Animation South Africa (ASA)
CIPC NPC Registration.: 2006/003985/08
SARS P.B.O Registration: 930052471
[redacted]

The Independent Producers Organisation
Registered Non-Profit Organisation 151-760 NPO
[redacted]

[redacted] July 2021

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

[redacted]

Dear Mr Nkosi

COPYRIGHT AMENDMENT BILL, B13 OF 2017/ PERFORMERS' PROTECTION AMENDMENT BILL, B24 OF 2016:
Submission by the Independent Producers Organisation and Animation South Africa.

Please find our submissions herewith for your and the Committee's consideration.

We thank you.

Yours faithfully

Trish Downing

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Acting Executive Officer: Independent Producers Organisation
[redacted]

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SUBMISSION ON THE COPYRIGHT AMENDMENT BILL (B13B-2017) AND THE PERFORMERS' PROTECTION BILL (B24B-2016) FROM THE AUDIO-VISUAL CONTENT PRODUCTION SECTOR – July 2021

This submission represents the views of leading organisations within the country's audio-visual content production sector, namely
The Independent Producers Organisation (IPO) and Animation South Africa (ASA), both of whom are members of the South African Screen Federation (SASFED). We note that the Independent Black Filmmakers Collective is also making a submission, which we endorse.

About the IPO:

The Independent Producers Organisation (IPO) is a national organisation which represents, protects and promotes interests and needs of independent South African film, television and new media producers. It strives towards creating an empowered, transformed and representative industry, by partnering with key stakeholders towards the advancement of a sustainable and enabling environment for producers and, recognizing their role and responsibilities as the engine drivers of work throughout the industry value chain, to creating opportunities for the full value chain of workers across and suppliers to the sector. The IPO aims to maximize the industry's potential to contribute to the country's economy, and to preserve and promote South Africa's national identity and stories. It currently represents over 70% of working producers in South Africa.

About ASA:
Animation South Africa is an industry association representing the interests of animation and VFX professionals
Our vision is to create the conditions necessary to foster a globally competitive, sustainable, and transformed animation and VFX industry for South Africa.

All of our efforts are aimed at growing and supporting our industry, which we believe will lead to:

- Make trading conditions more conducive to creating and/or maintaining work opportunities and increase domestic and foreign revenues.
- Initiatives which transfer and develop scarce and critical skills
- Conduct/participate in research. The findings of which accurately reflect and inform future interventions
- Initiatives which result in more commercial activity, including the exportation of South African animation products and services

Introduction:
We thank the Portfolio Committee on Trade and Industry (the "Committee") for the opportunity to make this submission in respect of the above CAB and PPAB Bills, and trust our views will be well-considered by the Committee in any amendments that will result from this process. We further request the opportunity to participate in the public hearings, currently scheduled for 4-5 August 2021.

We appreciate that the intention behind these Bills is to create a more equitable environment in which all in the affected sectors can flourish and that the Committee recognises that a pragmatic and sustainable copyright regime is the foundation for a viable AV sector and a key driver of its growth. However, we have serious concerns that the unintended or other consequences of many of the current provisions will severely hamper the AV sector's short-term recovery and long-term growth, resulting in significantly less work for all within the industry value chain (from producers right through to cast, crew, artisans and all the unskilled workers for whom the sector provides work) and will see the Foreign Direct Investment the sector currently attracts to the country all but disappear, leaving the sector – and the country – much the poorer.

We further appreciate that the Committee seeks to ensure alignment and compliance with international Copyright and IP treaties and generally accepted international best practices, yet many of the current provisions neither align nor comply with the international treaties to which South Africa is, or is considering becoming, a signatory. The impact of this, in what is an increasingly global marketplace and global production environment where alignment with best practice is essential, will render the South African industry at odds with the rest of the world, putting unnecessary obstacles in the way of producing foreign content in South Africa and of South African producers entering into any co-productions with other countries, and will render the local sector highly uncompetitive and ultimately shrinking as producers will not be able to grow their companies by reinvesting longer-term income through IP into producing more content.

