28 January 2022

The Chair: Portfolio Committee on Trade, Industry and Competition
c/o The Secretariat of the Portfolio Committee
Parliament of the Republic of South Africa
CAPE TOWN

Attention: Mr A Hermans

By email to the Secretariat: ahermans@parliament.gov.za; tmadima@parliament.gov.za; msheldon@parliament.gov.za; ymanakaza@parliament.gov.za

Dear Chair

RESPONSE TO CALL FOR PUBLIC SUBMISSIONS AND COMMENTS ON ADDITIONAL DEFINITIONS AND CLAUSES IN RELATION TO THE COPYRIGHT AMENDMENT BILL (B13B-2017)

This joint submission is made by the leading organisations within the country's audiovisual industry, namely the Independent Producers Organization (IPO), the Independent Black Filmmakers Collective (IBFC), Animation South Africa (ASA) and the Commercial Producers Association of SA (CPA). Our members are producers of audiovisual works and content for use in films, television, documentary features, animation, and commercials.

We thank the Portfolio Committee for the opportunity to present this submission in response to the call for public submissions and comments published on 03 December 2021 on additional definitions and clauses in relation to the Copyright Amendment Bill ("the Bill").

It is our submission that the Copyright Amendment Bill, even if amended as currently proposed, would fail to deliver on its stated key objective of improving the plight of South Africa's creators of copyright works, which includes producers of audiovisual works, especially in the digital environment. If enacted into law without much further substantive reassessment and amendment, the Bill would serve to undermine the audiovisual sector's ability to create jobs, and attract the high-level investments required to increase productions to support the sector and the country's economic growth, when it would be most needed in the post-pandemic era.

Introduction: The contribution of South Africa's audiovisual industry to the country's economic growth and recovery from the pandemic

The global audiovisual content production space is an intensely competitive environment in which countries with the most 'television and film-friendly environments' tend to attract the

larger shares of production spend and investment. This investment fuels domestic productions, enables international co-productions, and supports businesses from other sectors that serve productions, including hospitality, tourism and travel, catering, construction, engineering, and many others. It creates a broad spectrum of jobs ranging from highly skilled individuals (cast and crews, sound and visual effects specialists, editors, script writers, musicians, animation, and graphic artists, etc.) and for artisans and unskilled new entrants to the workplace who can go on to build highly successful careers in the industry.

In 2017, the National Film and Video Foundation (NFVF), an agency of the Department of Sports, Arts and Culture, published the findings of an economic impact assessment study on the economic contribution made by SA's film and television industry, measured over a four-year period[1].

Some of the reported economic benefits of investment and expenditure in SA's film and television industry include the following:

- An increase by a multiple of 4.9 in the employment multiplier for every R1 invested, which shows how well this industry is positioned to create sustainable jobs and employment, and to drive transformation objectives. 65% of the workforce has subsequently been measured to be under the age of 35.
- A GDP contribution of R5.4 billion, which shows substantial growth from the R3.5 billion contribution measured by the NFVF in 2013.
- A direct impact of R4.4 billion on overall economic production in SA, which comprised approximately one third of the total production in the economy, measured at R12,2 billion.

The NFVF study did not measure the economic contribution made to SA's GDP by producers of television commercials. The Commercial Producers Association of South Africa (CPA) is a trade association representing production companies that produce television commercials for both the domestic and international markets. The CPA informed as part of its written submission made to the Portfolio Committee during the July-August 2021 consultation on the Bill[2] that the GDP contribution from its sector is approximately R2 billion per annum, 50% of which is the result of foreign direct investment.

In 2021, the NFVF presented the findings of an impact assessment study, which measured the economic contribution of the SA film and video industry to the country's GDP between April 2016 to March 2021, and which assessed the impact of the COVID-19 pandemic on the industry[3]. Due to the negative impact of the pandemic on industry operations the estimated economic contribution to the country's GDP in 2019/20 of R7.2 billion declined to R2.9 billion in 2020/21. The total number of full-time equivalent jobs created in the film

[1] NFVF study reveals SA film industry has a positive impact on the economy (southafricanculturalobservatory.org.za)
[2] https://www.parliament.gov.za/storage/app/media/Links/2022/1-january/26-01-2022_Copyright_AB/CPA_Redacted.pdf
[3] Economic impact assessment study by the NFVF shares effects of the pandemic on the industry.

industry decreased from approximately 32, 400 in 2019 to 12, 700 in 2021. The study remarked that the industry continued to contribute '*intangible benefits to the wider economy and society including destination profiling, and marketing and tourism, skills development, contribution to social cohesion and development and distribution of local content amongst others*'.

