

## **IFLA Submission to the USTR Review of South Africa's Qualification for the Generalised System of Preferences USTR-2019-0021-0001**

The International Federation of Library Associations and Institutions (IFLA) is the international body for all types of libraries around the world, with members in 153 countries.

Libraries play a key role in the copyright system, providing public goods (such as preservation), and looking to ensure that no-one is prevented from gaining an education, carry out research, or participating in cultural life for want of resources. They do this on a non-commercial basis, drawing on exceptions and limitations to copyright that respect the principle of balance.

It is on this basis that we submit the following arguments concerning the efforts to remove South Africa's from the list of countries benefitting from the Generalised System of Preferences.

### **1. The request concerns a law that has yet to be finalised**

The conditions for benefiting from the GSP are 'the extent to which such country is providing adequate and effective protection of intellectual property rights', and 'the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets... of such country'. Both imply that a law has already been passed and its impacts made manifest.

However, the petition is focused on a law that is yet to be approved by the President, and so on which no evidence can yet be provided.

Therefore, the request from the IIPA is untimely, and should be dismissed at least until a full and independent analysis of the impact of the law can be carried out, should it be agreed by the President.

### **2. The request contains numerous inaccuracies**

As highlighted in the previous section, the petition makes a large number of questionable and necessarily speculative claims about the proposed Act.

A. Restrictions on freedom to contract (1st bullet, p7): the proposals in the South African law are designed to protect the interests of authors, and go in the same direction as the provisions of Section 203 of the United States Copyright Act concerning termination of rights assignment. The recently voted European Union Directive on Copyright in the Digital Single Market creates a Union-wide reversion right after a 'reasonable' time (Article 22, alongside an obligation of fair remuneration to authors in Article 18. Such rights promote creativity and open possibilities to rediscover works and generate value for creators and society at large.

B: Fair use and exceptions to copyright (2nd bullet, p7), a comparison of the provisions in the proposed Section 12A of the South African Copyright Act and Section 2017 of the US Copyright Act shows finds no substantive differences. Concerning the additional exceptions included in the proposed Act (Sections 12B-D), these follow the model that already exists in US copyright law,

and are governed by the condition that no use shall go beyond the extent justified by the purpose, drawing on existing jurisprudence. Section 13 of the existing Act (which prevents reproductions that conflict with normal market exploitation, and which cause unreasonable prejudice to the legal interests of rightholders) is also retained.

C: Over-regulation of licencing mechanisms (3rd bullet, p7), it is worth recalling that the genesis of the proposed legislation was the criticism made by Justice Ian Farlam in his review on the activities of collecting societies in redistributing royalties to creators. The proposed reforms aim to ensure a better functioning licencing regime.

D. Remedies for infringement (4th bullet, p7), it is worth noting that the proposed Act maintains existing provisions which include the possibility of up to ten years' imprisonment for copyright infringements, in line with the provisions of Title 18, Section 23 19 of the US Code.

E. Provisions on technological protection measures (TPMs) (5th bullet, p7), the petition appears to forget that under current South African law there are no provisions on technological protection measures. Those that are introduced in the law provide strong legal protections (including prison terms of up to five years for those who circumvent them, or produce or sell tools which allow this).

Where TPMs prevent enjoyment of exceptions (which, by their nature, are focused on activities that do not undermine markets), the Act is clear in giving rightholders the initial possibility to offer a means of removing those measures which prevent use of a legitimate exception elsewhere in the Act.

### **3. Acceding to the request could lead to harmful actions from others regard US copyright law**

In implying that the type of fair use provisions proposed in South Africa (and already in place in the US) are evidence of unfair practice or ineffective protection of intellectual property, this petition, if acted on, increases the risk of steps being taken against the US itself in other fora. Given ongoing claims of fair use's incompatibility with international law, acceding to this petition could strengthen those who question US Copyright Law.