



# COPYRIGHT AMENDMENT BILL & PERFORMERS PROTECTION AMENDMENT BILL

NATIONAL COUNCIL OF PROVINCES | MARCH 2023



# TEAM



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# Introduction



# Introduction

- MultiChoice and M-Net welcome the opportunity to make submissions on the Bills
- We are major investors in and users of copyright – copyright framework is therefore of critical importance
- We agree –
  - South Africa's copyright regime must be updated
  - with the Bills' objectives
- But because of flaws in the Bills, the objectives are unlikely to be met. Instead, damage will likely be caused to our industry
- We're thankful for the chance to share our experience and highlight all that could be lost if the problems in the Bills are not addressed



# Our commitment to investing in local TV content

- Creating local TV content boosts the local film and production industry and creates opportunities for writers, actors, producers and numerous support positions

We have a local audiovisual content library in Africa spanning

**69 997 hours**

In 2022, MultiChoice produced

**6 028 hours**

of local TV content for African markets and invested substantially in local general entertainment and sport content



# POSITIVE SPINOFFS OF INVESTMENT IN LOCAL TV CONTENT

The World's Greatest Game creates jobs, transfers world-class skills and donates essential materials to local causes.



Survivor South Africa was filmed on home soil on the Wild Coast in the Eastern Cape

Boosts local economy by  
**+R28 MILLION**



Total value of donations

**+R400 000**

**SURVIVOR**  
SOUTH AFRICA  
RETURN OF THE OUTCASTS



**DONATIONS**

Amagqunukhwebe Prudhoe Community Development Trust

Tatshana Junior / Senior Primary School



**28% FEMALE**



**68% YOUTH BASED**

**168**  
Jobs created



THIS INNOVATIVE PARTNERSHIP WITH THE EASTERN CAPE DEVELOPMENT CORPORATION (ECDC) SAW:



A PARTNER FOR THE LAST TWO SEASONS OF SURVIVOR SA



JOB CREATION



UPSKILLING & A MUCH-NEEDED FINANCIAL BOOST

# Importance of a sound copyright framework

- A key question for the committee to consider is

will the Bills promote or discourage investment in the creative sectors?

- Unfortunately, in their present form the Bills will discourage investment
- Many proposed new, rigid and impractical rules will make it much harder to get content on air



# Proposal to move forward on the Bills

- The interests of investors and creators should not be seen as competing interests - we all want to see a thriving and sustainable local production sector
- We need an enabling legislative environment
- In their current form the Bills **do not** provide this enabling environment and will harm those it seeks to protect
- The two Bills should be delinked



# Copyright Amendment Bill



# One size fits all approach

- The Bill proposes a ‘one size fits all approach’ that is unsuitable for the creative world in general and television in particular
- Bill gives the Minister wide, vague and unfettered powers to –
  - prescribe **compulsory** and **standard** contractual terms to be included in agreements – Minister would be empowered to write compulsory contract terms which parties would have no choice but to adhere to, regardless of whether they are appropriate for their context and circumstances; and
  - to set royalty rates and tariffs
- But the Bill gives no guidance to the Minister on what should be in these contracts or how the royalties should be determined
- This is likely to be unconstitutional and make the Bill vulnerable to legal challenge (thereby causing even further delays)

## One size fits all approach (2)

- The provisions are also highly impractical:
  - The determination of royalty rates and tariffs are at the very heart of contractual negotiations for TV, and is particularly complex, nuanced and context-specific - not suited to the “one size fits all” approach
  - Standard contracts are not appropriate for this sector and will slow down the pace at which content can be produced
    - How will the Minister’s terms cater for all the different types of (i) copyright works and (ii) audiovisual content?
    - How can standard contracts reflect the nuances within each production?
  - Hollywood doesn’t work according to government drafted contracts - likely to deter investors
- Parties must have the freedom to negotiate their own agreements



# How to fix this?

- We appreciate that the Bill is trying to deal with unfair contract terms in the creative industries
- But rather than give the Minister wide and unfettered powers to decide how everyone must do business, the Bill should follow in the steps of consumer protection law which allows unfair terms to be set aside
- Provisions giving the Minister the power to set contract terms and prescribe royalty rates or tariffs should be deleted
- Tribunal should be empowered to set aside contractual terms that are manifestly unjust and unreasonable
- This will allow all role-players flexibility to negotiate deals but safeguard against unscrupulous terms

See drafting  
proposal

# Unenforceable contractual terms

- **s39B** of the Bill seeks to make contractual terms unenforceable
- Provisions are loosely-framed and may have far-reaching unintended consequences
- We appreciate that the Bill is trying to ensure that particular rights, now being introduced to protect authors, should not be capable of being renounced
- But that is not the way **s39B** currently stands
- Right now, it restricts creators from commercialising their rights even where they want a contract which might better protect their commercial interests
- This is likely to cause considerable difficulties for all parties, including individual creators and performers who are trying to get the best deal they can

