convention and the corresponding provisions in the WIPO digital treaties). The government should be guided by a 2016 High Court decision that firmly rejected an expansive reading of South Africa's provisions on exceptions and limitations, rejecting arguments that copyright stifled freedom of expression, and holding that copyright is a constitutionally protected property interest. The case rejected any interpretation of the "public interest" that would serve to constrain copyright protection.[2]

[2]See South African Broadcasting Corporation v. Via Vollenhoven & Appollis Independent, et al., Case No. 13/23293, The High Court of South Africa, Gauteng Local Division, Johannesburg (Sept. 2, 2016) http://www.saflii.org.za/za/cases/ZAGPJHC/2016/228.pdf.

The fair use provisions proposed in the 2018 Bill derive from the fair use statute in U.S. law. However, the doctrine will likely be difficult to apply in South Africa, as the country lacks the decades of legal precedent that have served to define, refine, and qualify the fair use doctrine in the United States. The relative confidence with which copyright owners and users can function within the fair use environment in the U.S. is a result of nearly two centuries of case law that has developed and (after codification) elaborated on the four factors to be considered; how they are to be balanced and weighed in particular cases; what presumptions ought to apply; and so forth. Without the foundation of a well-developed body of case law, South Africa's importation of the U.S. fair use doctrine can only result in uncertainty for rights holders and users on the parameters of permissible uses. Furthermore, South Africa's legal system lacks statutory and punitive damages that infringers face in the United States. The reality is local and other rights holders will not have the protections afforded by the U.S. precedent, which means that they will face far more uncertainty in the South Africa market, as well as legal fees and protracted timeframes for cases that will likely deter most and leave even the most courageous determined never to try again.

At the same time, the draft retains South Africa's existing "fair dealing" system, but also introduces a number of extremely broad, new exceptions and limitations to copyright protection, all of which have the potential to adversely impact the legitimate market for educational texts, locally distributed works, and online works in general. These exceptions virtually guarantee an intolerable level of confusion and uncertainty about which uses of copyright works require licenses and which may not. A robust legitimate marketplace for works cannot develop in such an unpredictable environment and may well jeopardize the existing licensing system in the country. A 2017 study by PricewaterhouseCoopers predicted "significant negative consequences" for the South African publishing industry should the proposed fair use provision and the broad exceptions be adopted.[3] The study notes that a 33% weighted average decline in sales would likely occur, with concomitant reductions in GDP, VAT, and corporate tax revenue collections. Some 89% of publishers surveyed noted that the 2018 Bill, if adopted in its current form, would negatively impact their operations, likely resulting in retrenchments and possible business closures.

4. Exceptions and Limitations

In addition to the introduction of "fair use" into South African law, the following new or expanded statutory exceptions contained in the 2018 Bill are likewise of concern:

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.

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, 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.

C. Section 12C provides an exception for temporary reproduction of a work "to enable a transmission of a work in a network between third parties by an intermediary or any other lawful use of work; or . . . to adapt the work to allow use on different technological devices . . . as long as there is no independent, economic significance." This provision also allows for *reformatting* an integral and essential part of a technical process, if the purpose of

[3]See "The expected impact of the 'fair use' provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry," available at http://www.publishsa.co.za/file/1501662149slp-pwcreportonthecopyrightbill2017.pdf.

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. If any such exception is to be included, IIPA recommends that the word "lawful" be replaced by "authorized," so that this provision meets its principal objective (ensuring that incidental copies made in the course of a licensed use does not give rise to separate liability) without frustrating enforcement efforts where the "incidental" reproduction within the jurisdiction of South Africa is the only justiciable act in a claim against an unauthorized transmission.

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.

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 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.

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.

5. Exclusive Rights of 'Communication to the Public' and the 'Making Available'

The proposed Section 9(f) confirms that sound recording producers have the exclusive making available right set out in WPPT Article 14. This is a positive clarification, as this right underpins the digital music industry. However, the wording of draft Section 9(e), which enumerates sound recording producers' exclusive right of communication to the public, omits an express reference to "public performance," as provided for in the WPPT definition of "communication to the public": communication to the public "includes making the sounds or representations of sounds fixed in a phonogram audible to the public." To avoid ambiguity in the legal framework, we submit that the new Section 9(e) should expressly refer to public performance. (Existing Section 9(e) in the Copyright Act provides sound recording producers with an exclusive right of communication to the public).

Furthermore, the meaning of Section 9A(aA) (and equivalent provisions in relation to exploitation of other categories of works, and in the PPAB with respect to performers' rights) is not clear. While it is understood that these provisions are intended to ensure accurate reporting of authorized uses of works, to the extent they could be interpreted as providing a legal license for such uses, they would be wholly incompatible with the WIPO Internet Treaties, while undermining the economic feasibility of South African creative industries. These provisions should therefore be clarified to avoid any such confusion.