Despite the damaging impact that the pandemic had on the growth of our industry, we are confident that an enabling policy and legislative framework can position SA favourably as a preferred destination for high quality audiovisual content production. This would make it possible for our audiovisual producers to attract and secure the levels of investment and finance required to reignite the growth of our sector, for the benefit of all stakeholders, and for the country's broader economy.

A 2020 economic impact assessment study[4] by prominent UK-based consultancy firm, Olsberg SPI, found that investment in the production of feature-length films and multi-part television series ("Screen Production") has become a key economic driver in many countries around the world, fuelled by the unprecedented levels of consumer demand for high quality content that arose during the pandemic. Such investments can inject significant amounts of capital very rapidly into an economy. An analysis of expenditure relating to a major feature film showed that an average of US$10 million per week was spent in the local economy where the production was based, during a 16-week shoot. On average, 67% of production spend was traced to flow to other businesses and sectors outside of Screen Production.

South Africa is uniquely positioned, due to a number of factors, to attract a larger share of global production spend in the years to come, which would bolster the country's prospects of economic recovery from the pandemic. This would only be achievable if the underlying legislative and policy framework creates an enabling environment for high level investment and the financing of high-quality productions. Sound copyright laws and policy that are aligned with international best practices is the foundation for encouraging new investments of high value.

Audiovisual producers leverage and rely mainly on rights of copyright in audiovisual works to raise finance and attract investment for new domestic productions, international co-productions and to attract international productions to South African locations. The Copyright Amendment Bill contains many '*world first*' proposals that were not subjected to appropriate economic impact assessments and that, if enacted into law, would raise SA's investment risk profile for high quality productions to an unacceptable level. This would position SA as an '*outlier*' in many respects internationally, as many of the concerning provisions in the Bill that would affect trade and investment in our sector have no equal in any other legislation around the world, were not subjected to economic impact assessment, and are not aligned with international best practices observable for our industry. Many of these provisions, if enacted as presently tabled in the Bill, fail to appreciate the complexities of our industry, and would give rise to legal uncertainty on key issues, and result in unjustifiable limitations of the constitutionally enshrined principle of freedom to trade, and

[4] The Impact of Film and Television Production on Economic Recovery from COVID-19 — Olsberg SPI (o-spi.com)

contract. The Bill proposes unwaivable statutory royalties as practically the only mode of remuneration for performers, and places poorly conceived, high-risk reporting obligations and penalties on production companies and their licensees. The Bill fails to introduce meaningful enforcement mechanisms and remedies to curb online infringements and piracy, while introducing a sweeping new regime of overly broad exceptions to copyright protections. The net effect is that the enactment of the Bill, without substantial reassessment and amendment, would expose producers and investors to unprecedented levels of risk which would not exist in other jurisdictions competing with SA for the same investment and production spend. This would prejudice the ability of our producers to raise the finance and attract the investments required for high quality domestic and international productions located in South Africa.

It is our submission that much more work is required on the Bill, and that the amendments that are currently proposed alone would not be sufficient to resolve all the serious flaws and constitutional defects in the Bill. The enactment of the Bill, even as proposed to be amended now, will have a devastating impact on trade and investment in our sector, that would further compound the destructive impact of the pandemic.

The Bill remains fundamentally flawed and will materially damage the interests of stakeholders in the audiovisual sector

We understand that the document that was published as a Call for Public Comments and Submissions reflects wording prepared by Adv Charmaine Van Der Merwe on behalf of Parliamentary legal services in response to proposals made by the Department of Trade, Industry and Competition ("DTIC") to amend the Bill following its consideration of stakeholder inputs received during the July-August 2021 public consultation on the CAB. The DTIC's proposals were presented by Minister Patel to the Portfolio Committee in November last year. Curiously, not all the proposed amendments motivated by the Honourable Minister were taken up in the proposals subsequently made by Parliamentary legal services which gave rise to the present consultation. Some of the proposed amendments that are subject to this consultation required approval from the National Assembly as it purports to introduce amendments outside of the scope of the Bill itself, and the President's constitutional reservations.