# How to fix this?

- To help make **s39B** more workable and equitable, we propose that it be amended to –
  - provide that a contractual term will be unenforceable only if the Tribunal makes a finding that the term unfairly renounces a right or protection; and
  - allow the parties to renounce a right or protection in circumstances where they have received equitable remuneration for doing so

See drafting  
proposal

# Performer issues should not be in Copyright Bill

- We support appropriate initiatives to ensure fair remuneration of performers
- Copyright Bill confers protection rights on performers, but this overlaps substantially with PPA Bill, causing confusion, duplication, and likely litigation
- PPA Bill is the appropriate statutory instrument to deal with performers rights and already does so
- We propose deleting the performers' protection provisions from the Copyright Bill
- Alternatively, if these provisions are retained in Copyright Bill, they must be amended to –
  - reduce confusion and duplication with PPA Bill
  - and
  - provide for "royalties or equitable remuneration" as the PPA Bill does (correctly)



See drafting proposal

# Internet Piracy is not dealt with

- Internet piracy is a global threat to the copyright industry and to everyone in the value chain, including creators
- Revenue leakage from piracy negatively affects everyone
- Different services and technologies, e.g., live streaming, now employed by pirates are not addressed by the outdated 1978 copyright legislation
- It is very concerning that copyright bills tabled in 2023 doesn't address internet piracy at all
- The specific problems in dealing with internet piracy require urgent legislative attention
- At a minimum, the Bill must include provisions for a streamlined and fast-track process for removal, takedown and site blocking by ISPs, without the need to approach the court



