The Honourable Mr Duma Nkosi
Chairperson: Portfolio Committee on Trade and Industry
Attention Mr A Hermans
Parliament of the Republic of South Africa
CAPE TOWN

16 July 2021

By email only to: ahermans@parliament.gov.za

COPYRIGHT AMENDMENT BILL, B13 OF 2017/ PERFORMERS PROTECTION AMENDMENT BILL, B24 OF 2016; Submission by the Commercial Producers Association of South Africa

The Commercial Producers Association of South Africa ("the CPA") is the trade association representing production companies which produce television commercials for both the domestic and international markets. The CPA comprises of 55 production companies that collectively produce roughly 85% of all television commercials made in South Africa. The sector generates at least R2 billion per annum, 50% of which is direct foreign investment which originates mainly from North America and Europe. The sector supports hundreds of small-to-medium enterprises and creates approximately 20,000 jobs.

As an association representative of businesses within the Audio-Visual sector in South Africa it is incumbent upon the CPA to make this submission to the Portfolio Committee in order to safe-guard and future-proof our sector against the negative effects of the CAB and PPAB in their current form.

We thank the Portfolio Committee for the opportunity to make comments in respect of the Copyright Amendment Bill (CAB) and the Performers' Protection Amendment Bill (PPAB) and we request to have a presentation slot allocated to us during the August Parliamentary hearings scheduled for 4-5 August to inform the Committee of our members' specific concerns further orally.

In order to make this written submission short, concise and sector specific, we state at the outset that we support the content of all the submissions made by other trade associations within the AV sector (including but not limited to feature films, television series, animation, video games, music videos, photography etc.) that are opposed to the legislation and who believe that the scope granted by the Portfolio Committee should be considerably widened to include additional concerns that fall outside of the narrow area of focus that has been prescribed. Many other provisions contained in the Bills, and which were perhaps not expressly articulated in the President's referral decision, also risk breaches of the Constitution and international treaties, and the National Assembly should be in a position to consider arguments thereon, to ensure that the Bills, when eventually referred back to the National Assembly for adoption and forwarding to the President for his assent, do not suffer from any material defects in these critical respects, which could have been addressed by the Portfolio Committee following the upcoming engagements.

We are disappointed with the short time that was allowed for public comments. One month, and one week's extension (which extension fell within the time of disruptive political and civil unrest that precluded us from appropriately further engaging with our members during this time to settle our submission) is too short for us to prepare the comprehensive advice on highly technical and complex legal issues that the Portfolio Committee called on the public to comment.

Commercial Producers Association of South Africa
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It is also deeply troubling that the Department of Trade & Industry has, to date, failed to produce a single meaningful economic impact assessment that measures the impact that the enactment of the Bills would have on the audiovisual and other affected industries that depend on sound copyright and performers' rights legislative frameworks to function. The SEIAS reports that the DTI rely on to be the impact assessments that underpinned their conceptualization and drafting of the texts of the Bills show that the necessary academic research, including legal research to measure the new legislative proposals against the Constitution and relevant international treaties for compliance therewith, were never properly undertaken. These assessments also do not contain any meaningful economic impact assessments or related data that measure the impact that the enactment of the Bills would have on all of the affected industries and sub-sectors. In the circumstances, it is critical that these assessments be undertaken and published for further stakeholder comment, and that amendments to the texts of the Bills, that are identified thereafter, should be undertaken by drafters who are practicing copyright lawyers, who are highly experienced in this field, to ensure that the final texts of the Bills would be fit for purpose, and aligned with the Constitution and international law.

The commercial production sector is global and highly competitive and relies upon a number of core principles to attract investment:

- **Legal Certainty**: As is the case with all businesses, commercial production relies heavily on an advantageous legal and regulatory framework to underpin its success. If the conditions to efficiently make commercials are not correct or are deemed to be high risk, our clients (marketers and advertising agencies) will look to other countries to produce their commercials. This is not something that may happen – instead this situation is already in place and marketers and advertisers all over the world are not confined to their home countries to produce commercials. Instead, they routinely travel abroad to produce their work and this serves as a competitive advantage rather than a deterrent to them. The reason that South Africa has managed to attract foreign clients to work in the country is as a direct result of the many advantages of working here rather than in other territories where there may be less legal certainty.

  The enactment of the CAB and PPAB in their current form would create a substantial risk to the conducive legislative environment and repel clients (both domestic and international) from working in South Africa.

- **Contractual Flexibility:** Contractual flexibility is vital in the commercial production sector. Every commercial commissioned is unique and has a different set of requirements from any other. The sector relies heavily on many different individuals and elements coming together seamlessly in a highly creative and dynamic environment to produce a final product that meets the high standards expected by the client who will benchmark it against international outcomes.

  In order to achieve this, the businesses in the industry must be free to contract according to their specific requirements. The proposed "one size fits all" approach currently set out in the Bills is impossible to implement and, if enforced, will further deter clients from commissioning commercials in South Africa.

