Submission
by the International Federation of Film Producers Associations [FIAPF]

For the attention of the Portfolio Committee on Trade & Industry

Concerns: Alignment of the Copyright Amendment Bill [B13B-2017] and the Performers Protection Amendment Bill [B24B-2016] with the obligations set out in International Treaties

1. Who we are

The international Federation of Film Producers' Associations [FIAPF] is a non-profit organisation representing the economic and legal interests of film and audiovisual producers worldwide. FIAPF currently has 38 national producers' organisations from 30 countries across four continents in its membership and has developed working connections on common issues with many others. FIAPF has been working collaboratively with South Africa's Independent Producers Organisation [IPO] during all the key legislative stages that concerned the Copyright Amendment Bill and the Performers Protection Amendment Bill. We share IPO's concerns regarding the need to develop a national Copyright framework that will fully enable and incentivise local producers to take the considerable economic and creative risks involved in making professional films and audiovisual content, and to ensure that all the participants in the creative chain can benefit from the industry's growth.

Additionally, we hold that compliance and alignment with international law in the copyright field will be key to the efficiency and effectiveness of Copyright law reform in South Africa, as it will secure legal and business certainty to enable South African audiovisual content to find foreign market outlets, raise inward investment into its domestic productions and develop co-productions and co-ventures with producers and distributors in the rest of the world.

Finally, we respectfully request the Portfolio Committee to allow FIAPF an opportunity to participate further in this important process by granting us a speaking slot during the forthcoming oral hearings, currently scheduled for August 4th and 5th.

2. Our focus: the Bills' alignment with South Africa's International obligations under international treaties

The PCTI has invited submissions *inter alia* on a framing question raised in President Ramaphosa's Referral Letter of June 16th 2020, which expressed "*reservations about whether the Bills comply with the [above] Treaties*". The letter also made specific references to some of the relevant Treaties that South Africa intends to accede to, namely the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT), the 'Marrakesh' Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually-Impaired or Otherwise Print Disabled.

The present submission will make reference to these international Treaties at various points; it will also examine the questions arising from South African law's compliance and alignment with the 'Beijing' Treaty on Audiovisual Performances (BTAP) as this Treaty was also listed by the South African Government's Cabinet in its December 5th 2018 motion, as part of the Treaties it intended to accede to. The motion was also introduced in Parliament (PCTI) on February 26th 2019. Furthermore, the BTAP is entirely germane to the compliance and alignment issues raised by the current draft of the Performers Protection Amendment Bill ['PPAB' thereafter], which makes direct references to the BTAP, as well as related clauses in CAB.

Finally, we note that South Africa's obligations under international law are also relevant to the conventions and treaties it has already acceded to. Chief amongst those is the Berne Convention for the Protection of Literary and Artistic Works, ('Berne Convention' thereafter) and the Agreement on the Trade Related Aspects of Intellectual Property Rights ('TRIPS' thereafter).

This paper does not provide comprehensive comments on the alignment – or otherwise – of the two Bills with all aspects of the international legal Copyright framework. Rather, we have elected to focus on the alignment question with regards to a limited set of key issues that we have assessed as being of most direct relevance to the efficient and effective functioning of a sustainable film and audiovisual sector in South Africa for both domestic and foreign professionals and entities. Our silence on other issues, e.g. exceptions and limitations and the proposed introduction of a US-style open-ended exception regime in addition to specific 'fair dealing' exceptions, does not imply a tacit endorsement of other provisions in the Bills with regards to constitutionality or to compliance and alignment with international laws to which South Africa is – or will be - obligated. For a fuller evaluation of these, we respectfully refer Members of PCTI to the written opinions tabled in 2018 by Messrs Myburgh and Baloyi as well as Mrs Woods, at the behest of the Committee. These comprehensive opinions on the two Bills raised important critical questions across the board, regarding both constitutionality and compliance with international law, which we believe to be of direct relevance to perfecting the drafting of the two Bills.

