

**PRESENTATION TO THE WESTERN CAPE PARLIAMENT-STANDING COMMITTEE ON FINANCE, ECONOMIC OPPORTUNITIES AND TOURISM:
ON THE COPYRIGHT AMENDMENT BILL AND THE PERFORMERS' PROTECTION AMENDMENT BILL
Meeting of 5 May 2023**

Copyright Amendment Bill and Performers' Protection Amendment Bill Matrix

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A	Wikimedia (Douglas Scott-Director)	CAB	<ul style="list-style-type: none"> The two aspects of the Copyright Amendment Bill that they are most strongly supportive of are a) the introduction of a Freedom of Panorama clause and b) the adoption of the Fair Use doctrine into South African copyright law. The adoption of Freedom of Panorama, as outlined in section 14 (ii) which amends section 15 of the original act, will allow South Africans to freely celebrate our recent history. It will allow the people to share photographs of public monuments and works of art over the internet to celebrate our struggle against apartheid. So images such as the one (of the Nelson Mandela statue at the Union Buildings in Pretoria) will no longer need to be censored before they can confidently be shared over the internet without fear of violating the nation's copyright law. The amendment will also allow Wikipedia to feature these images on the free encyclopaedia along with other educational public benefit uses of similar images such as the facades of notable buildings or works of public art. 	<ul style="list-style-type: none"> The comments are noted.
B	Scholarly Horizons-Denise Nicholsons	CAB and PPAB	<ul style="list-style-type: none"> Strongly supports the provisions of fair use in Section 12A as they will greatly improve access to information for everyone, particularly in the digital environment. They are also progressive, flexible, future-proof and address the needs of the 21st century. They will enable and advance development, innovation, AI, robotics, gaming, inventions and prosthetic 	<ul style="list-style-type: none"> The comments are noted. IPLAA is an Act of Parliament in the statute books. It has to

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			<p>enhancements through 3D printing, augmented reality, inventions, and futuristic technologies in relation to the Third and Fourth Industrial Revolutions.</p> <ul style="list-style-type: none"> • S.12B-D – these are very helpful exceptions, especially for education, research, but also for journalists, newsreaders, motivational speakers, TV hosts, etc. The educational and academic activities exceptions in the Bill are welcomed and will provide better access to teaching and learning material and research resources, and free up more public funding for new library acquisitions and infrastructure. • Supports the freedom of panorama in section 15 (1), section 19B-computer programs, section 19D and provisions on orphan works. • S.39(1)-(2) – This section (and point 3.36 of the Memorandum to the Bill) refers to the impractical 'Intellectual Property Laws Amendment Act 28 of 2013' (IPLA Act) (not yet operational after 10 years!). There is a more practical and appropriate piece of legislation which is outside copyright law. It is the "sui generis" 'Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019', that addresses IK and TK but conflicts with the IPLA Act. Recommend that any reference to the IP Laws Amendment Act 28 of 2013 should be removed if it is likely to affect the passage or enactment of the Bill. 	<p>be referenced in the law.</p>
C	Voices of Africa Today-Ohis Abdulrahman Yakubu	CAB	<ul style="list-style-type: none"> • Voices Of Africa Today commend the effort of the government for putting together and constantly amending such a comprehensive bill which they believe is perfect in all of its considerations. • However, suggest that the government could play a significant role in administration of certain aspects of this bill as follows: • The government might want to think of setting up a copyrights registration portal, a platform for musical artists and content creators of all kinds to register their original works of arts at a minimum administrative fee per submission. This fee could be utilized by the government to distribute digital copies of the artworks (music) to all of its SABC Radio and TV stations nationwide for digital scheduling/ 	<ul style="list-style-type: none"> • Copyright does not require registration. The right is secured in a work automatically, once it is reduced in writing and it is original. A person can create their own copyright by putting the words "copyright" or "copyright reserved" or the internationally

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			<p>publishing, invitation to interviews and play listing – depending on the artist's location within South Africa.</p> <ul style="list-style-type: none"> • The advantage of this system is that it will create the opportunity for the government to educate and identify with its own local talents. It could also generate a revenue stream for the government, as well as the artists who are in this process, guaranteed to be paid royalties from airplays on SABC. • The Department of Cultural Affairs and Sports, with its partners could also host workshops to educate musical artists and digital content creators on copyright laws, provisions and how they can benefit from using the above suggested platform for copyrights registration and distribution for radio airplay and otherwise. 	<p>recognised copyright symbol followed by your name and the year e.g. © John 2020 on the original work.</p> <ul style="list-style-type: none"> • The education and awareness comment is noted.
D	Western Cape Government	CAB	<ul style="list-style-type: none"> • One of the predominant concerns, which has loomed large throughout the development of the amendment Bill, has been the lack of a publicly available regulatory socio-economic impact assessment. • Paragraph (a) of the definition of “authorized entity” refers to “the government”. If the intention is to refer to all three spheres of government then it is submitted that the wording can be improved by referring to “...any sphere of government”. If the intention is to only refer to national government then a definition needs to be inserted. • Paragraph (b) of the definition of “authorized entity” refers to “non-profit organization”. It is submitted that a definition needs to be inserted referring to the legislation in terms of which non-profit organizations are registered. • 1(k). This provision provides for the insertion of a definition for “technological protection measure circumvention device or service”. The last line in this proposed definition – “protection measure;” – needs to be underlined in its entirety to indicate the insertion. • 10.b. This provision provides for the insertion of three proposed paragraphs – (f), (g) and (h) in section 9 of the Act. It is submitted that proposed paragraph (f) should end in a semi colon, not a full stop. 	<ul style="list-style-type: none"> • The Department conducted a regulatory impact assessment study finalised in 2014. The study was not published to the public. The requirement for legislation is not a regulatory impact assessment study. The study mentions fair use and other issues considered in the Bill. • The Socio Economic Impact Assessment System was developed by the Department of Performance and Monitoring and Evaluation in the

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			<ul style="list-style-type: none"> • Section 12(1) of the Act provides for a closed list of purposes. Proposed section 12A(1) refers to “purposes such as the following”. This is an open list so copyright owners may not receive remuneration if their work is used for purposes similar to those listed. It is submitted that this substantially limits the owner’s right to enjoyment of his or her property. • It is also submitted that proposed section 12A contravenes section 22 of the Constitution which states that every citizen has a right to choose their trade, occupation or profession freely and that the practice of a trade, occupation or profession may be regulated by law. • It is submitted that where the use is for commercial purposes then it cannot be considered to be “fair” for the purposes of determining an exception in terms of this provision. It is submitted that private study and private use can be undertaken for a commercial purpose. If an exception from copyright protection were to be granted for research, private study and private use for commercial purposes the effect would be to deprive the copyright owner of the fruits of his or her intellectual property for the purposes of enriching another. • It is submitted that this can be interpreted to mean informal teaching between two individuals. In such instances, an exception from copyright protection should not be granted. It is submitted that the amendment Bill should clarify what is meant by “teaching” and “education”, perhaps by way of definitions. • The existing • It is submitted that this constitutes arbitrary deprivation of property as contemplated in section 25(1) of the Constitution. The deprivation is substantial and overly broad. Copyright owners will no longer be entitled to profit from an exploitation of a • Quotation exception found in section 12(3) of the Act limits the exception to literary or musical works. Proposed section 12B(1)(a) does not have this limitation and has expanded the exception considerably to include e.g. visual artistic works, which by their nature cannot be quoted but must be reproduced as a whole. Proposed section 12B(1)(c) refers to 	<p>Presidency. This one is the legislative requirement.</p> <ul style="list-style-type: none"> • In February 2015, Cabinet approved the SEIAS in line with the Medium Term Strategic Framework (MTSF) to improve policy development and create a more efficient and robust legislation and regulations. Cabinet adopted a resolution on the establishment of the SEIAS Unit in the Presidency to facilitate and provide guidance to national departments on the application of SEIAS to the design of policies, legislation and regulations. • According to Cabinet Resolution, all policies, bills and regulations were to be subjected to SEIAS, to assess their impacts and contribution to the

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			<p>reproduction of a work by a broadcaster. Section 12(5) of the Act limits the broadcasting to literary or musical works. Proposed section 12B(1)(c) does not have this limitation and the exception has now been extended to the broadcasting of any work.</p> <ul style="list-style-type: none"> • The exception from copyright protection in educational and academic activities also results in copyright owners being afforded far less protection and their right to benefit from their work is consequently limited. It is submitted that this amounts to a deprivation of property, which is arbitrary, as contemplated in section 25(1) of the Constitution. The purpose of this provision is to promote access to copyright material for educational purposes. However, it is submitted that the provision is, once again, too broad. For example, the provision permits the copying of entire books or journals if the licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions [proposed section 12D(3)] or where the book cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works [proposed section 12D(4)(c)]. It is not clear what constitutes a reasonable price or reasonable terms and conditions. These provisions can be interpreted very broadly and abused. • It is submitted that the exceptions regarding protection of copyright work for libraries, archives, museums and galleries also constitute an arbitrary deprivation of property as contemplated in section 25(1) of the Constitution. Proposed section 19C(3) provides for a library, archive, museum and gallery to provide “temporary access” to a copyright work to a user or another library. It is not clear from this what is meant by “access”. It is therefore submitted that proposed section 19C needs to be reassessed. • This clause provides for the proposed insertion of proposed section 27(5A). The proposed provision reads, “Any person who at the time when copyright subsists in a work, without the authority of the owner of the copyright and for commercial purposes—(a) communicates the 	<p>National Development Plan priorities before their approval. The CAB was subjected to a SEIAS.</p> <ul style="list-style-type: none"> • The department conducted various studies that informed the Bill, the Copyright Review Commission report is one of such studies. • The definition of authorized entity is aligned to the Marrakesh treaty. It does not categorise spheres of government. • The definition does not distinguish forms of NGOs, aligned to the treaty. • The drafting suggestions are noted. • The Bill’s exception and other provision were found to be Constitutional based on advise and legal analysis.

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			work...; and (b) makes the work available..., which they know to be infringing copyright in the work,...”.	<ul style="list-style-type: none"> • Commonly used dictionary words such as education, teaching, access, do not have to be defined in law. • Multilateral agreements have always permitted countries the policy space to move in, pertaining issues of public interest. The South African Copyright Law has always had some form of limitation or exception from copyright infringement. The exceptions relate to matters of public interest and are for non-commercial purposes. • It should be assessed whether the exception is reasonable, justifiable in an open and democratic society based on human dignity, equality and freedom.

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				<ul style="list-style-type: none"> The law serves a constitutionally acceptable purpose.
E	South African Democratic Teachers Union	CAB	<ul style="list-style-type: none"> SADTU calls for the Bill to be passed urgently by the National Council of Provinces and the Provincial Legislatures and returned to the President for assent during the first half of 2023. 	The comments are noted.
F	Patricia Ramela-Mothapeng	CAB	<ul style="list-style-type: none"> Is happy to see that the Bill will be very helpful to librarians and other information services. It also introduces fair use (with four criteria), which is more flexible than our current fair dealing. It has practical exceptions for academic activities, education, people with visual, hearing, and other disabilities, as well as for archives, museums and galleries. It also allows copies of at least 50% state-funded manuscripts to be placed in open access repositories, which will provide so many more resources for our staff and students. The Bill is a great improvement on the current Act. Hope that the Western Cape Legislature, and the other Provincial Legislatures, will recognise the benefits of this Bill for the library, research, and educational sectors, and other stakeholders. Hope the Bill will be passed as soon as possible. 	The comments are noted.
G	Prof Sadula Karjiker-The Anton Mostert Chair of Intellectual Property Law	CAB	<ul style="list-style-type: none"> "audiovisual work": The effect of this definition and the use of the term in the Bill is to create a new category of work eligible for copyright, with no corresponding change to section 2 of the Copyright Act, which lists the eligible works. The term as defined is largely synonymous with "cinematograph film" as defined. However, the definition creates a new genus of work of which "cinematograph film" is a species. The term "cinematograph film" as currently used in the Act can now have two possible meanings. It is probably better to stay with the existing terminology and delete this definition or possibly have it indicate that it means "cinematograph film", in which case no further changes are necessary. "authorized entity"-What the Constitutional Court had to say in refusing to simply "read in" the Bill's proposed section 19D into the Copyright Act in <i>Blind SA v Minister of Trade, Industry and Competition & Others</i> [2022] 	<ul style="list-style-type: none"> The definition of audiovisual works has been drafted in a manner that includes the cinematograph film. The audiovisual works was considered in order to take into account the treaty language. The view is that the term commonly utilized now is audiovisual works. An

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			<p>ZACC 33 cannot be ignored. There appears to be no analysis of the Blind SA case, and how the concerns raised by the court have been addressed.</p> <ul style="list-style-type: none"> • “broadcast”: The proposed amendment of the definition of “broadcast” is a good illustration of the lack of technical competence of the drafters of the Bill in the field of copyright law. First, there is no recognition of the relationship between the definitions of “broadcast” and that of “programme-carrying signal”. In fact, a programme carrying signal is a distinct category of copyright work. Given the fact that paragraph (b) of the proposed definition states that a broadcast includes a “transmission, partially or wholly, by satellite”, does this suggest that the definition of “programme-carrying signal” is now redundant, and that programme-carrying signals will no longer be a distinct form of copyright work? This cannot be the case. The provisions of the Copyright Act relating to programme-carrying signals cannot simply be ignored. • “orphan work”: The whole point about regulating orphan works is to facilitate the use of these works. The current definition creates too onerous a standard. It should be an orphan work if reasonable efforts have been made to identify or locate the copyright owner, without success. • Clause 5 – Proposed introduction of new section 6A-This section shows that the drafters do not understand some of the most fundamental principles of copyright law, which has led to garbled drafting. Apart from some very practical problems with interfering with the contractual freedom of copyright owners, it is unclear when this section would even be applicable, given the exclusions pursuant to section 6A(6). Assignments are often in respect of the world-wide copyright and it is most unlikely that parties will be willing to go into this degree of detail for one country (very few, if any other countries have similar provisions in their laws). • 7A-This section contemplates and regulates the sale of the item of physical property. What it should say is that, for the duration of copyright protection, each and every time the item of physical property (that is, 	<p>example of use is in the US copyright Act.</p> <ul style="list-style-type: none"> • The definition as it stands intended to incorporate the programme carrying signal particularly the transmission by satellite. If that is unclear, it can be reviewed. • The Blind SA judgement has been considered. • Orphan works in the Bill has an important procedure that will enable works to be located. It is used in countries such as the UK. The provisions are comprehensive in sections 116A-116D. • On the original, the provisions related to digital rights are derived from the international treaties. The text was used to

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			<p>the piece of canvas carrying the painting) is sold, a proportion of the proceeds of such sale should be paid to the author of the copyright work.</p> <ul style="list-style-type: none"> • Section 7C and section 7E: Who is to determine whether a work contains an indigenous cultural expression and which community is to benefit? The costs of this exercise will erode any benefit which an artist may derive from it. This provision amply demonstrates the minefield that needs to be navigated when blurring the lines between copyright protection and TK/IP. It also seeks to give any TK/IP provisions retrospective effect, which is highly problematic. Given the fact that section 7E provides that the provisions apply to visual artistic works that were created before the provision comes into force, it leads to an anomaly that an indigenous community may be considered to be the co-author of an artistic work that no one in the community even knew existed! • Clause 9 – Proposed introduction of new section 8A: The proposed section is very likely to be unworkable and could lead to South Africa being avoided as a jurisdiction for the creation of films • Clause 11 – Proposed amendment to section 9A: Section 9A(1)(a) should be amended to include the act of making available, now provided for in the proposed section 9(f) to include the use of protected works by, for example, users of online music streaming services. Having said that, you are referred to the earlier comments relating the conceptual confusion concerning the right of communication to the public, and the making available right. • Clause 12 - Proposed amendment to section 11A in the Copyright Act First, in relation to paragraphs (b) and (c), you are referred to the comments relating to the proposed definition of “broadcast” above, more specifically, the conceptual confusion concerning the right of communication to the public, the making available right, right to broadcast and the right to emit a programme-carrying signal. Second, it should immediately be noted that “original” is a technical term in copyright law, whereas it is clearly being used here in its lay sense, which 	<p>ensure alignment with the treaties. An example below is from the WCT.</p> <ul style="list-style-type: none"> • Wipo Copyright Treaty (WCT)-Agreed statement concerning Articles 6 and 7: As used in these Articles, the expressions “copies” and “original and copies,” being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects. • Article 6 -Right of Distribution (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or

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			<p>is problematic. Is the issue not that it is the unauthorised disclosure of the "original" that is sought to be prohibited?</p> <ul style="list-style-type: none"> • Third, in relation to paragraph (d), it is not clear how, factually, an "original" published edition could be distributed (as there should presumably only be one such item). "Distribution" suggests that there are multiple copies of something. Accordingly, paragraph (d) should only deal with publishing (or making available) the work to the public, as with, for example, literary works. • Proposed amendment to section 11B in the Copyright Act First, in relation to paragraphs (dA) and (dB), you are referred to the comments relating to the proposed definition of "broadcast" above, more specifically, the conceptual confusion concerning the right of communication to the public, the making available right, right to broadcast and the right emit a programme-carrying signal. The same concern also affects paragraph (e), namely, transmission by diffusion service, which is, in essence, a broadcast by non-wireless means. • Secondly, it should immediately be noted that "original" is a technical term in copyright law, whereas it is clearly being used here in its lay sense, which is problematic. Is the issue not that it is the unauthorised disclosure of the "original" that is sought to be prohibited? • The introduction of fair use is highly problematic, and questionable, for two main reasons. First, fair use creates a level of uncertainty amongst copyright stakeholders that does not exist with fair dealing. In comparison with fair dealing, fair use greatly increases the threat of (and need for) litigation, and the costs associated with it, as it does not provide sufficiently clear guidelines about what is permissible. If anything, it simply favours parties who have the greatest financial resources to litigate. For the aforementioned reasons alone, the proposed introduction of fair use should be rejected. • Neither the DTI, nor the Portfolio Committee, has provided any basis to suggest that the adoption of fair use is in compliance with South Africa's treaty obligations. In fact, despite support amongst the Lobbyists for the 	<p>other transfer of ownership.</p> <ul style="list-style-type: none"> • The section 12A(a)((iv) of scholarship, teaching and education was deliberated in the previous public submission process. The public opined that the purpose should be retained. • The section 12A(d) was removed from the Bill, in the previous advertised Bill of the National Assembly, it was incorporated and advertised following public submissions. The public found it problematic and it was removed, not in the current version of the Bill. • The other comments by Prof Karjiker were considered and are noted. They have been submitted in previous processes in Parliament

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			<p>introduction of fair use, there is no detailed analysis — other than bald assertions about its alleged compliance with the Berne Convention or the TRIPs Agreement.</p> <ul style="list-style-type: none"> • The proposed section corresponds, to some extent, with the present section 12 of the Act, but with one important difference. It is clear that, as a consequence of the words “such as” in 12A(a), the specific examples of fair use listed are simply illustrative (and not a closed list), and gives a court an extremely wide discretion to exempt any use of whatever nature of a copyright work. • The new proposed section 12A(d) now undermines the express limitations that are provided in relation to the permitted uses in section 12B. The effect of section 12A. (d) is to render those limitations nugatory because, ultimately, any use of a copyright work will have to be measured by the factors in 12A(b). This underscores the fact that the Bill is not introducing some “hybrid system” of exceptions between fair use and fair dealing, but is a fully blown fair-use system. The net result is that tremendous uncertainty is created as to what a copyright owner can actually prevent others from doing with its copyright work. • For completeness, the portion of paragraph (a)(i) that, presumably, seeks to facilitate so-called “time shifting” and “format shifting” only causes confusion as to the scope of this exemption. Time shifting and format shifting should be regulated by separate provisions. For example, there is no requirement that the persons engaging in such acts must have lawful access to the relevant copyright works. • Section 12A(a)(iv): While a fair-use exception for scholarship and illustrative purposes in teaching may be appropriate, the exception for “education” could have disastrous consequences for educational authors and publishers, depending on how wide this exception will be. It is the long-term impact of legislation that should be considered, rather than seeking to achieve populist (short-sigh Section 12A(a)(v) • What is meant by “cartoon” in this context? At present, the owner of a literary work has the right to make an adaptation of the literary work. 	<p>as well and were considered.</p>

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			<p>For example, the copyright owner of a literary work of fiction has the exclusive right to convey the story “wholly or mainly by means of pictures in a form suitable for reproduction”. The latter picture form version would include converting the story into a cartoon. Thus, unless it is clear what “cartoon” in section 12A(a)(v) refers to, and that such definition is sufficiently restrictive, there does not appear to be any justifiable reason for this unwarranted exception. Similarly, the inclusion of “tribute” and “homage” provide unwarranted grounds for allowing the use of another’s copyright work.</p> <ul style="list-style-type: none"> • Proposed section 12C-First, the section is cast in the form of giving someone the right to make transient copies, which should not be the case. It should entitle the beneficiary to immunity from liability (or an exemption from liability), not a positive right. Second, the exception should be limited to “reproductions”, and should not extend to “adaptations”. • The exception for education could have disastrous consequences for educational authors and publishers, if the cannibalisation of educational material is permitted without any compensation to the copyright owners. Something less than “substantially the whole of a work” could still amount to a substantial part of the work for copyright law. • Section 12D(3)-The Act contains no reference to “indigenous communities” and confers no rights on such groups. This problem is exemplary of a wider fundamental problem, namely, that the Bill is based on the erroneous premise that the Copyright Act has already been amended by the Intellectual Property Law Amendment Act 2013 (“IPLAA”). • Section 12D(6)-The “instruction” should take place at a recognised educational institution. “Incorporate” is not a restricted act under Act. “Reproduce”, which is a restricted act, should be substituted for it. The effect of an exemption is to authorise the performance of a restricted act under Act. 	