We firmly believe that the net effect of these Bills in their current format will have a potentially devastating economic impact on the local AV production industry, and, in turn, the country's economy and job creation. This sector is already reeling and struggling to survive in the face of the pandemic, which has seen productions shut down, international servicing work grind to a prolonged halt due to ongoing travel restrictions, added production costs to cover covid-related health & safety issues; ongoing policy uncertainty around and inefficient administration of the DTIC's rebate

incentive scheme which has resulted in Billions of Rands in international jobs being lost to other countries and put many local producers on the verge of bankruptcy; ICASA exempting all broadcasters from being required to broadcast any local content at all for over a year; and the financial crisis at the SABC having resulted in production budgets having been slashed by an effective 50% over the past 12 years by not keeping in line with inflation, amongst others. The Bills, in their current form, will simply add to these woes.

It is notable and greatly concerning that the required independent academic and legal research required to measure each new legislative proposal contained in the Bills against the Constitution and the relevant international treaties to determine compliance therewith have not been undertaken to date. It is now incumbent on the National Assembly to attend to this research. It is also clear from the SEIAS reports that the DTI relied on as impact assessments when it conceptualized and developed the texts of the Bills that no adequate economic assessment was performed that measures the impact of the enactment of the Bills on the AV-sector any of the other copyright industries. A proper assessment would include an economic impact study, which measures the associated cost to each industry if any of the highly controversial and contentious provisions in the Bills were to be enacted as presently tabled.

The CAB contains a number of *world first proposals* such as a compulsory and unwaivable royalty scheme as proposed in Section 8A (which was never fully consulted on previously), a regime of overly broad and expropriative copyright exceptions and limitations that have no peer in other legislation in the world when the cumulative impact thereof is considered, and a blanket contract override provision which severely restricts the freedom to contract and trade in respect of all copyright works. When *world first* proposals are considered, it is challenging to properly assess compliance with international treaties and alignment with international best practices, not to mention constitutional implications, especially in the absence of appropriate assessments being performed locally. It is therefore necessary for the required research, and impact assessments to be attended to, on the basis of which further stakeholder consultations should be had.

We recommend that the Portfolio Committee instructs the DTI to first attend to proper impact assessments and legal research, or that the National Assembly engages independent copyright experts and lawyers who are highly experienced in practicing the law in this field, to prepare the necessary legal opinions that would measure the Bills for Constitutional and international treaty compliance. Further, it is also notable that Section 6 (A) and 8 (A) were introduced subsequent to the August 2017 Parliamentary hearings and, as such, have not been subjected to a process of public consultation. We urge that consultations on these Sections are required. A failure to address this lack of proper consultation on these provisions would constitute a procedural vulnerability, which may well have constitutional implications.

It is regrettable that we are advised to limit our submissions to only a few of the points on which the President referred the Bills back to Parliament, when we believe that it is incumbent on the National Assembly to consider all provisions in the Bills which may suffer from constitutional and international treaty non-compliance. As the President referred both Bills back to the National Assembly *in their entireties* and due to the incorrect Parliamentary process followed, it should be incumbent on the National Assembly to consider any provisions which may be unconstitutional or

otherwise place SA at risk of breaching obligations in terms of international law and treaties, before again advancing the Bills back to the President for his assent. .

Such a review, we believe, must also align with the objectives of and proposals in the Creative Industries Masterplan, which seeks to grow the Creative Industries Sector in a sustainable and long-term manner. Ours is one of several sector Masterplans being developed at the behest of the President under the auspices of the Department of Small Business Development.
We therefore appeal for the Committee in its further deliberations on these Bills to take the above under consideration and, further, to contextualise their deliberations within the current reality and future potential of the South African industry within the context of global AV production arena, and ultimately ensure that the policy framework is conducive for the sector to reach its fullest potential and deliver the best possible returns to country.