All the defects and obvious errors that are now proposed to be corrected were already identified by the four experts[5] appointed by the Portfolio Committee under the previous Parliament to advise it on the Bill prior to its adoption in 2018. Their recommendations, and much broader criticisms on the Bill's constitutionality and misalignment with relevant international treaties appear to have been inexplicably ignored at that time. While the focus is now on the correction of some of the obvious errors identified previously, many of the more contested provisions and fundamental defects appear to remain unassessed, leaving the Bill non-compliant with the Constitution and international treaties if enacted into law.

[5] Ms Michelle Woods, Mr André Myburgh, Dr Joel Baloyi and Mr Wiseman Ngubo.

During the July-August 2021 public consultation, the South African Institute of Intellectual Property Lawyers (SAIIPL) delivered a submission[6] to the Portfolio Committee that identified 19 sets of provisions in the Bill that may have constitutional implications if left unaddressed, or which may amount to breaches of relevant international treaties if enacted into law.

We are concerned that the proposed amendments that are subject to this consultation amount largely to cosmetic updates and the fixing of obvious errors that would not serve to resolve the more fundamental flaws and serious constitutional defects that appear to remain unassessed for constitutional and treaty compliance to date.

By means of example, a ***clear procedural irregularity*** which will have constitutional implications if left unaddressed is the lack of proper public consultation on the statutory royalty regimes proposed in Sections 6A-8A[7] of the Bill. These provisions were written into the text of the Bill by the Portfolio Committee, after the August 2017 public hearings, and without subjecting it to any economic impact assessment, or substantively consulting on it with the public. The provisions contain directions for the Minister to, after the enactment of the Bill, attend to an impact assessment study, to determine '*how*' the statutory royalty regime should be implemented, and it was never properly assessed whether there is a specific market failure that it serves to address, and whether this is the optimal solution to address it, or whether it may have serious unintended consequences for the affected industries, and its intended beneficiaries, if enacted into law as presently tabled.

Since the Portfolio Committee resolved to amend the Bill in ways that fall outside the scope of the President's reservations and the Bill itself and secured the permission of the National Assembly to do so, it is incumbent on the Committee to reassess and address the other obvious errors that remain in the text of the Bill and certainly those provisions that may have constitutional or international treaty non-compliance implications.

We made submissions[8] on highly problematic provisions that affect our sector and that requires reassessment to determine constitutional and international treaty compliance during the July-August 2021 consultation, and during previous rounds of public consultations on the Bill. We received no response or indication that the serious issues raised in our prior submissions have been properly assessed to date.

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[6] https://www.parliament.gov.za/storage/app/media/Links/2022/1-january/26-01-2022_Copyright_AB/SAIIPL_Submission_Redacted.pdf

[7] Sections 6A – 8A were introduced by the Portfolio Committee under the previous Parliament after the August 2017 public hearings on the Bill. Only sub-sections 6A(4) and (5), 7A(4) and (5) and 8A(4) and (5) were opened for public consultation. Sub-sections 6A(7), 7A(7) and 8A(5) were since found to bring about arbitrary deprivations of property rights and the Portfolio Committee already resolved to remove it. **The substantive provisions of Sections 6A-8A were never opened for public consultation.**

[8] https://www.parliament.gov.za/storage/app/media/Links/2022/1-january/26-01-2022_Copyright_AB/IPO_ASA_Redacted.pdf ; https://www.parliament.gov.za/storage/app/media/Links/2022/1-january/26-01-2022_Copyright_AB/IBFC_Submission_Redacted.pdf ; and the CPA's submission which referenced under footnote no 2 above.

Our submissions made to the Portfolio Committee in respect of the Bill to date have remained consistent from the onset. We remain deeply concerned with the lack of appreciation of the complexities of our industry that is evident from many proposals in the Bill that serve to address perceived market faults in other sectors, but that are also made applicable to the audiovisual sector, without justification. The Bill, in many key respects, seeks to paint with a broad brush across all creative industries, without any economic impact assessment supporting this approach. This fails to appreciate that there is not '*one creative industry*' to legislative for, but many different and commercially unrelated industries and sub-sectors that deploy different rights management and remuneration models, whether in the audiovisual, music, publishing and print media, design, gaming, software development, arts and crafts, broadcasting, etc. industries. The problem with this approach is that a solution that is proposed to address a bespoke issue that may exist in one industry, might present serious challenges and risks to everyone in the value chain concerned, if applied indiscriminately to have general application in all creative industries.