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			<ul style="list-style-type: none"> • "Assignment" has a recognised specific meaning in copyright law, namely, to transfer the ownership of copyright. It should ideally not be used in this context as it is potentially misleading and could cause confusion. Maybe it is best to try to distinguish it from the legal concept with the necessary qualification, for example, "educational assignment". • Section 19C(1)-What is meant by "library", "archive" or "gallery" in this context? These terms should be construed strictly as recognised institutions, so as to prevent the wholesale abuse of these provisions by so-called "digital" libraries, archives or galleries that are in the business of harvested data for profit. 	
H	Professor Sadulla Karjiker-The Anton Mostert Chair of Intellectual Property Law	PPAB	<ul style="list-style-type: none"> • "fixation", "audiovisual fixation" and "sound recording" These definitions are central to the application of the Principal Act, namely, "fixation", "audiovisual fixation", and "sound recording" (introduced by the Amendment Bill). Given the fact that the purpose of the Principal Act is to protect the rights of performers, the recording of a performance and exploitation of such recording should be one of the main areas of concern that the Act would seek to address. However, this concern is not consistently dealt with by the Amendment Act (and, also not by the Principal Act, as it currently exists). One would expect that most provisions would seek to protect performers' rights in relation to the exploitation of any form of recording, unless there was a specific reason for distinguishing between an exclusively aural recording and an audiovisual recording. Thus, most provisions should simply refer to a "fixation" of a performance, which should be the umbrella term for any type of recording. • In other words, if necessary, there are two subcategories of fixation, namely, a sound recording and audiovisual fixation. To this end, it is unclear why the existing definition of "fixation" has been deleted, rather than simply amended, if desirable, by the addition of the following words "which can be perceived, reproduced or communicated by any means". Having said that, it is not clear if a distinction between sound recordings 	<ul style="list-style-type: none"> • The comments are noted. The fixation was incorporated in the audio visual works and on the sound recordings. • The aim was also to align with the treaties. The Beijing treaty refers to audio visual fixation. • The fixation and the two types are not that opposed from one another. It may be a matter of the preferred language. The audio visual and sound recordings are aligned to the treaty language.

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			<p>and audiovisual recordings is at all necessary. This matter needs to be properly re-considered.</p> <ul style="list-style-type: none"> • “communication to the public of a performance” -Having regard to comments, is there any reason why the proposed definition must expressly refer to the two forms of fixations? The definition could simply be in respect of a fixation, which would then cover both an audiovisual fixation and a sound recording. • Given the fact that one of the stated objectives of the Amendment Bill is to promote performers’ moral and economic rights, the new proposed section 3(2) seems to contradict that objective. The Amendment Bill assumes that a performer may have transferred its rights in terms of the Principal Act, and, on the basis of that assumption, seeks to ensure that the performer at least has some moral rights, as well as a reversionary right. In fact, in one material respect, the Amendment Bill appears to weaken the position of performers. Currently, the accepted view is that the rights granted to performers under the Principal Act cannot be transferred (more correctly, assigned) as the Act makes no provision for the rights granted to be transferred. The most obvious, and simplest, way to enhance the rights of performers would be to maintain the principle that the rights afforded by the Act cannot be transferred by performers. • The proposed new section 3(3) is, at best, unclear. First, although the rights granted under the Principal Act may in some respects be similar to copyright, it is not copyright. It is, thus, important to distinguish performers’ right from copyright. Second, it is submitted that the moral rights in copyright law are considered to be akin to commonlaw personality rights protecting honour or reputation. At present, such personal rights can only be enforced by the author of the copyright work, and will, thus, terminate on the death or termination of the author. Accordingly, the proposed new section creates confusion. • In keeping with the comments in paragraph 1.1, the proposed sections 3(4)(c) to (g) could simply refer to “fixations”. 	<ul style="list-style-type: none"> • The term producer and author are not the same. • The two Bills are interlinked. It does not mean there is confusion between copyright and performers and the rights. • The right to transfer is an economic right availed to the performer. This right is also recognised in the treaties.

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			<ul style="list-style-type: none"> • Proposed new section 3B-Guidance should be provided as to whether the term “producer” is considered to be the same as the “author” (or even the “owner”) under the Copyright Act, or whether there may be a distinction between the two concepts. If it is the latter case, what if there is a dispute between the “producer” and the copyright owner (or author) of the phonogram? What if the copyright owner wishes to commercially exploit the phonogram but the producer refuses to consent to such exploitation? Will this not introduce another layer of complexity? • Proposed sections 5(1)(a)(i) to (iv), and 5(1)(b) may be simplified by merely referring to “fixations”. See the comments in paragraph 1.1 above. • In relation to the proposed subsection (2), it is not clear why the performer (and producer) should not be deemed to have also consented to the rebroadcasting of the relevant performance. • The proposed section 8(2)(f) is inappropriate, and should be deleted. It cannot apply to the performance. As indicated above, copyright is regulated by the Copyright Act, and is a distinct right. Issues of fair-dealing in the fixation should be left to be dealt with in terms of the Copyright Act, otherwise it may result in possible confusion. • In relation to the proposed section 8(3)(a), it is not clear why there should not be a general archiving right. Archiving should not affect any of the moral or economic interests at issue. • These sections are identical to proposed sections 28O, 28P, 28R and 28S of the Copyright Amendment Bill [B13D-2017] and any issues pertaining to the proposed sections of the Copyright Amendment Bill will apply accordingly. 	
I	South African Institute of Intellectual Property Law (SAIPL)	CAB and PPAB	<ul style="list-style-type: none"> • Local organisation provision in section 22 be withdrawn. Giving arbitrary powers to Minister. • Reject 12B(6). • Reject contract override section 39 and definition of open licence • Reject royalty provisions and government to identify workable solutions for authors and performers. 	<ul style="list-style-type: none"> • The copyright vested in local organization will operate similarly to the state and international organization that were

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			<ul style="list-style-type: none"> • Reject the reversion clause, not same as recommended in the CRC • Reject 7B, 7C, 7D, 7E, 7F and definition of art market professional and visual artistic works • Reject all provisions of contract regulations • Fair use and impact assessments, reject fair use • Reject section 12B on translations • The use of audiovisual works as opposed to cinematograph as a work eligible for copyright does not have a rationale because it is derived from the performers treaty and not copyright.- • Reject section 12 C(b) that include adaptations • Section 12C -This section should be reviewed to (i) apply only to temporary copies and not adaptations, given that adaptation is a copyright law concept that goes beyond the formatting of a text for example. The format shifting in section 12C(b) is suitable for personal use as recommended by the CRC. • Prescribing royalty rates or tariffs for various forms of use, particularly Resale Royalty Rights. • Section 39(CI) be reworded to specify Minister will set royalty rates for resale royalty rights. • Concerns were raised regarding section 12B(6), regarding its alignment to the Wipo Copyright Treaty, the alignment with the current provision in the Act in section 23(2), conditions of distribution versus importation. Prescribing royalty rates or tariffs for various forms of use, particularly Resale Royalty Rights. • The definition of visual artistic works and resale royalty rights to be recast in a new chapter.- • Section 39(CI) be reworded to specify Minister will set royalty rates for resale royalty rights. Prescribing royalty rates or tariffs for various forms of use, particularly Resale Royalty Rights. • The NCOP to determine whether the Tribunal provisions of 29A to 29H comply with section 3 of the Superior Courts Act of 2013 	<p>already in the Copyright Act.</p> <ul style="list-style-type: none"> • There is copyright that can be generated by a local organization and not infringe copyright of an author. • The powers of the Minister are meant to create an enabling environment. The Minister will not interfere in private contracts but will create a framework to guide contracting parties when they carry out contracts. • The provisions on unenforceable contracts are aimed at ensuring adherence to the Act. Where the rights provided in the Act are violated, the contract becomes unenforceable. This is additional protection provided. • The royalty rates are not legislated. There has been challenges

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			<ul style="list-style-type: none"> • Resale royalty right is not a copyright, recommend a separate chapter in Bill. • The words by 'art market professional' be added after 7B(1)(a). • The definitions of 'technological protection measure' and 'technological protection measure circumvention device' are incorporated by reference from the Copyright Act, and PASA suggests a loose-standing set of definitions in the PPAB. • Section 8F and 8H not compliant with the treaties and not provide adequate legal protection. • Reject the definition of communication to the public in 1(d) <ul style="list-style-type: none"> • New section in 3(4) in clause 2 • New section 5(1)(a)(i), 1(b)(iv) to (vii), 1A, 2, 4 and 5 in clause 4 • New section 8(2)(f) in clause 5(a) • Amendment of section 8(3) (a) by clause 5(b), because they are in some places incorrect or in conflict with the WPPT and the Beijing treaty. 	<p>with the setting of the rates and these have resulted in court intervention before.</p> <ul style="list-style-type: none"> • The Resale Royalty Rights is a specific type of royalty involving virtual artistic works. Governments are allowed to determine matters of collections and amounts how they regulate this form of right in terms of the Berne Convention (Article 14'ter). • It is recommended the provision in section 39 (Cl) can be focused on the resale royalty rights and the royalty for other uses be left amongst contractual parties to determine. It is recommended that section 39(Cl) be amended. • It is recommended that the adaptation in section 12C can be reviewed, in line with the EU Directive and

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				<p>the UK copyright law. Adaptation in section 12C can be recommended for removal.</p> <ul style="list-style-type: none"> • The section 15(1) substitutes the section in the current Act. The section 15 (1) does not have to be repealed. • The definitions of TPMs were deliberated in the PC and the definitions provide adequate legal protection and effective legal remedies. The implications of adding stronger TPMs was found to have serious negative implications on areas such as competition and consumer protection. • The definition of artistic visual works and resale royalty rights comment is noted. The reference to section 37 of the Berne Convention in the RRR can be

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				reviewed to amend the section.
J	Joint Academic Opinion: Dr Sanya Samtani, Et al.	CAB	<ul style="list-style-type: none"> • Clause 22, CAB : Section 19D(1)-Propose that, in order to avoid any interpretation that could lead to its unconstitutionality, s 19D be amended to comply with the Constitutional Court's judgement in Blind SA v Minister of Trade, Industry and Competition. • Delete the phrase "as may be prescribed and" from s 19D(1). • Section 19D(2)(a) restricts the scope of its application to those activities that are a result of the operation of s 19D(1). This means that persons with disabilities are permitted to only use accessible format copies made under s 19D(1). Since s 19D(1) relates to persons serving persons with disabilities and authorised entities only, this excludes the possibility of a blind person already having lawful access to a work (say, through an e-library) and converting it to an accessible format on their own; or already having lawful access to a work that is in an accessible format and needing to lawfully share such copies, say for educational purposes. This creates limitations on the actual practice of making and sharing accessible format works within the disability community and runs the risk of perpetuating further unfair discrimination. • Delete the phrase "as a result of an activity under subsection (1)". • Section 19D as a whole -propose, to avoid further litigation on the grounds of unfair disability discrimination, that the scope of s 19D remains extended to persons with disabilities across the spectrum. The Constitutional Court, in Blind SA, understood its mandate as limited to visual disabilities on the basis that the affidavits and evidence before it related to the discrimination experienced by people with visual and print disabilities. By law, courts are limited in their interpretation to the case and issues presented by parties to the suit before them. Hence the Court crafted s 13A which only addressed people with visual and print disabilities. However, the purport of the CAB is to address all forms of disabilities, therefore s 19D is drafted more broadly. Parliament's role is 	<ul style="list-style-type: none"> • It is recommended that the policy on all works, all forms of disabilities be retained. • The prescribed in the Bill in section 19D (1) is different to the court judgment, the copyright Act had to be effective immediately to activate the rights and subjecting it to regulations was going to delay the rights. In the Bill, it is important recommended that the prescribed in the Bill is retained. • The recommendation to delete section 28P(2) is supported. • Reference to sub section 1 in section s 19D(3) is recommended to be removed as it restrict the rights provided in the provision and not in the spirit of the court judgement. Also, other

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			<p>broader than the Court's in this regard, and must consider the analogous impact of copyright on all people with disabilities across the spectrum.</p> <ul style="list-style-type: none"> • To retain its scope as catering for all forms of disabilities. • Clause 31, CAB -Section 28P(2) -propose that s 28P(2) be deleted as it replicates the requirement of authorisation by the copyright owner that renders accessible format shifting near impossible. This requirement was considered by the Constitutional Court as the key obstacle to accessible format shifting and the basis for the unfair discrimination ruling. Moreover, the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled ("Marrakesh VIP Treaty") requires that where contracting parties decide to provide protection against circumvention of technological protection measures ("TPMs") in their laws, this protection must not prevent accessible format shifting in any way, whether in the law or in its effect. • Recommend to delete s 28P(2). • Recommend that the example purposes include "information analysis" as do recent copyright amendments in many countries. The issue here is that new research methodologies allow computers to help researchers read and analyse information, including in copyrighted works such as books, articles and web pages. • These "text and data mining" methods are "used in many machine learning, digital humanities, and social science applications, addressing some of the world's greatest scientific and societal challenges, from predicting and tracking COVID-19 to battling hate speech and disinformation." The current proposed fair use exception should be sufficient to authorise text and data mining methodologies. However, to give researchers a clearer signal, an explicit reference to information analysis (or computational analysis) research methods could be added to the list of presumptively authorised purposes. • Retain the section in its current form, and after "research", add the phrase ", including informational analysis". • Clause 29 and 31, CAB-Sections 27(5B) and 28O 	<p>minor amendments to ease the provision can be considered.</p> <ul style="list-style-type: none"> • In international discussions on copyright related matters, the intellectual property legislative regime of South Africa has been questioned in terms of the strong legal measures to deal with infringements related to the digital environment. • The view is that the matters are serious such that the penalties should be more stronger. The criminal penalties will send a message that deters these infringements. This aspect can be reviewed.

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			<ul style="list-style-type: none"> • Propose that ss 27(5B) and 28O be replaced by civil liability provisions. Section 27(5B) criminalises the use, provision, and possession of technologies on the basis that these technologies could be used to circumvent technical protection measures and then infringe copyright. The WCT does not require criminal penalties and permits circumvention for uses authorised by exceptions and limitations. • Leading jurisdictions prefer civil remedies for circumvention and civil remedies are also a common consequence for copyright infringement under the current Copyright Act. When circumvention includes technological acts that are criminal in nature, such acts are already extensively dealt with in dedicated cybercrime legislation. If Parliament elects to criminalise circumvention of TPMs as part of copyright law, the Bill should clearly indicate that the requisite criminal intent is required. • Replace criminalisation of circumvention with civil penalties including damages and interdicts for circumvention of technical protection measures. This requires that sections 27(5B) and 28O be deleted from the Bill and replaced by a provision deeming circumvention and trafficking in anti-circumvention devices to be an infringement of copyright. • Delete sections 27(5B) and 28O and insert in its place: • “Section 23A Subject to s 28P any person who, at a time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright— (a) intentionally circumvents that effective technological protection measure in order to infringe copyright when that person is not authorized to do so; or • (b) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertises for sale or hire, a technological protection measure circumvention device or service and knows that the device or service will, or is likely to be used to, infringe copyright in a work protected by an effective technological protection measure; or 	

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			<ul style="list-style-type: none"> • (c) provides a service to another person to enable or assist such other person to circumvent an effective technological protection measure when they know that the service will, or is likely to be used, by that other person to infringe copyright in the work;nis deemed to have infringed copyright in the work which infringement is actionable under s 24.” • The wording of s 28P(1) is too narrow to achieve its objective. Propose a minor amendment to rectify this. Technological protection measures can prevent people including people with disabilities, learners and artists from engaging in lawful uses of works permitted by the Act. Section 27(5B) seeks to impose criminal liability for engaging in uses that Parliament expressly authorises subject to certain exceptions. Section 28P(1) is intended to permit these lawful uses, however its language refers only to exceptions. But not every lawful use is in the form of an exception. Sections 12C and 12D are not labelled as exceptions and may be better termed limitations. The memorandum to the Bill, preamble to the Bill and s 19D(2) refer to both limitations and exceptions. Lawful uses include those permitted by regulation and statutory licences such as those in Schedule 2. To avoid a lack of clarity whether a lawful use is technically an exception or not, all lawful uses should be included. • Extend the ambit of the clause to every lawful use but retain the reference to exceptions to ensure clarity. • Insert the words “by law”, resulting in the amended clause reading as follows: “(a) An act permitted by law, including in terms of any exception provided for in, or prescribed under, this Act; or [...]”. 	
K	Prof Peter Lor- Research Associate Department of Information Science, University of Pretoria	CAB	<ul style="list-style-type: none"> • In respect of access to information for the blind and the partially sighted, find it a disgrace and a tragedy that delaying tactics are still preventing the signing of the Bill, and hence, South Africa's ratification of the Marrakesh Treaty. • It is disheartening that in this day and age it is still necessary to emphasize in our country a point that is blindingly obvious to all, including the leaders of the above-mentioned governments: the obvious point that access to information and knowledge is critically important for 	The comments are noted.