3. Comments on dispositions regarding the transfer of rights and remuneration of authors and performers in CAB and PPAB

As an international trade association, FIAPF has been dedicated for many years to promoting good regulation to enable sustainable growth in film and TV industries worldwide. Our expertise is in both the legal dispositions and the custom and practice regarding the functioning of chain of title, transfer of rights, licensing and other

normal legal and business procedures that permit the fluid functioning of this complex creative sector and the fundamental conditions for raising investments in new productions, for the benefit of all participants in the creative enterprise of film and TV making.

We contend that Sections **6A, 8A, 8A(6)** and **39** of the **CAB**, as drafted, constitute undue interference in the contractual relationships between copyright owners including producers, and the authors and performers contributing to film and audiovisual works. In our view, these provisions are not compatible with both the spirit and the letter of international Copyright Treaties and Agreements.

Exclusive rights and the freedom to contract on mutually agreed terms are fundamental fixtures of the international agreements and treaties of which South Africa is either already a Contracting Party (e.g. TRIPS and Berne) or is in the process of accessing (WCT, WPPT, BATP). These fixtures are the result of legislators engineering copyright statute in a manner that takes into account the fact that every single film or TV content unit is an original creation demanding considerable economic risk-taking and requiring a wide range of approaches to financing, licensing and distribution – and engage multiple creative contributors, including authors and performers. We observe that best practice resides in the freedom for the parties to a production to engage freely in contracts and to aggregate exclusive rights in the producer in order to raise production financing and enable the unencumbered exploitation of the finished work, for the benefit of all creative and financial participants in the process that goes into making the works. These working principles are supported by local legal dispositions which themselves rest on an interlocking infrastructure of international Copyright Treaties, Conventions and Agreements.

Section **6A CAB** imposes restrictions on contractual freedom between the parties by mandating that an author would be entitled to "*a fair share of the royalty*" generated by the exploitation of his/her contribution to the collective work. This disposition is imposed in **6A** regardless of whether or not the author will have assigned or licensed his/her rights in the work, as contractual freedom would allow. Although the Section also stipulates that this is "*subject to an agreement to the contrary*", this sub-clause appears to be directly contradicted by **Section 39B** , which places an interdict on "*contractual override*". For all intent and purpose, it appears therefore that the royalty disposition as read laterally across **6A** and **39B** would be tantamount to a compulsory and statutory royalty scheme, as a share of gross profit. By allowing only one single model for the remuneration of the rights-holders concerned, this disposition appears to ignore the economic realities that beset film and TV production and, in particular, the difficulties for most local productions to generate sufficient revenues to allow financiers to recover their investments .

We conclude that **6A CAB and 39B** have the effect of placing limitations on the exclusive rights of authors as enshrined in Treaties and Conventions of which South Africa is already a Party or has stated its intention to accede: the restrictions apply to the entire suite of exclusive rights in international Copyright law, including reproduction, communication to the public, making available to the public,

distribution and adaptation. In the process of drafting domestic legislation, the introduction of such limitations should be rigorously examined for their compliance – or lack thereof – with the international legal framework and need to be justified to the extent that they would result in curtailment of the clauses that grant exclusive right to authorise or prohibit the use of a work, a creative contribution or a performance within this international body of treaties and agreements. Additionally, such limitations should be submitted to the three step test of Art 9(2) of the Berne Convention, also in subsequent international agreements including WCT (Art 10) and TRIPS (Art 13).