Industry overview in brief:-

The AV industry is a significant contributor to both economic and cultural components of South Africa. The following points briefly outline some of the most salient contributions to our economy.
Locally:

- in the year pre-Covid, the South African sector was valued at R8-10 billion of which over R3.4 billion was Foreign Direct Investment. It:
- is labour-intensive - created some 60 000 full time, FTE and freelance jobs with induced jobs bringing that figure to over 120 000. (South African Cultural Observatory)
- is highly unique in that the jobs created range from highly-skilled, world-class cast and crew all the way through to artisans and unskilled new entrants to the workplace who can go on to build highly successful careers in the industry
- 65% of the workforce is under the age of 35, making it an invaluable ally in the country's ability to achieve its NDP 2030 goals
- 67% of below-the-line production spend flows to other sectors, from logistics, hospitality, catering and hiring all the way to the corner florist who delivers flowers to a set
- rapidly injects this spend throughout the economy, the bulk of the budget being spend within the very short shooting stage of the production lifespan
- was starting to enjoy long-awaited international recognition, acclaim, and offshore growth with an unprecedented appetite for South African content, spurred on by many of our productions reaching the number 1 slot on some global streaming platforms
- contributes meaningfully to the fiscus by way of taxes – company, workers including even highly-paid international key cast and crew, VAT and all the direct and indirect taxes paid by the companies and individuals who are downstream beneficiaries of the sector
- the majority of the companies in the sector are small businesses, which have been severely affected by the lockdowns and other pandemic-related issues

Globally:

- The film and TV production sector is one of the fastest growing sectors in the world.
- In 2019/2020 until lockdown, it reached a new global high watermark of $177bn, creating 14 million jobs globally.
- In the past year, since production resumed post hard lockdowns, it has exploded to $220 billion, with a seemingly insatiable global appetite for content, also fuelled by pandemic, to the extent that some countries, for example the UK, are running out of equipment and skills to service their production boom (and South Africa is currently losing scarce skills to these countries).

Given the economic and cultural significance of the AV industry and the fast-changing effects of the Fourth Industrial Revolution on media industries globally, it is vital that the correct regulatory measures should be put in place to protect, transform and grow the industry. South African producers must be enabled, through the sector's foundational policies and regulations, to exploit every opportunity within this massive global growth scenario – or our industry will find itself left behind and marginalised.

Substantive Response:

The cornerstones for positioning South Africa as an attractive destination in a highly competitive global market to produce – and attract the production of international - high-quality audio-visual content, including feature films, television series, animation, commercials, video games, music videos, etc., must include:

1. **Legal Certainty** in the underlying legislative and regulatory framework within which accurate financial planning can be attended to and cost recovery and recoupment can be projected with reasonable certainty. SA's risk profile could be unnecessarily compromised as a result of legislative proposals that could cast doubt on the ability of rights holders to acquire full rights in a produced work for the life of the copyright, and without restriction on how the work can be commercialized and remuneration to participants can be determined. Overly prescriptive administrative burdens placed on producers, rights holders and licensed broadcasters and distributors to account to performers on each act of commercialization or be placed at risk of criminal prosecution and crippling fines, within a reporting structure that has not yet been determined, adds massive legal uncertainty, and could raise the risk profile for content production and distribution in SA to unacceptable levels.

2. **Contractual Flexibility** is critical in an environment as diverse and complex as the audio-visual content production industries where each project requires a sophisticated approach, depending on a diverse number of factors, and no single remuneration or rights management model can be cast to capture all potential project requirements.

3. **Unification of rights** is key for maximizing the value of content, as this enables rights holders to commercialize produced works for the full but limited life of the copyright (which, in SA, is already only two-thirds of the lifespan of copyright protection in the US) without hindrance or undue encumbrance, and without the risk that one participant or stakeholder in a project may prevent the further commercialization of the work due to a dispute or unreasonable demand made in the future that was not agreed upon at the onset.

4. **Enforcement of rights** is important, especially in the digital space where piracy and IP infringements are rampant, and effective and efficient remedies are required to enable rights holders to take action, including against foreign infringers who do not own assets in SA, and against whom traditional legal remedies would be completely ineffective.

