



**Call for Public Submissions and Comments on Additional Definitions and Clauses in  
Relation to the Copyright Amendment Bill [B13B-2017]**

**Submission to the Portfolio Committee on Trade, Industry & Competition of the  
National Assembly of South Africa**

**By the  
International Federation of Film Producers Associations [FIAPF]**

1. 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 36 national producers' organisations from 29 countries across four continents in its membership and has developed working connections on common issues with many others. We have a working relationship going back many years with our South African colleagues in the film and TV content sectors: in particular, we hold similar views to those of the Independent Producers Organisation (IPO) regarding the importance of developing a national Copyright framework that will empower local film and TV content producers to take the economic and creative risks involved in making professional films and audiovisual content, including international co-productions and co-ventures, and to ensure that all the participants in the creative chain can benefit from the industry's growth.
2. We are grateful to PCTI for an opportunity to participate in this consultation regarding a set of specific new amendments to the Copyright Amendment Bill [thereafter 'CAB']. Since 2017, when we first contributed to a PCTI hearing, FIAPF has been an assiduous participant in consultations on both the CAB and the Performers Protection Amendment Bill [thereafter 'PPAB'].

In July 2021, FIAPF filed a detailed submission to PCTI over the questions posed by President Ramaphosa's referral letter, regarding possible misalignment of some provisions of the CAB with international copyright treaties to which South Africa is – or intends to be – a party. Subsequently, we were also invited to speak to the Distinguished Members of PCTI at an oral hearing held in August last year.

3. Although the present paper complies with the narrow scope of the current consultation and provides our perspective on the specific amendments for consideration only, we wish to begin by registering the gravest of concerns: further to last year's consultation with a range of stakeholders, it appears that none of the specific issues likely to affect the South African audiovisual sector and which were

raised comprehensively by FIAPF, IPO and allied local organisations, has been considered by the honourable legislators as meriting re-consideration and re-drafting.

4. In this context, we are alarmed that some of the clauses which PCTI did not deem to require further consideration, will, if not amended, be non-compliant with South Africa's obligations – both current and future – under international copyright law. Again, we are mindful of the fact that compliance with international law was one of the core concerns laid out in the Presidential referral.
5. We also believe that compliance and alignment with international law in the copyright field remains pivotal if this legislature is to achieve an efficient and effective modernisation of the national Copyright framework. Doing so would introduce legal and business certainty, thereby deploying a powerful incentive that would stimulate investment in local productions and enable the sustainable growth of production companies through ownership of their IP. It would also consolidate opportunities for South African audiovisual content companies to expand in foreign markets, and develop co-productions and co-ventures with producers and distributors in the rest of the world. It would also create a propitious legal and business climate for further inward investment into international productions locating in South Africa. Conversely, misalignment with the treaties will, we believe, generate legal uncertainty, with attendant chilling effects of both local investments and foreign direct investment into South Africa's audiovisual production infrastructure and jobs.
6. Along with many of our colleagues in the South African film and TV content production and distribution sectors, we maintain our view that certain sections of CAB, if unassessed and unamended, will establish an onerous and unwieldy statutory royalty regime in audiovisual works, will directly undermine the principles of contractual and commercial freedom and will render the exclusive rights that are at the core of WIPO Copyright Treaties of the United Nations Organization and other international agreements, essentially void. As we expressed in both our written and oral submissions to PCTI last year, we hold the view that these provisions, taken both together and separately, are not only misconceived from an economic and legal standpoint; they are also misaligned with regards to South Africa's current and future legal obligations under international copyright law.
7. We wish consequently to express our support for the urgent requests made by our South African colleagues [IPO, IBFC, CPA and ASA] in their joint submission for the present consultation, that the following provisions of the CAB, all of which have remained unexamined and unamended after last year's consultation, be reconsidered:
  - ⇒ Section 6A-8A – establishing a statutory royalty regime which forecloses on other forms of potential remuneration options that may be preferred by the authors and performers these clauses purport to protect;
  - ⇒ Section 39B – this section prevents the parties to an audiovisual contract from electing alternative modes of remuneration – by establishing a contractual

override, it reinforces the removal of contractual freedom already effected in Section 6A-8A. The section also grants extensive powers to the DTIC Minister to directly intervene in the content of audiovisual contracts and, in effect, micro-manage the audiovisual sector;