- **Unification of Rights:** This enables the rights holder (in our case, the corporate client) to effectively commercialize their work without hinderance or undue encumbrance. As the entire point of a television commercial is to sell as many of the client's products as possible, the client must be certain that these rights cannot be challenged or placed at risk due to unreasonable demands.

  Any suggestion that this may be the case in the future – as outlined in the CAB and PPAB – will act as an immediate deterrent. Clients will simply take their business to countries that have a lower risk profile.

- **Enforcement of Rights:** The CAB and PPAB could effectively undermine copyright protections in South Africa leaving work open to IP infringement. This would not be acceptable in an industry where original ideas and creative excellence are highly valued and protected.

  The lack of recourse offered by the CAB if this were to occur would act as an additional deterrent to clients who are accustomed to working in environments where IP and copyright protections are both respected and upheld.

  It is important for Government to recognize that clients in the AV sector have a choice about where to conduct their business. They are not constrained by physical resources or locations. If Government is serious about harnessing the potential of the "fourth industrial revolution" as it has claimed, it must acknowledge that South Africa must be globally competitive and legislate accordingly. To do otherwise will simply diminish South Africa's ability to be able to compete on the global stage.

  As we have stated previously, it is the CPA's view that both the CAB and PPAB provide a strong deterrent to business for all the reasons that will be cited by other industry players in the AV sector and their legal experts. For the purposes of this submission, we would like to focus our attention on the issue which most impacts our sector: **Section 8A of the CAB.**

  Clause 9 (CAB) to insert 8A into Act: This section, when read with Section 39B (contract override provision) purports to introduce an unwaivable and compulsory statutory royalty scheme in terms of which all performers in audio-visual works would be entitled to share in any profits generated from the commercialization of the works with the rights holders.

  This would compromise the principles of legal certainty and contractual flexibility which have been set out above.

  We note the following:

  - The proposed royalty scheme was not opened for public comment previously, which has constitutional implications on the validity of the section, if passed into law without proper stakeholder consultation.

  - It may also constitute an unjustified and arbitrary restriction on the constitutional rights of freedom to trade and contract, when read with Section 39B of the CAB, which imposes an arbitrary and statutory restriction on the ability of performers and producers to elect for a different mode or model of remuneration, regardless of whether the parties to the agreement prefer such an alternative model.

In practical terms, Clause 8A would require rights holders to negotiate anticipated royalty payments with all performers, regardless of how small or insignificant their role in the television commercial may be.

The following challenges arise:

- What does the "the commercialization of the work" mean given that commercials, unlike films, are not sold and distributed but are instead broadcast with the specific intention of marketing a particular brand or product? The ambiguity alone poses a threat as performers may interpret this definition to mean that they should be entitled to a percentage of profits from the sale of goods generated by a commercial.

- In addition to this, the legislation currently states that the percentage due for royalties must be negotiated between the parties which means that work on the production can only commence once an agreement has been reached. As performers will undoubtedly want a higher percentage than clients are willing to offer, these "negotiations" will result in delays which will make an industry that works on an extremely quick turnaround (as ours does) un-workable. If the client elects to enter into a negotiation regarding royalties after the production is complete the client will have no bargaining power whatsoever and will be required to pay whatever the performer demands.

- In the event that the parties cannot agree on royalties, the CAB in its current form offers resolution via a tribunal of 5 retired judges who will then deliberate and decide on an appropriate percentage. The reality is that the proposed tribunal will be inundated with disputes as performers will demand royalties that clients are simply not prepared to pay. The delays caused by the tribunal's inevitable backlog will deter clients from even considering working in South Africa – the risk of delays will just be too great.

- If Clause 8A is enacted, it will mean a considerable amount of administration for clients as they will need to ensure all agreements and licenses are in place and that royalties are paid on an on-going basis as long as the commercial remains in the public domain.

- If clients fail to do the necessary paperwork, Clause 8A(7) of the CAB imposes hefty penalties which include the imprisonment of directors of companies and/or fines up to 10% of annual turnover. We consider this to be unjustifiable and disproportionate.

Without going any further into the many defects of the CAB, we can assure you that Clause 8A, read with Section 39B of the CAB, will put an end to commercial production in South Africa. International clients will simply opt to make their commercials in other countries and South African clients will look to other media or territories to produce their advertising content. The enactment of this legislation will have the opposite effect to that envisioned by performers who naively support this legislation and the consequences for all people who currently derive an income from our sector will be dire.

If Government is to insist on legislating for a statutory royalty scheme in the CAB, then it would be necessary to first attend to an appropriate economic impact assessment, which considers the different models of remuneration that are applied in other prominent jurisdictions with successful audiovisual content production industries, and which would still cater for contractual freedom, so that contracting parties are able to settle on a mode of remuneration that would best fit each particular project. In this sector, each production is undertaken on the basis of highly divergent variables, which is influenced by a number of different factors, and contractual flexibility is key to ensure that the financial investment made into a new production can be justified without the burden of undue statutory restrictions on how profits generated from commercialization activities must be shared between producers, the client who engage advertising agencies, and the performers featured in the commercials. Commercials are different to most other audiovisual works that are produced in terms of high levels of financial investment, such as feature films, television series, and video games, as commercials are not assets from which ongoing revenues are generated each time it is flighted on screen. Commercials do not give rise to royalty income that can be divided between different parties, and to subject commercials to a statutory royalty scheme that cannot be contracted out of, does not only pose serious problems with respect to implementation prospects, but it also serves to induce an unacceptable level of legal uncertainty which would be severely detrimental for our members' ability to keep attracting new projects for commercial production in South Africa.

