



Post-Hearing Submission by the  
Embassy of the Republic of South Africa,  
on behalf of the Government of the Republic of South Africa  
relating to the USITC investigation into “***U.S. Trade and Investment with Sub-Saharan  
Africa: Recent Trends and New Developments***”

**Introduction:**

The Government of South Africa through the Department of Trade and Industry wishes to thank the USITC in the manner they conducted the public hearing in the investigation on “U.S. Trade and Investment with Sub-Saharan Africa: Recent Trends and New Developments”.

South Africa would like to submit its response to some of the issues raised during the public hearing, in particular relating to the Copyright Amendment Bill and the Performers Protection Amendment Bill.

It is crucial to take note that the amendment to the South African Copyright and related rights legislation was under taken in order to not only update the legislation but to create an enabling environment for the South Africa’s copyright based industries to participate in the economy of South Africa. Similarly, the US based copyright based industries are one of the fastest growing sectors in the US and this may be attributed to advanced and flexible copyright regime which have principles such as Fair Use and limiting the assignment period to 30 years etc. this evidence based approach is a model that has been considered alongside other jurisdictions in order for South Africa to have a model Copyright regime in Sub-Saharan Africa.

The International Intellectual Property Alliance (IIPA) participated at the public hearings of 24 July 2019 and raised concerns. The concerns include that:

- South Africa is not aligned with international IP obligations that include the TRIPS and Berne convention as well as the WIPO Treaties it intends to ratify to by alleging the Bill is incompatible with the Treaties;
- it may hinder market participation by the interference in contractual arrangements;
- the content of creators will be compromised and therefore impact on creators and producers and investment and the concern of educational use.

Responses are provided below to address these concerns raised:

**Alignment to International Intellectual Property (IP) laws and WIPO Treaties:**

The purpose of South Africa’s copyright law is to protect the exclusive right of authors and inventors to benefit from their works of authorship while ensuring that the development objective of promoting the creative industry is achieved. South Africa is a signatory to various international Intellectual Property agreements, e.g. the Berne Convention (which obliges South Africa to give recognition and protection to copyright works from signatory countries) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

In addressing developments at a multilateral level, the Copyright Amendment Bill (CAB) and the Performers Protection Amendment Bill (PPAB) seeks to introduce provisions contained in the World Intellectual Property Organisation (WIPO) digital treaties namely the WIPO Copyright Treaty (WCT), WIPO Performances Phonograms Treaty (WPPT) and the Beijing Treaty on Audiovisual Performances (BTAP). Although South Africa has not ratified the Treaties, the Bills have incorporated them and they will inform the South African Copyright and related rights legislation going forward. Government is in the process of ratifying the Treaties in order for the international legal instruments to be effective.

The Bill will be implemented in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) read with other international Treaties or conventions. The aim is to leverage the flexibilities contained in the TRIPS Agreement to protect IP rights and advance South Africa's development goals. The principles that underpin the WIPO development agenda are fully supported by the SA government. South Africa's approach is to ensure the balance is in the interest of producers, consumers and users of IP for the benefit of all stakeholders in accordance with the TRIPS Agreement.

**Alignment with the Treaties:**

- The founding principles regarding how State parties would take legislative measures to give all or part of the provisions in the treaty, the latter simply means, when we align with international law, we do not have to take all the statements (statements are provisions in international laws) that are incorporated in the treaties, but state parties are also allowed to take part of the statements.
- Furthermore, we are also allowed to make reservations (not to be bound by) some statements that incorporated in the treaty. The Vienna Convention is the only treaty that governs international laws and treaties between states. Articles 24 and 25 in particular.
- WIPO treaties must not be read in isolation, there is an umbrella body that governs international laws and treaties between states, also guides how state parties are to position themselves when acceding or ratifying the treaties.
- This argument is the same as the practice adopted by state parties of using their Constitutions as the law to guide the drafting of domestic legislation.
- Where we did not apply or align with certain parts of the WIPO treaties, we aligned with our Constitution, which promotes and respect the redressing of past discriminatory laws and policies.