Key Examples include:

- The erroneous attempt to introduce a **reversion right** through amendment of Section 22(3) which was originally intended to only have application to certain special cases in the music industry, as recommended in the Copyright Review Commission (CRC) report of 2011. The proposal in Section 22(3) amounts to an arbitrary restriction of the term limits of *all* assignments of copyright in literary and musical works, regardless of the circumstances. Authors should be given the choice to assign their rights for longer terms, especially in circumstances where they could negotiate higher remuneration for this upfront. Also, works commissioned specifically for use in audiovisual works, such as scripts and musical compositions, need to be excluded from the application of this provision to enable producers to unify rights in the audiovisual works for the life of copyright in the works. This is a critical requirement to enable the effective and unencumbered commercialization of audiovisual works at the highest possible return for all creative contributors to the works. If a single creative contributor to a multi-authored work, including an audiovisual work, were to refuse to renew an assignment term after 25 years, for whatever reason, this could result in many works having to be withdrawn from the market at that time to avoid copyright infringement, and resulting in financial loss for all creative contributors in those works and the parties that invested in its production and commercialization.

- The **contract override provision**, Section 39B, which instead of only applying to certain special cases where a market fault has been identified through proper impact assessment, has been arbitrarily extended to have general application to all contracts containing terms relating to rights of copyright. Such a general contract override does not exist in copyright law anywhere else in the world to our knowledge, and for good reason. It poses serious and unjustifiable challenges for contractual dealings in respect of copyright works and the freedom of contracting parties to enter into agreements on the terms of their choosing. It also poses serious

issues for parties when negotiating settlement agreements, and license agreements in terms of which certain waivers of rights are intended to be agreed on.

- The **unwaivable statutory royalty right** (Section 8A, read with Section 39B of the Bill) that is proposed for performers featured in audiovisual works was not subjected to proper public consultation or economic impact assessment. The corresponding provisions in the Performers' Protection Amendment Bill (PPAB) provides for contractual flexibility (Section 3A(1)(b) of the PPAB allows for *'statutory royalties **or** equitable remuneration*' to be agreed on). Section 6A of the Copyright Amendment Bill also affords parties contractual flexibility with respect to the statutory royalty right for authors of literary and musical works through the insertion of the phrase '***subject to any agreement to the contrary***'. The arbitrary restriction that is placed on the contractual freedom of performers and producers to agree on a preferred remuneration model in circumstances that will vary greatly from project to project is unjustifiable, may have constitutional implications, and is not aligned with the corresponding provisions of the PPAB or the Beijing Treaty.

- The criminalization of and disproportionate penalties prescribed (Section 8A(6) – (7) of the Bill) for **non-reporting of legitimate commercial uses made of audiovisual works** to all performers featured in such works (including '*extras*', given the broad definition of a '*performer*' contained in the PPAB) appears to be another unjustifiable extrapolation of a proposal developed from a recommendation made in the CRC report with respect to a perceived market fault that may exist in the music industry. It's scope of application to also include audiovisual works is highly problematic as it would be practically unworkable to implement in our industry, and the failure to report accurately on legitimate uses made of works could expose the directors of production companies and their licensees to the risk of criminal prosecution, and to incurring completely disproportionate penalties of up to 10% of a company's annual turn-over. This would discourage producers and investors in the production of audiovisual works and content from doing business in SA.

We submit that the legal assessment that informed the identification of the provisions that require reassessment and amendment to address all aspects of constitutionality and international treaty non-compliance that afflict the Bill is incomplete and problematic, and should be revisited by the Portfolio Committee, with input from an independent copyright law expert. Further, the DTIC should be called upon to produce the missing economic impact assessment study, as required in terms of government's SEIAS guidelines, that measures the impact of the Bill on the audiovisual sector, and the other sectors represented in SA's creative industries.

Specific comments on the proposed amendments to the text of the Bill

We welcome the proposals to improve the text of the Bill and the Portfolio Committee's positive action of seeking the National Assembly's approval to even go beyond the scope of the President's referral decision and the Bill itself to effect amendments deemed necessary to ensure that the updated provisions are fit for purpose and will achieve their intended outcomes.