5. **Alignment/Compliance with International Treaties** to which South Africa is currently or intends to become a signatory is essential, not only so that South African producers can compete in line with international best practice and on an even playing field with other jurisdictions, but also so that international productions and international/continental co-productions planned to be filmed in South Africa are not compromised and moved to other, more compliant, jurisdictions. Such treaties include Berne Convention on the Protection of Literary & Artistic Works (**Berne Convention**), the WIPO Copyright Act (**WCT**), the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (**TRIPS**), the WIPO Performances and Phonograms Treaty (**WPPT**), the Beijing Treaty on Audiovisual Performances (**BTAP**) and the Marrakesh treaty. It must be ensured that provisions in the CAB and PPAB must align with and pass the established three step test in international treaties, which many in the current Bills do not.

Below please find a headline summary of our primary concerns and proposals, and we hope to have the opportunity to elaborate on these during the oral presentation on 4-5 August.

Clause (CAB)	**Problematic and contentious provisions in the CAB that may have constitutional implications or breach international treaties**	**Corner-stones compro-mised**
9 (CAB) to insert 8A into Act*	This section, when read with Section 39B (contract override provision) purports to introduce an unwaivable and compulsory, statutory royalty scheme in terms of which all performers featured in audio-visual works would be entitled to share in any gross profits generated from the commercialization of the works with the rights holders. The problem: • This proposed royalty scheme was not opened for public comment previously, which has constitutional implications on the	**1, 2 & 5.**

validity of the section, if passed into law without proper stakeholder consultation. The proposal was not included in the text of the CAB when it was consulted on during the August 2017 Parliamentary hearings. It was subsequently written in by the Portfolio Committee without fully engaging on the concept or the provisions themselves. Similar to the President's reservation regarding the lack of consultation on the broadening of Section 12A in the CAB (the broadening of the scope of application of the fair use provisions), the lack of consultation on Sections 6A and 8A in the CAB has constitutional implications, and these provisions should be opened for full public consultation and after the necessary economic impact assessments and legal research measuring international treaty compliance and the constitutionality thereof have been attended to.

It may also amount to an unjustified and arbitrary restriction on the constitutional rights of freedom to trade and contract, due to the unwaivable nature of the royalty right when read with Section 39B of the CAB, and considering the expropriative impact of this on the rights of all parties concerned during a contractual negotiation, as it precludes them from opting for a different remuneration model which may be more preferred by the parties.

The broad and ambiguous definition of performers in the CAB include 'extras' who in reality are not pivotal collaborators to the creative execution of the AV work. It is not in the custom and practice in other jurisdictions to grant such rights to remunerations to extras, 'walk-ons' and/or crowd artists, who are generally remunerated on a daily or hourly basis for their limited engagements. We hold that the definition of 'performers in CAB is also not aligned with the definition in Article 3(a) of the BTAP, which South Africa has signalled its intention to join and implement. Additionally, the extension of a compulsory royalty scheme to such categories will impose severe new liabilities of production companies looking to finance new projects will have a freezing effect on investment in new original content from South Africa.

- **Clause** 8A introduces a statutory royalty scheme that will not serve the best interests of performers featured in AV works, or the authors and composers of literary works and music used in AV works (Clause 6A as it would make licensing of content problematic for producers and place an undue burden on producers to indemnify licensees or third parties who acquire the rights in the works for future usages against royalty payments to authors, composers and performers, when producers already operate in a highly challenging environment with high risk and small margins.