6. Technical Protection Measures

Technological protection measures are vital tools for the copyright-based sectors in the digital era, enabling creators and rights holders to offer consumers their desired content, at the time and in the manner of their choosing, while also empowering rights holders to explore new markets opened up by current and emerging technologies. The

provisions regarding technological protection measures (TPMs) introduced in the 2018 Bill (and incorporated by reference into the PPAB), while welcome, are inadequate. Article 18 of WPPT requires that contracting parties provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures." At present, the proposed provisions in the bills are not compatible with that requirement.

This issue is of paramount importance when considering the central role of digital distribution to the current and future economics of the creative industries, including the music industry. While the recorded music industry in South Africa is now predominantly a digital industry, piracy remains a serious obstacle to continued growth in this area. The introduction of adequate provisions on TPMs is therefore essential to protect against piracy and enable the development of new business models.

First, the definition of "technological protection measure" in Section 1(h) is problematic because it refers to technologies that prevent or restrict infringement, as opposed to technologies designed to have that effect or control access to copies of works. The plain reading of this definition would be that a TPM that is circumvented is therefore not one that prevents or restricts infringement (because it has not achieved that aim), and therefore the circumvention of it is not an infringement. This would defeat the purpose of the provisions prohibiting the circumvention of TPMs. It needs to clarify that a protected TPM is one that in the normal course of its operation is designed to prevent or restrict infringement of copyright in a work. Furthermore, paragraph (b) of the definition should be removed; that a TPM may prevent access to a work for non-infringing purposes should not have the effect of removing its status as a TPM. Rather, the provision of Section 28P(2)(a) would apply to enable the user to seek assistance from the rights holder in gaining access to the work in question. As it stands, paragraph (b) of the definition is open to abuse and would provide a charter for hacking TPMs. In this respect, see also our comments below with respect to Section 28P(1)(a).

Second, we also recommend that the definition of "technological protection measure circumvention device" be amended also to include devices that (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent TPMs. This would ensure that the definition is adequately scoped to encompass all TPM circumvention devices, which would also be consistent with Article 6(2) of the EU Copyright Directive.

Finally, the exceptions in Section 28P regarding prohibited conduct with respect to TPMs (in Section 28O) are inadequately defined, therefore rendering them incompatible with the three-step test and substantially reducing the effectiveness of the protections afforded by Section 28O. Under Section 28P(1)(a) it would be extremely burdensome, if not impossible, for rights holders to establish that the use of a TPM circumvention device by a user was to benefit from an exception. Additionally, a provider of an unlawful circumvention technology could rely on Section 28P(1)(b) to claim they are acting lawfully merely by showing that the technology can be used to access a work to perform a permitted act. There is a substantial risk that this provision would be abused by those providing circumvention technologies for unlawful purposes. The same is true of Section 28(2)(b).

7. Penalties for Infringement

The 2018 Bill lacks appropriate remedies for infringement. The criminal fines provided will not assist copyright owners in recovering their losses from infringement, as the money does not go to them. Additionally, the bill does not provide copyright owners any additional civil remedies in cases of online infringement. Online piracy remains a persistent and growing threat to the creative industries. In 2016, nearly one billion films and TV shows were pirated. With regard to worldwide streaming piracy, in 2016 there were an estimated 21.4 billion total visits to streaming piracy sites across both desktops and mobile devices.[4] Given the scope and scale of online piracy, there is a serious need for more mechanisms to combat infringement and further remedies for rights holders.

[4]Alliance for Creativity. https://alliance4creativity.com/mission/the-threat-of-online-piracy/.

IIPA reiterates its recommendations to introduce enforcement provisions that are effective in the Internet Age and protect the online marketplace, such as: (1) ensuring online platforms do not make or allow unauthorized use of copyrighted works on their platforms; (2) preventing the unauthorized distribution of electronic formats of copyright works; (3) alleviating the burden of proof on claimants with respect to technical allegations in claims that are not in dispute; and (4) providing for appropriate and adequate damages for online infringement.

8. Intellectual Property Tribunal

Proposed amended Sections 29 through 29H would establish an Intellectual Property Tribunal to replace the existing Copyright Tribunal. The Tribunal's purpose would purportedly be to assist the public in the transition to the new copyright regime by resolving disputes and settling the law, particularly in relation to the proposed "fair use" and other exceptions. This assumes that the Tribunal will be staffed with qualified professionals, adequately resourced, and accessible to the parties it is intended to serve, though none of these things are required by the bill, nor do the proposed provisions sufficiently delineate the Tribunal's scope. Indeed, the 2018 Bill adds a Schedule 2 to Section 22(3), which would allow any person to apply to the Tribunal for a license to make a translation of a work, including broadcasts or to reproduce and publish out of print additions for "instructional activities," with few limitations. To the extent that a revitalized Tribunal is to be considered, it would best serve the South African market with a much more limited mission, confined to copyright matters related to collective licensing.