The initial call for public comments and submissions, as published on 03 December 2021 was deemed to be incomplete and confusing and this resulted in an additional document (entitled "*Wording for All Amendments.PDF*") being circulated by the Secretariat on 08 December.

This document contains proposed amendments to the Bill and the Performers' Protection Amendment Bill ("PPAB") including many which are not to be subjected to further public comment as it is deemed to be informed by stakeholder submissions received during the July-August 2021 public consultation.

It is challenging, and in places highly problematic, to restrict comments to certain provisions in isolation. For instance, when commenting on new definitions, one must consider the potential impact thereof on the interpretation of the clauses in the Bill where the new definitions would convey a different meaning than before. Also, due to cross-referencing with other provisions in the Bills, some provisions simply cannot be considered without assessing the net-effect it would have if read with all provisions that bear relevance to it.

Further, when considering the cross-referencing of provisions between the two Bills, the proposed amendment of the PPAB, without also amending the corresponding provisions in the Copyright Amendment Bill, would introduce new inconsistencies. By means of example, an amendment of **Section 3A(3)(b) of the PPAB** is proposed to clarify that written agreements between producers of audiovisual works and performers featured in the works '*must set out the royalties **or** equitable remuneration*' in respect of the commercialization of such works. This proposal is aligned with the corresponding provision of the Beijing Treaty but is not aligned with Section 8A of the Copyright Amendment Bill, which prescribes statutory royalties as the only mode of remuneration that should be agreed with performers. **Section 8A of the Copyright Amendment Bill should be updated in a similar fashion** to ensure that the two Bills before Parliament are aligned on this issue, and with the Beijing Treaty. In other instances, the alignment of the Bills is duly considered, for instance, with respect to the proposed amendment of the definition of '*broadcast*' in both Bills.

Bearing the above in mind, we set out our specific comments on the proposed amendments of the Bill in respect of provisions affecting the audiovisual sector below.

New Definitions: "authorized entity"; "broadcast"; "lawfully required"

We concur with the proposed amendments, and the better alignment with relevant treaties (where applicable) that would result from it.

Technological Protection Measures (TPMs)

Adequate and effective legal protections against the unlawful circumvention of Technological Protection Measures or 'TPMs' is critical for copyright owners of audiovisual works to protect their works online against the scourge of rampant infringement and piracy that is a pervasive, global challenge to rights holders and producers of audiovisual works and content.

The WIPO Copyright Treaty (WCT), WIPO Performances and Phonograms Treaty (WPPT) and the Beijing Treaty require that the national legislation of member countries provides for "*adequate legal protection and effective legal remedies against the circumvention of effective technological measures".* SA has resolved to accede to these treaties following the enactment of the Bill and it is therefore important that the provisions relating to TPMs in the Bill are aligned with the corresponding provisions of the treaties on how TPMs should be approached.

The provisions in the Bill relating to TPMs have been subjected to strong criticism to date, and our comments in this submission will be focused on the new definitions proposed that are expressly the subject of this consultation, and the proposed amendments to some of the exceptions or limitation clauses (Sections 28O, 28P and 28S).

The question that should be answered is whether the updated definitions of *'technological protection measure' and 'technological protection measure circumvention device or service'* would amount to a competent development of the Bill, so that when it is read with the exception and limitation clauses that are also proposed to be amended, would find proper alignment with the treaties, to provide for the required "*adequate legal protection and effective legal remedies against the circumvention of effective technological measures"*. When interpreting the scope of legal protection afforded to TPMs, one must consider the level of protection that is afforded against unauthorized acts of circumvention on the one hand, and '*preparatory activities*' which render such acts possible, on the other. Preparatory activities, which include the manufacturing, distribution, and importation of circumvention tools and devices, and the offering of services for circumvention, typically occur in the public space. Acts of circumvention typically occur in a domestic or private space, where effective enforcement can be problematic.

It is our submission that, despite the improved wording proposed for the definitions of '*technological protection measure*' and '*technological protection measure circumvention device or service*', these amendments are not sufficient to render the Bill treaty compliant. A reconsideration of the clauses that are proposed to be amended without calling for further public comments, namely Sections 28O, 28P and 28S is also required.