- As with other property rights the ownership right embedded in copyright is key to maximising revenues out of copyrighted works. The author does not always possess the means to distribute, but they can license or sell their rights to another party who can also financially gain from the work. In their current form these provisions will discourage investment and copyrighted works of South African origin because the law will limit the rights an author to trade and create uncertainty in rights holders' ability to recover high value investments through the effective protection and commercialisation of

*Also read with PPAB clause 4 to insert 5 into PPAB	produced content that consist of amalgamated rights. • This proposal is clearly misaligned with Article 12 of the BTAP and due to its blanket application to all audiovisual works without justification, and the expropriative effect it has on the rights of copyright owners and performers to contract in respect of their works and fixations of their performances, would also fail to comply with the Berne Convention's three-step test. **Proposals:** If government were set to push ahead with the statutory royalty scheme, then: • Section 8A should be opened for broad public comment and stakeholder engagement; and • The unjustified restriction on freedom to trade by Section 8A could be somewhat ameliorated by introducing the same phrase as per Section 6A(2)(b), namely '*subject to any agreement to the contrary*' into Section 8A(1). There is no rational justification for authors and composers of literary and musical works to be afforded the freedom to choose a different remuneration model, and for this fundamental right to be denied to performers featured in AV-works. • The definition of 'performer' should be refined to ensure non-application of this royalty right to extras and others who do not contribute primarily to the creative process or end-product. • An economic impact assessment study should first be attended to, in order measure the impact on the affected AV-content production industries. • The PC should consider how the principle of National Treatment under the Berne Convention would impact on local producers, rights holders and the licensed commercial broadcasters and distributors of content, as foreign performers, authors and composers would also be able to rely on the statutory royalty provisions to claim from local rights holders, producers, and licensed commercial broadcasters and distributers of content for all works shot on location in SA and commercialized in any way. • The requirement (Clause 8A(6)) for rights holders or licensed users of content to register each act of commercialization in a manner and form yet to be prescribed by the Minister, and to submit a complete, true and accurate report to each performer (even including extras given the broad definition of performer in the PPAB) with a calculation of royalties payable for each commercial usage is unworkable for a number of reasons. • The criminalization of non-reporting as per Clause 8A(7) and the hefty penalties prescribed (imprisonment of directors of companies and/or fines up to 10% of annual turn-over) amount to unjustifiable and disproportionate measures which effectively places rights holders who make legitimate uses of AV works in a worse position than actual infringers, especially in the digital environment, as Section 27 of the Copyright Act is not amended by the CAB to criminalize the	

	deliberate infringement of the digital rights of 'making available' and 'communication to the public'. Another clear and obvious error in the current text of the CAB, which requires addressing. It also places a practically administrative and unjustifiable burden on rights holders to report to performers on each and every instance of commercialization, which introduces massive potential liability and could disincentivise investment into new content production projects in SA. Reason being, nowhere else in the world would investors and rights holders be subjected to such onerous obligations and potentially disastrous consequences if all instances of commercialization cannot be accurately and timely be reported to each and every performer featured in a work. Remuneration from commercialization activities are in any event shared with all parties who contributed creatively to a production, and who are entitled to such shares through contracts negotiated at the onset of each project. The criminalization of a fault to perform an administrative function, which may not have any bearing whatsoever on the payment of monies due contractually, as determined between the parties, is a completely disproportionate sanction considering the purpose of the administrative function (which is simply to determine whether payments were correctly allocated, and which determination can be made at any point in time, and be made referrable to a dispute resolution function or the Copyright Tribunal in case any dispute arises). The disproportionate nature of the criminal sanction may well have constitutional implications and the penalty clauses contained in this section should be reconsidered in its entirety. Non-alignment/compliance with international treaties: • **Section 8A CAB** is configured in a manner that goes well beyond the requirements in Article 12 of the BTAP and also fails the three-step test. While limited to performers, this proposal is actually more onerous than Section 6A **Section 8A(6)-(7) CAB** which requires registration of any act of commercial use of a copyright work and the reporting of such use, subject to criminal penalty, is a significant departure from the international norm and finds no basis in the BTAP.	
Clause (CAB)	**Problematic and contentious provisions in the CAB that may have constitutional implications or breach international treaties**	**Corner-stones compro mised**
13 to insert 12A	The problem: The broadening of the application of the fair use legal defence by the insertion of the phrase 'such as', instead of 'namely' was not previously consulted on. The President raised this as a constitutional reservation in his referral decision.	**1, 4 & 5.**

