



**COPYRIGHT COALITION OF SOUTH AFRICA NPC**

28 January 2022

The Honourable Ms Judy Hermans: Chairperson of the Portfolio Committee on Trade and Industry

Attention Mr. A Hermans

Parliament of the Republic of South Africa

CAPE TOWN

By email only to: [ahermans@parliament.gov.za](mailto:ahermans@parliament.gov.za)

Dear Ms Hermans,

**CALL FOR PUBLIC SUBMISSIONS AND COMMENTS IN RELATION TO AMENDMENTS TO SPECIFIC CLAUSES IN THE COPYRIGHT AMENDMENT BILL (B13B-2017) AND THE PERFORMERS PROTECTION AMENDMENT BILL (B24B-2016) – SUBMISSION BY THE COPYRIGHT COALITION OF SOUTH AFRICA (CCSA)**

We wish to convey our heartfelt condolences on the recent passing of the previous chairperson of the Portfolio Committee Mr Duma Moses Nkosi.

## 1. INTRODUCTION

The Copyright Coalition of South Africa (CCSA) is a broadly representative group mainly comprised of local trade and industry associations representing hundreds of local companies that drive investment into SA's creative and education sectors, creating jobs and opportunities for tens of thousands of SA's creatives in the publishing, music, film, animation, and other industries<sup>1</sup>

This commentary is made by the CCSA in response to the call for public submissions and comments in relation to amendments to specific clauses in the Copyright Amendment Bill (hereinafter the CAB) and the Performers Protection Amendment Bill (hereinafter the PPAB) (both hereinafter the Bills).

The submission is made mindful of the South African context where our democracy is experiencing severe challenges manifesting through lack of inclusive growth compounded by the global pandemic which has created dents in our already ailing economy. It is paramount now more than ever that the reform of old legislation in order to align it to the fast growing digital era and to ensure recovery from the maladies caused by the pandemic, is expedited. Investment is critically needed in our creative industries and it is therefore important that we have a regulatory framework that presents an attractive or enabling environment for recovery, inclusive, and sustainable growth. The Copyright Coalition of South Africa members remain hopeful that despite these trying moments, the nation will rise triumphantly to the occasion.

In making this commentary we acknowledge that the Portfolio Committee (PC) has taken into consideration inputs received from the public in the previous submission(s) and note that the PC has made changes to some deficiencies which appeared in earlier drafts of the CAB and PPAB. However, we remain concerned that despite these amendments to the draft Bills, the CAB and PPAB remain to a large extent constitutionally flawed, and misaligned to international treaties. These amendments in our view are not resolving the critical issues faced by the CAB and PPAB.

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<sup>1</sup> ***The Copyright Coalition of SA comprises of:***

*The Independent Black Filmmakers Collective (IBFC), Trade Union for Musicians of South Africa (TUMSA), The Music Publishers Association of South Africa (MPASA), The Publishers Association of South Africa (PASA), Academic and Non-Fiction Authors of South Africa (ANFASA), PEN Afrikaans, Printing SA (PIFSA), Recording Industry of South Africa (RiSA), RiSA Audio Visual (RAV), Dramatic, Artistic, Literary Rights Organisation (DALRO), Writers Guild SA, Audio Militia, Animation SA, Musicians Association of South Africa (MASA), Southern African Music Rights Organisation (SAMRO), Composers, Authors and Publishers Association (CAPASSO) and the Visual Arts Network of South Africa (VANSA), Independent Producers Organisation (IPO), Academy of Sound Engineering]*

Since the referral of the Bills by the President on the basis of a number of concerns rightly raised, there seems to be a growing persistence in narrowing the scope for stakeholders to ventilate the multitude of what we consider to be fundamental flaws remaining in the Bills. The Copyright Coalition of South Africa and many other like-minded stakeholders emphatically submit that despite the changes that have been made most of them remain cosmetic and do not speak to the heart of the issues in the Bills. The CAB and PPAB remain not fit for purpose and cannot be cured by only addressing the issues specified in the President's reservations nor by commenting only on the recent proposed amendments in Blue contained in the document titled 'All Proposed Amendments presented by the PC'. In fact what these changes do, they compound the already existing problem of structural deficiencies and ambiguity and confusion in the Bills.

To address all other lingering constitutional issues raised by stakeholders, a broader approach should be followed to avoid "supervening constitutional challenges"<sup>2</sup> that may arise after the Bills have been enacted. The four experts<sup>3</sup> appointed by the previous Parliaments Portfolio Committee pointed out in detail the fundamental defects in the Bills and made recommendations which are yet to be considered True.