Section 28P(2) of the Bill introduces an exemption for a person who intends on circumventing a TPM to perform a '*permitted act*' (i.e. an act permitted in terms of any exception provided for in the Act) where permission to do so was denied by the copyright owner. In cases like these, it is proposed that the person may proceed to engage the services of a third party for assistance to enable the circumvention of the TPM.

We have serious reservations about this proposal, as a copyright owner may withhold or deny permission on the basis that a dispute exists as to whether the intended user's conduct would amount to a 'permitted act' in the first place. It would, in such instances, force the copyright owner to institute legal proceedings to attempt to restrain the unauthorized action taken to overcome the TPM, and the copyright infringement that ensued with respect to the unauthorized use of the copyright work in question that followed. In terms of SA Copyright law, damages can only be claimed in infringement matters where it can be proven that the defendant had 'guilty knowledge' that the offending conduct amounted to copyright infringement. If a person who unlawfully overcame a TPM to access and use a copyright work can claim to have laboured under the mistaken impression that his conduct amounted to a 'permitted act' and not infringement, copyright owners would find it challenging, in most instances, to prove that this was not the case, and that the defendant should be held liable for damages. This places rights holders in a precarious position as there would be no effective deterrent for a mis-reliance on the statutory exemption. The prohibition of actions undertaken to unlawfully overcome TPMs would therefore not provide for an effective deterrent in cases like these, and this would not provide for "*adequate legal protection and effective legal remedies against the circumvention of effective technological measures"* as required by the relevant international treaties.

To resolve this issue, we submit that Section 28P(2)(b) should be amended to allow for instances where the copyright owner refuses a request made by person for a TPM to be circumvented and where a dispute exists between the parties' assessment whether the intended action qualifies as a '*permitted act*', to be referred to the Copyright Tribunal for adjudication. Also, in instances where a copyright owner does not respond to such a request made by an intended user, the matter should be referred to the Copyright Tribunal for the determination whether the intended action qualifies as a '*permitted act*' and under what terms the intended actions may be performed if the copyright owner is unresponsive or untraceable.

With respect to the exemption proposed in **Sections 28S(a) and (c)** we submit that it is inappropriate for a '*performer*' to authorize the removal or modification of copyright management information from a copyright work. The Bill defines '*copyright management information*' as information that is attached to or embodied in a work that identifies the work, the author or copyright owner, or identifies or indicates the terms and conditions for using the copyright work. Copyright management information is determined and applied to a copyright work by the owner of the work, and it should therefore only be the copyright owner that has the exclusive right to authorize the removal or modification of copyright management information that is applied in respect of the work. When considering that audiovisual works such as feature films typically include recordings of the performances of hundreds of performers (featured performers and extras), it could give rise to serious difficulties arising if any performer featured in the film would have the right to unilaterally remove or modify copyright management information with respect to the underlying

copyright work, which they do not own. Only the copyright owner of the audiovisual work should have the exclusive right to modify or remove copyright management information that is attached to or embodied in the work.

To resolve this issue, we submit that Section 28S(a) and (c) should be amended by the deletion of the term 'performer'.

Online infringements and piracy

From an enforcement perspective, and to ensure that '*effective legal remedies*' are enacted into law to assist rights holders who deploy TPMs effectively to guard against rampant infringement and piracy online, the current remedies in law are not well suited for the online environment. In SA, there are no legal remedies that rights holders can rely on when seeking to take action against 'foreign infringers' who do not own any assets in SA against which a judgement can be executed or jurisdiction to hear a case confirmed by a Court. In other jurisdictions, including the UK, Canada and Australia, remedies like dynamic no-fault injunctions and website blocking have been recognized in law to assist rights holders to restrain acts constituting online infringements and to prevent or block user access to websites primarily designed to facilitate infringements. Various submissions were made to the Portfolio Committee during prior public consultations on the Bill by stakeholders in the audiovisual sector, calling for similar remedies to be considered for SA. To date, there has been no response to this, and it therefore appears that the need for an appropriate remedy to assist SA's rights holders to prevent or restrain flagrant online infringements and acts of piracy and counterfeiting have not been properly assessed. The inability of SA's rights holders to take effective action to curb or prevent online infringements, especially against infringers who base their operations in other countries but provide user access to SA's consumers of content and products via online portals, also exposes SA's consumers to risk.

The failure to introduce meaningful enforcement remedies in the online environment remains a key oversight in the Bill and we call upon the Portfolio Committee to reassess the introduction of a new enforcement remedy that would assist rights holders and protect consumers in SA against the pervasive scourge of online infringements, piracy and counterfeiting activities.