Further, the criminalization of the non-reporting to each performer featured in a commercial, as proposed in Section 8A(7), on any *commercial usages* that are made of the commercials amounts to an unjustifiable and disproportionate application of statutory criminal sanctions to all stakeholders in the audiovisual sector.

Commercial Producers Association of South Africa
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It is our understanding that the issue of non-reporting on commercial usages of copyright works originally arose in the music industry, as identified in the Copyright Review Commission report of 2011 relating to challenges posed for music performers' Needletime rights to receive remuneration, mainly from radio and television broadcasts, and distributions from collecting societies. To extrapolate this problem to the audiovisual industry, and propose harsh criminal sanctions that would deter investment into a sector where criminal liability and crippling financial penalties could accrue, simply due to the practical difficulties in administering an onerous reporting scheme, would likely divert the attention of international clients to other jurisdictions, where such laws do not exist (to our knowledge, this would be any other country around the world) and this could pose disastrous consequences for the viability of the commercial production sector, and the performers and other persons who gains employment and income from this sector.

It is our recommendation that the entire Section 8A be seriously reconsidered, and also measured for compliance against the Constitution and relevant international treaties.

Other concerns that we have regarding provisions in the Bills which may have constitutional and international treaty compliance implications, and which require further in-depth investigation and assessment, include:

- Section 6A of the CAB, which also poses potential challenges for the unencumbered acquisition of rights and the freedom of parties to contract with respect to underlying literary works (e.g. scripts for commercials that are conceptualized by SA copywriters) and musical works (e.g. musical compositions or recordings used in commercials). Section 6A was also not fully consulted on previously, this introduces a procedural vulnerability that may have constitutional implications as well. This is further compounded by the statutory limitation of assignments of rights in respect of literary and musical works, as proposed in Clause 22 of the CAB, which cannot be varied contractually due to the application of Section 39B (the contract override provision), even if the authors of the work could be engaged on much more favourable terms if they were able to sell their rights in their works for a longer term, e.g. the full life of the copyright in the works. These provisions, when considered together, raises the risk that SA authors of literary and musical works may lose out on future employment opportunities in the commercial production space, as they would likely not be contracted, especially by international clients.

- Section 39 of the CAB which empowers the Minister to, without Parliamentary oversight, and unilaterally, determine the scope and terms of all agreements in which copyright works are traded or rights transferred or licensed, in addition to a broad range of other determinations, such as royalty or usage rates, creates a level of anxiety for industry stakeholders as this form of potential government overreach could harm investor confidence that they can contract on terms for specific projects which require flexibility. For the Minister to be vested with such broad powers to, within a short period of time, publish new regulations and determinations that effectively 'make new law' by unilaterally determining industry standards and compulsory industry contract terms and usage rates, not only damages investor confidence in the market due to the uncertainty it injects into what contractual permutations might exist in SA tomorrow, but it also may amount to an impermissible delegation of executive legislation authority and have constitutional implications as a result.

- The broad new regime of copyright exceptions and limitations, backed by a vague and open-ended fair use legal defence that infringers can raise with impunity in SA to avoid damages claims and liability, should be reconsidered in its entirety. None of the exceptions have been formally measured, in terms of any published study or impact assessment by the DTI to be fully compliant with the Berne Three-Step Test to our knowledge. Further, the impact of the introduction of sweeping and unqualified exceptions and limitations to copyright protections, without also introducing any balancing mechanisms, and remedies for rights holders, especially in the online space, may result in arbitrary and unjustifiable deprivations of property rights, which would have constitutional implications.

Due to the short time afforded to prepare for this consultation, we reserve our comments in respect of other problematic provisions in the Bills at this stage, provide any supplementary submission that the Portfolio Committee may wish to receive and to further elaborate on our specific industry concerns during the upcoming hearings.

In conclusion, the CPA would like to reiterate that, if these considerations (and others put forward by our AV Sector colleagues), are not taken into proper consideration and the CAB & PPAB are enacted without further investigation and amendment, we predict catastrophic consequences for our industry which could take decades to reverse. We urge the Portfolio Committee to perform a further in-depth analysis of content of the Bills, that is backed by proper independent academic studies and legal research that have clearly not been produced by the DTI to date, in order to appropriately measure the compliance of the Bills with the Constitution and with international law. Also, to consider how trade and investment would be impacted upon, on the basis of proper economic impact assessments which have also not been produced by the DTI to date to support the sweeping changes to SA's legal framework within which copyright works can be produced and commercialized in SA that will result from the enactment of the Bills, as they are presently tabled.

We thank you for your consideration.

Yours sincerely,

Bobby Amm
Executive Officer
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