into Act	Industry concern: The introduction of a broad new regime of copyright exceptions has the net result of the further weakening of rights holders' position with respect to the unauthorized and unremunerated usages of their protected works, in an environment where piracy and online infringement of AV works are already rampant, and without introducing any counterbalances or mechanisms to assist rights holders. The extension of fair use and all of the exceptions to be read with Sections 86, 87 and 88 i of the Electronic Communications and Transactions Act of 2002, as proposed in Sections 28O and P of the CAB, appears to constitute a covert amendment of ECTA, without any clear inputs on the matter received from the Minister of Communications. The proposal appears to be the extension of the scope of all of the copyright exceptions to benefit third parties, including ISPs and online platforms, from avoiding liability for certain online infringements in many instances. This also bears no justifiable policy position. Instead of moving towards legislating for more obligations on online platforms to assist with the prevention of infringements in SA, this moves in the opposite direction. Also, the provisions included in the Bill which relate to TPMs, or Technological Protection Measures, are inadequate and may be in breach of the WIPO Internet Treaties. **Proposals:** • Government should reconsider its policy position on whether the introduction of a US-styled fair use legal defence to copyright infringement, without also including any of the counter-balances that US rights holders can rely on (hefty statutory damages for infringers who fail to justify their unauthorized use made of a work as 'fair use') is fit for purpose in SA's legal environment, where rights holders are already on the back foot in a weak enforcement framework, and have to prove 'guilty knowledge' before they can sue an infringer for damages, is fit for purpose in the SA legal environment, or whether it enables more and unjustified leniency to pirates and infringers. • The extension of all of the new copyright exceptions and fair use to ISP's and intermediaries through a covert amendment of the Electronic Communications and Transactions Act (ECTA) should be reconsidered and motivated – no clear policy objective to grant more freedoms to ISPs, online platforms and third parties to, for instance, resist take-down notices to restrain online infringements on the basis of a broad and vague new regime of copyright exceptions that may find almost unlimited application in scope. • The Portfolio Committee should consider the introduction of a legal remedy that would allow SA rights holders of AV and other works to act against foreign infringers who do not own assets in SA (e.g. site blocking, dynamic injunctions) to restrict user access to websites that are primarily designed to facilitate copyright infringements and piracy. In the absence of such legal remedies, SA rights holders remain powerless to act against foreign infringers who do not own any assets in SA, against which a SA Court could confirm jurisdiction to hear a case, or execute a judgement.	

	• The provisions dealing with TPMs should be re-worked as per the expert advice of Michelle Woods, as provided in her submission to the previous Portfolio Committee, and to ensure compliance with the WIPO Internet Treaties.	
Clause (CAB)	**Problematic and contentious provisions in the CAB that may have constitutional implications or breach international treaties**	**Corner-stones compro mised**
23 read with 39B (CAB) To amend 22 in Act	The 25-year limitation on all copyright assignments, when read with Section 39B (contract override provision) results in an unconstitutional restriction on the fundamental right of authors of literary and musical works to freely trade and contract with respect to their works. It is understood that the policy intention behind this provision is to address a fault line that was identified in the 2011 Copyright Review Commission report in the music industry, and to prevent a situation where a songwriter or composer were to assign their rights to a record label for little to no remuneration and the song eventually becomes a commercial success. The intention was therefore to legislate for a reversion of rights in the music industry, but due to clumsy drafting the reversion right was cast as a limitation of all assignment terms for all literary and musical works, which authors cannot contract out of, even if they wished to do so, and were happy with the remuneration they would receive to, for instance, write a script for a movie, or compose a song for a movie soundtrack. To legislate for a proper reversion right in particular instances, such as a situation in the music industry where a lone artist transfers all rights in a music catalogue to a record label or publisher, this would require a much more sophisticated solution. US Copyright law presents an example of such a reversion right after 35 years, which includes notification periods in which re-negotiations with respect to musical works may be initiated, and for rights reversions to occur, but not in respect of works that were taken up in derivate works and 'works made for hire' are exempted to prevent a rights reversion scheme that could result in AV works becoming unusable without risk of infringement after only 25 years in SA, if a new deal cannot be struck with each and every author of literary and musical works included in a film or other audio-visual production. Such a situation would be detrimental towards all parties involved, including the companies that invested in the production of the work, the producers and cinematographers and the performers featured in the work, if it is withdrawn from the market due to a dispute with a single scriptwriter or musician after 25 years. This provision would also place an unjustifiable burden on production companies and on companies that acquire the rights to distribute the content, to on each production in South Africa, maintain a register of all authors of literary and musical works included in the content, and an onus to renegotiate terms every 25-years with these parties,	**1, 2, 3, 5**