- There are studies and guidelines that support the importance of a country's own constitution and legal system and the freedom to choose the best way to implement the provisions. The catch provision being "Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty."
- Some of the concerns regarding the treaties is that the Marrakesh treaty does not include all forms of disabilities. It focuses on the blind and visually impaired but the Copyright Amendment Bill has included all.
- The other treaty they have raised a concern about is the WIPO Performances and Phonograms treaty which makes reference to a single equitable remuneration. While the Bills refer to perpetual remuneration or payment of royalties. There were also concerns raised that the Technological Protection Measures (TPMs) were not taken exactly as are in the treaties. The TPMs are new and for that reason, it is critical to not have too strong TPMs as one would prefer to also encourage access to copyright works within the allowable parameters. There are broad statements made about alignment of the Treaties to the Bills.

#### **The hybrid model of Fair Use:**

In relation to the concern on "fair use", South Africa has adopted the hybrid model which takes into account the list of exceptions that seeks to create access to education, libraries and archives, computer programmes and making learning materials accessible to the disabled and visually impaired. Fair use is a doctrine under copyright law that permits certain uses of a work without the copyright holder's permission. The fair use is an exception to the exclusive rights of a copyright owner. Fair use exceptions include but not limited to criticism, parody, comment, news reporting, teaching, scholarship, or research. It allows users to make use of copyright work without permission or payment when the benefit to society outweighs the cost to the copyright holder. Interestingly, today it is recognised that while fair use may diminish the profits of a copyright holder to some degree, doing so can simultaneously provide a stimulus to other profitable economic activity and support the economy.

The hybrid model was the best middle ground to address the different approaches of fair use and fair dealing. This involves a mixture of the general, fair use style factors for lawful use, combined with more specific fair dealing style requirements in certain cases. The Preamble of the World Intellectual Property Organisation Copyright Treaty affirms the "need to maintain a balance between the rights of authors and the large public interest, particularly education, research and access to information as reflected

in the Berne Convention”. This could be used to direct interpretation towards a broader construction of the listed exceptions, and to address this newly enshrined balance with a ‘fair use’ concept, which takes into account the rights of authors and the rights of access to information.

Reference to the hybrid model is not unique to South Africa. The model was adopted in countries such as Singapore which has a broad exception mirrored strongly on the US model of Fair Use despite having a Fair Dealing regime.

The current Copyright Amendment Bill introduces a safeguard that serves as a guideline on how to use the exceptions. The Bill includes a well-considered four-factor test that reflects the global trend, but clarifies its application. The four fair use factors in the Bill add to the predictability of the law. The fair use factors address the concern about the wide exceptions and limitations in the Bill. The factors include the nature of the work in question, the amount and substantiality of the part of the work affected by the act in relation to the whole of the work, the purpose and character of the use that include whether it is of a commercial nature or for non-profit research library or educational purpose. The current model of a hybrid has received much praise and positive feedback from many global organisations and various stakeholders. See the article by Sean Flynn, ‘South Africa’s Proposed Copyright Fair Use Right Should Be A Model For The World’.

The fair use provision is aligned to the Berne convention 3 step test and have safeguards. The three-step test sets restrictions to copyright exceptions and limitations, thus creating an international standard against which national copyright exceptions and limitations are to be judged. The test puts forward three cumulative conditions for national copyright exceptions and limitations and prescribes that such exceptions and limitations must:

- be confined to certain special cases;
- not conflict with the normal exploitation of the copyright work; and
- not unreasonably prejudice the legitimate interests of the rights holder /author.

The opinion on the exceptions and its alignment to the Berne convention sought by the Portfolio Committee also attested to the alignment of the fair use provision as well as exceptions and limitations to the Berne 3 step test.