Clause 13: Section 12A(d): New paragraph (d) making the four factors in paragraph (b) applicable to the exceptions in Sections 12B, 12C, 12D, 19B and 19C

The proposed introduction of a fair use-styled exception to copyright protection is one of the most contentious and problematic proposals advanced in the Bill for several reasons that stakeholders who oppose its introduction have illuminated during previous consultations. These concerns, which we share, include that it would introduce unnecessary vagueness into SA's copyright law, and no effective counterbalances have been introduced

with it to deter infringers from over- and mis-reliance on this statutory defence against infringement claims.

To compound this, the fourth factor of the '***substitution effect of the act on the potential market for the work in question***' that is proposed in the Bill amounts to a clear deviation from the wording used in Section 107 of the US Copyright Act, from where we understand the fair use proposal in the Bill finds its origin. We are not aware of any legal or impact assessment that has been performed by government to determine how this change in wording would impact on the interpretation of the fair use-styled provisions in the Bill or any of the exception clauses to which the four-factor test is proposed to be extended. The impact of the '*substitution effect*'-factor in the digital environment requires further assessment, especially with respect to how this could impact on SA's indigenous communities with respect to the effective protection of their cultural expressions.

We are concerned that the extension of the open-ended fair use factors to the interpretation of the specifically worded exceptions would introduce unnecessary vagueness in the legal interpretation of the scope of application of the exceptions and that the potential impact thereof has not been properly assessed.

Our suggestion would be that the reasons behind this proposed change be clarified by the DTIC, and that they make the legal and economic impact assessments that support it available for review and further consideration.

Section 12B(1)(c) and new 12B(2) providing for new provisions relating to ephemeral rights

It appears that an incorrect reference was made in the published notice relating to the call for public comments, and in the additional document with explanatory notes on the wording of all amendments that are proposed, as the first new paragraph inserted to deal with so-called ephemeral rights is numbered paragraph 12B(1)(b), not sub-section (c) as stated in the published notice.

The reference to a '*cinematographic work*' is erroneous and should be replaced with '*audiovisual work*' considering that other references to cinematographic works in the Act will be replaced throughout with '*audiovisual work*' as proposed in the Bill.

The qualification of authors' moral rights in Section 12B(1)(a)(ii) and 12B(1)(c) and 12B(1)(d) for the source and the name of the author to only be mentioned in instances '*where it appears on the work*' amounts to an unjustifiable limitation and therefore expropriation of authors' moral right to be recognized as the author of their works. Authors' names do not always appear 'on a work'.

The proposed wording is undesirable, problematic, and should be reconsidered. It conflicts with Section 12A(c) of the Bill which confirms that 'the source and the name of the author *shall* be mentioned' (our emphasis), and there is no clear justification for this proposed deviation in the relevant provisions.

Sections 12C(2) and 12D(1)(b), (c) and (d): Adding the wording of the three step test as additional factors against which the exceptions must be tested.

We support the inclusion of the wording of the Berne-3-step test to add clarity to the scope of application of the relevant exceptions. That being said, **we find the proposed qualification of the Berne 3-step test through the inclusion of the phrase '*flowing from the copyright in that work*' to be problematic**. This deviation from the wording of the three-step test as it appears in the Berne Convention would introduce unnecessary vagueness as it would exclude so-called '*non-consumptive uses*' from its scope of application. In the digital environment, it is often a grey area to determine whether certain unauthorized uses made of copyright works, by tech firms in particular, amount to consumptive or non-consumptive uses, depending on the manner in which a work is used and the technological process that is served by the use. Many of the errors that were made by the drafters of the Bill right from the onset of the matter, some of which still require addressing to this day and are subject to this very consultation, arose due to an unjustified deviation from the express wording of the relevant international treaties when seeking to incorporate 'treaty principles and definitions' into the text of the Bill.

Examples of this include the definition of '*broadcast*', the provisions relating to the exceptions for the blind and visually impaired, and the definitions and provisions relating to technological protection measures. This serves to illustrate how undesirable it is, when the intention is to introduce certain provisions or principles, as they are enshrined in international treaties, into national law, but to deviate from the wording as it appears in the treaties without clear justification and impact assessment on how the proposed changes might alter the interpretation of the provisions.