	with accompanying risks of liability of a work is commercialized further in instances where not all of the authors could be located in time to renegotiate terms. This would result in a major disincentive to produce AV works in South Africa, as the unification of rights in the producer for the life of the copyright is one of the key requirements, especially for high-investment projects. **Additionally,** producers are concerned with the proposed amendment of Section 5 and 22 of the Copyright Act which will result in all copyright works commissioned by or made by or under the direction of the State to vest in the State, without the possibility of the copyright being capable of being assigned from the State. The State/Minister is also granted the power to designate certain local organizations (think the SABC, for instance) as parties that would in this way gain full and complete control of all copyright works included in an AV work that is made under the commission, or direction or control of the State or the local designated entity, without the need for any copyright transfer agreements to be concluded first – all rights of copyright will simply vest in the State or local organization for the life of the copyright. Finally, we contend that the 25-year limitation as drafted would fail all three steps of the three step test to which South Africa is obligated as – inter alia - a Member of the Berne Convention and a Party to the TRIPS Agreement. Instead of being applied to "special cases" only, the Section 22 drafting extends this provisions to all rights and all forms of copyright works. It also constitutes an egregious attack on the second step of the test, namely the "*normal exploitation of the work*". And it fails to avoid doing *"disproportional harm to the rights holders*" since the provision itself is designed to curtail the term of assignment during which a work may be commercially exploited. . **Proposal:** The contract override provision should be reconsidered and deleted, and section 22 be re-worked to introduce a sophisticated solution for the issue identified in the CRC report which should find application in the music industry only, and only in very specific circumstances, with the exclusion of applicability for literary and musical works incorporated in AV-works. Alternatively, to somewhat ameliorate the negative impact of the provision on the film industry, the phrase *'subject to any agreement to the contrary'* should accompany Section 22(b)(2) to at least preserve the contractual freedoms of authors of literary and musical works, and the parties with whom they wish to conclude a deal on different terms.	
Clause (CAB)	**Problematic and contentious provisions in the CAB that may have constitutional implications or breach international treaties**	**Corner-stones compro**

		mised
33 (CAB) to insert 39 into Act	The granting of broad and sweeping powers to the Minister of Trade & Industry to, at any point in time, to: • Prescribe compulsory and standard contractual terms to be included in any agreements relating to copyright and copyright works; and • Permit acts of circumvention of TPMs to allow for access to and use of copyright protected works; and • Prescribe royalty rates or tariffs for any forms of use made of copyright works; and • Prescribe royalty percentages and distribution methods of CMOs This may constitute an unjustifiable and arbitrary delegation of executive legislative powers to the Minister, as it would enable the Minister to, unilaterally and without the necessary Parliamentary oversight, *make the law* that would govern the basis on which industry contracts relating to all industries where copyright works and rights therein are trade. Finally, we contend that, by granting extensive powers to the Minister of Trade and Industry to prescribe compulsory standard terms to audiovisual contracts, and, in particular, to directly mandate the level of royalties and the mode of their payment, Section 39 places severe limitations on the exercise of exclusive rights. These rights are at the core of the protection afforded by international treaties and conventions of copyright and may only be limited in domestic legislation for specific purposes and providing they meet the three-step test enshrined in these treaties. We contend that this disposition would fail the three step test on and all three components. **Proposal:** Clause 33 of the CAB which purports to amend the Copyright Act in this way should be reconsidered or at least allow for Parliamentary oversight to require that the necessary impact assessments which would support the proposed regulatory interventions, be approved in the National Assembly before stakeholder consultations are to be attended to.	**1, 2, 3 & 5.**
Clause (CAB)	**Problematic and contentious provisions in the CAB that may have constitutional implications or breach international treaties**	**Corner-stones compro mised**
34 (CAB)	The blanket contract override provision which amounts to a proposal to restrict all copyright owners, authors, performers, and other beneficiaries of any rights granted to them in terms of the Act (once amended) from contracting in a way that would	**1, 2, 3, 4.**

