

In the United States Trade Representative

South Africa Country Practice Review

GSP Eligibility Criterion Requiring Adequate and Effective Protection of Intellectual Property Rights

Notice of Intent to Testify

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I request to testify at the USTR public hearing on the GSP country practice review of South Africa.

I am available at to appear at the hearing in person at any time.

A summary of my testimony follows.

I. STATEMENT OF INTEREST

As a Member of the European Parliament (2014-2019) entrusted with the review of the 2001 EU Directive on Copyright in the Information Society and one of the lead negotiators on the 2019 Directive on Copyright in the Digital Single Market, as well as a substitute Member of the European Parliament delegation to the United States, I have gained a deep understanding of international copyright regimes. I wish to testify on the GSP eligibility of South Africa, as I believe that my expertise on international comparative copyright law will help the members of the GSP Subcommittee to put the proposed changes to South Africa's copyright law into context.

II. PRECEDENTS IN EU AND U.S. COPYRIGHT LAW

All elements of the South African Copyright Amendment Bill closely resemble established norms in the U.S. or EU copyright systems, which doubtlessly fulfil the criterion of adequate and effective protection of intellectual property rights. In both the EU and the U.S., the marketplace for cultural and entertainment media is healthy and growing, indicating that similar provisions in the respective domestic copyright laws have not unduly negatively affected the trade in copyright-protected works.

In the continental European legal tradition, the purpose of copyright is the protection of the author's personality as expressed in his or her creative works. Copyright is therefore not merely an economic instrument to stimulate creation and investment, but an instrument to protect the author's interests. This perspective is reflected in the preamble of the Berne convention¹. Similarly, the Universal Declaration of Human Rights protects the participation in cultural life, freedom of the arts and sciences, and the moral and material interests of authors², elevating the protection of authorship over that of secondary rightsholders in the international legal framework.

Acknowledging that authors are often the weaker party in contractual relations with publishers or other intermediaries, specific provisions limiting the length and scope of transfers of exclusive rights are an established practice in several countries with a high level of copyright protection. For example, Germany's

¹ "The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works [...]" Preamble, Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979).

² Article 27, Universal Declaration of Human Rights.

copyright law only recognizes the creator of a work as author and copyright holder³. Copyright cannot be transferred, except in the case of inheritance⁴. German copyright law allows authors to revoke the transfer of usage rights under certain conditions⁵. EU copyright law further recognizes an author's right of revocation of a usage rights transfer for reasons of lack of exploitation⁶. Conditions on and limits to the assignment of rights by authors to third parties are therefore not unique to South Africa's Copyright Amendment Bill, but have a long tradition in continental European copyright law, which, indeed, considers certain authors' rights to be inalienable.

Mandatory contractual terms protecting authors in their relations with publishers and other intermediaries are similarly recognized in EU law. For example, German copyright law protects an author's right to appropriate remuneration when assigning usage rights⁷, as well as the right to demand additional remuneration, should the remuneration agreed in an assignment contract turn out to be inappropriate⁸. Similar provisions have been made mandatory for all EU Member States under EU copyright law⁹. In the context of South Africa, a developing country with considerable income inequality, safeguarding the author's economic interests by putting in place contractual rules for their benefits seems all the more justified than in the European context.

European copyright law knows both mandatory collective management of licenses¹⁰, as well as extended collective licensing¹¹, which serve to expedite the licensing process and limit transaction costs, rather than unduly limiting rightsholders' abilities to exercise usage rights. The regulation of collecting societies at an EU level, which could be seen as a model for the South African provisions on collective management of rights, has contributed to transparency and legitimacy of collecting societies in Europe¹².

The fair use clause introduced by the South African Copyright Amendment Bill closely resembles similar provisions in domestic copyright laws around the world, including the United States of America¹³. It is by no means unusual that the fair use provision be complementary to specific copyright exceptions or limitations. For example, U.S. copyright law includes specific copyright limitations for reproductions by libraries and archives, for first sale, or for educational purposes¹⁴. It is unlikely that the language used to define fair use, which is modeled on the U.S. provision, would lead to legal uncertainty. The U.S. example shows that clarity and predictability is ensured through the development of fair use doctrine by the courts.

The South African Copyright Amendment Bill introduces criminal sanctions for the circumvention of

³ § 7, Gesetz über Urheberrecht und verwandte Schutzrechte.

⁴ § 28, Gesetz über Urheberrecht und verwandte Schutzrechte.

⁵ § 31a, Gesetz über Urheberrecht und verwandte Schutzrechte.

⁶ Article 22, Directive 2019/790 of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

⁷ § 32, Gesetz über Urheberrecht und verwandte Schutzrechte.

⁸ § 32a Gesetz über Urheberrecht und verwandte Schutzrechte.

⁹ Articles 18 & 20, Directive 2019/790 of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

¹⁰ Article 9, Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

¹¹ Article 12, Directive 2019/790 of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

¹² Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

¹³ § 107 U.S. Code Title 17 — Copyrights.

¹⁴ §§ 108—110 U.S. Code Title 17 — Copyrights.

technological restrictions on the copying of copyright-protected material. Any such restrictions must necessarily come with provisions regarding the legal circumvention of these technological restrictions, in order to be proportionate. Such limits to technological restrictions are incorporated both in European¹⁵ and in U.S. copyright law¹⁶.

III. COMPLIANCE OF SOUTH AFRICAN COPYRIGHT LAW WITH INTERNATIONAL OBLIGATIONS

The provisions of the Copyright Amendment Bill comply with South Africa's international obligations under the Berne convention and the TRIPS agreement in general, and the three-step-test in particular. The TRIPS three-step-test states that "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder".¹⁷ All three criteria are clearly reflected in the wording of the fair use provision in question.

Certain special cases: Section 12a of the South African Copyright Amendment Bill lists specific criteria that need to be taken into account when determining whether a particular use constitutes fair use, limiting the application to certain special cases. These criteria are closely modeled on those of the U.S. fair use provision. To further clarify the scope, the South African bill includes an indicative list of the types of special cases covered by the fair use provision.

No conflict with the normal exploitation of the work: Section 12a of the South African Copyright Amendment Bill specifically includes the criterion whether the use serves a different purpose than that of the affected work, as well as the possible substitution effect on the market for the original work. Both criteria are suitable to shielding the normal exploitation of the work.

Prejudice to the legitimate interests of the author/rightsholder: The use of material pursuant to section 12a is further limited in scope by considering the amount of a work that is used, as well as the not-for-profit or educational character of the use, in determining the application of the fair use provision, safeguarding the legitimate interests of the author or rightsholder.

All three criteria of the three-step-test are respected, using language common to fair use provisions in other TRIPS-signatory countries.

IV. CONCLUSION

South Africa's Copyright Amendment Bill follows international best practice for a balanced copyright system that safeguards the fundamental rights of both users and authors. Most provisions are directly modeled on or closely resemble provisions from the copyright laws of TRIPS signatories, most notably the U.S. and European copyright legal systems. The provisions are fully compliant with South Africa's international commitments. No element of the pending changes to South African copyright law justify the conclusion that adequate and effective protection of intellectual property laws could be lacking.

¹⁵ Article 6(4), Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

¹⁶ Library of Congress. U.S. Copyright Office. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies.

¹⁷ Article 13, Agreement on Trade-Related Aspects of Intellectual Property Rights.