See drafting proposal

# Performers protection amendment bill



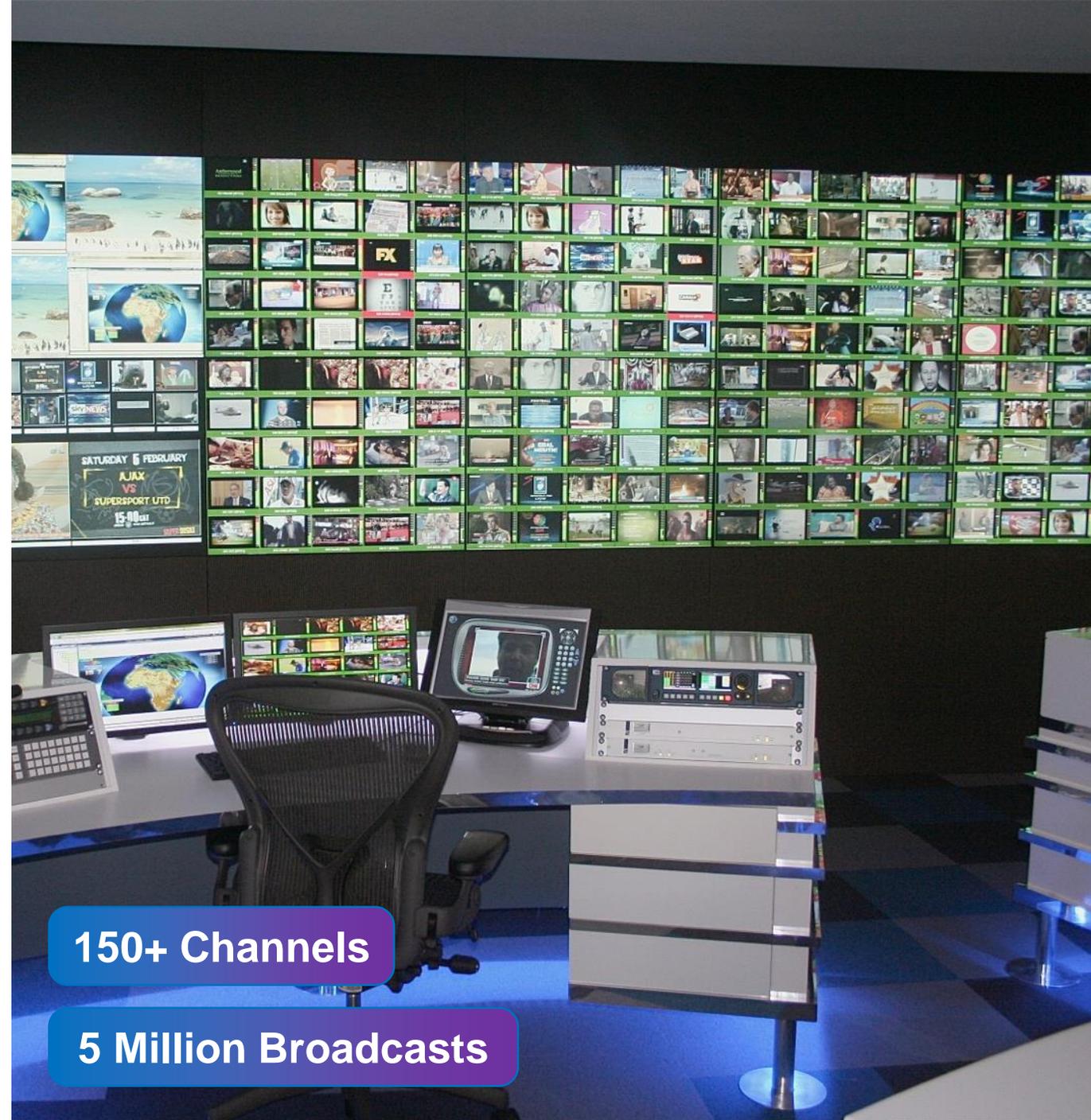
# Approach to Performers Bill

- PPA Bill is broadly in line with the applicable treaties and **less problematic** than the Copyright Bill
- PPA Bill could, with some important but manageable amendments, proceed to finalisation
- In the interests of time, we highlight only two matters which require urgent attention for PPA Bill to proceed:
  - Make reporting requirements and fines more reasonable
  - Ensure fair contractual terms for performers without a “one size fits all” approach



# Reporting requirements

- New PPA reporting requirements require broadcasters to register every broadcast of a performance
- This provision is irrational, burdensome and practically impossible to comply with
- Does not take into account huge volume of content - MultiChoice alone broadcasts more than **150 channels**
- This may result in almost **5 million** broadcasts of individual performances every month needing to be registered, will be even higher for on-demand platforms like Showmax
- Proposal is so unduly burdensome that it will likely not pass constitutional muster
- Provisions are also unnecessary because every performer will already have an agreement with the owner of copyright that will set out the remuneration to which that performer is entitled



**150+ Channels**

**5 Million Broadcasts**

# Fines for non-compliance with reporting

- Fines for non-compliance on reporting are draconian – minimum of 10% of annual turnover
  - Failing to submit a report should not be a criminal offence
  - Penalties far exceed fines for copyright infringement
  - They even exceed fines in the Competition Act where the maximum fine for prohibited cartel conduct is a maximum of 10% of turnover of a company

**A fine should be proportionate to the severity of the act**

- Fines are so unreasonable and irrational that they are unlikely to pass constitutional muster

# How to fix it

- We agree performers must receive equitable remuneration and should have visibility on how their performances are used. We understand that this is what the Bill is trying to achieve
- But the reporting system won't work. The Bill should instead require that users of performances should compile an annual usage report – this can be made available within a reasonable time after being requested

**On fines, we propose the maximum be set at R100,000 and the determination of the fine should be left to the Tribunal**

See drafting  
proposal

# List of contractual terms to be included in agreements

- Like the Copyright Bill, the PPA Bill is concerned with unfair contract terms
- We have already explained that giving the Minister unguided discretionary powers to set contract terms is problematic and why the “one size fits all” approach impractical and unworkable for the television industry
- In the context of the Copyright Bill our proposed solution was to rather empower the Tribunal to deal with any unfair contract terms
- For the PPA Bill we suggest that there is a role that can be played by the Minister in the protection of performers



# How to fix it?

- Minister should be empowered to prescribe a list of items which must be included in agreements with performers
- For example, Minister could direct that parties must agree on their respective rights and royalties or equitable remuneration and method and timing of payment etc.
- But Minister should not specify what the agreement on rights is or the royalty rate to be paid
- A win/win - allows the Minister to specify that agreements must deal with issues of concern, but also safeguards flexibility of role-players
- Also addresses the constitutional concerns regarding the Minister's unfettered powers

See drafting  
proposal

# Conclusion

- We are thankful for the opportunity to comment on the Bills and reiterate our support for their objectives
- At a minimum, certain key amendments are critical for the two Bills to progress:
  - Copyright Bill, despite its admirable objectives, is very problematic. We have proposed key minimum amendments to address the most problematic issues for the Bill to progress
  - PPA Bill is less problematic and requires only a few amendments in specific instances
- We also refer you to our drafting proposals in Annexure A of our written submission
- In addition, we leave you with this summary of the minimum issues which in our view, must be addressed for the two bills to progress



# These minimum amendments could easily achieve Bills' objectives without the current problems



## Copyright Amendment Bill

- Royalty concerns are already addressed in Performers Bill, which provides for royalties or equitable remuneration. Leave performer's royalty provisions in the Performer's Bill and remove them from the Copyright Bill (Amend s6A and delete s8A)
- Remove provision for Minister to prescribe compulsory contract terms and royalty/tariff rates (Delete s39(cG) and s39(cI))
- Amend provision on unenforceable contract terms in s39B so that Tribunal is empowered to set aside unfair terms
- Revert to definition of "broadcast" in current Copyright Act (s1)
- Revert to current Copyright Act's wording on ownership of copyright in commissioned works (s21(1)(c))
- Delete limitation on duration of assignment of copyright (proviso to s22(3))
- Introduce anti-internet piracy provisions to protect creatives

## Performers' Protection Amendment Bill

- Remove onerous reporting requirements (s5(1A)(a) and (c), s5(1B(a)), and s5(5))
- Remove provision for Minister to prescribe compulsory contract terms and replace it with list of matters which contracting parties must include in their commercial agreements (s8D(3))
- Use definition of "broadcast" in the current Copyright Act (s1)
- Use narrower definition of "performer"