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			<p>our country's future: for scholars, students, researchers, managers, leaders. Access to information is key to economic development in all sectors, and essential for the development of a literate and well-informed population. Barriers enshrined in current legislation impede this.</p> <ul style="list-style-type: none"> • Opposition to the exceptions and limitations to copyright by parties arguing for the interests of foreign copyright holders is hypocritical in the extreme. All wanted in the Bill is the fair use provisions that are already in place in the wealthy Western countries. They became wealthy at least in part because they had untrammelled access to information and knowledge when their economies were developing, but now they place obstacles in the development path of countries of the Global South. 	
L	M-Net and MultiChoice	CAB and PPAB	<ul style="list-style-type: none"> • A major flaw is that the new proposed definition of broadcast actually reduces the scope of protection offered by the current definition in the Copyright Act, instead of improving the scope of protection. The current definition by virtue of "includes the emitting of programme-carrying signals to a satellite" would include the uplink programme-carrying signal to the satellite and not just the downlink signal to the public. The new definition thus, reduces the scope of 'broadcast' and the protection afforded under copyright law. • The definition of "broadcast" in the Copyright Bill and PPA Bill has also introduced features of the Beijing Treaty definition such as "partially or wholly" that are unclear. The Beijing Treaty defines the transmission by wireless means which constitute broadcasting, and then simply confirms that transmission by satellite is also broadcasting, whereas the proposed new definition of "broadcast" in the Copyright Bill and the PPA Bill separates transmission by satellite from the previous definition of broadcasting, which in The definition of • Support the broad objectives of the PPA Bill and, in particular, the increased protections of performers whose works feature in audiovisual fixations which will be brought about by the provisions of the Bill. However, the overlap in performers protections that will result if both 	<ul style="list-style-type: none"> • The definition of broadcast was deliberated and consideration was made to the white paper process underway for the Electronic Communications Act of 2005 and the international treaty processes where discussions on broadcasting are still on-going. There were concerns noted with unintended consequences of the proposed changes.

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			<p>the Copyright Bill and the PPA Bill in their current forms are made law will be untenable commercially and will result in confusion, duplication, and litigation to the prejudice of all industry participants, including performers.</p> <ul style="list-style-type: none"> • Urge the Select Committee and NCOP to consider carefully, in this regard, the prejudice to all stakeholders (including performers) that will arise as a result of having a dualistic statutory framework, particularly in circumstances where there is no obvious purpose or benefit to having two statutory instruments perform the same object. • Propose the deletion of the performers' protection provisions from the Copyright Bill to do away with the duplicated provisions that already exist in the PPA Bill • In this context, it is incongruent and confusing to refer to a "royalty received for the execution of any of the acts contemplated in section 6". Therefore propose that the reference in s6A to the "execution" of the work be deleted, and that the section refer to the royalty received for the authorisation of any of the acts contemplated in s6 and s8 if it is not deleted. • A further fundamental difficulty with s6A and 8A is that they contemplate a single remuneration model namely, a share of royalties. • The proposed royalty provisions might be workable in the context of a literary work such as a book where there is one, or a few, authors of the literary work. However, it is not workable in circumstances where numerous authors of a literary work, such as a script, are involved as a single input to a highly collaborative work such as a film or television series. • In practice, there are numerous different ways in which commercial deals can be structured and authors and performers can receive remuneration for their rights, considering the parties' respective objectives and priorities. 	<ul style="list-style-type: none"> • There was a discussion on the alignment to the international treaties and implications on wire and wireless means of broadcasting. • The current definition in the Bill was retained and it was recommended that when future policy direction changes, the definition can be considered. • The definition as it stands intended to incorporate the programme carrying signal particularly the transmission by satellite. If that is unclear, it can be reviewed. • It is recommended to retain the current definition in the Act. • The decision to include the performers in the copyright was to create a link between the two bills and to ensure a

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			<ul style="list-style-type: none"> • No single model can be practically applied to the multiple models that currently exist for television production. However, the Copyright Bill contemplates only a single one-size-fits-all model. The Copyright Bill accordingly eliminates the parties' ability to contract on mutually beneficial terms by narrowly referring to a "share of the royalty". • The proposed new s6A and 8A are accordingly so narrow and inflexible that they are unworkable. Are therefore concerned that it will be extremely difficult to implement and extremely disruptive to contracting workflows and schedules. Given the vast number of commercial agreements needed to get television content on air, the impact of the new inflexibly framed s6A and s8A could be that everything simply grinds to a halt. • This inflexibility could be easily remedied by providing for an alternative between equitable remuneration or a share of any royalty received by the owner for the authorisation of any of the relevant acts. This would allow the parties to agree on an appropriate remuneration model, which could be an upfront remuneration payment or an ongoing royalty percentage. The PPA Bill, for example, has already adopted this principle which has also been articulated in the Beijing Treaty language and provides for "royalties or equitable remuneration in respect of audiovisual works". • Other aspects of the Copyright Bill further reduce the flexibility of the different role players to contract: For example: s6A(3)(a) provides that the share of royalty "shall be determined by a written agreement in the prescribed manner and form..." • s6A(4) provides that where the author and copyright owner cannot agree on the author's share of the royalty, either party may refer the matter to the Copyright Tribunal for an order determining the author's share of the royalty. • The proposed amendments to Section 22(3) of the Copyright Act limit the term of assignment of literary and musical works to a period of 25 years from the date of assignment which will unnecessarily limit the 	<p>stronger protection for performers.</p> <ul style="list-style-type: none"> • The Copyright Act is linked to the performers and the royalty provisions were in the Act as far back as 2002. The definition of performance was incorporated in 1992. • Related rights" refer to the category of rights granted to performers, phonogram producers and broadcasters. In some countries, such as the United States of America and the United Kingdom, these rights are simply incorporated under copyright. • Other countries, such as Germany and France, protect these rights under the separate category called "neighbouring rights." • In South Africa, related rights are incorporated under copyright and

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			<p>opportunity to commercialise audiovisual works (which inevitably contain literary and musical works) to only 25 years.</p> <ul style="list-style-type: none"> • It is also unclear on what basis the Copyright Tribunal will reach a decision on the share of royalty, since no guidance is provided in the Copyright Bill as to the factors which should be considered by the Tribunal. • Reporting requirements: Accordingly, we propose the deletion of these provisions in the Copyright Bill and their amendment in the context of the PPA Bill to address unreasonableness and irrationality. • In light of the need for clarity, propose that the Bill reverts to the original wording in the current Act: "21(1)(c) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, such person shall, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4." To the extent that there are concerns that a work is commissioned but never used, we support, in principle (with the limited amendments proposed below) the Bill's new provisions which allow the author to approach the Tribunal where the work is not used. • Drafting suggestions were made. • Minister's powers to prescribe compulsory and standard contractual terms (clause 35(b) of the Copyright Bill). Clause 35(b) of the Bill seeks to amend s39 of the Act, to give the Minister wide powers to prescribe compulsory and standard contractual terms to be included in agreements to be entered into in terms of the Act. This provision would empower the Minister to make regulations that limit the parties' freedom to contract on terms that are mutually acceptable to them. • Have grave concerns that the provision confers unguided discretionary powers upon the Minister, which are extremely far-reaching and which 	<p>protected under the Copyright Act 98 of 1978 and the Performers Protection Act 11 of 1976.</p> <ul style="list-style-type: none"> • The remuneration model is noted. It is recommended that the amendment be effected by including equitable remuneration or royalties in section 8A to take into account other modes of remuneration. • The non-reporting is a serious issue that has impacted on many performers whose works is played on radio or television or any medium for commercial purposes without any compensation. There are series played repeatedly on television and actors have indicated that they are not paid for those works.

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			<p>unduly limit the parties' freedom to contract on terms that are mutually acceptable to them.</p> <ul style="list-style-type: none"> • Appreciate Parliament's concern that creators are in a weaker bargaining position that may result in unfair contract terms being agreed with publishers or producers. Believe that the proposed powers to be given to the Minister in terms of s39(cG) are deeply problematic and would therefore, propose the deletion of these provisions. • Submit that, rather than giving the Minister wide, vague and unfettered powers to regulate contractual terms - which would be both impractical and susceptible to legal challenge - the Tribunal should be empowered to set aside contractual terms that are manifestly unjust and unreasonable (rendering them null and void). Thus, we propose that s29A of the Act (as proposed to be amended by clause 33 of the Copyright Bill) could include a new s29A(2)(g). • Urge the Committee to delete the proposed s39(cl) and submit that any concerns about fair remuneration are adequately addressed through their proposal in paragraph 142 and elsewhere in this submission. • Propose that a minimum consultation period of 60 days for any regulations prescribed under the Act is necessary. We further propose that any regulations prescribed should be informed by a thorough consultation on the underlying policy and practical considerations and a comprehensive socio-economic impact assessment. • In order to help make the proposed 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 157.2 allow the parties to renounce a right or protection in circumstances where they have received equitable remuneration for doing so. • Oppose the Commission's proposed enforcement function contemplated in the new s28Q of the Act or the proposal that the Commission should deal with "any other matter referred to the Commission by any person, Tribunal or any other regulatory authority". 	<ul style="list-style-type: none"> • The CRC found: music usage information (music log sheets)- It was noted that music log sheets are kept mainly by broadcasters, and that general music users tend not to retain any log sheets. Collecting societies are, therefore, not able accurately to distribute royalties based on music usage. In cases where there are no log sheets, collecting societies use the available usage information as a mechanism for distributing unlogged royalties. For essential music users, the CRC believes that the legislation should be amended to make it compulsory for them to retain music usage information records. - page 77 • The reporting requirements are

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			<ul style="list-style-type: none"> • Concerns about unfair contract terms and unenforceable contract terms (currently dealt with in the proposed s39(cG) and 39B of the Act respectively) should rather be dealt with by the Tribunal. Submit that proposals will achieve the Bill's objectives in a more achievable and lawful way. • s29H(c) empowers the Tribunal to impose a fine under s175 of the Companies Act. The Tribunal is not the appropriate forum to impose such fines. More generally, it is unclear what the rationale is for empowering the Tribunal to make an order for an administrative fine. If reparation in the form of a monetary award is required, it must take the form of a damages award made in favour of the successful party before the Tribunal (the copyright owner, author, licensee etc.). The State has no interest in the disputes that will be heard by the Tribunal, and there is no justification for it benefitting from them. • Submit that a turnover-based fine is not appropriate in the context of intellectual property rights penalties. This should also be borne in mind in the context of fines under s27(6) of the Act, as proposed to be amended by clause 29(b) of the Bill. Point out in this regard that turnover-based fines are not appropriate in the context of copyright infringement, such as piracy, because the offenders often do not infringe piracy for payment (e.g., file sharing websites do not do so in consideration for payment, and therefore do not have a "turnover" on which to base or cap fines, rendering the penalties academic for such offenders, thereby defeating the object of the legislation. • To avoid general harm to the effectiveness of TPMs, the only circumstance in which a technological protection measure circumvention device should be permitted to be used is: for law enforcement purposes by an authorised state investigative, protective or intelligence agency in accordance with applicable laws; where the owner of the technological protection measure has consented to that use; where ordered by a court or the Tribunal after the owner has refused access; where a person authorised by government in terms of s19D for 	<p>necessary to provide certainty on payments of royalties for commercial usage.</p> <ul style="list-style-type: none"> • The reporting provisions have a rationale and they address the challenges with royalties. This impacts the music and audiovisual sector. • The reporting and recordal of commercial uses was introduced to address the policy gap of lack of royalty payments and no mechanism to ensure the use of works of performances for commercial purposes are addressed. • The challenges arise where work is commissioned. One of the challenges is where the copyright owner who commissioned the work, utilizes the work for purposes other than that which was

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			<p>the benefit of persons with disabilities; and where a person authorised by government in terms of s19C for libraries, archives, museums and galleries.</p> <ul style="list-style-type: none"> • In s19D in the Copyright Bill there has been an attempt to put in place a government managed regime to authorize persons to make copies for persons with disabilities without first obtaining the permission of the owner of the works. A similar provision should be considered for s19C. Where government has authorised a person in terms of s19D and s19C there should also be a requirement to keep records of such circumvention of TPMs for inspection as may be prescribed in regulation. There should also be kept a record of a reasonable attempt being made to obtain a copy without TPM from the owner of the works. • M-Net and MultiChoice propose that the Copyright Act should be amended to include provisions for a streamlined and fast-track process for removal, takedown and site blocking by ISPs upon notification by verified rights holders without the need to approach the court, as the process to obtain an interdict can be costly and time consuming and may well end up being too little too late in the majority of cases. The "trusted notifier" programmes that the Motion Picture Association, other rights holder bodies and various domain name registries have implemented could form a working precedent for this. YouTube's Content ID system is another model that could be considered, in terms of an automated process which allows verified copyright owners to remove material, rather than rely solely on YouTube to do so. • In addition to the ISPs, search engine operators should also be included within the scope of site blocking provisions in the Copyright Bill to allow for de-indexing of websites. This will mitigate the concern that even though an ISP may have blocked access to pirate material, it may still be possible for a user to circumvent the block by relying on Virtual Private Network (VPN) technology. If the material is de-indexed from search engines, it will be harder to find. For example, in Australia there are 	<p>commissioned for or where he fails to utilize the work at all and the work lies dormant. Section 21 of the Act must be amended to give the author of the copyright the right to apply before the Tribunal for a licence to use the work where the person who commissioned the work has not exploited the work within a reasonable time and where he is using the work for purposes other than what is commissioned for.</p> <ul style="list-style-type: none"> • The commissioned works provisions were informed by challenges with the practices on these works. • The Commissioned works was deliberated extensively in the PC at the time. Measures were added for more protection and certainty in different

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			<p>provisions that require de-indexing of infringing websites in s115A(2) of their Copyright Act.</p> <ul style="list-style-type: none"> • The Copyright Bill should also allow copyright owners to approach a court with competent jurisdiction for an order compelling ISPs to block illegal streaming websites • Drafting suggestions were made. • These actions would not fall under the current prohibition of circumvention of TPMs. M-Net and MultiChoice therefore propose that this conduct be dealt with by way of a provision in the Copyright Bill that serves to criminalise the making and selling of equipment and software used for purposes of signal piracy. The following provision be inserted in Bill as a new s27(4A): • M-Net and MultiChoice therefore propose an amendment to the Copyright Bill that will effectively criminalise the making available (on a website or an app) of copyright content for downloading or streaming by members of the public. The following provision be inserted in Bill as a new s27(4B). • In addition, we recommend the introduction of a new criminal provision dealing with digital sharing. As the name implies, digital sharing involves two or more members of the public reproducing each other's content (often by copying the content onto a central database made available to a number of people but even simply by way of a memory stick or other storage device). Infringers will usually download libraries of content, books, music, games or anything that can be stored digitally. • Accordingly propose that the Bill come into operation 24 months after its passage to allow parties to regulate their future contracts accordingly. Amend the definition of "producer" to read as follows: "producer means the person who takes responsibility for the first fixation of a sound recording or an audiovisual fixation". • Amend the definition of "performer" to read as follows: "'performer' means an actor, singer, musician, dancer or other person who acts, 	<p>scenarios wherein the author did not have recourse before.</p> <ul style="list-style-type: none"> • The powers of the Minister are meant to create an enabling environment. The Minister will not interfere in private contracts but will create a framework to guide contracting parties when they carry out contracts. • This recommendation was focusing on the music industry, however, through developments in the industries, practices, consultations and studies, it was found that unfair contracts cuts across in the creative sector hence the standard contract provisions were developed. • The minimum requirements Minister may prescribe will also

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			<p>sings, delivers, declaims, plays in or otherwise viewed in context, performs literary, musical or artistic works as contemplated in the Copyright Act, but does not include extras, ancillary participants or incidental participants“.</p>	<p>be informed by market failures or prevailing gaps in the market.</p> <ul style="list-style-type: none"> • The provisions on unenforceable contracts are aimed at ensuring adherence to the Act. Where the rights provided in the Act are violated, the contract becomes unenforceable. This is additional protection provided. • The policy objective applies to sections 6A, 7A, 8A and the regulations on the contractual terms. • The Tribunal will play an important role in terms of disputes that arise from the agreements. • There is example of government globally that set the framework in copyright contracts to address challenges in contractual issues. • Minimum consultation term is 30 days, if

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				<p>extended to 45 days. The regulations involve public participation.</p> <ul style="list-style-type: none"> • Tribunals can impose fines. The Tribunal can make orders that benefit the parties not only government. There are Tribunals currently that carry similar functions. • Turnover based fines can be imposed on juristic persons. This will not be unique to the Act and intellectual property. • There is a Copyright Tribunal currently with limited jurisdiction. In terms of adjusting and strengthening the powers of the Tribunal, the necessary legislation will be applied. • The proposed amendments have not been part of the Bill and will require a separate process and further

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				<p>review. They are noted.</p> <ul style="list-style-type: none"> • The language in the definition of performer and producer is in line with the language of the treaty. • The definition proposal to address the extras, is not necessary because extras are not entitled to royalties. The treaty definition does not include the extras. However, the recommendation to clarify in the law can be considered as proposed.
M	Professor Owen Dean		<ul style="list-style-type: none"> • The Intellectual Property Laws Amendment Act (IPLAA) which has never been brought into operation. It is anomalous to amend an Act which is not on the statute book. • This comment applies to references to IPLAA throughout the Bill and assumptions made in certain places that it is in operation, and includes in particular to the numbering of some of the new sections sought to be introduced into the Copyright Act by the Bill. This will lead to considerable confusion and is editorially irrational and unsound. • This definition of 'audiovisual work' is identical in effect to the current definition of 'cinematograph film'. The term is simply nothing more than a synonym for 'cinematograph film' as defined in the Act. The current definition of 'cinematograph film' has a very broad meaning and has been interpreted by the court of include an microchip comprising 	<ul style="list-style-type: none"> • IPLAA is an Act of Parliament in the statute books. It has to be referenced in the law. • The definition of audiovisual works has been drafted in a manner that includes the cinematograph film. The audiovisual works was considered in order to take into