We submit that Section **8A CAB** is even more restrictive of contractual freedom. It appears this section also introduces a form of compulsory and statutory royalty payment scheme, in this case for audiovisual performers. Whilst Section **6A** seemingly provides for the possibility to contract out of the mandated royalty share-out ("*subject to an agreement to the contrary*"), no such option exists in **8A**. The section is also applied to a broad suite of exclusive rights and is unnecessarily prescriptive as to the nature and detail of the contractual relations between producers and audiovisual performers. We submit that Section **8A** goes well beyond the confines of **Art 12 BATP** which grants a large measure of discretionary powers to national legislators viz the dispositions for the remuneration of audiovisual performers. Section **8A** effectively restricts the contractual freedom of performers and forecloses other potential forms of remuneration, such as those borne of collective bargaining and individual contracts. FIAPF notes the laudable intentions of South Africa's Government and its legislators in wanting to provide a framework that ensures improved working conditions and contractual terms for the country's audiovisual performers. However, aside from our concern that the **8A** dispositions are non-compliant with international treaties, including the BTAP, we submit that **8A** as drafted, far from boosting the economic status of local performers, would act as a powerful disincentive for the financing of new original South African film and audiovisual productions by placing additional financial liabilities on producers and/or their successors in chain of title. The audiovisual sector makes content that requires high levels of investment and a myriad of creative contributors, among them many right holders. In that context the principle of unification of rights with the film / TV producer is essential to ensure efficient and streamlined negotiations both for pre-financing, producing and distributing. It has long proven to be the most effective practice to guarantee the exploitation of the collective work on behalf of all right holders. Section 8A as drafted would undermine the overall value of the rights represented through the production company, including at pre-financing stage, by preventing the unification of the rights with the producer.

While performers' bargaining power may appear to improve on paper, the foreseeable drop in original local production would mean a diminishment in the number of employment opportunities for performing talent, with attendant negative economic consequences.

We note also that similar problems arise with respect to some dispositions of the PPAB, principally **Section 3A**, which attempts to legislate on the mode of transfer of rights from an audiovisual performer to a producer. As with **8A CAB**, this section

severely restricts the freedom of the parties to enter into contractual agreements. The reference under **3A(3)(a)** in particular that written agreements between the two parties must "*contain the compulsory standard contractual terms as may be prescribed*" suggests these terms will be dictated directly with the Minister of State (as with **Section 39 CAB**). This model of prescriptive intervention is unprecedented and goes well beyond the standards set in international copyright treaties and conventions. The curtailment of freedom to contract and of the integrity of exclusive rights in also manifest in clause 3A(3)(c) which limits the duration of the transfer of rights to 25 years. The clause effects the same compulsory limitation as is extant under current **Section 22 CAB** (see below) and constitutes an unwarranted limitation to exclusive rights.

Prima facie, we conclude that that **Section 6A** and **8A CAB**, especially when combined with the further restrictions of Section **39B,** as well **Section 3A PPAB** fail the three step test as the established international legal standard for introducing limitations to the exercise of exclusive rights. Not only would it fail the first element of the test in that the **6A**, **8A** and **39B** CAB (and **3A PPAB**) dispositions would apply across a range of uses and not, as the test specifies, to "*certain special cases*" but we submit that it would inevitably fail the second step of the test regarding the need to avoid a legal measure "*conflicting with the normal exploitation of the work*", given the measure's direct interference with legal custom and practice in transactions governing exclusive rights. Since each of the three conditions of the test need be met in order to satisfy the Berne et al. standard, we submit that these dispositions cannot be reconciled with the international legal framework and attendant South African obligations. Accordingly, we hold that they are not aligned with relevant Treaties and Conventions.

An additional challenge for alignment with the international legal framework arises regarding foreign authors whose rights may be affected by the proposed dispositions under **6A** and **39B**. As a Member of the Berne Convention, South Africa is obligated under the National Treatment principle, which is also extant in other Treaties and Conventions such as WCT, WPPT, TRIPS an BTAP. National Treatment holds that nationals of one Member State enjoy the same rights in other States that are also parties to the relevant Conventions and Treaties. The proposed right to a royalty-based remuneration that may be established for authors under Section **6A** and for performers under **8A** may therefore have to be applied to foreign authors and performers who may have assigned their rights or provided consent for the use of their performances to South African persons or entities and will therefore be entitled to receive royalties under the proposed royalty rights, either by execution of individual contracts or through relevant collecting societies. Whilst FIAPF has a neutral stance regarding this potential policy outcome, we note that it was not a part of the South African Government's original review of national Copyright statutes and subsequent policy documents, including the SEAIS Report and the Memorandum of Objects that preceded the original drafting of both CAB and PPAB.