⇒ Section 22(3) – this section restricts the freedom of parties to an audiovisual contract to set the term of license of assignment best suited to the work and the circumstances of its creative participants by imposing a reversion right entirely unsuited to the audiovisual industry. Screenplays, commissioned music and underlying literary works, all of which are germane to audiovisual works' creation would thus see their term limited arbitrarily. As with Sections 6A-8A, we maintain that this clause, far from benefitting the rights-holders it purports to protect and empower, will hamper their freedom to choose and negotiate on preferred terms. The prescribed term will discourage the hiring of South African screenwriters and the optioning of screen adaptation rights from books and other underlying IP by South African authors and other talent. The consequence will be a diminishment of investment into creative development in the South African audiovisual sector overall, with attendant negative effects on the competitiveness of domestic South African production, job creation and the sector's contribution to GDP growth.

8. We join our South African colleagues in calling for an independent legal review of these sections of CAB, to produce a comprehensive assessment of their compliance – or lack thereof – with international copyright norms.
9. We also uphold our colleagues' request that a socio-economic impact assessment of these sections be carried out by the Department of Trade Industry and Commerce. No such assessment has been carried out during the CAB's progress through the National Assembly, since its introduction in 2017. Nor have any formal consultations with stakeholders been undertaken regarding the potential impact of these proposed clauses of their livelihoods.
10. Additionally, we wish to draw the attention of PCTI to an important disconnect between the CAB and PPAB regarding the remuneration of audiovisual performers. Namely, Section 8A of CAB is prescriptive about a single mode of remuneration of audiovisual performers (a statutory royalty) whereas Section 3A(3)(b) PPAB refers to a choice between a royalty or 'equitable remuneration'. We urge PCTI to amend Section 8A of CAB accordingly, so as to avoid conflict of interpretation of the two statutes and attendant legal uncertainties.
11. Discussion of specific amendments proposed by PCTI in [B13B-2017] [in numerical order]:
  - a. Proposed extension of fair use to general exceptions to copyright [Section 12A(d)]

FIAPF's first submission to PCTI in July 2017 contained our comments on the introduction of the fair use doctrine and criteria in South African copyright law.

Our analysis has remained consistent since: we are deeply concerned that the importation into South Africa's fair dealing legal tradition, of US-style fair use will result in considerable legal uncertainty for local and international rights holders working in the audiovisual and other creative sectors in South Africa.

We support our colleagues at IPO *et al* in their joint submission asking for reasons for the introduction of fair use to the interpretation of all the more specifically crafted exceptions contained in Sections 12B, 12C, 12D, 19B and 19C, and for a thorough legal and economic impact assessment to be conducted, with a view to potentially revisiting this section of the draft CAB.

b. Three step test

FIAPF welcomes the proposed insertion of the Berne Convention's three step test within relevant clauses of CAB that deal with exceptions to copyright [12C(2), 12D(1)(b),(c),(d)]. We believe this to be an important step in South Africa's bid to align with the Berne Convention and subsequent international copyright law treaties and agreements.

We agree with our IPO *et al* colleagues that there is an issue with the particular wording regarding the third test, that the proposed use of the work should: "*not unreasonably prejudice the legitimate interests of the copyright owner flowing from the copyright in that work*". The use of "flowing from" is a marked departure from the Berne Convention (and subsequent treaties') straight formulation that the use should not "unreasonably prejudice the legitimate interests of the author". The "flowing from" alternative wording in the proposed CAB amendment appears to be designed to exclude non-consumptive uses of copyright works. However, the debate about the boundaries between consumptive and non-consumptive uses is ongoing, e.g. the extent to which non-consumptive should include caching, indexing or text data mining. The ambiguity of the proposed wording would compound and intensify the legal uncertainties that the drafters would introduce, in our view, through the adoption of fair use in the South African copyright legal standard.

Consequently, we support our IPO *et al* colleagues' submission in calling for the deletion of "flowing from the copyright in that work" from the proposed amendment.

c. Criminal sanctions for offences regarding infringement of TPMs and copyright information management [27(5A), 5B, 5C]

FIAPF supports the introduction in the CAB of criminal sanctions that may act as effective deterrent against infringement of digital rights and offer meaningful legal recourse for rights holders, it is disappointing that the amendment in Section 5A proposes to restrict the application of such remedies to infringements committed "for commercial purposes".