The CCSA members have throughout the process remained committed and hopeful that Parliament will evaluate our comments (in all our previous submissions) and those reflected in the letters from the Copyright Coalition of South Africa (CCSA) dated 15 November 2021 and 29 November 2021 and addressed to the then-Chairperson of the portfolio committee, Mr Nkosi<sup>4</sup>, which we can again make available upon request. We urge you to pass copyright legislation which will advance the interests of South African creators of copyright works. We again offer our continued support and are available to be heard at future public hearings and/or workshops.

## **2. ISSUES WHICH REMAIN UNADDRESSED IN THE CAB AND PPAB:**

Notwithstanding the amendments made, there remains issues which are unaddressed which mostly fall outside the narrow scope for consideration by the PC. In the July to August 2021 public consultations, The South African Institute of Intellectual Property Lawyers (SAIPL) made submissions<sup>5</sup> presenting to the Portfolio

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<sup>2</sup> See *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* [1999] ZACC 15 at para 19

<sup>3</sup> Dr Joel Baloyi, Mr André Myburgh, and Mr Wiseman Ngubo and Ms Michelle Woods

<sup>4</sup> [https://twitter.com/CCSA\\_Official/status/1461281869404815362?s=20](https://twitter.com/CCSA_Official/status/1461281869404815362?s=20)

<sup>5</sup> [https://www.parliament.gov.za/storage/app/media/Links/2022/1-january/26-01-2022\\_Copyright\\_AB/SAIPL\\_Submission\\_Redacted.pdf](https://www.parliament.gov.za/storage/app/media/Links/2022/1-january/26-01-2022_Copyright_AB/SAIPL_Submission_Redacted.pdf)

Committee a list of 19 provisions in the Bills which if the Bills are passed in their current form would have international treaty implications as well as constitutional implications. The Portfolio Committee has resolved to make amendments to the Bills beyond the President's reservations and in this regard have secured the permission of the National Assembly, the CCSA calls upon the Portfolio Committee to ensure that this process is given the seriousness it deserves and that all provisions which are likely to have constitutional implications or treating noncompliance are reviewed and the errors corrected.

Some of the issues that fall outside the scope of the current submission, and which remain problematic is the:

- Lack of a proper socio-economic impact assessment

The main issue earlier identified is one of the lack of a proper socio-economic impact assessment. This in our view is the cracked foundation upon which these Bills were built.

The Department of Trade Industry and Competition is yet to present a proper socio-economic impact assessment of the totality of the effect of the Bill on the creative sector, or a professional legal analysis of the Bill's provisions measured against the Constitution and international treaties when the Bill was introduced.

The creative industries embodies a broad number of sectors (Audiovisual, Music, Publishing, etc.) which all operate quite differently from one another. It is therefore imperative to ensure that provisions prior to being introduced into any piece of legislation are taken through a proper socio-economic impact assessment to ascertain their effect on each of these sectors. A paintbrush approach which has been used to date renders the Bills not fit for purpose for the creative industry and certainly not for the South African society at large.

**In view of this, we are imploring the Portfolio Committee to ensure that this exercise is carried out urgently prior to the Bills being finalised.**

- International Treaty Implications

The President when referring the Bills rightly raised concerns in respect to whether the Bills have fully taken into account the provisions and requirements of the international treaties that South Africa has acceded to and those that she intends to accede to, including the WCT, the WPPT and the Marrakesh Treaty. This concern remains unresolved as there are still a number of exceptions

introduced in the CAB which are not adequately aligned to the provisions and requirements of the relevant treaties and which have not undergone the three-step test.

We are encouraged that in the document titled 'All Proposed Amendments' the three-step test has now been introduced into some exceptions in line with international copyright treaties. We however hold the view that the manner in which the three-step test has been applied in this document in the latest blue amendments, is inaccurate. We refer specifically in this regard to the proposed introduction of the three-step test in 12C(2) in clause 13 of the Bill. The temporary reproduction and adaptation exception covered in section 12 borrowed from the provisions of article 5 of the EU Copyright Directive of 2001. In terms of article 5(5) of the said Directive, the copyright exceptions provided for in the article may only be *"applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder"*. The CAB has introduced a version of the three-step test which is altered and not according to the wording from which the exceptions are borrowed. We thus implore that adherence to the wording in the treaty, which is aligned to the Berne Convention wording, is done.

Mere insertion of the wording of three-step test into an exception clause, does not automatically render the clause compliant with the Berne Convention, and does not sufficiently resolve potential conflicts with the treaty as 'saying that an exception will apply only to certain special cases, does not necessarily mean it will, if those cases are not also well defined in the actual exception clause'. **All of the exceptions and limitations should be subjected to proper legal review and reassessment for compliance with Berne.** This in our view has not been applied to the amendments to date.