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			<p>computer game (see Nintendo Co Ltd v Golden China TV-Game Centre and Others 1995(1) SA 229(T) and Golden China TV Game Centre and Others v Nintendo Co Ltd 1997(1) SA 405 (A). See also Dean: Handbook of South African Copyright Law, 15th Edition, paragraph 1-2.9. (This work is hereafter referred to as 'Dean Handbook').</p> <ul style="list-style-type: none"> • The definition suggests that 'audiovisual work' is a genus of which 'cinematograph film' is a species, which is incorrect. The two apparent categories are on all fours. The whole approach of creating a category of work called 'audio visual' work should be abandoned. It is unnecessary, causes complications and is confusing. If considered necessary (in order to clarify the position), the existing definition of 'cinematograph film' (which term is used in the Berne Convention) could be amended by the following change '.....and includes all forms of audio visual works and the sounds embodied • A further complication of the new definition/category is that it does not exclude computer programs, which is essential. • It follows from this that all provisions and references relating to 'audio visual works' should be removed from the Bill. • Paragraph (b) of the definition of 'broadcast' conflicts with and duplicates the definition and category of 'programme carrying signal'. This means that the same 'work' will fall into two categories eligible for protection, having different authors, owners and circumstances. This cannot happen in copyright law (see for instance Computer Programs and Cinematograph Films, which are mutually exclusive - the correct approach). This anomaly will have to be addressed. • See the reference to 'community protocol' There is no such definition in the Act. It is contemplated that it will be inserted by IPLAA which has not happened. • See the reference to 'National Trust'. There is no such definition in the Act. It is contemplated that it will be inserted by IPLAA, which has not happened 	<p>account the treaty language. The view is that the term commonly utilized now is audiovisual works. An example of use is in the US copyright Act.</p> <ul style="list-style-type: none"> • The definition of broadcast as it stands intended to incorporate the programme carrying signal particularly the transmission by satellite. If that is unclear, it can be reviewed. • The provisions related to digital rights are derived from the international treaties. The text was used to ensure alignment with the treaties. An example below is from the WCT. • Wipo Copyright Treaty (WCT) Agreed statement concerning Articles 6 and 7: As used in these Articles,

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			<ul style="list-style-type: none"> • See the reference to 'traditional work', There is no such definition in the Act in the absence of IPLAA being in operation. • See the reference to 'visual artistic work', Bearing in mind the purpose of this definition (i.e. the proposed new sections 7A and 7B- see my comments in regard to these sections below) it is far too wide and its appellation is inappropriate. • The term 'drawing' in the paragraph means (as commonly interpreted by the court), inter alia, technical drawings, the designs of machinery and the like, engineering and industrial drawings, and basically any visual manifestation of the result of intellectual activity. See the definition of 'drawing' in the Act and Dean Handbook, paragraph1-2.6.2. The proposed sections 7A and 7B cannot possibly have application to drawings of this nature. What is in contemplation is clearly drawings and other art works which can be considered to be fine art and have aesthetic or cultural appeal. Drawings and other works of a utilitarian nature are not appropriate to sections 7A and 7B and must be excluded from its ambit. • The term 'visual artistic work' is a misnomer, is confusing and anomalous. All artistic works are 'visual'. That is their defining quality and their essential characteristic when comparing them to the other categories of works eligible for copyright. Paragraphs (b) and [c] of the definition of artistic work contemplate works that are also of necessity 'visual' artistic works. A better term would be 'aesthetic' works or something along those lines. 'Art works' is the term used in this context in the Berne Convention and it is probably the most apposite one. • See the reference to the term 'original'. The essence of copyright is to enable the copyright owner to control the making and distribution of Copies of their work, hence the term Copyright. The subject matter of the protection is the intellectual property, not the physical item. This clause purports to enable the copyright owner to control the 'distribution' of the original version of the work, i.e. the physical object embodying the 'work', bearing in mind the work must exist in a material 	<p>the expressions “copies” and “original and copies,” being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.</p> <ul style="list-style-type: none"> • Article 6 -Right of Distribution-(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership. • It is agreed that the author and the copyright owner are not synonymous terms. • There are instances where the author is the copyright owner. And instances where the

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			<p>form to be eligible for copyright. This goes beyond the scope of the principles of copyright. Furthermore, it is not known how one can 'distribute' (which suggests a multiplicity of items) a single article, which is what the original version is. If a collector purchases and pays for the manuscript of a literary work, and pays good money for it (which absent an assignment or licence of copyright does not entitle him to make copies of it), why should he need to obtain the copyright owners permission to sell it to another collector. This goes beyond the scope of copyright.</p> <ul style="list-style-type: none"> • The ownership and control of an item of physical property (i.e. the original version) is governed by the law of property and is not a copyright issue. • The words 'original or' should be deleted from the paragraph. • Article 14 ter of the Berne Convention provides that the author of a literary, musical or artistic work is entitled to an interest in any sale of the original version of the work (e.g. the manuscript of a literary or musical work) but this right to remuneration is not the same as a right of prevention as provided for in this section. • The meaning given to the term 'royalty' (6A) in this section is unusual and confusing. It is a misnomer. In general parlance and in particular in the field of IP law, 'royalty' means that proportion of the sales price of a copy of a copyright work, or of the profit made as a result of such sales, which is payable to a copyright holder as remuneration for the right to exploit the work. The term is used in this manner and context throughout the Act and in copyright law and practice in general. It is undesirable and unjustifiable for a term to be used with two divergent and different meanings in the same piece of legislation. A preferable term to use as a substitute for 'royalty' might be 'dividend'. This is a apt term to describe the reward contemplated in the section. • See the reference to the term 'author'. 'Author' is the incorrect term to use in this context. It should be substituted by a term that is correct in law'. There are a number of circumstances in which the author of work 	<p>author is only an author and not a copyright owner.</p> <ul style="list-style-type: none"> • The copyright owner is the one who can exploit the rights provided economically by section 6A or the work. • For this provision, the author when he/she is the copyright owner, is not the one who authorizes but a person doing such acts on behalf of the author who is also copyright owner. • The clause and other similar ones (S7A) in our view are clear. • However, it is recommended the wording can be amended to make this distinction clearer. • On fair dealing and fair use. It has been found that countries with fair dealing are moving towards or have open exceptions that are

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			<p>does not hold (and never has held) rights of copyright in a work and is thus not in a position to grant any authority as envisaged. In general the author, as such is not in a position to grant any rights. It is only when he is at the same time the copyright owner that he has this power to do so. It is accordingly wrong and misleading to suggest that he any such power simply by reason of being the author of a work. It must be appreciated that the author of a work and the copyright owner/ right holder are two different concepts and must not be confused with one another. The terms are by no means synonymous.</p> <ul style="list-style-type: none"> • The word should be substituted by the term 'copyright holder'. All references in the section to 'author' should be similarly substituted. • See the reference to 'artistic work.' The correct term is 'work of art' or a similar term distinct from the general description 'artistic work' See comments above in this regard with reference to the term 'visual artistic work'. • This comment has reference to the proposed new Section 8A as a whole. My comments in regard to the proposed new section 6A apply equally to this section. • In contrast to the previous categories of works in which similar systems have been created, this section purports to benefit performers rather than authors. The reason for the change is not apparent nor rational. Rights accorded to performers ought to be, and are adequately, dealt with in the Performers Protection Act and not in the Copyright Act. In general comments in regard to the proposed new section 6A apply equally to this section. • A block buster movie can have a cast of thousands of performers. It is totally impractical for the copyright owner, who might not be producing the movie, to enter into individual contracts with each of these performers as contemplated. These performers will have entered into contracts with their employers, based on their standard performers protection rights, regulating their terms of employment and 	<p>similar to fair use. This is not unique to South Africa. According to new developments, more countries have flexible exceptions under fair dealing. Having exception in fair use and a list of exceptions is practiced globally.</p> <ul style="list-style-type: none"> • The CAB was found to be aligned and compliant with the three step test. • The Commission is defined in the Intellectual Property Laws Amendment Act (IPLAA). The transitional provision provides clarity on the definition of the Commission. • Royalty is a commonly used remuneration regime in copyright law. Its use is recognised internationally and in treaty language. There was nothing found

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			<p>remuneration. There is no need for the legislator to intervene or interfere with this process.</p> <ul style="list-style-type: none"> • What form does this royalty take? Is the normal meaning of the term contemplated or is it envisaged that the term will have the strained and artificial meaning given in the proposed new Section 6A. This reference emphasises my point about the undesirability of having a term having two different and divergent meanings in a piece of legislation. This point will have to be clarified and corrected. • This comment pertains to the 'agreement' referred to. • Unlike in the case of literary and musical works, no provision is made here for the parties to contract out of the arrangement. Why the distinction? There is no apparent reason for the different approach. Indeed, in this instance there is an even greater need for the parties to be able to contract out of an impractical and unworkable arrangement. • Similar arrangements do not exist in other countries. An American copyright owner authorising the making a film to be released in South Africa is not going to enter this arrangement with the performers peculiarly for South Africa when it is not germane for the rest of the world. • The use of the term 'original'-See my comments made in regard to the revised Section 6 of the Act above on the question of the distribution on the original version of the work. Those comments apply equally to the rental of the original version. This version is covered by the normal principles of the law relating to ownership of physical property and is not a copyright issue. • In the absence of the IPLAA being in force, indigenous communities have no status in the Copyright Act. In any event indigenous works will be but another of the categories of works eligible for copyright. They will be lumped together with all the other categories. The indigenous community will be the copyright owner and will have the same status as other copyright owners. Why deal with them specially? The term 'indigenous community' should be deleted as 'copyright owner' includes 	<p>concerning about the use of the word royalty.</p> <ul style="list-style-type: none"> • The rest of the comments from Prof Owen Dean were considered and noted.

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			<p>it and will suffice. This principle applies throughout the Bill and should be universally applied.</p> <ul style="list-style-type: none"> • The use of the term 'shared'. This suggests that the copyright owner and a performer must receive the same amount. This makes sense if there is a single performer, but what about the situation where there are, say, ten performers? Surely the intention is that the ten performers collectively will receive the same amount as the copyright owner? But this is not what the provision says. It should be amended to reflect the true intention. • Section 12A purports to introduce the principle of so-called 'Fair Use' into our law. This is an alien American doctrine which has no place in our law. Our law, in common with all but a handful of countries in the world, embraces the principle of 'Fair Dealing' in addressing the issue of copyright exceptions. The crux of the matter is that that Fair Use does not comply with the 'Three Step Test' comprised in the Berne Convention and the TRIPS Agreement and it would be in breach of these conventions to incorporate it in our law, and thus unconstitutional. It is also most undesirable by virtue of its vagueness and the uncertainty that it would bring to bear in our law. • Both the Berne Convention and the TRIPS Agreement are unequivocal in requiring that any exceptions to the minimum protection provided for in them must meet with the three-step test. This is nowhere provided for in the Bill and should be. It is particularly relevant to Section 12A and the other sections granting new and far-reaching exceptions. Arguably several of those exceptions do not comply with the test and therefore are invalid and unconstitutional. • It has been claimed by certain commentators that he has gone on record as saying that Fair Use and Fair Dealing are synonymous. There is no substance in this allegation. Consequently the views of what constitutes 'fairness' under American law may be instructive in interpreting the second of the two tests under SA law. For the rest the two doctrines are 	

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			<p>significantly different. Views on the merits of the two systems are clear and unambiguous and have been plainly publicly stated.</p> <ul style="list-style-type: none"> • The exceptions in this section embrace the principle of Fair Dealing. The Bill thus embraces both the systems of Fair Use and Fair Dealing. This is unprecedented anywhere in the world and causes uncertainty and confusion. It is thus undesirable. An example of this situation is the obvious overlap in the provisions of new sections 12A(i) and 12B(1)(i) which both address private use of a work. • This sub-section (3) is very garbled and makes no sense. It should be assessed in the light of Section 23(2) of the Copyright Act. The aforementioned section will have to be made subject to the proposed new section as they are to some extent contradictory. • It would appear that the intention of the proposed new section is to introduce the so-called 'First Sale Doctrine' into our copyright law. In terms of this doctrine, the first sale of an article, comprising an intellectual property right, i.e. a copy of a work, anywhere in the world, with the authority of the rights holder, exhausts the right of the rights holder to control further dealings with that article (i.e. the physical object) elsewhere. So, if an authorised copy of a book is sold in the UK that specific book can be imported into SA and resold here without any further authorisations being required. The doctrine has absolutely nothing to do with any 'assignment of ownership of an assigned original or copy of a work,' whatever that might mean! • Our Act cannot regulate anything that happens outside our borders with the result that the provision is meaningless insofar as it purports to deal with what can happen to articles in other countries. The section requires to be completely redrafted. • This section 19D is primarily designed to enable SA to accede to the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind. This emerges clearly from Case no CCT 320/21 Blind SA v Minister of Trade and Industry and Others in the Constitutional Court. As such the section is formulated to meet the requirements of an exception 	

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			<p>in favour of the blind in respect of published literary works and the peculiar requirements of the Marrakesh Treaty. However, the Bill seeks to apply these very special considerations to the situation of all forms of disabled persons in respect of all categories of works whether published or unpublished. It simply does not, and cannot, work.</p> <ul style="list-style-type: none"> • There is a vast difference in the circumstances of the need of blind persons to have access to braille copies of published books and, for instance paraplegics accessing exercising on gym equipment that has been designed in and derived from drawings. One size does not fit all, and that is regrettably the premise on which the section is based. • The Marrakesh Treaty specifically requires exceptions granted on its principles to satisfy the Three Steps Test. It can be assumed that's its provisions do so, but specifically in the case of published literary works and the visually impaired. That is not to say, however, that its principles will satisfy the test in respect of, for instance, paraplegics and gym equipment. The section will be invalid and unconstitutional insofar as particular applications cannot satisfy the three step test. • In order to satisfy the three step test an exception must deal with a 'certain special case'. Disabled persons generally in respect of all or any categories of works cannot possibly constitute a 'certain special case' • The section should be confined specifically to access by the blind to published literary works and further specific exceptions should be made if considered appropriate for other disabled persons in respect of other categories of work. Such further exceptions must each be capable of satisfying the three step test. • 'Wireless'. Why is this limited to communication of the work only in this form? There is no apparent reason for this irrational approach. • 'Served persons'-This is a very vague term. Taken at face value it would cover, for instance, the mechanic who repairs a paraplegic's wheel chair. This cannot be the intention! The Marrakesh Treaty contemplates a visually impaired person's care giver and it is obviously this kind of 	

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			<p>person who should be contemplated. This is an example of the problems that come about through adopting an irrational one size fits all approach</p> <ul style="list-style-type: none"> • There is no good reason to single out 'assignment' among the various forms of changing the ownership of the copyright in the operation of the moral rights. Article 6ter(1) of the Berne Convention applies the principle where there has been a transfer of the ownership of the copyright. This corresponds with Section 22(1) of the Copyright Act which specifies the various ways in which the copyright in a work can be transferred or transmitted, of which assignment is only one. The current version of the section is correct and the amendment should be cancelled. • As the section is to be amended, the moral rights will not apply if one of the other forms of transmission of copyright, besides assignment takes place. This will amount to an invalid deprivation of rights. • The amendment contemplated in sub-section (3) is a debacle. It postulates that the departure point is that the ownership of the copyright is not allocated to anyone at the outset. This flies in the face of the basic principles of copyright. It is determined entirely by a contact between the parties. If they omit to make such a determination, it would appear that the commissioner is granted the ownership in those acts which must necessarily be performed in carrying out the purpose of the commission. The section is silent on the question of who owns the balance of the copyright, but I surmise that it must be the author. This is unacceptably vague and inadequate. The public at large cannot be in a situation where they have to guess who is the copyright owner and in what respects. The situation must be spelled out. • The supposition is consistent with sub-section (3)(ii) which enables the author to claim royalties from the commissioner in respect of acts which fall outside his domain (and within the provenance of the author.) • While it is technically feasible to limit the effect of an assignment in this way, it is not desirable to do so. • This is the first of several references in the Bill to the 'Commission'. This institution, which is presumably the Companies and Intellectual Property 	

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			<p>Commission constituted under the Companies Act, is nowhere defined or introduced in the Bill. References to it comes out of the blue. This is unacceptable. The less informed reader of the Bill, and ultimately the Copyright Act (if this amendment goes through), will have no idea who or what the 'Commission' is. Reference is made in sub-section (6)(a) to a register of copyright. Besides the register maintained in terms of the Registration of Copyright in Cinematograph Films Act, which only relates to those works, there is no register of copyright in existence. Sub-section (9) is thus inoperable.</p> <ul style="list-style-type: none"> • The final phrase of this sub-section preceding and ending with 'offence' (shaded in yellow) does not make sense. It should read as follows: "in circumstances which they know constitute infringement of copyright in terms of Section 23. • Sections 280 to 285-Like elsewhere in the Bill, the numbering of Sections 280 -285 is awry and does not follow the existing sequence. This is due to the absence of additional sections that have not been inserted in the Act by the non-operational IPLAA. This creates enormous confusion and upsets the cohesion of the Act. • The amendment to Section 28(2) is problematic. There has been a long line of cases (see paragraph 1 - 8.14 of Dean: Handbook of South African Copyright Law) which deal with the question of which copyright owner is pertinent, i.e. in which country. Case law has resolved the question as being the owner in SOUTH AFRICA and not in the PLACE OF MANUFACTURE of the copy. Sections 23(2) and 27(1) which create the unlawful conduct are interpreted in this way. In the instant sub-section the words that are being deleted are precisely those that render the unamended provision consistent with the aforementioned interpretation. The amendment lends to the provision being interpreted as meaning the owner at the place of manufacture of the copy. Deleting the salient wording will cause the section to be at odds with the aforementioned sections and their authoritative interpretation. The amendment should thus be abandoned and the section left as it is. 	

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			<ul style="list-style-type: none"> • Section 29A. It is unclear whether the Tribunal may hear and decided copyright infringement cases. On balance it would seem that this is not the case. If it is intended that the Tribunal should have locus standi to hear and decide infringement cases, this should be plainly and unequivocally stated. • Section 24 of the Act clearly states that it is the court that has adjudication powers in copyright infringement cases • In terms of sections 31- 33 of the current Act (which sections are to be repealed by Section 32 of the Bill) it is possible for a prospective licensee who has been refused a licence by a copyright owner to apply to the Tribunal to obtain what is in effect a compulsory licence. This facility is available in respect of all categories of work and irrespective of whether a the right sought is covered by a licensing scheme. • It is not at all clear that the proposed Section 29A(2) will confer this power of granting compulsory licences in general on the Tribunal. It ought to have this power and it must be clearly and unambiguously stated that this is the case. This power is probably the most important function of the current Tribunal. • Where a copyright owner refuses a request to grant a licence, it cannot be said that a 'dispute' arises. The prospective licensee has no right to a licence, and the copyright owner has not obligation to grant one - he has a prerogative to grant or refuse one. Such a refusal cannot therefore give rise to a 'dispute' as this entails a weighing up of respective rights and obligations. • Such a request for a compulsory licence is also not an 'application or referral made to it in terms of this Act'. The conclusion is thus that this section does not confer on the Tribunal the right to grant compulsory licences in general. • Section 29D. The section does not envisage that actions (such as would be conducted in the court) can be brought before the Tribunal. This is another indication that the Tribunal does not have the power to deal with infringement matters. 	