Finally, we note **Section 8A(6)** would effectively compel rights holders to submit to a registration **(8A(6)(a)** and reporting **(8A(6)(b**) regime for all "*acts contemplated in Section 8 for commercial purposes*". This requirement, which is also to be "prescribed"

(presumably, again, by the Minister of State), will impose an administratively tortuous and financially onerous burden on producers or other entities over and above their normal business and legal obligations under contractual law. Additionally, criminal sanctions and penalties of up to a 5 years' imprisonment term are proposed under **8A(7)** for anyone "intentionally" failing to comply with this burdensome statutory obligation. We submit that Sections 8A(6) and (7), aside from mobilising managerial resources rarely available to most South African small to medium size film and TV companies, go well beyond dispositions in other jurisdiction and the letter of international copyright treaties and conventions. There is, for instance, no such provision in the BTAP, which South Africa is wont to transpose. Foreign jurisdictions typically deal with transparency requirements through alternative dispute resolution systems and a resort to civil courts, not criminal sanctions. In many jurisdictions also, such matters are the object of detailed dispositions in contracts based on collective agreements resulting from private sector negotiations between, typically, unions, guilds and trade associations representing the different contracting parties. We note also that similarly onerous requirements are present in Section 5 PPAB (subsection 1A(h) and (1B)).

Turning now, to **Section 22 CAB**, we note this disposition constitutes additional interference with – and limitations of – contractual freedom and the exercise of exclusive rights enshrined in international copyright treaties and conventions. **Section 22** as amended proposes a limitation of 25 years on all forms of copyright assignments and effectively creates a reversion right that takes no consideration of economic impact on the sector or on other right-holders who have contributed to the collective work that a film or TV programme constitutes. As with Section **6A** and **8A CAB**, this disposition should be read in conjunction with **Section 39B** which proscribes contractual overrides, thereby further depriving rights holders of alternative options to accommodate **Section 22** to the legal and economic realities of film and TV production. Although this proposal concerns literary and musical works only, we submit that its restrictive impact on the film and audiovisual sector will be profound. Many films and audiovisual works are based on pre-existing literary works and make use of pre-existing musical compositions for which rights are acquired accordingly. An artificial time limit of 25 years will discourage investment into new South African productions and dry out opportunities for composers and authors of literary works to seek further sources of revenue by licensing or assigning relevant rights to film or TV producers.

As with Sections **6A** and **8A CAB**, we contend that such a restrictive disposition would fail the three step test. Clearly, the proposal does not fulfil the first criteria of "special cases" only, as it would apply broadly to an entire range of exclusive rights and curtail the established mechanism whereby producers are able to aggregate all rights into a film/TV project in order to attract financing and negotiate the optimal distribution. **Section 22** would also fall at the next hurdle due to its blatant conflict with the "*normal exploitation of the work*". Custom and practice worldwide allow contracting parties to set the term of a license or assignment on the basis of contractual freedom and **Section 22** is in direct opposition to this principle. Finally, we hold the proposed disposition would quite definitely "*do disproportional harm to the rights holders*" (or

"prejudice their legitimate interests") given the severe limitation to rights holders' freedom to license or assign rights for a mutually agreeable term.

4. Conclusion

In conclusion, FIAPF respectfully submits that key dispositions regarding the transfer or assignment of exclusive rights and regarding royalties payable to creative contributors, constitute regulatory overreach which we fear will result in lasting detriment to the South African film and TV industries and a disincentive for foreign direct investment into its talent and its production infrastructure and services. It is also our considered view that these dispositions fall far short of compliance and alignment with international copyright law, including several abovementioned Conventions and Agreements of which South Africa is a Party and several others to which it intends to accede.

We respectfully urge the Portfolio Committee to re-engage with stakeholders with a view to aligning the two Bills with both their laudable original policy intentions and with the standard of the international copyright framework to which South Africa is already obligated and has stated its determination to comply with.

FIAPF stands ready to assist the Portfolio Committee and its Honourable Members regarding the re-examination of any relevant Sections and clauses of the two bills which will have a direct impact on the South African film and TV industries' functioning, competitiveness and capacity of growth.

FIAPF 15th July 2021

FIAPF | FILM PRODUCERS WORLDWIDE