## Education issues

- Research and scholarship rely on the public domain and others' research, as a building block to the creation of new knowledge. Education is promoted through the spread of ideas and information, and access to cultural heritage is enabled through symphonies, ancient texts, among other' (J Cheverie 'Copyright, the Public Domain, and the Value to Higher Education' (2011). There is no empirical evidence in the US or elsewhere that shows that fair use destroys creative industries - just as the photocopier, the videotape, and remixes have not destroyed the creative industries. Fair use is not a carte blanche for free use; it is not fair if the use deprives the owner of revenue by substituting for the need of buying (refer to the fairness factor 4)
- Fair use is not a carte blanche for free use; it is not fair if the use deprives the owner of revenue by substituting for the need of buying (refer to the fairness factor 4).
- Fair use does not permit full-text copying or multiple copies of a book for students. This is not fair as it will be a substitution of the original work. The Bill makes clear that schools and universities may make copies of extracts for educational purposes without licensing.
- The law is limited to excerpts. It specifically provides that course packs or other forms of copying may not "incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work" under normal circumstances. (12D(2)). The Bill permits copies of whole works only where there is an abuse of the market. It authorizes copying of full works only if "a licence to do so is not available from the copyright owner, collecting society, an indigenous community or the National Trust on reasonable terms and conditions"; "where the textbook is out of print"; "where the owner of the right cannot be found"; or where the right holder is engaged in anticompetitive conduct in the form of excessive pricing. (Copyright Amendment Bill Section 12D(3)-(4). In each case, no copying is permitted for commercial gain, (12D(5)), and the copying must be restricted to the "extent justified by the purpose."
- Exceptions and Limitations for Education Clause 12D: Copyright Policy Document (2015): The practical problems experienced by educators, researchers, and libraries under the current law called for a revision, which enhanced access to and use of copyright works and to enhance access to information for the enhancement of education and research. The 1978 Act had no exception for education or research.

- The cost of procuring education material in South Africa is very high therefore maximum flexibilities will be incorporated with teaching exceptions.
- Digitisation without authorisation is not fair use. Numerous courts have found that digitisation of a work and incorporation into a database for purpose of search is essentially transformative use.
- Copyright regimes across the world are slowly moving away from the closed-list system to an open system, which will keep up with innovation, and changing environment. Globally, research has found that fair use has not impacted negatively on the economy. On the contrary, there is evidence that shows that countries with open exceptions and use have high levels of innovation, economic growth and development.

**The Publishing industry concerns:**

- The publishing industry have raised concerns with fair use and the wide exceptions and limitations in the Bill that will make them vulnerable to their works being used carte blanche. They make reference to a PWC study that shows the negative impact of fair use in the publishing industry. Canada is an example of a country said to have experienced the negative impact of fair use because many authors stopped writing and incurred losses.
- There is no evidence of these concerns. Former common wealth countries like Canada, Singapore and South Africa contain fair dealing provisions however these countries embarked on legislative review either moving to the fair use doctrine like the United States legislation or expanding the fair dealing provision like Canada which can be argued as having broader application than Fair Use. Exceptions and limitations are allowed under the law and international best practice.
- The rationale to extend the fair use exception is based on the fact that South African spends more than R600 million annually on licensed material,80% of which is from international publishers. South Africa pays double for material included in course-packs or on e-platforms. The existing fair dealing exception in the 1978 Copyright Act fails to provide an exception for education purpose and other uses necessary for teaching. This is linked to “fees must fall” marches by students.
- It is a commonly held view that education materials are expensive in South Africa. It is worth noting that the Competition Commission is conducting an investigation on the publishing industry of South Africa at this stage, alleged to be involved in price fixing and in contravention of the Competition Act. Some of

the books range from pre-school to grade 12 books, student books, trade books as well as eBooks.

- The cost of books is not the only consideration for the hybrid model grounded in fair use. Best practice has shown that countries that have fair use and flexible or open exceptions grow faster and innovate and fair use has not been found overall to have negative implications.
- Econometric research has shown that, overall, adopting fair use and other more open copyright exceptions has positive effects for scholarly production and in investment in the technology sector, without harming publishers or the education industry, Sean Flynn and Michael Palmedo. *The User Rights Database: Measuring the Impact of Opening Copyright Exceptions*. 2018.
- There could be a negative effect on current spending on publishing in South Africa if government and educational institutions respond to the Bill by using their rights to lower budgets however the Bill does not allow this. Educational budgets could remain the same, in which case spending may shift in ways that help local publishers. If budgets remain the same and licensing for access to foreign works decreases, then local publishers may see a gain from more book purchasing.