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			<ul style="list-style-type: none"> • 'inquisitorial manner'-Hearing disputes by means of an inquisitorial procedure is an unusual procedure in South Africa. The standard South African procedure is adversarial. In view of the complexity of copyright matters, which may involve evidence by experts, it is doubtful whether adopting the inquisitorial process is desirable or viable. • 'Person who has a material interest'. What about witnesses? A witness is not necessarily a person having a material interest in the matter. It would seem that in some instances witnesses may not participate in a hearing. None of the categories of persons specified cover witnesses. This is bizarre and cannot stand! • This provision suggests that witnesses may participate in hearings, in conflict with Section 29F. The position needs to be clarified. • Section 29H is confusing. I have already pointed out that the Bill does not contemplate that copyright infringement matters can be adjudicated by the Tribunal. • The section purports to grant powers in circumstances not provided for in the Copyright Act and the Companies Act. What can they be? • The power to adjudicate copyright infringement matters is of course something that stems from the Copyright Act. This power is therefore not in contemplation in this section. What is therefore envisaged in paragraph (a) which speaks of declaring conduct to constitute an infringement of this Act. What is contemplated here is obscure to say the least. Unauthorised reproduction of a work, for example, constitutes an infringement of copyright (i.e. a property right), not of the Act. An infringement of the Act may perhaps be something like disclosing a document that is confidential and may not be made available. • It is all very unclear and obscure, and is unacceptable. • The provisions regarding the translation licence should be viewed in the light of my comments made above in regard to the proposed new Section 29A., in particular with respect to the question of compulsory licences granted by the present Tribunal. 	

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			<ul style="list-style-type: none"> • Of course, this Part of the Bill places severe constraints on the ability of the Tribunal to grant the envisaged specific licences, but that is a question of policy. There is no apparent reason why this particular licence should be made subject to such conditions, whereas there are currently no such constraints on the Tribunal in granting compulsory licences in general. • At the very least, this specific licence will have to be brought into the context of, and into relationship with, the Tribunal's general power to grant compulsory licences. • in different and conflicting ways and award ownership in the properties respectively created to different persons in some circumstances. Ten years have already passed since the IPLAA was passed by Parliament and yet it has never been brought into operation. • The Bill creates a myth that the IPLAA is already in operation. So the numbering of the Bill is seriously awry due to provision being made for non-existent sections. Likewise it (wrongly) presupposes that institutions and categories of works are in existence, with owners who exist only in theory. • The situation above creates situations in the Bill that are incoherent and incomprehensible. This does serious damage to the lucidity and cogency of the Bill and contributes to it being a bad piece of legislation that is not fit for purpose. • These aberrations and difficulties must be addressed and resolved by the proposed expert drafting committee. 	
N	ReCreate South Africa	CAB	<ul style="list-style-type: none"> • ReCreate has previously made submissions on different versions of the Bill. Fully support Bill B13D-2017, but notice that Section 28 P (2) conflicts with the Constitutional Court ruling of 21 September 2022 relating to people with disabilities and should be deleted from the Bill. • Submit this in the spirit of recognising the role of authors and creators in the creation of knowledge (including traditional knowledge), and their right to earn royalties for works that are copyrightable, but also the importance of these works being accessible for education, research, 	<ul style="list-style-type: none"> • The comment is noted. • The section 28P(2) has been recommended to be removed to ensure the persons with disabilities have rights.

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			libraries and other information services, civic and other purposes, and especially for the benefit of society.	
O	Artists Unite	CAB and PPAB	<ul style="list-style-type: none"> • They call for: Urgent reform of the Copyright law in South Africa to replace the 1978 Act by means of the Copyright Amendment Bill • They support the proposed amendments in S.22B-D and S.28S that will protect and enhance the rights of creators, authors, musicians, photographers, and others. The Bill will empower them to have more control over their works and benefit more from their works. S.22(3) provides them with an assignment period of 25 years, which they can either renew or exploit on their own in the future. They can benefit from improved contracts and contractual protection in S.12D(7)(3), S.22D and S.39B. S.20(1)-(2) will give creators and others better protection of their moral rights and S.12A-D will increase access to others' works. • The Bill will enable visual artists to benefit from a resale right in S.7A-F. The Bill's intrinsic link to the Performers' Protection Bill will give actors and performers certain protections, and for the first time, the right to earn fair royalties in S.22B-D. 	The comments are noted.
P	Publishers' Association of South Africa	CAB	<ul style="list-style-type: none"> • The wording in 12A deviates from the classic 'fair use' wording, yet there is no evaluation of the impact of these deviations. Neither does any of these deviations appear in the 'fair use' provisions implemented by any of the few countries that have adopted 'fair use'. • The introduction of 'fair use' is claimed to be based on an equivalent provision in US law but is actually and patently by the very wording much wider than the US provision. Submissions by PASA, among others, to the National Assembly have already shown how the 'fair use' clause in the Bill differs in material respects from the 'fair use' clause in the US Copyright Act. • The Minister for the Department of Trade, Industry and Competition will be empowered and called upon to prescribe the terms of publishing contracts. This will be time-consuming – if ever accomplished – and once adopted will result in a rigid and inflexible system that interferes with freedom of contract between authors and publishers, taking bargaining 	<ul style="list-style-type: none"> • The impact assessment was responded to above. The response is similar. • Clause 15 of the Bill proposes the insertion of section 12A in the Act, providing for the general exceptions from copyright protection for all works, providing for fair use, which is a model of use of work or the performance and

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			<p>power away from authors and interfering with the healthy competitive environment for the best authors. As a result, authors may end up choosing to publish overseas.</p> <ul style="list-style-type: none"> • This provision to be added to the current provisions relating to the formalities of assignments, simply states that every assignment of copyright in a literary or musical work shall only be valid for 25 years, and not potentially the current 50 years after the death of the author. This is irrespective of whether the publisher is marketing the work or not; even irrespective of whether the assignment is made by an author or a successor-in-title. • This amendment is an incorrect implementation of the recommendation of the Copyright Review Commission, which was a recommendation for the reversion of rights to composers and performers in respect of musical works and performances taken up in sound recordings. • Bluntly capping transfers of copyright at 25 years may to a lay person seem a long time, but publishers often invest in their authors, supporting their further development. • Permitting parallel imports of materials for schools and other educational institutions will furthermore encourage materials to be imported that are not suited to South Africa's curricula, to the detriment of South African publishing and local content. • Section 12B(6) also refers to the possibility of parallel importation and should be rejected. • What would be suitable is to retain the present scheme, where parallel imports are permitted if and only if the making of copies in any foreign jurisdiction would have been legal, had the copies been made in South Africa – in other words, where a South Africa copyright holder agrees to the making of copies fit for importation into South Africa. • These concerns about regulatory prescription of royalty rates and minimum terms should be viewed together with the broad exceptions that will cut authors off from remuneration for educational, library and new digital uses of their works. 	<p>includes factors to consider to ensure the usage of the works is fair (the nature of the work, the amount and substantiality of the part of the work, the purpose and character of the use, etc). The clause includes examples or purposes of uses (research, scholarship, reporting current events, criticism or review, etc) .</p> <ul style="list-style-type: none"> • Fair use is a doctrine under copyright law that permits certain uses of a work without the copyright holder's permission. The fair use is an exception to the exclusive rights of a copyright owner. Fair use exceptions include but are not limited to criticism, parody, comment, news reporting, teaching, scholarship, or research. It allows

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			<ul style="list-style-type: none"> • No proper Socio-Economic Impact Assessment Study (SEIAS). A proper Socio-Economic Impact Assessment Study (SEIAS) was not conducted before the Bill was approved. Although such a study is not a legislative prescript, the potentially far-reaching social, cultural and trade impacts of the CAB does require a sound basis for legislative decisions. • Technological Protection Measures (TPMs)-Section 28P(2) still entails ultimately what is colloquially known as a 'licence to hack' by users and in combination with other sub-paragraphs in the Section creates a secondary market in circumvention devices and services for private persons believing to be acting within the scope of an exception. • The provisions in the exception clause, Section 28P(2), are problematic, in that it legitimises uses of measures by means of circumvention devices simply by notice to the copyright owner. This is compounded by the broad scope of the new copyright exceptions, especially the 'fair use' defence to copyright infringement. The United States undertakes a three-yearly rule-making process for exemptions and this may be a solution for the Bill. However, as it stands, Section 28P(2) undermines the protection afforded by technological protection measures and that may well, too, not be sufficient for the amended copyright legislation to comply with Article 11 of WCT. • These deficiencies apply equally to the new Sections 8E and 8F to be introduced by the Performers' Protection Amendment Bill. The definitions of 'technological protection measure' and 'technological protection measure circumvention device' are incorporated by reference from the Copyright Act, and PASA suggests a loose-standing set of definitions in the PPAB. • New Section 39(cH) contemplates "prescribing permitted acts for circumvention of technological protection measures". However, there are a number of errors, since this section cross-refers to Section 28B, where it should be 28P, and Section 28P has no reference to permitted acts 'as prescribed.' 	<p>users to make use of copyright work without permission or payment when the benefit to society outweighs the cost to the copyright holder.</p> <ul style="list-style-type: none"> • Introduction of a hybrid fair use provisions is a policy position of the dtic and it is addressing socio economic challenges of a developmental state of SA. The Portfolio Committee on Trade and Industry agreed that the Bill should use a hybrid approach to the fair use/ fair dealing, which must be anchored in fair use. A hybrid model is the mixing of fair dealing and fair use. Mixing fair use with pre-existing fair dealing provisions creates a hybrid model. • Fair use is not foreign to SA, other jurisdictions have introduced it. The provisions of fair use

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			<ul style="list-style-type: none"> Appropriate steps now are to * reject the Bill and eventually have it lapsed * conduct a proper socio-economic impact assessment * acquire independent legal opinion from experts in copyright law and constitutional law 	<p>have safeguards. Countries that apply fair use tend to be more innovative and with a growing creative industry.</p> <ul style="list-style-type: none"> There are some countries in the world with open broad exceptions and have not been found to be in contravention of international law. Other countries have adapted fair use such as the US, Israel, Sri Lanka. The current system in the Copyright Act of 1978 is fair dealing, comprising of a closed list of exceptions. The Act does not define it. TRIPS article 6 allows exhaustion of rights and for the country to choose which system of exhaustion which then determines how the parallel import will work. The term exhaustion refers to

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				<p>the principle in IP law to the principle that a right holder cannot prevent the further distribution or resale of the goods after consenting to the first sale also known as the first sale doctrine. Once the good has been put on the market by or with the consent of the right holder further circulation cannot be controlled. Parallel imports refer to the original products sold by the right holder or with his consent in another market and then imported through a channel "parallel" to that authorized by the right holder. Parallel imports are not counterfeit or pirated goods and they do not infringe Intellectual Property Rights in the country of Origin.</p> <ul style="list-style-type: none"> • Parallel importation would allow

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				<p>distributors and booksellers to choose from a range of world markets as opposed to the South African market, which could lead to a more equitable pricing structure. Parallel importation would open access to cheaper copyright works abroad. A relative lack of competition in the marketplace is an important factor. The lack of competition is evident from price of the books. National copyright legislation should therefore follow the rule of international exhaustion rather than the rule of national exhaustion.</p> <ul style="list-style-type: none"> • It is recommended that section 12B(6) be reviewed and possibly removed to ensure better clarity. Section 23(2) to be reviewed to

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Q	Composers Authors and Publishers Association (CAPASSO)	CAB	<ul style="list-style-type: none"> • General Exception 12A -The incorporation of a Fair Use exception alongside that of Fair Dealing raises fundamental problems as the two are jurisprudentially incompatible. Fair Use is a wide and general exception whereas Fair Dealing is a closed and more specific list of exceptions. As such, the two forms of exceptions are fundamentally different. It is important for purposes of legal certainty, to elect one of these instead of attempting to have a legal system that recognises both. Generally, no legal system in any jurisdiction uses both. • Should the Committee be steadfast in the need to introduce the Fair Use doctrine into South African law, there would be even more of a need for the introduction of the Statutory Damages. These are a fundamental part of the functioning of any general exceptions legal framework. Without statutory damages, author and copyright owners would be unduly prejudiced whilst also being dis-incentivised to institute actions which are required to develop jurisprudence around Fair Use. 	<p>ensure policy objective is addressed.</p> <ul style="list-style-type: none"> • The response about fair use, fair dealing and fair use has been addressed above. • South African judges have already been applying the four factor U.S. fair use test in their fair dealing jurisprudence. There is case law on fair dealing matters. • The comment about statutory damages is noted. It is an area that can be reviewed further before placing in a legislation.
R	Research ICT Africa	CAB	<ul style="list-style-type: none"> • Artificial Intelligence raises copyright questions about the inputs that are used to create an AI model and also the outputs. The questions about inputs are analysed under informational analysis, and the question about outputs is analysed in the section on authorship and AI outputs. • In its current form S12A represents an appropriate balance between the exclusive rights given by copyright and the flexibility needed for uses in essence unpredictable because they are innovative. • Therefore, it is essential that copyright law permits use for machine learning, and other AI technologies. Once enacted S12A will authorise use of copyright works for informational analysis including machine learning, provided that the machine learning in question is considered fair in view of the balancing exercise required by S12A(2). 	<ul style="list-style-type: none"> • The computational Analysis is noted. We opine, with 'such as' in the provision, it is not necessary to add to the list. Several stakeholders raised concern with the longer list of examples in fair use exception citing that they are more than the US examples. The

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			<ul style="list-style-type: none"> • S12A is the most appropriate way to deal with computational analysis and machine learning, since these are general purpose techniques that are constantly evolving and developing - thus an open ended approach that balances the rights and interests involved is the best way to keep pace with technological changes. • In a S12A balancing inquiry some machine learning uses are not fair, for example, using only the works by a particular artist in order to imitate her style would not be permitted. • The following purpose be added to those explicitly protected by the fair use clause: after “research” insert 1 “,including informational analysis,” • There are a number of reasons why machine learning outputs should not be treated as copyright works. Copyright is intended to act as an incentive to human creators. Even when copyright vests in a juristic person or the State it does so only when a human creates a copyright work. The relationship of the author to the juristic person as an employee or someone commissioned to produce the work is the basis for ownership vesting in the juristic person. The producers of the AI model do not need the incentive of copyright. • Copyright has historically extended only to human activities, and efforts to extend copyright to outputs from non-humans have been rejected. Extending copyright to AI outputs is a far reaching extension of copyright. • Parliament has an opportunity to deal with this issue in the Copyright Act. If it does not do so then it leaves courts without the guidance of democratically elected representatives and may be persuaded to extend copyright to AI outputs. Parliament should clarify that only human creative outputs are copyright. Attempting to define AI or AI outputs in order to explicitly exclude them from copyright creates a risk that as technology changes that the definitions will become outdated. Instead it is suggested that the CAB makes it clear that copyright attaches only to human creativity. • Insert a sub-section that states: 2A (3) (a) Copyright extends only to the products of a natural person’s skill, effort and creativity. (b) In any 	<p>existing purposes can be retained as are.</p> <ul style="list-style-type: none"> • The AI recommendation is noted and shed light on the role of technology in copyright however this is a new amendment that have not been consulted upon. It will be considered for further discussions and future amendments.

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			<p>dispute concerning whether copyright or authors rights apply to a product the author or their successor shall bear the onus of proving that a work or aspect of a work is the product of the skill, effort and creativity of the author.</p>	
S	Netflix	CAB and PPAB	<ul style="list-style-type: none"> • The definition of “performer” should exclude “extras”, in line with the Beijing Audiovisual Performances Treaty and international standard practice. • Section 8A (performers) should be deleted from the CAB and exclusively dealt with in the PPAB to avoid overlap and confusion. • The 25 year limitation for assignment of rights • This limitation should be deleted as it will do much more harm than good. In theory, it will limit the commercial availability of works, and require any such rights to be re-cleared after 25 years - which in many instances will not be possible. This limitation will likely reduce any upfront remuneration, and materially diminish incentives for producers to invest in content given the heightened risk of losing the ability to commercialize it after 25 years. • The broad ministerial power. This provision should be deleted, as it will have a chilling effect on investment. It is an extreme form of regulation, and creates great uncertainty for existing and prospective productions. The specter of government intervention in contractual arrangements would make it virtually impossible to forecast and plan investments, and substantially increase risk of investing in South African content. • The registration/reporting obligation-. Imposing registration and comprehensive reporting would create material administrative burdens and costs on distributors, diverting investment from content, and be practically impossible to comply with. The possibility of a punitive sanction for non-compliance could chill the market. • The CAB proposes that authors of literary works and performers in audiovisual works are entitled to share in royalties received by the copyright owner. While authors can “opt out” of this and decide to receive payment in other ways, performers are subject to a mandatory 	<ul style="list-style-type: none"> • The performer does not include an extra. The Beijing treaty does not exclude extras. This is seemingly known in industry as a practice. • It has been established that section 8A is in the CAB and can be retained. There is no overlap. The two Bills are linked. • The reversion period is 25 years informed by the Copyright Review Commission (CRC) report. The period of reversion is informed by a study. In the US it is 35 years, in view of the fact that the period of copyright protection in the US is much longer than in South Africa (i.e 70 years). • The 25 years reversionary right is informed by the

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			<p>restriction and have no choice regarding their preferred mode of remuneration.</p> <ul style="list-style-type: none"> • Netflix supports fair remuneration for authors and performers, but a “one-size fits all” royalty obligation will instead tie the hands of the parties and restrict upfront lump sum payments which many creators depend on to ensure they receive remuneration without waiting for future commercialization or even the chance that no profits will ever be realized. • Preserves contractual freedom of the parties to determine what is feasible and favorable. • The Bills require registration and reporting of all commercial uses of every work which is practically unworkable, nor would it provide a corresponding proportional benefit for creators. • Limiting assignments and reversion of performers’ rights in sound recordings will result in lower remuneration and abandonment of works. • The Bills prevent certain authors and performers from licensing or assigning their rights for longer than 25 years. This means that creators are prevented from realizing the value of the full term of the rights under copyright. Producers will pay less because they are obtaining less than full value, and after 25 years, the ability to continue to make a film or TV program available will require the producer or distributor to go and find each right holder and obtain a further license/assignment. • This provision was never subjected to an impact study, and was historically only considered in the context of music works. So the impact on the film and TV sector has not been fully considered. • Suggest deleting the 25 year limitation for assignment of rights. There are other legal mechanisms to achieve the goal of ensuring creators retain an ability to reap benefits from long term success of their works. • The ministerial power to prescribe contractual terms will have a chilling effect: By enabling the Minister to prescribe compulsory and standard contractual terms will create a cloud of legal and economic uncertainty, and may deter investment in new projects. 	<p>Copyright Commission Review report recommendations.</p> <p>This right is not unique to SA. Some countries have the reversionary rights.</p> <ul style="list-style-type: none"> • The reversion clause can be expanded more in the Regulations. • The parties can renegotiate their agreements. • The Ministerial powers on contracts, the reporting were addressed above. • The remuneration model is recommended to be amended by accommodating other modes of remuneration.