Even a passing acquaintance with current forms of infringement of the right of *making available* online, reveals that considerable prejudice to rights holders is caused by offenders who are not driven by profit or commercial gain but are nevertheless motivated to share and disseminate content unlawfully to a large number of users, through the use of cyber-lockers and other forms of online storage and dissemination. The restriction of criminal sanctions to acts that are demonstrably for commercial purposes not only reduces significantly the deterrent impact of the proposed amendment, but appears, by default, to minimise or legitimise other forms of infringement that do measurable damage to rights holders' economic sustainability and the integrity of their intellectual property.

We strongly urge PCTI to delete the reference to "and for commercial purposes", so as to ensure that this important plank of the enforcement chapter of the CAB results in meaningful deterrence against a wide range of online infringements.

d. Technical protection measures [thereafter 'TPMs']

We contend that, as drafted, aspects of amendments to Sections 28P and 28S would fail to meet the international legal standard as laid out in the WIPO Internet Treaties.

Section 28P(2) introduces an exemption from liability for people who intend to circumvent a TPM in order to perform a 'permitted act' in the event that permission would have been denied by a copyright owner. The 'permitted act' is an act pertaining to one of the exceptions to copyright as defined in the CAB.

We submit that this language puts a disproportionate and thoroughly unfair burden on copyright owners, who will be left with no option other than onerous and costly legal proceedings in cases where disagreement would arise as to whether or not the act envisaged would indeed qualify as a 'permitted act' according to relevant clauses of CAB covering exceptions to copyright. Not only would the burden of proof be unfairly placed on the copyright owner, but the current standard regarding damages under Copyright law entails the copyright owner being able to demonstrate that the defendant had 'guilty knowledge' that their action constituted infringement. This, as standard of evidence goes, is a tall order.

Section 39(cH) of the CAB endows the Secretary of State with powers to prescribe 'permitted acts' for the circumvention of TPMs as provided in the Act. However, the CAB proposes no arbitration or adjudication in the event when a copyright owner would have good grounds to challenge whether the intended circumvention fell under that definition.

FIAPF supports the amendment to 28P(2)(b) proposed by our colleagues at IPO *et al* in their joint submission, calling for the introduction of referrals to the

Copyright Tribunal in the event of a dispute between parties as to whether an intended action meets the 'permitted act' criteria. Without this recourse, copyright owners in the South African film and TV sectors will be left only with the onerous alternative of legal proceedings; the majority of local production and distribution companies are not in a position to cover the legal costs involved: in effect, the industry would be left extremely vulnerable to mis-interpretation, wilful or otherwise, of the boundaries between permitted acts and infringement. This would result in losses to an industry already reeling from the impact of two COVID years, with attendant destructive effects on working capital and revenue.

12. We hope both comments on the specific amendments put up for this round of consultations will prove helpful to the deliberations of PCTI on this extremely important piece of legislation. We also urge the Committee to consider carefully and respond to our South African colleagues' call for Sections 6A-8A, 39B and 22(3) to be the object of thorough legal and economic impact assessments, combined with relevant and essential consultations with audiovisual sector stakeholders.

As an international trade association, FIAPF holds considerable expertise regarding the economic impact of copyright laws on the growth of national audiovisual industries worldwide. Two years of COVID have resulted in the South African film and video industry's output contracting by 59%, between 2020-21 compared to 2019, according to a recent study by the National Film & Video Foundation [NFVF]<sup>1</sup>. Powerful and coordinated incentives will be needed to restore the industry to its full capability and address its more long-term and well documented structural weaknesses. As partners of IPO in South Africa, we are united with our local colleagues in the belief that the final shape and content of the CAB will be of cardinal importance for the future of the South African film and TV content sectors.

A well-conceived, modernised copyright Act could become a powerful tool for economic growth and an invaluable aid to the transformation agenda. The ability for companies in the sector to raise working capital and achieve long term financial sustainability through controlling their IP rights, is the best guarantee of good, remunerative employment opportunities for authors, performers and other talent and skilled workers. Like our colleagues, we remain very concerned that key provisions in the bill, if left unexamined, will become a hindrance to realising this vision of growth and job creation.

We remain at the disposal of the Committee should you wish to receive further technical input regarding this vitally important bill.

[End.27.01.22]

---

<sup>1</sup> Third Economic Impact Assessment Study (EIA) which measures the economic contribution of the South African film & video industry to the country's GDP between April 2016 (2016/17) to March 2021 (2020/21). Published by the National Film & Video Foundation, 23<sup>rd</sup> September 2021