Another significant concern with these provisions is the lack of benchmarks for how the Intellectual Property Tribunal should determine royalties in the event of a dispute between a collective licensing body and a user. It is imperative that the legislation set out that rates should be determined with reference to the value to the user of the rights in trade and the economic value of the service provided by the collective licensing body. Licensing rates should reflect market forces based on a willing buyer and a willing seller, and not by reference to a perceived and vague "public good." If creators are not rewarded at market-related rates, even the best copyright regime in the world will not achieve its objectives.

9. Collective Management of Rights

IIPA is concerned by proposed Section 22B, which may be understood to preclude a Collective Management Organization (CMO) representing, for example, both copyright owners and performers. Such an interpretation could prohibit the existing collaboration between performers and producers in the SAMPRA CMO, which administers needletime rights on behalf of both recording artists and record labels. This would go against the interests of those rights holders, the users (licensees), the public at large, and industry standards. Joint sound recording producer and performer organizations operate in some 40 territories. By working together on the licensing of rights, performers and producers save costs, increasing the proportion of revenues returned to them. This also reduces transaction costs to users, who can take a license from one CMO that covers both performers' and producers' rights. The provision should be clarified.

As a general point, it is also vital that any rates set by the Tribunal for performance rights (including "needletime") reflect the economic value of the use of recorded music in trade. This would be consistent with international good practice, which seeks to ensure that rights holders are remunerated adequately for the high value of recorded music.

10. State Intervention in Private Investments and the Public Domain

The 2018 Bill contains concerning provisions that revert rights to the government in situations that could discourage investment, while unnecessarily diminishing the public domain. The proposed Section 5(2) transfers to the state all rights in works "funded by" or made under the direction or control of the state. This provision could be broadly interpreted to include works developed with a modicum of government involvement and may well diminish incentives for public-private cooperation in creative development.

11. Term of Protection

At present, sound recordings only receive a term of protection of 50 years from the year in which the recording was first published. The 2018 Bill should be revised to include a proposal to extend the term of protection for sound recordings to 70 years. This will provide greater incentives for the production of sound recordings, and also provide producers with a stronger incentive to invest in the local recording industry, spurring economic growth, as well as tax revenues, and enabling producers to continue offering recordings to local consumers in updated and restored formats as those formats are developed.

MARKET ACCESS ISSUES IN SOUTH AFRICA

Broadcast Quota: In 2014, the Independent Communications Authority of South Africa (ICASA) began the Review of Regulation on South African Local Content: Television and Radio. While the regulations have yet to be finalized, IIPA recommends that that market forces, rather than discriminatory quota regimes, should be used to determine programming allocation.

Online Value-Added Tax: In May 2014, South Africa published regulations relating to registration and payment of value-added tax on all online transactions conducted in, from, or through South Africa. Currently levied at 15%, the tax includes online selling of content such as films, TV series, games, and e-books.

COPYRIGHT PIRACY AND ENFORCEMENT ISSUES IN SOUTH AFRICA

Creative sectors in South Africa are growing, but face the challenge of illegal competition. One group of South African artists lamented that they came together as youths to try and make a living out of music, but that street vendors are killing their business by illegally selling pirated CDs and DVDs that they would have released.

Internet Piracy: Online piracy continues to grow in South Africa. Growth in bandwidth speeds, coupled with lax controls over corporate and university bandwidth abuse, drive this piracy. Easy access to pre-released film and television content through international torrent, linking, and cyberlocker sites also fuels online piracy in the country. As South Africa lacks injunctive relief for rights holders, consumer access to these infringing sites continues unabated. It is important to have a legal framework that facilitates rights holders in addressing unauthorized use in all ways and supports consumer education and awareness programs.

Piracy Devices and Apps: Set-top boxes and sticks pre-loaded with infringing content or apps continue to grow in popularity in South Africa. Consumers use these devices to bypass subscription services or to consume unauthorized copyrighted content such as music, movies, TV series, or sporting events. These devices are most commonly sold to South African consumers online. There are some companies that develop devices pre-loaded with infringing music content for use in various stores, pubs, and taverns. In January 2018, the Durban Commercial Crime Unit executed a search and seizure warrant for IPTV boxes and Play Station peripherals after it received a filed complaint. Actions like this are helpful, but much more is needed to effectively combat the growing problem. There are a number of examples of enforcement and consumer education programs that are effective in other markets and should be replicated in South Africa. It is critical for South Africa to gain more understanding of these approaches and to work proactively with the people from the applicable creative industry sectors to localize and implement similar programs.

Parallel Imports: The Copyright Law does not protect against parallel imports. As a result, the motion picture industry has sought protection under the Film and Publications Act. Industry stakeholders are in the process of developing a MOU with the Film and Publication Board, which will focus on joint cooperation on enforcement against parallel imports.

Enforcement: The Electronic Communications and Transactions Act (ECTA), read with the Copyright Act, is the legislation that rights holders rely upon for title, site, and link take downs. The lack of cybercrime inspectors continues to limit the full potential of this legislation. To facilitate a healthy online ecosystem, South Africa should appoint cybercrime inspectors and develop a cybercrime security hub recognizing copyright as one of its priorities.