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T	Section 27 and Blind SA	CAB	<ul style="list-style-type: none"> • The definition of 'accessible format copy' as in the Constitutional Court crafted remedy be adopted as it is in line with the Marrakesh VIP Treaty; • b. No change required to the definition of 'persons with disabilities' as the breadth of the definition fulfils South Africa's Bill of Rights and international disability rights obligations; • c. The definition of 'permitted entities' as in the Constitutional Court crafted remedy be adopted in the definition of 'authorised entities'; • d. No change required to the application of s 19D to all types of works under copyright as the breadth of the scope fulfils South Africa's Bill of Rights and international disability rights obligations; • e. Section 19D(1) be made operational immediately through minor modifications to its language recommended below so that our access is not delayed further; • f. Minor amendments to be effected to s 19D(2)(a) and 19D(3) to ensure that these provisions do not unintentionally prevent the making and sharing of accessible format copies between Blind SA and the people whom we serve; • g. Section 28P(2) be deleted, in accordance with the Constitutional Court judgment and the Marrakesh VIP Treaty, to ensure that technological protection measures do not prevent accessible format shifting and inadvertently cause further unfair discrimination against us by requiring us to seek the copyright owner's authorisation; • h. No change required to sections 12A-D and 19C as they fulfil several rights in the Bill of Rights, including the rights to education, equality, freedom of expression, culture, dignity, among others. 	<ul style="list-style-type: none"> • The definition of accessible format copies will accommodate other forms of disabilities and other works. • It is recommended that authorised entity in line with the Marrakesh treaty be used. • The analysis of the Constitutional judgement was done and the amendments proposed noted for further consideration.
U	Writers Guild of South Africa	CAB	<ul style="list-style-type: none"> • Although the Copyright Act does in fact define "dramatic work", and CAB does seek to introduce a definition for "audiovisual work," there lacks an appropriate and clear distinction between these works. It may be misconstrued that dramatic work would fall under audiovisual work, at least to some extent, and as such it is imperative to note that although all audiovisual work may be dramatic work, not all dramatic work is necessarily audiovisual work. 	<ul style="list-style-type: none"> • It is recommended the definition of dramatic work can be reviewed. The proposed definition is as follows: "dramatic work" means any piece for recitation,

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			<ul style="list-style-type: none"> • Furthermore, the flawed inclusion of “dramatic work” under the definition of “literary work” as it currently stands in the Copyright Act is also an outdated approach which does not accurately depict the complexity of such works. This necessitates the need for dramatic work to be appropriately re-defined in CAB. • Herein, the Guild proposes the following (separate standing) definition for dramatic work be considered – as well as that the term is added as a separate concept throughout CAB: “dramatic work” means any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise and any compilation of dramatic works. • A further opportunity which was overlooked is that CAB was the opportunity to provide clarity on who is viewed as a “producer” by adding a definition for this term. The Guild, therefore, suggests that consideration be given to the possible addition of an appropriate definition for this person in CAB. Herein, the Guild proposed a definition. • “Producer” in relation to a sound recording or an audiovisual work, means the person by whom the arrangements necessary for the making of the sound recording or audiovisual work are undertaken. • Unfortunately, the attempt to legislate a universal “one size fits all” solutions across multiple commercially unrelated copyright industries is ill-conceived. Each industry has its own unique structures wherein the copyrighted work related to that specific industry functions. The reality is that any attempt to universally address an issue in one specific industry may have a detrimental impact on another. • The restrictions on contractual freedom contained in CAB preventing authors to contractually negotiate on their work and deal with it as they deem fit has far-reaching consequences. • Contractual freedom is of fundamental importance to allow parties involved in audiovisual productions to negotiate specific remuneration, usually under terms unique to the specific project. The Guild therefore respectfully requests that the proposed Sections 6A, 7A and 8A of the 	<p>choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise and any compilation of dramatic works.</p> <ul style="list-style-type: none"> • The definition in the current Act is as follows: “dramatic work” includes a choreographic work or entertainment in dumb show, if reduced to the material form in which the work or entertainment is to be presented, but does not include a cinematograph film as distinct from a scenario or script for a cinematograph film. • The definition of producer was raised and deliberated before. It is provided in the Performers’ Protection Amendment Bill.

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			<p>Copyright Act be rejected by the NCOP Select Committee, or at least that the restrictive sections of CAB be amended to cater for contractual freedom through the introduction of the below phrase where relevant:</p> <ul style="list-style-type: none"> • It is imperative to note that the 25-year limitation was initially intended to benefit musicians and composers, and not authors of other forms of work such as literary or dramatic work. To be blunt, this amendment proposed by CAB will have a detrimental effect on the creative industry as it would impair the desirability to include South African authors in new works. • Furthermore, Section 39B seeks to introduce indiscriminate provisions which will imply that the 25-year limitation is contractually un-waivable. Mention can further be made of the contract override provision as contemplated in Section 39B.81 In short, authors would not be able to assign their rights for the lifetime of the copyright. This limitation on contractual freedom would apply to authors of dramatic or audiovisual work, as well as CAB82 proposes that all assignments of copyright in literary work would only be valid for a maximum of 25 years. • The contract override provision further entails that these authors may not contractually negotiate freely, which will undoubtedly have a severe impact on the South African creative industries and may cause it to miss out on high-value opportunities. • Although reversion rights do exist in other countries, they are vastly different to those proposed by CAB. Both US and EU laws provide for reversion rights in certain instances. However, where such rights are provided, audiovisual works are either wholly excluded or adequate safeguards and conditions are put in place to mitigate the impact of the reversion.85 Unlike these countries, CAB does not provide any suitable exclusions or safeguards to the proposed reversion rights – which may be in contravention of international treaties. • As such, on these points, the Guild requests that Section 22(3) be rejected by the NCOP Select Committee, or as an alternative, that the 	<ul style="list-style-type: none"> • Other issues have been addressed in the other comments above.

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			<p>sections be reconsidered with proper research being conducted on the possibility of balancing of rights. Also, the contract override provision under Section 39B should be reconceptualised.</p> <ul style="list-style-type: none"> • Exceptions and Fair Use: Although the Guild agrees that the current copyright exceptions in the Copyright Act must be updated to meet the circumstances of the new digital age, the introduction and/or amendment of copyright exceptions must be subject to legitimate needs identified in a socio-economic impact assessment and must be weighed up in an appropriate legal analysis against prerequisites which take precedent. 	
V	South African Guild of Actors	CAB and PPAB	<ul style="list-style-type: none"> • It is SAGA's position that the Copyright Amendment Bill [B13D - 2017] should be passed without further delay. While there are aspects that can be improved upon over time to increase protection for actors, the current Bill represents a meaningful departure from the status quo. • Actors are technically not classed as employees, but as freelancers or independent contractors with limited rights. Actors are not protected under Labour Laws, and have no right to unionise as permitted under the Labour Relations Act 66 of 1995. As a result, there is no room for actors to dispute the one-sided contracts they are forced to sign, nor do they have any input in the drafting of these contracts in the first place. It is essential that statutory provision is made for actor royalties to be paid when episodes of a series are broadcast repeatedly or when they are sold to parties in other territories as they frequently are. • The royalty right for actors in the CAB will go some way towards aligning South Africa's audio-visual industry with international best practice. • Furthermore, the proposed 25 year reversion clause will allow actors an opportunity to address exploitative contracts they may have entered in the past, so the abuse does not continue into the FUTURE. • In addition to their support for fair royalties, SAGA supports fair use of copyrighted materials, as provided for within the CAB. This is because we believe South Africa will benefit from widening access to arts, culture and education. 	<ul style="list-style-type: none"> • The comments are noted.

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W	Recording Industry of South Africa and International Federation of the Phonographic Industry (RISA and IFPI)	CAB and PPAB	<ul style="list-style-type: none"> • Freedom to contract-Submit that Sections 39(cG), (cI), (cJ) and 39B(1) of the Copyright Amendment Bill, which sidestep the democratic process and extend Ministerial powers to mandate standard and compulsory contractual terms in private contractual arrangements, be deleted. • Automatic reversion of assigned rights-Submit that Section 3A(3)(c) of the Performers' Protection Amendment Bill, which provides for an automatic reversion of assigned rights after 25 years, be deleted. • Recommend that fair use-Section 12A of the Copyright Amendment Bill, which introduces an open ended is deleted. • Section 8A: Mandatory royalty entitlement for all audiovisual performers which will result in reduced incomes for performers, reduced engagement of South African performers in audiovisual productions and reduced investments in South Africa. • Section 12B(1)(a), Section 12B(1)(h) and Section 12B(2), and Section 12B(1)(b): Broad exceptions and limitations that are not adequately scoped in keeping with the three-step test including the quotation exception, private copying exception, and reproductions of sound recordings by a broadcaster exception. Under this test, exceptions and limitations to exclusive rights must apply in certain special cases, must not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of right holders. • Section 1 and Section 28P: The definitions of "technological protection measure" and "technological protection measure circumvention device and service" are not compatible with the WPPT's requirement to provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures". Further, the exceptions in relation to prohibited conduct in respect of technological protection measures are inadequately defined, therefore rendering them incompatible with the three-step test. 	<ul style="list-style-type: none"> • The comments on contracts, reversion, TPMs and 8A addressed above. • The quotation exception was considered in the parliamentary process. It includes all works. Control measures were incorporated in the quotation exception to tighten it.
X	The Southern African Music Rights	CAB and PPAB	<ul style="list-style-type: none"> • An impression has been created by the legislators that the ratios between countries using the fair dealing defence and those using the fair use defence, is in par or reasonably comparable. However, the reality is 	<ul style="list-style-type: none"> • The comments are noted. Some are addressed above.

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	Organisation (SAMRO)		<p>that the ratio is disproportionately dissimilar: While only less than a dozen countries use a fair use system – with several of those using a brand of ‘fair use’ that is very dissimilar to that applicable in the USA – the majority of countries use a fair dealing defence.</p> <ul style="list-style-type: none"> • It is important for the NCOP and Provincial Legislatures to insist that the drafters of the CAB provide a rationale for this drastic change from the current policy to the proposed USA doctrine. SAMRO submits that such a policy change requires strong motivation and adequate stakeholder consultation. There should be cogent reasons to motivate why South Africa should leave its tradition of using a fair dealing defence, to join the less-than-a-dozen countries that use a non-uniform fair use system. This is even more so considering the fact that our courts will need to develop fair use jurisprudence “from scratch”, and in so doing will be forced to rely on jurisdictions such as the USA which are not compatible with our system of law – while disregarding a rich jurisprudence from English law and other common-law jurisdictions still using a fair dealing defence. • SAMRO and other rights-holders observe the Bill being increasingly transformed into a de facto users’ rights law, rather than it being an authors’ rights law, as copyright law generally is. • SAMRO submits there lies a need for certainty when dealing with copyright infringement matters. It should be immediately clear what acts constitute infringement and not be left to the courts to determine such on a case-by-case basis, where the courts will need to develop new rules with no precedent in our law (and thus having to rely on American law – a legal system diametrically different from ours in many ways). • Lack of a proper Socio-Economic Impact Assessment System (SEIAS). Most rights-holders unanimously contend that the foundation upon which these Bills were built is procedurally flawed and goes against Cabinet’s February 2007 decision on the need for a consistent assessment of the socio-economic impact of policy initiatives, legislation, and regulations through a proper Socio-Economic Impact Assessment System (SEIAS). 	<ul style="list-style-type: none"> • On the ephemeral use, the comments seem to be based on the previous draft Bill in the National Assembly. The Canadian model was considered and was found to have many implications and possible unintended consequences. The advertised clauses were removed from the Bill. • This exception is currently in section 12(5) of the Copyright Act. The Act is limited to musical or literary works. Ephemeral rights form part of exceptions and allow a broadcaster to have a copy of the work such as sound recordings for a limited period of six months without being allowed to distribute it to any person. During live events that are broadcast, the broadcaster may have

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			<ul style="list-style-type: none"> • The fact that Parliament was not provided with a proper SEIAS of the totality of the effect of the Bill on the creative sector or professional legal analysis of the Bill's provisions measured against the Constitution and international treaties when the Bill was introduced, is reason enough to go back to the drawing board and make considerations to insist on a redraft of the Bills and a SEIAS report. • SAMRO submits that the proposed amendment in respect of "accessible format copy" definition, does not align to the definition in the Marrakesh Treaty. • As advised in the advisory opinion of one of the technical experts appointed by the Committee in 2018 the definition of "accessible format copy" in the Bill is diametrically opposed to the definition in the Marrakesh Treaty. This has not changed by the insertion of the phrase "including to" in the definition and the definition has not thereby been made to be more conformed to the definition in the Marrakesh Treaty. As indicated in Dr Baloyi's advisory opinion, the definition of "accessible format copy" in the Bill is inconsistent with the definition in the Marrakesh Treaty in the following manner: • It extends the application of the proposed exception to all works (thus including musical works), rather than certain literary works only, as contemplated in the Marrakesh Treaty, which seeks to address the "book famine" phenomenon; and • (ii) It not only limits the application of the exception to certain "beneficiary persons", as contemplated in the Treaty, but extends this to all "persons with a disability", as further defined in the Bill. • It was argued that South Africa is not bound to strictly adhere to the regime contemplated in the Marrakesh Treaty and that it may, in fact, introduce additional exceptions other than those contemplated in the Treaty. However the treaty provides that such additional limitations and exceptions must be 'in conformity with ... international rights and obligations'. This entails strictly applying the three-step test when introducing any new limitations and exceptions. 	<p>the copy of the music played. It allows broadcasters the right to use sound recording in their reproductions without paying royalties. Ephemeral is temporary use, and according to the Act it is for 6 months. The Act also specifies how this reproduction can be stored.</p> <ul style="list-style-type: none"> • The section 12A(d) was removed from the Bill, in the previous advertised Bill of the National Assembly, it was incorporated and advertised following public submissions. The public found it problematic and it was removed, not in the current version of the Bill. • On the digital rights and their offences, consideration was made to the making available the works to the public or

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			<ul style="list-style-type: none"> • Clause 20 - amendment to section 19(D) of the Bill It is submitted that the insertion of the expression “authorized entity” in this section does not cure the defect of the section, in that, by keeping the phrase, “any person that serves persons with disability, including an authorized entity” (s19D (1)), the facilitation of access to accessible format copies is not limited to authorized entities, as contemplated in the Marrakesh Agreement, but also includes other persons serving persons with disability. This defeats the purpose of having authorized entities to facilitate access to copies by beneficiaries and in fact removes the incentive to seek authorisation and /or recognition by government as an authorized entity – if any other person, even though not an authorized entity, may also provide those services. • Clause 13, section 12B(1)(b) – Ephemeral use exception. This amendment seeks to amend the ephemeral use exceptions in the Copyright Act by introducing a regime similar to that applicable in Canadian copyright law. This is welcome, as rights-holder groups have called for a review of the ephemeral use provisions. In particular the amendment seeks to limit the period within which a broadcaster may reproduce performances, sound recordings and other works for purposes of making a broadcast / doing communication to the public, without requiring authorisation from the rights-holder, to a period not exceeding thirty days – as contrasted with the current arrangement where such use is permitted for a period of up to six months. However, the following highlights instances where the amendment should be distinguished from the position applicable in the Canadian regime, or where it has not fully captured that position: The rest refers to the Canadian model provisions. • Clause 27 – new subsection (5A) of section 27 The proposed subsection (5A) under section 27 of the Act seeks to add the newly-introduced restricted acts of communicating a work to the public and making the work available to the public among the acts that are considered to be infringing acts under section 27 of the Copyright Act and for which 	<p>communicating the work to the public for commercial and non-commercial purposes, the issue was addressed.</p> <ul style="list-style-type: none"> • The proposed three step test on incidental technical uses were also advertised previously but due to public comment, removed.

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			<p>criminal sanctions are imposed. While this is laudable, it is greatly concerning that subsection (5A) would only consider such acts as constituting copyright infringement if they are carried out “without the authority of the owner of the copyright and for commercial purposes” (emphasis added).</p> <ul style="list-style-type: none"> • This is extremely problematic as infringement of copyright should not be dependent on whether or not a use is for commercial purposes. Whether a use is for commercial purposes or not, the copyright owner has the exclusive right to authorise the usage of the work. • Clause 13 – section 12A(d) – extension of fair use principles to other exceptions Paragraph (d) of section 12A in clause 13 of the Bill introduces this provision: “The exceptions authorized by this Act in sections 12B, 12C, 12D, 19B and 19C, in respect of a work or the performance of that work, are subject to the principle of fair use, determined by the factors contemplated in paragraph (b).” • While not derogating from the consistent objection to introducing a fair use defence in South African copyright law (considering that SA, together with the majority of countries in the world, have a fair dealing provision that can be adapted to changing circumstances), are of the view that making the fair use provisions apply to other exceptions, as proposed here, is plainly wrong. Each exception must stand on its own legs. The only condition in international copyright law in this regard is that the exception must satisfy the requirements of the three-step test. • Suggest that the proposed section 12A(d) is not appropriate and should thus be removed from the Act. • Recommend, to ensure alignment with what was contemplated when introducing this exception in the EU Directive, the following revision of paragraph (2): (2) The making of transient or incidental copies or adaptations of a work contemplated in subsection (1), may—(a) only be done in certain special cases; (b) that do not conflict with the normal exploitation of the copyright work; and (c) do not unreasonably 	

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			<p>prejudice the legitimate interests of the copyright owner flowing from their copyright in that work.”</p> <ul style="list-style-type: none"> • Appeal to the NCOP and Provincial Legislatures to sincerely reflect on their submissions and reject the Bills in their current form particularly given their potential impact on Provincial Cultural and Creative Industries and employment. 	
Y	The Copyright Coalition of South Africa	CAB and PPAB	<ul style="list-style-type: none"> • Lack of a proper Socio-Economic Impact Assessment System (SEIAS) • Strongly submit that the NCOP and Provincial Legislatures should reject both Bills and insists on a proper SEIAS being conducted to assess the social and economic consequences of the proposed amendments on copyright holders and investment into the linked sectors. • An aggravating factor regarding the fair use provision introduced under section 12A in the CAB is the fact the words “such as” in the phrase “for purposes such as the following” were inserted by the previous Portfolio Committee at-the-last-minute, at the instigation of the proponents of the fair use exception, without affording stakeholders the opportunity to debate the matter. Apart from adding broad uses as exemplars under this new “such as” regime in what is supposed to be a general criterion standard – even broader than what is contemplated in the US fair use regime – the lack of consultation on the introduction of the “such as” regime poses a serious Constitutional issue. • The NCOP should reject sections 12B – 12D, 19B and 19C as proposed in the CAB and consider legislation to more effectively benefit authors, performers and all copyrights-holders, while creating a balanced regime for exceptions and limitations through the use of a revised, modern fair dealing exception. Specific recommendations against each of these sections are available in the annexed document. • Recommend that a team of international copyright experts is assembled to ensure that the Bills comply with relevant international treaties in their general scheme. • Dr. Baloyi implored the Portfolio Committee to ensure that the definition of “accessible format copy” is aligned to that provided for in the 	<ul style="list-style-type: none"> • The expression ‘such as’ was subject to public consultation. It contributes to the fair use to be future proof. It is not necessary to make a lengthy list of examples, as ‘such as’ covers many purposes. • The uniformity of international rights is noted. The Bill provides more rights in line with the Constitution. In our reading, the Marrakesh treaty is not that explicit on national treatment. It gives the national governments the guidance on ensuring support through legal systems and practice, economic situation, social and cultural needs, to persons with disability