To resolve this, we suggest that the phrase '*flowing from the copyright in that work*' be deleted from the proposed new Sections 12C(2)(c) and 12D(1)(d).

Clause 27: Section 27(5A), 5(B) and 5(C), providing offenses in respect of digital rights, technological protection measures, and copyright management information.

We support the correction of the obvious errors that were made by the drafters of the Bill with respect to the omission of the introduction of criminal sanctions for the infringement of the new '*digital rights*', and infringing actions undertaken in respect of TPMs and copyright management information.

In the proposed Section 5A, which purports to criminalize the infringement of the digital rights of '*communication to the public*' and '*making available*', the qualification that only

infringing acts which are committed '*for commercial purposes*' are to be criminalized is unjustified. There are many scenarios in which copyright infringement might occur online where the infringer does not necessarily make copyright works available for commercial gain or purposes. For instance, where a person makes online storage depositories containing libraries of audiovisual works, including films, music videos, etc. available to others for free downloading, streaming, and further distribution, without the permission of the rights holders and does not profit in a commercial sense from doing so, that would clearly amount to copyright infringement and this conduct should also be subject to criminal penalties.

We submit that the proposed exemption with respect to the criminalization of infringing acts performed in respect of the new digital rights of '*making available*' and '*communication to the public*' to exclude acts not committed for commercial purposes is arbitrary and unjustifiable. None of the other acts of copyright infringement that are described and criminalized in Section 27 are subjected to the same limitation.

To resolve this issue, we submit that the phrase '*and for commercial purposes*' be deleted from the proposed new sub-Section 5A.

Conclusion

South Africa's audiovisual sector has tremendous potential to attract significant investment and become a key driver of economic growth and recovery from the pandemic for the country. The global audiovisual content production industry is an intensely competitive space, and government policy and legislative frameworks should be investment focused with the view of creating an enabling environment to attract new investment. The Copyright Amendment Bill contains so many deeply flawed proposals for general application across all copyright industries, without any proper economic impact assessment of how this would impact on the audiovisual sector, and the film, television, animation and advertising commercials production industries contained therein. This resulted in legislative proposals that would be largely damaging to investor confidence in our sector. Producers of audiovisual works rely on and leverage the unencumbered rights of copyright in the works to secure the levels of funding required to produce new works of high quality.

The net-effect of the enactment of the Bill, even with the changes now proposed, will be expropriative with respect to rights of copyright, and result in unjustifiable limitations of contractual freedom. This would unnecessarily raise SA's risk profile and severely damage its ability to be positioned as a preferred global destination for high quality audiovisual content production. This would stunt the growth of our sector and impact negatively on all participants in the value chain, including all satellite economies served by our sector.

It is our submission that much more work is required on the Bill before the President's valid constitutional concerns would be fully resolved and the Bill would serve its key objective of improving the plight of SA's creators of copyright works.

It is our recommendation that an independent legal analysis be performed by persons who are proven copyright experts and practitioners and non-partisan to the matter, and that a proper economic impact assessment be published by the DTIC, or attended to if not done to date before further work to settle on the final text of the Bill is undertaken. As it stands, the enactment of the Bill, even with the proposed amendments, poses a grave risk for the viability of the independent audiovisual content production sector in SA. The undersigned organizations would be pleased to present practical examples to the Committee of how the Bill would place substantial risks on producers to such an extent as to render many productions non-viable. The Bill presents a threat to small businesses, individuals, and the possibility for South Africa to take its rightful place as a source of rich storytelling for local and international audiences to enjoy.

In our experience of the copyright reform project to date, the complexities of our industry have not been fully appreciated. We avail ourselves to present a workshop to the Committee to improve its understanding of how our industry functions, and how it depends on sound copyright laws that are aligned with international best practices, and grounded in contractual flexibility, to create opportunities for SA's creatives to thrive. Also, to enable our producers to attract the high-level investment required to fuel production growth and deliver on our industry's promise of becoming a key economic driver for the country's post-pandemic economic recovery.

We thank the Portfolio Committee again for the opportunity to present this submission.

Yours Sincerely

[redacted]

For: the IPO

Quinton Fredericks

[redacted]

For: the IBFC

Azania Muendane

[redacted]

For: the CPA

Bobby Amm

[redacted]

For: the ASA

Nick Cloete