to insert 39B Into Act	renounce or waive any of these rights, amounts to an unjustifiable breach of the fundamental rights of freedom to trade, contract and to choose a profession, as this could hinder deals being done on favourable terms for the rights holders and beneficiaries concerned. It may also prevent the conclusion of out of Court settlement agreements, as waivers of rights would not be legally possible any longer. This could force parties to see matters where conflict arise to litigate and to have the agreement between the parties on how to resolve the dispute be made an order of the Court before it would be legally enforceable. **Proposal:** This 'world-first' proposal has no place in law in a country where the freedom to contract and trade is considered sacrosanct and a fundamental human right. This provision should be reconsidered and scrapped.	
Clause (PPAB)	**Problematic and contentious provisions in the PPAB that may have constitutional implications or breach international treaties**	**Cornerstones compromised**
3A	The Problem: This clause in the PPAB, which seeks to legislate for statutory requirements for the transfer of rights from performers to producers needs to be reconsidered in its entirety. The limitations placed on the contracting parties' freedom to contract are highly problematic. These include the powers granted to the Minister to determine compulsory and standard contract terms, the vague references to 'royalties or equitable remuneration', where the CAB only speaks to royalties and does not afford flexibility to consider alternate remuneration, and the 25-year reversion right for performers featured in sound recordings. First of all, the remuneration right for performers featured in AV-works should be clarified so that it does not extend to any person who may be featured in any way in an AV work, regardless of their level of contribution (e.g. extras). The definition of 'performer' as it stands is sufficiently broad to include any person who appears on the screen in a creative production. The 25-year reversion right for performers is clearly linked to the 25-year limitation on assignments in the CAB for literary and artistic works, which was designed to address a perceived failure in the SA music industry (as mentioned above). The definition of a 'sound recording' in the PPAB is sufficiently broad to include any recording of sounds, and as AV-works may	**1, 2, 3 & 5.**

	contain sound recordings (featuring music lyrics, voice-overs, and even any actor speaking or making an audible sound may be construed as a sound recording included in a AV work), it should be clarified that sound recordings incorporated in AV-works are exempted from this 25-year reversion right to avoid unintended application of this reversion right to cover most AV-productions as well. It is unfeasible and clearly unintended for any performer featured in a sound recording that is also included in an AV-production to acquire exclusive commercialization and other rights in respect of an AV work after 25 years. The notion of a prescribed contractual standards in PPAB **3A(3)(a)** appears to be far in excess of the custom and practice elsewhere in the world and in international copyright treaties and conventions. The restrictions to contractual freedom and limitation to the exercise of exclusive rights as laid out in international treaties would fail the three step test and place South Africa in misalignment with its obligations under international treaties, agreements and conventions.	

We thank the Committee for taking the time to consider this submission, recognising that a sustainable and pragmatic Copyright policy regime compatible with relevant international treaties will be the foundation from which the local production sector, and all who work in and are suppliers to, can thrive.

The IPO and ASA will welcome the opportunity to participate in the oral hearings and, further, to engage with and assist the Honourable Members in their deliberations on the relevant Sections and Clauses of the Bills as noted above, to ensure the most conducive legislation for the sector and the country.

We thank you.

16 July 2021