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			<p>Marrakesh Treaty in line with the intention of that treaty and that a definition of “beneficiary” that aligns with that used in the Treaty be inserted. Dr. Baloyi cautions that, in line with the principle of national treatment, if South Africa introduces exceptions that go beyond what is required in international treaties, only South African rights-holders will suffer from this. Foreign rights-holders will not suffer as their rights cannot be curtailed more than required by international treaties. Furthermore, all users, including foreign users, will benefit from the expansive exceptions, while South African rights-holders will be the victims.</p>	<p>and ensuring availability of accessible format copies as well as other rights.</p>
Z	South African Music Industry Council (SAMIC)	CAB and PPAB	<ul style="list-style-type: none"> • In terms of Section 3A (3) (c) of the PPAB, the exclusive rights of reproduction, making available to the public, communication to the public, broadcasting, rental, and distribution will all revert to the performer after a maximum period of 25 years. • The reversion to the performer of exclusive rights after 25 years will mean that the rights in a recording would be fragmented between the copyright owner and the performers, or their respective successors, meaning no one party would be able to authorise a third party to use the recording. • As section 8A of the CAB currently stands, however, a producer/ copyright owner and performer are not permitted to agree that the background performer is paid a session fee or similar lump sum for his/ her contribution. • Section 8A(1) should be amended to include an option of remuneration through a single payment or made subject to a written agreement to the contrary • Section 8D of the PPAB, read with Section 3A(3)(a) of the PPAB and with Section 39(b)(cG) and (cl) of the CAB empowers (and in the case of the PPAB, requires) the Minister to impose compulsory and standard contractual terms relating to contracts involving the rights covered by the CAB and PPAB, which would include agreements entered into by performers, producers, broadcasters and other commercial users. 	<p>The comments are noted. They have been addressed on similar issues raised above.</p>

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			<ul style="list-style-type: none"> • The potential disadvantage under which all rightsholders, including authors and performers, will be placed by the exercise by the Minister of these powers is exacerbated by the provision in section 39B(1) of the CAB that restricts the parties' freedom of contract. • Sections 8D and 3A(3)(a) of the PPAB should be removed from the Bill or the Minister's powers should be limited to providing guidelines. • Section 39B in the CAB stipulates that any contract term that purports to restrict a right or protection afforded by the Act shall be unenforceable. This is a drastic interference in the constitutionally protected rights of authors, publishers, performers, and producers to exercise their rights to trade by entering into contracts that reflect the outcome of arm's length bargaining and the free exchange of rights and obligations. • Section 39B should be deleted. • Delete section 12A and ask DTIC to conduct an economic assessment of the impact of introducing fair use in South Africa. • Section 3A(3)(c) of the PPAB conflicts with section 9 of the Copyright Act, and stands to be set aside for vagueness. • In terms of section 3A(l) of the PPAB, where a performer has consented to fixation of his or her performance, the exclusive rights of authorisation granted to the performer by sections 3(4)(c), (d), (e), (f) and (g) are transferred to the producer. This consent must be embodied in a written agreement. • In terms of section 3A(3)(c), that written agreement shall, in the case of a sound recording, be valid for a period of up to 25 years from the date of commencement of the agreement. After 25 years, the exclusive rights revert to the performer. • Section 3A(3)(c) should be deleted from the PPAB to prevent constitutional vagueness. Alternatively, it should be made subject to a written agreement to the contrary. 	

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			<ul style="list-style-type: none"> Section 8D(3) constitutes an impermissible delegation of legislative authority to the Minister. As such, it would be invalid if enacted and should be deleted from the PPAB. 	
AA	<p>ANC Western Cape represented by:</p> <p>Ms Michelle Sabepa Mr T Olivier Ms S Mshemuswa</p>	CAB and PPAB	<ul style="list-style-type: none"> Ms Michelle Sabepa: Support the Performers' Protection Amendment bill as it is presented. Appreciate the amendments advocated by SADTU towards ensuring free or very low cost education material for the disenfranchised masses of our people. Support the said clauses in the CAB. Support the CAB and the PPAB. Mr Theo Olivier and Ms Mshemuswa: Supports the PPAB and notes and support the overall thrust and purpose of the CAB. Fair use must distinctly differentiate copyright of works for music composers, photographers and other sub sectors with the arts and culture sector. Proposes an additional sub clause 12E, to differentiate between musical composition, authorship and academic literary works. The suggested wording is noted. The creative industries have a potential of contributing to tourism and employment, possibilities for small scale entrepreneurs, alleviating unemployment and contributing to the fiscus. 	<ul style="list-style-type: none"> Fair use is a general exception and the Bill guides its usage. The way fair use is applied can work without specific sector differentiations.
BB	<p>Commercial Producers Association (CPA) and Association for Communication and Advertising (ACA)</p>	CAB and PPAB	<ul style="list-style-type: none"> Even within one broadly defined creative industry, like the audiovisual services sector, there are many different sub-industries, each with their own bespoke rights management, commercialization and remuneration models, and financing and licensing frameworks that were developed over many years in response to continually developing market practices and consumer demands in each industry. The Copyright Amendment Bill proposes an unwaivable 25-year limitation on all assignments of rights in literary and musical works that would pose great challenges to a producer's ability to secure rights clearances and consolidate all rights in an audiovisual work. Consolidation of rights in the producer is a fundamental requirement in 	<ul style="list-style-type: none"> The royalty regime is in the copyright Act although limited in scope (sound recordings, performers), the royalty sharing, the language, assignments, contracts are in those provisions, this was not arbitrary but included to create more

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			<p>the film and television industries. The 25-year limitation on assignments might be less problematic in the advertising environment, as most commercials are created with a shorter lifespan in mind than most other film and television productions, but it may well serve to undermine the attractiveness of South Africa as a destination for new investments to be made in high-cost creative content production projects.</p> <ul style="list-style-type: none"> • A material procedural oversight during the development of the Copyright Amendment Bill is the absence of a meaningful economic impact assessment that should have informed the drafting of the Bill. The Bill contains an alarming number of proposals that would dramatically change the way that business can be done in South Africa's copyright industries, without due regard given to the specificities of each affected sector. • The Copyright Amendment Bill proposes to change the existing rules that govern how copyright vests in commissioned works, including audiovisual works. The Bill proposes that certain commissioned works must be produced under written agreements that would determine how copyright ownership would be vested in the work, failing which only limited rights would vest in the commissioning party. The Copyright Tribunal can be approached by the producer of the work to compel the commissioning party to enter into a licensing arrangement that was not initially contemplated, in terms of which the commissioned work may be used by the producer (if the work is not used by the commissioning party) or the producer may be entitled to receive royalty payments for future commercial usages made by the commissioner (if the work is used for a purpose other than the original commissioning). The proposed changes will likely result in legal uncertainty on key issues relating to the commissioning of works that do not currently exist in the Copyright Act, and submit that these proposed changes should be rejected by the NCOP. • The definition of a 'performer' in the Performers' Protection Act (which is to be read with Section 8A) is so broad that it would include 'extras' or 	<p>certainty and strengthen provisions for the copyright based industries .</p> <ul style="list-style-type: none"> • The provisions in section 6A, 7A and 8A provide a royalty regime. These provisions will provide more protection for authors and copyright owners as they aim to create an enabling environment. • The legislation provides a framework but contracting parties have the freedom to arrange how they make arrangements. The recommendation to exclude a sector is noted.

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			<p>background performers who are typically not entitled to receive ongoing royalty payments for the commercial use made of television productions. Extras are remunerated based on agreed 'day rates' via secured or guaranteed up-front or lump sum payments. Section 39B of the Bill proposes a contract override that would indiscriminately apply to all contracts dealing with rights of copyright, and which renders it impossible for a party to such a contract to waive any right or benefit received in terms of the Copyright Act.</p> <ul style="list-style-type: none"> • The same problem does not exist in the advertising industry, and our sector should be excluded from the application of the new Section 8A in the Copyright Amendment Bill. • The Minister of Trade, Industry and Competition (the 'Minister') is empowered under Section 39 of the Copyright Amendment Bill to prescribe compulsory and standard contractual terms for all copyright agreements, and to prescribe royalty rates and usage tariffs for the use of copyright works, including in the advertising industry. These Ministerial interventions that could severely impact on the constitutionally enshrined freedom to trade and contract, and ride roughshod over existing contractual dealings and established best industry practices in the private sector could have tremendously negative economic impacts on trade and investor confidence. • South Africa's advertising sector is already subject to self-regulation and any Ministerial or government interventions made into our sector would risk disrupting our existing rights acquisition, management and remuneration benchmarks that were already negotiated and implemented to the satisfaction of the primary associations that represent the interests of performers, models, producers, and advertising agencies in South Africa. • There are therefore no royalties payable to the owner of a television commercial when it is flighted, and as such, it appears that Section 8A bears no practical application to the advertising industry whatsoever. 	

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			<ul style="list-style-type: none"> • Section 8A, it also seeks to criminalize the non reporting of all commercial uses that may be made of audiovisual works, including television commercials.8 Section 8A(5) purports to introduce a mandatory reporting obligation that would require of all users of audiovisual works, including copyright owners and their licensees, to register each act of commercialization and to submit a 'complete, true and accurate report' to each performer that may appear in an audiovisual work, even to every 'extra' or background performer appearing • Copyright Review Commission Report (2011) to address a bespoke issue identified in the music industry where large users of recorded music (including broadcasters like the SABC) have come under criticism for a failure to report accurately to music royalty collecting societies on the commercial use made of recorded music. The same problem was never identified to exist in the film and television industries, and submit that the proposed extension of statutory reporting obligations and related criminal sanctions for non-compliance to the audiovisual services sector have no basis and should be rejected by the NCOP. The onerous reporting obligations that Section 8A would impose on copyright owners and producers of commercials and audiovisual advertising campaigns to report on each commercial usage made to each performer concerned would result in high administrative cost overheads and forced resource allocations that would drive up the legal risks and operational costs for production companies, without any clear benefit resulting for performers, who already benefit from future usage reporting and remuneration agreements with production companies. • Sections 6A, 7A and 8A which propose the introduction of statutory royalty entitlements for authors of literary, musical, and visual artistic works, and performers appearing in audiovisual works were not subjected to full stakeholder consultation previously. These sections were not drafted or conceptualized by the Department of Trade and Industry from where the Bill originated, and were instead written into 	

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			<p>the Copyright Amendment Bill by the National Assembly's Portfolio Committee on Trade & Industry after the first public consultations on the Bill that were held in August 2017. The provisions were not subjected to any economic impact assessments to assess its potential negative impacts on the affected copyright industries or legal research to measure its compliance with international treaties and best practices. Alternative methods of achieving the underlying objective of ensuring for more equitable and transparent remuneration models for authors and performers in certain instances where specific market faults may have been identified to exist in practice do not appear to have been considered.</p> <ul style="list-style-type: none"> • The enactment of these provisions may well have tremendous negative economic impacts on the sector, as well as constitutional implications. • The NCOP should reject Sections 6A – 8A of the Copyright Amendment Bill. • If the provisions are to be proceeded with, that the advertising industry should be excluded from its operation, due to the reasons set out in their submission. 	
CC	Independent Producers Organisation, Animation SA and Independent Black Filmmakers Collective	CAB and PPAB	<ul style="list-style-type: none"> • A fundamental failure of the Copyright Amendment Bill is that it contains many proposals that were originally conceptualized and intended to only apply to one creative industry (e.g., the music industry), but during the drafting of the Bill, it was cast in a way for it to have general application across all copyright industries. • Stakeholders have, from the onset of the matter, made consistent calls on the Department of Trade and Industry to publish the findings of its SEIAS (Socio-Economic Impact Assessment System) report, to show that proper research was done to measure the potential economic impacts of the controversial proposals advanced in the Copyright Amendment Bill. • The Copyright Amendment Bill proposes serious restrictions on contractual freedom, including through the following proposals: • Section 39B(1) of the Bill which introduces a contract override provision that would indiscriminately apply across the board to all contracts 	<ul style="list-style-type: none"> • The Bill introduces provisions that bring a balance in the digital environment and also provides protection of rights holders. • The comments are noted and most responded to in responses above, to avoid repetitions.

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			<p>dealing with rights of copyright. It seeks to prevent the ability of a contracting party who receives any right or entitlement in terms of the Act, from assigning or transferring that right contractually. It is designed to protect a 'weaker bargaining party' to a contract from being capable of being forced by the 'stronger bargaining party' from transferring rights contractually.</p> <ul style="list-style-type: none"> • Where contract overrides exist in foreign legislation, it caters for very bespoke and highly specific cases (and specific types of clauses in contracts). Are not aware of any copyright legislation around the world that contains a contract override that applies broadly to all rights of copyright, and even to copyright exceptions and limitations. • An unwaivable 25-year limitation on assignment terms of literary and musical works would mean that a producer can only guarantee the risk-free commercialization of a film for that period, which is half the time currently allowed in terms of the Act (50 years) and about a third of the time afforded under US and UK law (75 and 70 years respectively). International studios might well be disinclined from producing films in South Africa in these conditions. We urge the NCOP to reject Section 39B(1) of the Copyright Amendment Bill. • The Minister of Trade, Industry and Competition is granted overly broad regulatory powers under Section 39B of the Bill to prescribe compulsory standard contract terms that are to be included in copyright contracts, and royalty rates and tariffs for the use made of copyright works. As mentioned above, there are no standardized set of agreement and remuneration terms that can be horizontally applied to all contracts in the film and television production industries, let alone across board to cover all copyright industries. • The Bill contains a concerning proposal to empower the Minister to designate any "local organization" that would, after such designation, be vested with all rights of copyright in any work that is made by or under its direction or control. Are not aware of any rational basis for this 	

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			<p>provision which would mean that a designated organization would be vested with all rights of copyright despite the absence of an agreement to this effect with the creators and producers of the works concerned. In our industry, and if the SABC were to be designated in this way by the Minister, this would result in situations where filmmakers, producers and other creative contributors may be divested of their rights in a produced work, even in the absence of an agreement to this effect. This proposed amendment should be rejected by the NCOP as it is open to potential abuse and does not appear to serve any other purpose.</p> <ul style="list-style-type: none"> • The way in which the new statutory royalty entitlements under Sections 6A – 8A were conceptualized and hastily drafted by the National Assembly' Portfolio Committee introduces so much legal uncertainty on how royalty rates could be determined, payable and shared, that it would likely not provide substantial practical benefits for the intended beneficiaries. • Ultimately, there would be no royalties to share, if there are no new productions of high value being produced in South Africa. We call on the NCOP to reject Sections 6A – 8A. • Even though it is encouraging that the Bill makes provision for the new exclusive 'digital rights' for copyright owners, and takes a positive step forward in that regard, it takes another three steps back through the proposed introduction of an overly broad and extensive regime of new copyright exceptions and limitations. The proposed introduction of a statutory 'fair use' legal defence into the law, which is much broader in scope than in US Copyright law, from where the doctrine has its origin. Also, the Bill's proposal does not include any of the balancing mechanisms that exist in US law to somewhat balance the scales and deter would-be infringers from mis- and over-reliance on this defence against infringement. • Fair use could swiftly become cast as 'Free Use' in South Africa as users of copyright works would have much more room to maneuver than they currently have to make unlicensed and unremunerated consumptive 	

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			<p>uses of copyright protected works, without much risk of incurring damages awards or other penalties that exist in US law to act as a deterrent against mis-reliance on this legal defence to infringement.</p> <ul style="list-style-type: none"> • The Bill does not introduce any meaningful enforcement mechanisms or remedies to assist rights holders to combat infringement and piracy in the online environment. Stakeholders have made repeated calls during the copyright reform project for government to introduce a legal remedy that would assist rights holders to combat content piracy, especially in cases where the infringers and their servers are based in other countries and traditional enforcement remedies are ineffective. No-fault website blocking orders have been demonstrated to be highly effective in other countries around the world to block user access to pirate sites, yet no similar proposal was made provision for in the Bill. • The net-effect of the invasive new regime of copyright exceptions and limitations, the weak legal protections proposed for TPMs, and the failure to introduce an effective legal remedy to assist rights holders to combat online infringements and piracy when offenders are located abroad, is that the enactment of the Bill would reduce copyright protections in South Africa to an all-time low, and in a way that would likely breach important international treaties. 	
DD	Pen Afrikaans	CAB	<ul style="list-style-type: none"> • Fair use and other exceptions-PEN Afrikaans considers the new proposed section 12A as well as 12B(1)(f), 12B(1)(g), 12B(6), 12C(b), the whole of 12D (educational exceptions), coupled with the indiscriminate contract override provision in 39B, to be prejudicial to our members' rights to their works and that it will unduly interfere with the normal, commercial exploitation of authors' work. • Fair use fails to satisfy the requirements set out in the Berne Convention and the TRIPS Agreement, particularly as it relates to the well-known three-step test for copyright exceptions and limitations. • Even if one were to assume that Karjiker is incorrect in his interpretation of fair use as contrary to the Berne Convention, which we do not agree with, one must recognise that section 12A introduced by the Bill differs 	<ul style="list-style-type: none"> • The fair use was found to be compliant with the three step test and not in violation of international law. • The public administration purpose was deliberated under fair use purposes. It was found to not be problematic, hence it was retained. It would

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			<p>from the fair use provisions contained in section 107 of the United States' Copyright Act.</p> <ul style="list-style-type: none"> • For instance, there is a permitted fair use for “proper performance of public administration”, which is not part of US fair use. In the absence of an explanation or demarcated definition of what this entails, are concerned on behalf of the members that this represents a free licence for state use of copyright works for a potentially wide array of purposes. This would represent an instance of expropriation of property and would especially impact on authors writing for the academic and education markets. • The fair use clause is not only an expanded version of what is allowed under the few copyright dispensations that have adopted it internationally, but it is not brought in check by corresponding limitations like statutory damages (under US law). • Considers the qualification of moral rights by use of the words “as far as is practicable” in the context of the copyright exceptions for educational and academic activities introduced by the Bill as an unwarranted and unsubstantiated disregard for the moral rights of the author. It deprives the author of firm legal ground upon which to assert his/her moral rights (i.e. claim authorship inter alia) where these copyright exceptions apply. • Implore the legislature to remove the words “as far as is practicable” from section 12D(8). The author is the cornerstone of copyright law and should be entitled to acknowledgement. • Regarding the overbroad fair use and other copyright exceptions, feel that the Bill neglects to take proper account of the constitutional framework in which the law operates, particularly in respect of the property clause. Section 25(1) of the Constitution of the Republic of South Africa, 1996, requires all property-related law to be non-arbitrary, meaning that the burden being imposed on property owners must not be disproportionate or ungrounded. 	<p>be subjected to the four factor test.</p> <ul style="list-style-type: none"> • As far as practicable serve as a safeguard on an exception. It has been considered on a new exception, in particular for teaching and education purposes. • On moral rights, the Bill supports the acknowledgement of the author. There are instances when the author is not known or cannot be found. • The exceptions were consulted upon, they were found to not have constitutional implications and that they are in line with international law and obligations. They also have their own safeguards of usage. • The exceptions in the Bill were found to be in line with the three step test and not in violation

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			<ul style="list-style-type: none"> • It is submitted that the proposed sections 12A and 12D, especially but not exclusively, are open to a constitutional challenge as they represent disproportionate, and thus arbitrary, deprivation of the intellectual property rights protected by section 25(1). • A key concern about section 12A is the addition of the words “for purposes such as” in this version of the Bill. In essence, this renders all the purposes listed in this section – and these are numerous – as mere examples of an open-ended list of exemptions. This falls foul of the requirement under the three-step test that exceptions must be limited to certain, special cases to be in line with international copyright treaties. Such a broad, open-ended exception will not satisfy the first step of the test. • The three-step test is an outflow of the national treatment principle, which specifies what exceptions and limitations to copyright may be applied to rights holders of other member states. Therefore, to the extent that the exceptions are not in line with the three-step test, it will not be binding on foreign rights holders. The result is that it is South African authors, including members of PEN Afrikaans, that will be treated less favourably than foreign rights-owners, while foreign works will not bear the brunt of the over-broad exceptions introduced by the Bill. • Sections 12A, most of 12B, 12C(b), 12D as well as 39B have no place in South African copyright legislation. In addition, the qualification of moral rights in section 12B must be removed entirely. 	<p>of international obligations.</p>
EE	Motion Picture Association	CAB and PPAB	<ul style="list-style-type: none"> • The Bills contain a number of concerning proposals that would introduce legal uncertainty on key issues, and severe limitations on contractual freedoms. Legal certainty and contractual freedoms are fundamental for producers to raise finance, accurately budget for new productions, and consolidate rights in an audiovisual project. Every project requires contractual flexibility to cater to different production, distribution, remuneration, and commercialization models, whether the work produced is a feature film, television series, documentary feature, animation 	The comments are noted.