More specifically we are calling for the following:

- **The three-step test should be applied to all the exceptions which have now made their way into the CAB. The three-step test's exact wording as in the [Berne Convention Article 9\(2\)](#) should be used, not some modified or alternative wording.**

- **A proper socio-economic impact assessment of all the proposed limitations and exceptions should be urgently undertaken to ensure that the new exceptions comply with international treaties.**
- **Due to the complexity of this law, we further urge the PC to consult the advice and recommendation of the (four) experts appointed by the previous Portfolio Committee which advice is yet to be taken into account.**

- Provisions that introduce an open Fair Use Exception

The introduction of a new fair use exception in South African copyright law has been highly criticised by the CCSA members and like-minded stakeholders for its open -ended and limitless possibilities where unauthorised use is permissible. This in our view will inherently weaken the copyright system as an author's right and likely strengthen the so called 'user rights' in South Africa.

We are aware that there is strong lobbying to push this narrative as can be seen by the now new proposal to extend exceptions as contained in the document '**All Proposed Amendments**'.

- **We urge the PC to withdraw this proposal as amended, and to first subject this to a proper and independent social and economic impact assessment and application of the three-step test to all new exceptions.**
- **We call upon the PC to review our copyright laws to ensure their effectiveness in a digitized environment; whilst not disenfranchising the livelihoods of the South African creatives.**

- Technological Protection Measures (TPMs)

As South African copyright owners trade their works in the fast pace online and digital platforms, effective legal protection measures against unlawful circumvention of Technological Protection Measures or 'TPMs' is crucial against hacking and/or piracy of their content.

The CCSA submits that despite the amended and improved wording proposed in the definition of Technological Protection Measures and technological protection measures circumvention device or service these amendments are still not enough to render the Bill Treaty compliant.

The intention of the legislature should not be to find ways to “crack” authors’ protections, as done through the introduction of provisions relating to the use of those TPM’s circumvention devices or services. The Act should not promote this but rather discourage it.

All the provisions relating to TPM should be reassessed as when read together it is clear that they do not provide adequate and effective legal protections against the act of circumvention of TPM devices as required in the relevant treaties namely the The WIPO Copyright Treaty (WCT), WIPO Performances and Phonograms Treaty (WPPT) and the Beijing Treaty. By means of example some of the exemption clauses that are proposed to be amended which are not made subject to this consultation are Sections 28O, 28P and 28S. These clauses are highly problematic as they encourage parties who are interested to manufacture and deploy circumvention tactics and devices to base their operations in South Africa.

**An introduction of a new enforcement remedy that would assist rights holders and protect consumers in SA against online infringements, piracy and counterfeiting activities is required.**

**We urge the Portfolio Committee to review this and introduce meaningful enforcement remedies in the online environment to align with international treaties.**

### **3. CONCLUSION**

The Copyright Coalition of South Africa and many of its members have since inception of the draft Bills made several detailed submissions, participated in meetings of your committee including those conducted in November 2021, and have been taking part in robust discussions on this matter when presented the opportunity to.

We nevertheless feel our main concerns are overlooked and the advice of other persons whom we consider to be partial stakeholders continues to be taken into consideration by the Minister for Trade Industry and Competition, the Honourable Minister Patel, and by the Parliamentary Legal Adviser, Adv Van der Merwe. Notably, this is a highly specialized and complex area of the law, and we recommend that the National Assembly engages a select group of experts who are practitioners in the industry and who have experience in constitutional law and copyright law to provide an in-depth review of the Bills and all the legal issues being raised by stakeholders.

The creative industries were hardest hit as a result of the global pandemic and requires vigorous investment in order to realize the vision of the **Creative Industries Masterplan** i.e., to become:

*“Globally competitive, innovative, sustainable, vibrant and transformed Creative Industry that creates prosperity for creatives, entrepreneurs and broader society”.*

In conclusion we submit that due to their inherent flaws, and legal risks of proceeding with this deeply flawed Bill, which, if passed by the National Assembly again, there will certainly be a delay by many more years for the creative industry in becoming globally competitive and sustainable.

As pointed out earlier, the CCSA has broad representative of members that spans across the different creative industries in South Africa's creative sector. Our members concerns have not been fully appreciated and we avail ourselves as an organization with broad representation to present a workshop to the Committee to assist its understanding of the key issues which remain unresolved.

The CCSA is thankful in advance for noting all out comments and taking them into serious consideration.