#### **Contractual freedom concerns:**

- The copyright regime of South Africa has dynamics that are unique to the historical context of the country. The intention is to ensure that authors, performers and copyright owners receive economic benefit from the exploitation of their work and that their rights to copyright are exercised.
- IIPA has raised concerns with regards to licensing and regulatory mechanisms that are to undermine the digital market place. It should be noted that South Africa has unique developmental characteristics when it comes to the copyright based industries. The country faces many challenges in copyright that have not been sufficiently catered for in law with a long history of exploitation and abuses coupled with a broad economic climate of poverty, unemployment and high inequality. Many of the authors have no rights and have not benefitted from their creative efforts historically and this was coupled by the exploitation of authors of works and abuses in contractual arrangements. The draft Bill aims to ensure the protection of the authors, performers, copyright owners and others while it creates new regulatory mechanism for them to benefit economically.

- The Bill provides for the standard terms of contract on the share of royalties as well as agreements in terms of provisions provided for in the Bill. The unfair contractual terms and assigning of rights unaware is one of the reasons authors have not received their royalties. The standard prescribed contractual terms serve as a guideline on the minimum terms that must be in a contract.
- There has been concerns with the unfettered interference of these provisions in the Bill as they are seen as violating contractual freedom. The Bill is not interfering with contractual freedom but addressing a gap to ensure contractual parties are aware of minimum requirements that should be in the contract, such as the rights and obligations of the author and the copyright owner, dispute resolution mechanism, royalty share, method of payment and period of contract.
- The Minister's powers are only prescribing minimum requirements and not the whole contractual arrangement, therefore parties are still at freedom to include other terms. Providing guidance to contacting parties is to empower them to be able to know how to negotiate the terms in the contract. It is important to allow the market to dictate the terms of engagements, allow for freedom to contract as well as to create a robust regulatory framework for the protection of creative works. The unique developmental and historical context of South Africa informs the need to protect the role players in the copyright based industries and to find ways to address their challenges. Creating minimum broad framework of factors to include in a contract for instance does not serve as an interference but to guide the many poor illiterate creators of copyright who are not vested in contract law and have been subject to copyright abuse and exploitation.
- The Bill in its current form strikes a fair balance between protection of the rights of authors and copyright owners and the respect of contractual relationships between parties. It creates an enabling environment by creating a broad framework that sets the tone for a fair and open legislation that allows the creators of copyright to benefit economically without compromising the extent of investment by the copyright owners. The Bill also addresses the users and their use of copyright works. There is balance in the use of copyright.
- The Bill recognises the importance of treating each works differently in order to attract the investment and exploit its benefit economically. The works under consideration is literary, musical works, visual artistic works, the audiovisual works and works in sound recordings. The Bill has strengthened these clauses and ensured that each one is exploited fully in its uniqueness.

- The Bill further introduces a strengthened Tribunal in order to address matters speedily. Prior to the amendment the jurisdiction of the Tribunal was limited.

**Conclusion:**

In conclusion, the concerns raised by IIPA has been considered, debated and there is further scope to strengthen implementation through the regulations and guidelines developed in consultation with stakeholders and the rollout of education and awareness initiatives. The debate around some of the issues are matters of interpretation, piracy is a global issue and has been grappled with before the amendment and piracy cannot be attributed the copyright law solely or fair use.

South Africa has conducted several studies which under pin the amendment and indicate a positive growth for the creative economy and copyright based industries. The South African copyright based industries contribution to GDP is 4.11% and to employment is 4.08% and can increase through the issues which the amendment seeks to address. Lastly as there has been opposition towards the Bills there has also been strong support for the Bills from many creators in the copyright based industries.