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			<ul style="list-style-type: none"> The Copyright Amendment Bill was not supported by an economic impact assessment study and fails to appreciate the specificities of the film and television production industries. For example, it includes provisions initially developed for the music industry. Another concern is the Bills' failure to introduce meaningful enforcement mechanisms and remedies to assist rightsholders in combatting the scourge of online infringement and piracy. For example, the provisions relating to Technological Protection Measures (TPMs) are inadequate to provide for effective legal protections for works made available in the online environment, where most content distribution takes place nowadays. Similarly, overly broad exceptions and limitations to exclusive rights of copyright would further reduce the ability of rightholders to take effective action against infringers. 	
FF	Trade Union for Musicians of South Africa	CAB and PPAB	<ul style="list-style-type: none"> Appreciate that amendments advocated by the South African Democratic Teacher's Union (SADTU), towards ensuring free or very low-cost education material for the disenfranchised masses of our people, has been successfully incorporated into the CAB. Submit that the current Clause 12 (A to D) on "fair use" must distinctly and unambiguously differentiate between the copyrights of authors of academic and educational works as being distinct of copyright of works for example of music composers / authors (lyrical) and other similar such sub-sectors within the overarching arts and culture sector. The mere existence of these sub-sectors within the overarching sector attests to the need for us to be cautious about applying a "one size fits all" lens when refining this critical DRAFT Clause 12 (A to D). The CAB includes intellectual property pertaining to scientific and technological inventions/inventors in addition to the creative and literature sectors. Submit that the formulation of clauses in the CAB must not hamper or obstruct the exploration and innovation of new 	<ul style="list-style-type: none"> The proposed distinction of fair use is noted. This has not been noted before even from international best practice. Local content was in the original version of the Bill before and removed because it is the mandate of another Department.

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			<p>ideas by vague and/or over-flexible usage exceptions that could inadvertently expose them to IP infringements.</p> <ul style="list-style-type: none"> • A simple and concise additional sub-clause be added to the current Section 12. This additional sub-clause (being 12E) must explicitly differentiate between “fair use” in relation to Music composition/authorship as opposed to Academic Literary works. • Their proposed wording for the additional sub-clause 12E is: 12E) “Notwithstanding S12A and S12D, any use by or for persons benefitting from or engaged in primary or secondary education, or further and ongoing education, adult literacy and adult education shall be deemed fair use, provided that the use is restricted to literary works or in respect of other categories of works and performances is limited to instances where no licence is available within a reasonable time and at a reasonable price”. • Will therefore support any measures seeking to Promote Local Content as an Economic Imperative, the need for which was included in both reports (MITT 2001 and CRC 2011) informing the critical need for these Amendments. Yet there is no mention of this in either of these Bills, whilst Foreign Music and Visual content still overwhelmingly dominates the media exposure of most South Africans, especially in the Commercial Broadcasting Media, where advertising spend is at its premium. Despite our appeals to the Portfolio Committee in this matter, our calls fell on deaf ears. 	
GG	Turksvy Publikasies	CAB	<ul style="list-style-type: none"> • No proper SEIAS was done before the Bill was completed. • Section 6A is a problem because not all commercial activities are a success. The royalty provision is a problem. Prescription of royalty rates a concern. • The powers of the Minister to impose contractual arrangements and to impose on contractual freedoms a challenge. • The PASA impact assessment report on publishing industry has not been taken into account by government. 	<ul style="list-style-type: none"> • The comments are noted. They were addressed above. • Because of the diverse nature of industries and concerns they have, government can note the issues but

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				must act independently in the public interest.
HH	Chanon Lecodey Merricks (Online submission form)	CAB and PPAB	N/A	
II	Motlhabane Koloji	CAB	N/A	
JJ	Quaanitah Simons-Cabinet member of the SAN (Oral)-Oudtshoorn	CAB and PPAB	N/A	
KK	Andile Mahenene-Member of Bongolethu Performers and Arts Organisation (Oral submission)	CAB and PPAB	N/A	
LL	Thulani Justice Meme-Member of the public (Oral submission)	PPAB	N/A	
MM	Mr AK Warnick, Councillor, Swartland Municipality	CAB and PPAB	N/A	

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NN	Dramatic, Artistic and Literary Rights Organisation (Pty) Ltd	CAB and PPAB	<ul style="list-style-type: none"> • Submitted the table that illustrates that the South African fair use provision, even before it is to be interpreted side by side with the other exceptions under discussion here, is much broader in its introductory text, and also in the way it frames the four-factor test. • If a decision is made to introduce the US-style fair use, do not introduce a variant wider than the country of origin: stick to a verbatim copy which will make application of some 100 years of US case law easier. • Section 12A by incorporating the words “for purposes such as” provides for an open, illustrative list of purposes for which a work can be used and be considered ‘fair use’. These words should be removed, as was done in Uganda recently where a US-style fair use four-factor test was introduced verbatim, but without opening the list up by “such as”. • Recommend that: (i) the over-broad fair use doctrine is revised, (ii) that the words “such as” are struck, (iii) that the provision be narrowed down to the words not highlighted in yellow in their submission, and (iv) directly subjected to a test limiting Section 12A inherently by mandating the relevant adjudicator to apply the three-step test of the Berne Convention as an overall yardstick. • They also urge that widespread public consultation process and a proper economic impact assessment be conducted to assess for the first time the impact of the amendments on the various copyright sectors. • Sub-sections 12D (1)-(3) could be construed quite easily to allow an individual to legitimately make an exact reproduction of an entire book which he has borrowed or taken from a library so as to avoid having to purchase his or her own copy. It is easy to see that this represents for educational authors the entire market, if the wording is not amended. • The first section of Section 12D(3) is consistent with copyright principles however the wording ‘unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community or reasonable terms and conditions’ results in the section not being in line with copyright principles and gives user the ability to unfairly prejudice copyright owners (i) by not specifying parameters for an license being 	<ul style="list-style-type: none"> • The Bill provides extensively for the collecting societies in a chapter (Chapter 1A). It addresses issues raised and more on their regulation and strengthens their regime. • On the reciprocity, the collecting societies as a point of departure must make a finding and a determination that the rights under it administration are enjoying protection usually through a treaty such as WPPT. Once that has been determined, a collecting society must then find out if the rights of its members (under the administration) are indeed consumed in the jurisdiction in question (e.g US). If such rights are indeed consumed then it therefore expedient

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			<p>unavailable, (ii) leaving the determination of the reasonableness of the terms and conditions to the user, and (iii) then permits the user to further contravene copyright general principles by copying the whole book or journal issue or a whole recording of a work.</p> <ul style="list-style-type: none"> • The relationship between Section 12A and section 12D must be clarified as follows: Copying not permitted under Section 12D should be deemed also unfair under Section 12A; copying permitted subject to the unavailability of a license under Section 12D should also constrain copying under • The textual deletions and clarifications as per above need to be inserted into Section 12D. • The entire Section 12D should be redrafted such that it is subject to copyright principles (in particular the Three-Step Test), licencing and does not unduly prejudice rights owners. • DALRO submits that Section 19C shall be amended in light of comments provided. • A round table of DALRO, authors, librarians and publishers must be convened to see if the stakeholders cannot agree on guidelines that could later be substituted for overbroad provisions. • Guidelines could also be more frequently and easily amended than casting any over-broad exceptions into the statutory text. The National Library of South Africa already holds roundtable exchanges with publishers and these should be made more inclusive for wider stakeholders such as Authors, Creators, Museums, Archives. All of the exceptions that are re-drafted should be explicitly prefaced to apply only subject to the Three-Step Test. • Extend duty to account to collecting societies to all classes of copyright protected works and performances. • Extend duty to account to all users that are juristic persons, not only commercial entities ∅ Instead of providing for penalties for violation of duties, provide for a civil law remedy of estimating damages or exemplary damages based on statistical information: A collecting society 	<p>and/or desirable for a collecting society to enter into a reciprocal agreements to ensure that the citizens (right holders from the two jurisdictions are equalled in terms of receiving royalty) receive royalty from the usages. Secondly, the treaty itself creates obligations for all contracting members and when that is taken down to the level of operations in the collecting societies, it basically translates to reciprocal arrangements.</p> <ul style="list-style-type: none"> • Collecting societies are not forced to conclude reciprocal agreements, they only do so when it is expedient and/or desirable to do so with a treaty supporting the protection of the rights under administration.

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			<p>would be entitled to charge according to its tariff estimating the usage based on information received from entities with a comparable user profile, e.g. same industrial or service sector, same market segment.</p> <ul style="list-style-type: none"> • Empower collecting societies to demand payment provisionally in part based on past licensing fees due and payable or actually paid or not in dispute. • Provide for exemplary damages as twice or three times the amount of past royalties due and payable or actually paid in case of violation of a duty to account. • DALRO urges the Committee (as it did urge the Portfolio Committee of the National Assembly) to send the Bills back to the drawing table. And for the same reason DALRO requests that the NCOP do the same: reject the Bill, in the alternative raise these structural defects in the Parliamentary Mediation Committee to be charged with the Bill in the event that NCOP and National Assembly disagree over a section 76 Bill. • Instead of providing for penalties for violation of duties, provide for a civil law remedy of estimating damages or exemplary damages based on statistical information: A collecting society would be entitled to charge according to its tariff estimating the usage based on information received from entities with a comparable user profile, e.g. same industrial or service sector, same market segment. • Empower collecting societies to demand payment provisionally in part based on past licensing fees due and payable or actually paid or not in dispute. • DALRO suggests that, in order to achieve this objective in good time, the NCOP would be well advised to define a roadmap with stakeholder consultations to feed into a group of copyright experts to completely redraft the Copyright Bill and the Performers Protection Bill, perhaps on separate legislative tracks rather than as twin bills. • Clause 25 – New Section 22C(3)(c)-Section 22C(3)(c) provides that a collecting society may “only make payment of royalties to a collecting 	

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			<p>society outside the Republic, if there is a reciprocal agreement regarding royalties in place between that country and the Republic.”</p> <ul style="list-style-type: none"> It is submitted that this section introduces reciprocity requirements that are at odds with the national treatment and minimum rights principles embodied in the TRIPs Agreement and the Berne Convention. In this regard it needs to be recalled that the principles of national treatment and minimum rights provide that foreign authors are to be accorded the rights which the laws of member countries of the Berne Convention other than the country of such foreign authors’ origin, “do now or may hereafter grant to their nationals, as well as the rights specially granted by [the] Convention”.⁷⁹ Thus, since South African copyright law accords rights to South African nationals which are administered by collecting societies, the foreign nationals of other Berne Convention countries are entitled to be accorded the same rights. Reciprocity thus does not apply, as noted by Nodermann: ... [T]he principle of reciprocity, otherwise extensively applicable in international law, does not hold good within the sphere of the [Berne Convention].The principle of national treatment and the principle of reciprocity are mutually exclusive. 	
OO	Ilse Assman, Director Apricity Consulting	CAB	<ul style="list-style-type: none"> Support the Copyright Amendment Bill B13D-2017, and pleased to note their concerns were taken into account. The Copyright Amendment Bill B13D-2017 updates our copyright law and ensures it is progressive, digitally friendly, dynamic, and in line with other countries that already have these positive exceptions. 	The comment is noted.
PP	Music Publishers’ Association of South Africa	CAB	<ul style="list-style-type: none"> What the reversion clause means, in simple terms, is that a creator will no longer be permitted to sell his copyrights for due consideration that he deems to be of sufficient value. It is a restriction on his freedom to trade. Works created by South African creators will have a <i>de facto</i> commercial lifetime of 25 years. Furthermore, composite works created by multiple South African co-authors and co-composers would also have a <i>de facto</i> commercial lifetime of 25 years. 	<ul style="list-style-type: none"> The personal use provisions were reviewed. The private copy levy is a system that was raised. In other countries implementing it, there

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			<ul style="list-style-type: none"> • Whether the State should own or control copyrights (especially in musical works) is a contentious question. The amendments to Section 21(2) and 5(2) of the Act, supported by various provisions in the Bill, comprise an inexplicable and somewhat arbitrary measure that ignores accepted and established rules and principles of copyright and of business. It appears that 'local organizations' nominated by the Minister will now automatically acquire copyrights in works made under their direction or control. • Particular regard must be had to the new s12C(a), the so-called 'temporary reproduction' or 'caching' exception. It allows incidental and temporary copies to be made on an online device, as intended by the Legislator to keep pace with technological advancement. However, the new s12C(b), which allows members of the public "to adapt the work to allow use on different technological devices, such as mobile devices", has another, much different, application and purpose. • The Legislator has attempted to create a hybrid of Fair Use and Fair Dealing. In the first place, we will be (to our knowledge) the only country in the World with such a hybridized and bastardized provision. In the second, the hybrid provision simply does not make jurisprudential sense. Either the provision is a closed list of exceptions such as in our current Fair Dealing law, or it is an open-ended Fair Use concept, such as that in the United States. It cannot be both. Yet this is precisely what the Legislator has attempted to do by including the words 'such as' and replicating the Fair Dealing exceptions after the Fair Use portion. • These entitlements, as set out in ss6A, 7A and 8A of the Bill, are ill-considered and will have extensive negative consequences. Whilst the Legislator's intention in introducing these provisions was no doubt a noble one, it should be noted that no proper impact assessment was done in this regard, and that our firm opinions, as the music publishing industry, were simply ignored. 	<p>are challenges with its application. More work and research is needed to look into it.</p> <ul style="list-style-type: none"> • The other comments are noted.

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			<ul style="list-style-type: none"> • The provisions comprise a multi-purpose (read 'one size fits all') attempt to provide fair remuneration to creators, in response to the observations made in the CRC Report. The problem, however, is that a 'multi-industry' approach simply will not work in practice. The CRC report was in any event mainly concerned with performers. • Ongoing Royalties Even Where Copyright is Assigned or Transferred The sections are frankly even more revolutionary in that they provide for ongoing royalty income for the creator despite outright copyright transfer, where the rights to television, film, radio, photography or art work, are sold on for repeat use, such as for broadcast, and a broadcast thereof is indeed repeated. Commercially, we have difficulty in seeing how this will work. • Ownership of copyright in commissioned works • The amendments to Section 21 of the Act contain no description of the default position that will apply where no written agreement has been concluded in the commissioning of a work. This will cause massive uncertainty, given the ubiquity of verbal and implied agreements that take place on a daily basis in the music industry, whether the Legislator recognizes this fact or not. In addition, the power given in new Section 21(3) to the Tribunal to impose a licence agreement on parties in a commissioning arrangement is just one in a long line of examples of the Bill's violations of the public's constitutional right to contract freely, as provided in s22 of the Constitution. • The provision focuses heavily on the responsibilities of a potential user who wishes to use an Orphan Work. It is undoubtedly true that processes and procedures for the use of such works is required, but in our opinion, the procedures imposed by the proposed provision are so onerous as to create the possibility that the user might look elsewhere rather than use the orphan work. To expect a potential user to publish his intention in the Government Gazette and two newspapers in two languages, conduct extensive searches and then to apply to CIPC with the distinct possibility of an enquiry or hearing, is simply unrealistic. 	

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			<ul style="list-style-type: none"> • Resale royalty right-Whilst these provisions do not directly affect the copyrights in musical or literary works, it is worth noting that they are jurisprudentially unsound (since they are not rights of copyright) and further that they will create uncertainty around the re-sale of second hand music products such as vinyl records and compact discs. • A Private Copy Levy should be introduced-While the Copyright Act is being overhauled, the Legislator should seize the opportunity to introduce a long-awaited and much needed reform, namely the introduction of a private copy levy on all devices that can copy music, manufactured in or imported into, the Republic of South Africa. Such a levy is urgently needed in order to increase revenues in a flailing industry that has been ravaged by piracy. • This provision in our Copyright Act, known as the “Ephemeral Exemption”, is highly controversial, and should, in our opinion, be deleted from our Copyright Act. • It should be made clear that religious organizations are not exempt from Copyright Churches and other religious organizations should not be exempt from copyright liability or royalty payments. They are not, yet there seems to be confusion and a misapprehension regarding this matter. We are aware that SAMRO intends addressing the issue of performing rights in churches in due course. We feel that CAPASSO, for reproduction rights, and SAMPRA, for sound recording performance, should do likewise. • Inadequate Anti-Piracy Measures-The Bill does very little, if anything, to address piracy, and it is most sorely lacking in this regard. Technological protection measures (“TPMs”) will be crucial, and the importance of their effectiveness cannot be over-emphasized. • The Bill should have addressed the so-called ‘Value Gap’ which is the ongoing devaluation of music at the hands of Big Technology. An example of this is YouTube’s abuse of various ‘Safe Harbour’ provisions (such as that contained in our own ECTA) which allow it to hide behind 	

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			<p>Safe Harbour/lack of knowledge to avoid liability for user-generated infringements.</p> <ul style="list-style-type: none"> The provisions in 6A, 7A and 8A that define royalties as unwaivable rights to share in "gross profits" have not been subjected to public scrutiny and are a non sequitur . No music publishing companies (nor indeed any producer) can reasonably calculate royalties owed to composers and original publishers as a percentage of future gross profit. If publishers were to do so, this would in most cases be to the severe disadvantage of the composer due to the low to non-profitability of many projects. 	
QQ	Stellenbosch University: Innovation and Commercialisation in conjunction with Roux de Villiers	CAB	<ul style="list-style-type: none"> That the proviso to Section 22(3) that limits assignment of copyright in literary works and musical works be scrapped OR if retained that all functional or utilitarian works and particularly “ tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer” be excluded from its operation. Although Parliament has already restricted its proposals for such limitation by removing many types of works from its scope, including “computer programs”, it has apparently failed to draw any distinction between the “creative works” and “utilitarian works” forming part of the term “literary works”. As a result, all types of “literary works” still fall within the scope of the proposed limitation, including a number of utilitarian works such as electronic data files. 	<ul style="list-style-type: none"> The comment about literary works is noted. The distinctions can be addressed through contractual arrangements.

Thank you!!!